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INVESTIGATION OF OFFENCES AGAINST NATIONAL SECURITY

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V. N. SANKARJEE

Under The Supervision Of

Prof. Dr. G. SADASIVAN NAIR

SCHOOL OF LEGAL STUDIES
COCHIN UNIVERSITY OF SCIENCE AND TECHNOLOGY
KOCHI-682022
MARCH-2003

Dr. G. Sadasivan Nair
Professor
School of Legal Studies
Cochin University of
Science and Technology
Kochi-682022.

CERTIFICATE

This is to certify that this thesis entitled "INVESTIGATION OF OFFENCES AGAINST NATIONAL SECURITY" submitted by V.N. Sankarjee, for the Degree of Doctor of Philosophy is the record of bonafide research carried out under my guidance and supervision from 6-03-1996 in the School of Legal Studies, Cochin University of Science and Technology. This thesis, or any part thereof, has not been submitted elsewhere for any other degree.

Dr. G. Sadasivan Nair
(Supervising Teacher)

Kochi-22
5th March 2003

PREFACE

When after incessant activity and deep study one reaches the final phase of his endeavor and steps aside to have a glimpse of the work that he has undertaken and attempts to appreciate the final product, then along with the particulars of the end result, the indebtedness that he owes to many individuals during the whole process comes to the fore. My experience when I present the result of my study to the world has not been different. There are those who had been with me when I took the first step of my journey and had traveled along with me guiding me through the labyrinthine courses of the subject of study and remained with me till the final culmination, to share my joy of the final result. There are also those who joined me at various phases of my journey and guided me at critical junctures and times when I needed their guidance and help the most. They gave me guidance, directed me to the proper course and faded away without even staking to claim my gratitude which was due to them in abundance. Dr. G. Sadasivan Nair and Dr. N.S. Chandrasekharan, Professors, School of Legal Studies, Cochin University of Science and Technology had been kind enough to accept me as their student and guided me all along through the complexities of the subject. They had by their scholarly advice lighted the dark alleys of the subject and inspired me to take to un-chartered waters with confidence and poise. When ever I found myself entangled in the cobwebs of the subject, the deftness with which they disentangled the same had left me awestruck and instilled in me a sort of privilege to claim to be their student. Dr. K.N. Chandrasekharan Pillai, Dean, Faculty of Law, Cochin University of Science and Technology has been equally forthcoming when I needed his help. He had generously allotted me his valuable time for discussing the topic and had permitted me to delve deep into his immense knowledge on the subject. The help rendered by Dr. D. Rajeev,

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CHAPTER 1
INTRODUCTION

All along the various phases of human civilization, maintenance of social order and security has remained a difficult task. The enormous strides made by human beings in all their endeavors only made the problem more complex and bewildering. Isolated groupings of human beings that flourished and evolved in various parts of the globe without any mutual contact developed their own peculiar criminal justice administration systems which would cater to the felt necessities of their times. A comparative analysis of these systems would reveal that the means employed to achieve the common goal of a peaceful and orderly society, by these peoples had striking similarities. A specialized agency for effectuating the norms evolved towards maintaining social order as well as for investigating into the aberrations to the same is a common factor in all these systems. But regarding the powers to be exercised by the said body and the value of evidence gathered by them during the process of investigating in to crimes, stark contradictions become apparent.

Socio- political scenario of the globe has never been more chaotic. Unlike any earlier times, in the present day world, disturbances in one part whether it is in the social political or cultural sphere, sends ripples right down to touch the lives of the humblest of the human beings and no one in any part of the world however hard he may try can remain unscathed of the same. Thus the changed world order demands commensurate change in the way each human group runs its criminal administration system. No system can afford to remain exclusive and will have to indulge in fervent

borrowings and takings from each other. Together they may also have to evolve new means to meet the new challenges.

The study in hands attempts a close scrutiny of the process of investigation of offences in India along with an analysis of the powers and functions of the investigating agency. A comparative analysis of systems prevalent in the various countries has been attempted.

Offences against national security being prejudicial to the very existence of the nation and its legal system, is a heinous and terrible one. Hence the different governments that came to power cutting across political lines have dealt the same with an iron hand. But a panacea is yet to be discovered. As early as 1971 the Law Commission of India had pointed out the need for treating the offences relating to national security and their perpetrators on a totally different procedural footing. The recommendation that the all the offences coming under the said category ought to be brought under the purview of a single enactment so as to confront such offences effectively, fell only on the deaf ears. It is interesting to note that vociferous criticisms against the same, the legislations intended and aiming at the preservation of national security has generously adopted many of the techniques and methods prevalent in other systems and had sought to weave them into the Indian criminal administration system to its advantage. An attempt has been made in this study to scrutinize the provisions of the said enactments and sift those norms and concepts that have been borrowed from other systems and also to probe the prospects for further assimilation and absorption.

The two major criminal procedure systems prevalent in various countries viz., inquisitorial and accusatorial are closely scrutinized. For identifying the underlying

philosophy and values of these criminal procedures two models of value systems developed by the Herber L. Packer are seriously studied. The legal actors in the administration of criminal justice namely, the court, the prosecutor, the police and the defence counsel and their functions and powers are also dealt with.

The discrepancies in and inadequacies of the criminal justice system in India as much as they are related to the investigations of the offences against national security are examined and the reforms needed are also suggested

It is sincerely hoped that this study would show a ray of light into the future course which the criminal administration system in this land should partake in the future.

CHAPTER 2

OFFENCES AGAINST NATIONAL SECURITY

The offences which are prejudicial to sovereignty, integrity and security of the nation or to its friendly relations with foreign states are generally called the offences against national security.[1] Unlike other offences which are nothing more than mere acts or omissions made punishable by law, this category of offences are directed against the very existence of the state itself and are therefore peculiarly odious.[2]

The most heinous and formidable offences among them have the peculiarity that if they are successfully committed the criminal is almost always secure from punishment. The murderer is in greater danger after his victim is despatched than before. The thief is in greater danger after the purse is taken than before. But the rebel is out of danger as soon as he has subverted the government, as the penal law is impotent against a successful rebel. So said the authors of the Indian Penal Code characterising these offences in contrast to others.[3]

In reference to certain offences included in this category the Law Commission of India points out that such activities, if successful would bring into existence a parallel nation with its own sovereignty and territorial integrity which will

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[1] The Law Commission of India, 43rd Report on Offences against National Security, p.93, the National Security Bill, 1971, cl. 2(h). The definition as such is not in the Report. Rather, the definition is one made in tune with the contents of the Report generally and cl.2(h) particularly.

[2] *Id*, p.1. Though it has been so said in reference to 'treason', yet the Commission has taken the view that the expression 'crime against national security' conveys the idea of treason in a wide sense, at p. 2; the Code of Criminal Procedure, 1973, s. 2(n) provides: " 'offence' means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act, 1871 (Act 1 of 1871)." See also the Indian Penal Code, 1860, s.40 and the General Clauses Act, 1897, s.3 (38).

[3] The Notes appended to the Draft Penal Code, 1836 submitted by the First Indian Law Commission before the Government on 2nd May, 1837, at page 119. It is pertinent to note that the First Indian Law Commission appointed in 1834 by the Charter Act of 1833 consisted of Lord Macaulay, J.M. Macleod, G.W. Anderson, Hay Cameron and F. Millet. They used the expression 'State-crimes' with reference to the offences against national security.

be a rival to the country from which the territory is detached.[4] It is thus doubtless that these offences, directly or indirectly, endanger the existence of the state together with its legal system. Now the matter of debate is as to whether the administration of criminal justice pertaining to them shall remain the same as that relating to other offences.

In every legal system these offences are treated specially, adopting different criminal justice measures. In international legal order also they are considered with utmost caution. The right to independence and state sovereignty is universally accepted as the fundamental right of each sovereign state, while the duty to refrain from intervening in the internal affairs of any other state and respect other states' independence and sovereignty is universally accepted as fundamental duty of each such state in order to make that fundamental right of the state more meaningful and effective. The international documents on human rights are thus made reserving the liberty of individual state to treat these offences on a totally different pedestal.[5]

2.1 Philosophy underlying the offences

The concepts of state and nation, which are inseparable to each other, have paramount importance while elucidating this category of offences. Though we have several jurists and theories, yet Austin's theory of law remains the most comprehensive and important attempt to formulate a logically coherent legal system in the context of the modern state.[6] The quintessence of his theory is that the law is the general command of the sovereign in an independent political society.[7] The independent political society including the sovereign constitutes the state.[8]

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[4] The Law Commission of India, *op. cit.*, p. 4.
[5] The Universal Declaration of Human Rights; the International Covenants on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights.
[6] W. Friedmann, *Legal Theory*, 4th ed., 1960, p.211; Julius Stone, *Legal System and Lawyers' Reasoning*, 1999, pp. 71, 73.
[7] *Lectures on Jurisprudence*, 4th ed., Campbell, vol. 1, pp. 86, 176, 182, 183 & 226.
[8] Julius Stone, *op. cit.*, pp. 69 - 73.

A group of men defined by reference to specific territory which they ordinarily inhabit constitute the society. Certain men amongst the group constitute the sovereign, who render no habitual obedience to others. The rest of the group constitute the subjects. The bulk of the subjects render habitual obedience to the sovereign. Such a group is called an independent political society or a state.[9]

Thus the concept of state carries the ideas of government, territory and population in it. Representing the organised power of the political society, the state has to exercise the function of controlling or setting in motion its forces for certain purposes. The authority constituted to exercise this function is called the government of the state.[10] In a dictatorial state the government is appointed by the dictator or the ruler. In a republic the people choose their representatives to form the government. The three main branches of the state activity are the legislative, the executive and the judicial. For the security of civil liberties these activities are entrusted to different bodies with independent spheres of action.

The territory of state means a definite portion of the earth surface, which is in its exclusive possession and under its sovereignty. It includes the land with its bowels, waters and corresponding air space, within the borders of state.[11] The totality of individuals living within the territory constitute the population of the state.[12] The population constituting the political society of state must be considerably large.

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[9] *Ibid.*

[10] In modern state the government besides wielding the political power, co-ordinates and centralises in itself the collective resources and common activities of the people.

[11] The land covers all the continental territory within the state borders. The waters include internal or national waters and territorial waters. The bowels below them belong to that state up to technically accessible depth. The air space includes the troposphere and stratosphere and a considerable part of outer space. The side limits of the state territory are designated to be the state borders. A natural or imaginary line on territorial or water surfaces defines the limits of state's sovereignty over its land and waters, air space and natural resources. Each state has territory bounded by land or sea borders. The state border separates one state from that of another or the high seas. The state borders are inviolable. The state borderline is drawn under border treaties on geographical maps and on the land surface and is designated by special border sign posts.

[12] Among them are the nationals of that state, including those who are staying abroad as well as foreign nationals and stateless persons permanently residing in the country.

The Constitution embodies all these ideas and concepts. It determines the territory and the population of India.[13] It also determines the rights and duties of every individual member of the population.[14] It provides for establishment of the organs of state including the government.[15] Though the Constitution gives different meanings to the expression 'state' commensurate with its accompanying context, it declares that India is a nation comprising all these components.[16]

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[13] The Constitution of India, Arts. 1 to 4 constituting Part I titled 'The Union and its Territory', Arts. 5 to 11 constituting Part II titled 'Citizenship'. See also the Citizenship Act, 1955.

[14] *Id.*, Parts II, III & IVA.

[15] The Constitution does not define the expression 'Government'. In view of Art. 367, it is necessary to refer to the General Clauses Act, 1897. S.3(23) provides: " 'Government' or 'the Government' shall include both the Central Government and any State Government."; s.3(8) provides: " 'Central Government' shall,-
(a) in relation to anything done before the commencement of the Constitution, mean the Governor General or the Governor general in Council, as the case may be; and shall include,-
(i) in relation to functions entrusted under sub-section (1) of Section 124 of the Governor of India Act, 1935, to the Government of a Province, the Provincial Government acting within the scope of the authority given to it under that sub-section; and
(ii) in relation to the administration of a Chief Commissioner's Province, the Chief Commissioner acting within the scope of the authority given to him under sub-section (3) of Section 94 of the said Act; and
(b) in relation to anything done or to be done after the commencement of the Constitution, mean the President; and shall include,-
(i) in relation to functions entrusted under clause (1) of Article 258 of the Constitution, to the Government of a State, the State Government acting within the scope of the authority given to it under that clause;
(ii) in relation to the administration of a Part C State before the commencement of the Constitution (Seventh Amendment) Act, 1956, the Chief Commissioner or the Lieutenant-Governor or the Government of a neighbouring State or other authority acting within the scope of the authority given to him or it under article 239 or article 243 of the Constitution, as the case may be; and
(iii) in relation to the administration of a Union territory, the administrator thereof acting within the scope of authority given to him under article 239 of the Constitution."; s.3(60) provides: " 'State Government',-
(a) as respects anything done before the commencement of the Constitution, shall mean, in a Part A State, the Provincial Government of the corresponding Province, in a Part B State, the authority or person authorised at the relevant date to exercise executive government in corresponding Acceding State, and in a Part C State, the Central Government;
(b) as respects anything done after the commencement of the Constitution and before the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a Part A State, the Governor, in a Part B State, the Rajpramukh, and in a Part C State, the Central Government;
(c) as respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a State, the Governor, and in a Union territory, the Central Government; and shall, in relation to functions entrusted under article 258A of the Constitution to the Government of India, include the Central Government acting within the scope of the authority given to it under that article."

[16] In Part I the expression 'states' specified in the First Schedule constituting the Union of India. Art.366(15) provides: " 'Indian State' means any territory which the Government of the Dominion of India recognised as such a state." Art.12 defines 'the state' for the purpose of Part III. It provides: "In this part, unless the context otherwise requires, "the State includes the Government and Parliament of India and the government and the Legislature of each of the states and all local or other authorities within the territory of India or under the control of the Government of India." The Preamble of the Constitution itself conveys that India is a nation.

Thus offence which are directed against the government, the territory or the population, and prejudicial to sovereignty, integrity and security of the nation are usually considered as the offences against national security. Furthermore, every nation has an interest to continue its existence and to preserve its national honour and integrity. This interest can be protected only by observing the international legal order. Maintaining peace and good relations with other powers of the world is thus only a matter of state policy. The offences prejudicial to the nation's friendly relation with foreign states are ultimately affecting the national security. Hence these offences are also treated under this category.

2.2 Governing statutes

The offences under the general classes, insurrection, assisting the enemy, relations with foreign states, offences relating to the armed forces, subversive activities and subversive associations constitute this category of offences.[17] The following are the governing statutes:

(i) The Indian Penal Code, 1860, Chapters 6 and 7,

(ii) The Foreign Recruiting Act, 1874,

(iii) The Foreign Enlistment Act, 1870,

(iv) The Official Secrets Act, 1923,

(v) The Criminal Law Amendment Act, 1938,

(vi) The Criminal Law Amendment Act, 1961,

(vii) The Unlawful Activities (Prevention) Act, 1967 and

(viii) The Prevention of Terrorism Act, 2002.

[17] The Law Commission of India, 43rd Report on Offences Against National Security, p.3.

2.3 Insurrection

Literally, the word 'insurrection' means an organised attempt by a group of people to defeat the government or the person who is in power and take control of the country, usually by violence.[18] The group of offences involving direct internal opposition to the authority of the State can be collected under the head 'insurrection'.[19] The offences of waging war and its allied offences come under this group.[20] Thus the following offences are included under the heading 'insurrection':

1. Waging war against the Government of India,
2. Preparation to wage war,
3. Concealing to wage war,
4. Conspiracy to overawe the Government, Parliament etc.,
5. Preventing by force exercise of State authority in furtherance of inter-state disputes, and
6. Assault on the President and other high dignitaries.[21]

2.4 Offences relating to waging war

The expression war is not limited here to the true war as contemplated by the international law, rather it also includes any forcible disturbance made by a considerable number of persons directed at some purpose which is not of a private but of a general character.[22] There must be a deliberate and organised attack upon the Government machineries and servants to overcome them by force and violence and thus to prevent them from exercising their functions.[23]

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[18] Cambridge International Dictionary of English, 1996 Cambridge University Press.
[19] The Law Commission of India, *op. cit.*, p.12, para 3. 1 to 3.
[20] These offences are defined and punishable under Chapter-6 of the Indian Penal Code, 1860. The offence of waging war is described as 'levying war' in England, Canada and other Commonwealth countries.
[21] The Law Commission of India, *op. cit.*, p.14, para 3.7.
[22] *Mathew* v. *T.C. State*, AIR 1956 SC 241.
[23] *Ramanand* v. *Emperor*, (1950) 30 Pat 152; *Jubba Mallah* v. *Emperor*, (1943) 22 Pat 662.

No specific number of persons is necessary to constitute this offence.[24] The manner in which the offenders were equipped or armed is not material. The incriminating criterion is *quo animo* or the object of general public nature thereby striking directly against the government.[25] There is no distinction between principal and accessory. All who take part in the unlawful act incur the same guilt.[26]

Thus the offences of waging war and attempting or abetting to wage war are treated alike. Any person committing all or any of these acts is punishable with death or imprisonment for life in addition to fine.[27] Unlike the principles governing the offence of abetment in general, there is no distinction between the accomplished abetment and the unaccomplished abetment instigating the offence of waging war.[28]

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[24] *Magan Lal Radhakrishnan* v. *Emperor*, AIR 1946 Nag 173.

[25] *Ibid.* See also *Mathew* v. *T.C.State*, AIR 1956 SC 241.

[26] *Ibid.*

[27] The Indian Penal Code, 1860, s.121. See also the Law Commission of India, *op. cit.*, p. 94, the National Security Bill, 1971, cl.3.

[28] *Hasrat Mohani* v. *Emperor*, (1922) 24 Bom LR 885: It is not essential that as a result of the abetment the war should in fact be waged. The main purpose of the instigation should be 'the waging of war'. It should not be merely a remote and incidental purpose but the thing principally aimed at by the instigation. There must be active suggestion or stimulation to the use of violence. See also *Magan Lal Radhakrishnan* v. *Emperor*, AIR 1946 Nag 173. More solid reasons for treating abetment of waging war exceptionally by doing away the distinction between the accomplished abetment and the unaccomplished abetment instigating the offence of waging war can be seen in the words of the authors of the Code in the Notes appended to the Draft Penal Code, 1836. It reads thus at page 119: "We have made the abetting of hostilities against the Government, in certain cases, a separate offence, instead of leaving it to the operation of the general law laid down in the chapter on abetment. We have done so far two reasons. In the first place, war may be waged against the Government by persons in whom it is no offence to wage such war, by foreign princes and their subjects. Our general rules on the subject of abetment would apply to the case of a person residing in the Indian territories who would abet a subject of the Indian Government in waging war against the Government; but they would not reach the case of a person who, while residing in the Indian territories, should abet the waging of war by foreign prince against the Indian Government. In the second place, we agree with the great body of legislators in thinking that though in general a person who has been a party to criminal design which has not been carried into effect ought not to be punished so severely as if that design had been carried into effect, yet an exception to this rule must be made with respect to high offences against the State; for State-crimes, and especially the most heinous and formidable State-crimes have this peculiarity that if they are successfully committed, the criminal is almost always secure from punishment. The murderer is in greater danger after his victim is despatched than before. The thief is in greater danger after the purse is taken than before. But the rebel is out of danger as soon as he has subverted the Government as the penal law is impotent against a successful rebel, it is consequently necessary that it should be made strong and sharp against the first beginning of rebellion, against treasonable design which have been carried no further than plots and preparations. We have, therefore, not thought it expedient to leave such plots and preparations to the ordinary law of abetment. Under that general law, a conspiracy for the subversion of the Government would not be punished at all if the conspirators were detected before they had done more than discuss plans, adopt resolutions and interchange promises of fidelity. A conspiracy for the subversion of the Government, which should be carried as far as the gunpowder treason or the assassination plot against William the Third would be punished very much less severely than the counterfeiting of a rupee, or the presenting of a forged cheque. We have, therefore, thought it absolutely necessary to make a separate provision for the previous abetting of great State offences. The subsequent abetting of such offences may, we think without inconvenience, be left to be dealt with according to the general law."

Apart from these three offences relating to waging war, conspiracy to commit any of those offences is made yet another crime.[29] Along with it the conspiracy to overawe[30] the Government[31] by means of criminal force or the show of criminal force is also a crime bearing the same guilt as the former bears.[32] To constitute such a conspiracy it is not necessary that any act or illegal omission shall take place in pursuance thereof.[33] These offences carry a punishment of imprisonment for life or with imprisonment of either description which may extend to ten years in addition to fine.[34] The fine is a mandatory punishment for all these offences.[35]

2.5 Preparation to wage war

The offence of preparing to wage war consists of collection of men, arms or ammunition or preparing otherwise with intention of either waging or being prepared to wage war against the Government of India.[36] Any person commits this offence is punishable with imprisonment for life or imprisonment of either description for a term not exceeding ten years in addition to fine.[37]

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[29] The Indian Penal Code, 1860, s.121A. The Criminal Law (Amendment) Act, 1913 included this section in the Code. A conspiracy is a combination of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. For general principles of the offence of conspiracy see: *Pulin Behary Das* v. *Emperor*, 16 CWN 1106; *Sorrel* v. *Smith*, [1925] AC 700; *DPP* v. *Doot*, [1973] 1 All ER 940 (HL); *R* v. *Cooke* [1986] 2 All ER 985 (HL).

[30] See *Aravindan* v. *State of Kerala*, 1983 CriLJ 1259 (Ker HC): The word 'overawe' clearly imports more than the creation of apprehension or alarm or fear. *Ramanand* v. *State*, (1950) 30 Pat 152: The word overawe appears to connote the creation of a situation in which the members of the Central or State Governments feel themselves compelled to choose between yielding to force or exposing themselves or members of the public to a very serious danger.

[31] Government includes both Central and State Governments. See s.121A.

[32] *Ibid.* See also *Barindra Kumar Ghosh* v. *Emperor*, ILR 52 Cal 197 (Alipore conspiracy case); *Kehar Singh* v. *State (Delhi Admn.)*, AIR 1988 SC 1883; *Haradhan Chakrabarty* v. *U.I.*, AIR 1990 SC 1210; *Shambhu Singh* v. *State of U.P.*, AIR 1994 SC 1559; *State of Maharashtra* v. *Som Nath Thapa*, (1996) 4 SCC 659.

[33] *Id, Explanation*; This is an exception to the general principle of conspiracy contemplated under s.120A. In *State* v. *Nalini and ors.*, (1999) 5 SCC 253, per D.P. Wadhwa, J at para 583: for details see Annexure I.

[34] *Id.* s.121 A. See also the Law Commission of India, *loc. cit.*, National Security Bill, 1971, cl.6; *Topandas* v. *State of Bombay*, AIR 1956 SC 33; *Major E.G. Barsay* v. *State of Bombay*, AIR 1961 SC 1762; *Sardar Sardul Singh Caveeshar* v. *State of Maharashtra*, AIR 1965 SC 682; *Nand Kumar Singh* v. *State of Bihar*, AIR 1992 SC 2153; *Ajay Aggarwal* v. *Union of India*, (1993) 3 SCC 609.

[35] *Ibid.*

[36] *Id*, s.122.

[37] *Ibid.* See also the Law Commission of India, *loc. cit.*, the National Security Bill, 1971, cl.4.

2.6 Concealing design to wage war

The concealment of the existence of a design to wage war against the Government of India constitutes this offence.[38] The offender does it by any act or by any illegal omission intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate the waging of such war.[39] The offence is punishable with imprisonment of either description for a term which may extend to ten years in addition to a mandatory fine.[40]

2.7 Assaulting President or Governor

If any person assaults or wrongfully restrains, or attempts wrongfully to restrain, or overawes by means of criminal force or the show of criminal force, or attempts so to overawe the President of India or the Governor of any State it constitutes this offence.[41] It must be done with the intention of inducing or compelling such President

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[38] *Id*, s.123.

[39] *Ibid*; s.33 provides: "The word 'act' denotes as well a series of acts as a single act; the word 'omission' denotes as well a series of omissions as a single omission"; s. 43 provides: "The word 'illegal' is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action; and a person is said to be 'legally bound to do' whatever it is illegal in him to omit."

[40] *Ibid.* See also the Law Commission of India, *loc. cit.*, the National Security Bill, 1971, cl.5.

[41] *Id*, s.124; s. 351 defines 'assault' as: "Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.
Explanation.- Mere words do not amount to an assault. But the words which a person uses may give to gestures or preparations such a meaning as may make those gestures or preparations amount to an assault."; s. 339 defines 'wrongful restraint' as: "Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.
Exception.- The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section."; s. 349 defines 'force' as: "A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling:
Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described:
First.- By his own bodily power.
Secondly.- By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person.
Thirdly.- By inducing any animal to move, to change its motion, or to cease to move."
s. 350 defines 'criminal force' as: "Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other."

or Governor to exercise or to refrain from exercising in any manner any of the lawful powers of such President or Governor.[42] The punishment provided for the offence is imprisonment of either description for a term which may extend to seven years, in addition to a mandatory fine.[43] The Law Commission has recommended to extend the scope of the offence so as to criminalise similar acts against the Vice-President of India, the Chief Justice of India, the Speaker of the House of the People, the Chief Justice of any High Court, the Speaker of the Legislative Assembly of any State and the Chairman of the Legislative Council of any State also.[44] It is desirable as well.

2.8 Sedition

Sedition is really defamation of the State. In broad sense it is disloyalty in action.[45] In India the scope of offence is limited.[46] A person commits the offence of sedition when he brings or attempts to bring into hatred or contempt, or excites or

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[42] *Ibid.*

[43] *Ibid.*

[44] The Law Commission of India, *loc. cit.*, the National Security Bill, 1971, cl.8. It provides the expression 'office-holder' to describe all these dignitaries. One more offence has been recommended to be included under the head 'insurrection' vide s.7. It provides: "Whoever, by means of force or show of force, prevents or attempts to prevent any State from exercising its authority in any part of that State, with a view to securing an alteration of the boundaries of that State, or in furtherance of a dispute between that State and another State or the Union, shall be punishable with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to a fine."

[45] Lord Fitzgerald explained the full meaning of sedition in *R* v. *Sullivan*, 1841 Carrington and Marshman 209. It reads: "Sedition is a crime against society, nearly allied to that of treason, and it frequently precedes treason by a short interval. Sedition in itself is a comprehensive term, and it embraces all those practices, whether by word or deed, or writing which are calculated to disturb the tranquility of the State, and lead ignorant person to endeavour to subvert the Government and laws of the Empire. The objects of sedition generally are to induce discontent and insurrection and to stir up opposition to the Government and bring the administration of justice in contempt, and the very tendency of sedition is to incite the people into insurrection and rebellion. Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war, or to bring into hatred or contempt the Sovereign or the Government, the laws or Constitution of the realm and generally all endeavours to promote public disorder."

[46] The Indian Penal Code, 1860, s.124A embodies only one aspect of the English law of sedition. The Indian law criminalise only seditions libel- or publication of matter calculated to bring the Sovereign or the Government into hatred or to excite disaffection towards them.

attempts to excite disaffection towards the Government established by law in India.[47] Such act or attempt must be done by words, either spoken or written, or by signs or by visible representation or otherwise.[48]

The expression 'disaffection' includes disloyalty and all feelings of enmity.[49] No comments expressing disapprobation of the measures of the government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection constitute sedition.[50] Similarly no comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, constitute sedition as well.[51] The offence carries the punishment, imprisonment for life and fine, or imprisonment which may extend to three years and/or fine.[52]

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[47] *Ibid.* As the words of provision show that incitement violence is not at all essential to constitute sedition. See *Queen-Empress* v. *Bal Gangadhar Tilak*, 22 Bom 112 (PC); The expression 'Government established by law in India' means ruling authority and its representatives as such- the existing political system as distinguished from any particular set of administrators. It means the various Governments constituted by the statutes relating to the Government of India consolidated into the Constitution and denotes the person or persons authorized by law to administer Executive Government in any part of India. It includes the State Government, as well as the Central Government of India. See also *Kshiteeschandra Ray Chandhuri* v. *Emperor*, 59 Cal 1197; *Baskar* v. *Emperor*, (1906) 8 Bom LR 421.

[48] *Ibid*; It is not necessary that the attempt need be successful. Attempt does not imply success. Whether the intention has achieved the result is immaterial. See *Bhaskar*, (1906) 8 Bom LR 421; *Luxman*, (1899) 2 Bom LR 286; Disaffection may be excited in a thousand different ways. A poem, an allegory, a drama, a philosophical or historical discussion, may be used for the purpose exciting disaffection. The expression 'visible representation' covers a wood-cut or engraving of any kind. See *Raghubir Singh* v. *State of Bihar*, AIR 1987 SC 149.

[49] *Id*, Explanation 1.

[50] *Id*, Explanation 2.

[51] *Id*, Explanation 3. See also *Bhagawati Charan Shukla* v. *Provincial Government*, Central Provinces and Berar, (1946) Nag 865.

[52] *Id*, s.124A; In *Kedarnath* v. *State of Bihar*, AIR 1962 SC 955 the Supreme Court declared valid section 124A, IPC holding that the section did not violate Art.19(1) (a) of the Constitution and held: "The expression 'Government established by law' is the visible symbol of the State. The very existence of the State will be in jeopardy if the Government established by law is subverted. That is why sedition as the offence in s.124-A has been characterised, comes under Chapter VI relating to offences against the State. Hence any act within the meaning of s.124-A which has the effect of subverting the Government by bringing that Government into contempt or hatred or creating disaffection against it, would be within the penal statute, because the feeling of disloyalty to the Government established by law or enmity to it imports the idea of tendency to publish disorder by the use of actual violence or incitement to violence. In other words, any written or spoken words, etc. which have implicit in them 'revolution' have been made penal by the section in question." This decision settled many controversies clouded around this section. See *Nitharendu Datt Majumdar* v. *The King Emperor*, AIR 1942 FC 22; *King Emperor* v. *Sadashiv Narayan Bhalerao*, ILR 1947 Bom 110 (PC); *Rama Kurup* v. *Sirkar*, 1949 KLT 27 (TC HC); *Romesh Thapper* v. *State of Madras*, AIR 1950 SC 124; *Tara Singh Gopichand* v. *State*, AIR 1951 Punj 27 –Where s.124A, IPC was declared void in view of Art.13(1); *State of Bihar* v. *Shaliabala Devi*, AIR 1952 SC 329; *Debi Soren & Ors.* v. *State*, AIR 1954 Patna 254.

2.9 Offences prejudicial to relation with foreign states

Waging war against foreign state

Waging war against the Government of any Asiatic Power in alliance or at peace with the Government of India is an offence.[53] Attempting and abetting to wage such war are also separate and independent offences carrying the same punishment.[54] Imprisonment for life to which fine may be added, or imprisonment of either description for a term which may extend to seven years to which fine may be added or fine is the punishment provided for all the three offences.[55]

Depredation

The depredation committed on the territories of any power in alliance or at peace with the Government of India is a crime.[56] Equally, the preparation to commit such depredation is also an independent offence.[57] Literally, depredation means an act causing damage or destruction.[58] Whoever commits either of the offences shall be punished with imprisonment of either description for a term which may extend to seven years, in addition to fine and forfeiture of any property used or intended to be used in committing such depredation, or acquired by such depredation.[59]

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[53] *Id*, s.125.
[54] *Ibid.*
[55] *Ibid.* the Law Commission has recommended to widen the scope of offence by replacing 'Asiatic power' with 'foreign state'. The recommended punishment is only imprisonment for a term which may extend to ten years in addition to fine. See the Law Commission of India, *op. cit.*, p.96, the National Security Bill, 1971, cl.14.
[56] The Indian Penal Code, 1860, s.126.
[57] *Ibid.*
[58] Cambridge International Dictionary of English, 1996, Cambridge University Press.
[59] *Ibid.* See also the Law Commission of India, *loc. cit.*, the National Security Bill, 1971, cl.15.

Receiving property

Receiving property with knowledge that the same has been taken in the commission of such waging war and depredation is yet another crime.[60] Whoever so receives such property shall be punished with imprisonment of either description for a term which may extend to seven years in addition to fine and forfeiture of the property so received.[61]

2.10 Offences of recruiting and enlistment

If the Central Government considers it necessary so to do, it may prohibit or impose condition on recruiting for the service of a specified foreign state, and enlistment for such service.[62] It shall be done by notification in the Official Gazette. It shall be necessary in the interest of friendly relations with foreign states or national security.[63]

Contraventions of such prohibition or conditions are offences. Inducing or attempting to induce, any person to accept or agree to accept, or to proceed to any place with a view to obtaining, any commission or employment in the service of a foreign state in contravention of the notification is thus an offence.[64] Similarly, aiding with knowledge in the engagement of any person so induced by forwarding or conveying him or by advancing money or in any other way whatsoever in contravention of the notification is also an offence.[65] Whoever commits any of the offences shall be punishable with imprisonment for a term which may extend to seven years, or with fine,

[60] The Indian Penal Code, 1860, s.127.
[61] *Ibid.* See also the Law Commission of India, *loc. cit.*, the National Security Bill, 1971, cl.16.
[62] The Foreign Recruiting Act, 1874, ss.3 and 4, and the Foreign Enlistment Act, 1870 (English), s.4.
[63] *Ibid.*
[64] The Foreign Recruiting Act, 1874, s.6 (a).
[65] *Id*, s.6 (b).

or with both.[66] Equally punishable are the acts of enlisting himself with a view to obtaining any commission or employment in the armed forces of a foreign State and of aiding with knowledge such enlistment of any person.[67]

2.11 Assisting the enemy

Public servant allowing prisoner to escape

A public servant having the custody of any State prisoner or prisoner of war, voluntarily allowing such prisoner to escape from any place in which such prisoner is confined is punishable.[68] This offence carries the punishment of imprisonment for life, or imprisonment of either description for a term which may extend to ten years in addition to fine.[69] There is also a connected offence. If such public servant negligently suffers such State prisoner or prisoner of war to escape from such place of confinement he is punishable with simple imprisonment for a term which may extend to three years in addition to fine.[70]

Aiding escape of, rescuing or harbouring prisoner

Aiding or assisting with knowledge any state prisoner or prisoner of war in escaping from lawful custody is a crime.[71] Similarly rescuing or attempting to rescue any such prisoner is also a crime.[72] Moreover, harbouring or concealing any such

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[66] *Supra* nn.64 and 65.

[67] The Foreign Enlistment Act, 1870 (English), s.4. See the Law Commission of India, *op. cit.*, Chapter 5, pp 18 – 25 and 96, the National Security Bill, 1971, cl.17. The Commission has recommended to bring only the offences relating to recruitment and enlistment pertaining to the service in the armed forces of the foreign state to the category of offences against national security. It has proposed to reduce the punishment to 3 years imprisonment.

[68] The Indian Penal Code, 1860, s.128; s.21, defines 'public servant'.

[69] *Ibid;* see also the Law Commission of India, *op. cit.*, p.95, the National Security Bill, 1971, cl.12. The proposed section deals only with prisoner of war. It carries only less punishment, namely, rigorous imprisonment for a term which may extend to ten years in addition to fine.

[70] *Id*, s.129. See also the Law Commission of India, *loc. cit.*, the National Security Bill, 1971, cl.13. As in the case of s.12, this section also deals only with prisoner of war.

[71] *Id*, s.130.

[72] *Ibid.*

prisoner who has escaped from lawful custody is yet another crime.[73] Equally punishable is the offence of offering or attempting to offer any resistance to the recapture of such prisoner.[74] Whoever commits any of these offences is punishable with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years in addition to fine.[75] Any such prisoner who is permitted to be at large on his parole within certain limits is deemed to escape from lawful custody if he goes beyond the permitted limits.[76]

The acts of assisting enemy countries and infiltration into India with object of causing danger to national security are not yet made offences. It is high time to criminalise these acts in view of their being multiplied day by day. It is worth noting the Law Commission's recommendations in this regard.[77]

2.12 Offences relating to armed forces

The security of a country may also be threatened by indirect acts, such as those which weaken the agencies established for the maintenance of its security. Since armed forces of a country are the most important of such agencies, provisions punishing interference with their preparedness and efficiency in the discharge of their functions are formed in the criminal law of all countries.[78]

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[73] *Ibid.*

[74] *Ibid.*

[75] *Ibid*; See the Law Commission of India, *loc. cit.*, the National Security Bill, 1971, cl.11. Here also the section deals only with prisoner of war.

[76] *Id*, Explanation.

[77] The Law Commission of India, *op. cit.*, Chapter-4, pp.15 to 17. The exact recommendation of the Commission can be read in cls. 9 and 10 of the National Security Bill, 1971. It reads: "9. Whoever, assists in any manner an enemy at war with India, or the armed forces of India are engaged in hostilities, whether or not a state of war exists between that country and India, shall be punishable with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."; "10. Whoever, unlawfully enters into, or remains in, India for the purpose of committing an offence under this Act shall be punishable with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

[78] The Law Commission of India, *op. cit.*, p.26, paras 6.1 & 6.3.

Abetting mutiny and attempt to seduce

Abetting to commit mutiny by an officer or member of any of the armed forces is an offence.[79] The penal gravity of the offence varies depending whether the mutiny is committed or not pursuant to such abetment. Thus if mutiny be committed in consequence of that abetment, the abettor shall be punished with death or with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, in addition to fine.[80] If no mutiny be committed pursuant to that abetment, the abettor shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, in addition to fine.[81] Similarly whoever attempting to seduce any such officer or member of any of the armed forces is liable to punishment same as that provided for the offence of unsuccessful abetment of mutiny.[82]

Abetment of assault

Abetting an assault by an officer or member of any of the armed forces,[83] on any superior officer being in the execution of his office is a crime.[84] The gravity of punishment varies in accordance with whether the assault is committed pursuant to the abetment. If such assault is committed pursuant to the abetment, the abettor shall be punished with imprisonment of either description for a term which may extend to seven

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[79] The Indian Penal Code, 1860, ss.131 and 132. The expression 'officer or member of any of the armed forces' means an officer, soldier, sailor or airman, in the Army, Navy or Air Force of the Government of India. The explanation to s.131 clarifies as follows: "Explanation.- In this section the words "officer", "soldier", "sailor", and "airman", include any person subject to the Army Act, the Army Act, 1950, the Naval Discipline Act, the Indian Navy (Discipline) Act, 1934, the Air Force Act or the Air Force Act, 1950, as the case may be."

[80] *Id.*, s.132.

[81] *Id.*, s.131.

[82] *Ibid.* see 43rd Report, Chapter 6, p.26 to 29, and cls.18 and 19 of the National Security Bill, 1971. The proposed sections provide maximum punishment only ten years imprisonment for offences of unsuccessful abetment of mutiny and attempt of seducing.

[83] *Supra* n.79.

[84] The Indian Penal Code, 1860, ss.133 and 134.

years in addition to fine.[85] And in case no assault is committed in consequence of the abetment the abettor shall be punished with imprisonment of either description for a term which may extend to three years in addition to fine.[86]

Abetment of desertion

Abetting the desertion of any officer or member of any of the armed forces[87] is an offence and the abettor shall be punished with imprisonment of either description for a term which may extend to two years and/or with fine.[88]

Harbouring deserter

Any person harbouring a deserter from any of the armed forces with knowledge or belief of his desertion is punishable.[89] Such deserter may be any officer or member of any of the armed forces.[90] No criminality is attributed to a wife harbouring her husband who is a deserter.[91] The punishment provided is imprisonment of either description for a term which may extend to two years and/or fine.[92]

2.13 Offences as to deserter's concealing

The master or person in charge of a merchant vessel, on board of which any such deserter is concealed, shall be liable to be punished.[93] If such master or other person might have known of such concealment but for some neglect of his duty or but for some

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[85] *Id*, s.134.
[86] *Id*, s.133; see also the Law Commission of India, *op. cit.*, p.97, the National Security Bill, cl.20 1971, *op. cit.*
[87] *Supra* n.79.
[88] The Indian Penal Code, 1860, s.135; see also the Law Commission of India, *loc. cit.*, the National Security Bill, 1971, cl.21,. Vide the section it recommends to provide for five years imprisonment to the abettor if the desertion is committed in consequence of that abetment.
[89] *Id*, s.136.
[90] *Supra* n.79.
[91] The Indian Penal Code, s.136, Explanation.
[92] *Id*, s.136; see also the Law Commission of India, *loc. cit.*, the National Security Bill, 1971, cl.22.
[93] *Id*, s.137.

want of discipline on board of vessel he is ignorant of such concealment, he shall be liable to a penalty not exceeding five hundred rupees though he is ignorant of such concealment.[94]

2.14 Abetting act of insubordination

Any person abetting what he knows to be an act of insubordination by an officer or a member of any of the armed forces[95] shall, if such act of insubordination be committed in consequence of that abetment, be punished with imprisonment of either description for a term which may extend to six months and/or with fine.[96]

2.15 Wearing garb or carrying token

Any person not being a member of any of the armed forces of India[97] wears any garb or carries any token resembling any garb or token used by such member of the armed force with the intention that it may be believed that he is such a member of the armed force, commits a crime.[98] The punishment provided for this offence is imprisonment up to three months and/or fine.[99]

2.16 Incitement to mutiny

Any person making, publishing or circulating any statement, rumour or report with intend to cause, or which is likely to cause any officer or member of any of the armed forces of India[100] to mutiny or otherwise disregard or fail in his duty as such is guilty.[101] This offence carries the punishment of imprisonment upto three years and/or fine.[102]

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[94] *Ibid.*
[95] *Supra* n.79.
[96] The Indian Penal Code, 1860, s.138.
[97] *Supra* n.79.
[98] The Indian Penal Code, 1860, s.140.
[99] *Ibid;* See the National Security Bill, 1971, cl.27 *op. cit.*
[100] *Supra* n.79.
[101] The Indian Penal Code, 1860, s.505.
[102] *Ibid*; see the Law Commission of India, *op. cit.*, p.98, the National Security Bill, 1971, cl.24. The proposed section incorporates the recommendation of the Law Commission to exempt those persons making, publishing, circulating such things who has reasonable grounds for believing that such things are true and does so in good faith and without any such culpable intention, from the scope of this offence.

No person subject to the law governing the armed forces is subject to the punishment provided for the offences of this class.[103] Apart from these offences the Law Commission has recommended to include certain offences relating to dissuasion from enlisting and instigation into mutiny or insubordination after enlistment, in this class.[104]

2.17 Subversive activities

Committing any unlawful activity is an offence.[105] The expression 'unlawful activity' means any action taken, whether by act done or by words spoken or written or by signs or by visible representation, or otherwise-

(i) which questions, disrupts, or is intended to disrupt, the sovereignty and territorial integrity of India; or

(ii) which is intended to bring about, or supports any claim for, the cession of any part of India, or the secession of any part of India from the Union, or

(iii) which incites any person to bring about such cession or secession.[106]

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[103] *Id*, s.139. The Army Act, the Army Act, 1950, the Naval Discipline Act, the Indian Navy (Discipline) Act, 1934, the Air Force Act and the Air Force Act, 1950 constitute the law governing the Armed Forces of India. See also cl.26, the National Security Bill, 1971, *op. cit.*

[104] The Law Commission of India, *op. cit.*, p.29. The National Security Bill, 1971, cl.25 contains this recommendation as: " Whoever:-
(a) with intent to affect adversely the recruitment of persons to serve in the armed forces of the Union, dissuades or attempts to dissuade the public or any person from entering any such forces, or
(b) without dissuading or attempting to dissuade from entering such forces, instigates the public or any person to do, after entering any such force, anything which is punishable as mutiny or insubordination under the law relating to that armed force, shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.
Explanation.- The provisions of clause (a) do not extend to comment on, or criticism of, the policy of the Government in connection with the armed forces, made in good faith without any intention of dissuading from enlistment, or to advice given, or of any member of his family, or any of his dependants."

[105] The Unlawful Activities (Prevention) Act, 1967, s.13(1); the Law Commission of India, *op. cit.*, pp.30 & 31.

[106] *Id*, s.2(f).

In reference to a State territory, the term cession literally means yielding or giving up its ownership to someone else unwillingly or because forced to do so.[107] It includes the admission of claim of any foreign country to any part of India.[108] Similarly, so far as a State territory is concerned the term 'secession' literally means its becoming independent or its withdrawing from the federation.[109] It includes the assertion of any claim to determine whether a part of India will remain within the Union.[110]

The offence of committing such an unlawful activity is punishable with imprisonment for a term which may extend to seven years in addition to fine.[111] Equally punishable are the offences of abetting the commission of advocating and advising any such unlawful activity.[112]

2.18 Subversive association

The Central Government may declare any association to be an unlawful association for certain reasons.[113] The Government can so declare three types of associations. First, association whose very object is the commission of an unlawful activity, secondly, associations which encourage or aid persons, whether members or not, to undertake any unlawful activity, and thirdly, associations whose members undertake such activity, whether or not the object of the association is the commission of such acts.[114]

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[107] Cambridge International Dictionary of English, 1996, and Chambers 20th Century Dictionary, 1983. Both dictionaries do not contain the word cession as such. The meaning given is one developed from the root verb cede.

[108] The Unlawful Activities (Prevention) Act, 1967, s.2(b).

[109] *Supra* n.107.

[110] The Unlawful Activities (Prevention) Act, 1967, s.2(d).

[111] *Id*, s.13(1).

[112] *Ibid*; This penal provision is not applicable to any treaty, agreement or convention entered into between the Government of India and the Government of any other country or to any negotiations therefor carried on by any person authorised in this behalf; see also the Law Commission of India, *op. cit.*, pp.30, 31 and 99.

[113] The Unlawful Activities (Prevention) Act, 1967, s.3(1). Such declaration shall be made by notification in the official Gazette.

[114] *Id*, s.2(f); the Law Commission of India, *op. cit.*, pp.70 – 72, 106 & 107.

2.19 Spying

The offence of spying consists of any of the three activities. Any person does any such activity for any purpose prejudicial to the safety or interest of the state he is said to commit the offence.[115] Approaching, inspecting, passing over or being in the vicinity of or entering any prohibited place constitutes the first limb of the offence. [116]

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[115] The Indian Official Secrets Act, 1923, s.3(1); In the decision of the House of Lords in *Chandler* v. *DPP*, [1962]3 WLR 694 at p.705 Lord Reid explained the expression 'safety or interests of the state' as: " 'state' is not an easy word. It does not mean the Government or the Executive. '*L'etat c'est moi*' was a shrewd remark, but can hardly have been intended as definition even in France of the time. And I do not think that it means, as counsel urged, the individuals who inhabit these islands. The statute cannot be referring to the interests of all those individuals because they may defer and the interests of the majority are not necessarily the same as the interest of the state. Again we have seen only too clearly in some other countries what can happen if you personify and almost deify the state. Perhaps the country or the realm are as good synonymous as one can find and I would be prepared to accept the organised community as coming as near to a definition as one can get." In the same decision another member of the Bench Lord Radcliff explained the meaning of 'motive' and 'purpose' at p.709 as: "All controversies about motives or intentions or purposes are apt to become involved through confusion of the meaning of the different terms and it is perhaps not difficult to show by analysis that the ideas conveyed by these respective words merge into each other without a clear line of differentiation. Nevertheless the distinction between motive and purpose, for instance is familiar enough in ordinary discussion and there are branches of law in which the drawing of such a distinction is unviolable... I do not think that the ultimate aims of the appellants in bringing about these demonstration of obstruction constituted a purpose at all within the meaning of the Act [The Official Secrets Act, 1911, (English)]. I think that those aims constituted their motive, the reason why they wanted the demonstration, but they did not qualify the purpose for which they sought to enter the airfield." It is worth noting that the Law Commission of India in its 43rd Report at p.44, assumed that the courts in India would adopt the above view held in *Chandler's* case.

[116] *Id*, s.3(1)(a); s.2(8) defines 'prohibited place'. It provides: " 'prohibited place' means-
(a) any work of defence, arsenal, naval, military or airforce establishment or station, or any minefield, camp, ship or aircraft belonging to, or occupied by or on behalf of Government, or any military telegraph or telephone so belonging or occupied and any factory, dockyard or other place so belonging or occupied and used for the purpose of building, repairing, making or storing any munitions of war, or any sketches, plans, models or documents relating thereto, or for the purpose of getting any metals, oil or minerals of use in time of war;
(b) any place not belonging to Government where any munitions of war or any sketches, models, plans or documents relating thereto, are being made, repaired, gotten or stored under contract with, or with any person on behalf of Government, or otherwise on behalf of Government;
(c) any place belonging to or used for the purpose of Government which is for the time being declared by the Central Government, by notification in the Official Gazette, to be a prohibited place for the purposes of this Act on the ground that information with respect thereto, or damage thereto, would be useful to an enemy, and to which a copy of the notification in respect thereof has been affixed in English and in the vernacular of the locality;
(d) any railway, roadway or channel, or other means of communication by land or otherwise (including any works or structures being part thereof or connected therewith) or any channel used for gas, water or electricity works or other works for purposes of a public character at any place where any munitions of war or any sketches, models, plans, or documents relating thereto, are being made, repaired, or stored otherwise than on behalf of Government and which is for the time being declared by the Central Government, by notification in the Official Gazette, to be a prohibited place for the purposes of this Act on the ground that information with respect thereto, or the destruction or obstruction thereof, or interference therewith, would be useful to an enemy, and to which a copy of the notification in respect thereof has been affixed in English and in the vernacular of the locality."

the second limb consists of making any sketch, plan, model or note which is calculated to be or might be or is intended to be, directly or indirectly useful to an enemy.[117] The third limb consists of obtaining, collecting, recording or publishing or communicating to any other person any secret official code or pass words, or any sketch, plan, model, article or note or other document or information which is calculated to be or is intended to be, directly or indirectly, useful to an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the state of friendly relations with foreign states.[118] The offence carries the punishment of imprisonment which may extend to fourteen years where the offence is committed, and three years in other cases.[119]

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[117] *Id*, s.3(1)(b); s.2(9) defines 'sketch' as: " 'sketch' includes any photograph or other mode of representing any place or thing."; s.2(7) provides: " 'photograph' includes an undeveloped film or plate."

[118] *Id*, s.3(1)(c); s.2(2) provides: "expressions referring to communicating or receiving include any communicating or receiving, whether in whole or in part, and whether the sketch, plan, model, article, note, document, or information itself or the substance, effect or description thereof only be communicated or received; expressions referring to, obtaining or retaining any sketch, plan, model, article, note or document, include the copying or causing to be copied of the whole or any part of any sketch, plan, model, article, note or document; and expressions referring to the communication of any sketch, plan, model, article, note or document include the transfer or transmission of the sketch, plan, model, article, note or document."; s.2(3) provides: " 'document' includes part of a document."; s.2(4) provides: " 'model' includes design, pattern and specimen."

[119] *Id*, s.3(1); The section is specific to the effect that the aggravated punishment shall be given where the offence is committed in relation to any work of defence, arsenal or naval, military or air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of government or in relation to any secret official code. As to the suggestion to impose death penalty for the offences under ss.3 and 5 the Law Commission of India in its 35th Report on capital punishment held the view that the present punishment is adequate. Paragraphs 473 and 474 reveal the reason therefor: "473. The offence of espionage should, it has been suggested, be made a capital one. It may be noted, that where espionage consists of acts which constitute an abetment of the waging of war against the State, the offence would be amply covered by s.121 of the Indian Penal Code, which allows the penalty of death. Other cases of collection and transmission of State secrets mostly fall under the Official Secrets Act, s.3(1) of which provides the maximum punishment of imprisonment up to 14 years. In times of emergency, additional provisions are made by special legislation.
474. Thus under s.5(4) of the Official Secrets Act, 1923, as amended by the Defence of India Act, a person guilty of an offence under s.5 of the Official Secrets Act shall, if such offence is committed with intend to wage war or to assist any country committing external aggression against India, be punishable with death or imprisonment for life or imprisonment up to ten years, etc."

Divulging official secrets

If any person having in his possession or control any official secret commits any of the following activities is said to commit the offence of divulging the official secrets.[120] The first limb consists of willful communication on his part the official secret to any person.[121] However any such communication to a person to whom he is authorised to communicate it or a Court of Justice or a person to whom it is his duty to communicate in the interests of a State is exempted.[122] Secondly, if he uses it for the benefit of any foreign power or in any manner prejudicial to the safety of the State it would constitute another limb of this offence.[123] The third limb consists of retaining it when he has no right to do so, or when it is contrary to his duty to do so, or willful failure to comply with any direction issued by lawful authority with regard to its return or disposal.[124] And last, his failure to take reasonable care of or his so conducting himself as to endanger the safety of the official secret, constitutes the fourth limb of the offence.[125]

The punishment provided for this offence is imprisonment for a term which may extend to three years with or without fine.[126] There are two other equally punishable offences in this category. Any person voluntarily receiving any official

[120] *Id*, s.591); the expression official secret is not defined as such in the Act, rather it is used in conjunction with the view of the Law Commission as a matter of convenience and thus to avoid repetition. Thus the expression official secret covers any secret official code or pass word or any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place or relates to anything in such a place or which is likely to assist directly or indirectly an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States or which has been made or obtained in contravention of the Act or which has been entrusted in confidence to him by any person holding office under Government or which he has obtained or to which he has had access owing to his position as a person who holds or has held office under Government or as a person who has held a contract made on behalf of Government, or as a person who is or has been employed under a person who holds or has held such an office or contract.

[121] *Id*, s.5(1)(a).

[122] *Ibid.*

[123] *Id*, s.5(1)(b).

[124] *Id*, s.5(1)(c).

[125] *Id*, s.5(1)(d).

[126] *Id*, s.5(4).

secret knowing or having reason to believe that it is communicated to him in contravention of the Act, commits an offence as is liable to be so punished.[127] Lastly, any person having in his possession or control any such official secret communicates it directly or indirectly to any foreign power or any other manner prejudicial to the safety or interests of the State is liable to be so punished.[128]

Offences relating to official uniforms, documents and seals

If any person does any of the following acts for the purpose of gaining admission or of assisting any other person to gain admission to a prohibited place or for any other purpose prejudicial to the safety or interests of the State he is said to commit this offence. [129]

Using or wearing by any person without lawful authority any armed force or police uniform or any uniform so nearly resembling the same as to be calculated to deceive or falsely represent to be a person who is or has been entitled to use or wear any such uniform, constitutes this offence.[130] Secondly, knowingly making or conniving at the making of any false statement or any omission orally or in any document signed by an accused or on his behalf, constitutes the offence.[131] The third limb of the offence consists of forging, altering or tampering with any official document or knowingly using or having in possession any such forged, altered or irregular official document.[132] If a person personates or falsely represents himself to be, a person holding or in the

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[127] *Id*, s.5(2).
[128] *Id*, s.5(3); the Law Commission of India, 43rd Report, pp.50-52, 101 & 102, the National Security Bill, 1971, cl.34.
[129] *Id*, s.6(1); see also the Law Commission of India , *op. cit.*, pp. 52-54.
[130] *Id*, s.6(1)(a); the expression armed force is not used in the section in relation to uniform. Rather the expression 'naval, military, airforce' is used there.
[131] *Id*, s.6(1)(b).
[132] *Id.*, s.6(1)(c); the expression official document includes any passport or any naval, military or airforce official pass, permit, certificate, licence or other document of similar character.

employment of a person holding office under government or falsely represents himself to be or not to be a person to whom an official document or secret official code or password has been duly issued or communicated, he is said to commit this offence. Another act may also constitute this limb of the offence. Thus a person knowingly making any false statement with intention to obtain any such official document, secret official code or password whether for himself or any other person commits this offence.[133] The last limb of the offence consists of the acts of using, having in possession, or under control, without lawful authority manufacturing or selling any official seal or any die or any seal or stamp so nearly resembling an official seal has to be calculated to deceive, or counterfeiting any official seal.[134]

The above offence carries a punishment for a term which may extend to three years and/or fine.[135] There are some more equally punishable offences under this class. Any person retaining any official document without right to retain it for any purpose prejudicial to be so punished.[136] Similarly any person wilfully omitting to comply with any directions issued by or under authority of government with regard to return or disposal of any official document contrary to his duty to retain it for any such purpose, commits the same offence.[137] Here, the official document includes any such document whether or not completed or issued for use.[138]

Any person allowing another person to have possession of, or communicating another person, any official document issued for his use alone for any

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[133] *Id.*, s.6(1)(d).
[134] *Id.*, s.6(1)(e); the expression official seal means one made or provided by any department of the government or by any naval, military or airforce authority appointed by or acting under the government.
[135] *Id.*, s.6(3).
[136] *Id.*, s.6(2)(a).
[137] *Ibid.*
[138] *Ibid.*

purpose prejudicial to the safety of the State, commits an offence.[139] Possessing without lawful authority or excuse any official document, secret official code or password issued for the use of another person is also a crime.[140] Wilful omission to restore any such official document to the authority by whom or for whose use it was issued or to a police officer on obtaining the same by finding or otherwise is yet another offence, when the omission is made for a purpose prejudicial to the safety of the State.[141] Manufacturing or selling or having in possession for sale any such die, seal or stamp as aforesaid for the same purpose is the last offence in this category.[142]

2.20 Interfering with police and armed force officers

It is a general duty that in the vicinity of any prohibited place no person shall obstruct, knowingly mislead or otherwise interfere with or impede any police officer or any member of the armed force engaged on guard, sentry, patrol or other similar duty in relation to such prohibited place.[143] If any person acts in violation of this duty he is punishable with imprisonment which may extent to three years with or without fine.[144]

2.21 Omission to give information

Every person is duty bound to give any information in his power relating to any offence or suspected offence of spying including those relating to its defence personnel on demand.[145] Moreover every such person is bound to attend at such reasonable time and

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[139] *Id*, s.6(2)(b).
[140] *Ibid.*
[141] *Ibid.*
[142] *Id*, s.6(2)(c); see also the Law Commission of India, *op. cit.*, pp. 52-54,102 &103, the National Security Bill, 1971, cl.35.
[143] *Id*, s.7(1).
[144] *Id*, s.7(2); see also the Law Commission of India, *op. cit.*, pp. 54 and 103, the National Security Bill, 1971, cl.36.
[145] *Id*, s.8(1); a superintendent of police or other police officer not below the rank of Inspector, empowered by an Inspector General or Commissioner of police in this behalf or any member of the armed forces engaged on guard, sentry, patrol or other similar duty is said to be competent for this purpose.

place, specified, for the purpose of furnishing such information if so required by such personnel.[146] Any person omitting to give any such information or to attend as aforesaid is punishable with imprisonment which may extent to three years and/or fine.[147]

Harbouring spies

If any person knowingly harbours any person whom he knows or has reasonable grounds for supposing to be a person who is about to commit or who has committed any offence relating to spying, he commits an offence carrying a punishment of imprisonment which may extent to three years with or without fine.[148] Equally punishable is the act of permitting such persons to meet or assemble in any premises in the occupation or control of the accused.[149] Any omission on the part of the person so harbouring or permitting such persons to so meet or assemble, to give any information in his power relating to any such person or persons to such competent police officers on demand is yet another equally punishable offence.[150]

Inchoate offences

Any attempt or abetment of any of the offences punishable under the Indian Official Secrets Act, 1923 is made punishable with the same punishment as the principal offence carries.[151]

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[146] *Ibid.*

[147] *Id*, s.8(2); see also the Law Commission of India, *op. cit.*, pp.54, 55 and 103, the National Security Bill, 1971, cl.37.

[148] *Id*, s.10(1) and (3); an offence relating to spying means any offence punishable under s.3 r/w s.9.

[149] *Id*, s.10(1).

[150] *Id*, s.10(2); see also the Law Commission of India, *op. cit.*, pp. 55, 56, 103 and 104, the National Security Bill, 1971, cl.38.

[151] *Id*, s.9; this section is suggested to be omitted. See the Law Commission of India, *op. cit.*, p.55. Second part of 7.83 provides: "we are of the view that s.9 can be safely omitted. Abetment of an offence under the new law can be taken care of by the general provision in the Penal Code. So far as attempts are concerned many of the acts punishable under the penal sections, by their very terms, cover them."

2.22 Offences relating to terrorism

The Prevention of Terrorism Act, 2002 embodies the antiterrorism law. Earlier the Terrorist and Disruptive Activities (Prevention) Act, 1987, which was originally enacted for a duration of six years and extended by two years for combating terrorism got lapsed in 1995.[152] The present statute has been enacted pursuant to the recommendation of the Law Commission of India.[153]

Terrorist activities

Any act or thing by any person with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or the Government or any other person to do or abstain from doing in the following manner is called a terrorist act.[154] Such act or thing must be done in such a manner as to cause or likely to cause death of or injuries to any person or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies.[155] Moreover such act or thing must be done by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances, whether biological or otherwise, of hazardous

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[152] The extension of duration was effected by an amendment of s.1(4) substituting the words 'eight years' for the words 'six years' vide s.2 of the Terrorist and Disruptive Activities (Prevention) Amendment Act, 1993.

[153] The Law Commission of India, 173rd Report on Prevention of Terrorism Bill, 2000. Since Parliament was not in session the law at first promulgated as ordinance which was called the Prevention of Terrorism Ordinance, 2001. In due course the present statute has been passed with certain changes and repealing the Ordinance.

[154] The Prevention of Terrorism Act, 2002, s.3(1)(a).

[155] *Ibid.*

nature or by any other means whatsoever.[156] Similarly whoever detaining any person and threatening to kill or injure him for such purpose, in the same manner and with same intention, commits a terrorist act.[157]

Being or continuing to be a member of an association declared unlawful under the Unlawful Activities (Prevention) Act, 1967 and having in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and committing any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property constitute a terrorist act.[158] Similarly any person voluntarily doing an act aiding or promoting in any manner the objects of such association and having in possession of any of the above mentioned things and committing any such act, commits a terrorist act.[159] Any act of raising funds intended for the purpose of terrorism is also a terrorist act.[160]

Any person committing a terrorist act resulting in the death of any person is punishable with death or imprisonment for life in addition to a mandatory fine.[161] In any other case the person committing a terrorist act is punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life in addition to a mandatory fine.[162]

The inchoate offences of terrorist act such as conspiracy, attempt, advocating, abetting, advising or inciting or knowingly facilitating the commission thereof are punishable with imprisonment for a term which shall not be less than five

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[156] *Ibid.*
[157] *Ibid.*
[158] *Id.*, s.3(1)(b).
[159] *Ibid.*
[160] *Id.*, Explanation to s.3(1).
[161] *Id.*, s.3(2)(a).
[162] *Id.*, s.3(2)(b).

years but which may extend to imprisonment for life in addition to a mandatory fine.[163] Equally punishable is the act preparatory to a terrorist act.[164]

Any person voluntarily harbouring or concealing any terrorist with knowledge commits yet another offence of terrorist act.[165] It carries the punishment of imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life in addition to fine in mandatory character.[166] Equally punishable is the offence of attempt to harbour or conceal any such terrorist with knowledge.[167]

Besides, being a member of a terrorist gang or terrorist organisation which is involved in terrorist acts is an offence. Any person who is such a member is punishable with imprisonment for a term which may extend to imprisonment for life or with fine which may extend to rupees ten lakh or with both.[168] A terrorist organisation, for the purpose of this offence, means an organisation which is concerned with or involved in terrorism.[169]

Holding with knowledge any property derived or obtained from commission of any terrorist act or acquired through the terrorist fund is also an offence. This offence is punishable with imprisonment for a term which may extend to imprisonment for life or with fine which may extend to rupees ten lakh or with both.[170]

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[163] *Id.*, s.3(3).
[164] *Ibid.*
[165] *Id.*, s.3(4).
[166] *Ibid.*
[167] *Ibid*; proviso reads: "Provided that this sub-section shall not apply to any case in which the harbour or concealment is by the husband or wife of the offender."
[168] *Id.*, s.3(5).
[169] *Id.*, s.3(5) *Explanation.*
[170] *Id.*, s.3(6).

Whoever threatens any person who is a witness or any other person in whom such witness may be interested, with violence or wrongfully restrains or confines the witness or any other person in whom the witness be interested or does any other unlawful act with the said intent commits an offence. It carries a punishment of imprisonment of imprisonment which may extend to three years and fine.[171]

Any person having in unauthorised possession of any particular arms or ammunition in a notified area is punishable with imprisonment for a term which may extend to imprisonment for life or with fine which may extend to rupees ten lakh or with both.[172] Equally punishable is having in unauthorised possession of any bombs, dynamite or hazardous explosive substances or other lethal weapons capable of mass destruction or biological or chemical substances or warfare in any area whether notified or not.[173]

Holding or having in possession of any proceeds of terrorism is also an offence irrespective of whether it is held by a terrorist or by any other person and whether or not such person is prosecuted or convicted under this Act.[174] Such proceeds of terrorism is liable to be forfeited to the Central Government or the State Government as the case may be.[175]

Any person contravening any provision of certain statutes with intent to aid any terrorist, is punishable with imprisonment for a term which may extend to imprisonment for life and a mandatory fine, notwithstanding anything contained in

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[171] *Id.*, s.3(7).

[172] *Id.*, s.4(a). Notified area means such area as the State Government may by notification in the official Gazette specify, as provided for in the Explanation to the section. Arms or ammunition mentioned are those specified in columns (2) and (3) of Category I or Category III (a) of Schedule I to the Arms Rules, 1962.

[173] *Id*, s.4(b); this penal provision has overriding effect over any other law as it contains the expression: "... notwithstanding anything contained in any other law for the time being in force..."

[174] *Id.*, s.6(1) & (2).

[175] *Id.*, s.6(2).

those statutes.[176] For the purpose of this enhanced penalty any person who attempts to contravene or abets or dos any act preparatory to the contravention of any provision of any law, rule or order is deemed to have contravened that provision.[177]

Notwithstanding anything contained in any other law, the officer investigating any offence under this Act with prior approval in writing of an officer not below the rank of a superintendent of police may require any officer or authority of the Central Government or a State Government or a local authority or a bank or a company or a firm or any other institution, establishment, organisation or any individual to furnish information in their possession in relation to such offence, on points or matters where the investigating officer has reason to believe that such information will be useful for or relevant to the purposes of this Act.[178] Failure to furnish the information so called for or deliberately furnishing false information is punishable with imprisonment which may extend to three years or with fine or with both.[179]

[176] *Id.*, s.5(1).; the Explosives Act, 1884, the Explosive Substances Act, 1908, the Inflammable Substances Act, 1952 and the Arms Act, 1959 are the statutes specified by this provision. Contravention of its provision and rules made thereunder results in such an enhanced penalty.
[177] *Id*, s.5(2).
[178] *Id*, s.14(1).
[179] *Id*, s.14(2).

CHAPTER 3

TYPES OF CRIMINAL PROCEDURE

Succinctly defined, a criminal justice process is that series of procedures through which the substantive criminal law is enforced.[1] The principles underlying different criminal justice systems vary according to history, culture and underlying ideology.[2] Among the criminal justice systems existing in different countries two main types of criminal procedures can be identified on the basis of their underlying principles: accusatorial and inquisitorial.[3] A mixed system adopting selected features of both these systems can also be identified as a third type.[4]

The common law countries including England, India, Australia, Canada and the United States follow an adversarial system inspired by accusatorial tradition. The civil law countries, such as France, Germany and Italy pose a system based on inquisitorial principles as a major alternative to adversarial system.[5] Both systems have their origin in Europe.

Until 1215 criminal proceedings in England and on the European continent were more or less the same. Victims were the movers of the accusation and conducted prosecutions. Several forms of trial including the oath *ex officio*, the trial by ordeal, and the trial by battle existed. In 1215 two events occurred that caused a divergence in the systems of England and Europe. One was the signing of Magna Charta in England. It guaranteed among other safeguards the right to trial by one's peers. The other, in Rome,

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[1] Yale Kamisar, Wayne R. LaFave and Jerold H. Israel, 'Modern Criminal Procedure', 8th edn, p.1.
[2] Andrew Sanders and Richard Young, 'Criminal Justice', 1994, p.7.
[3] *Ibid*, A.R.Biswas, 'B.B.Mitra on Code of Criminal Procedure, 1973', 15th edn vol I, p.4.
[4] A.R.Biswas, 'B.B.Mitra on Code of Criminal Procedure, 1973', 15th edn vol I, p.4.
[5] Andrew Sanders and Richard Young, 'Criminal Justice', 1994, p.7.

the Fourth Lateran Council[6] prohibited clergy from officiating at trials by ordeal. As a result of these two events, England developed the jury system as well as what has now evolved into the adversary-accusatorial system, while Europe developed a system of official inquiry or inquisitorial system.[7]

3.1. Accusatorial system

Criminal process consists of two important steps, namely the investigation and the judicial process. Someone is to make an investigation in order to formulate a charge and someone is to exercise the judicial function in deciding whether the charge is

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[6] Bouvier's Law Dictionary: A Concise Encyclopedia of the Law, Rawle's Revision-Third Revision, 1914, vol-II, St. Paul Minn, West Publishing Company, pp. 1873-74: **Lateran Councils.** The general name given to the numerous councils held in the Lateran Church at Rome. The first of these was convened A.D. 649 to consider the doctrine of the Monothelites. This council held five sessions, during which the writing of the leading advocates of the theory were examined and condemned, and all persons anathematized who did not confess their belief in the existence of both the divine and the human will in the person of Jesus Christ. The second of the councils, held in the years 1105, 1112, 1116 and 1123, settled the controversy between the pope and the emperor as to the investiture of bishops, prescribed the methods of ordinations and elections, by which, although the pope apparently made large concessions to the emperor, he was, in fact, able to practically control the elections, and passed additional decrees to enforce the celibacy of the clergy. The fourth council (1179) decreed that the election of the popes should be confined to the college of Cardinals, two-thirds of the votes of which should be requisite for an election, instead of a majority, as had previously been necessary. It condemned the Albigeneses and the Waldeneses the fifth council convened in the year 1215. It is usually called the fourth Lateran and was the most important as marking the summit of the Papal power. It decreed that the doctrine of transubstantiation be one of the articles of faith, required all persons who had reached the age of discretion to confess once a year, arranged for the place of assembly and the time for the next crusade, and anathematized all heretics whose belief was opposed to the faith, decreeing that after their condemnation they should be handed over to the secular authorities, excommunicating all who received, protected, or maintained them, and threatening all bishops with deposition who did not use their utmost endeavours to clear their diocesses of them. The sixth council (1512-17) abolished the Pragmatic Sanction and substituted a concordat agreed upon by Leo X and Francis I in which the liberties of the Church were greatly restricted. Some authorities recognize five only, omitting the first above stated and numbering the others from one to five.

[7] Survey of the Major Criminal Justice Systems in the World, 549. There is a bit more different version: In the 12th and 13th Centuries, the English Common Law procedure was *accusatorial* -the parties came before the court on an equal footing; the court gave help to neither; and the one party formulated his grievance while the other party denied it. The mode of trial was some type of ordeal, which was *judicium dei* : the judgment was that of God, not that of the president of the court. This did not find favour with the church. A trusted person was thus sent to inquire into the allegations. And this founded the *inquisitorial* system of trial-the judge was to find out for himself what had happened by examining all persons, including the accused or suspected person. See A.R.Biswas, 'B.B.Mitra on Code of Criminal Procedure, 1973', 15th edn vol I, p.4

substantiated. There is this division of function and the judicial process is called accusatorial.[8]

The system has essentially two leading features. Firstly, there is a sham fight between two combatants and it contains the primitive idea of penal action. The parties come before the court on an equal footing. The court gives help to neither. The one party formulates his grievance while the other party denies it. Secondly, the judge ends the contest by deciding against one or other of the parties. The system is a mixture of two proceedings, civil and criminal. The mode of trial is some type of ordeal.[9]

The Crown is the prosecutor in all cases and this means that the case against the accused is presented by one party, called the prosecutor or prosecution, and met by the other party called the accused. The task of investigation, preparation and presentation of the case is upon the prosecutor and not upon the judge or the magistrate. A tribunal simply tries the issue between the two contesting parties. And the defence is no more than a demonstration that the prosecution has failed to prove its case beyond a reasonable doubt.

The adversary principle that it is for the prosecution to bring a case to court and prove guilt is an important characteristic of an accusatory system.[10] The trial is essentially a party process. It involves a two sided contest, between prosecution and defendant, in a judicial arena. The parties are in an equal position. The judge does not have any initiative either in taking jurisdiction or in collecting evidence and obtaining proof. The judge acts as an impartial moderator evaluating the evidence produced by the parties, ensuring that the proceedings are conducted with procedural propriety, and

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[8] Jackson, R.M., *The Machinery of Justice in England,* 5th ed. 1967, p. 129.
[9] Jackson, R.M., *The Machinery of Justice in England,* 5th ed. 1967, p. 129.
[10] Andrew Sanders and Richard Young, 'Criminal Justice', 1994, p.7.

announcing a decision at the conclusion of the case.[11] The collection of evidence is exclusively in the hands of the parties, chiefly with the prosecution. The judge is bound by the evidence, which survived the exclusionary rules. Furthermore, if the parties choose not to call a certain witness, then however relevant that person's evidence might have been, there is nothing the court can do about it.[12] The proceedings are oral, open to the public and the evidence is mainly tendered by direct examination of witnesses with a right of cross examination by the opposite party. Historically the accusatory system was tied to the popular juries which gave unreasoned verdicts.[13]

The adversary model recognises a more significant role for the accused and the defence in criminal justice administration, for this system is based on an adversary ideology. Its rationale is that if two parties assume contrary and opposite positions on the issues (prosecution and defence) and carry on competitive debate, complemented by the introduction of supporting evidence, the court as an impartial third party is thereby placed in a better position to analyse and evaluate the respective contentions and arrive at a correct finding about the issue in dispute. It prefers means to result and emphasizes process over goals.[14]

The accusatorial system is more sensitive to the liberty of the citizen.[15] It avoids recourse to brute force.[16] It imposes greater restriction on its public agents. It holds the integrity of the process and its means at a higher value than effective results. There is a high degree of constitutional review of criminal justice administration

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[11] Andrew Sanders and Richard Young, 'Criminal Justice', 1994, p.7; A.R.Biswas, 'B.B.Mitra on Code of Criminal Procedure, 1973', 15th ed. vol I, p.5.

[12] Andrew Sanders and Richard Young, 'Criminal Justice', 1994, p.7.
G.L. Certoma, *The Accusatory System v. The Inquisitorial System: Procedural Truth v. Fact?*, (1982) 56 ALJ 288.

[14] Andrew Sanders and Richard Young, 'Criminal Justice', 1994, p.7; G.L. Certoma, *The Accusatory System v. The Inquisitorial System: Procedural Truth v. Fact?*, (1982) 56 ALJ 288.

[15] *Ibid.*

[16] A.R.Biswas, 'B.B.Mitra on Code of Criminal Procedure, 1973', 15th ed. vol. I, p.5.

practices. It embodies party evidence, elaborate exclusionary rules and other rules of evidence and is characterised as a system tending to procedural truth. It seeks truth as the product of collaboration between the parties through legal proof. [17]

In the system the law rigidly determines the evidence to be admitted and the weight it must be given. The system of legal proof with its mechanical standards was the product of an age which it was considered dangerous to subject an accused to a judiciary, which was not independent from other powers of the state nor, in many cases, legally trained. [18]

3.2. Inquisitorial system

There are two basic features to an inquisitorial system. The judge in an inquisitorial system is both judge and prosecutor. Thus several functions concentrate in the judge. Secondly, collection of evidence is in the control of the judge.[19] It places more emphasis on ensuring the punishment of a guilty party. It does not have much concern or considerations for basic and fundamental rights of the citizens. It is clear that a zealous pursuit of the inquisitorial approach would erode the freedom of the citizen.[20]

In an Inquisitorial system, the dominant role in conducting a criminal inquiry is played, at least in theory, by the court, a dossier is prepared to enable the judge taking the case to master its details. The judge then makes decisions about which witnesses to call and examines them in person, with the prosecution and defence lawyers consigned to a subsidiary role. In some inquisitorial systems the dossier is prepared (in serious cases)

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[17] G.L. Certoma, *The Accusatory System v. The Inquisitorial System: Procedural Truth v. Fact?*, (1982) 56 ALJ 288. See also Ex p Lloyd (1822) Mont 70 at 72n.
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*

by an examining magistrate (*juge d' instruction*) with wide investigative powers, but more frequently this preparatory task is carried out by the prosecutor and police. [21]

The judge initiates investigation and collects all of the evidence. The investigation is thus a part of judicial proceeding. The judge has full control all over the proceedings. The calling and examination of witnesses and the employment of experts are the concern of the judge. Instead it is not the concern of the parties. The proceedings are (usually) written and secret (although the defendant or his attorney can be present at most of the proceedings). There is no cross-examination (although the parties may submit written questions to the examining judge requesting that they be put to the witness.

The trial consists of open proceedings. Theoretically, the trial is characterised by orality and immediacy, but in practice it has degenerated into a mere formal reception of the written summaries of the evidence collected in the previous instruction phase, (by examining judge) rather than retaking the evidence orally in open court. Therefore, in practice, the criminal process consists of a cumulative series of activities all of which are utilized by the trial judge in making the final decision. This rule gets varied in certain exceptional circumstances.

Facts adducement

The civil law system strives to ensure a complete and factual judicial inquiry. It places the pursuit of truth in the control of a judge who has the initiative in collecting all the material he needs to decide the matter, and thus is not bound by the evidence tendered to him by the parties. Therefore, evidence damaging to the accused is not only brought

[21] There are considerable differences between systems, which are labeled 'inquisitorial'. See eg. the review by L.H. Leigh and L. Zender, A Report on the Administration of Criminal Justice in the Pre-trial phase in England and Germany (Royal Commission on Criminal Justice, Research Study no1) (HMSO, 1992).

forward by the prosecution but also by the judge; and, similarly, evidence favouring the accused not only come from the defendant, but also from the judge.

Admission and evaluation of evidence

The operative principle with regard to the admission and evaluation of evidence in criminal trials is the free evaluation of evidence or, 'free proof'. This means that the evidence may be weighed by the judge freely in accordance with the prudent judgment. The principle of free evaluation of evidence has its origin in the French Revolution which exploited the institution of the jury. Traditionally the jury gave an unreasoned verdict reached on the basis of an "intimate conviction" of the facts presented to it. The principle of free evaluation of evidence developed from the principle of "intimate conviction" but is different from its forerunner because the decision, being the result of the free evaluation of evidence must be supported by a recent judgment.

The principle of free evaluation of evidence is seen to constitute not only a freedom in favour of the judge, namely, the freedom to apply his prudent judgment to the facts of the case at hand, but also as an advantage operating in favour of the accused who will know that the judge will not be restricted in his evaluation of the facts and can decide the case having regard to the accused's own circumstances.

The principle of free evaluation of evidence confers full and uncontrolled power to the judge over evidence. This principle justifies the judge in probing into any sort of evidence, even to the point that the judges ignore any exclusionary rules contained in the (Code of Criminal Procedure) law. Taking the principle of free evaluation to its logical but extreme conclusion the judges contend that even if the

collection of certain evidence does not comply with certain procedures or other requirements prescribed by the law (Code of Criminal Procedure), the court may nonetheless utilise the evidence and evaluate and convince itself of its probative value.

The principle of free evaluation means in substance: First, full freedom to admit evidence even if it is specifically excluded by some Code provision; Second, the right to inquire into atypical forms of evidence, that is to say forms of evidence not considered by the law as desirable, and Third, the free evaluation of all evidence.

3.3. Packer's two models of criminal process

Herbert L. Packer, a celebrated American jurist has developed two theoretical models of the criminal process: due process and crime control, by means of which we can explore the value choices underlying the details of the criminal process.[22] The models make us perceive the normative antinomy at the heart of the criminal law. They are not the only way of thinking about criminal justice[23], but they are widely recognised as useful tools of analysis.[24] They represent an attempt to abstract two separate value systems that compete for priority in the operation of the criminal process. Packer has presented them as neither corresponding to reality nor representing the ideal to the exclusion of the other.[25] Since they are distortions of reality and normative in character no one shall see one or other as good or bad.[26]

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[22] H.L. Packer, *The Limits of the Criminal Sanction*, 1968, p.153, chapter 8 'Two models of the Criminal Process', pp.149 to 173.

[23] For refinements and other approaches, see eg. A. E. Bottoms and J.D. Mc Clean, *Defendants in the Criminal Process (Routledge & Kegan Paul*, 1976) pp.226-232 and M. King, *The Framework of Criminal Justice* (Croom Helm, 1981) ch.2.

[24] M. Mc Couville and J. Baldwin, *Courts, Prosecution and Conviction* (Oxford University Press, 1981) pp 3-7 and S.H. Bailey and M.J. Gunn, *Smith and Bailey on the English Legal System* (1991) pp 680-695.

[25] H.L. Packer, *loc. Cit,* A legal paradox inspires him to develop these normative models. He expresses it as it at p. 150: "We are faced with an interesting paradox: the more we learn about the Is of the criminal process, the more we are instructed about its Ought and the greater the gulf between Is and Ought appears to become." However these models are not labeled Is and Ought, nor are they to be taken in that sense. Rather, they represent an attempt to abstract two separate value systems that complete for priority in the operation of the criminal process, at p. 153.

[26] *Id* at p. 153

The models describe two normative positions at opposite ends of a spectrum.[27] They merely afford a convenient way to talk about the operation of a process whose day-to-day functioning involves a constant series of minute adjustments between the competing demands of two value systems and whose normative future likewise involves a series of resolutions of the tensions between competing claims.[28]

3.4. Values Underlying Two Models

It is possible to identify two competing systems of values in the development of the criminal process. Law makers, judges, police, prosecutors and defence lawyers are the actors in the criminal justice at different stages in action. They do not often pose to articulate the values that underlie the positions that they take on any given issue. It is not feasible to ascribe a coherent and consistent set of values to any of these actors. The models are polarities, and so are the schemes of value that underlie them. No one can subscribe all of the values underlying one model to the exclusion of all of the values underlying the other. These values are presented as an aid to analysis, not as a program for action.[29]

The polarity of the two models is however not absolute. There are certain assumptions about the criminal process that are widely shared by both models. They are viewed as common ground for the operation of any model of criminal process. First, there is the assumption, implicit in the right against *ex post facto* Law guaranteed by the Constitution in every criminal justice system whereby the function of defining conduct that may be treated as criminal is separate from and prior to the process of identifying

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[27] Andrew Sanders & Richard Young, *Criminal Justice*, 1994, p.13.

[28] H.L. Packer, *loc. cit.;* the author however cautions that there is a risk in an enterprise of this sort that is latent in any attempt to polarise. It is simply, that values are too various to be pinned down to yes-or-no answers. The models are distortious of reality. And, since they are normative in character, there is a danger of seeing one or the other as good or bad.

[29] H.L. Packer, *loc. cit.*, p.154.

and dealing with persons as criminals.[30] There is a related assumption that the criminal process ordinarily ought to be invoked by those charged with the responsibility for doing so when it appears that a crime has been committed and that there is a reasonable prospect of apprehending and convicting its perpetrator.[31] They are expected to act how the legislature has demanded. This assumption may be viewed as the other side of the *ex post facto* coin.[32] Next, there is the assumption that there are limits to the powers of government to investigate and apprehend person suspected of committing crimes. Thus a degree of scrutiny and control must be exercised with respect to the activities of law enforcement officers, that the security and privacy of the individual may not be invaded at will.[33]

Finally, there is a complex of assumptions embraced by terms such as 'the adversary system', 'procedural due process', 'notice and opportunity to be heard', and 'day in court'. Common to them all is the notion that the alleged criminal is not merely an object to be acted upon but an independent entity in the process. He may, if he so desires, force the operators of the process to demonstrate to an independent authority (judge and jury) that he is guilty of the charges against him. This assumption speaks in

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[30] H.L. Packer, *op. cit.*, p.155. How wide or narrow the definition of criminal conduct must be is an important question of policy that yields highly variable results depending on the values held by those making the relevant decisions. But that there must be a means of definition that is in some sense separate from and prior to the operation of the process is clear. If this were not so, the efforts to deal with the phenomenon of organized crime would appear ludicrous indeed.

[31] *Ibid*; Although police and prosecutors are allowed broad discretion for deciding not to invoke the criminal process, it is commonly agreed that these officials have no general power. If the legislature has decided that certain conduct is to be treated as criminal, the decision-makers at every level of the criminal process are expected to accept that basic decision as a premise for action.

[32] *Ibid;* Packer explains that just as conduct that is not proscribed as criminal may not be dealt with in the criminal process, so conduct that been denominated as criminal must be treated as such by the participants in the criminal process acting within their respective competence.

[33] *Id*, at p.156; Packer points out that it is possible to imagine a society in which even lip service is not paid to this assumption. Nazi Germany approached but never quite reached this position. But no one in our society would maintain that any individual may be taken into custody at any time and held without any limitation of time during the process of investigating his possible commission of crimes, or would argue that there should be no form of redress for violation of at least some standards for official investigative conduct. Although this assumption may not appear to have much in the way of positive conduct, its absence would render moot some of our most hotly controverted problems.

terms of 'may' rather than 'must'. It permits but does not require the accused, acting by himself or through his own agent, to play an active role in the process. By virtue of that fact the process becomes or has the capacity to become a contest between, if not equals, at least independent actors. Much of the space between the two models is occupied by stronger or weaker notions of how this contest is arranged, in what cases it is to be played, and by what rules. The crime control model tends to de-emphasize this adversary aspect of the process, while the due process model tends to make it central.[34]

3.5. Crime control values

The value system that underlies the crime control model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process. The failure of law enforcement to bring criminal conduct under tight control leads to the breakdown of public order and thence to the disappearance of an important condition of human freedom. If the laws go unenforced a general disregard for legal controls tends to develop. The law-abiding citizen then becomes the victim of all sorts of unjustifiable invasions of his interests. His security of person and property is sharply diminished, and, therefore, so is his liberty to function as a member of society. Ultimately, the criminal process is a positive guarantor of social freedom.

Efficiency

In order to achieve this high purpose, the crime control model requires that primary attention be paid to the efficiency with which the criminal process operates to screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crime.[35] By 'efficiency' the model means the system's capacity to apprehend, try, convict, and dispose of a high proportion of criminal offenders whose

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[34] *Id*, at p.157.
[35] *Id*, at p.158.

offences become known.[36] The model, in order to operate successfully must produce a high rate of apprehension and conviction, in a context where the number of people being dealt with is very large and the resources for dealing with them are very limited. There must be a premium on speed and finality. Speed, in turn, depends on informality and on uniformity. Finality depends on minimising the occasions for challenge. The process must not be cluttered up with ceremonious rituals that do not advance the progress of a case. Facts can be established more quickly through interrogation in a police station than through the formal process of examination and cross-examination in a court. Thus extra-judicial processes should be preferred to judicial processes, informal operations to formal ones. But informality alone is not enough. There must also be uniformity. Routine, stereotyped procedures are essential if large numbers are being handled.[37] In theory the crime control model can tolerate rules that forbid illegal arrests, unreasonable searches, coercive interrogations and the like. It cannot tolerate vindication of those rules demanding exclusion of the illegally obtained evidence or through the reversal of convictions in cases where criminal process has breached the rules laid down for its observance.[38]

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[36] *Ibid*; Packer makes it clear that in a society in which only the grossest forms of antisocial behaviour were made criminal process might require the devotion of many more man-hours of police, prosecutorial, and judicial time per case than ours does, and still operate with tolerable efficiency. A society that was prepared to increase even further the resources devoted to the suppression of crime might cope with a rising crime rate without sacrifice of efficiency while continuing to maintain an elaborate and time-consuming set of criminal process. However, neither of these possible characteristics corresponds with social reality in this country. The economy to increase very drastically the quantity, much less the quality, of the resources devoted to the suppression of criminal activity through the operation of the criminal process has an important bearing on the criteria of efficiency, and therefore on the nature of the crime control model.

[37] *Id*, at p.159; Packer explains through illustration that the model that will operate successfully on these presuppositions must be an administrative, almost a managerial, model. The image that comes to mind is an assembly-line conveyor belt down which moves an end-less stream of cases, never stopping, carrying the cases to workers who stand at fixed stations and who perform on each case as it comes by the same small but essential operation that brings it one step closer to being a finished product, or, to exchange the metaphor for the reality, a closed file. The criminal process, in this model, is seen as a screening process in which each successive stage- pre-arrest investigation, arrest, post-arrest investigation, preparation for trial, trial or entry of plea, conviction, disposition- involves a series of routinised operations whose success is gauged primarily their tendency to pass the case along to a successful conclusion.

[38] *Id*, at p.168.

Presumption of Guilt

By the application of administrative expertness primarily that of the police and prosecutors, an early determination of probable innocence or guilt emerges. Those who are probably innocent are screened out those who are probably guilty are passed quickly through the remaining stages of the process. The key to the operation of the model regarding those who are not screened out is presumption of guilt.[39] This key makes the system capable to deal efficiently with large numbers. The supposition is that the screening processes operated by police and prosecutors are reliable indicators of probable guilt.[40]

The presumption of guilt not, of course, a thing. Nor is it even a rule of law in the usual sense. It simply is the consequence of a complex of attitudes, a mood. If there is confidence in the reliability of informal administrative fact-finding activities that take place early stages of the criminal process, the remaining stages of the process can be relatively perfunctory without any loss in operating efficiency. The presumption of guilt is the operational expression of that confidence.[41] It is not at all the opposite of the presumption of innocence, which is the polestar of the criminal process in the due process model. The two concepts are different rather than opposite ideas.[42]

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[39] *Id*, at p.160; The concept requires some explanation, since it may appear startling to assert that what appears to be precise converse of our generally accepted ideology of a presumption of innocence can be an essential element of a model that does correspond in some respects to the actual operation of the criminal process.

[40] *Ibid*; Packer makes it clear that once a man has been arrested and investigated without being found to be probably innocent, or, to put it differently, once a determination has been made that there is enough evidence of guilt to permit holding him for further action, then all subsequent activity directed toward him is based on the view that he is probably guilty.

[41] *Id*, pp.160-1.

[42] *Id*, at p.161; Packer epitomise the difference by an example. A murderer, for reasons best known to himself, chooses to shoot his victim in plain view of a large number of people. When the police arrive, he hands them his gun and says, "I did it and I am glad." His account of what happened is corroborated by several eyewitnesses. He is placed under arrest and led off to jail. Under these circumstances, which may seen extreme but which in fact characterise with rough accuracy the evidentiary situation in a large proportion of criminal cases, it would be plainly absurd to maintain that more probably than not the suspect did not commit the killing. But that is not what the presumption of innocence means. It means that until there has been an adjudication of guilt by an authority legally competent to make such an adjudication, the suspect is to be treated, for reasons that have nothing whatever to do with the probable outcome of the case, as if his guilt is an open question.

The presumption of innocence is a direction to officials about how they are to proceed, and not a prediction of outcome. The presumption of guilt, however, is purely and simply a prediction of outcome. The presumption of innocence, then, is a direction to the authorities to ignore the presumption of guilt in their treatment of the suspect. It tells them, in effect, to close their eyes to what will frequently seem to be factual probabilities. The presumption of guilt is descriptive and factual while the presumption of innocence is normative and legal.

The pure crime control has no truck with the presumption of innocence.[43] In presumption of guilt the crime control model finds a factual predicate for the position that the dominant goal of repressing crime can be achieved through highly summary processes without any great loss of efficiency, because the probability that, in the run of cases, the preliminary screening processes operated by the police and the prosecuting officials contain adequate guarantees of reliable fact-finding. This model indeed takes an even stronger position that subsequent processes, particularly those of a formal adjudicatory nature, are unlikely to produce as reliable fact-finding as the expert administrative process that precedes them is capable of. The criminal process thus must put special weight on the quality of administrative fact-finding. It becomes important, then, to place as few restrictions as possible on the character of the administrative fact-finding processes and to limit restrictions for other purposes. This view of restrictions on administrative fact-finding is a consistent theme in the development of the crime control model.[44]

[43] *Id*, at pp.161-2. However, Packer admits that the real life emanations are brought into uneasy compromise with the dictates of the dominant ideological position of presumption of innocence.
[44] *Id*, at p.162.

Informal Fact Finding

In this model the center of gravity for the process lies in the early, administrative fact-finding stages. The subsequent stages are relatively unimportant and should be truncated as much as possible. The pure crime control model has very little use for many conspicuous features of the adjudicative process.[45] In real life it works out a number of ingenious compromises with such features. Even in the pure model, however, there have to be devices for dealing with the suspect after the preliminary screening processes has resulted in a determination of probable guilt. The focal device is the plea of guilty. By means of it adjudicative fact-finding is reduced to a minimum. Thus the crime control model, when reduced to its barest essentials and operating at its most successful pitch, offers two possibilities: an administrative fact-finding process leading (1) to exoneration of the suspect or (2) to the entry of a plea of guilty.[46]

3.6. Due Process Values

The ideology of due process model is composed of a complex of ideas, some of them based on judgments about the efficacy of crime control devices, others having to do with quite different considerations. It is far more deeply impressed on the formal structure of the law than is the ideology of crime control. However, its ideology is not the converse of that underlying the crime control model it does not rest on the idea that it is not socially desirable to repress crime. [47] If the crime control model resembles an assembly line, the due process model looks very much like an obstacle course. Each of its successive stages is designed to present formidable impediments to

[45] *Ibid;* Packer acknowledges that this too produces tensions with presently dominant ideology.
[46] *Id.*, at pp.162-3.
[47] *Id.*, p.163; Packer acknowledges that the critics of due process model raise such an allegation.

carrying the accused any further along in the process. An accurate tracing of the strands that make up this ideology is strangely difficult.[48]

Formal Fact Finding

The due process model rejects the premise of informal fact-finding, rather it insists for formal, adjudicative, adversary fact-finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him.[49] Even then, the distrust of fact-finding processes that animates the due process model is not dissipated. The possibilities of human error being what they are, further scrutiny is necessary, or at least must be available, in case facts have been overlooked or suppressed in the heat of battle. The subsequent scrutiny must be available at least as long as there is an allegation of factual error that has not received an adjudicative hearing in a fact-finding context. The demand for finality is thus very low in the due process model.[50]

Reliability and Efficiency

The reliability of fact-finding processes constitutes the characteristic difference between the two models. The issue as to how much reliability is compatible with efficiency assumes great importance.[51] A high degree of probability in each case

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[48] *Ibid.*

[49] *Id*, pp.163-4; The due process model points out that in support of the rejection of informal fact-finding process that people are notoriously poor observers of disturbing events – the more emotion-arousing the context, the greater the possibility that recollection will be incorrect; confessions and admissions by persons in police custody may be induced by physical or psychological coercion so that the police end up hearing what the suspect thinks they want to hear rather than the truth; witnesses may be animated by a bias or interest that no one would trouble to discover except one specially charged with protecting the interests of the accused (as the police are not).

[50] *Ibid.*

[51] *Ibid;* Packer explains that granted that informal fact-finding will make some mistakes that can be remedied if backed up by adjudicative fact-finding. The desirability of providing this back up is not affirmed or negated by factual demonstrations or predictions that the increase in reliability will be x percent or x plus n percent.

that factual guilt has been accurately determined shows higher reliability of the criminal process, while the expeditious handling of the large numbers of cases that the process ingests shows its better efficiency. In the competing demands of reliability and efficiency the crime control model is more optimistic about the improbability of error in a significant number of cases, but it is also more tolerant about the amount of error that it will put up with. The due process model insists on the prevention and elimination of mistakes to the extent possible, whereas the crime control model accepts the probability of mistake upto the level at which they interfere with the goal of repressing crime, either because too many guilty people are escaping or more subtly, because general awareness of the unreliability of the process leads to a decrease in the deterrent efficacy of the criminal law. In this view, reliability and efficiency are not polar opposites but rather complementary characteristics.[52]

The system is reliable because efficient. Reliability becomes a matter of independent concern only when it becomes so attenuated as to impair efficiency. All of this the due process model rejects. If efficiency demands shortcuts around relatively then absolute efficiency must be rejected. The aim of the process is at least as much to protect factually innocent as it is to convict the factually guilty.[53]

The due process model disclaims any attempt to provide enhanced reliability for the fact-finding process and still produce a set of institutions and processes that would defer from those demanded by the crime control model. These are values quite different and more far reaching evolved from an original matrix of concern for the

[52] *Id*, pp.164-5.

[53] *Ibid*; Packer points out that it is a little like quality control in industrial technology: tolerable deviation from standard varies with the importance of conformity to standard in the destined uses of the product. The due process model resembles a factory that has to devote a substantial part of its input to quality control. This necessarily cuts down on quantitative out put.

maximisation of reliability. These values can be expressed in, although not adequately described by, the concept of the primacy of the individual and the complementary concept of limitation on official power.[54]

The combination of stigma and laws of liberty that is embodied in the end result of the criminal process is the heaviest deprivation that government can inflict on the individual. Furthermore, the processes that culminate in these highly afflictive sanctions are in themselves coercive, restricting and demeaning. Power is always subject to abuse- sometimes subtle, other times, as in the criminal process open and ugly. Precisely because of its potency in subjecting the individual to the coercive power of the state, the criminal process must be subjected to controls that prevent it from operating with maximal efficiency. Maximal efficiency means maximal tyranny. And, although the due process model does not assert that minimal efficiency means minimal tyranny, it affords, a substantial diminution in the efficiency for preventing official oppression of the individual.[55]

Adjudicating Legal Guilt

The most modest- seeming but potentially far reaching mechanism by which the due process model implements these antiauthoritarian values is the doctrine of legal guilt. According to this doctrine, a person is not to be held guilty of crime merely on a showing that in all probability, based upon reliable evidence he did factually what he is said to have done. Instead, he is to be held guilty if and only if these factual determinations are made in procedurely regular fashion and by authorities acting within competences duly allocated to them. Furthermore, he is not to be held guilty, even

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[54] *Ibid.*
[55] *id*, at p.165-6.

though the factual determination is or might be adverse to him, if various rules designed to protect him and to safeguard the integrity of the process are not given effect.[56] Wherever the competence to make adequate factual determinations, it is apparent that only a court that is aware of these guilt-defeating doctrines and is willing to apply them can be viewed as competent to make determinations of legal guilt. The police and the prosecutors are ruled out by lack of competence, in the first instance, and by lack of assurance of willingness in the second. Only an impartial court can be trusted to make determinations of legal as opposed to factual guilt.[57]

Presumption of Innocence

In this concept of legal guilt lies the explanation for the apparently quixotic presumption of innocence. A man who, after police investigation, is charged with having committed a crime can hardly be said to be presumptively innocent, if what we mean is factual innocence. But if what we mean is that it has yet to be determined if any of the myriad legal doctrines that serve in one way or another the end of limiting official power through the observance of certain substantive and procedural regularities may be appropriately invoked to exculpate the accused, it cannot be said with confidence that he will be found guilty.[58]

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[56] *Ibid*; Thus the tribunal that convicts him must have the power to deal with this kind of case ('jurisdiction') and must be geographically appropriate ('venue'); too long a time must not have elapsed since the offence was committed ('statute of limitations'); he must not have been previously convicted or acquitted of the same or substantially similar offence ('double jeopardy'); he must not fall within a category of persons, such as children or the insane who are legally immune to conviction ('criminal responsibility'); and so on. None of these requirements has anything to do with the factual question of whether the person did or did not engage in the conduct that is charged as the offence against him, yet favourable answers to any of them will mean that he is legally innocent.

[57] *Id*, at p.167.

[58] *Ibid*

In due process model by forcing the state to prove its case against the accused in an adjudicative context, the presumption of innocence saves to force into play a,, the qualifying and disability doctrines that limit the use of the criminal sanction against the individual, thereby enhancing his opportunity to secure a favourable outcome. It vindicates the proposition that the factually guilty may nonetheless be legally innocent and should therefore be given a chance to qualify for that kind of treatment. The doctrine leads to limit the use of criminal sanction against the individual and it operates as a kind of self-fulfilling prophecy.[59]

Equality

Another strand constituting the ideology underlying the due process model is the idea of equality. It represents a most powerful norm for influencing official conduct. The ideal of equality holds that there can be no equal justice where the kind of trial a man gets depends on the amount of money he has.[60] There are gross inequalities in the financial means of the accused as a class. In the adversary systems of criminal justice an effective defence is largely a function of the resources that can be mustered on behalf of the accused. The very large proportion of the accused being indigent will be denied an effective defence.[61] The norm of equality prevents situations in which financial inability forms an absolute barrier to the assertion of a right that is in theory generally available.[62]

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[59] *Ibid*; Packer explains that by forcing the state to prove its case against the accused in an adjudicative context, the presumption of innocence serves to force into play all the qualifying and disabling doctrines that limit the use of criminal sanction against the individual, thereby enhancing his opportunity to secure a favourable outcome. By opening up a procedural situation that permits the successful assertion of defences having nothing to do with factual guilt, it vindicates the proposition that the factually guilty may nonetheless be legally innocent and should therefore be given a chance to qualify for that kind of treatment.

[60] *Ibid*; see also *Griffin* v. *Illinois*, 351 U.S. 12, 19 (1956).The proposition is based on this decision.

[61] *Ibid.*

[62] *Id* at p. 169

Beyond this it may provide the basis for a claim whenever the system theoretically makes some kind of challenge available to an accused who has the means to press it. The norm of equality may be invoked to assert that the same kind of opportunity must be available to others as well. If the model of criminal process affords the accused who are in a sound financial position to avail the right to consult a lawyer before entering a plea, then the equality norm exerts powerful pressure to provide such an opportunity to all the accused irrespective of their financial status and to regard the failure to do so as a malfunctioning of the process of whose consequences the accused is entitled to be relieved.[63]

The mood of skepticism about the morality and utility of the criminal sanction, (taken either as a whole or in some of its application) constitutes the last strand of the ideology of the due process model.[64] There are two kinds of problems that need to be dealt with in any model of the criminal process. One is what the rule shall be. The other is how the rules shall be implemented. The second is at least as important as the first. The distinctive difference between the two models is not only in the rules of conduct that they lay down but also in the sanctions that are to be invoked when a claim is presented that the rules have been breached and, no less importantly, in the timing that is permitted or required for the invocation of those sanctions.[65]

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[63] *Id* at pp.169-170

[64] *Id*, at p.170; Here Packer's ideas are to be read in the light of- Paul Bator, 'Finality in Criminal Law and Federal Habeas Corpus for State Prisoners', 76 HLR 441 (1963). It reads at p.442: "In summary we are told that the criminal law's notion of just condemnation and punishment is a cruel hypocrisy visited by a smug society on the psychology and economically crippled; that its premise of a morally autonomous will with at least some measure of choice whether to comply with the value expressed in a penal code is unscientific and outmoded; that its deterrent agent is misplaced, particularly in the case of the very members of society most likely to engage in criminal conduct; and that its failure to provide for individualized and humane rehabilitation of offenders is inhuman and wasteful."

[65] *Id* at p. 171.

The due process model locates at least some of the sanctions for breach of the operative rules in the criminal process itself. The relation between the rules and the sanctions for their breach, the two aspects of the process, is a purely formal one unless there is some mechanism for bringing them into play with each other. The hinge between them in the due process model is the availability of legal counsel. This has a double aspect. Many of the rules that the model requires are couched in terms of the availability of counsel to do various things at various stages of the process- this is the conventionally recognised aspect. Beyond it, there is a pervasive assumption that counsel is necessary in order to invoke sanctions for breach of any of the rules. The more freely available these sanctions are, the more important is the role of counsel in seeing to it that the sanctions are appropriately invoked. If the process is seen as a series of occasions for checking its own operation, the role of counsel is a much more nearly central one than is the case in a process that is seen as primarily concerned with expeditious determination of factual guilt. And if equality of operation is a governing norm, the availability of counsel to some is seen as requiring it for all. Of all the controverted aspects of the criminal process, the right to counsel, including the role of government in its provision, is the most dependent on what one's model of the process looks like, and the least susceptible of resolution unless one has confronted the antinomies of the two models.[66]

The reason for the centrality is to be found in the assumption underlying both models that the process is an adversary one in which the initiative in invoking relevant rules rests primarily on the parties concerned, the state, and the accused. One

[66] *Id*, at p.171.

could construct models that placed central responsibility on adjudicative agents such as committing magistrates and trial judges.[67]

Because the crime control model is basically an affirmative model, emphasising at every turn the existence and exercise of official power, its validating authority is ultimately legislative (although proximately administrative). Because the due process model is basically a negative model, asserting limits on the nature of official power and on the modes of its exercise, its validating authority is judicial and requires an appeal to supra-legislative law, to the law of the Constitution. To the extent that tensions between the two models are resolved by deference to the due process model, the authoritative force at work is the judicial power, working in the distinctively judicial mode of invoking the sanction of nullity. That is at once the strength and the weakness of the due process model.[68]

3.7. Models in operation

The operation of two models at various stages of the criminal process is to be observed for the purposes of description and analysis. The period from arrest through the decision to charge the suspect with a crime, the period from the decision to charge through the determination of guilt and the stage of review and correction of errors that have occurred during the earlier periods are the three major stages or periods in the criminal process.

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[67] *Id*, at p.172.

[68] *Id*, at p.173; Packer pointing out the American legal order concludes that it is strength because there the appeal to the Constitution provides the last and the last and the overriding word and it is weakness because saying no in specific cases is an exercise in futility unless there is a general willingness on the part of the officials who operate the process to apply negative prescriptions across the board. The statements reinforcing the due process model come from the court, while at the same time facts denying it are established by the police and prosecutors.

3.8. Arrest for investigation

The act of taking a person into physical custody is arrest. It is normally the first stage of criminal process. It directly affects the suspect. On what basis are the police entitled to make an arrest and what consequences, if any, will flow from their making an illegal arrest, are two crucial issues arise at this stage of process. These are issues that divide the two models.

Crime control

The police should be entitled to arrest a person when they have reasonable suspicion to think that he has committed a particular criminal offence which is serious in character. It cannot be insisted that an arrest is permissible only in that situation. Many a time it is necessary for police to arrest certain known offenders at any time for the limited purpose of determining whether they have been engaging in antisocial activities especially when it is known that a crime of the sort they have committed has taken place and that it was physically possible for them to have committed it. In a wide variety of situations such as the one mentioned above justifying an arrest on the basis of 'probable suspicion' would be the exercise of hypocrisy.[69]

The power of the police to arrest people for the purpose of investigation and prevention is one that must exist if the police are to do their job properly. The only question is whether arrest for investigation and prevention should be made hypocritically and deviously, or openly and avowedly. It only causes disrespect for law when there are great deviations between what the law on the books authorises the police to do and what everyone knows they have to do.

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[69] *Id*, pp.176-7.

The police have no reason to abuse this power by arresting and holding law-abiding people. The innocent have nothing to fear. It is enough of a check on police discretion to let the dictates of police efficiency determine under what circumstances and for how long a person may be stopped and held for investigation. but if laws limiting police discretion to make an arrest are thought necessary they either should provide very liberal outer limits so as to accommodate all possible cases or, preferably, should acquire nothing more explicit than behaviour that is reasonable under all the circumstances.

The police should be given powers to arrest citizens irrespective of whether they are reasonably suspected of committing a particular crime. The standard should be no more than that a police officer honestly thinks that an arrest will serve the goal of crime control. Alternatively, the substantive laws must be so broadly defined that the police can easily overcome the reasonable suspicion hurdle so as to achieve the goal by means of frequent arrests. Thus it is preferable to have a combination of vague laws and lax standards for governing 'arrest'. In order to check unlawful arrest the sanction of discipline by superiors shall be applied against the erring police officer.[70] The person who is unlawfully arrested shall be permitted to resort to civil remedies against the erring police officer.[71] On the other hand the crime control model never permits exclusion of evidence obtained as a result of unlawful arrest. Nor does it permit dismissal of prosecution for that reason.[72] That kind of sanction for police misconduct simply gives the

[70] *Id*, at p.178; Packer proposes that the most appropriate sanction is discipline of the offending policemen by those best qualified to judge whether his conduct has lived up to professional standards- his superiors in the police department. Discipline by his superiors may make him a better policeman; in cases where that seems improbable, he should be dismissed from the force.

[71] *Ibid*; Packer acknowledges that such civil remedies are less likely to serve the end of educating the erring police officer.

[72] *Ibid*; The one kind of sanction that should be completely inadmissible is the kind that takes place in the criminal process itself: dismissal of prosecution or suppression of evidence..

criminal a windfall without affecting the conduct of the erring police.[73] The type of sanction adopted by the crime control model does not impair police efficiency.

Due process

It is a basic right of free men not to be subject to physical restraint except for good cause. No one shall be arrested except upon a determination that a crime has probably been committed and that he is the person who probably committed it. Normally such a determination should be made independently by a magistrate in deciding whether to issue a warrant, but in situations of necessity it may be made by a police officer acting on a probative data that is subject to subsequent judicial scrutiny. Any less stringent standard opens the door to the probability of grave abuse. A society that covertly tolerates indiscriminate arrest is hypocritical, while one that approves its legality is well on the way to becoming totalitarian in nature.[74]

It is far from being demonstrated that broad powers of arrest for investigation are necessary to the efficient operation of the police. If such arrests are actually tolerated on a wide scale it makes no sense to assert that legalising them is necessary to keep efficiency from being impaired. A totally efficient system of crime control would be totally repressive one, since it would require a total suspension of rights of privacy. The due process model desires a regime that fosters personal privacy and champions the dignity and inviolability of the individual. It is inevitable to pay a price for attaining such a regime. That price involves some sacrifice of police efficiency. Efficient law enforcement will be so heavily impaired by failure to adopt the proposed measure that the minimal conditions of public order necessary to provide the

[73] *Ibid*; Here Packer quotes much known line of Cardozo: "the criminal is to go free because the constable has blundered." – in *People* v. *Defore*, 242 N.Y. 13, 21(1926).
[74] *Id*, p.179.

environment in which individuals can be allowed to enjoy the fruits of personal freedom will in themselves cease to exist or be gravely impaired.[75]

The practical consequence of enlarging police authority to detain individuals for questioning is not likely to be that all classes of the population there upon be subjected to interference. If that were the consequence the practice would carry its own limiting features because the popular outcry would be so great that these measures could not long be resorted to. The danger is rather that they will be applied in a discriminatory fashion to precisely those elements in the population- the poor, the ignorant, the illiterate, the unpopular- who are least able to draw attention to their plight and to whose sufferings the vast majority of the population are least responsive. Respect for law would plunge to lower degree if what the police are now thought to do *sub rosa* became an officially sanctioned practice.[76]

The need, then, is not to legalise practices that are presently illegal but widespread. Rather, it is to reaffirm their illegality and at the same time to take steps to reduce their incidents. Then there is the question of sanctions for illegal arrest. To the extent possible these sanctions should be located within the criminal process itself, because it is the efficiency of that process that they seek so mistakenly to promote the process should penalise and thus label as insufficient, arrest that are based on any standard less rigorous than probable cause. As a minimal requirement any evidence that is obtained directly or indirectly on the basis of an illegal arrest should be suppressed. Beyond that, any criminal prosecution commenced on the basis of an illegal arrest should be dismissed, preferably with prejudice, but at the least with the consequence that the entire process if it is to be re-invoked must be started over again from scratch

[75] *Id*, at pp.179-180.
[76] *Id*, p.180.

and all records, working papers and the like prepared in the course of the first illegal proceeding impounded and destroyed.[77]

Most illegal arrests do not result in criminal prosecution and are therefore not amenable to sanctions imposed in the criminal process itself. A variety of devices should be marshaled to provide effective sanctions against arrests for investigation. The ordinary tort action against the policeman has very limited usefulness. It should be supplemented by provision for a statutory action against governmental unit employing the offending policeman with a high enough minimum recovery to make suit worthwhile.[78]

3.9. Access to counsel

The period from the time that a suspect is arrested until he is brought before a magistrate is likely to be the crucial phase in the investigation of a crime. This phase is investigative, not judicial. There is nothing going on at this point that requires or can tolerate the intervention of a lawyer. It is absolutely necessary for the police to question the suspect at this point without undue interference. This is their only chance to enlist the cooperation of the one person most likely to know the truth. Because the police do not arrest without probable cause, there is a high degree of probability that useful information can be learned from the suspect. If he is given an opportunity to consult a lawyer at this stage of the proceeding, he will invariably be told to say nothing. The most expeditious way of clearing a case will then be foreclosed, and the police will have to take the more laborious route of developing evidence unaided by leads redound to the disadvantage of the innocent suspect, because he will be deterred from making statements that would otherwise lead to his early release. The only person benefiting

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[77] *Ibid.*

[78] *Id*, p.181; Since an important public service is performed by attorneys who bring suits against errant police officers there should also be provision for allowing attorney's fees in cases where action is successful. Direct disciplinary measures against the offending police officer are also desirable.

from this procedure will be the guilty suspect, who is accordingly enabled to make it difficult, if not impossible, for a conviction to be obtained. As a result, the protection that the community enjoys against criminal activity will decline. A lawyer's place is in court. He should not enter a criminal case until it is in court.[79]

Due process model

A hardened and sophisticated criminal knows enough to keep silent in the face of police interrogation. He knows that he does not have to talk and that he is not likely to realise any advantage by talking. An inexperienced person in the toils of the law knows none of this. Unless the operative rules forbid it, the situations of these two categories of suspects are bound to be unequal.[80]

Likewise, there is no moment in the criminal process when the disparity in resources between the state and the accused is greater than the moment of arrest. There is every opportunity for overreaching and abuse on the part of the police. There is no limit to the extent to which these opportunities are taken advantage of except in the poilce's own sense of self-restraint. Later correctives palliate but not suffice. It is not hard to predict whose word will be taken if a contradiction arises in the police station.[81]

The only way to ensure that these two equally obnoxious forms of inequality do not have a decisively malign impact on the criminal process is to require at the time of arrest- (1) that the suspect be immediately apprised of his right to remain silent and to have a lawyer; (2) that he promptly be given access to a lawyer, either his own or one

[79] *Id*, at pp.202-3.
[80] *Id*, at p.203.
[81] *Ibid.*

appointed for him; or (3) that failing the presence of a lawyer to protect the suspect's interest, he not be subjected to police interrogation.[82]

3.10. Detention and interrogation after arrest

After every lawful arrest for investigation the detention of the arrested person and the interrogation of him during detention constitute an important stage of the criminal process. Both models adopt different mode of procedure at this stage.

Crime control

The police cannot be expected to solve crimes by independent investigation alone. The best source of information is usually the suspect himself. Without the cooperation of suspects, many crimes could not be solved at all. The police must have a reasonable opportunity to interrogate the suspect in private before he has a chance to fabricate a story or to decide that he will not cooperate. The psychologically optimal time for getting this kind of cooperation from the suspect is immediately after his arrest, before he has had a chance to rally his forces. Any kind of outside interference is likely to diminish the prospect that the suspect will cooperate in the interrogation. Therefore he should not be entitled to interact with his family, friends or lawyer. The first thing a lawyer will advise him is to say nothing to the police. Once he gets that kind of reinforcement, the chances of getting any useful information out him sink to zero.[83]

The police should not be entitled to hold the suspect for interrogation indefinitely, nor would they want to do so. But no hard and fast rule can be permitted to interrogate the suspect before bringing him before a magistrate. The gravity of the

[82] *Ibid.*
[83] *Id*, at pp.187-8.

crime, its complexity, the amount of criminal sophistication that the suspect appears to have- all these are relevant factors in determining how long he should be held. The standard ought to be length of time, given all the circumstances, during which it is reasonable to suppose that legitimate techniques of interrogation may be expected to produce useful information or that extrinsic investigation may be expected to produce convincing proof either of the suspect's innocence or of his guilt.[84]

The family of suspect is entitled to know where he is, but they should not be entitled to talk with him, because that may impair the effectiveness of the interrogation.

The principle is that hard and fast rules cannot be laid down if police efficiency is not to be impaired. Thus the rules must be flexible and that good faith mistakes about their applicability in any given case should not be penalized. If the police err by holding a suspect too long, he has no complaint, because they would not be holding him unless they had some good basis for their belief that he had committed a crime.[85]

Any trustworthy statement obtained from a suspect during a period of police interrogation should of course be admissible into evidence against him. Criminal investigation is search for truth, and anything that aids the search should be encouraged. There is, of course, a danger that occasionally police will not live up to professional standards and will use coercive measures to elicit a confession from a suspect. That is not to be condoned, nonetheless the confession obtained by coercion is not at all suppressed or excluded. Rather the evil of the coerced confession is that it may result in the conviction of an innocent man. Again there is no way of laying down hard and fast

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[84] *Ibid.*

[85] *Id*, at pp.188-9. The public has a complaint to the extent that police resources are thereby shown to have been used inefficiently, but the redress for that is intradepartmental discipline in flagrant cases and a general program of administrative management that keeps such occasions to a minimum.

rules about what kinds of police conduct are coercive. It is a factual question in each case whether the accused's confession is unreliable. An accused against whom a confession introduced into evidence should have to convince the adjudicating authority that the circumstances under which it was elicited were so coercive that more probably than not the confession was untrue. In reaching a determination on that issue, the trier of fact should of course be entitled consider the other evidence in the case, and if it points toward guilt and tends to corroborate the confession, should be entitled to take that into account in determining whether, more likely than not, the confession was untrue.[86]

The sanctions available for mistreating a person in custody are simple, if vigorously pursued, to ensure that this kind of conduct will be rare. It is by raising professional standards through internal administrative methods rather than altering the outcome of randomly selected criminal prosecutions that improper police conduct is being eliminated. The use of force is not in itself determinative of the reliability of a confession and should therefore not be conclusive against the admissibility of a confession.[87] The practices less likely than the use of force to be coercive, such as an overlong period of detention unaccompanied by physical abuse, should not count conclusively against the admissibility of a confession.[88]

Due process

In this model the decision to arrest in order to be valid must be based on probable cause to believe that the suspect has committed a crime.[89] Once a suspect has

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[86] *Ibid.*
[87] *Ibid.*
[88] *Id*, at p.190.
[89] *Ibid*; Packer puts it another way, the police should not arrest unless information in their hands at that time seems likely, subject to the vicissitudes of the litigation process, to provide a case that will result in a conviction. It follows that if proper arrest standards have been employed, there is no necessity to get additional evidence out of the mouth of the defendant he is to be arrested so that he may b held to answer the case against him, not so that a case against him that does not exist at the time of his arrest can be developed.

been arrested, he should be brought before a magistrate without unnecessary delay, which is to say as soon as it is physically possible to do so, once the preliminary formalities of recording his arrest have been completed. An arrested person has the right to test the legality of his arrest in a judicial proceeding. The right is practically diluted through delay unless the accused is promptly brought before a magistrate. Since a suspect is entitled to be at liberty pending the judicial determination of his guilt or innocence, there must be as promptly as possible after arrest a proceeding in which the conditions of his release- for example release on bail- are determined. This right too is diluted by delay unless the suspect is promptly brought before a magistrate.

The suspect is entitled to the assistance of counsel most acutely as soon as he is arrested. As a practical matter, he is unlikely to receive that right unless he is promptly advised of it. Once again, his prompt production before an impartial judicial officer is necessary if his right is not to be diluted by delay.[90]

As soon as a suspect is arrested the police are bound to tell him that he is under no obligation to answer questions, that he will suffer no detriment by refusing to answer questions, that he may answer questions in his own interest to clear himself of suspicion (but that anything he says may be used in evidence), and, above all, that he is entitled to see a lawyer if he wants to do so.[91]

If the suspect does not make self-incriminating statements while under arrest and before he is brought before a magistrate their admissibility into evidence against him should be barred under any of the following conditions: (1) if the police failed to warn him of his rights, including his right to the assistance of a lawyer; (2) if he was questioned after the required warnings were given, unless he expressly waived his rights to be silent and to

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[90] *Ibid.*
[91] *Id,* at p. 191.

see a lawyer; (3) if the confession was made during a period of detention that exceed what was necessary to get him promptly before a magistrate; or (4) if the confession was made by other coercive means, such as the use of force. Any confession made under these circumstances should be regarded as "involuntary"- and should be excluded at the trial in order to deprive the police of any incentive to obtain such a confession.[92]

The rationale of exclusion is not that the confession is untrustworthy, but that it is at odds with the postulates of an accusatory system of criminal justice in which it is up to the state to make its case against an accused without forcing him cooperate in the process, and without capitalizing on his ignorance of his legal rights. It follows, then, that the existence of other evidence of guilt has no bearing on the admissibility of the confession or on the necessity for reversing a conviction based in part on such a confession. It also follows that the procedure for determining the admissibility of a confession must be such as to avoid any possibility of prejudice to the defendant through the process of determining admissibility.[93]

3.11. Electronic surveillance

Crime control

The war on organised crime demands the use of electronic surveillance. High-ranking members of organised crime syndicates are insulated by layers of structure from direct participation in the crimes committed by their underlings. If they are to be implicated, it must be by showing that they have directed a conspiracy. Since their role may not even be known to the immediate participants in any given illegal transaction of

[92] *Ibid.*

[93] *Ibid.* Packer points out that in a jury trial the issue of the admissibility of a confession should be litigated on a record made before the judge and out of the hearing of the jury, so that the trial judge has the clear and undivided responsibility for deciding whether the jury should hear the confession and so that a reviewing court can have an unambiguous basis for deciding whether the trial judge reached the proper conclusion.

gambling or narcotics, the only way in evidence can be secured against them is by listening in on their telephone conversations and otherwise monitoring their discussions. Almost without exception, the conviction of top underworld figures has depended on the use of evidence or evidential leads obtained through electronic surveillance.[94]

It is undeniable that abuses may occur, but the danger is greatly outweighed by the necessity for using these devices. Judicial control of the use of surveillance device will probably not do much to protect against excess of enforcement zeal because it is impossible for the judge to whom application is made for an authorising order to do more than generally satisfy himself that the police have reasonable grounds for wishing to use the devices to overhear conversations on a particular telephone line or in a particular place. Judges cannot exercise continuous and detailed supervisions over the monitoring. And the nature of the business is such that there is going to be a high ratio of chaff to wheat. However, we do not object in principle to having to obtain a court order, so long as judges do not require an impossible degree of specific about what we were looking for, we wouldn't have to look.[95]

There should be no limitations on the kinds of criminal activity police are allowed to investigate using surveillance devices. Sometimes an important underworld figure can be tripped up on the basis of a relatively minor criminal charge by the same token, we should be free to use what turns up whether it is what we were looking for or not. Law-abiding citizens have nothing to fear. If conversations that we overhear produce no leads to evidence of criminal activity, we are not interested in them. Law

[94] *Id,* at pp. 195-6.
[95] *Ibid.*

enforcement has neither the time nor the inclination to build up files of information about activity that is not criminal.

Due process

The right of privacy cannot be forced to give way to the asserted exigencies of law enforcement. The use of electronic surveillance constitutes just the kind of indiscriminate general search that the law guards against. In the name of necessity this grant of power would permit an unscrupulous policeman or prosecutor to pray into the private lives of people almost at will. Knowledge that this was so would certainly inhibit the free expression of thoughts and feelings that makes life our society worth living. Electronic surveillance by anyone under any circumstances should be outlawed.[96]

This is the optimal position. If it cannot be established, certainly it is essential that police authority for electronic surveillance be strictly limited to a small class of very serious cases. The fight against organised crime is far too vague and sweeping a rubric to provide adequate protection. And the offences allegedly committed by organised criminals are committed by many others as well. The most that should be authorised is the use of electronic surveillance in case of espionage, treason, or other crimes directly affecting national security. And even in such cases as these, there should be judicial control comparable to what would be exercised in deciding whether to issue a search warrant.[97]

3.12. Illegally searched evidence

In every criminal process there are bound to the rules that delineate the circumstances under which the police may invade the privacy of the home in their

[96] *Id*, at p.197.
[97] *Ibid.*

search for evidence that will aid in convicting persons accused of crime. The competing models are appropriate to redress the person whose privacy has been unlawfully invaded and to deter similar unlawful invasions in the future.

Crime control

The police are bound to mistakes, and it is of course desirable that these mistakes be minimised. Here, as elsewhere, the way to deal with mistakes is to afford a remedy by people whose privacy has been improperly invaded and to correct, by discipline and education, the future conduct of the officers who make the mistakes. It is unwise and unnecessary to provide the allegedly injured party with a windfall in the form of freedom from criminal conviction when his guilt is demonstrable.[98]

There is no need for any special aid to private legal actions initiated for redress of illegal searches. The ordinary tort action that is available to law-abiding people when their interests have been invaded ought to be good enough for the criminal. The 'victim' should be entitled only to monetary compensation against the erring police in addition to moving the superiors to inflict discipline and education on such errands.[99] In any event, there is no reason why evidence should not be used in the criminal process without regard to the manner in which it has been obtained. Here, unlike the problem of

[98] *Id*, at p.199.

[99] *Ibid*; Let him hire a lawyer, sue the police, and persuade a jury if he can, that he has been actually damaged in a way that entitles him to monetary compensation. The discipline and education of the police is a matter, like any other problem of maintaining morale and standards in this large bureaucratic organisation, for the police department itself. The "victim" is entitled to have his complaint considered; but he has no further interest, once the facts have been drawn to the attention of the proper departmental authorities.

the confession, there is no question of trustworthiness or reliability. Physical evidence is physical evidence, regardless of how it is obtained.[100]

Due process

The ordinary remedies for trespass upon one's property are totally deficient as a means for securing police compliance with rules regarding illegal searches and seizures. The victim usually is in no position to sue; even if he is, juries are notoriously unlikely to provide a remedy; and even if they do, police officers are often judgment-proof. Likewise, departmental discipline is an ineffective deterrent. The police are expected to get evidence upon which convictions may be obtained; if they do so it is unlikely that their superiors will regard their illegal conduct as inefficient. The problem is that legality may mean inefficiency from the police stand point, and efficiency is a value they tend to place above adherence to the finer points of constitutional law.

The only practical way to control illegal searches is to take the profit out of them. This means that any evidence illegally obtained cannot be permitted as evidence. It should be suppressed before or during trial; if it is not convictions obtained in whole or in part on its basis should be reversed. Beyond that any evidence obtained by leads provided by the result of an illegal search should also be banned so that there may be no easy evasion of the mandate. In doubtful cases, where it is unclear whether there is a connection or how strong it is, the standard should be one that resolves doubts most strongly against the preferred evidence whenever its discovery has been preceded by illegal searches. Whenever an illegal search for evidence is shown to have taken place

[100] *Ibid*; Packer cites an example: If one suspected of illegally possessing heroine is found to have heroine on the kitchen shelf, this supply of narcotics is reliable evidence of his guilt, whether the search that turned it up is later found by some judge to be legal or illegal.

the model requires not only the exclusion of evidence obtained by illegality but also dismissal of the prosecution.[101]

3.13. The decision to charge

Crime control

The prosecutor is in the best possible position to evaluate the evidence collected by the police and to decide whether it warrants holding the suspect for a determination. The prosecutor must in any event do so in every case. It would be a waste of time and resources to require that the job be done over again by a magistrate. The prosecutor has no interest in pressing cases that are unlikely to result in conviction. His professional reputation is generally based on the proportion of convictions that he obtains in cases in which a charge has been lodged against a suspect. Therefore, the interest of the suspect in not being prosecuted on a completely groundless charge is amply protected by confiding the screening decision at the stage of the process entirely to the prosecutor's discretion. Any system that required a preliminary judicial examination in all criminal cases would collapse of its own weight. There are simply not enough trained magistrates to go around. The most that should be expected of the preliminary hearing is the appointment of counsel and the setting of bail.[102]

There may be occasions when the prosecutor needs some support in the decision to charge suspect. He may need to rally community sentiment in a case that has aroused widespread interest or in one where the suspect is a public official or otherwise prominent. Conversely, he may want to take a sounding of general opinion to see whether it will back such a prosecution. In this kind of situation a grand jury proves useful, providing as it does a kind of miniature public opinion poll for the prosecutor. If

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[101] *Id*, p.200.
[102] *Id*, at p.206.

the grand jury disapproves, the prosecutor need pass the case no further and can turn aside any criticism by pointing to the action of the grand jury. If, on the other hand, the grand jury approves, as it ordinarily will when the prosecutor voices a desire to press charges, any charge made is reinforced by the authority and prestige of the grand jury. Of course, the usefulness of the grand jury procedure depends on its secrecy. It is not an adversary proceeding, and the suspect is not entitled to be present, or to have the aid of counsel if he does testify, or to know what has gone on before the grand jury. If these conditions of secrecy are breached, the grand jury device simply provides another occasion for delaying or defeating the machinery of criminal justice.[103] The prosecutor should control the decision to charge. He should be entitled to institute charges either by filing an information or by persuading the grand jury to return an indictment. In either case, he should not have to wait for a judicial officer to rule that the evidence is sufficient to support the institution of criminal charges against the suspect. The decision to convert a "suspect" into a "defendant" should be entirely up to the prosecutor.[104]

Due process

It would be ridiculous to expect every arrest to produce a case sufficiently strong to warrant criminal prosecution. Some screening must take place. The appropriate forum for that screening process is not released before that stage is reached. The prosecutor cannot be trusted to do this screening job any more than the police can. Discretion at this stage of the process means substantial abandonment of an adversary system.[105] Beyond this, any standard for deciding when the evidence at hand is

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[103] *Id*, at p.207.

[104] *Ibid*

[105] *Ibid*; Packer clarifies: why should expect the prosecutor, with nobody looking over his shoulder, to decide that here is insufficient evidence to hold the suspect for criminal charges? Why, in particular, should we do so in the large number of cases in which the evidence in the hands of the police is inadmissible but may lead to the discovery of other, possibly admissible evidence if the process is not terminated?

sufficient to support a charge is bound to be too broad to be applied in a nondiscriminatory way unless it is applied impartially and openly, two adverbs that do not describe the operations of a public prosecutor.[106]

If the criminal process afforded a speedy and non-coercive mechanism for guilt determination without pre-trial detention, there might be something more to be said for dispensing with the requirement of a preliminary hearing. As it is, such a screening operation by an adequate opportunity to challenge the processes being invoked against them.

The preliminary hearing should be held in public or in private at the option of the suspect. He should be entitled to be present and to have the assistance of counsel. The prosecution should be required to present enough testimony, of a kind and in a form admissible at the trial on the merits, to support a judgment that there is probable cause to charge the suspect with a specific crime or crimes. It is apparent that the traditional grand jury proceeding does not conform to these requirements.

It is obvious that the effective implementation of these standards for "judicializing" the preliminary examination requires that counsel be available to the suspect at this stage of the proceeding. Indeed, if counsel is to be effective at this stage, he should probably enter the case at an earlier stage, as soon after arrest as possible, so that he may familiarize himself with the case before rather than during the hearing. It is equally obvious that the accused must be made to understand the function of the preliminary examination and the assistance of counsel in connection with it. Without that understanding, no waiver of the right to preliminary examination should be allowed

[106] *Id*, at p.208.

to stand. Indeed, it is doubtful that any waiver of preliminary examination should be allowed unless the suspect has had the assistance of counsel. The only effective sanction for ensuring that these procedures are followed in the sanction of nullity: a conviction obtained without adequate preliminary examination should not be allowed to stand.

3.14. Pre-trial detention

Crime control

The vast majority of persons charged with crime are factually guilty. An arrest that results in a formal charge has behind it a double assurance of reliability: the judgment of the police officer who made the arrest is backed up by that of the prosecutor, who has decided that there is enough evidence to hold the defendant for trial. For all practical purposes, the defendant is a criminal. Just because the assembly line cannot move fast enough for him to be immediately disposed of is no reason for him to go free. If he does go free there is a risk that he will not appear for trial, a risk that is heightened when he is well aware that he is guilty and has a lively expectation of probable punishment. If he does not appear voluntarily, the limited resources of the system will have to be devoted to tracking him down and bringing him in. that may be tolerable when it occurs sporadically and on small scale. On the other hand if large numbers of people are turned loose before trial, the chances are that the problem will get out of hand we will be faced with a vicious circle. The more people fail to appear, the more people will be encouraged not to appear, and the whole system will collapse.[107]

Another risk is that the known criminals will commit further crimes while at large awaiting trial is in itself an adequate reason for not making pre-trial liberty the

[107] *Id*, at p.212.

norm. The more hardened the criminal, the greater the likelihood that this will happen.[108] The danger to property and human life that results from letting known offenders go free even temporarily is inexcusable because it is so easily avoidable.[109]

Even for first offenders and others who do not seem very likely to repeat their crimes while awaiting trial, there are good reasons why pre-trial liberty should not be available as a matter of right. Courts are inclined to be lenient with first and other minor offenders. Prosecutions of these offenders are likely to be dismissed in a large proportion of cases because it is not worthwhile to use the limited available resources to prosecute them. If their cases are not dismissed, the offenders may nonetheless be put on probation or fined or given suspended sentences- all dispositions that fall short of having any significant effect on their future conduct. For many such persons, a short period spent in jail awaiting trial is not only a useful remainder that crime does not pay but also the only such reminder they are likely to get.

Other considerations apart, it is likely that a significantly higher percentage of defendants who now plead guilty would elect to stand trial if they could be at liberty pending trial. People who know that they are guilty would just as soon get it over with and take what is coming to them if, in order to gamble on the off chance of an acquittal, they have to spend weeks or months in jail awaiting trial. But if they are released pending trial, the incentive to plead guilty is greatly reduced. The inevitable delays of the process, as well as those that are not so inevitable but can be brought about by carelessness or bad faith would then work in favour of the defendant rather than, as is the situation when he is in custody against him. It is unlikely that there would be a significant rise in the percentage of defendants eventually found not guilty because we are considering here

[108] *Ibid*; Thus, burglars will commit more burglaries; narcotics peddlers will sell more narcotics; gunman will stage more robberies.
[109] *Ibid.*

only those people who are probably guilty. Due to delay the chances for disappearance of witnesses at the time of trial, and getting off the guilty accused through human error (mistakes by judges, jurors or prosecutors are very high. The main danger is that increase in time required to litigate cases that don't really need not to be litigated would put an intolerable strain on what is already an overburdened process. This consideration alone argues against a policy that makes pretrial liberty the norm.[110]

However the model acknowledges the bail system under which there is a nominal right to pretrial liberty. Still there is no such right because of the discretion granted the committing magistrate who can set bail in an amount that the defendant is u likely to be able to afford. Such an attitude is tantamount to the discretionary system required by the crime control model.

It is true that there are injustices in the bail system that are not required by the demands of the crime control model. There may be many instances in which police efficiency would be promoted by not chittering up station houses and detention centers with minute use of summons instead of arrest or release after arrest without the posting of bail may be desirable. However the pretrial detention is to be mitigated for some people, it ought to be done explicitly for the purpose of promoting the efficiency of criminal process rather than for the purpose of adhering to some abstract notion of a "right" to pretrial liberty. In cases of serious crime the confinement of the accused for adjudication of guilt definitely serves the ends of the process and should be regarded as the norm.

Due process

A person accused of crime is not a criminal. The sharpest distinction must be observed between the status of an accused and that of a person who has been duly convicted

[110] *Id*, at p.213.

of committing a crime. Perhaps, the most important, and certainly the most obvious, operational distinction between the two lies in the issue of physical restraint. Pending the formal adjudication of guilt by the only authority with the institutional competence to decree it- a court- the status of the convicted in this most important of respects.[111]

An accused who is confined pending trial is greatly impeded in the preparation of his defense. He needs to be able to confer on a free and unrestricted basis with his attorney, something that is notoriously hard to do in custody. He may be most likely person to interview and track down witnesses in his own behalf- something he cannot do if he is in jail. His earning capacity is cut off. He may lose his job. His family may suffer acute economic hardship. All these things may happen before he is found guilty. Furthermore, the economic and other deprivations sustained as a result of pre-trial confinement measures that inhibit the accused person's will to resist. He is rendered more likely to plead guilty and, as a result to waive the various safeguards against unjust conviction that the system provides. When this happens on a large scale, the adversary system as a whole suffers because its vitality depends on effective challenge.[112]

A person accused of crime is entitled to remain free until judged guilty so long as his freedom does not threaten to subvert the orderly process of criminal justice. His freedom could have this effect only if he deliberately omitted to appear at the time and place appointed for trial. If persons accused of crime could with impunity fail to appear, the premise of cooperation on which a system of pretrial liberty depends could

[111] *Id*, at p.214.
[112] *Id*, at pp.214-5.

not in practice be realised. Hence, it is important that the right to pre-trial liberty be exercised in a way that does not jeopardise the process as a whole.[113]

The right to pre-trial liberty has been firmly established by the institution by bail. It has been thought that the requirement of a financial deterrent to flight will adequately protect the viability of the system while ensuring that the defendant can enjoy liberty before his trial. The requirement that the accused be released pending trial on the basis of bail or whatever other device or combination of devices will ensure his presence at the trial without denying him freedom on grounds that have nothing to do with the assurance of his presence. Bail is simply one way- and not the only one- of assuring a defendant's presence at his trial. If the institution of bail does not adequately promote the desired combination of goals, then the alternatives thereto are to be resorted to. The alternatives might include such deterrents to flight as criminal penalties for nonappearance, the use of summons rather than arrest (with its attendant physical custody) to initiate criminal prosecution, release of arrested accused on their own recognizance or in the custody of some responsible person, and use of cash bail instead of bail bonds.

Where bail is used, it must be set according to the circumstances of the individual case rather than on a mechanical basis. Thus, the nature offence is only one of several elements to be taken into account in making the bail decision. Setting bail mechanically on the basis of a schedule for certain offences may in itself be an effective denial of the defendant's right. Essentially, a hearing for the setting of bail must be a fact-finding process in which the financial resources of the accused, his roots in the community, the nature and circumstances of the offence charged, and other relevant factors are all taken into account in arriving at the minimum level of bail required to

[113] *Ibid.*

assure a reasonable probability of the particular defendant's appearance for trial. It is completely unacceptable to set bail at a figure that the accused is thought to be unable to meet. Speedy appellate review must be available to correct errors of this sort, still another reason why the bail decision must initially be made on the basis of a record that others can subsequently appraise. To the extent that adequate investigative and other fact-finding resources are not brought to bear, the defendant should be entitled to go free on nominal bail or no bail. The period of custody should in no event exceed the minimum required after arrest to ascertain the relevant facts about the suspect's situation. Normally this should be done by the time the committing magistrate has made the decision to hold the arrested person for subsequent proceedings.[114]

For indigent accused any bail is excessive. There is substantial percentage of persons who do not succeed in making bail and are therefore held in custody pending trial. It may be that the decision not to seek bail in many of these cases is a voluntary one: a man who knows that he is factually guilty may simply decide that it isn't worth his while to spend money on a bail bond premium. However, many people who are eventually adjudged guilty do post bond and are released pending trial. Their awareness that they are guilty may be just as the poor man's, but they avail themselves of their right to be free pending adjudication of guilt. It is unfair to deny the poor the same right simply because for them the marginal utility of the bail money is higher than it is for the rich. At any rate, it is clear that if all persons in custody were informed of their right to be free on some basis other than the payment of bail premiums, may of those who now spend days or weeks or even months in custody awaiting trial would avail themselves of

[114] *Id*, at p.216.

these other means. And, if that is so, it seems to follow that system that makes pre-trial freedom conditional on financial ability is discriminatory.[115]

It is antithetical to our conceptions of justice to permit pre-trial detention to be used as a means of informal punishment in advance of (or instead of) a formal determination of guilt and sentence. And to speak of the possibility that the accused may commit further crimes if left at large is to beg the question; for it has not yet been determined that he has committed any crime at all. Many of the limitations on substantive criminal enactments safeguard us against being punished for a mere propensity to commit crime. The logic of preventive detention would extend to persons newly released from prison; why not re-arrest them and lock them up because they may commit another crime?[116]

The problem of what to do with dangerous people who have not been convicted of committing crimes is a troublesome one. It far transcends the question of preventive detention of persons accused of crime. The solution, if there is one, must include setting up standards for determining who is dangerous and providing the minimal procedural due process safeguards of notice and a hearing for persons whom the state seeks to confine on this ground. Whatever, the solution, it cannot bypass these basic due process requirements by permitting the indiscriminate preventive detention of people who are accused of crime. The problem can in any event be minimised by shortening the interval between charge and trial.[117]

In some cases it is possible that the accused if left at large will threaten witnesses, destroy evidence, or otherwise impede the preparation of the case against him. This is said

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[115] *Ibid*; Packer cautions: Indeed, given the malfunctioning of the present system where the financially disadvantaged are concerned, it may well be that the bail system should be ruled out for rich and poor alike. One need not pursue the argument to that extreme, however, to recognise that a system that conditions pre-trial release exclusively or even predominantly on the provision of financial assurance of presence at trial is a seriously defective one.

[116] *Id*, at p.217.

[117] *Id*, at pp.218-9.

to be particularly likely in the case of men involved in organised crime.[118] The due process model deals with this problem by giving witnesses police protection, by placing the accused under an injunction backed up by the contempt power, by providing criminal penalties for tampering with witnesses, and the like. The vice of detaining a defendant before he actually does anything bad is obvious: it penalises him for a mere disposition, a totally unapprovable thing, and it thus opens the way for the most widespread abuses. At the first concrete sign that the accused has engaged in obstructive activities, it is altogether proper to seek to confine him on the basis of proof that obstructive activities have taken place. But there is a great difference between doing this on the basis of proof after fact and doing it on the basis of suspicion before the fact.

In summary, the pre-trial liberty should be the norm in due process model.[119]

3.15. Plea of guilty

The plea of guilty is one of the institutions of the criminal justice where a guilty plea rather than trial is the dominant mode of guilt-determination. A substantive number of criminal prosecutions terminate with the entry of a plea of guilty.

Crime control

The model prefers plea of guilty to dispose of as large a proportion of cases as possible without trial. Such a termination of prosecution is in the interest of all- the prosecutor, the judge, the defendant. There is a distinct social advantage to terminating criminal proceedings without trial whenever the defendant is willing to do so. The judge must ensure that the plea of guilty is entered on his own free will.

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[118] *Ibid*; Packer clarifies: The argument is a little hard to understand. The higher the degree of organisation involved, the less likely it would seem to be that the personal attention of the defendant would be required to promote obstructive tactics.

[119] *Id*, at p.220.

The judge need not inquire into the factual circumstances underlying the commission of the offence except to the extent that he thinks it will help him perform his sentencing function. It serves to bypass issues that can only result in a weakening of effective criminal justice.

Due process

The arraignment is the fulcrum of the entire criminal process. It is at this point that one of two things happens: either the possible errors and abuses at the earlier, largely unscrutinised stages of the process are exposed to judicial scrutiny or they are forever submerged in a plea of guilty. It is not only a device for expediting the handling of criminal cases; it is kind of Iron Curtain that cuts off, almost always irrevocably, any disinterested scrutiny of the earlier stages of the process. Guilty pleas should therefore be discouraged. However the model permits guilty plea to a limited extent. It must be accepted scrupulously. No kind of pressure either by the prosecutor or by the judge, should be brought to bear on a defendant to induce him to plead guilty.[120]

Appeal

Crime control

Once a determination of guilt has been made either by entry of a plea or by adjudication, the paramount objective of the criminal process should be to carry out the sentence of the court as speedily as possible. The model desires that people who violate the law will be swiftly and certainly subjected to punishment. Appeal will definitely undermine and cause delay to this objective. Thus appeals should be so effectively

[120] *Id*, at p.224.

discouraged that merely taking an appeal will itself be fairly reliable indicator that the case contains substantial possibility of error concerning the factual guilt.[121]

If appeal in criminal cases is available as a matter of right, restrictions must be imposed to ensure that the right is exercised responsibly. The model places very heavy emphasis on the plea of guilty as the central determining device.

No issue should be raisable on appeal that was not raised at an earlier stage of the process. No conviction should be reversed for insufficiency of evidence unless the appellate tribunal finds that no reasonable trier of fact could have convicted on the evidence presented. Appeals against a verdict of acquittal should be available to the prosecution to the same extent that appeals against a conviction are available to the defence. Errors not relating to the sufficiency of the evidence to establish factual guilt- errors in the admission or exclusion of evidence, in the trial judge- should not provide a basis for reversal of a conviction on appeal unless it is found that in the absence of the error or errors the result would probably have been different. Finally, no errors should suffice for reversal if the appellate court concludes on a review of all the evidence that the factual guilt of the accused was adequately established.[122]

Due process

In this model appeal has a much broader function.[123] It operates to correct errors in the assessment of factual guilt (at least when they have hurt the accused's case), but that is only the beginning of its function. It serves, more importantly, as the

[121] *Id*, at p.229.
[122] *Id*, at p.230.
[123] *Id*, at p.228.

forum in which infringements on the rights of the accused that have accumulated at the earlier stages of the process can be redressed and their repetition in subsequent cases deterred. The appellate forum has distance from and independence of the police-prosecutor nexus into which the trial court is so often drawn.[124]

The first forum in which abuses of official power should be corrected in the criminal process is the trial. However, they are not always corrected there, and indeed the trial process may itself be a fertile source of additional abuses. Then the accused can very well get it corrected at the appellate stage. The right of appeal is an important safeguard for the rights of the individual accused. Beyond this, it plays an essential role in the law making process. For the steady flow of criminal cases on the appellate level provides the raw material for the elaboration of those very rights. If the model is to retain its dynamic character, there must be full and unrestricted access to the appellate phase of the process.[125]

There should be no limitations on the convicted accused's right to appeal. Financial restrictions are as much out of place here as they are at other levels of the process. If the appellant cannot afford to pay a filing fee, it must be given to him; if he cannot afford to buy a transcript, it must be given to him; if he cannot afford to hire a lawyer, he must be given to him.[126]

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[124] *Id*, at pp.228-9.
[125] *Id*, at p.230.
[126] *Id*, at p.231; Packer points out: The last point is very important; whether reversible errors justifying an appeal have occurred is certainly a matter on which the convicted defendant need the help of a lawyer; there is no more technical aspect to the criminal process. No lawyer will advise an appeal where grounds for appeal are lacking, but only a lawyer can tell whether the grounds are there or not; for at this stage of the process it is legal errors rather than factual guilt that are primarily at issue.

3.16. France

French penal law recognises three classes of offences: felonies, misdemeanors and petty offences.[127] The gravity of an offence is measured by the severity of the punishment prescribed for it.[128]

The first step in the prosecution of an offender for most offences is an investigation conducted by an examining magistrate.[129] The examining magistrate is bound to conduct preparatory investigation in felony cases, while it is permissible in misdemeanor cases in the absence of special provisions.[130] The investigation conducted by the examining magistrate is a regular part of the judicial process. Its function is channeling cases to the trial court having jurisdiction of which accused can most reasonably be expected to be convicted.

There are two ways in which a case may be initiated.[131] If a complaint is filed accompanied by a claim for civil damages, the magistrate is empowered to proceed with his investigation.[132] If the complaint is unaccompanied with a claim for damages it must be forwarded to the local prosecutor. If the prosecutor decides to pursue the matter

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[127] Offences, felonies and misdemeanors are called *infractions, crimes* and *delits* respectively in the French Penal Code. Arts. 6,7,8 & 9. Petty offence is called *contravention de simple police.*

[128] A petty offence (*contravention*) is punishable by imprisonment for not more than two months and a fine of not more than two thousand new francs (*une peine de simple police*); a misdemeanor (*delit*) is an offence punishable by jailing or imprisonment for not more than five years and a fine of more than two thousand new francs (*une peine corretionnelle*); and a felony (*crime*) is an offence punishable by more severe penalties, such as death or imprisonment at hard labour (*une peine criminelle or une peine afflictive et infamante*

[129] Code of Criminal Procedure, Art.79; investigation is called '*information*'.

[130] *Ibid*; A different procedure is adopted for the prosecution of each class of offence so as to provide a measure of protection for the accused commensurate with the security of the penalty carried by each offence.

[131] *Id*, Arts.51, 80 & 86.

[132] *Id*, Arts.85 & 86; See Howard, 'Compensation in French Criminal Procedure', (1958)21 MLR 387-400.

he so notifies the examining magistrate.[133] It is upon initial application that the jurisdiction to investigate is based.[134]

Once the investigation is initiated, the examining magistrate is free to inquire into any offence related to that stated in the complaint or application and may proceed to investigate any person who may appeal to be involved.[135] The examining magistrate is empowered to undertake all acts of investigation that he deems useful to the manifestation of the truth. If the examining magistrate is himself incapable of undertaking all the acts of investigation he may give a commission rogatory to officers of the judicial police that they may execute all the acts of the investigation necessary under the conditions.[136] The examining magistrate prepares a report of those acts as well as all procedural movements. The report is called dossier.[137]

The persons who are ordered to appear and give evidence must do so, subject to a penalty for non-appearance, as for contempt.[138] The subject of the investigation is not put on his oath as are other witnesses,[139] and he may have the assistance of counsel if he chooses.[140] The witnesses other than the civil claimant are not entitled to the assistance of counsel at these hearings unless they are advised that they are being investigated. The

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[133] *Id*, Art.80; The prosecutor can make use of the institution of police investigation, for arriving at the decision as to whether to pursue the matter. Here police investigation means preliminary investigation by the judicial police designated in Article 20, according to the provisions of Articles 75-78. See also, Anton, '*L' instruction Criminelle*', (1960)9 Am. J. Comp. L, 441-457.

[134] *Id*, Art.80.

[135] *Id*, Art.81.

[136] *Ibid.*

[137] *Ibid.*

[138] *Id*, Art.109; It provides that every person cited to be heard as a witness is bound to appear, to take the oath and to make a statement subject to the provisions of Article 378 of the Penal Code. If the witness does not appear, the examining magistrate may on the request of the prosecuting attorney, have him picked up by the police and sentence him to a fine of from 400 to 1,000 new francs. If he appears later, he may, however, on protection of his excuses and justifications, be released from that punishment by the examining magistrate after the prosecuting attorney has been heard.

[139] *Id*, Arts.103 &104.

[140] *Id*, Art.117; The accused and the civil party may at any time in the investigation acquaint the examining magistrate with the name of counsel chose by them.

magistrate is required to warn them should that be the case.[141] The proceedings are not open to the public.[142] The proceedings are in writing or promptly reduced to writing[143] and are not adversary in form, except in a very limited sense.[144]

The investigation need not end in a formal charge against anyone. During his investigation the magistrate may find that the statute of limitations has run and that he has therefore no jurisdiction.[145] The magistrate may, in his order closing the investigation, find that there are not charges enough to justify prosecution, that the facts as shown do not constitute an offence, or that it is not appropriate to prosecute.[146]

Appeals may be preferred against orders of the examining magistrate to the indicting chamber of the local court of appeal. The prosecutor may appeal from any order of the magistrate. The accused may appeal orders assuming jurisdiction, permitting civil claims to be filed, allowing extended preventive detention, or refusing provisional release on bail. A civil party may appeal from an order refusing to investigate and other orders

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[141] *Id*, Arts.104, 105; The witnesses shall take an oath to speak all the truth, nothing but the truth. (Art.103). Any person included by name in a complaint accompanied by a civil claim may refuse to be heard as a witness. The examining magistrate shall so advise him after acquainting him with the complaint. Mention of this shall be made in the official report. In case of refusal, he may be heard only as an accused. (Art.104). Art.105 provides that the examining magistrate so conducting investigation and magistrates and officers of the judicial police on commission rogatory may not, with intention to cut off the rights of the defence, hear as witnesses persons against whom there exist grave and concordant indications of guilt.

[142] *Id*, Art.11. It provides that proceedings in the course of inquiry and investigation shall be secret, unless otherwise provided by law and without prejudice to the rights of the defence. Each person who officially participates in that proceeding is bound to maintain professional secrecy, under the conditions and subject to the penalties of Article 378 of the Penal Code.

[143] *Id*, Art.107.

[144] *Id*, Art.120. It provides that the prosecuting attorney and counsel for the accused and the civil party may speak only in order to pose questions after having been authorised by the examining magistrate. If that authorization is refused them, the text of the questions shall be reproduced in or attached to the official report.

[145] *Id*, Arts.7, 8, 9. The periods of limitation prescribed for felony, misdemeanor and violation are ten, three and one years respectively.

[146] *Id*, Art.177; It provides that if the examining magistrate determines that the facts do not constitute either a felony, a misdemeanor or a violation or if the perpetrator remains unknown or if there are not sufficient charges against the accused, he shall declare, by order, that it is not appropriate to continue. The accused under detention shall be released on such a conclusion. The examining magistrate shall decide on the restitution of objects seized at the same time. He shall fix the expenses and condemn the civil part to costs if there was one in the case.

that he can show will prejudice his civil interests.[147] If the magistrate finds that it is an appropriate case for prosecution, he issues an order for transfer.[148] If the offence charged is a petty offence the case is transferred to a police court for trial.[149] If the offence is misdemeanor, it is transferred for trial to the appropriate court of primary jurisdiction.[150] If a felony is involved, the case is not transferred to a trial court but goes first to the indicting chamber of the local court of appeal.[151]

The indicting chamber of the court of appeal has exclusive jurisdiction to order the trial of felonies. It considers only the report of the magistrate's investigation, petition of the prosecutor and briefs submitted by the civil parties and the accused. Counsel for the civil party and the accused may appear and argue the case. No other witnesses are examined.[152] There are four courses open to the indicting chamber once the case has been submitted to them. First, the court may decide that further investigation is necessary before action can be taken. On such a decision, it orders to commit the case to one of the judges of the court or to an examining magistrate for action.[153] Secondly, the court may decide that it is an inappropriate case for prosecution for the nature of offence or the evidence available, and issue orders like that of the examining magistrate refusing to investigate.[154] Thirdly, the court may decide that the offence of which the accused is subject to conviction is not a felony. In such case the court renders a decree transferring the case to a court of primary jurisdiction or a police court, as the case may be.[155] The

[147] *Id*, Art.186.
[148] It is called *ordonnance de renvoi.*
[149] *Id*, Art.178; a police court is called *tribunal d' instance.*
[150] *Id*, Art.179; a court of primary jurisdiction is called *tribunal de grande instance.*
[151] *Id*, Art.181.
[152] *Id*, Art.199.
[153] *Id*, Art.205.
[154] *Id*, Art.212; The order is called *arret de non-lieu.*
[155] *Id*, Art.213; The decree is called *arret de renvoi.*

fourth, and most usual, course that may be taken by the court is to render a decree of indictment transferring the case to the assize court for trial.[156]

3.17. Trial court

The court having jurisdiction over the smallest offences consists of a single judge.[157] There are several ways in which a case can be brought before the court.[158] The culprit and the accuser may voluntarily appear before the court where justice will be rendered rather summarily. Another, and the most usual, way for offences to come in is by petition of the victim or the local prosecution.[159] On receipt of a petition, an order to appear is issued by the court and is served on the accused or at his domicile by the bailiff of the court.[160] The accused must be given not less than five days in which to appear, failing which he can be tried *in absentia*, subject to his right in some cases to demand a rehearing at a later date.[161] The local police commissioner is charged with pressing the interests of the public if the penalty that can be assessed is less than ten days in jail and a fine of 400 new francs, since there is no prosecutor assigned to this court.[162] The trial is open to the public unless the court finds that this would endanger the public order or welfare, but minors may always be excluded by the judge if he sees fit to do so.

The recorder reads aloud the transcript of the examining magistrate's investigation, if there is one. The judge then questions the accused and asks if he has a

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[156] *Id*, Art.594; The decree of indictment is called *arret de mise en accusation.*
[157] *Id*, Arts.521 & 523; The court is called *tribunal de police* (where hearing criminal case).
[158] *Id*, Art.531.
[159] The local prosecutor is called the *ministere public.*
[160] *Id*, Art.532; The order to appear is called *citation directe.*
[161] *Id*, Arts.487, 489 to 493 and 544; It is to be noted that if the prosecution was begun before the examining magistrate the accused is already well aware of the pendency of the action and the necessity for appearing for trial. When the examining magistrate issued his order remanding the case for trial before a police court, he so notified the accused and, if he had been held in custody, released him. See Arts.178 and 180.
[162] *Id*, Art.45.

statement to make. The witnesses are put on oath and testify under questioning by the judge. The civil claimant, if any and the prosecutor then argue their cases. Thereafter defense is heard in argument. The civil party and the prosecutor may reply to the defense argument. Again the defense has the right to have the last word. The judge then announces his decision on both the criminal prosecution and the civil claim or adjourn the case for announcing decision. An appeal may be taken to the local court of appeal by any party whose interests have been infringed.

Now consider the trial of misdemeanors. The court always consists of three judges.[163] Unlike the proceedings before the examining magistrate, here the hearing must be public except that the court may vote to close them if the public order or welfare is endangered, and the president of the court may prohibit the admissions of minors.[164] The procedures starting from recorder's reading of transcript to the last word of argument of defense, as involved in the trial held in police court, are there in the trial of misdemeanor.[165]

After the last argument, the court first considers the question of its jurisdiction. If the court finds that the offence should have been prosecuted before the police court, it may enter a final decision.[166] And, if the court finds that the offence was a felony, it must enter an order transferring the case to the prosecutor for further action.[167]

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[163] *Id*, Art.388; The court is the criminal chamber of the *tribunal de grande instnace.*
[164] *Id*, Arts.400 & 402.
[165] *Id*, Arts.427 to 461.
[166] *Id*, Art.466.
[167] The court may also order that the accused be taken or held in custody for further proceedings as provided under Art.469.

Appeal against the judgment in misdemeanor cases can be preferred to the local court of appeal by the accused, the civil party, the prosecutor attached to the trial court and the attorney-general attached to the court of appeal.[168]

In trial of felonies the procedure is much more elaborate. The assize court is the competent court to try such offences.[169] The cases to be tried are transferred to it by the indicting chamber of the local court of appeal. The assize court is presided over by the president and consists of a jury. It holds quarterly sessions.[170] The president has a proactive role to play. He assures himself that proper notice of the decree for trial was given to the accused.[171] He interrogates the accused.[172] The accused is then asked to designate counsel to assist in his defence.[173] If from interrogation of the accused or from the report of the examining magistrate the president feels that further investigation is required he may conduct such an investigation or order another judge of the court or an examining magistrate to do so.[174] Moreover, the president may order the joinder or severance of trials if associated offences or defendants have been brought for trial at the same term.[175]

The trial that follows is also unique in many respects. It with the selection of trial jurors from the panel called for the term of court.[176] The jurors are chosen by lot, but the prosecution is allowed four and the defence is allowed five peremptory challenges.[177] No reason may ever be given for a challenge.[178] If the trial promises to be a long one the court may order that one or more alternative jurors be selected.[179]

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[168] *Id*, Arts.496, 497.
[169] The assize court is called *cour d' assises.*
[170] *Id*, Arts.236 &240.
[171] *Id*, Art.270.
[172] *Id*, Art.273.
[173] *Id*, Art.275; The counsel is so appointed for the accused from among the attorneys called *avocats* or *avoues* admitted to practice before the court.
[174] *Id*, Arts.283, 284.
[175] *Id*, Arts.285 & 286.
[176] *Id*, Art.296.
[177] *Id*, Art.299.
[178] *Id*, Arts.297, 298.
[179] *Id*, Art.296.

The trial must be public unless the judges of the court decide that it would endanger the public order or welfare, and the president may prohibit the attendance of minors.[180] The trial once begun must continue without interruption to judgment unless it is ordered by the court to allow eat and sleep.[181]

The trial begins with a reading by the recorder of the decree of indictment.[182] The president then interrogates the accused and tells him he may make any statement he wishes, but the president is not supposed to indicate any opinion on his guilt or innocence.[183] The witnesses called by the prosecution, civil claimant and accused are then heard.[184] The witness is put on oath.[185] The president may pose questions to the witness after each statement.[186] The witness shall not be interrupted otherwise. After the witness has finished the prosecutor may pose questions directly to the accused and the witnesses.[187] The other judges and the jurors may with the president's approval, ask questions, and counsel for the accused and civil claimant may submit questions to be asked by the president.[188] The witness must remain in the courtroom until the court requires to deliberate unless he is excused by the president.[189]

After examination of all witnesses, counsel for the civil claimant argues his position, followed by the argument of prosecutor. The accused and his counsel then present the argument of the defence. If the prosecutor or civil claimant replies to the

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[180] *Id*, Art.306.
[181] *Id*, Art.307; The president of the court is responsible for maintaining the orderly progress of the trial and has power to do whatever he may deem necessary to discover the truth. See Arts.308, 309, 310, 403, 535.
[182] *Id*, Art.327.
[183] *Id*, Art.328.
[184] *Id*, Art.329; Before giving his statement, the witness is asked by the president of the court to state his name, age, occupation, domicile, if he knew the accused before offence, and whether is related to or employed by the accused or a civil claimant as required under Art.331.
[185] *Id*, Arts.331, 335; Unless a witness is related to the accused or a civil claimant or is under sixteen years old, he is required to swear that he will speak without favour or fear and tell nothing but the truth..
[186] *Id*, Art.332.
[187] *Id*, Art.312.
[188] *Id*, Arts.311, 312, 332.
[189] *Id*, Art.334.

defence the accused has another opportunity to speak. The defence has a right always to have the last word.[190]

On completion of argument, the court, judges and jurors, retire to deliberate. Before the court retires, however, the president must instruct them that they should ask themselves in silent reflection whether the impression of the evidence on their minds leaves them thoroughly convinced of the guilt of the accused.[191] Nothing may be considered by them that has not been prosecuted orally at trial. The court after a period of deliberation, votes by secret ballot.[192] The accused cannot be convicted unless eight of the twelve members vote for conviction.[193] Thus at least five of the nine jurors must vote for any conviction. If the vote is for conviction the court proceeds to vote on a penalty. Each member proposes a penalty by secret ballot, and the penalty must receive a majority of the votes to prevail. The members continue to vote until they arrive at penalty. On the third and subsequent ballots the most severe penalty proposed on the preceding ballot is stricken from the list of penalties available.[194] A penalty arrived at, the court returns to the courtroom, and after the accused is brought in, the president announces the decision and the penalty, if the accused was not acquitted.[195] If a civil claim has been tried along with the criminal charges the three judges then decide that part of the case and hand down their decision.[196] Civil damages may be awarded even if the accused has been acquitted.[197]

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[190] *Id*, Art.346.
[191] *Id*, Art.353.
[192] *Id*, Arts.356-358.
[193] *Id*, Art.359.
[194] *Id*, Art.362.
[195] *Id*, Art.366.
[196] *Id*, Art.371.
[197] *Id*, Art.372.

The French Criminal system is in the process of undergoing drastic changes to fall in line with the requirements of ECHR. They include broad reforms to strengthen the rights of the accused, to simplify and clarify aspects of criminal procedure and to reduce delay.[198] Presumption of innocence is now described as a cardinal principle, which should be respected at all, stages of the criminal process and from which other principles follow. Investigations are made time bound with justifications to be stated for any delay.[199] A *juge des libertes et de la detention* has been created for determining questions of pretrial detention and also to adjudicate on issues affecting rights and liberties of the suspect.[200] At the close of the instruction, the *juge d'instruction* sends the case directly to the *Cour d' assises* without having to remit the file to the procureur first.[201] The *Cour d' assises* tries the most serious offences, crimes and comprises a jury of nine and three judges who together determines guilt or innocence and the sentence. Untill recently there was no appeal against conviction to a differently *Cour d' assises* with twelve juriors who may decide by a 10 :2 majority[202]. The procureeur may also appeal against an acquittal[203].

[198] See for this reforms Jacqueline Hodgson, "Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reforms" 51 ICLQ 781 October 2002.
[199] Arts. 175-1 and 175-2
[200] Art. 137-1
[201] Art. 181
[202] Arts. 231,296,297,298,359,360 and 362.
[203] For Historical and Constitutional trappings of Prosecution service see Pieter Verrest- The French Public prosecution service, 2000-3 European Journal of Crime, Criminal Law and Criminal Justice 210.

CHAPTER 4
POLICE, PROSECUTORS AND DEFENCE COUNSEL

4.1 Police

The police is an instrument for the prevention and detection of crime.[1] The Code of Criminal Procedure does not provide for anything to establish a police force though it is an important agency for administration of criminal justice.[2] Rather, the Code premises on the fact that the police exists and confers certain powers and imposes certain duties thereon.[3]

4.2 Structure and hierarchy

The Police Act, 1861 embodies the law governing the constitution of police force throughout the country.[4] This Act however does not operate in any State unless the State Government extends its operation there by order.[5] The State may make its own

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[1] The Police Act, 1861, Preamble.

[2] Dr.K.N.Chandrasekharan Pillai, *R.V. Kelkar's Criminal Procedure*, 3rd ed., 1998, p.16; see also the Law Commission of India, 154th Report on Code of Criminal Procedure, chapter II, para 1.

[3] The earlier Codes (the Codes of 1861, 1872, 1882 and 1898) had the same scheme.

[4] There are also certain other Central Acts dealing with the law governing the police. The Police Act of 1888 enables the Central Government to create a special police district embracing part of two or more States and to extend to every part of such district the powers and jurisdiction of members of a police force belonging to a specific State subject to the concurrence of that State Government. The Police Act, 1949 enables the Central Government to constitute general police district embracing two or more Union territories, and one police force for such district under its superintendence. The Delhi Special Police Establishment Act, 1946 provides for the constitution of a special police force in Delhi for the investigation of certain specified offences in the Union territories and in certain other areas, of which there is detailed discussion in this chapter. Furthermore, we have the Police (Incitement to Disaffection) Act, 1922 providing penalty for spreading disaffection among the police and for kindred offences. Lastly, the Police Forces (Restriction of Rights) Act, 1966 provides for the restriction of certain rights conferred by Part III of the Constitution in their application to the members of the Forces charged with the maintenance of public order so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

[5] The Police Act, 1861, s.46(1). It provides: "This Act shall not by its own operation take effect in any Presidency, State or place. But the State Government by an order to be published in the official Gazette, may extend the whole or any part of this Act to any Presidency, State or place, and the whole or such portion of this Act as shall be specified in such order shall thereupon take effect in such Presidency, State or place."

legislation instead of extending the operation of this Central Act to its limits as several States including Kerala have done.[6]

Every State Government establishes its own police force.[7] The term police includes all persons by whatever name known who exercise any police functions in any part of the State.[8] The entire police establishment of every State is deemed to be one police force.[9] It consists of such number of superior and subordinate police officers and is otherwise constituted in such manner as the State Government may order from time to time.[10] Any member of the police force is a police officer.[11] All police officers of and above the rank of an Inspector are designated as superior police, whereas all police officers below the rank of an Inspector are designated as subordinate police.[12]

The service group consisting of Inspector General of Police, Deputy Inspector General of Police, Assistant Inspector General of Police, District Superintendent of Police and Assistant District Superintendent of Police belong to the

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[6] By virtue of the Legislative Power provided for under Art.246(3) r/w Entry 2 of List II- State List in the Seventh Schedule of the Constitution. The Kerala Police Act, 1960 is the statute in force for this purpose in the State of Kerala.

[7] The Police Act, 1861, s.2. The overall scheme set by the Act reveals such an idea.

[8] The Kerala Police Act, 1960, s.2(iv); the Police Act, 1861, s.1 provides: "the word 'police' includes all persons who shall be enrolled under this Act."

[9] The Police Act, 1861, s.2; the Kerala Police Act, 1960, s.3. It is to be noted that the Police Act, 1861, s.2 provides further that the entire police-establishment under a State Government shall be formally enrolled, while the Kerala Police Act, 1960 does not contain such a stipulation, rather, it provides for under s.7 that every officer of the subordinate police shall be formally enrolled, and shall receive on his enrolment a certificate under the seal of the Inspector General by virtue of which he shall be vested with the powers, functions and privileges of a police officer. In relation to such certificate it is further noted that s.8 of the Central Act provides for classification among police officers on a different basis in as much as it relates to their rank. Thus every police officer other than Inspector General, Deputy or Assistant Inspector General, District Superintendent and Assistant District Superintendent, of Police shall receive on his appointment such a certificate. See also *Superintendent of Police, Ludhiana* v. *Dwaraka Das*, (1979)3 SCC 789.

[10] The Kerala Police Act, 1960, s.3; the Police Act, 1861, s.2. The State Act contains the expression "such number of superior and subordinate police officers" instead of the expression "such number of officers and men" contained in the Central Act.

[11] The Kerala Police Act, 1960, s.2(iv).

[12] *Id*, s.2(ix) & (x). However the Central Act conveys a little different idea. S.2 provides: "References to the subordinate ranks of a police-force shall be construed as references to members of that force below the rank of Deputy Superintendent."

Indian Police Service. On the other hand Deputy Superintendents, Inspectors, Sub-Inspectors, Head Constables and Constables are appointed by the State Government.[13] All these officers constitute the hierarchy of police in every State.

The overall administration of police throughout the State is subject to the control of the Government vested in the Inspector General of Police and in such superior police officers as the Government may deem fit.[14] The police force within the local jurisdiction of a District Magistrate is under the general control and direction of such Magistrate.[15] The administration of police in every district vests in the District Superintendent of Police under the general control and direction of the District Magistrate.[16] In an area for which the Government has appointed a Commissioner of Police, the administration of police in that area vests with him subject to such a general control.[17]

4.3 Police station

A police station is the lowest unit of administration of criminal justice.[18] It means any post or place declared generally or specifically by the State Government, to be a police station, and includes any local area specified by the State Government in this behalf.[19]

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[13] Ahamed Siddique, *Criminology, Problems and Perspectives, 4th* ed., p.283.

[14] The Police Act, 1861, ss.3 & 4; the Kerala Police Act, 1960, s.4.

[15] The Kerala Police Act, 1960, s.5, in exercising authority under this section the District Magistrate shall be governed by such rules and orders as the Government may, from time to time, make in this behalf; s.2(ii) provides: " 'District Magistrate' shall mean the officer, charged with the executive administration of a district and invested with the powers of a Magistrate of the first class, by whatever designation such officer is styled."; see also the Police Act, 1861, s.4.

[16] The Police Act, 1861, s.4.

[17] The Kerala Police Act, 1960, s.2(3). The situation is somewhat different in metropolitan cities like Delhi, Calcutta, Bombay, Madras and Hyderabad where the office of the Police Commissioner combines the powers of the Superintendent of Police and those of District Magistrate for the purpose of law and order.

[18] S.D. Singh, J., *Sohoni's The Code of Criminal Procedure, 1973*, 17th ed., 1974, vol.1, p.56.

[19] The Code of Criminal Procedure, 1973, s.2(s); *Ram Govind Singh* v. *Askrit Singh*, AIR 1960 Pat 342; s.2(p) provides: " 'place' includes a house, building, tent, vehicle and vessel"; see also *Baidyanath* v. *State*, 1969 CriLJ 339.

4.4 Officer in charge of a police station

Generally a police officer who is a Sub-Inspector in rank is the officer in charge of every police station.[20] The Code broadens the meaning of the expression 'officer in charge of a police station' in view of the importance of duties of such a police officer and the need for their prompt discharge.[21] During absence or inability of the officer in charge of the police station the officer next in rank present at the police station but above the rank of constable will be the officer in charge.[22] Any other police officer present including a constable can become the officer in charge of a police station at such contingencies if the State Government so directs.[23] The scheme of the Code is that there is only one officer in charge of the police station.[24]

4.5 Powers of police officers

The police being an important agency for administration of criminal justice, its officers have elaborate powers in respect of the criminal process involving investigation, arrest, search, seizure, decision to charge, etc. Out of which, the powers conferred on the officer in charge of a police station are tremendous and significant, as elicited elsewhere in this paper. The police officers superior in rank to an officer in charge of a police station also have the same powers exercisable throughout the local

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[20] S.D. Singh, J., *Sohoni's The Code of Criminal Procedure, 1973*, 17th ed., 1974, vol.1, p.184.

[21] Dr.K.N.Chandrasekharan Pillai, *op. cit.*, at p.17.

[22] The inability of the police officer in charge to perform his duties may be due to illness or otherwise.

[23] The Code of Criminal Procedure, 1973, s.2(o). It provides: " "officer-in-charge of a police station" includes, when the officer-in-charge of the police station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station-house who is next in rank to such officer and is above the rank of constable or, when the State Government so directs, any other police officer so present."

[24] The Law Commission of India, 37th Report on the Code of Criminal Procedure, 1898, p.29, para 83 provides: "section 4(1)(p) defines an 'officer in charge of a police station. It has been suggested by the Inspector General of Police of a State, that a proviso should be added to the effect that a Sub Inspector on duty in the interior (i.e., while he is away on tour from the police station) is an officer in charge. It appears to us, that such change is not practicable, as it would mean duplication of 'Officer in charge of police station'. The scheme of the Code is, that there is only one officer in charge of a police station. As the scheme stands, when the officer in charge is out some person must be in charge of the police station. He has to maintain a record of the First Information Report and other records. Declaring some other officer as 'officer in charge' might create complications. The Law Commission of India on 41st Report on Code of Criminal Procedure, 1898 agreed with its earlier view as mentioned above at pp.10, 11, para 1.26(ix).

area to which they are appointed, as may be exercised by such officer within the limits of his station.[25] This further shows the key role given by the Code to police stations in the scheme of investigation and prevention of crime.[26]

4.6 Central Bureau of Investigation

The Central Bureau of Investigation being a matter enumerated in the Union List, Parliament has exclusive power to make laws with respect to it.[27] However, Parliament has not made any fresh legislation on the matter. On the other hand invoking the power of the President under Article 372(2), the Delhi Special Police Establishment Act, 1946, has been adapted and modified for the purpose of bringing its provisions into accord with Entry 8 in the Union List in as much as it relates to the Central Bureau of Investigation.[28] Thus the special police force constituted under this Act with the statutory name, the Delhi Special Police Establishment for the purpose of investigation of certain offences has also been called as the Central Bureau of Investigation.

The Delhi Special Police Establishment is empowered to investigate into certain notified offences in the Union territories and the area of a State to which its powers and jurisdiction are extended.[29] Thus in relation to such investigations throughout there, its members have all powers and privileges which the local police

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[25] The Code of Criminal Procedure, 1973, s.36; see also *Chittaranjan Das* v. *State of W.B.*, AIR 1963 Cal 191 at p.197; *State of Bihar* v. *J.A.C. Saldana*, (1980)1 SCC 554.

[26] Dr. K.N.Chandrasekharan Pillai, *loc. cit.*

[27] The Constitution of India, Art.246(1) r/w Entry 8, List I-Union List, Seventh Schedule.

[28] The Adaptation of Laws Order, 1950, dt/- 26th January, 1950, Gazette of India, Extraordinary, p.449.

[29] The Delhi Special Police Establishment Act, 1946, s.2(1) provides: "Notwithstanding anything in the Police Act, 1861, the Central Government may constitute a special police force to be called the Delhi Special Police Establishment for the investigation in any Union territory of offences notified under section 3."; s.3 provides: "The Central Government may by notification in the Official Gazette, specify the offences or classes of offences which are to be investigated by the Delhi Special Police Establishment."; s.5(1) provides: "The Central Government may by order extend to any area (including Railway area), in a State, not being a Union territory the powers and jurisdiction of members of the Delhi Special Police Establishment for the investigation of any offences or classes of offences specified in a notification under section 3."; s.6 provides: "Nothing contained in section 5 shall be deemed to enable any member of the Delhi Special Police Establishment to exercise powers and jurisdiction in any area in a State, not being a Union territory or railway area, without the consent of the Government of that State."

officers have in connection with the investigation of offences committed therein.[30] Their powers include one to arrest persons concerned in such offences.[31] Any such member of or above the rank of Sub-Inspector may exercise there any of the powers of the officer in charge of a police station in the area in which he is for the time being.[32] While so exercising such powers he is deemed to be an officer in charge of a police station discharging the functions of such an officer within the limits of his station.[33]

4.7 Prosecution

In criminal law prosecution has an important role to play.[34]All criminal proceedings are in theory instituted and conducted on behalf of the State because a crime is a wrong against the society at large rather than against the individual victim.[35] The State representing the people in their collective capacity prosecutes the offender in almost all cases involving serious offences, which are more particularly called by the Code as cognizable offences.[36] The Public Prosecutor or the Assistant Public Prosecutor is the counsel for the State in such prosecutions. The Public Prosecutor also represents the State in criminal appeals, revisions and such other proceedings.[37]

4.8 Role of prosecutor

Although the police may institute criminal proceedings, the responsibility for the conduct thereafter of proceedings instituted by them lies with the prosecutor. [38]

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[30] *Id*, ss.2(2) and 5(2). They have duties and liabilities as well. Every such power etc. is subject to the orders of the Central Government.
[31] *Ibid.*
[32] *Id*, ss.2(3) and 5(3).
[33] *Ibid.*
[34] The Law Commission of India, 154th Report on the Code of Criminal Procedure, 1973, chapter III, para 1.
[35] Card, Cross & Jones, *Criminal Law*, 12th ed., 1992, pp.3 & 22.
[36] *Queen-Empress* v. *Murarji Gokuldas*, ILR 13 Bom 389; *Gaya Prasad* v. *Bhagat Singh*, ILR 30 All 525 (PC).
[37] Dr. K.N.Chandrasekharan Pillai, *loc. cit.*
[38] Card, Cross & Jones, *loc. cit.*

In the machinery of justice he has to play a very responsible role.[39] The prosecutors are really Ministers of Justice whose job is nothing but to assist the State and the court in the administration of justice.[40]

The object of criminal trial is to find out the truth and to determine the guilt or innocence of the accused. There the prosecutor's duty should consist only in placing all available evidence irrespective of the fact whether it goes against the accused or helps him before the court in order to aid the court in discovering the truth.[41] He should be personally indifferent as to the result of the case and leave the court to adjudicate upon the guilt or innocence of the accused based on all such evidences.[42]

The prosecutor must be as impartial as the court.[43] He is not there to see the innocent go to gallows. Equally, he is not there to see the culprits escape the conviction.[44] Rather, he is there to see that justice is done.[45] The last thing he would desire is to secure a wrongful conviction or even to secure a conviction in a doubtful case.[46] He must play his role always consistent with the ethics of legal profession and

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[39] The Law Commission of India, 14th Report on Reform of Judicial Administration, vol.II, p. 765, para 2.

[40] In *Rajender Kumar Jain* v. State, (1980)3 SCC 435 at p.445: the Supreme Court has used the expression 'Minister of Justice' to describe the Public Prosecutor. In *Babu* v. *State of Kerala*, 1984 CriLJ 499 (Ker) at p.502; the High Court of Kerala lays down: "The Public Prosecutors are really Ministers of Justice whose job is none other than assisting the State in the administration of justice. They are not representatives of any party. Their job is to assist the court by placing before the court all relevant aspects of the case. They are not there to see the innocent go to gallows; they are also not there to see the culprits escape the conviction."

[41] The Law Commission of India, *loc. cit.*; *Babu* v. *State of Kerala*, 1984 CriLJ 499 (Ker) at p.502; *Sheonandan Paswan* v. *State of Bihar*, (1987)1 SCC 288.

[42] *Ram Ranjan Roy* v. *Emperor*, ILR 42 Cal 422 at p.428; *Ghirrao* v. *Emperor*, 34 CriLJ 1009 at p.1012.

[43] The Law Commission of India, *loc. cit.*; *Shrilekha Vidyarthi* v. *State of U.P.*, (1991)1 SC 212.

[44] *Babu* v. *State of Kerala*, 1984 CriLJ 499 (Ker) at p.502.

[45] Sir Alfred Denning, *The Road to Justice*, 1959, p. 36.

[46] *Mohd. Mumtaz* v. *Nandini Satpathy*, (1987)1 SCC 299; *Anant Wasudeo Chandekar* v. *King Emperor*, AIR 1924 Nag 243 at p.245:There should not be on the part of the prosecutor any unseemly eagerness for or grasping at conviction.

fair play in the administration of justice.[47] The prosecutor has one more role to play. He is also a legal adviser to the police department in charge of investigation.[48]

4.9 Organisation of prosecution

There are several prosecutors under the Code. Some of them are appointed by Central Government, others by the State Government and yet others by the District Magistrate. Nevertheless, the Code does not provide for the actual organisation of the prosecuting agency.[49] In practice, however, the prosecution work in the Courts of Magistrates is under the directions of the Police Department, while that in the Courts of Sessions is under the general control of the District Magistrate.[50] The Public Prosecutors appointed for the High Court are under the control of the State Government.[51]

4.10 Public Prosecutors for High Courts

The Central Government or the State Government shall appoint a Public Prosecutor for every High Court for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or the State Government, as the case may be.[52] The Government shall do so only after consultation with the High

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[47] *Sunil Kumar Pal* v. *Phota Sheikh*, (1984)4 SCC 532. It is inconsistent with all these principles for the Public Prosecutor to appear on behalf of the accused.

[48] The Law Commission of India, 154th Report on the Code of Criminal Procedure, 1973, chapter III, para 3. It reads: "It is a matter of common knowledge, that a public prosecutor has a dual role to play, namely, as a prosecutor to conduct the trial and as a legal adviser to the police department in charge of investigation. For some reason or other, in the present administration, the latter part is not given due weight and virtual communication gap exists."

[49] The Law Commission of India, 41st Report on the Code of Criminal Procedure, 1898, p.311, para. 38.1.

[50] *Ibid*; the Law Commission of India, 14th Report on the Reform of Judicial Administration, vol.II, p.766, para 5.

[51] See *Abdul Rahiman* v. *State*, 1997(1) KLJ 640; *P.C. Chacko* v. *State of Kerala*, 1998(1) KLJ 769, usually under the Home Department of the Government.

[52] The Code of Criminal Procedure, 1973, s.24(1). S.2(u) provides: " 'Public Prosecutor' means any person appointed under sec.24 and includes any person acting under the directions of the public prosecutor."

Court.[53] Only an advocate who has been in practice for not less than seven years is eligible to be appointed as a Public Prosecutor.[54] Either Government may in the same manner appoint one or more Additional Public Prosecutors for the same purpose.[55]

4.11 Public Prosecutors for districts

The District Magistrate, in consultation with the Sessions Judge, prepares a panel of names of persons, who are in his opinion, fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.[56] The State Government shall appoint a Public Prosecutor out of this panel for the district.[57] It may also appoint one or more Additional Public Prosecutors out of the panel for the district.[58] Where in a State there exists, a regular cadre of Prosecuting Officer, such Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such cadre.[59] However, if in the opinion of the Government, no suitable person is available in such cadre for such appointment, it may so appoint a person from the panel of names prepared by the District Magistrate.[60] The Central Government may appoint one or more Public Prosecutors for the purpose of conducting any case or class of cases in any district or local area.[61] It can very well so appoint any advocate who has been in practice for not less than seven years.[62] The Public Prosecutors and Additional

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[53] *Ibid*; the Law Commission of India, 154th Report on the Code of Criminal Procedure, 1973, chapter III, para 1.

[54] *Id*, s.24(7). Sub-sec. (9) provides that: The period during which a person has been in practice as a pleader, or has rendered service as a Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate.

[55] *Id*, s.24(1).

[56] *Id*, s.24(4); see also the Law Commission of India, *loc. cit.*

[57] *Id*, s.24(3).

[58] *Ibid.*

[59] *Id*, s.24(6).

[60] *Id*, s.24(6), Proviso.

[61] *Id*, s.24(2).

[62] *Id*, s.24(7).

Public Prosecutors conduct prosecution and other criminal proceedings in the Sessions Courts and the High Courts, according to the pattern set by the Code.[63]

4.12 Assistant Public Prosecutors

They conduct prosecution in the courts of Magistrates.[64] The State Government is bound to appoint one or more Assistant Public Prosecutors in every district.[65] The Central Government may also appoint one or more Assistant Public Prosecutors for the purpose of conducting any case or class of cases in the courts of Magistrates.[66] Where no Assistant Public Prosecutor is available for the purposes of any particular case, the District Magistrate may appoint any other person to be an Assistant Public Prosecutor in charge of that case.[67] A police officer who has taken any part in the investigation into the offence with respect to which the accused is being prosecuted, shall not be so appointed the Assistant Public Prosecutor in charge of that case.[68] Furthermore, a police officer below the rank of Inspector also shall not be so appointed the Assistant Public Prosecutor in charge.[69] Barring the appointment of such police officers as the Assistant Public Prosecutor in charge of a particular case as mentioned above no police officer shall be eligible to be appointed as the Assistant Public Prosecutor.[70] The Code does not prescribe any qualification for the purpose of

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[63] The Law Commission of India, 41st Report on the Code of Criminal Procedure, 1898, pp.311 & 312, para 38.3; Dr. K.N. Chandrasekharan Pillai, *op. cit.*, p.18.

[64] The Code of Criminal Procedure, 1973, s. 25(1); The definition under s.2(u) doesn't cover the Assistant Public Prosecutors as they are not appointed under s.24; at the same time they are not defined separately.

[65] *Ibid.*

[66] *Id*, s.25(1-A); This section was inserted by Act 45 of 1978.

[67] *Id*, s. 25(3).

[68] *Id*, s.25(3), Proviso (a).

[69] *Id*, s.25(3), Proviso (b).

[70] *Id*, s.25(2). The rationale behind the provision is elicited by the Law Commission of India, in the 14th Report on the Reform of Judicial Administration, vol. II, p.769, para 12 as: "It must not also be forgotten that a police officer is generally one-sided in his approach. It is no reflection upon him to say so. The Police Department is charged with the duty of the maintenance of law and order and the responsibility for the prevention and detection of offences. It is naturally anxious to secure convictions...It is obvious that by the very fact of their being members of the police force and the nature of the duties they have to discharge in bringing the case to court it is not possible for them to exhibit that degree of detachment which is necessary in a Prosecutor."

appointment of the Assistant Public Prosecutors. However, they should be legally qualified and the present trend of appointing, as far as possible, qualified legal practitioners as the Assistant Public Prosecutors need be maintained.[71]

According to the prevailing practice, the prosecution is conducted in the Court of Magistrate by the Assistant Public Prosecutor in cases initiated on police reports, while in cases initiated on a private complaint the prosecution is conducted either by the complainant himself or by his duly authorised counsel.[72] In cases initiated on private complaint also the State can appoint prosecutors if the cause has public interest.[73] Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a legally ineligible police officer.[74] Any person conducting the prosecution may do so personally or by a pleader.[75]

4.13 Special Public Prosecutors

The Central Government or the State Government may appoint a Special Public Prosecutor for the purposes of any particular case or class of cases.[76] The Special Public Prosecutors are to conduct prosecutions and other criminal proceedings in the Sessions Court and the High Courts, as revealed by the pattern set by the Code.[77] Only

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[71] The Law Commission of India, 41st Report on the Code of Criminal Procedure, vol. I, p.312, para 38.3.
[72] *Ibid*; Dr. K.N. Chandrasekharan Pillai, *loc. cit.*
[73] *Mukul Dalal* v. *Union of Inda*, (1988)3 SCC 144.
[74] *Id*, s.302(1). As in the case of s.25(3), a police officer who has taken any part in the investigation into the offence with respect to which the accused is being prosecuted, and an officer below the rank of Inspector are not eligible for the purpose under this section also.
[75] *Id*, s.302(2).
[76] *Id*, s.24(8); Yale Kamisar, Wayne R. LaFave & Jerold H. Israel, *Modern Criminal Procedure*, 8th ed., 1994, p.916: There appear to be three areas where the need for the services of a special prosecutor arises: 1. Conflict: The prosecuting attorney is legally precluded from proceeding due to a conflict of interest; 2. Complexity: The prosecutor is faced with a difficult case beyond his investigative and legal abilities; 3. Public trust: There is corruption within the judicial/ governmental system, and public confidence requires an 'uninvolved' outsider to investigate and prosecute.
[77] Dr. K.N. Chandrasekharan Pillai, *loc. cit.*

an advocate who has in practice for not less than ten years is eligible to be appointed as the Special Public Prosecutor.[78]

4.14 Power of prosecutors

The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any court in which that case is under inquiry, trial or appeal.[79] If in any such case any private person instructs a pleader to prosecute in any court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution.[80] The pleader so instructed shall only act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor.[81] He may, submit written arguments after the evidence is closed, with permission of the court.[82]

The Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor is entitled to intervene and assume the charge of prosecution in any case being inquired or tried by a Magistrate despite it is case instituted on private complaint without any permission of the Magistrate.[83] On such intervention the advocate appearing for the complainant shall only act under the directions of the Prosecutor.[84]

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[78] The Code of Criminal Procedure, 1973, s.24(8).
[79] *Id*, s.301.
[80] *Id*, s.301(2).
[81] *Ibid.*
[82] *Ibid.*; see also *Kuldip Singh* v. *State of Haryana*, 1980 CriLJ 1159, at p.1160 (P & H HC).
[83] *Id*, s.302(1); *Babu* v. *State of Kerala*, 1984 CriLJ 499 (Ker HC).
[84] *Id*, s.301(2); such intervention on the part of the prosecutor is warranted only when the cause has public interest. The power shall not be used for defeating justice. See *Kihar Karal* v. *Satyanarayana*, 1984 CriLJ 344 (AP HC).

4.15 Withdrawal from prosecution

Withdrawal from a prosecution means retiring or stepping back or retracting from the prosecution.[85] The Public Prosecutor or Assistant Public Prosecutor in charge of a case has power to withdraw from the prosecution of any person.[86] This power can be exercised only in cases initiated on police report and not in cases initiated on private complaint.[87] The prosecutor can so withdraw from the prosecution only with consent of the court. [88]

The withdrawal can be sought at any time before the judgment is pronounced.[89] The provision has no application at all at the appellate stage.[90] During the pendency of the committal proceedings in the Court of Magistrate in cases involving offences triable exclusively by Court of Session there can be withdrawal from the prosecution with the consent of the Magistrate.[91] Where an accused is charged with

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[85] *Public Prosecutor* v. *Mandangi Varjuno*, 1976 CriLJ 46 (AP HC) at p.47; It is as well withdrawal of appearance from the prosecution or refraining from conducting or proceeding with the prosecution.

[86] The Code of Criminal Procedure, 1973, s.321; It is to be noted that the section provides for 'the withdrawal from the prosecution' and not 'the withdrawal of the prosecution'. See *Subhash Chander* v. *State*, (1980)2 SCC 155; The Code of Criminal Procedure, 1898, s.494 contained the law which was in force prior to the present Code.

[87] *State of Punjab* v. *Surjit Singh*, AIR 1967 SC 1214; *Saramma Peter* v. *State of Kerala*, 1991 CriLJ 3211 (Ker HC).

[88] The Code of Criminal Procedure, 1973,s.321; *Rajender Kumar Jain* v. *State*, (1980) 3 SCC 435 lays down at p.445: "It shall be duty of the Public Prosecutor to inform the court and it shall be the duty of the court to appraise itself of the reasons which prompt the Public Prosecutor to withdraw from the prosecution. The court has a responsibility and a stake in the administration of criminal justice and so has the Public Prosecutor, its 'Minister of Justice'. Both have a duty to protect the administration of criminal justice against possible abuse or misuse by the Executive by resort to the provisions of s.321 Criminal Procedure Code. The independence of the court requires that once the case travelled to the court, the court and its officers above must have control over the case and decide what is to be done in each case." See also *M.N. Sankaranarayanan Nair* v. *P.V. Balakrishnan*, (1972) 1 SCC 318 at p.322; *Sheonandan Paswan* v. *State of Bihar*, (1983) 1 SCC 438 at 456; *Pichan Cheerath Mamoo* v. *A.P.P. Malappuram*, 1980 CriLJ 901 (Ker HC) at p.904; *Tejinder Singh* v. *Bhavi Chand Jindal*, 1982 CriLJ 203 (Del HC) 26.

[89] *Ibid;* The withdrawal can be done only in the trial court; see *T.C. Thiagarajan* v. *State*, 1982 CriLJ 1601 (Mad HC) at p.1607.

[90] *Ananta Lal Sinha* v. *Jahiruddin Biswas*, AIR 1927 Cal 816; *State of M.P.* v. *Mooratsingh*, 1975 CriLJ 989 (MP HC)

[91] *State of Bihar* v. *Ram Naresh Pandey*, AIR 1957 SC 389; *Rama Singh* v. *State of Bihar*, 1978 CriLJ 1504 (Pat HC); *Niranjan Pradhan* v. *State*, 1991 CriLJ 224 (Ori HC). The contrary view that the committing magistrate is not competent to give consent for withdrawing from the prosecution as expressed in *A. Venkatramana* v. *Mudem Sanjeeva Ragudu*, 1976 Andh LT 317 and *Abdur Rahaman* v. *Makimar Rahaman*, 1979 CriLJ 147 (Cal HC), is no longer good law.

more offences than one and where more accused than one are prosecuted at the same trial, the prosecutor may withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried.[92]

If the withdrawal is made before framing charge, the accused shall be discharged in respect of such offence or offences. If it is made after a charge has been framed, or when no charge is required under the Code, he shall be acquitted in respect of such offence of offences.[93]

If the prosecutor in charge of the case has not been appointed by the Central Government and the offence relates to a matter to which the executive power of the Union extends, or was investigated by the Delhi Special Police Establishment, or involved the misappropriation of, destruction of, or damage to, Central Government property, or was committed by a Central Government servant in the course of his official duty, the prosecutor shall not move the court for its consent to withdraw from the prosecution unless the Central Government permits him to do so.[94] Further, the court shall, before according consent, direct the prosecutor to produce before it the permission granted by the Central Government to that effect.[95]

Nature of power

Under the scheme of the Code the prosecution of an offender for a serious offence is primarily the responsibility of the executive. The withdrawal from the prosecution is an executive function of the prosecutor. The discretion to withdraw from the prosecution vests in the prosecutor.[96] The statutory responsibility for deciding

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[92] The Code of Criminal Procedure, 1973, s.321; s.218 provides for separate charge for distinct offences and the trial thereof, while s.223 provides for charging several persons jointly.

[93] *Ibid.*

[94] *Id*, s.321 Proviso; see also the Law Commission of India, 41st Report on the Code of Criminal Procedure, 1898, pp.313 and 314, paras 38.6 & 38.7.

[95] *Ibid.*

[96] *Rajender Kumar Jain* v. *State*, (1980) 3 SCC 435 at p. 445.

withdrawal equally rests upon him.[97] He cannot surrender it to someone else for these reasons.[98] Moreover, this function relates to a public purpose entrusting him with the responsibility of so acting only in the interests of administration of criminal justice. This additional element flowing from statutory provisions in the Code undoubtedly invests the prosecutors with the attribute of holder of a public office which cannot be whittled down by the assertion that their engagement is purely professional between a client and his lawyer with no public element attaching to it.[99] It is non-negotiable and cannot be bartered away in favour of those who may be above him on the administrative side.[100] The Government may suggest to the prosecutor that he may withdraw from the prosecution, but none can compel him to do so.[101] The only limitation on the discretion of prosecutor is the requirement of consent of the court.[102]

Reason for withdrawal

The Code does not mention any reason for the prosecutor to withdraw from the prosecution nor does it mention any ground for the court to grant or refuse permission thereto.[103] The court as well as the prosecutor has a duty to protect the

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[97] *Balwant Singh* v. *State of Bihar*, (1977) 4 SCC 448 at 450; *Navnitdas Girdharlal Ramaya* v. *Kundalikrao Shinde*, 1979 CriLJ 1242 (Bom HC).

[98] *Rajender Kumar Jain* v. *State*, (1980) 3 SCC 435 at p.445.

[99] *Shrilekha Vidyarthi* v. *State of U.P.*, (1991) 1 SCC 212 at p.233.

[100] *Balwant Singh* v. *State of Bihar*, (1977) 4 SCC 448 at 450; *Navnitdas Girdharlal Ramaya* v. *Kundalikrao Shinde*, 1979 CriLJ 1242 (Bom HC).

[101] *Rajender Kumar Jain* v. *State*, (1980) 3 SCC 435 at p.445. In *Sheonandan Paswan* v. *State of Bihar*, (1983) 1 SCC 438, though the Supreme Court accepted this position it took a somewhat inconsistent view. At p.492 Baharul Islam, J. observed: "Unlike the judge, the Public Prosecutor is not an absolutely independent officer. He is an appointee of the Government, Central or State (see ss.24 and 25 Cr.P.C.), appointed for conducting in court any prosecution or other proceedings on behalf of the Government concerned. So there is the relationship of counsel and client between the Public Prosecutor and the Government. A Public Prosecutor cannot act without instructions of the Government; a Public Prosecutor cannot conduct a case absolutely his own, or contrary to the instruction of his client, namely the Government. Section 321...does not lay any bar on the Public Prosecutor to receive any instruction from the Government before he files an application under that section.... On the contrary the Public Prosecutor cannot file an application for withdrawal of a case on his own without instruction from the Government."

[102] *Shrilekha Vidyarthi* v. *State of U.P.*, (1991) 1 SCC 212 at p.233.

[103] *M.N. Sankaranarayanan Nair* v *P.V. Balakrishnan*, (1972) 1 SCC 318; *Sheonandan Paswan* v. *State of Bihar*, (1983) 1 SCC 438.

administration of criminal justice against possible abuse or misuse under the guise of this provision.[104] It is settled that the prosecutor must exercise this power only in the interest of justice which may be either that he will not be able to produce sufficient evidence to sustain the charge or that subsequent information before the prosecuting agency would falsify the prosecution evidence or any other similar circumstance which it is difficult to predicate as they are dependent entirely on the facts and circumstances of each case.[105] Moreover, the power must be exercised with object to further the broad ends of public justice, public order and peace this power.[106] Thus even in cases where reliable evidence has been adduced to prove the charges the prosecutor can exercise this power if it is in order to further any of these objects.[107] On the other hand he cannot

[104] *Rajender Kumar Jain* v. *State*, (1980) 3 SCC 435 at p.445. See also *State of Orissa* v. *Chandrika Mahapatra*, (1976) 4 SCC 250; *Balwnat Singh* v. *State of Bihar*, (1977) 4 SCC 448; *Subhash Chander* v. *State*, (1980) 2 SCC 155.

[105] *M.N. Sankaranarayanan Nair* v *P.V. Balakrishnan*, (1972) 1 SCC 318; *Bansi Lal* v. *Chandan Lal*, (1976) 1 SCC 421; *Dy. Accountant General* v. *State of Kerala*, AIR 1970 Ker 158(FB); *Sadanand Muralidhar Burma* v. *State of Maharashtra*, 1976 CriLJ 68 (Bom HC). The observation of the Supreme Court in *Rajender Kumar Jain* v. *State*, (1980) 3 SCC 435 is worth noting. It reads at p.445: "In the past, we have often known how expedient and necessary it is in the public interest for the Public Prosecutor to withdraw from prosecutions arising out of mass agitations, communal riots regional disputes, industrial conflicts, student unrest etc. Wherever isues involve the emotions and there is a surcharge of violence in the atmosphere it has often been found necessary to withdraw from prosecutions in order to restore peace, to free the atmosphere from the surcharge of violence, to bring about a peaceful settlement of issues and to preserve the claim which may follow the storm. To persist with prosecutions where emotive issues are involved in the name of vindicating the law may even be utterly counter-productive. An elected government, sensitive and responsive to the feelings and emotions of the people, will be amply justified if for the purpose of creating an atmosphere of goodwill or for the purpose of not disturbing a calm which has descended it decides not to prosecute the offenders involved or not to proceed further with the prosecution already launched. In such matters who but the government can and should decide, in the first instance, whether it should be baneful or beneficial to launch or continue prosecutions."

[106] Thurman W. Arnold, 'Law Enforcement – An Attempt At Social Dissection', 42 YLJ 1, (1932), at pp. 17-18: "It is the duty of the prosecuting attorney to solve the problem of public order and safety using the criminal code as an instrument rather than as a set of commands. This makes it proper and necessary that some laws should be enforced, others occasionally enforced and others ignored according to the best judgment of the enforcing agency. The criminal problem must be looked at as a war on dangerous individuals and not as a law enforcement problem, unless we want to escape from reality by taking refuge in an ideal world of false assumptions concerning both criminal codes and criminals"; *Rajender Kumar Jain* v. *State*, (1980) 3 SCC 435 at p.445: "the broad ends of public justice will certainly include appropriate social, economic and political purposes".

[107] *Mohd. Mumtaz* v. *Nandini Satpathy*, (1987) 1 SCC 279.

exercise this power even on the ground of paucity of evidence when there is no such object to be furthered.[108]

Ground for according sanction

The independence of the court requires that once the case has travelled to the court, the court and its officers must have control over the case and decide what is to be done in each case.[109] The statutory discretion vested in the Public Prosecutor, who is though an officer of the court is neither absolute nor unreviewable, but it is subject to the court's supervisory functions.[110] The prosecutor is as well bound to convince the court the grounds and needs for withdrawing the prosecution.

The court need not grant permission for withdrawal from the prosecution as a necessary formality - granting it for mere asking. Of course, being an executive function, it would be subject to a judicial review on certain limited grounds like any other executive action.[111] It may accord consent if and only if it is satisfied on the materials placed before it that the grant of permission is not being sought covertly with an ulterior purpose unconnected with the vindication of the law which the executive organs are in duly-bound to further and maintain.[112] Though the court has wide discretion either to grant or to withhold consent, yet it must be exercised only on sound legal principle without any arbitrariness or fancifulness.[113] There cannot be any hard and fast rule for determining the cases in which the court can accord or refuse consent.

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[108] *Rajender Kumar Jain* v. *State*, (1980) 3 SCC 435.
[109] *Id* at p.445.
[110] *State of Punjab* v. *Gurdip Singh*, 1980 CriLJ 1027 (P & H HC) at p.1029; *Shoenandan Paswan* v. *State of Bihar*, (1983) 1 SCC 438.
[111] *State of Punjab* v. *Union of India*, (1986) 4 SCC 335.
[112] *M.N. Sankaranarayanan Nair* v *P.V. Balakrishnan*, (1972) 1 SCC 318 at p.324; *Dwarka Prasad* v. *State*, 1982 CriLJ 713 (Ori HC) at p. 714.
[113] *Purshottam Vijay* v. *State*, 1982 CriLJ 243 (MP HC) at p. 251.

It must ultimately depend on the facts and circumstances of each case.[114] All that the court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law.[115]

4.16 Advocate General

The Advocate General has a significant part in the mechanism of prosecution. He is the supreme law officer of the State and the only constitutional functionary among such officers.[116] He may represent the State Government in any criminal Case in which it is a party before any court upon direction.[117] In a case where the Advocate General appears for the State and in a criminal appeal where he has been specifically empowered by the Government to appear, the Public Prosecutor has no right to be heard except through him under his instructions.[118] The functions and powers of the Advocate General and the Public Prosecutor are distinct.[119]

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[114] *State of Orissa* v. *Chandrika Mohapatra*, (1976)4 SCC 250 at p.254; In *Pijush* v. *Ramesh*, 1982 CriLJ 452 (Gau HC) at 456: The order of the court must be a speaking order which means the order must be based on sufficient reasoning so that the superior court can look into the propriety or legality of the order. Consent must be emerged from an opinion framed by the court on the grounds and circumstances that may be connected with the case. A judicial opinion must be based on some objective materials placed before the court simultaneously with the prayer for withdrawal. See also *State* v. *Mohd. Ismail*, 1981 CriLJ 1553 (Ker HC) at p.1555.

[115] *Sheonandan Paswan* v. *State of Bihar*, (1983)1 SCC 438, per Khalid, J. at p.453.

[116] *Joginder Singh Wasu* v. *State of Punjab*, (1994)1 SCC 184; *Abdul Rahiman* v. *State*, 1997(1) KLJ 640 at p.648; *P.C. Chacko* v. *State of Kerala*, 1998(1) KLJ 769 at p.795; the expression 'law officer' includes the Public Prosecutors and the Government Pleaders.

[117] The Constitution of India, Art.165 and Rule (2) of the Rules formulated by the Governor (Kerala) in pursuance of the duties under Art. 165(2) & (3); Rule (2) (iii) (vi) (vii) & (viii); see *Abdul Rahiman* v. *State*, 1997(1) KLJ 640 at pp.642 & 643.

[118] *Abdul Rahiman* v. *State*, 1997(1) KLJ 640 at p.648; *P.C. Chacko* v. *State of Kerala*, 1998(1) KLJ 769. See also *Thadi Narayanan* v. *State of Andhra Pradesh*, AIR 1960 AP 1.

[119] *Ibid*; *Subhash Chander* v. *State*, AIR 1980 SC 423: The power of withdrawal from the prosecution can be exercised by the Public Prosecutor in charge of that case alone and not by the Advocate General. (However the Rules formulated by the Governor under Art.165(2) & (3) permits him to do so subject to limitations-see Rule (2) of Part III); *State of Kerala* v. *Krishnan*, 1981 KLT 839: so long as the Advocate General or the Addl. Advocate General is not a Public Prosecutor of the High Court under s.24(1) neither of them can present an appeal to the High Court from an order of acquittal under s.378(1) if the State Government directs.

4.17 Defence counsel

Like the police and the prosecutor, the defence counsel is also a functionary with equal importance in the administration of criminal justice. Any person accused of an offence before criminal court, or against whom proceedings are instituted under the Code has the right to be defended by a pleader of his choice.[120] A pleader is one who is legally authorised to practise in any court or any other person appointed with the permission of the court to act in any proceeding.[121]

There shall be only one class of persons entitled to practice the profession of law, namely, advocates.[122] A person who entered in the roll of advocates prepared and maintained under the Advocates Act, 1961 is called an advocate.[123] Every advocate is entitled as of right to practice throughout India in all courts including the Supreme Court, before any tribunal or person legally authorised to take evidence, and before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise.[124] The advocates are the officers of the court. Nevertheless they are not in the regular employment of the State. The accused himself shall pay his advocate the fee for engaging him.[125]

The adversary system of criminal trial, which we have adopted, assumes that the State using its investigative resources and employing competent prosecutor

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[120] The Code Of Criminal Procedure, 1973, s.303.

[121] *Id*, s.2(q): " 'pleader' when used with reference to any proceeding in any court means a person authorised by or under any law for the time being in force to practice in such court and includes any other person appointed with the permission of the court to act in such proceeding.'

[122] The Advocates Act, 1961, s.29; s.33 provides: "*Advocate alone entitles to practice.*- Except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practice in any court or before any authority or person unless he is enrolled as an advocate under this Act."

[123] *Id*, s.2(a) r/w (k).

[124] *Id*, s.30 r/w s.1(2).

[125] Dr. K.N. Chandrasekharan Pillai, *op. cit.*, p.22.

would prosecute the accused, who, in turn, will employ equally competent defence counsel to challenge the evidence of the prosecution.[126] Thus the right to consult, and to be defended by a legal practitioner of his choice, is made fundamental right besides it is a statutory right.[127] But for the advocates all these rights would become meaningless and it would make the system providing for adversarial criminal trial defunct.

[126] The Expert Committee, Report on Legal Aid, p.70.
[127] The Constitution of India, Art.22(1) and the Code of Criminal Procedure, 1973, s.303.

CHAPTER 5
COURTS

The word 'court' originally meant the King's palace. Later, it has acquired two important meanings, firstly, a place where justice is administered and secondly, the person or persons who administer justice.[1] The Indian Evidence Act, 1872 is the only statute which defines the term court as such. The court, accordingly, includes all judges[2] and magistrates[3] and all persons except arbitrators legally authorised to take evidence.[4] The Indian Penal Code, 1860 expresses the idea more clearly while defining the words 'court of justice'.[5] A judge empowered by law to act judicially alone or a body of judges so empowered to act judicially as a body is denoted as a court of justice when such judge or body of judges is acting judicially.[6]

The person or persons constituting the court must be entrusted with judicial functions and powers. The judicial function means deciding litigated questions according

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[1] Halsbury's Law of England, 4th ed., Volume 11, Butterworths, 1976.

[2] The Indian Penal Code, 1860, s.19 provides: "The word 'Judge' denotes not only every person who is officially designated as a Judge, but also every person, who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which if confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such a judgment.
Illustrations
(a) A collector exercising jurisdiction in a suit under Act X of 1859, is a Judge.
(b) A Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment, with or without appeal, is a Judge.
(c) A member of a Panchayat, which has power, under Regulation VII, 1816, of the Madras Code, to try and determine suits, is a Judge.
(d) A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court, is not a Judge."

[3] The General Clauses Act, 1897, s.3 (32) provides: " 'Magistrate' shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force."

[4] The Indian Evidence Act, 1872, s.3.

[5] The Indian Penal Code, 1860, s.20.

[6] *Ibid.*

to law fairly, impartially and without arbitrariness.[7] Such proceedings before the court are normally conducted in public and in the presence of the parties concerned. The powers such as those to receive evidence, to enforce the attendance of witnesses and the production of documents and material objects before it and to pronounce judgment and carry it into effect are conferred on the court for functioning properly. Another important feature of the court is that it exercises jurisdiction over person by reason of the sanction of law and not merely by reason of voluntary submission to such jurisdiction.[8]

5.1 Territorial divisions

The entire territory of our nation is divided into as many units as necessary for the purposes of administration whether judicial or otherwise. Such a territorial division is very much expedient for the administration. The size and the number of such units vary upon the needs of the administration.

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[7] The Code of Criminal Procedure, 1973, s. 2(i) provides: " 'judicial proceeding' includes any proceeding in the course of which evidence is or may be legally taken on oath."

[8] *Mst. Dirji* v. *Smt. Goalin*, AIR 1941, Pat 65 (FB), at p. 65: "In order to be a Court the person or persons who may be said to constitute it must be entrusted with judicial functions. 'Judicial function' means the function of 'deciding litigated questions according to law'- deciding them not arbitrarily but on evidence and according to certain rules of procedure which ensure that the person, who called upon to decide them, acts with fairness and impartiality. It is often said that two of the important features of a Court are (1) that the proceedings before it are normally conducted in public and (2) that it is conducted in the presence of the parties concerned. A court can not function properly unless it is armed with certain powers such as the powers to receive evidence bearing on the matters which it is called upon to decide, the power to enforce the attendance of witnesses and the production of documents and material objects before it and 'the power to pronounce judgment and carry it into effect between the person and parties who bring a case before it for decision'. Thus a Court must not only be charged with judicial functions but must also be invested with judicial powers. Another important feature of a Court is that it exercises jurisdiction over person by reason of the sanction of the law and not merely by reason of voluntary submission to such jurisdiction. Properly speaking, the Courts are created only by the authority of the sovereign power as the fountain of justice, such authority being exercised either by Statute, Charter, Letters Patent or Order in Council. It was suggested before us on behalf of the respondent that the Indian Legislature cannot create a new Court, but the matter is now concluded by the decision of the Full Bench, in which it has been held that the Governor-General-in-Council has power to create new Courts of Justice and to limit the jurisdiction of the existing Courts. The learned Judges who decided the case cited in support of their view the decision of the Privy Council, where it was held that the Indian Legislature has powers expressly limited by the Act of the Parliament which created it, but has, when acting within those limits, plenary powers of Legislature as large and of the same nature as those of Parliament itself. Now I do not pretend that the tests I have laid down above are exhaustive, but I believe that is a tribunal satisfies all those tests, it will be difficult to hold that it is not a Court."

On the basis of such territorial units various courts are established and their local jurisdiction is determined.[9] India consists of several States and Union Territories.[10] For the purpose of administration of criminal justice every State[11] is a session division or consists of more sessions divisions than one.[12] Every Sessions division is a district or consists of several districts.[13] The State Government may divide any district into sub-divisions after consultation with the High Court.[14] It may as well alter the limits or the

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[9] See s.2(e), (j), (k), (v); s.3 & s.7.

[10] The Code of Criminal Procedure, 1973, s.2(f) provides: "'India' means territories to which this Code extends." The Code only implies the idea that India consists of Union Territories besides States (See for example, the definition "High Court" under s.2(e)). A search for full clarification leads to the Constitution and the General Clauses Act. Article (1) of the Constitution provides: "Name and territory of the Union.-
(1) India, that is Bharat, shall be a Union of States.
(2) The States and the territories thereof shall be as specified in the First Schedule.
(3) The territory of India shall comprise-
(a) the territories of the States;
(b) the Union Territories specified in the First Schedule; and
(c) such other territories as may be acquired."
Article 366(15) provides: "'Indian State' means any territory which the Government of the Dominion of India recognised as such a State"
Article 366(30) provides: "'Union territory' means any Union territory specified in the First Schedule and includes any other territory comprised within the territory of India but not specified in that Schedule."
In view of Article 367 it is useful to look into the General Clauses Act, 1897. S.3(28) provides:
" 'India' shall mean,-
(a) as respects any period before the establishment of the Dominion of India, British India together with all territories of Indian Rulers then under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, and the tribal areas;
(b) as respects any period after the establishment of the Dominion of India and before the commencement of the Constitution, all territories for the time being included in that Dominion; and
(c) as respect any period after the commencement of the Constitution, all territories for the time being comprised in the territory of India."
See also the Indian Penal Code, 1860, s.18.

[11] The General Clauses Act, 1897, s.3(58) provides:
" 'State'-
(a) as respects any period before the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean a Part A State, a Part B State or a Part C State; and
(b) as respects any period after such commencement, shall mean a State specified in the First Schedule to the Constitution and shall include a Union Territory."
S.3(62 A) provides: " 'Union territory' shall mean any Union territory specified in the First Schedule to the Constitution and shall include any other territory comprised within the territory of India but not specified in that Schedule."

[12] The Code of Criminal procedure, 1973, s.7(1).

[13] *Ibid.*

[14] *Id*, sub-sec(3).

number of such sessions divisions, districts and sub-divisions after consultation with the High Court.[15]

Every metropolitan area is a separate sessions division and district.[16] A metropolitan area is an area declared or deemed to be declared as such under the Code.[17] The Code empowers the State Governments to declare any area in the State comprising a city or town whose population[18] exceeds one million as a metropolitan area for its purpose.[19] The Code declares the Presidency-towns of Bombay, Calcutta and Madras and the city of Ahamedabad as metropolitan areas.[20] Recognising the needs of metropolitan areas the Code envisages a set-up of courts different from one devised for the other parts of State. The administration of criminal justice in large cities requires a measure of special treatment. The magistrates there ought to be better qualified and more competent to deal expeditiously with sophisticated crimes particularly in the socio-economic field, which are more common in the cities.[21]

5.2 Criminal Courts

The Code does not define the term 'criminal courts'. However, it was defined in the first and second Codes.[22] Every judge or magistrate lawfully exercising jurisdiction in criminal cases, whether for the decision of such cases in the first instance

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[15] *Id*, sub-secs.(2) and (3).
[16] *Ibid.*
[17] *Id*, s.2(k).
[18] *Id*, *Explanation*.- In this section, the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published."
[19] *Id*, s.8(1).
[20] *Id*, s.8(2).
[21] The Law Commission of India, 41st Report, p.17, para 2.11. It is to be noted that in the Presidency-towns of Bombay, Madras and Calcutta, the magisterial work was in the hands of a special category of magistrates known as the Presidency Magistrates. Usually persons appointed to these posts were having special qualifications or experience and were paid higher emoluments. The special procedure followed by those magistrates took less time. The system having been found useful, the Code has adopted a similar system for the metropolitan areas.
[22] The Code of Criminal Procedure, 1861 and the Code of Criminal Procedure, 1872.

or on appeal or for commitment to any other court or officer, constituted a criminal court as per the definition contained in the 1861 Code.[23] The definition was modified in the second Code, whereby every judge or magistrate or body of judges or magistrates inquiring into or trying any criminal case or engaged in any judicial proceeding constituted a criminal court.[24] It also explained the expression 'judicial proceeding' as any proceeding in the course of which evidence is, or may be, taken or in which any judgment, sentence or final order is passed on recorded evidence.[25] Though the present Code does not specifically define the expression criminal courts it follows the meaning of the expression as defined by the earlier Codes.

5.3 Classes of criminal courts

The Code envisages the following courts as criminal courts:

i. Supreme Court,

ii. High Court,

iii. Court of Session,

iv. Judicial Magistrates of the first class and, in any metropolitan area, Metropolitan Magistrates

v. Judicial Magistrates of the second class,

vi. Executive Magistrates, and

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[23] The Code of Criminal Procedure, 1861, s.11.

[24] The Code of Criminal Procedure, 1872, s.4.

[25] *Ibid*; The difference in the definition of the expression contained in the present Code is relevant to be noted. The Code of Criminal Procedure, 1973, s.2(i) provides: " 'judicial proceeding' includes any proceeding in the course of which evidence is or may be legally taken on oath"; *Mayne's Criminal Law of India*, 2nd ed., p.565: "any step in the lawful administration of justice in which evidence may be legally recorded for the decision of the matter in issue in the case, or of any question necessary for the decision or final disposal of such matter"; In *Queen* v. *Ghulam Ismail*, 1 All 1(FB), at p.13, Spankie, J., defined judicial proceeding as "any proceeding in the course of which evidence is or may be taken, or in which any judgment, sentence, or final order is passed on recorded evidence."; In *E. Pedda Subba Reddy* v. *State*, AIR 1969 AP 281 at 284, laid down: judicial proceeding includes any proceeding in the course of which evidence is or may be legally taken on oath. To constitute a judicial proceeding, therefore, evidence need not have necessarily been taken. It is sufficient if evidence is contemplated to be taken on oath; *Chima Singh* v. *State*, AIR 1951 MB 44: for determining the question whether an inquiry is a judicial proceeding or not one must look to (1) the object of the inquiry (2) the nature of the inquiry and (3) the powers of the person holding the inquiry has in relation thereto.

vii. The courts constituted under any law other than the Code.[26]

5.4 Supreme Court

The Constitution deals with establishment and constitution of the Supreme Court and the High Court.[27] The Supreme Court is the apex Court in the hierarchy of Courts. The law declared by it shall be binding on all Courts within India.[28] The Supreme Court consists of the Chief Justice of India and as many other Judges as Parliament may by law prescribe.[29] Every Judge of the Supreme Court shall be appointed by the President, after consultation with such Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose.[30] The Chief Justice of India shall always be consulted in the matter of appointment of a Judge other than the Chief Justice.[31] No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within India.[32]

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[26] The Code of Criminal Procedure, 1973, s.6.

[27] The Constitution of India, Arts. 124 and 214.

[28] *Id*, Art.141.

[29] The Constitution of India, Article 124(1); Originally, the total number of judges was seven as prescribed in the Article. In 1977 this was increased to seventeen in addition to the Chief Justice. In 1986 this number was again increased to twenty-five in addition to the Chief Justice by the Supreme Court (Number of Judges) Amendment Act, 1986. Thus, the total number of judges in the Supreme Court at present is twenty-six including the Chief Justice.
Article 130 provides: "The Supreme Court shall sit in Delhi or in such other place or places, as the Chief Justice of India may, with the approval of the President, from time to time, appoint."

[30] *Id*, Art.124(2). The power of the President to appoint Judges is purely formal because in this matter he acts on the advice of the Council of Ministers. There was an apprehension that Executive may bring politics in the appointment of Judges. The Indian Constitution, therefore, does not leave the appointment of Judges on the discretion of the Executive. The executive under this Article is required to consult persons who are ex-hypothesis well qualified to give appointment of Judges; see the Constituent Assembly Debate, vol. 8, p. 285; For meaning of the word 'consultation' see *Sankalchand Sheth's* case, AIR 1977 SC 2328. In Judges Transfer case (*S.P. Gupta* v. *Union of India*, AIR 1982 SC 149), the Court unanimously agreed with the meaning of the term consultation as explained by the majority in *Sankalchand Sheith's* case. The proposition that the ultimate power to appoint judges is vested in the Executive from whose dominance and subordination it was sought to be protected as laid down in S.P. Gupta's case was overruled by 7-2 majority in *Supreme Court Advocate-on-Record Association* v. *Union of India*, (1993)4 SCC 441; This historic judgment is the authority now for the proposition that in the matter of appointment of the judges of the Supreme Court and the High Courts the President is bound to act in accordance with the opinion of the Chief Justice of India who would tender his opinion on the matter after consulting his colleagues and the appointment of the Chief Justice of India shall be on the basis of seniority.

[31] *Ibid*; See also *Supreme Court-on-Record Association* v. *Union of India*, (1993)4 SCC 441.

[32] *Id*, Art. 124(6).

When the office of the Chief Justice of India is vacant or when he is unable to perform his duties by reason of absence or otherwise, the President may appoint one of the other judges of the Court as the Acting Chief Justice for performing such duties of the office.[33]

The Constitution does not provide for the minimum number of Judges to constitute a Bench for hearing cases. If at any time there is no quorum of the Judges available in the Court to hold and continue any session of the Court, the Chief Justice of India may, with the previous consent of the President and after consultation with the Chief Justice of the High Court concerned, request a Judge of the High Court to act as *ad hoc* Judge in the Supreme Court for such period as may be necessary.[34] The *ad hoc* Judge should be qualified to be appointed as a Judge of the Supreme Court.[35] The *ad hoc* Judge shall also have all the jurisdiction, powers and privileges and shall discharge all the duties of a Judge of the Supreme Court.[36] Similarly, the Chief Justice of India may at any time, with previous consent of the President, request any person who has held the office of a Judge of the Supreme Court and has held the office of a Judge of a High Court and is duly qualified for appointment as a Judge of the Supreme Court to sit and act as a Judge of the Supreme Court.[37]

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[33] *Id*, Art. 126.
[34] *Id*, Art. 127.
[35] *Ibid.*
[36] *Id*, Art. 127(2).
[37] *Id*, Art. 128. The Article provides that any person who has held the office of a Judge of the Federal Court be requested to sit and act as a Judge of the Supreme Court as well. It is not mentioned for such portion has no more any importance.

5.5 Qualification of Judges

A person to be appointed as a Judge of the Supreme Court must be a citizen of India and

a) has been for at least five years a Judge of any High Court; or

b) has been for at least ten years an Advocate of any High Court; or

c) is in the opinion of the President , a distinguished jurist.[38]

5.6 Tenure and removal of Judges

A Judge of the Supreme Court holds office until he attains the age of sixty-five years.[39] However, the age of a judge shall be determined by such authority and in such manner as Parliament may by law provide.[40] A Judge may however, resign his office by writing to the President.[41]

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[38] *Id*, Art. 124 (3); A Judge of a High Court or two or more such courts in succession for five years and an Advocate of a High Court or two or more such Courts in succession are sufficiently qualified to be appointed as Judges of the Supreme Court under Clauses (a) and (b). " Explanation I,- In this clause 'High Court' means a High Court which exercises, or which at any time before the commencement of this Constitution exercised, jurisdiction in any part of the territory of India.
Explanation II.- In computing for the purpose of this clause, the period during which a person has been an advocate, any period has held judicial office not inferior to that of a District Judge after he became an advocate shall be included."
It is to be noted that though such a jurist can be appointed the Judge of the Supreme Court, so far no such person has been so appointed. The Law Commission of India, in its 14th Report on Reform of Judicial Administration, vol. 1, pp. 36-37, deals with the position in America, where jurists or non-practising Lawyers were appointed Judges of the Supreme Court. Mr. Felix Frank Furter was appointed Judge of the Supreme Court while he was a Professor of Law at Harward University.

[39] *Id*, Art.124(2).

[40] *Id*, Art.124(2-A), this sub-Article has been inserted by the Constitution (Fifteenth Amendment) Act, 1963, s.2.

[41] *Id*, Art. 124 (2) (a). It is to be noted that under this clause it is not clear whether a resignation sent to the President becomes final immediately or it becomes effective only when accepted by the President or can it be withdrawn before it is accepted by the President. In *Union of India* v. *Gopal Chandra Mishra*, AIR 1978 SC 694, this question was considered. Although the case is based on Art. 217 relating to the resignation of a High Court Judge it applies to Art. 124 (6) in similar terms. Held, in the absence of legal, contractual or constitutional base a "prospective" resignation be withdrawn before it becomes effective when it operates to terminate the employment of the office tenure of the resignor. 'Resignation' takes place when a Judge of his own volition chooses to sever his connections with his office. If in terms of his own writing he chooses to resign from a future date, the act of resignation is not complete because it does not terminate his tenure before such date and the Judge can at time before the arrival of that prospective date on which it was intended to be effective, withdraw it, because the Constitution does not bar such withdrawal.

A Judge of the Supreme Court can be removed from his office only on grounds of proved misbehaviour or incapacity.[42] Such removal shall be done by an order of the President passed by each House of Parliament and presented to the President in the same session.[43] The order of removal must be passed after an address by each House of Parliament supported by a majority of not less than two-thirds of the members of that House present and voting.[44] No other procedure like forced resignation can be adopted for removal of a Judge.[45]

5.7 Jurisdictions and powers

The Constitution as well as the Code and certain other statutes confers several powers and jurisdiction on the Supreme Court in various matters of criminal justice. In general it exercises, original, appellate and advisory jurisdictions. Besides, it has jurisdiction to transfer certain cases.

5.8 A court of record

The Supreme Court is a court of record.[46] A court of record is one whose records are admitted to be of evidentiary value and they are not to be questioned when produced before any court. Such a court has inherent power to punish for its contempt.[47] The Supreme Court has all the powers of a court of record including the power to

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[42] *Id*, Art. 124(4).
[43] *Ibid.*
[44] *Ibid*; Art. 124(5) provides that the procedure of the presentation of an address for investigation and proof of misbehaviour or incapacity of a judge will be determined by Parliament by law. The Judges (Inquiry) Act, 1968 enacted by Parliament under Art. 124(5) and the Judges (Inquiry) Rules, 1969 made thereunder provide for removal of a Judge on the ground of proved misbehaviour or incapacity. In *K. Veeraswami* v. *Union of India*, (1991)3 SCC 655, a five judge Bench of the Supreme Court by a majority of 4 – 1, held that the expression misbehaviour includes criminal misconduct as defined in the Prevention of Corruption Act.
[45] *C. Ravi Chandran Iyer* v. *Justice A.M. Bhattacharjee*, (1995)5 SCC 457.
[46] The Constitution of India, Art.129.
[47] The Constituent Assembly Debate, vol.VIII, 882.

punish for its contempt.[48] The power to punish for the contempt of its subordinate court is also covered by this provision.[49] This power being extraordinary must be sparingly exercised only where the public interest demands.[50]

5.9 Enforcement of fundamental rights

The original jurisdiction of the Supreme Court does not extend to taking cognizance, conducting trial or to committing for trial in criminal cases. However, its writ jurisdiction has much significance in the administration of criminal justice. Issuing writs is usually come within its original jurisdiction.[51]

The right to move the Supreme Court for enforcement of the fundamental rights guaranteed by the Constitution is also made yet another fundamental right.[52] Corresponding to this fundamental right the Supreme Court is bound to issue appropriate directions or orders or writs including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* for the enforcement of any of such fundamental

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[48] *Ibid.* The Constitution does not define the expression 'contempt of court'. It is defined under the Contempt of Courts Act, 1971, an Act to define and limit the powers of certain courts in punishing contempt of courts and to regulate their procedure in relation thereto. S.2(a) provides: "'contempt of court' means civil contempt or criminal contempt."
S.2(b) provides: "'civil contempt' means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court."
S.2(c) provides: "'criminal contempt' means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which-
(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or
(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner."
See also, *Noorali Babul Thanewala* v. *K.M.M. Shetty,* AIR 1990 SC 464; *C.P. Singh* v. *State of Rajasthan,* 1993 Cri LJ 125; *Pritam Lal* v. *High Court of M.P.,* AIR 1992 SC 904; and *Dr. D.C. Saxena* v. *Chief Justice of India,* (1996)5 SCC 216.

[49] *Delhi Judicial Service Association* v. *State of Gujarat,* (1991) 4 SCC 406; See also *Mohd. Aslam* v. *Union of India,* (1994)6 SCC 442; *In re Vinay Chandra Mishra,* (1995)2 SCC 584; *DDA* v. *Skipper Construction Co.,* (1996)4 SCC 622.

[50] *Hira Lal* v. *State of U.P.,* AIR 1954 SC 743 at p. 747. See also *Delhi Judicial Service Association* v. *State of Gujarat,* (1991) 4 SCC 406.

[51] The original jurisdiction of the Supreme Court provided under Article 131 of the Constitution, does not have any bearing on criminal matters, because it relates to dispute (a) between the Government of India and one or more States; or (b) between the Government of India and any State or States on one side and one or more other States on the other; or (c) between two or more States.

[52] The Constitution of India, Art. 32. Part III of the Constitution guarantees the fundamental right.

rights.[53] This Article, according to Dr. Ambedkar, is the very soul of the Constitution and the very heart of it.[54] It is an important and integral part of the basic structure of the Constitution.[55] Parliament may by law confer on the Supreme Court power to issue directions, orders or writs including above mentioned ones for any purposes other than the enforcement of the fundamental rights.[56]

5.10 Appellate jurisdiction

The Supreme Court is the highest Court of appeal in India. The orders of the Court run throughout the country. It has elaborate appellate jurisdictions in criminal matters besides several other appellate jurisdictions.[57] In view of the limited scope of this paper the appellate jurisdiction in criminal matters alone need be considered herein. The criminal appellate jurisdiction of the Supreme Court is derived from the Constitution, the Code and certain other statutes. An appeal lies to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the following two ways:

(1) without a certificate of the High Court, and

(2) with a certificate of the High Court.[58]

5.11 Without certificate

An appeal lies to the Supreme Court without any such certificate of the High Court if the High Court:

(a) has on appeal reversed an acquittal and sentenced the accused to death;

(b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused and sentenced to death.[59]

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[53] *Id*, Art 32(2).
[54] The Constituent Assembly Debate, vol.VII, p. 953.
[55] *Fertilizer Corporation Kamgar (Union)* v. *Union of India*, (1981)1 SCC 568. The basic structure doctrine was evolved by the Supreme Court in *Kesavanand Bharati* v. *State of Kerala*, AIR 1973 SC 1461.
[56] The Constitution of India, Art. 129.
[57] The appellate jurisdiction of the Supreme Court extends to constitutional matters, civil matters and special leave to appeal as well.
[58] The Constitution of India, Arts. 132, 134 & 134A.
[59] *Id*, Art. 134 (a)(b).

5.12 With certificate

An appeal lies to the Supreme Court if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution.[60] The High Court grants such a certificate only when the appeal is sought to be preferred against a judgment, final order or a sentence in a criminal proceeding of the High Court.[61] The power of the High Court to grant fitness certificate in criminal cases is discretionary, but judicial. It must thus be exercised judicially along the well established lines which governs these matters.[62] Where such a certificate is granted the ground of appeal to the Supreme Court will be that such question has been wrongly decided.[63]

The Supreme Court is not constituted as a general court of criminal appeal under this provision. It entertains appeals from the High Courts only on certain settled principles. The provision confers on the Court only a limited criminal appellate jurisdiction. As a court of criminal appeal it exercises this jurisdiction only in exceptional cases where the demand of justice requires interference by the highest court of the land.[64]

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[60] *Id*, Arts.132(1), 134(1) (c) and 134 A.

[61] *Id*, Art.133 r/w Art.132. The Explanation to Art 132 provides that the expression 'final order' includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case. The Proviso to Art.134(1) reads that an appeal under sub-cl. (c) shall lie subject to such provisions as may be made in that behalf under cl. (1) of Art. 145 and to such conditions as the High Court may establish or require.

[62] *Nar Singh* v. *State of U.P.*, AIR 1954 SC 457. See also *Sidheshwar Ganguly* v. *State of W.B.*, AIR 1958 SC 143; *Uma Narain* v. *K. Karson*, AIR 1971 SC 759; *State of U.P.* v. *Raj Nath*, AIR 1983 SC 187.

[63] The Constitution of India, Art.132(3).

[64] *Id*, Art.134(1)(c). The Constitution 44th Amendment has amended Article 132, 133 and 135 and inserted a new Article 134-A for regulating the grant of the certificate for appeal to the Supreme Court by the High Courts. The object of this new provision is to avoid delay in cases going to the Supreme Court in appeal from the judgment, decree, final order or sentence of the High Court. Article 134-A provides:
"Every High Court, passing or making a judgment, decree, final order or sentence, referred to in clause (1) of Article 132 or 134-
(a) may, if it deems fit so to do, own motion, and
(b) shall if an oral application is made, by or on behalf of the party aggrieved, immediately after the passing or making of such judgment, decree, final order or sentence, determine as soon as may be after such passing or making, the question whether certificate of the nature referred to in clause (1) of Article 132, 133 or sub- clause (e) of clause (1) of Article 134, may be given in respect of that case."

5.13 Enlargement of criminal appellate jurisdiction

The Constitution empowers Parliament to extend the appellate jurisdiction of the Supreme Court in criminal matters.[65] By virtue of this power Parliament has enacted the Supreme Court Enlargement of Criminal Appellate Jurisdiction Act, 1970. It enables to prefer appeal to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India, without prejudice to the powers conferred on the Supreme Court by clause (1) of Article 134 of the Constitution, if the High Court-

a) has on appeal reversed an order of acquittal of an accused person and sentenced the accused to imprisonment for life or to imprisonment for a period not less than ten years;

b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused and sentenced him to imprisonment for a period not less than ten years.[66]

5.14 Appeal by special leave

The Supreme Court may grant in its discretion special leave to appeal from any judgment, decree, determination, sentence or order, in any case or matter, passed or made by any court or tribunal in the territory of India.[67] The only exception to this

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[65] *Id*, Art.134(2).

[66] The Supreme Court Enlargement of Criminal Appellate Jurisdiction Act, 1970, s.2. Thus under clause (2) of the Act an accused, who has been convicted for an offence under section 302 r/w. 34 of the I.P.C. can prefer appeal to the Supreme Court as a matter of right. But in appeal by special leave under Article 136 the Supreme Court does not undertake to reappreciate evidence. However in a situation where the Sessions Judge regards the entire prosecution evidence as unworthy of belief but the High Court implicitly relies on almost the entire evidence, the Supreme Court would be bound to examine the evidence for the purpose of ascertaining whether there has been any such error of law or fact as to vitiate the findings in the impugned judgment. See also *Muthu Naiker* v. *State of T.N.*, AIR 1978 SC 647.

[67] The Constitution of India, Art.136. Articles 132 to 135 deal with ordinary appeals to the Supreme Court in cases where the needs of justice demand interference by the highest court of the land.

power of the Supreme Court is with regard to any judgment, etc. of any court or tribunal constituted by or under any law relating to the Armed Forces.[68]

This power is very wide and is in the nature of a special residuary one, which is exercisable outside the purview of the ordinary law. The Supreme Court has a plenary jurisdiction in entertaining appeals by granting special leave in such matters. The exercise of this power is left entirely to the discretion of the Court unfettered by any restrictions. This power cannot be curtailed by any legislation short of amending the Articles itself.[69]

The power of the Supreme Court to grant special leave to appeal has more frequently been invoked in criminal appeals. The court grants special leave to appeal only when it is shown that special and exceptional circumstances exist, or it is established that grave injustice has been done and that the case in question is sufficiently important to warrant a review of the decision by the Supreme Court.[70]

5.15 Appellate jurisdiction under the Code

Any person convicted on a trial held by a High Court in its extraordinary original jurisdiction may appeal to the Supreme Court.[71] However there shall be no appeal by a convicted person where the High Court passes only a sentence of

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[68] *Id*, Art. 136(2).

[69] The power of the Supreme Court under Art. 136 is not fettered with any of the limitations contained in Arts 132 to 135. Under Arts. 132 to 135 appeal can be entertained by the Supreme Court only against a 'final order', but under Art. 136, the word 'order' is not qualified by the adjective 'final' and hence the court can grant special leave to appeal even from interlocutory order. Under Arts. 132 to 134 appeals lie only against such orders of the High Court; while under Art. 136 the Supreme Court can grant special leave for appeal from "any court," including any subordinate court even without following the usual procedure of filing appeal in the High Court or even where the law applicable to the dispute does not make provision for such an appeal. See also Basu, D.D., *An Introduction to the Constitution of India*, p. 233.

[70] *Haripada Dey* v. *State of W.B.*, AIR 1956 SC 757; *Matru* v. *State of U.P.*, AIR 1971 SC 1050; *Subedar* v. *State of U.P.*, AIR 1971 SC 125; *Delhi Judicial Service Association* v. *State of Gujarat*, (1991) 4 SCC 406.

[71] The Code of Criminal Procedure, 1973, s. 374(1); The Law Commission of India, 41st Report on the Code of Criminal Procedure, 1898, p.259 para 31.10: Since such trials are extremely rare appeals should lie direct to the Supreme Court and not to another bench of the same High Court, in the interests of finality to the proceedings. Such appeals lie on fact as well as law. However, there is no appeal in the event of an appeal. If the State wishes to appeal from an acquittal by a High Court, it will have to seek leave to appeal under Article 136 of the Constitution.

imprisonment for a term not exceeding six months or of fine not exceeding one thousand rupees, or of both such imprisonment and fine.[72] An appeal may be brought even against such a sentence if any other punishment is combined with it.[73] Where the High Court has, on appeal reversed an order of acquittal of an accused and convicted and sentenced him to death or to imprisonment for life or to imprisonment for a term of ten years or more, he may appeal to the Supreme Court.[74] Thus the appeals under the Code can be preferred to the Supreme Court as of right by such an accused.[75] However, there shall be no such appeal if the accused has been convicted on a plea of guilty.[76]

5.16 High Court

Every State and every Union Territory has a High Court.[77] However, Parliament can establish by law a common High Court for two or more States or for two or more States and a Union Territory.[78] The High Court is the highest court in the hierarchy of courts in such State or Union Territory. The law declared by it shall be binding on all courts subordinate to it.[79]

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[72] The Code of Criminal Procedure, s.376(a).

[73] *Ibid*, But such sentence shall not be appealable merely on the ground-
(i) that a person convicted is ordered to furnish security to keep the peace; or (ii) that a direction for imprisonment in default of payment of fine is included in the sentence; or (iii) that more than one sentence of fine is passed in the case, if the total amount of the fine imposed does not exceed the amount herein before specified in respect of the case.

[74] *Id*, s.379.

[75] *Chandra Mohan Tiwari* v. *State of M.P.*, (1992)2 SCC 105 at pp. 113-114.

[76] The Code of Criminal Procedure, 1973, s.375.

[77] The Constitution of India, Art.214. The Code of Criminal Procedure, 1973, s.2(e) provides: "High Court" means-
(i) in relation to any State, the High Court for that State;
(ii) in relation to a Union territory, to which the jurisdiction of the High Court for a State has been extended by law, that High Court;
(iii) in relation to any other Union territory, the highest court of criminal appeal for that territory other than the Supreme Court of India."

[78] *Id*, Art. 231(1).

[79] There is no specific Article in the Constitution in this regard. The common law practice of the doctrine of precedent as adopted by the Indian legal system by virtue of Article 372 read with Article 366 (10) envisages the same. See M.C. Setalvad, The Common Law in India, The Hamlyn Lectures, 12th series, 1960, pp 3 & 45; *Director of R. & D.* v. *Corporation of Calcutta*, AIR 1960 SC 1355 at p.1360; *P.Ramaswami* v. *Chandra Kottayya*, AIR 1925 Mad 261 at p. 262; V.N. Sankarjee, "Authority of High Court Decisions as Judicial Precedents", AIR 1996 Journal 157-159.

Every High Court consists of a Chief Justice and such other Judges as the President may from time to time determine.[80] The Constitution does not fix any maximum number of Judges of a High Court. The Judges are appointed by the President. The President appoints the Chief Justice of a High Court after consultation with the Chief Justice of India and the Governor of the State concerned.[81] In case of appointment of a Judge other than the Chief Justice he may consult even the Chief Justice of the High Court concerned.[82]

The President may appoint one of the Judges of the High court as Acting Chief Justice, when the office of the Chief Justice falls vacant or he is unable to perform his duties by reason of absence or otherwise.[83] The President may appoint duly qualified persons to be additional judges of the court for a temporary period not exceeding two years, in order to clear off the arrears of work in High Court.[84] The President may also appoint an acting Judge when any Judge of a High Court other than Chief Justice is unable to perform his duties by reason of absence or for any other reason, or is appointed to act temporarily as Chief Justice. An acting Judge is to hold office until the permanent Judge resumes his duties.[85] Moreover, the Chief Justice of a High Court may at any time, with the previous permission of the President request retired Judges of the High Court to sit and act as Judges of the High Court.[86] In actual practice, the appointment of judges are, however, made by the President on the advice of the Council of Ministers. The President may after consultation with the Chief Justice of India

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[80] *Id*, Art. 216.
[81] *Id*, Art. 217;
[82] See Judge's Transfer case, AIR 1982 SC 149.
[83] *Id*, 223.
[84] *Id*, Art. 224(1).
[85] *Id*, Art. 224 (2).
[86] *Id*, Art.224 A

transfer a Judge form one High Court to any other High Court.[87] A person who has held office as a permanent Judge of a High Court shall not plead or act in any court or before any authority in India except the Supreme Court and other High Courts.[88] This prohibition is necessary to preserve independence of judiciary.

5.17 Qualification of Judges

Any person who is a citizen of India and has for at least ten years held a judicial office in India, or has for at least ten years been an advocate of a high Court or of two or more such courts in succession may be appointed as a Judge of the High Court.[89] The independence, efficiency and integrity of the judiciary can only be maintained by selecting the best persons in accordance with the procedure provided under the Constitution.[90]

5.18 Tenure and removal of Judges

A Judge of the High Court shall hold office until he attains the age of sixty-two years.[91] If a question arises as to the age of a Judge of a High Court, then it shall be

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[87] *Id*, Art.222(1). Clause (2) makes provisions for the grant of compensatory allowances to a Judge who goes on transfer to another High Court. See *Union of India* v. *Sankalchand*, AIR 1977 SC 2328; *S.P. Gupta and anr.* v. *President of India and Ors.*, AIR 1982 SC 149, (Judges Transfer Case).

[88] The Constitution of India, Art.220. the expression "High Court" does not include a High Court for a State specified in Part B of the First Schedule as it existed before the commencement of the Constitution (Seventh Amendment) Act, 1956.

[89] *Id*, Art.217(2). It further provides: "*Explanation.*- For purpose of this clause
(a) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate of a High Court or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special Knowledge of law;
(aa) in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate;
(b) in computing the period during which a person has held judicial office in the territory of India or been an advocate of a High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before the fifteenth day of August, 1947, within India as defined by the Government of India Act, 1935, or has been an advocate of any High Court in any such area, as the case may be."

[90] *Shri Kumar Padma Prasad* v. *Union of India*, (1992)2 SCC 428.

[91] Art.217(1).

decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.[92] A Judge may, however, be removed from the office by the President in the same manner and on the same grounds as a Judge of the Supreme Court. The office of a Judge falls vacant by his being appointed by the President to be Judge of the Supreme Court or being transferred to any other High Court. A Judge may also resign his office by writing to the President.[93]

5.19 Jurisdiction of the High Court

The High Court has original, appellate, revisional, supervisory and disciplinary jurisdictions. Besides it has jurisdiction to answer the references made to it by its subordinate courts, and to transfer certain cases pending in its subordinate courts. The Constitution as well as the Code and certain other statutes confers these powers on the High Court.

5.20 Court of record

Every High Court is a court of record and shall has all the powers of such a court including the power to punish for its contempt.[94] The scope and nature of the power of the High Court under this Article is similar to that in respect of the Supreme Court.

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[92] Art. 217 (3).
[93] Art. 220.
[94] Art.215. {Subject to the provisions of the Constitution and to the provisions of any law of the appropriate Legislature (a) the jurisdiction of the High Court, (b) the law administered in the existing High Court, (c) the powers of the judges in relation to the administration of justice in the the courts, (d) the power to make rule of the High Court shall be the same as immediately before the commencement of this Constitution. Thus the pre-constitutional jurisdiction of the High Court is preserved by the Constitution. In pre-constitutional period the decision of the Privy Council were binding on all the High Courts unless it is reversed by the Supreme Court or by a law of the appropriate Legislature. The jurisdiction and powers of the High Courts can thus be changed by both the Union and State Legislatures.

5.21 Power of superintendence over all courts by the High Court

Every High Court has the power of superintendence over all courts and tribunals throughout the territory in relation to which it exercises jurisdiction. For this purpose, the High Court may call returns from them make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts and prescribe forms in which books, entries and accounts are to be kept by the officers of such courts, and settle table of fees to be given to the sheriff, clerks, attorneys, advocates and pleaders. However this power of superintendence of High Court does not extend over any court or tribunal constituted by law relating to the Armed Forces.

The power of superintendence conferred on the High Court by this Article is a very wide power. This power is wider than the power conferred on the High Court to control inferior courts through writs under Article 226. It is not confined to administrative superintendence, but also judicial superintendence over all subordinate courts within its jurisdiction.[95] This power of superintendence conferred on the High Court being extraordinary to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts, within the bounce of their authority and not for correcting mere error of facts, however, erroneous those may be.[96]

5.22 Original jurisdiction

The High Court gets original jurisdiction by virtue of the Code as well as the Constitution. It may try any offence defined and punishable under the Indian Penal

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[95] *Warayam Singh* v. *Amarnath*, AIR 1954 SC 215; *Hari Vishnu* v. *Ahamad Sidhique*, AIR 1935 233; *Babhutmal* v. *Laxmi*, AIR 1975 SC 1297.

[96] *Warayam Singh* v. *Amarnath*, AIR 1954 SC 321 (?); See also *Santhosh* v. *Mool Singh*, AIR 1958 SC 321; *Chandavarkar, S.R.Rao* v. *Asha Latha S. Guram*, (1986) 4 SCC 447; *D.N. Banerji* v. *P.R. Mukherji*, AIR 1953 SC 58; *In Re, Annamali Mudaliar*, AIR 1953 Mad 262; *Dhian Singh* v. *Deputy Secretary*, AIR 1960 Punj 41; *Gujarat Steel Tubes Ltd.*, v. *Its Mazdoor Sabha*, AIR 1980 SC 1897.

Code.[97] It may also try any offence under any other law when no court is mentioned in this behalf in such law.[98] It may pass any sentence authorised by law as well.[99]

Though the High Court has power to try any offence, in practice, it does not conduct any trial, nor does the First Schedule indicate any offence as being triable by it. However, on certain rare occasions, after considering the importance and widespread ramifications of a case, it may decide to try the case itself either at the instance of the Government or on its own initiative. The procedure to be observed in such a trial shall, according to s.474, be the same as would be followed by a court of session trying similar case. [100]

5.23 Appellate jurisdiction

The High Court has a three-fold appellate jurisdiction. It extends to appeals against conviction, sentence and acquittal.

5.24 Appeal against conviction

Any person convicted on a trial held by a Sessions Judge or Additional Sessions Judge may appeal to the High Court.[101] Similarly, any person convicted on a trial held by any other court in which a sentence of imprisonment for more than seven years has been passed against him or against any other person convicted at the same trial may also appeal to the High Court.[102] Where an accused has been convicted on his plea of guilty no such appeal lies to the High Court except as to the extent of legality of

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[97] The Code of Criminal Procedure, 1973, s.26(a).
[98] *Id*, s.26(b).
[99] *Id*, s.28.
[100] Dr. K.N. Chandrasekharan Pillai, 'R.V. Kelkar's Criminal Procedure', 3rd edn, 1998, p.361.
[101] The Code of Criminal Procedure, 1973, s.374(2).
[102] *Ibid.*

the sentence.[103] Again, where a Court of Session passes only a sentence of imprisonment for a term not exceeding three months, or of fine not exceeding two hundred rupees, or of both such imprisonment and fine, no appeal lies.[104]

5.25 Appeal against sentence

An appeal lies to the High Court against the sentence on the ground of its inadequacy in any case of conviction on a trial held by any court other than a High Court.[105] Only the Government is competent to prefer an appeal against sentence.[106] If such conviction is in a case in which the offence has been investigated by the Delhi Special Police Establishment, or by any other agency empowered to make investigation into an offence under any Central Act other than the Code, only the Central Government is competent to prefer such an appeal to the High Court.[107] In such an appeal the High Court may enhance the sentence after affording the accused a reasonable opportunity of showing cause against such enhancement.[108] The accused may as well plead for his acquittal or for reduction of the sentence while showing cause.[109]

5.26 Appeal against acquittal

An appeal against acquittal has to be preferred with leave of that court.[110] No other court has such an appellate jurisdiction. Only the Government is competent to

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[103] *Id*, s.375(b).
[104] *Id*, s.376(b).
[105] *Id*, s.377(1).
[106] *Ibid*, it provides that the State Government may direct the Public Prosecutor to present an appeal to the High Court against the sentence on the ground of its inadequacy.
[107] Ild, sub-sec.(2); Delhi Special Police Establishment Act, 1946 (25 of 1946). Here also the Central Government has to direct the Public Prosecutor to present an appeal to the High Court against the sentence on the ground of its inadequacy.
[108] *Id*, sub-sec.(3).
[109] *Ibid*, Joint Committee Report, p.xxvi: An appeal for enhancement of sentence can be entertained only by the High Court. This is because the punishment awarded by the competent court should not be disturbed except by the highest court in the State. Further, certain uniform standards have to be adopted in this regard and this can be secured only if the power is exercised by the High Court.
[110] *Id*, s.378(1)(2) and (3).

prefer the appeal against acquittal in all cases involving public prosecution.[111] Such an appeal lies from an original or appellate order of acquittal passed by any court other than a High Court or from an order of acquittal passed by a Court of Session in revision.[112] The State Government has to prefer such an appeal in almost all cases. If the acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment or by any other agency empowered to make investigation under any Central Act other than the Code, the Central Government has to prefer the appeal against acquittal before the High Court.[113] If the acquittal is passed in any case instituted upon complaint, the complainant may prefer appeal to the high Court with the special leave of that court.[114]

5.27 Power of the High Court exercising Appellate jurisdiction

As in the case of every other appellate court the High Court also has certain powers in appeal against conviction. Thus it can summarily dismiss an appeal for lack of sufficient ground for interfering.[115] On the other hand if there is sufficient ground for interfering it may (i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retried by the subordinate court having jurisdiction, or, (ii) alter the finding maintaining the sentence, or, (iii) with or without altering the finding,

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[111] See *State of M.P.* v. *Dewadas*, (1982)1 SCC 552.

[112] *Id*, s.378(1); see also *Khemraj* v. *State of M.P.*, (1976)1 SCC 385; *State of Maharashtra* v. *Vithal Rao Pritrao Chawan*, (1981)4 SCC 129.

[113] *Id*, sub-sec. (2).

[114] *Id*, sub-sec. (4); sub-sec. (5) provides that no application for the grant of special leave to appeal from an order of acquittal shall be entertained after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of acquittal. Sub-sec. (6) provides that no appeal from acquittal shall lie unless the special leave is granted. Article 114 of the Limitation Act, 1963 provides that in an appeal against acquittal by the State the period of limitation is ninety days from the date of the order appealed from, and in an appeal against acquittal in any case instituted upon complaint, the period is thirty days from the date of the grant of special leave.

[115] *Id*, s.384(1).

alter the nature or the extent, or the nature and extend, of the sentence but not so as to enhance the same.[116]

In an appeal against acquittal the High Court may reverse such order and direct that further inquiry be made or that the accused be retried or committed for trial as the case may be, or find him guilty and pass sentence on him according to law after examining the records.[117] In an appeal for enhancement of sentence, the High Court may-

1. Reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a court competent to try the offence, or
2. Alter the finding, maintaining the sentence, or
3. With or without altering the finding alter the nature or the extent, or the nature and extent of the sentence so as to enhance or reduce the same.[118]

The High Court may make any amendment or any consequential or incidental order that may be just and proper.[119] The sentence shall not be enhanced without affording the accused an opportunity of showing cause against such enhancement. Moreover, it shall not inflict greater punishment than might have been inflicted for the offence by court passing the order or sentence under appeal.[120] In dealing with any appeal the High Court may take additional evidence itself or direct it to be taken by a court of session or a magistrate if it thinks necessary after recording its reasons.[121] When the additional evidence is taken by the Court of Session or the

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[116] *Id*, s.386(b).
[117] *Id*, s.386 r/w s.385(2).
[118] *Id*, s.386(c).
[119] *Id*, s.386(e).
[120] *Ibid.*
[121] *Id*, s.391(1).

magistrate, it or he shall certify such evidence to the High Court which shall thereupon proceed to dispose of the appeal.

5.28 Finality of the appellate judgment

Generally, the judgment and orders by an appellate court upon an appeal shall be final. However this general principle does not preclude an appeal for enhancement of sentence or an appeal against acquittal, or an appeal preferred by an appellant who is in jail and dismissed summarily, or for the purpose of reference under revision.[122]

5.29 Revisional jurisdiction

The High Court exercises its revisional jurisdiction for examining the correctness, legality or propriety of any finding, sentence or order recorded or passed by, or the regularity of any proceeding of any inferior court situate within its local jurisdiction.[123] The High Court may call for the records of the inferior court in this regard.[124]

The High Court may direct further inquiry into any complaint which has been dismissed or into any case in which the accused has been discharged, while exercising the power of revision.[125] An order discharging the accused shall not be revised without affording the person discharged an opportunity of being heard.[126] As a revisional court the High Court may in its discretion exercise those powers conferred on it as a court of appeal.[127]

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[122] *Id*, s.393.
[123] *Id*, s.397(1).
[124] *Ibid.*
[125] *Id*, s.398; The dismissal of complaint means those under s.203 or sub-sec.(4) of s.204 of the Code.
[126] *Ibid.*
[127] *Id*, s.401; The powers conferred on a court of appeal mean those provided for under ss.386, 389, 390 and 391.

Concurrent revisional jurisdiction is conferred on the High Court and the Court of Session. Whenever two or more revision petitions are preferred against an order of conviction passed at the same trial, to the High Court and the Court of Sessions by different accused convicted at the same trial the High Court shall decide, having regard to general convenience of the parties and the importance of the questions involved, which of the two courts should finally dispose of the application for the revision.[128] The High Court may decide all the applications for revision should be disposed of by itself and direct the Court of Session to transfer the application for revision pending before it to itself.[129] The High Court may also decide that it is not necessary for it to dispose of the application for revision and direct that the applications for revision made to it be transferred to the Court of Session.[130] On such transfer of applications for revision the High Court or the Court of Session as the case may be shall deal with the same as if it were an application duly made before itself.[131]

5.30 Supervisory jurisdiction

The Constitution as well as the Code confers on the High Court certain supervisory jurisdiction to be exercised over its subordinate courts. Every High Court has superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.[132] It may call for returns from such courts, make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts and prescribe forms in which books, entries and accounts shall be kept by

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[128] *Id*, s.402.
[129] *Ibid.*
[130] *Ibid.*
[131] *Id*, sub-sec.(2) & (3).
[132] The Constitution of India, Art.227(1).

the officers of any such courts.[133] It may also settle tables of fees allowed to the Sheriff and all clerks and officers of such court and to attorneys, advocates and pleaders practicing therein.[134] This power of superintendence does not extend to any court or tribunal constituted by or under any law relating to armed forces.

By issuing writ of *certiorari* and prohibition the High Court can exercise supervisory jurisdiction over its subordinate courts.[135]

5.31 Inherent power

The High Court has inherent power to make such orders as may be necessary to give effect to any order under the Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice.[136] This power cannot be invoked in respect of any matter covered by the specific provisions of the Code. Invoking this power shall never be inconsistent with any specific provision of the Code.[137] The inherent power has to be exercised sparingly, carefully and with caution and only where such exercise is justified by the test specifically laid down in the section itself.[138]

The inherent power of the High Court has a great role in the administration of criminal justice. In cases where the High Court is satisfied that the institution or continuance of any criminal proceedings against any accused is only an abuse of

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[133] *Id*, Art.227(2).
[134] *Id*, Art.227(3).
[135] *Id*, Art.226.
[136] The Code of Criminal Procedure, s.482.
[137] *Simrikhia* v. *Smt. Dolley Mukherjee*, (1990)2 SCC 437.
[138] *Talab Haji Hussain* v. *Madhukar Purshottam Mondkar*, AIR 1958 SC 376; *State of U.P.* v. *Mohammad Naim*, AIR 1964 SC 703; *Raghubir Saran* v. *State of Bihar*, 1964 SC 1; *Raj Kapoor* v. *State (Delhi Admn.), (1980)1 SCC 43; Municipal Corporation of Delhi* v. *Ram Kishan Rohtaji*, (1983)1 SCC 1; *S.K. Viswambaran* v. *Koyakunju*, (1987)2 SCC 109; *State of Bihar* v. *Murad Ali Khan*, (1988)4 SCC 655; *State of Maharashtra* v. *Ram Narayan Patel*, 1991 Supp (2) SCC 704; *C.K.P. Assankutty* v. *State*, 1990 Cri LJ 362 (Ker HC).

process of court. It may quash the proceedings invoking the inherent power.[139] And, in cases where if it is satisfied that quashing of the impugned proceedings would secure the ends of justice the High Court may do so.[140] Where any criminal proceeding is instituted and continued in violation or in ignorance of any express legal bar such as absence of requisite sanction, etc. the High Court can quash the proceedings. In certain other cases even if the allegations in the first information report or in the complaint are taken at their face value and accepted in their entirety do not constitute the offence alleged. The High Court can very well quash the proceedings because in such cases no question of appreciating evidence arises and it would be manifestly unjust to allow the criminal process continued against the accused. Though the allegations in the first information report or in the complaint do constitute the offence alleged yet there is no legal evidence adduced in support of the case or evidence adduced clearly or manifestly inconsistent with the accusation, the High Court may quash the proceedings.[141]

5.32 Superintendence over Court of Judicial Magistrates

The High Court is duly bound to exercise its superintendence over all courts of Judicial Magistrates subordinate to it as to ensure that there is an expeditious and proper disposal of cases by such Magistrates.[142]

5.33 Jurisdiction to transfer cases

The High Court may suitably transfer certain cases pending before any courts subordinate to it, if it is satisfied that

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[139] *R.P. Kapur* v. *State of Punjab*, AIR 1960 SC 866.
[140] *Ibid;* see also V.N. Sankarjee, 'Compounding of offences', 2000 (2) KLJ (Jour) 13.
[141] *Madhu Limaye* v. *State of Maharashtra*, (1977) 4 SCC 551.
[142] The Code of Criminal Procedure, s.483.

I. a fair and impartial inquiry or trial cannot be had in any criminal court subordinate to it, or

II. some question of law of unusual difficulty is likely to arise, or

III. an order to transfer cases is required by any provision of the Code, or will tend to the general convenience of the parties or witnesses or is expedient for the ends of justice.[143] The High Court may so transfer cases either on the report of the lower court or on the application of a party interested or on its own initiative. Where both the criminal courts from which and to which the case is to be transferred, situate in the same session division the High Court can entertain an application for transfer if and only if an application for such transfer has been made to the Sessions Judge and rejected by him.

5.34 Power in bail matters

The High Court may in its discretion direct that any person accused of offence including non-bailable ones and in custody be released on bail.[144] It may impose any condition which it considers necessary when certain offences are involved.[145] The High Court may also set aside or modify any condition imposed by a magistrate while

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[143] *Id*, s.407(1); The section further provides as to the particulars of the cases to be transferred and the courts from and to which such cases and appeals be transferred as follows: "(1) that any offence be inquired into or tried by any court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence; (2) that any particular case or appeal or class of cases or appeals be transferred from a criminal court subordinate to its authority to any other such criminal court of superior jurisdiction; (3) that any particular case be committed for trial to a court of session; or (4) that any particular case or appeal be transferred to and tried before itself.

[144] *Id*, s.439(1)(a).

[145] *Ibid*; Here as to the particulars of offences and conditions to be imposed a reference is made to s.437(3). It provides: "When a person accused or suspected with imprisonment which may extend to seven years or more or of an offence, under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abetment of or conspiracy or attempt to commit any such offence s released on bail under sub-sec.(1), the court may impose any condition which the court considers necessary-
(a) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or
(b) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or
(c) otherwise in the interest of justice.

releasing any person on bail.[146] It may also direct that any person who has been released on bail be arrested and commit him to custody.[147]

5.35 Anticipatory bail

The High Court may, upon application made by any person apprehending arrest on an accusation of having committed a non-bailable offence, direct that in the event of such arrest, he shall be released on bail.[148] It may include such condition in such direction as it may think fit considering the factual situation of each case.[149] If such person is thereafter arrested without warrant on such accusation, and is prepared either at the time of arrest or at any time while in the custody, he shall be released on bail.[150]

5.36 Reference

The high Court is empowered to answer any reference made by any court subordinate to it.[151] Such a reference is made when certain situations exist and for certain specific reasons. The court making the reference must satisfy that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation, or

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[146] *Id*, s.439(1)(b). The proviso to the sub-section provides that before granting bail to person who is accused of an offence which is triable exclusively by the court of session or which though not so triable is triable, is punishable with imprisonment for life, the High Court has to give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

[147] *Id*, s.439(2); see also *Mohan Singh* v. *Union Territory*, AIR 1978 SC 1095; *Delhi Admn.* v. *Sanjay Gandhi*, AIR 1978 SC 1961.

[148] *Id*, s.438(1); see *Bhagirathi Mahapatra* v. *State*, (1975)41 CriLJ 619.

[149] *Id*, s.438(2); It can so impose conditions including-
(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;
(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer;
(iii) a condition that the person shall not leave India without the previous permission of the court;
(iv) such other condition as may be imposed under sub-section (3) of sec.447, as if the bail were granted under that section.

[150] *Id*, s.438(3).

[151] *Id*, s.396.

any provision contained in an Act, Ordinance or Regulation.[152] The determination of the question must be necessary for the determination of that case.[153] The court making the reference must be of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which it is subordinate or by the Supreme Court. If all the situations exist, the court shall state a case setting out its opinion and reasons thereof and refer the same to the decision of the High Court.[154]

A similar reference may be made to the High Court for determining any question of law arising in a case pending before the court making the reference. However, scope of this provision is narrower and only a court of session or a Metropolitan Magistrate can make such a reference to the High Court.[155]

The High Court shall pass such orders as it thinks fit on the reference made to it and send a copy of such order to the court which made the reference to dispose of the case in conformity with the order.[156]

5.37 Disciplinary jurisdiction

The High Court has disciplinary jurisdiction over all courts subordinate to it under Article 235. The Government has no jurisdiction to take disciplinary action against

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[152] *Id*, s.395(1).
[153] *Ibid.*
[154] *Ibid*; "*Explanation.*- In this section, "Regulation" means any regulation as defined in the General Clauses Act, 1897 (10 of 1897), or in the General Clauses Act of a State." The General Clauses Act, 1897, s.3(50) provides: " 'Regulation' shall mean a regulation made by the President under Art.240 of the Constitution and shall include a regulation made by the President under Art.243 thereof and a regulation made by the Central Government under the Government of India Act, 1870, or the Government of India Act, 1915, or the Government of India Act, 1935."
[155] *Id*, s.395(2).
[156] *Id*, s.396.

any judge or such other presiding officer of a subordinate court.[157] Rather the High Court alone is competent to exercise disciplinary power against a judge of the inferior court. Any recommendation of the High Court to this effect shall be binding on the State Government.[158] Similarly, the transfer of judges and presiding officers of the subordinate courts is within the power of the High Court and the Government has no power in this matter.[159] However, the power of the High Court shall not extend to tribunals.

5.38 Writ jurisdiction

The High Court may issue any directions, orders or writs including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari* or any of them for enforcement of fundamental rights or for any other purpose.[160] This power can be exercised against any person or authority including the Government within the territories in relation to which the High Court exercises jurisdiction.[161] The High Court may issue this power notwithstanding the power of the Supreme Court to issue writs for enforcement of the fundamental rights.[162] Not withstanding anything in Article 32 every High Court shall have power, throughout the territories in relation to which it exercise its jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *Habeas Corpus*, *Mandamus*, Prohibition, *Quo-Warranto*

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[157] *State of W.B.* v. *Nripendra Nath Bagchee*, AIR 1966 SC 447.
[158] *State of Haryana* v. *Inder Parekh*, AIR 1976 SC 1841.
[159] Article 235, *State of Assam* v. *Ranga Mohammed*, AIR 1967 SC 907.
[160] The Constitution of India, Art.226(1).
[161] *Ibid.*
[162] *Ibid. Assistant Collector, Central Excise* v. *J.H. Industries*, AIR 1979 SC 1889: The High Court should be careful to be extremely circumspect in granting these reliefs especially during the pendency of criminal investigations. The investigation of a criminal case is a very sensitive phase where the investigating authority has to collect evidence from all odd corners and anything that is likely to thwart its course may inhibit the interest of justice.

and *Certiorari* or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.[163]

This power shall not be in derogation of the powers conferred on the Supreme Court by Clause (2) of Article 32.[164]

5.39 Court of Session

For every Sessions division the State shall establish a Court of Session which shall be presided over by a Judge appointed by the High Court.[165] The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session.[166] The Additional Sessions Judge or the Assistant Sessions Judge exercises the powers of a Court of Session and his judgments and orders are considered as those of the Court of Session.[167] All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose court they exercise jurisdiction.[168]

Where the office of the Sessions Judge is vacant, the High Court may make arrangements for disposal of any urgent application which is, or may be, made or pending before such court by the Additional or Assistant Sessions Judge in the sessions division. If there is no Additional or Assistant Sessions Judge the High Court may

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[163] Article 226 (1).
[164] Article 226 (4).
[165] The Code of Criminal Procedure, 1973 s.9 (1) & (2). The explanation to the section provides that the term 'appointment' does not include the first appointment, posting or promotion of a person by the Government to any service, or post in connection with the affairs of the Union or of, a State, where, under any law such appointment, posting or promotion is required to be made by the Government.
[166] *Id*, s. 9 (3). Sub-section (4) provides that the High Court may appoint the Sessions Judge of one sessions division as an Additional Sessions Judge of another division and in such case he may sit for the disposal of cases at such places in the other division as the High Court may direct.
[167] *Rahul* v. *State of Rajasthan*, 1978 Cri LJ 1276 (Raj HC); *Gokaraju Rangaraju* v. *State of A.P.*, (1981) 3 SCC 132.
[168] The Code of Criminal Procedure, s. 10 (1).

arrange its disposal by a Chief Judicial Magistrate in the sessions division.[169] Every such Judge or Magistrate shall have jurisdiction to deal with any such application.[170]

5.40 Jurisdiction of Sessions Court

The Court of Session has original, appellate and revisional jurisdictions. Besides, it has power to transfer certain cases and to grant bail in certain cases.

5.41 Original jurisdiction

A court of session may try any offence under the Indian Penal Code.[171] However, the first schedule appended to the Code clearly specifies what all cases are to be tried by the Court of Session. A sessions judge or additional sessions judge may pass any sentence authorised by law.[172] However, any sentence of death passed by any such judge shall be subject to confirmation by the high Court.[173] An assistant sessions judge may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years.[174]

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[169] *Id*, s.9(5).

[170] *Ibid. Qualification*: The Code does not provide any qualification for a person to be appointed as Sessions Judge. The Constitution stipulates the qualifications of a person for being appointed as District Judge under Art.233(2). The expression 'district judge' includes Sessions Judge. Additional Sessions Judge and Assistant Sessions Judge as per Art.236(a). Art.233(2) provides that a person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment. Art.233(1) would show that such an appointment shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. There is an apparent incongruity between Art.233 r/w Art.236(a) and s.9 of the Code of Criminal Procedure. The Constitution provides for the appointment of district judge including sessions judge by the Governor of the state in consultation with the High Court, while the Code provides for the appointment of sessions judge be made by the High Court in the court established by the State Government.

[171] *Id*, s.26(a).

[172] *Id*, s.28; The Indian Penal Code s.53 provides 'punishments'.

[173] *Ibid.*

[174] *Id*, s.28(3).

5.42 Appellate jurisdiction

Any person convicted on a trial held by a metropolitan magistrate or assistant sessions judge or magistrate of the first class or of the second class in which a sentence of imprisonment upto seven years has been passed against him may appeal to the Court of Session.[175] Any person sentenced by a chief judicial magistrate in a case forwarded to him by a Magistrate to pass sentence sufficiently severe, may appeal to the Court of Session.[176] Furthermore, any person convicted on a trial held by any of those courts, in respect of whom an order has been made or a sentence has been passed for failure to observe condition of the probation of good conduct, may appeal to the Court of Session.[177] Again, any person who has been ordered to give security for keeping the peace or for good behaviour, or who is aggrieved by any order refusing to accept or rejecting a security may appeal against such order to the Court of Session.[178]

There is no appeal to the Court of Session from any subordinate court against a conviction passed on a plea of guilty except as to the extent or legality of the sentence.[179] There is no appeal to the Court of Session where a Metropolitan Magistrate passes only a sentence of imprisonment for a term not exceeding three months or of fine not exceeding two hundred rupees or of both.[180] Similarly, there is no appeal where a

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[175] *Id*, s.374(3)(a).

[176] *Id*, s.374(3)(b); The reference is to s.325 which provides that whenever a Magistrate is of opinion after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, of more severe than, that which such Magistrate is empowered to inflict, he may record the opinion and submit his proceedings, and forward the accused, to the Chief judicial Magistrate to whom he is subordinate. The Chief Judicial Magistrate may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case and may call for and take further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law.

[177] *Id*, s.374(3)(c) and s.360.

[178] *Id*, s.373; s.117 provides for giving security for keeping the peace or for good behaviour, while s.121 provides for refusing to accept or for rejecting a security.

[179] *Id*, s.375(b).

[180] *Id*, s.376(b).

Magistrate of the first class passes only a sentence of fine not exceeding one hundred rupees or where in a case tried summarily, a magistrate passes only a sentence of fine not exceeding two hundred rupees.[181]

An appeal to the Court of Session is heard by the Sessions Judge or by an Additional Sessions Judge.[182] An appeal against a conviction on a trial held by a Magistrate of the second class may be heard and disposed by an Assistant Sessions Judge or a Chief Judicial Magistrate.[183] An Additional Sessions Judge, Assistant Sessions Judge or a Chief Judicial Magistrate hears only such appeals as the Sessions Judge of the division may, by general or special order, make over to him or as the High Court may, by special order, direct him to hear.[184] As an appellate court a court of session has all such powers as the High Court has in appeal against conviction.

5.43 Revisional jurisdiction

The revisional jurisdiction of the Court of Session is concurrent with that of the High Court.[185] It can exercise this jurisdiction over all inferior criminal court situate within its sessions division and thus examine the correctness, legality or propriety of any finding, sentence or order, recorded or passed and the regularity of any proceedings of such inferior court.[186]

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[181] *Id*, s.376© & (d): The proviso to the section provides that an appeal may be brought against any sentence if any other punishment is combined with it, but such sentence shall not be appealable merely on the ground-
(i) that the person convicted is ordered to furnish security to keep the peace; or
(ii) that a direction for imprisonment in default of payment of fine is included in the sentence; or
(iii) that more than one sentence of fine is passed in the case, if the total amount of the fine imposed does not exceed the amount hereinbefore specified in respect of the case.

[182] *Id*, s.381(1).

[183] *Id*, proviso to s.381(1).

[184] *Id*, s.381(2).

[185] *Id*, s.397.

[186] *Ibid.*

The Court of Session may exercise all or any of the powers which the High Court may exercise in the matter of revision.[187] An additional sessions judge has and may exercise all the powers of a sessions judge in respect of any case which may be transferred to him by or under any general or special order of the sessions judge.[188]

5.44 Jurisdiction to transfer of cases and appeals

A court of session may transfer any particular case from one criminal court to another in its sessions division when it is expedient for the ends of justice.[189] It may act either on the respect of the lower court or on the application of a party interested, or on its own initiative.[190] It may withdraw any case or appeal from, or recall any case or appeal which he has made over to any assistant sessions judge or chief judicial magistrate subordinate to him.[191] Similarly, it may recall any case or appeal which he has made over to any additional sessions judge at any time before the commencement of the trial of the case or of the hearing of the appeal.

In dealing with the cases or the appeal so withdrawn or recalled, the Court of Session may try or hear itself or make over to another court for trial or hearing as the case may be.[192]

5.45 Jurisdiction in bail matters

In the matter of regular bail and anticipatory the jurisdiction of the Court of Session is concurrent with that of the High Court.[193]

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[187] *Id*, s.399 r/w s.401.
[188] *Id*, s.400.
[189] *Id*, s.408(1).
[190] *Id*, sub-sec.(2).
[191] *Id*, s.409(1).
[192] *Id*, s.409(3).
[193] See ss.438 and 439.

5.46 Court of Judicial Magistrate

The courts of judicial magistrate are established by the State Government after consultation with the High Court.[194] The High Court appoints the Magistrates to preside those courts.[195] The Government so establishes as many Courts of Judicial Magistrates of the first class and of the second class as it specifies at such places in every district not being a metropolitan area.[196]

Similarly the Government may establish one or more Special Courts of Judicial Magistrates of the first class or of the second class for any local area to try any particular case or particular class of cases. The consultation with the High Court is mandatory for this purpose as well.[197] Where any such Special Court is established, other than court of Magistrate in the local area shall have jurisdiction to try any such cases or class of cases.[198]

5.47 Chief Judicial Magistrates

The High Court appoints a Judicial Magistrate of the first class to be the Chief Judicial Magistrate in every district not being a metropolitan area.[199] Similarly the High Court may appoint any Judicial Magistrate of the first class to be an Additional

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[194] *Id*, s.11(1).

[195] *Id*, s.11(2); The Law Commission of India, 41st Report on the Code of Criminal Procedure, 1898, vol. 1, p.22, para 23 observed: "The separation of the execution from the judiciary will be effective only when the judicial magistrates are brought under the control of the High Court and this can be readily achieved by action under article 237 of the Constitution." The observation in para 2.24 is also to be noted: "It will be observed that..., the power to determine the number of courts of Judicial Magistrates of either class and their location is left to the State Government since it will have to take into account various administrative and financial considerations. The State Government, may however, is required to exercise this power in consultation with the High Court in order that an adequate number of magistrates' courts is established in all districts and at suitable places."

[196] *Id*, s.11(1). Sub-section (3) provides that the High Court may confer the powers of a Judicial magistrate of the first class or of the second class on any member of the Judicial Service of the State, functioning as a Judge in a civil court when it appears to it to be expedient or necessary.

[197] *Id*, proviso to s.11(1).

[198] *Ibid.*

[199] *Id*, s.12(1).

Chief Judicial Magistrate.[200] The Additional Chief Judicial Magistrate has all or any of the powers of a Chief Judicial Magistrate as the High Court may direct.[201]

5.48 Sub Divisional Magistrate

The High Court may designate any Judicial Magistrate of the first class in any subdivision as the Sub Divisional Magistrate and relieve him of the responsibilities as occasion requires.[202]

5.49 Special Judicial Magistrates

The Special Judicial Magistrates are appointed by the High Court when the Central or the State Government request to do so.[203] Such magistrates are appointed for such term not exceeding one year at a time as the High Court by general or special order direct.[204] Such appointment is done by conferring upon a duly qualified person who holds or has held any post under the Government, all or any of the powers conferred or conferrable on a Judicial Magistrate of the first class or the second class in respect to particular cases or to particular classes of cases in any local area not being a metropolitan area.[205] The High Court may empower a Special Judicial Magistrate to exercise the powers of a Metropolitan Magistrate in relation to any metropolitan area outside his local jurisdiction.[206]

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[200] *Id*, sub-sec.(2).
[201] *Ibid.*
[202] *Id*, sub-sec.3(a).
[203] *Id*, s.13(1).
[204] *Id*, s.13(2).
[205] *Id*, s.13(1); The proviso provides that the High Court may specify the qualification or experience required for a person to be so appointed as Special Judicial Magistrates, by its rules.
[206] *Id*, s.13(3).

5.50 Jurisdiction of Magistrates

The Judicial Magistrates may try all offences under the Indian Penal Code which are shown in the First Schedule of the Code as triable by it.[207] They are also competent to try the offences punishable under any other Statute if such Statute so empowers them.[208] The Court of Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.[209]

The Court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years or of fine not exceeding five thousand rupees or of both.[210] The Court of a Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding one thousand rupees, or of both.[211] The powers of the Courts of Chief Metropolitan Magistrate and Metropolitan Magistrate are same as that of the Courts of Chief Judicial Magistrate and Judicial Magistrate of the First Class respectively.[212]

Besides these courts may award such term of imprisonment in default of payment of fine as is authorised by law.[213]

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[207] *Id*, s. 26.
[208] *Ibid.*
[209] *Id*, s.29(1).
[210] *Id*, s.29(2).
[211] *Id*, s.29(3).
[212] *Id*, s.29(4).
[213] *Id*, s.30; It provides that (1) The Court of a Magistrate may award such term of imprisonment in default of fine as is authorised by law:
Provided that the term-
(a) is not in excess of the powers of the Magistrate under Section 29;
(b) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.
(2)The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awarded by the Magistrate under section 29."

When a person is convicted at one trial of two or more offences the court may sentence him for such offences to the several punishments prescribed therefor which such court is competent to inflict. Such punishment when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, unless the court directs that such punishments shall run concurrently.[214] However this is subject to the provisions of the substantive law.[215]

5.51 Local jurisdiction of Judicial Magistrates

Subject to the control of the High Court, the Chief Judicial Magistrate may, from time to time, define the local limits of the areas within which the Judicial Magistrates may exercise all or any of the powers with which they might be invested under the Code. But if the jurisdiction and powers of a Judicial Magistrate are not so defined, they shall extend throughout the district.[216]

5.52 Sentence in cases of conviction of several offences at one trial

When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of Section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefor which such Court is competent to inflict, such punishment when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of

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[214] *Id*, s.31.
[215] The Indian Penal Code, s.71.
[216] *Id*, s. 14.

the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher court. However, in no case such person shall be sentenced to imprisonment for a longer period than fourteen years. Moreover, the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence. For the purpose of appeal by a convicted person the aggregate of the consecutive sentences so passed against him shall be deemed to be a single sentence.

5.53 Procedure when Magistrate cannot pass sentence sufficiently severe

Whenever a Magistrate is of opinion that the accused is guilty, and that the ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict or, being a Magistrate of the second class, is of opinion that the accused ought to be required to execute a bond under section 106, he may record the opinion and submit his proceedings, and forward the accused, to the Chief Judicial Magistrate to whom he is subordinate.

When more accused than one are being tried together, and the Magistrate considers it necessary to proceed as required above in regard to any of such accused, he shall forward all the accused, who are in his opinion guilty, to the Chief Judicial Magistrate.

The Chief Judicial Magistrate to whom the proceedings are so submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, in accordance with law.

5.54 Subordination of Judicial Magistrates

Every Chief Judicial Magistrate shall be subordinate to Sessions Judge; and every other Judicial Magistrate shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Judicial Magistrate.[217] The sub-divisional Judicial Magistrate also, subject to the general control of the Chief Judicial Magistrate, shall have and exercise such powers of supervision and control over the work of the Judicial Magistrates (other than Additional Chief Judicial Magistrate) in his sub-division as the High Court may specify.[218]

5.55 Courts of Metropolitan Magistrates

As in a district, every metropolitan area will have almost a parallel set-up of Judicial Magistrates. In every metropolitan area, the State Government may, after consultation with the High Court, establish courts of Metropolitan Magistrates at such places and in such number as it may specify.[219] The presiding officers of such courts shall be appointed by the High Court, and the Jurisdiction and powers of every such magistrate shall extend throughout the metropolitan area.[220] Likewise, in every metropolitan area, the High Court shall appoint a Metropolitan Magistrate as Chief Metropolitan Magistrate. It may similarly appoint an Additional Chief Metropolitan Magistrate and such Magistrate shall have all or any of the powers of a Chief Metropolitan Magistrate as the High Court may direct.[221]

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[217] S. 15 (1).
[218] S. 12 (3).
[219] S. 16 (1).
[220] S. 16 (2) (3).
[221] S. 17.

5.56 Subordination of Metropolitan Magistrates

The Chief Metropolitan Magistrate and every Additional Chief Metropolitan Magistrate shall be subordinate to the Sessions Judge. Every other Metropolitan Magistrate shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Metropolitan Magistrate.[222] For the purposes of this Code, the High Court may define the extent of subordination, if any, of the Additional Chief Metropolitan Magistrates to the Chief Metropolitan Magistrate.[223]

5.57 Executive Magistrates

Executive Magistrates are appointed for performing magisterial functions allotted to the Executive. This becomes essential while implementing the policy of separation of the Judiciary from the Executive. In every district and in every metropolitan area, the State Government may appoint as many persons as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate.[224] The State Government may also appoint any Executive Magistrate to be an Additional District Magistrate who shall has such of the powers of a District Magistrate as may be directed by the State Government.[225] Further, the State Government may place an Executive Magistrate in charge of a sub-division and such magistrate shall be called as the Sub-divisional Magistrate.[226]

In some States, particularly in some metropolitan areas, the practice of conferring on a Commissioner of Police some magisterial powers of an executive nature

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[222] S. 19 (1).
[223] S. 19 (2).
[224] S. 20 (1).
[225] S. 20 (2).
[226] S. 20 (4).

has been already in vogue. This well established and smoothly operating arrangement, if authorised by any law, has been allowed to continue.[227]

5.58 Courts under other statutes

Besides the courts established under the Constitution and the Code, the courts constituted under certain statutes such as the Juvenile Justice Act, the Prevention of Terrorism Act, 2002 are also coming under the expression 'criminal courts' for all the purposes of the Code. The jurisdiction and powers of such courts are provided under the concerned statutes.

[227] S. 20 (5); *M.Narayana Swamy* v. *State of T.N.*, 1984 Cri LJ 1583 (Mad HC).

CHAPTER 6

INVESTIGATION

Investigation is one of the important pretrial stages in the administration of criminal justice.[1] It is basically an art of unearthing hidden facts with the purpose of linking up different pieces of evidence for the purpose of successful prosecution.[2] It means a systematic, minute and thorough attempt to learn the facts about something complex or hidden and it is often formal and official[3].

Section 2(h) of the Code of Criminal Procedure[4] provides:

> "'investigation' includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf."

The definition as such is not comprehensive or exhaustive. The Codes, which were previously in force also, contained the same definition.[5] The definition

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[1] The Law Commission of India, 37th Report on the Code of Criminal Procedure, 1898, p.3.

[2] The Law Commission of India, 154th Report on the Code of Criminal Procedure, 1973, Chapter II, para 2. This paragraph opens with the sentence: "Investigation of crime is a highly specialised process requiring a lot of patience, expertise, training and clarity about the legal position of the specific offences and subject matter of investigation and socio-economic factors."

[3] *Hamlyn's Encyclopedic Word Dictionary*, 1972, p.836; *Liberty Oil Mills* v. *Union of India*, AIR 1984 SC 1271 at 1283: " 'investigation' means no more than the process of collection of evidence or the gathering of material."; *Krishna Swami* v. *U.I.*, (1992)4 SCC 605 at p.646, per K Ramaswamy, J. (descending), lays down: "investigation is the discovery and collection of evidence to prove the charge as a fact or disproved." *State* v. *Pareswar Ghasi*, AIR 1968 Ori 20 at p.24, lays down: "investigation in its ordinary dictionary meaning is, in the sense ascertainment of facts, sifting of materials and search for relevant data."
The Indian Evidence Act, 1872, s.3 provides: " 'fact' means and includes.-
(1) anything, state of things, relation of things, capable of being perceived by the senses;
(2) any mental condition of which any person is conscious."

[4] The Code of Criminal Procedure, 1973; The Indian Evidence Act, 1872, s.3 provides: " 'Evidence' means and includes-
(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence.
(2) all documents produced for the inspection of the Court; such documents are called documentary evidence."

[5] It is the verbatim reproduction of the definition provided under the Code of Criminal Procedure, 1882 (Act 10 of 1882), s.4(b) and the Code of Criminal Procedure, 1898 (Act 5 of 1898), s.4(1)(2).

conveys two ideas of radical importance: (i) the collection of evidence by the proceedings prescribed and (ii) which to be done by a police officer or by a person, other than a magistrate, who is authorized by a magistrate to do so.[6]

Articulating the procedural scheme set up by the Code, the Supreme Court[7] declared that the investigation of an offence generally consists of:

(1) Proceeding to the spot,

(2) Ascertainment of the facts and circumstances of the case,

(3) Discovery and arrest of the suspected offender,

(4) Collection of evidence relating to the commission of the offence which may consist of:

   (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit,

   (b) the search of places or seizure of things considered necessary for the investigation or to be produced at the trial, and

(5) Formation of the opinion as to whether on the materials collected there is a case to place the accused before a magistrate for trial, and if so, taking the necessary steps for the same by the filing of a charge- sheet under s.173.[8]

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[6] A.R. Biswas, *B.B. Mitra on the Code of Criminal Procedure, 1973*, p.149. See also *Directorate of Enforcement* v. *Deepak Mahajan*, AIR 1994 SC 1775.

[7] *H.N.Rishbud* v. *State of Delhi*, AIR 1955 SC 196. See also *Chathukutty* v. *S.I. of Police*, 1988 SCC (Cri) 549.

[8] *S.N.Bose* v. *State of Bihar*, (1968)3 SCR 563: The "proceedings under this Code" are five in number. And the "collection of evidence", that is step No.4, is only one of the five-fold proceedings. It may be noted, however, that an investigation is one and indivisible. A permission enables the officer concerned not only to lay a trap but also to hold further investigation (pp. 566 & 567).

6.1 Commencement of investigation

An officer in charge of a police station[9] can initiate investigation:

(1) on receiving information as to the commission of any cognizable offence, [10]

(2) otherwise he has reason to suspect the commission of any cognizable offence,[11] or

(3) upon the order of a magistrate empowered to take cognizance of any offence under section 190 of the Code.[12]

6.2 Classification of offences and power to investigate

The Code classifies various offences[13] and cases into cognizable[14] and non-cognizable[15] ones and confers power to police to arrest without warrant for the purposes of cognizable offences and cases[16]. The same classification is made the basis to

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[9] The Code of Criminal Procedure, 1973, s.2(o) provides: " 'officer-in-charge of a police station' includes, when the officer-in-charge of the police station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station-house who is next in rank to such officer and is above the rank of constable or, when the State Government so directs, any other police officer so present."
S.2(s) provides: " 'police station' means any post or place declared generally of specifically by the State Government, to be a police station, and includes any local area specified by the State Government in this behalf."
The officer in charge of the police station should have territorial jurisdiction in that area where the offence is occurred. If he has not, on receiving information, he should not register the FIR, but should write in the Daily Diary Reg. No. II of the police station, or on a separate sheet and forward it to the officer in charge of the police station in whose jurisdiction the offence is occurred.

[10] *Id*, s.157 (1). See also *infra* n.14.

[11] *Ibid*, see also *Jayantilal Jagjivan Mulji and Ors.* v. *Emperor*, AIR (31) 1944 Bom 139.

[12] *Id*, s.156 (3).

[13] *Id*, *s*.2(n). It provides: " 'offence' means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under the Cattle Trespass Act, 1871 (Act I of 1871), section 20." See also the Indian Penal Code, 1860, s.40 and the General Clauses Act, 1897, s.3(38).

[14] *Id*, s.2(c). It provides: " 'cognizable offence' means an offence for which, and 'cognizable case' means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant".

[15] *Id*, s.2(l).It provides: " 'non-cognizable offence' means an offence for which, and 'non-cognizable case' means a case in which, a police officer has no authority to arrest without warrant."

[16] Generally speaking, all serious offences are considered as cognizable. The seriousness of the offence depends upon the maximum punishment provided for the offence. Subject to certain reasonable exception offences punishable with imprisonment for not less than three years are taken as serious offences and are made cognizable. It is the responsibility of the State (and hence the police) to bring the offender to justice in the cases involving cognizable offences.

determine the police officer's power as to investigation. Any officer in charge of a police station thus has power to investigate any cognizable case without an order of a magistrate.[17] The court cannot interfere with this power, for the court's function begins only when a charge is preferred before it not until then.[18] The police have no power to investigate a non-cognizable case without the order of a competent magistrate.[19] Whenever a police officer is ordered by a magistrate to investigate a non-cognizable case, he may exercise the same powers in respect of investigation (except the power to arrest without warrant) as a police officer-in-charge may exercise in a cognizable case.[20] Where a case involves two or more offences of which at least one is cognizable, it shall be deemed to be a cognizable case despite that other offences involved are non-cognizable.[21] For all these purposes 'magistrate' means 'judicial magistrate'.[22]

6.3 Investigation on receiving information

In most of the cognizable cases, usually investigation is initiated on receiving information by police officer-in-charge of a police station. In such cases certain procedures shall be complied with as to recording of the information so received and lodging of the first

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[17] *Id*, s.156 provides: "(1) Any officer-in-charge of a police station may without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.
(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.
(3) Any Magistrate empowered under section 190 may order such an investigation as above mentioned."

[18] *Ibid*, *Emperor* v. *Kh. Nazir Ahamed*, AIR 1945 PC 18; the Law Commission of India, 41st Report, page 67, para 14.2. See also *H.N.Rishbud* v. *State of Delhi*, AIR 1955 196; *State of W.B.* v. *S.N.Basik*, AIR 1963 SC 447; *Abhinandan Jha* v. *Dinesh Mishra*, AIR 1968 SC 117; *S.N.Sharma* v. *Bipen Kumar*, (1970) 1 SCC 653; *State of W.B.* v. *Sampat Lal*, AIR 1985 SC 195.

[19] *Id*, s.155(2) r/w. s.3(1)(a) provides that a police officer has neither the duty nor the power to investigate the cases involving only non-cognizable offences without the authority conferred by a judicial magistrate. Barring certain exceptions, the non-cognizable offences are considered more in the nature of private wrongs and therefore the collection of evidence and the prosecution of the offender are left to the initiative and efforts of private citizens and the State is not responsible to investigate and prosecute in such cases unless otherwise ordered by the competent judicial magistrate.

[20] *Id*, *s*.155(3).

[21] *Id*, s.155(4).

[22] *Id*, s.3(1); See also *Bateswar Singh* v. *State of Bihar*, 1992 CriLJ 2122 (Pat).

information report. In the second and third means of initiation of investigation no such procedure pertaining to the first information report need be followed.[23]

6.4 Information to police

Any person can give information to the police as to the commission of a cognizable offence.[24] It shall be given to an officer in charge of a police station in whose jurisdiction the offence has been committed.[25] The information can be given either orally or in writing.[26] If given orally, it shall be reduced to writing by such officer in charge or under his direction, and be read over to the informant.[27] Every such information whether given in writing or reduced to writing shall be signed by the person giving it.[28] The substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.[29]

A copy of the information so recorded shall be given forthwith, free of cost to the informant.[30] Any person aggrieved by a refusal on the part of the police officer in charge to record the information as to the commission of a cognizable offence may send

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[23] *Liberty Oil Mills* v. *Union of India*, AIR 1984 SC 1271 at 1283.

[24] Generally speaking it should be the duty of every citizen to report to the authorities any crime, which he knows to have been committed. However minor offences are not usually coming within the scope of this duty. Section 39 imposes a duty on every person who is aware of the commission of, or of the intention of any other person to commit certain offences. Moreover, section 40 casts a duty on village-officers and village-residents to report certain matter to the police or to the magistrate.

[25] *Id*, s.154(1): If the police officer-in-charge has no territorial jurisdiction, he shall not register the FIR on receipt thereof, rather he has to write it in the Daily Diary Reg. No.II of the Police Station or on a separate sheet and forward it to the police officer-in-charge of police station in whose jurisdiction the offence has been committed.

[26] *Ibid.*

[27] *Ibid.*

[28] *Ibid.*

[29] *Ibid;* The book so prescribed is called Daily Diary or Roznamcha Reg. No.2. According to the Indian Police Act, 1861 (Act V of 1861), s. 44, Daily Diary is required to be kept for recording therein all complaints and charges preferred, the names of the complainants, the offence charged, the weapons or property taken from their possession and names of witnesses who shall have been examined. The book in which the substance of the information is entered is called 'station diary' or 'general diary'.

[30] *Id*, s.154(2). There was no such a provision in the 1898 Code. It has been introduced in the present Code in pursuance of the recommendation of the Law Commission of India vide its 41st Report, vol.1, p.68, para 14.3.

the substance of such information, in writing and by post to the Superintendent of Police concerned.[31] The Superintendent shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by the Code, if satisfied that such information discloses the commission of a cognizable offence. Such officer conducting investigation shall have all the powers of an officer in charge of the police station in relation to that offence.[32]

The statement so recorded is usually mentioned in practice as the first information report or popularly abbreviated as FIR. The object of the first information report is to set the criminal law in motion.[33] When information is given to a police officer-in-charge as to the commission of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book prescribed for this purpose and shall refer the informant to the magistrate for the police lack power to investigate non-cognizable case without an order of a magistrate.[34]

6.5 Report to magistrate

Where a reasonable suspicion of the commission of a cognizable offence exists, whether on the basis of the first information report or on any other information of the police, the officer in charge must immediately send a report of the circumstances creating the suspicion, to a magistrate having jurisdiction to take cognizance of such an offence on a police report.[35] The law envisages to keep the magistrate informed of the

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[31] *Id*, s.154(3).
[32] *Ibid.*
[33] *Hasib* v. *State of Bihar*, 1972 CriLJ 233, at p.236. Sometimes it may happen that more than one person go at or about the same time and make statement to the police about the same cognizable offence. In such a situation the police officer will have to use common sense and record one of the statements as the FIR.
[34] *Id*, s.155(1) & (2).
[35] *Id*, s.157(1).

investigation, but he is not authorized to interfere with the actual investigation or to direct the police how that investigation is to be conducted.[36]

6.6 Proceeding to spot

The police officer in charge shall then proceed in person, or shall depute his subordinate officer, not below the rank prescribed by the State Government in this behalf, to proceed to the spot for further proceedings.[37] It is however not necessary for the police officer in charge to proceed in person or depute a subordinate officer to make an investigation on the spot in two circumstances. Firstly, when the information as to the commission of the offence is given against any person by name and the case is not of a serious nature.[38] The police in such a case is required to state in his report to the magistrate his reasons for not proceeding to make an investigation on the spot.[39] Secondly, when it appears to the police officer in charge that there is no sufficient ground for entering on an investigation.[40] As in the earlier case the police officer is required to state in his report to the magistrate his reasons for not proceeding to investigate the case. He is further required to notify immediately to the informant, if

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[36] The Law Commission of India, 41st Report, vol.1, p.67, para 14.1. Failure to send a report to the magistrate as required by the provision is a breach of duty and may go to show that the investigation in the case was not just, fair and forthright and that the prosecution case must be looked at with great suspicion. However, the non-compliance of ss.154 and 157 does not constitute a ground to throw away a prosecution case but it does emerge as a factor to be seriously reckoned with while appreciating the entire evidence. Its non-observance is bound to suffer some adverse inference against the prosecution. See *Mahabir Singh* v. *State*, 1979 CriLJ 1159 (Del HC); *Gabriel Re*, 1977 CriLJ 135 (Mad HC); *V.A.Victor Immanuel* v. *State of T.N.*, 1991 CriLJ 2014 (Mad HC). The time at which the report is received by the magistrate concerned goes a long way in coming to the proper conclusion as to time at which the FIR might have been written, lodged or registered. See *Swaran Singh* v. *State*, 1981 CriLJ 364 (P&H HC); *Kamaljit Singh* v. *State of Punjab*, 1980 CriLJ 542 (P&H HC); *Pala Singh* v. *State of Punjab*, (1972) 2 SCC 640.

[37] The Code of Criminal Procedure, 1973, s.157(1).

[38] *Id*, s.157(1), proviso (a).

[39] *Id*, s.157(2). If the police officer makes a wrong assessment as to the seriousness of the case, the superior police officer through whom the report is sent to the magistrate, can always give appropriate directions to the officer in charge of the police station to set right the course of his action.

[40] *Id*, s.157(1), proviso(b).

any, in the manner prescribed by the State Government, the fact that he would not investigate the case or cause to be investigated.[41]

6.7 Ascertainment of facts and circumstances

The police officer conducting investigation on proceeding to the spot shall prepare a detailed statement ascertaining the facts and circumstances of the sport where the cognizable offence is alleged or is informed to have been committed. The statement is popularly called as scene mahazar.

6.8 Inquest

Inquest is the ascertainment of the cause of death when it is homicidal, suicidal or accidental.[42] Its object is merely to ascertain whether a person has died under suspicious circumstances or has suffered an unnatural death and if so what is the apparent cause of death. The question as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted does not come within the scope of inquest.[43] An officer-in-charge of a police station or some other police officer specially empowered by the State Government holds inquest in cases where a person has committed suicide or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some

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[41] *Id*, s.157(2). This would enable the informant to approach a magistrate or a superior police officer for redress, if he feels aggrieved by the view taken by the police officer in charge. As the report to the magistrate is to pass through the superior police officer, he can issue appropriate instruction to the station house officer. By virtue of section 159 the magistrate may direct an investigation or may at once proceed, or depute any magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of the case in the manner provided in the Code.

[42] *Sohoni's, The Code of Criminal Procedure*, 1973, 17th ed., vol.II p.1413; Patrick Devlin, '*The Criminal Prosecution in England*, 1960, p.3: It is to investigate death, an incident which deserved particular attention because it was an especial source of profit.

[43] *Pedda Narayana* v. *State of A.P.*, (1975)4 SCC 153; *Basit Ali* v. *State of M.P.*, 1976 CriLJ 776 (MP HC). In *Budhish Chandra* v. *State of U.P.*, 1991 CriLJ 808 (All HC), it has been held that the lapses in filling up the inquest form do not destroy the prosecution case. However the Supreme Court in *Jaharlal Das* v. *State of Orissa*, (1991) 3 SCC 27 has held since the circumstances that the deceased was last seen in the company of the accused was not mentioned in the inquest report, the same is not established beyond reasonable doubt. It is apparent that the section does not admit this interpretation.

other person has committed an offence.[44] Any district magistrate or sub-divisional magistrate and any other executive magistrate specially empowered in this behalf by the State Government or the district magistrate holds inquest as mandatory when any person dies while in the custody of the police or the case involves suicide or death of a woman within seven years of her marriage in any circumstances raising a reasonable suspicion that some other person committed an offence in relation to such woman.[45] Any such magistrate has discretion to hold an inquest either instead of, or in addition to, the investigation held by the police officer.[46] In the cities of Bombay and Calcutta inquest is held by the coroner.[47]

6.9 Inquest by police

The police officer on receiving information as to any death, warranting inquest, shall immediately give intimation thereof to the nearest executive magistrate empowered to hold inquests and proceed to the place where the body of such deceased is.[48] He shall there make an investigation, in the presence of two or more respectable inhabitants of the neighbourhood and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury as may be found on the body stating in what manner, or by what weapon or instrument (if any), such marks appear to have inflicted.[49]

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[44] The Code of Criminal Procedure, 1973, s.174(1).
[45] *Id*, s.176(1) & 174(1).
[46] *Id*, s.176(1).
[47] The coroners are appointed under the Coroners Act, 1871, s.3, to inquire into the cause of death in case the death of any person has been caused by accident, homicide, suicide, or suddenly by means unknown, or that any person being a prisoner has died in prison and that the body is lying within the place for which the coroner is so appointed. The coroner is deemed a public servant within the meaning of the Indian Penal Code. Moreover the inquiry into death held by the coroner is deemed a judicial proceeding within the meaning of s.193 of the Indian Penal Code.
[48] The Code of Criminal Procedure, 1973, s.174(1).
[49] *Ibid.*

The report shall be signed by such police officer and other persons or by so many of them as concur therein and shall be forthwith forwarded to the district magistrate or the sub-divisional magistrate.[50] The police officer may by order in writing summon two or more persons as aforesaid for the purpose of the said investigation.[51] He may as well summon any other person who appears to be acquainted with the facts of the case.[52] Every person so summoned shall be bound to answer truly all questions other than incriminating ones.[53] It is not necessary at all for the police officer to record the statements of the witnesses or to get such recorded statements signed on the inquest report and incorporate the same in it.[54] The police officer, however, shall not require any such person to attend a magistrate's court if the facts do not disclose a cognizable offence.[55]

The police officer shall forward the body for post-mortem examination to the nearest civil surgeon, or other qualified medical man appointed in this behalf by the State Government, when:

i. the case involves suicide by a woman within seven years of her marriage,

ii. the case relates to the death of a woman within seven years of her marriage in any circumstances raising a reasonable suspicion that some other person committed an offence in relation to such woman,

iii. the case relates to the death of a woman within seven years of her marriage and any relatives of the woman has made a request in this behalf,

iv. there is any doubt regarding the cause of death, or

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[50] *Id*, s.174(2).
[51] *Id*, s.175(1).
[52] *Ibid.*
[53] *Ibid.*
[54] It would rather introduce an element of chaos and confusion demanding an explanation from the prosecution regarding the statements made therein. See *Nirpal Singh* v. *State of Haryana*, (1977)2 SCC 131.
[55] The Code of Criminal Procedure, 1973, s.175(2).

v. the police officer for any other reason considers it expedient so to do.[56]

He shall so do if and only if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.[57] It is implied that when there is no doubt as to the cause of death the police officer has discretion for not sending the body for post-mortem examination by the medical officer.[58] This discretion shall however be exercised prudently and honestly.[59]

The inquest report is a document of vital importance and has to be prepared promptly because it has to be handed over to the doctor along with the dead body to be sent for post-mortem examination. If the facts about the occurrence are mentioned in the inquest report, it would go to show that by that time the true version of the occurrence had been given therein. If, however, the facts of the incidents are not mentioned in the inquest report it might mean that till that time the investigating officer making the inquest was not definite about the factual position.[60] The inquest report is not substantive evidence.[61]

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[56] *Id*, s.174(3).

[57] *Ibid.*

[58] *Id*, s.174(3).

[59] *K.P. Rao* v. *Public Prosecutor, A.P*, (1975)2 SCC 570. This discretion of the police officer is completely taken away in cases falling under clauses (i), (ii) and (iii) of sub-sec(3) of s.174. The police officer shall send the dead body of the woman for post mortem examination in such cases if the state of weather and the distance admit of its being so sent without risk of such putrefaction on the road as would render such examination useless.

[60] *Banwari* v. *State of Rajasthan*, 1979 CriLJ 161 at p.166 (Raj.HC). Dr. K.N. Chandrasekharan Pillai. *R.V.Kelkar's Criminal Procedure*, 3rd ed., p 138.

[61] *Adi Bhumiani* v. *State*, AIR 1957 Ori 216. In *Pandurang* v. *State of Hyderabad*, AIR 1955 SC 216, the Supreme Court raised the question as to how far inquest report is admissible except under the Indian Evidence Act; 1872, s.145; *Maruthamuthu Kudumban, Re*, ILR 50 Mad 750; *Hansraj* v. *Emperor*, AIR 1936 Lah 341: The statements of witnesses during such inquiry are governed by s.162 as is obvious from that section itself; However, *Mukunda* v. *State*, AIR 1957 Raj 331 laid down that it can be used for corroboration of the evidence given by the police officer making it.

6.10 Inquest by magistrate

A magistrate holding inquest shall have all the powers in conducting it, which he would have in holding inquiry into an offence.[62] He shall record the evidence taken by him in connection with the inquest according to the circumstances of the case.[63] Whenever it is expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the magistrate may cause the body to be disinterred and examined.[64] He shall, wherever practicable, inform the relatives of the deceased whose names and addresses are known, and shall allow them to remain present at the inquiry.[65] The expression 'relative' means parents, children, brothers, sisters and spouse.[66]

6.11 Arrest

Arrest used simply to be a mechanism for bringing offenders to court. This is no longer so.[67] The police typically want to arrest suspects to facilitate investigation and prosecution.[68] Arrest and subsequent detention is now frequently used as part of the investigation, not as the culmination of it.[69] Its purpose is often to secure the evidence, which used to be secured before the arrest took place.[70]

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[62] The Code of Criminal Procedure, 1973, s.176(1).
[63] *Id*, s.176(2).
[64] *Id*, s.176(3).
[65] *Id*, s.176(4).
[66] *Id*, s.176(4), *Explanation*.
[67] Andrew Sanders & Richard Young, *Criminal Justice*, Butterworths, (1994), p.70.
[68] *Id*, p.68; see Glanville Williams, 'Arrest', 14 MLR 489 (1951).
[69] *Id*, p.71; Patric Devlin, *The Criminal Prosecution in England*, (1960), p.68: Arrest and imprisonment are in law the same thing. Any form of physical restraint is an arrest and imprisonment is only a continuing arrest.
[70] *Ibid*. Arrest is used to secure attendance of the accused at the time of trial and as a preventive or precautionary measure in respect of a person intending to commit a cognizable offence, or a habitual offender or an ex-convict, or a person found under suspicious circumstances [ss.151, 41(2) r/w ss. 110, 41(1)(h), 41(1)(b) and (d)]. It may sometimes become necessary to obtain correct address of a person committing a non-cognizable offence (s.42). A person obstructing a police officer in discharge of his duties is liable to be arrested to put a stop to such obstruction [s.41(1)(c)]. So also a person escaping from lawful custody should be liable to be arrested and re-taken in custody.

The Code doesn't define the expression 'arrest'. It is the taking or apprehending of a person and restraining him from his liberty.[71] It means the deprivation of a person of his liberty by legal authority or at least by apparent legal authority.[72] It consists in the seizure or touching of a person's body with a view to his restraint.[73] Words may, however, amount to an arrest if, in the circumstances of the case, they are calculated to bring, and do bring, to a person's notice that he is under compulsion and he thereafter submits to the compulsion.[74] An arrest can be made either with a warrant or without.[75]

6.12 Arrest with warrant

A warrant of arrest has significance in cognizable as well as non-cognizable cases. A police officer can arrest only with a warrant in a non-cognizable case, while he has discretion to arrest without warrant in cognizable cases and for certain other grounds.[76] As from the scheme set up by the Code an arrest with warrant is used only as a process to compel attendance in the court and it has no relevance in investigation.

A warrant of arrest is a written order issued by a court under the Code directing one or more police officers or some other person or persons to arrest the body

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[71] Sir William J Williams, *Moriarty's Police Law*, 23rd ed., p.17: Arrest in a criminal sense is the apprehension or restraining of a person in order that he or she shall be forthcoming to answer an alleged or suspected offence.; According to Blackstone arrest is the apprehending or restraining of one's person in order to be forthcoming to answer an alleged or suspected crime, Bl Com (1830) p. 289 as quoted in V Bevan and K Lidstone, *The Investigation of Crime: A Guide to Police Powers*. Butterworths, 1991.

[72] The Law Commission of India, 154th Report, on the Code of Criminal Procedure, 1973, Chapter IV, para1; Dr. K.N. Chandrasekharan Pillai, *R.V.Kelkar's Criminal Procedure*, 3rd ed., p.53. Andrew Sanders & Richard Young, *Criminal Justice*, 1994, Butterworths, p.68: The act of taking persons into custody and exerting physical control over their movements is commonly thought of as an arrest. Suspects are under arrest when they are no longer at liberty to go where they choose.

[73] *Halsbury's Law of England*, Butterworths, 4th ed., vol.11, p.73, para 99.

[74] *Ibid.*, See also *Alderson* v. *Booth* [1969]2 All ER 271, *R* v. *Jones, ex parte Moore*, [1965] CrimLR 222; *R* v. *Inwood*, [1973]2 All ER 645: A person accompanying an officer voluntarily and not as a result of compulsion cannot be said to be under arrest.

[75] Patric Devlin, *The Criminal Prosecution in England*, 1960, p.69.

[76] The Code of Criminal Procedure, 1973, ss. 2(c) & (l), 41.

of the person named in it.[77] It shall be signed by the presiding officer of the court.[78] It shall bear the seal of the court.[79]

Every such warrant shall remain in force until it is cancelled by the court which issued it, or until it is executed.[80] It may be executed anywhere in India.[81] When a warrant is directed to more officers or persons than one, it may be executed by all, or any one or more of them.[82] A warrant directed to any police officer may also be executed by any other police officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed.[83] The police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and if so required, shall show him the warrant.[84] The police officer or other person executing a warrant of arrest shall subject to the provision as to security for appearance,[85] without unnecessary delay bring the person arrested before the court before which he is required to produce such person.[86] Provided that such delay shall not in any case exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the magistrate's court.[87]

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[77] *Id*, ss.70(1) & 72.
[78] *Id*, s.70.
[79] *Ibid.*
[80] *Id*, s.70(2).
[81] *Id*, s.77. Yet s.78 provides that when a warrant is to be executed outside the local jurisdiction of the court issuing it, such court may, instead of directing the warrant to a police officer within its jurisdiction, forward it by post or otherwise to any executive magistrate or district superintendent of police or commissioner of police within the local limits of whose jurisdiction it is to be executed. He shall forward along with warrant, the substance of the information against the person to be arrested together with such documents, if any, as may be sufficient to enable the court acting under s.81 to decide whether bail should or should not be granted to the person. Ss.79 to 81 are also applicable to a warrant of arrest to be executed outside the jurisdiction of the court issuing it.
[82] *Id*, s.72(2).
[83] *Id*, s.74.
[84] *Id*, s.75.
[85] *Id*, s.71.
[86] *Id*, s.76.
[87] *Ibid.*

6.13 Arrest without warrant

Any police officer may without an order from a magistrate and without a warrant arrest any person who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned.[88] There are also several other grounds for arresting a person without a warrant for other purposes than investigation.[89]

6.14 Deputing subordinate to arrest

When any officer in charge of a police station or any police officer making an investigation requires any officer subordinate to him to arrest without warrant (other than in his presence) any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence or other cause for which the arrest is to be made and the officer so required shall, before making the arrest, notify to the person to be arrested the substance of the order so required by such person, shall show him the order.[90]

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[88] *Id*, s.41(1)(a); *Kajal Dey* v. *State of Assam*, 1989 CriLJ 1209 (Gau HC). What is a reasonable complaint or suspicion or what is credible information must depend upon the facts and circumstances in each case. The words "reasonable" and "credible" have reference to the mind of the police officer receiving information and such information must afford sufficient materials for the exercise of an independent judgment at the time of making arrest. See also *Subod Chandra Roy* v. *Emperor*, ILR 52 Cal 319; *K.V. Muhammed* v. *C.Kannan*, AIR 1943 Mad 218: *Tribhuvan Singh* v. *Rex*, AIR 1949 Oudh 74; .*Bhaskaran* v. *State*, 1987 CriLJ 653 (Del HC).

[89] Arrest is used to secure attendance of the accused at the time of trial and as a preventive or precautionary measure in respect of a person intending to commit a cognizable offence, or a habitual offender or an ex-convict, or a person found under suspicious circumstances [ss.151, 41(2) r/w ss. 110, 41(1)(h), 41(1)(b) and (d)]. It may sometimes become necessary to obtain correct address of a person committing a non-cognizable offence (s.42). A person obstructing a police officer in discharge of his duties is liable to be arrested to put a stop to such obstruction [s.41(1) (c)]. So also a person escaping from lawful custody should be liable to be arrested and re-taken in custody.

[90] *Id*, s.55(1).

6.15 Arrest how made

In making arrest the police officer or other person[91] making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.[92] If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.[93] However, the person effecting arrest shall not have any right to cause death of a person who is not accused of an offence punishable with death or with imprisonment for life.[94] Again, the person arrested shall not be subjected to more restraint than is necessary to prevent his escape.[95]

6.17 Additional powers for effecting arrest

The police officer or other person having authority to arrest a person under a warrant or otherwise has reason to believe that the person to be arrested is within or has entered any place, he may search there.[96] Any person residing in, or being in charge of such place shall, on demand afford all reasonable facilities for the search.[97] If ingress to such place is not be obtained it shall be lawful for a person acting under a warrant or for a police officer to enter such place and search therein and in order to effect an entrance into such place to break open, any outer or inner door or window of any house or place whether that of the person to be arrested or of any other person, if after notification of

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[91] The Code of Criminal Procedure, 1973, s.43 provides for arrest by private person, while s.44 provides for that by magistrate.

[92] *Id*, s.46(1). See also *Harmohanlal* v. *Emperor*, 30 CriLJ 128; *Aludomal* v. *Emperor*, 17 CriLJ 87; *Paramahansa* v. *State*, AIR 1964 Ori 144; *State of U.P.* v. *Deoman*, AIR 1960 SC 1125; *Bharosa Ramdayal* v. *Emperor*, AIR 1941 Nag 86; *Legal Remembrancer* v. *Lalit Mohan Singh Roy*, ILR 49 Cal 167; *Santokhi Beldar* v. *Emperor*, 34 CriLJ 349; *Supdt. & Remebrancer of Legal Affairs* v. *Kaloo Khan*, AIR 1948 Cal 68; *Roshan Beevi* v. *Jt. Secy. to the Govt. of T.N.* 1984 CriLJ 134 (FB) – (Mad HC).

[93] *Id*, s.46(2).

[94] *Id*, s.46(3).

[95] *Id*, s.49. See also *Prem Shankar Shukla* v. *Delhi Administration*, AIR 1980 SC 1535; *Aeltemesh Rein* v. *Union of India*, AIR 1988 SC 1768.

[96] *Id*, s.47(1).

[97] *Ibid.*

his authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance.[98]

Provided that, if any such place is an apartment in the actual occupancy of a female (not being the person to be arrested) who, according to custom, does not appear in public, such person or police officer shall, before entering such apartment, give notice to such female that she is at liberty to withdraw and shall afford her every reasonable facility for withdrawing, and may then break open the apartment and enter it.[99]

Any police officer or other person authorized to make an arrest may break open, any outer or inner door or window of any house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.[100]

6.18 Pursuit of offenders

A police officer may, for the purpose of arresting without warrant any person whom he is authorized to arrest, pursue such person into any place in India.[101] A police officer's power to arrest is ordinarily limited to the police district.[102] The former power to an extent supplements the latter. If a person in lawful custody escape or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in India.[103]

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[98] *Id*, s.47(1) & (2).
[99] *Id*, Proviso to s.47(2).
[100] *Id*, s.47(3).
[101] *Id*, s.48.
[102] The Police Act, 1861, s.22.
[103] The Code of Criminal Procedure, 1973, s.60(1). The person effecting such re-arrest has the same powers and duties as mentioned in sections 46 and 49.

6.19 Extradition

The investigation officer can also get the accused extradited if he is abroad. The Extradition Act, 1962 provides for the procedure to be adopted for the surrender or return to India of accused or convicted person who is in a foreign State or commonwealth country.[104] When a person accused or convicted of an extradition offence committed in India, is or is suspected to be, in any foreign State or a commonwealth country, the Central Government may make a requisition for his surrender to India. [105] Such requisition shall be made to a diplomatic representative of that State or country at Delhi, or to the Government of that State or country through the diplomatic representative of India in that State or country.[106] If neither of these modes is convenient, the requisition shall be made in such other mode as is settled by arrangement made by the Government of India with that State or country.[107] Moreover, a Magistrate in India is empowered to issue warrant for the apprehension of any such person who is or is suspected to be in any

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[104] The Extradition Act, 1962, [Act No.34 of 1962], s.19; s.2(e) provides: " 'foreign State' means any State outside India other than a commonwealth country, and includes every constituent part, colony or dependency of such State;" s.2(a) provides: " 'commonwealth country' means a commonwealth country specified in the First Schedule and such other commonwealth country as may be added to that Schedule by the Central Government by notification in the official Gazette, and includes every constituent part, colony or dependency of any commonwealth country so specified or added."

[105] *Id*, s.19(1); s.2(c) provides: " 'extradition offence' means-
(i) in relation to a foreign State, being a treaty State, an offence provided for in the extradition treaty with that State;
(ii) in relation to a foreign State other than a treaty State or in relation to a commonwealth country an offence which is specified in; or which may be specified by notification under, the Second Schedule"; s.2(j) provides: " 'treaty State' means a foreign State with which an extradition treaty is in operation"; s.2(d) provides: " 'extradition treaty' means a treaty or agreement made by India with a foreign State relating to the extradition of fugitive criminals, and includes any treaty or agreement relating to the extradition of fugitive criminal made before the 15th day of August, 1947, which extends to, and is binding on, India"; s.2(f) provides: " 'fugitive criminal' means an individual who is accused or convicted of an extradition offence committed within the jurisdiction of a foreign State or a commonwealth country and is, or is suspected to be, in some part of India."

[106] *Id*, s.19(1)(a) & (b).

[107] *Ibid.*

commonwealth country.[108] Any such person who is surrendered or returned by a foreign State or commonwealth country may be brought into India and delivered to the proper authority to be dealt with according to law.[109]

6.20 Post arrest procedures

Whenever a person is arrested by a police officer under a non-bailable warrant or under a bailable warrant but the arrestee cannot furnish bail, and whenever a person is arrested without warrant, or by a private person under a warrant, and cannot legally be admitted to bail or is unable to furnish bail, and the officer making the arrest or, when the arrest is made by a private person, the police officer to whom he makes over the person arrested, may search such person, and place in safe custody all articles, other than necessary wearing apparels found upon him and where any article is seized from the arrested person, a receipt showing the articles taken in possession by the police officer shall be given to such person.[110] Whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency.[111]

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[108] *Id*, s.19(2). It provides: "A warrant issued by a Magistrate in India for the apprehension of any person who is or is suspected to be, in any commonwealth country to which chapter III applies shall be in such form as may be prescribed.

[109] *Id*, s.20; For a general discussion on different aspects of extradition see *Michigan* v. *Doran*, 439 U.S. 282, 58 L.Ed.2d.521(1978) per Blackmun J., joined by Brennan and Marshall, JJ., laid down: "The extradition process involves an 'extended restraint of liberty following arrest' even more severe than that accompanying detention within a single State. Extradition involves, at a minimum, administrative processing in both the asylum State and the demanding State, and forced transportation in between. It surely is a 'significant restraint on liberty'. For me, therefore, the Amendment's language and the holding in *Gerstein* mean that, even in the extradition context, where the demanding State's 'charge' rests upon something less than an indictment, there must be a determination of probable cause by a detached and neutral magistrate, and that the asylum State need not grant extradition unless that determination has been made. The demanding State, of course, has the burden of so demonstrating."

[110] *Id*, s.51(1).

[111] *Id*, s.51(2).

The search should be conducted in the presence of witnesses.[112] The witnesses should be independent and respectable. The power is available if and only if the arrested person is not released on bail. After search all the articles other than necessary wearing apparel found upon the arrested person are to be seized. The person exercising the power is under legal obligation to give a receipt acknowledging the articles taken in possession by the police. However, it will not make the search-evidence inadmissible simply for some irregularities in making the search.[113]

6.21 Power to seize offensive weapons

The officer in charge of the police station or other person may take from the person arrested any offensive weapons which he has about his possession.[114] The weapons so seized shall be delivered to the court or the officer before which or whom the officer or person making the arrest is required by the Code to produce the person arrested. The power to seize can be exercised by any person effecting arrest.[115]

6.22 Medical examination of the arrested

An arrested person can be subjected to medical examination.[116] For that he must be arrested on a charge of committing of an offence of such a nature and alleged to have been committed 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. The medical examination shall be conducted by a registered medical practitioner or any person acting in good faith in his aid and under his direction. It shall

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[112] The Police Rules (Rules framed under the Police Act).
[113] *Kamalabai* v. *State*, 1990 CriLJ 258 (All HC).
[114] The Code of Criminal Procedure, 1973, s.52.
[115] *Ibid.*
[116] *Id*, s.53.

be so done by the registered medical practitioner or such other person at the request of a police officer not below the rank of sub-inspector. It shall be lawful to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.[117] Whenever the person of a female is to be so examined, it shall be made by, or under the supervision of a female registered medical practitioner.[118] This provision makes such medical examinations lawful so as to save it from the scope of the fundamental right against self-incrimination.[119] The medical examination takes various forms depending upon the nature of the case.[120] Even if an accused is released on bail, the medical examination of his person can be done.[121]

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[117] *Id*, s.53(1).

[118] *Id*, s.53.(2). As to the meaning of the expression "registered medical practitioner", the explanation to the section provides: "In this section and in s.54, "registered medical practitioner" means a medical practitioner who possess any recognised medical qualification as defined in clause (h) of s.2 of the Indian Medical Council Act, 1956 (102 of 156), and whose name has been entered in a State Medical Register".

[119] The Law Commission of India at its 37th Report on the Code of Criminal Procedure, 1898 at page 205 has expressed the view that the decision of the Supreme Court in *Kathikalu* v. *State*, AIR 1961 SC 1808, has the effect of the privilege under Article 20(3) only to testimony written or oral. See also *Anil A. Lokhande* v. *State of Maharashtra*, 1981 Cri.LJ 125 (Bom. HC.); *Ananth Kumar Naik* v. *State of A.P.*, 1977 Cri. LJ 1797 (AP HC); *Jamsheel* v. *State of U.P.*, 1976 Cri.LJ 1680 (All HC). In all these decisions, relying on the principles of laid down in *Kathikalu* case. It has been held that s.53 is not violative of Article 20(3) and that a person cannot be said to have been compelled "to be a witness" against himself if he is merely required to undergo a medical examination as contemplated under section 53.

[120] *Neeraj Sharma* v. *State of U.P.*, 1993 Cri. LJ 2266 (All HC); *Anil A. Lokhande* v. *State of Maharashtra*, 1981 Cri.LJ 125 (Bom. HC.); *Ananth Kumar Naik* v. *State of A.P.*, 1977 Cri. LJ 1797 (AP HC); *Jamsheel* v. *State of U.P.*, 1976 CriLJ 1680 (All HC). The expression 'examination of the person' is not confined only to the examination of the skin or what is visible on the body. Even examination of some internal organs for the purpose of collecting evidence comes within the purview of this section. It includes X-ray examination, taking electrocardiograph and testing of blood, sputum, semen, urine, hair etc. The condition that the medical examination has to be done at the instance of a police officer not below the rank of sub-inspector does not debar other superior officers or the court concerned from exercising the power if necessary. It is open to the court to issue direction or to grant approval or permission to the police for carrying out further examination. See also *State of Maharashtra* v. *Dryanoba*, 1979 CriLJ. 277 (Bom HC).

[121] *Thaniel Victor* v. *State of T.N.*, 1991 CriLJ 2416 (Mad HC); *Anil A. Lokhande* v. *State of Maharashtra*, 1981 CriLJ 125 (Bom. HC.); *Ananth Kumar Naik* v. *State of A.P.*, 1977 CriLJ 1797 (AP HC). Even after the release on bail, he is still a person arrested on a charge of committing an offence. Furthermore, such person while released on bail is notionally in the custody of the court.

Similarly, the Identification of the Prisoners Act, 1920 contributes certain procedures. It empowers a police officer to take measurements including finger impressions and foot-print impressions of a person arrested in connection with an offence punishable with imprisonment which may extend to one year or more.[122] If in the opinion of a magistrate it is expedient to direct any person to allow his measurements or photographs to be taken for the purpose of investigation or proceeding under the Code, he may make an order to that effect, provided that the person at some time or other has been arrested in connection with such investigation or proceeding.[123]

The law as well envisages the medical examination of a person arrested, whether on charge or otherwise upon his request. If he alleges at the time when he is produced before a magistrate or at any time during the period of his detention in custody that the examination of his body will afford evidence which will disprove the commission by him of any offence against his body, and requests to do so, the magistrate shall direct the examination of the body of such person by a registered medical practitioner unless the magistrate considers that the request is made for the purpose of vexation or delay or for defeating the ends of justice.[124]

6.23 Arrestee's rights

(a) Right to know grounds of arrest:

Every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offences for which he is

[122] The Identification of the Prisoners Act, 1920, s.4
[123] *Id*, s.5.
[124] The Code of Criminal Procedure, 1973, s.54.

arrested or other grounds for such arrest.[125] When a subordinate officer is deputed by a police officer in charge or any police officer making investigation to arrest a person such subordinate officer shall, before making the arrest, notify to the person to be arrested the substance of the order in writing requiring to arrest given by the superior police officer and if so required by such person shall show him the order.[126]And, in case of arrest to be made under a warrant, the police officer or other person executing the warrant of arrest shall notify the substance thereof to the person to be arrested and if so required, shall show the warrant.[127]

Besides, the Constitution confers on this right the status of a fundamental right. Article 22(1) provides:

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

The right of arrestee to be informed of the grounds of arrest forthwith is precious. Its timely information enables him to move the proper court for bail or to resort to the remedies available to check the illegality involved in arrest and detention.[128] It is 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 the accusation against him is so that he can

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[125] *Id*, s.50(1).
[126] *Id*, s.55; *Ajith Kumar* v. *State of Assam*, 1976 CriLJ 1303 (Gauhati). Non compliance with this provision will render the arrest illegal.
[127] *Id*, s.75. *Sathish Chandra Rai* v. *Jodu Nandan Singh*, ILR 26 Cal 748; *Abdul Gafur* v. *Queen Empress*, ILR 23 Cal 896. If the substance of the warrant is not notified, the would be unlawful.
[128] *Poovan* v. *S.I of Police Aroor*, 1993(1) KLJ 569.

exercise the second right, namely of consulting a legal practitioner of his choice and to be defended by him.[129]

(b) Information as to the right to be released on bail:

Where a police officer arrests without a warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail.[130]

(c) Right to be taken before a magistrate or officer in charge of police station without delay:

A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions as to bail, take or send the person arrested before a magistrate having jurisdiction in the case, or before the officer in charge of a police station.[131] The arrested person should not be confined in any place other than a police station before he is taken to the magistrate.[132]

The procedure as to arrest with warrant is a bit more different. The police officer or other person executing a warrant of arrest shall subject to the provision as to security[133] without unnecessary delay bring the person arrested before the court before

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[129] *Madhu Limaye, Re* (1969)1 SCC 292; *Christie* v. *Leaelinsky*, (1947)1 All ER 567. See also, *Harikrishnan* v. *State of Maharashtra*, AIR 1962 SC 911: The grounds of arrest should be communicated to the arrested person in language understood by him, otherwise it would not amount to sufficient compliance with the constitutional requirement. In *Tarapanda De* v. *State of W.B.*, AIR 1951 SC 174, it is made clear that the words 'as soon as may be' in Art.22 (1) would mean as early as is reasonable in the circumstances of the case however the word 'forthwith' in s.50(1) of the Code creates a strict duty on the part of the police officer making the arrest and would mean immediately.

[130] *Id*, s.50(2).

[131] *Id*, s.56

[132] K.N.Chandrasekharan Pillai, *R.V. Kelkar's Criminal Procedure*, 3rd ed., p.61.

[133] The Code of Criminal Procedure, 1973, s.71.

which he is required by law to produce such person.[134] Such delay shall not in any case exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the magistrate court.[135]

(d) Right of not being detained beyond twenty-four hours without judicial scrutiny

No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a magistrate authorising further detention exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the magistrate's court.[136]

This right is a fundamental right as well.[137] Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody without the authority of a magistrate.[138] Similarly in the case of arrest with warrant the police officer or other person executing the warrant shall without unnecessary delay bring the person arrested before the court before which he is required by law to produce such person.[139]

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[134] *Id*, s.76.
[135] *Ibid.*
[136] *Id*, s.57.
[137] The Constitution of India, Art.22(2).
[138] *Ibid.*
[139] The Code of Criminal Procedure, 1973, s.76; In *Mohd. Sulemain* v. *King Emperor*, 30 CWN (FB). Per Rankin, J, it has been explained that this provision has been enacted with a view (i) to prevent arrest and detention for the purpose of extracting confessions, or on a means of compelling detenues to give information, (ii) to prevent police stations being used as though they were prisons, (iii) to afford an early recourse to a judicial officer independent of police on all questions of bail or discharge. Again in *Dwaraka Das Haridas* v. *Ambalal Ganpathra*, 28 CWN 850, it has been held that this precautionary provision is designed to secure that within not more than 24 hours some knowledge of the nature of the charge against the accused, however incomplete the information may be. See also *Khatri* (II) v. *State of Bihar*, (!981)1 SCC 627; *Sharifbai* v. *Abdul Razak*, AIR 1961 Bom 42; *State of Punjab* v. *Ajaiv Singh*, AIR !956 SC 10.

(e) Right to consult a legal practitioner:

It is a fundamental right that every person who is arrested is entitled to consult a legal practitioner of his choice and the state shall not deny it.[140] There are umpteen number of decisions by the Supreme Court casting constitutional obligation on the state to provide free legal aid to an indigent accused. This obligation does not arise only when the trial commences but also attaches when the accused is for the first time produced before the magistrate, as also when he is remanded from time to time.[141] This right begins from the very moment of the arrest.[142] The consultation with the lawyer may be in the presence of police officer but not within his hearing.[143] In *D.K. Basu* v. *State of W.B.*, the Supreme Court has laid down certain guidelines to be observed indispensably by police officers or such other persons effecting arrest.

6.24 Procedure when investigation cannot be completed within twenty-four hours of arrest

Whenever a person is arrested and detained in custody and it appears that the investigation cannot be completed within the stipulated twenty-four hours[144] and there are grounds for believing that the accusation or information is well founded the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit a copy of the entries in the case diary to the nearest judicial magistrate and shall at the same time forward the accused to such magistrate.[145] The magistrate to whom an accused is so forwarded may authorize the

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[140] The Constitution of India, Art.22(1).
[141] *Hussainara Khatoon (IV)* v. *Home Secretary State of Bihar*, (1980)1 SCC98; *Khatri (II)* v. *State of Bihar*, (1981)1 SCC 627; *Suk Das* v. *Union Territory of Arunachal Pradesh*, (1986)2 SCC 401.
[142] *Moti Bai* v. *State*, AIR 1954 Raj 241; *Sudhasindhu De* v. *Emperor*, ILR 62 Cal 384; *Llewelyn Evans, Re* ILR 50 Bom 741.
[143] *Sunder Singh* v. *Emperor*, 32 CriLJ 339.
[144] The Code of Criminal Procedure, 1973, s.57.
[145] *Id*, s.167(1).

detention of the accused from time to time in such custody as such magistrate thinks fit for a term not exceeding fifteen days in the whole.[146] The magistrate can exercise this power irrespective of whether he has or has not jurisdiction in the case.[147] If the magistrate has no jurisdiction in the case and considers further detention unnecessary he may order the accused to be forwarded to a judicial magistrate having jurisdiction.[148]

The magistrate may authorise the detention of the accused beyond fifteen days otherwise than in police custody if he is satisfied that adequate grounds exist for doing so. The total period of detention of the accused in all such custody shall not be exceeded: (i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than ten years, and (ii) sixty days, where the investigation relates to any other offence.[149]

On the expiry of the period of ninety days or sixty days, as the case may be the accused shall be released on bail on his furnishing bail.[150] So long as the accused does not furnish bail he shall be detained in custody notwithstanding the expiry of the period stipulated.[151] The magistrate shall not so authorise detention in any such custody unless the accused is produced before him.[152] If any question arises whether an accused

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[146] *Id*, s.167(2).

[147] *Ibid;* However, in *Balakrishna* v. *Emperor*, AIR 1931 Lah 99, it was held that in the absence of any difficulties like long distance etc., the police should approach for the purposes of remand a magistrate having jurisdiction to try the case.

[148] *Id, s.*167 (2).

[149] *Id*, s.167(2), proviso, cl.(a).

[150] *Ibid.*

[151] *Id*, s.167(2), *Explanation I.*

[152] *Id*, s.167(2), proviso, cl.(b); In *Bal Krishna* v. *Emperor*, AIR 1931 Lah 99 and *Chadayam Makki* v. *State of Kerala*, 1980 CriLJ 1195, it has been made clear that the object of requiring the accused to be produced before the magistrate is to enable him to decide judicially whether remand is necessary and also to enable the accused to make any representation to the magistrate to controvert the grounds on which the police officer has asked for remand. In order to facilitate the proof of the fact that the accused was produced before the magistrate may obtain signature of the accused on the order authorizing detention. See also *R.K. Singh* v. *Bihar*, (1986)2 Scale 1256; *Ramesh Kumar Ravi* v. *State of Bihar*, 1987 CriLJ 1489 (Pat HC).

was produced before the magistrate, it may be proved by his signature on the order authorising detention.[153]

Where a Judicial Magistrate is not available, the police officer-in-charge or the police officer making investigation if he is not below the rank of Sub-Inspector transmit a copy of the entry in the case diary and shall at the same time forward the accused to the nearest Executive Magistrate on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred.[154] Such Executive Magistrate may for reasons recorded in writing authorise the detention of the accused in such custody as he may think fit for a term not exceeding seven days in the aggregate. He shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the case diary transmitted to him by such police officer before the expiry of the period of detention so authorised by him.[155]

On expiry of the period of detention so authorised the accused shall be released on bail except where an order for further detention of the accused has been made by a magistrate competent to make such order.[156] Where an order for such further detention is made, the period during which the accused was detained in custody pursuant to the order of the Executive Magistrate shall be taken into account in computing the total periods stipulated.[157]

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[153] *Id*, s.167(2), *Explanation II.*
[154] *Id*, s.167(2-A).
[155] *Id*, s.167(2-A), proviso.
[156] *Id*, s.167(2-A).
[157] *Ibid; Jai Singh* v. *State of Hariyana*, 1980 CriLJ 1229 (P&H HC); *L.R. Chawla* v. *Murari*, 1976 CriLJ 212 (Del HC); *Tarsem Kumar* v. *State*, 1975 CriLJ 1303 (Del HC); *Jagadish* v. *State of M.P.*, 1984 CriLJ 79 (MP HC); *High Court of A.P.* v. *Chaganti Satyanarayana*, (1986)1 Scale 1037. Thus if the magistrate authorizes detention on the very date of arrest of an accused then the period of detention is to be computed from the date of his arrest.

The nature of the custody can be altered from judicial custody to police custody and vice versa, but the detention in police custody shall not exceed fifteen days.[158] After the period of detention in police custody, the accused can be kept in judicial custody or any other custody as ordered by the magistrate for the remaining period.[159] The magistrate has full discretion to order detention in police custody or judicial custody even during the fifteen days permitted to authorise detention in police custody.[160]

The magistrate has to apply his judicial mind while deciding whether or not the detention of the accused in any custody is necessary.[161] He shall record his reasons in support of the order authorising detention in custody of the police.[162] The magistrate should consider all available materials including the copy of the case diary before authorising detention.[163] Any magistrate other than the chief judicial magistrate making such order shall forward a copy of his order with his supporting reasons to the chief judicial magistrate concerned.[164]

6.25 Collection of Evidence

(a) Examination of witnesses by police

An investigating police officer can by order require the attendance before him any person for the purpose of his being examined as witness.[165] The order requiring

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[158] This limit is not applicable when there is a series of different cases requiring investigation against the same accused as held by the Punjab and Hariyana High Court in *S. Harisimran Singh*, v. *State of Punjab*, 1984 CriLJ 253.

[159] *State of Delhi Administration* v. *Dharam Pal*, 1982 CriLJ 1103.

[160] *M.R. Venkatraman, Re*, AIR 1948 Mad 100. It is pertinent to note that the magistrate can remand the accused person even to Military, Naval or Air Force custody if such accused person is subject to Military, Naval or Air Force law as laid down by the Delhi High Court in *State (Delhi Admn.)* v. *Dharam Pal*, 1982 CriLJ 1103.

[161] *Bir Bhadra Pratap Singh* v. *D.M.*, AIR 1959 All 384; *E.P.Subba Reddy* v. *State*, AIR 1969 AP 281.

[162] The Code of Criminal Procedure, 1973, s.167(3).

[163] In *Madhu Limaye, Re* (1969)1 SCC 292, it has been held that the order of detention is not to be passed mechanically as a routine order on the request of the police for remand.

[164] The Code of Criminal Procedure, 1973, s.167(4).

[165] *Id*, s.160.

attendance must be in writing. Only those persons appearing to be acquainted with the facts and circumstances of the case and being within the limits of police station of such police officer or within the limits of any adjoining police station can be so required to attend for being examined.[166]

A male person below fifteen years of age or a woman, however, shall not be required to attend any place other than the place in which such person or woman resides.[167] Any person so required is bound to attend before the officer pursuant to the order.[168] Any intentional omission to attend on the part of any person so required by the police, amounts to an offence and he is liable to be prosecuted.[169] However, the police officer has no authority to use force to compel attendance of such person; nor does he have any power to arrest or detain such a witness. Similarly no magistrate has any power to issue any process compelling a person to attend before a police officer.[170]

The police officer may examine orally any person supposed to be acquainted with the facts and circumstance of the case.[171] He may as well examine the accused.[172] The accused, even after his remand to judicial custody can subject to his

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[166] *Ibid.*

[167] *Id*, s.160(1), proviso. See also, *Niloy Dutta* v. *District Magistrate, Sibsagar*, 1991 CriLJ 2933 (Gau HC); *Nandini Satpathy* v. *P.L. Dani*, (1978)2 SCC 424.

[168] *Id*, s.160(1).

[169] The Indian Penal Code, 1860, s.174.

[170] *Queen Empress* v. *Jogendra Nath Mukerjee*, ILR 24 Cal 320. See also *M.N. Sreedharan* v. *State of Kerala*, 1981 CriLJ 119 (Ker HC). As to expenses of such witness any State Government, if it so desires may make rules and provide for payment by the police officer, of the reasonable expenses of every person attending or required at any place, other than such person's residence, as provided under section 160(2) of the Code. In the Joint Committee Report, it has been made clear that as the payment of expenses to persons attending before police officer would involve substantial financial burden on the State Government, it is appropriate to leave the matter entirely to the State Government to make rules for such a provision.

[171] The Code of Criminal Procedure, 1973, s.161(1). It shall be done by a police officer making investigation of the case or on the requisition of such officer, by any police officer not below such rank as the State Government may by order prescribe in this behalf.

[172] The words "any person", include any person who may be accused of the crime subsequently. See *Dina Nath Ganpath Rai, Re*, AIR 1940 Nag 186; *Pakala Narayana Swami* v. *Emperor*, AIR 1939 PC 47. The expression any person supposed to be acquainted with the facts and circumstances of the case includes an accused person who fills that role because the police suppose him to have committed the crime and must therefore, be familiar with the facts. See *Nandini Satpathy* v. *P.L. Dani*, (1978)2 SCC 424; *Mahain Mandal* v. *State of Bihar*, (1972)1 SCC 748.

right to silence, be questioned by the police with the permission of the magistrate in any place and manner which do not amount to custody in the police.[173]

The person being examined by a police officer shall be bound to answer truly all questions relating to that case put to him by such officer.[174] He is, however, not bound to answer such questions, the answer to which would have a tendency to expose him to criminal charge or to a penalty or forfeiture.[175]

Though any person, including an accused is required to answer truly all questions relating to the case under investigation put to him by the investigating police officer, there is legal and constitutional protection to such person against incriminating questions.[176] The accused may remain silent or may refuse to answer when confronted with incriminating questions by virtue of the fundamental right that no person accused of any offence shall be compelled to be a witness against himself.[177]

If an accused person expresses the wish to have his lawyer by his side when the police interrogate him, this facility shall not be denied to him. However, the police need not wait more than for a reasonable while for the arrival of the accused's advocate. The police must invariably warn and - record that fact - about the right to silence against incrimination; and take his written acknowledgement where the accused is literate. After

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[173] *Gian Singh* v. *State (Delhi Admn)*, 1981 CriLJ 100 (Del HC).

[174] The Code of Criminal Procedure, 1973, s.161(2).

[175] *Ibid.* It is quite important for effective investigation that every person questioned by the police officer must furnish, and must be under a legal duty to furnish all information available with him to police. Logically, the law must also require that the information is not false or misleading. If a person being bound to answer truly all questions relating to such case refuses to answer any such question demanded to him, he shall be liable to be punished under section 179, IPC. Further if such a person gives an answer which is false and which he either knows or believes to be false or does not be believe it to be true, he is liable to be punished under section 193, IPC for giving false evidence. Probably, such a person is also liable to be punished under section 177 for furnishing false information.

[176] *Id*, s.161(1) and the Constitution of India, Art.20(3).

[177] *Nandini Satpathy* v. *P.L. Dani* (1978)2 SCC 424: it has been held that the area covered by Art. 20(3) and section 161(2) is substantially the same and section 161(2) is parliamentary gloss on the constitutional gloss. The Supreme Court in this case has extensively considered parameters of section 161(2) and the scope and ambit of Art 20(3).

an examination of the accused, where lawyer of his choice is not available the police officer must take him to a magistrate, doctor, or other willing and responsible non-partisan official or non-official and allow secluded audience where he may unburden himself beyond the view of the police and tell whether he has subjected to duress, which should be followed by judicial or some other custody for him where the police can not reach him. The collector may briefly record the relevant conversation and communicate it to the nearest magistrate.[178]

The police officer may reduce into writing any statement made to him in the course of the examination of a person, and if he does so, he shall make a separate and true record of the statement of each such person, whose statement so recorded.[179] The police officer has wide discretion to record or not to record any statement made to him during investigation. This appears to be necessary also.[180]

No statement made by any person to a police officer in the course of an investigation, if reduced to writing be signed by the person making it.[181] The contravention of the provision will be considered as impairing the value of the evidence given by person making and signing a statement before the police during the investigation of a crime.[182]

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[178] *Nandini Satpathy* v. *P.L. Dani* (1978)2 SCC 424; *Abdul Rajak Mohd.* v. *Union of India* 1986 CriLJ 2019 (Bom HC).

[179] The Code of Criminal Procedure, 1973, s.161(3).

[180] The Law Commission of India in its 41st Report on the Code of Criminal Procedure, 1898, vol.1 (at pp. 69 & 70) has opined that a police officer investigating crime has to question, and then to examine orally, a large number of persons may of whom may have no useful information to give, and much of the information is later found to be pointless. It would be too great a burden on him. If he should be required by law to reduce into writing every statement made to him; nor would it serve any purpose apart from distracting attention from the main work. Further this discretion is in practice, is not being abused, nor have we heard any complaint that it is abused. There has been no lack of complaint that the record prepared by the investigating police officer is not accurate, but no serious compliant that the statements of material witnesses are not recorded.

[181] The Code of Criminal Procedure, 1973, s.162(1).

[182] *Zahiruddin* v. *Emperor*, AIR 1947 PC 75; Joint Committee Report, p.XVI.

During investigation, the statements of witnesses to be recorded as promptly as possible. Unjustified and unexplained long delay on the part of investigating officer in recording a statement of a material witness during the investigation may render the evidence of such witness unreliable.[183]

6.26 Use of the statements made to the police during investigation

A statement recorded by police officer during investigation is neither given on oath nor is it tested by cross-examination. Such statement is not evidence of the facts stated therein and therefore is not considered as substantive evidence.[184] If the person making such statement is examined before the court at the time of trial or inquiry his former statement, if duly proved, may be used by the accused, and with the permission of the court by the prosecution to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872.[185]When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.[186] It shall not be used for any other purpose than that of ss.27 and 32(1) of the Indian Evidence Act, 1872.[187] An omission to state a fact or circumstance in the statement so recorded by the police may amount to contradiction, if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs. Whether any omission amounts to contradiction in the particular context shall be a question of fact.[188] The object of the section is to protect the accused both against overzealous police officers and untruthful witnesses.[189]

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[183] *Balakrishna* v. *State of Orissa*, (1971)3 SCC 192; *Thangarai, Re*, 1973 CriLJ 1301; *Atmaduddin* v. *State of U.P*, (1973)4 SCC 35. See also, *Ganesh Bhaven Patel* v. *State of Maharashtra* (1978)4 SCC 371: It has been held that inordinate delay in the registration of FIR and further delay in recording statement of material witness would cause a cloud of suspicion on the credibility of the entire warp and woof.

[184] *Sewaki* v. *State of Himachal Pradesh*, 1981 CriLJ 919 (HP HC); *Hazarilal* v. *State (Delhi Admn.)* (1980)2 SCC 390; *Gilasuddin* v. *State of Assam*, 1977 CriLJ 1512 (Gau. HC).

[185] The Code of Criminal Procedure, 1973, s.162.

[186] *Ibid.*

[187] *Id*, s.162(2).

[188] *Id*, s.162. See also, *Asan Tharayil Baby* v. *State of Kerala* 1981 CriLJ 1165 (Ker HC); *State of U.P.* v. *M. R. Anthony* (1985)1 SCC 505.

[189] *Khatri(iv)* v. *State of Bihar* (1981)2 SCC 493; *Bhaliram Tikaram Marathe* v. *Emperor*, AIR 1945 Nag 1.

6.27 Confessions and statements

Admitting the offence in terms or at any rate substantially all the facts constituting the offence is confession.[190]

Any confession made by an accused to the police is not admissible in evidence against the person making it.[191] On the other hand confession made to a judicial magistrate is substantive evidence. Any metropolitan magistrate or judicial magistrate may record any confession or statement made to him by an accused.[192] Any such magistrate can record it irrespective whether or not he has jurisdiction in the case.[193] It can be recorded in the course of investigation or at any time afterwards, but before the commencement of the inquiry or trial.[194] Even a police officer on whom any power of a magistrate has been conferred, under any law for the time being in force, shall not record any confession.[195] 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.[196] The magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.[197] The magistrate shall not authorise the detention of the person appearing before him in police custody if at any time before the confession is recorded, states that he is not willing to make the confession.[198] Any

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[190] See *Om Prakash* v. *State of U.P.*, AIR 1960 409; *Sahoo* v. *State of U.P.*,AIR 1966 SC 40; *Padayachi* v. *State of Tamil nadu*, AIR 1976 SC 1167; *Nagesia* v. *State of Bihar*, AIR 1966 SC 119. The word confession is not defined either in the Code or in the Indian Evidence Act, 1872.

[191] The Indian Evidence Act, 1872, s.25.

[192] The Code of Criminal Procedure, 1973, s.164(1).

[193] *Ibid.*

[194] *Ibid;* Any investigation under Chapter XII of the Code and any other law for the time being in force is covered by the provision.

[195] *Id*, s.164(1), proviso.

[196] *Id*, s.164(2). The provision is in conformity with s.24 of the Indian Evidence Act, 1872. It provides: "Confession caused by inducement, threat or promise when irrelevant in criminal proceedings. A confession made by an accused person is irrelevant in a criminal proceeding, 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 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 evil of a temporal nature in reference to the proceedings against him."

[197] *Ibid.*

[198] *Id*, s.164(3).

such confession shall be recorded in the manner provided for recording the examination of the accused.[199] The confession so recorded shall be read over to the person making it. The magistrate shall ascertain whether he admits that the recorded confession is correct. It shall then be signed by the person making it. The magistrate shall make a memorandum stating that he has duly complied with all such legal requirements in the manner prescribed, at the foot of such record.[200]

A statement (other than a confession) shall be recorded in such manner provided for the recording of evidence as is, in the opinion of the magistrate, best fitted to the circumstances of the case.[201] The magistrate has power to administer oath to the person whose statement is so recorded.[202] The magistrate so recording a confession or statement shall forward it to the magistrate by whom the case is to be inquired into or tried.[203]

6.28 Order to produce documents or things

Whenever any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purpose of any investigation by or before him, he may issue a written order to the person in whose possession or power, such document or thing is believed to be, requiring him to attend and produce it or to produce it, at the time and place stated in the order.[204]

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[199] *Id*, s.164(4). The manner of recording the examination is provided under s.281.

[200] *Id*, s.164(4). The sub-section provides the memorandum as: "I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. it was taken in my presence and hearing and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B., Magistrate."

[201] *Id*, s.164(5).

[202] *Ibid.*

[203] *Id*, s.164(6).

[204] *Id*, s.91(1). Under this section any court can issue summons to produce documents or other things, whose production is necessary or desirable for any inquiry or trial by or before him. Sub-sec.(2) provides: "Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same." Sub-sec.(3) provides: "Nothing in this section shall be deemed – (a) to affect ss.123 and 124 of the Indian Evidence Act, 1872 (1 of 1872) or the Banker's Books Evidence Act, 1891 (13 of 1891); or (b) to apply to a letter, post card, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority."

When any document, parcel or other thing in the custody of a postal or telegraph authority is necessary for any investigation, the police officer can get it delivered to him by means of a requisition made by the District Magistrate, the Chief Judicial Magistrate, the court of session or the High Court, addressing such authority.[205] Pending the order in such requisition proceeding, the police officer can make use of the power of any other magistrate, whether executive or judicial, or of any commissioner of police or district superintendent of police to make requisition to the postal or the telegraph authority to cause search to be made for and detain such document, parcel or thing necessary for the investigation.[206]

If evidence necessary for investigation is available in a country or place outside India, the investigating officer can very well procure it.[207]

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[205] *Id*, s.92(1).

[206] *Id*, s.92(2).

[207] The Code of Criminal Procedure (Amendment) Act, 1990 introduced ss.166-A and 166-B for achieving this task. S.166-A provides: **"Letter of request to competent authority for investigation in a country or place outside India.** - (1) Notwithstanding anything contained in this Code, if, in the course of an investigation into an offence, an application is made by the investigating officer or any officer superior in rank to the investigating officer that evidence may be available in a country or place outside India, any Criminal Court may issue a letter of request to a Court or an authority in that country or place competent to deal with such request to examine orally any person supposed to be acquainted with the facts and circumstances of the case and to record his statement made in the course of such examination and also to require such person or any other person to produce any document or thing which may be in his possession pertaining to the case and to forward all the evidence so taken or collected or the authenticated copies thereof or the thing so collected to the Court issuing such letter.
(2) The letter of request shall be transmitted in such manner as the Central Government may specify in this behalf.
(3) Every statement recorded or document or thing received under sub-section (1) shall be deemed to be the evidence collected during the course of investigation under this chapter."
S.166-B provides: **"Letter of request from a country or place outside India to a Court or an authority for investigation in India.** - (1) Upon receipt of a letter of request from a Court or an authority in a country or place outside India competent to issue such letter in that country or place for the examination of any person or production of any document or thing in relation to an offence under investigation in that country or place, the Central Government may, if it thinks fit,-
(i)forward the same to the Chief Metropolitan Magistrate or Chief Judicial Magistrate or such Metropolitan Magistrate or Judicial Magistrate as he may appoint in this behalf, who shall thereupon summon the person before him and record his statement or cause the document or thing to be produced; or
(ii)send the letter to any police officer for investigation who shall thereupon investigate into the offence in the same manner,
as if the offence had been committed within India.
(2) All the evidence taken or collected under sub-sec.(1), or authenticated copies thereof or the thing so collected, shall be forwarded by the Magistrate or police officer, as the case may be to the Central Government for transmission to the Court or the authority issuing the letter of request, in such manner as the Central Government may deem fit."

6.29 Search and seizure

In certain situations collection of evidence can be achieved only by adopting the procedure of search. A search can be done either with or without warrant. A search warrant is a written authority given to police officer or other person by a competent magistrate or court for the search of any place either generally or for specified things or documents or for persons wrongfully detained.[208] A search being a coercive method involving invasion of the sanctity and privacy of a citizen's home or premises, the power to issue search warrant should be exercised with all care and circumspection.[209]

6.30 Search with warrant

Any court may issue a search warrant:

(a) where it has reason to believe that person to whom a summons or an order[210] or requisition[211] has been or might be, addressed, will not or would not produce the document or thing as required thereby or

(b) where such document or thing is not known to the court to be in the possession of any person, or

(c) where the court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection.[212]

The person to whom such warrant is directed may search in accordance with law.[213] The court may, if it thinks fit, specify in the warrant the particular place or part

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[208] K.N. Chandrasekharan Pillai, *R.V.Kelkar's Criminal Procedure*, 3rd ed., p.69.

[209] *Kalinga Tubes Ltd.* v. *D.Suri*, AIR 1953 Ori 153; *Gangadharan* v. *Chellappan*, 1985 CriLJ 1517 (Ker HC); *Bimal Kanti Ghosh* v. *Chandrasekhar Rao*, 1986 CriLJ 689 (Ori HC); *Stephan* v. *Chandramohan*, 1988 CriLJ 308 (Ker HC).

[210] The Code of Criminal Procedure, 1973, s.91.

[211] *Id*, s.92(1).

[212] *Id*, *s*.93(1).

[213] *Ibid*

thereof to which the search or inspection shall extend.[214] The person charged with the execution of such warrant shall then search or inspect only the place or part so specified.[215] No magistrate other than a district magistrate or chief judicial magistrate shall grant a warrant to search for a document, parcel or other thing in the custody of the postal or telegraph authority.[216]

The search shall be made in the presence of two or more independent and respectable witnesses.[217] They shall be the inhabitants of that locality where the place to be searched is situate.[218] If no inhabitant of that locality is available or is willing to be a witness to the search, the inhabitants of any other locality may be made such witnesses.[219] They shall be called upon before making the search, either by order in writing or otherwise.[220] Any person who, without reasonable cause, refuses or neglects to be a witness to the search when called upon by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under s.187 of the Indian Penal Code, 1860.[221]

A person residing in, or being in charge of any closed place liable to search or inspection, shall on demand of the officer or other person executing the warrant, and on production of the warrant allow him free ingress thereto and afford all reasonable facilities for a search therein.[222] If he refuses or omits to do so the officer or other person executing the warrant may break open any outer or inner door or window of any house or place in order to effect an entrance or liberate himself or any other person who having

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[214] *Id*, s.93(2).
[215] *Ibid.*
[216] *Id*, s.93(3).
[217] *Id*, s.100(5) r/w (4).
[218] *Id*, s.100(5).
[219] *Ibid.*
[220] *Ibid.*
[221] *Id*, s.100(8).
[222] *Id*, s.100(1).

lawfully entered for the purpose of making arrest, is detained therein.[223] Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched.[224] If such person is a woman, the search shall be made by another woman with strict regard to decency.[225]

The officer or other person shall prepare a list of all things seized in the course of such search and of the places in which they are respectively found. The witnesses shall sign it.[226] No such witness shall be required to attend the court as a witness of the search unless specifically summon by it.[227] The occupant of the place searched, or some person in his behalf, shall in every instance, be permitted to attend during the search and a copy of the list signed by the witnesses shall be delivered to such occupant or person.[228] When any person is searched as aforesaid a list of all things taken possession of shall be prepared and a copy thereof shall be delivered to such person.[229]

6.31 Search without warrant

A magistrate competent to issue a search warrant under six circumstances mentioned above may direct a search to be made in his presence if he considers it advisable and in such a case it would not be necessary to formally issue a search warrant.

6.32 Search by police officer during investigation

An officer in charge of a police station or police officer making an investigation may search or cause search to be made in any place within the limits of his station for anything necessary for the purpose of investigation into any offence which he is authorised to investigate whenever he has reasonable ground for believing that such

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[223] *Id*, s.100(2) r/w s.47...
[224] *Id*, s.100(3).
[225] *Ibid.*
[226] *Id*, s.100(5).
[227] *Ibid.*
[228] *Id*, s.100(6).
[229] *Id*, s.100(7).

thing may be found there and in his opinion such thing cannot be otherwise obtained without undue delay.[230] He shall record in writing, the grounds of his belief and specify in writing, so far as possible the thing for which the search is to be made before search.[231] He shall if practicable conduct the search in person.[232] He may, however, require any officer subordinate to him to make the search if he is unable to conduct the search in person, and there is no other person competent to make the search present at the time. He shall record his reasons for so doing before deputing his subordinate officer. He shall also deliver to such subordinate officer an order in writing, specifying the place to be searched and so far as possible, the thing for which the search is to be made. Such subordinate officer may thereupon search for such thing in such place.[233]

The search shall be conducted in accordance with the governing legal provisions.[234] Copies of any record made as aforesaid shall forthwith be sent to the nearest magistrate empowered to take cognizance of the offence. The magistrate shall furnish a copy of the same, free of cost to the owner or occupier of the place searched, on application.[235]

This provision does not permit a general search.[236] A promiscuous entry into the houses is not permitted to an investigating officer simply to satisfy himself as to the truth of an allegation made by a complainant or an accused or a witness.[237]

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[230] *Id*, s.165(1).
[231] *Ibid.*
[232] *Id*, s.165(2).
[233] *Id*, s.165(3).
[234] *Id*, s.165(4).
[235] *Id*, s.165(5).
[236] *Lal Mea* v. *Emperor*, AIR 1925 Cal 663; *Ram Parves Ahir* v. *Emperor*, AIR 1944 Par 228; *Sitha Ram Ahir* v. *Emperor*, AIR 1944 Pat 222.
[237] *Jaganath* v. *Emperor*, 29 CriLJ 272. See also *A.P. Kuttan Panicker* v. *State of Kerala*, 1963(1) CriLJ 669; *Emperor* v. *Mohammed Sha*, AIR 1946 Lah 456; *Pratap Dr)* v. *Director of Enforcement*, (1985)3 SCC 72; *Sohanlal* v. *Emperor*, AIR 1933 Oud 305; *State* v. *Satya Narayana Mallik*, AIR 1965 Ori 136; *State* v. *Reheman*, AIR 1960 SC 210; *Sanchaita Investments* v *State of W.B*, AIR 1981 Cal 157; *Stya Gopal* v. *Satraghan Bohra*, 13 CriLJ 763; *Ugagar Singh* v. *Emperor*, AIR 1932 Oud 249; *Madho Sonar* v. *Emperor*, 16 CriLJ 589; *Indhu Mandel* v. *Emperor*, 6 CriLJ 439; *Emperor* v. *Brikbhan Singh*, 16 CriLJ 819; *Heeralal* v. *Ram Dular*, AIR 1935 Nag 237.

6.33 Search by police officer in the limits of another police station

An officer-in-charge of a police station or a police officer not being below the rank of sub-inspector making an investigation may require an officer in charge of another police station, whether in same or a different district, to cause a search to be made in any place in any case in which the former officer might cause such search to be made, within the limits of his own station.[238] Such officer on being so required shall conduct search and forward the things found, if any, to the officer at whose request the search was made.[239] Whenever there is reason to believe that the delay occasioned by an officer in charge of another police station to cause a search to be made as contemplated under the provisions heretofore, might result in evidence of the commission of an offence being concealed or destroyed, it shall be lawful for an officer in charge of a police station or police officer making any investigation (under this chapter) to search, or cause to be searched any place in the limits of another police station (in accordance with the provisions of s.165) if such place were within the limits of his police station.[240] Any officer conducting a search (under sub-sec 3) shall forthwith send notice of the search to the police officer in charge of the police station within the limits of which such place is situate, and shall also send to the nearest magistrate empowered such notice a copy of the list (if any, prepared under section 100). He shall also send to the nearest magistrate empowered to take cognizance of the offence, copies of the records (referred to in sub secs.1 and 3 of Sec 165).[241] The owner or the occupier of the place searched shall, on application, be furnished free of cost with a copy of such records that sent to the magistrate.[242]

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[238] The Code of Criminal Procedure, s.166(1).
[239] *Id*, s.166(2).
[240] *Id*, s.166(3).
[241] *Id*, s.166(4).
[242] *Id*, s.166(5).

6.34 Procedure on completion of investigation

On completion of the investigation, it is for the investigating police officer to form an opinion as to whether or not there is a case to place the accused before the Magistrate for trial. If, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground to justify the forwarding of the accused to a magistrate, such officer shall forward the accused under custody to a magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial or if the offence is bailable and the accused is able to give security shall take security from him for his appearance before such magistrate on a day fixed and for his attendance from day to day before such magistrate.[243] As soon as the investigation is completed, a report which is commonly called as 'charge sheet' or 'chellan' is to be submitted to the magistrate having jurisdiction. Every investigation shall be completed without unnecessary delay.[244] On completion of investigation, the officer in charge of the police station shall forward to the magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government stating: -

(a) (i) the names of the parties;

(ii) the nature of the information;

(iii) the names of the persons who appeared to be acquainted with the circumstances of the case;

(iv) whether any offence appears to have been committed and if so by whom;

(v) whether the accused has been arrested;

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[243] *Id*, s.170(1).
[244] *Id*, s.173(1).

(vi) whether he has been released on his bond, if so whether with or without sureties;

(vii) whether he has been forwarded in custody to a Magistrate having jurisdiction.[245]

Where a superior officer of police has been appointed for the purpose the report shall be submitted through that officer.[246] Such superior officer may, pending the orders of the magistrate direct the orders of the Magistrate direct the officer in charge of police station to make further investigation.[247]

The police officer submitting the report is also required to communicate in the manner prescribed by the State Government the action taken by him to the to the person, if any, by whom the information relating to the commission of the offence was first given.[248] The police officer shall forward to the magistrate along with the report

(a) All documents or relevant extract thereof on which the prosecution proposes to relay other than those already sent to the Magistrate during investigation;

(b) The recorded statements of all the persons whom the prosecution proposed to examine as its witnesses.[249]

If the police officer is of opinion that any part of such statement is not relevant to the subject matter of the proceedings or that its disclosure to the accused is not essential in the interest of justice and is expedient in the public interest, he shall indicate that part of

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[245] *Id*, s.173(2)(i).
[246] *Id*, s.173(3).
[247] *Ibid.*
[248] *Id*, s.173(2)(ii).
[249] *Id*, s.173(5). See also *State of Hariyana* v. *Mehal Singh*, 1978 CriLJ 1810, it was held by the Punjab and Hariyana High Court that investigation of an offence could not be considered to be in conclusive mearly for the reason that the investigating officer, when he submitted his report under s.173(2) to the Magistrate still awaited the reports of the experts or by some charge, either inadvertently or by design, he fails to append to the report such documents of statements under s.161 all through those were available with him when he submitted the police report to the Magistrate.

the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.[250]

Thus if it appears to the officer in charge of the police station, on completion of the investigation, that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a magistrate, such officer shall if such person is in custody release him on his executing a bond, with or without sureties, as such officer may direct to appear if and when so required before a Magistrate empowered to take cognizance of the offence on a police report and to try the accused or commit him for trial.[251] The police officer shall report to the Magistrate having jurisdiction.[252] In case the Magistrate disagrees with such report and is of opinion that there is adequate evidence to put the accused persons on trial he may either take cognizance of the offence or direct the police officer to make further investigation.[253]

The Magistrate receiving the report has no power to direct the police to submit a particular kind of report.[254] If the Magistrate considers the conclusion reached by the police officer as incorrect, he may direct the police officer to make further investigation.[255] He may or may not take cognizance of the offence disagreeing with the police, but cannot compel the police officer to submit a charge sheet so as to accord with his opinion.[256]

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[250] *Id*, s.173(6).

[251] *Id*, s.169. The police can carry on the investigation even after the release of the accused (under s.169) and if sufficient evidence against the accused if found, submits a report under s.173 and gets the person re-arrested.

[252] *Id*, s.173(2).

[253] *Abhinandan Jha* v. *Dinesh Mishral*, AIR 1968 SC 117.

[254] *Abhinandan Jha* v. *Dinesh Mishral*, AIR 1968 SC 117; *King Emperor* v. *Kwaja NazirAhamad*,AIR 1945 PC 18; *H.N. Rishbud* v. *State of Delhi*, AIR 1955 SC 196; *State of W.B.* v. *S.N.Basak*, AIR 1963 SC 447.

[255] *Id*, s.156(3).

[256] *Abhinandan Jha* v. *Dinesh Mishral*, AIR 1968 SC 117; See also *H.S.Bains* v. *State*, (1980)4 SCC 631; *Surat Singh* v. *State of Punjab*, 1981 CriLJ 585 (P & H HC); *Gynendra Kumar* v. *State*, 1980 Crl.LJ 1349 (All HC); *Kuli Singh* v. *State of Bihar*, 1978 CriLJ 1575 (Pat HC); *Pratap* v. *State of U.P.*, 1991 CriLJ 669 (All HC); *P.V.KrishnaPrasad* v. *K.V.N. Koteswara Rao*, 1991 CriLJ 341 (AP HC).

6.35 Who shall conduct investigation

The police is the only agency to conduct investigation. Though the definition of investigation implies that any person (other than magistrate) authorised by a magistrate in this behalf can conduct investigation, the procedural scheme set by the Code as narrated above does not contemplate any investigation by any person other than police.[257]

[257] The Code of Criminal Procedure, 1973, ss.2(c), 41, 56, 57 and Chapter XII do not contemplate involvement of any person other than police officer to take part in any procedure forming part of investigation.

CHAPTER 7

POST INVESTIGATION CRIMINAL PROCESS

7.1 Cognizance of offences

The first step towards adjudication of guilt or innocence is taking cognizance of the offence. A competent Magistrate may take cognizance of any offence upon:

(a) receiving a complaint of facts which constitute such offence;

(b) a police report of such facts;

(c) information received from any person other than a police officer, or upon his own knowledge, that such an officer has been committed.[1]

The Code does not define what taking cognizance is. It does not involve any formal action or indeed action of any kind.[2] A Magistrate is said to take cognizance of an offence when he decides to continue the criminal process against the accused after he has intentionally applied his mind to the offence alleged in the complaint or police report.[3]

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[1] The Code of Criminal Procedure, 1973, s. 190. A Magistrate of first class or a Magistrate of second class specially empowered for this purpose is competent take cognizance of offences. This power is subject to the provisions of ss.195 to 199.

[2] The word 'cognizance' has no esoteric or mystic significance in criminal law or procedure. It merely means 'become aware of' and when used with reference to a court or judge, 'to take notice judicially' *Ajithkumar Palit* v. *State of W.B.*, AIR 1963 SC 765.

[3] It occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence for the purpose of proceeding to take subsequent steps towards inquiry and trial. The subsequent proceedings are provided under s.200 or s.202 or s.204.The Law Commission of India, 41st Report on the Code of Criminal Procedure, 1898, p.132, para 16.2. An order summoning a person to appear in a court of law to answer a criminal charge entails serious consequences. It has the effect of abridging the liberty of a citizen which is held so precious and sacred in our Republic. Such an order must not be passed unless it has behind it the sanction of law. A Magistrate is expected to observe this principle while taking cognizance of every offence. Thus ss.200 to 203 are enacted to have a weeding-out operation in order to distinguish unfounded from genuine cases so as to root out at the very outset without calling upon the party complained against in cases where the cognizance is taken on a complaint. For obvious reasons such special procedure is not needed in cases where cognizance is taken on a police report. See *Gopi Nath & Sons* v. *State of H.P.*, 1981 CriLJ 175 (HP HC).

7.2 Issuing summons or warrant

A summons is an authoritative call to the accused person to appear in court to answer to a charge of an offence.[4] A warrant of arrest is written authority given by a competent magistrate for the arrest of a person.[5] If the magistrate taking cognizance of an offence considers that there is sufficient ground for proceeding, then

(i) if the case appears to be a summons case, he shall issue his summons for the attendance of the accused, or

(ii) if the case appears to be a warrant case, he may issue a warrant, or if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such magistrate or (if he has no jurisdiction himself) before some other magistrate having jurisdiction.[6]

The general mandate is that in summons cases the magistrate shall issue a summons, while in warrant cases he has discretion to issue either warrant or summons. However, the court is empowered to issue warrant against the accused even in a summons case:

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[4] Every summons shall usually be served by a police officer. However, it can be served by an officer of the court issuing it or other public servant if the State Government makes rules as authorised by the Code(s.62). More details regarding form of summons, mode of its being served, etc are contained under ss 61 to 68 of the Code.

[5] The Code of Criminal Procedure, 1973, s.70(1). Section 72 provides that it must be in writing and signed by the presiding officer of the court issuing it. It shall bear the seal of the court. It must clearly mention the name and other particulars of the person to be arrested and must specify the offence with which he is charged. It must show clearly the person to whom the authority to arrest is given. It shall ordinarily be directed one or more police officers; but the court may, if its immediate execution is necessary and no police officer is immediately available, direct it to any other person or persons. Such person or persons shall be bound to execute the same. When a warrant is directed to more officers or persons than one, it may be executed by all or by any one or more of them. A warrant shall remain in force until it is cancelled by the court issuing it or until it is executed. Thus it would not be invalid simply on the expiry of the date fixed by the court or for the return of it .See also *Emperor* v. *Binda Ahir*, 29 CriLJ 1007 (Pat HC).

[6] *Id*, s. 204(1); s.2(w) provides: " 'Summons case' means a case relating to an offence, and not being a warrant case."; s.2(x) provides: " 'Warrant case' means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years."

(a) if, either before the issue of such summons or after the issue of the same but before the time fixed for his appearance, the court sees reason to believe that he has absconded or will not obey the summons; or,

(b) if, at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.[7] The court shall record its reasons in writing before so issuing warrant in summons cases.[8]

The discretion to issue a summons or warrant if there is sufficient ground for proceeding is restricted.[9]

7.3 Power to dispense with the personal attendance of the accused

The magistrate is empowered to dispense with the personal attendance of the accused under certain circumstances.[10] Whenever a magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.[11] However, the magistrate inquiring into or trying the case may in his discretion at any stage of the proceedings, direct the personal attendance of the accused, and if necessary, enforce such attendance in the manner provided in the Code.[12] Seriousness of the offence involved, the status of the accused,

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[7] *Id* ,s.87.

[8] *Ibid.*

[9] *Id,* s. 204. It provides that no summons or warrant shall be issued under s. 204(1) until a list of prosecution witnesses is filed. It is for protecting the interest of the accused. By virtue of this provision the accused would be in a position to know as to the witnesses who are supporting the prosecution case. *P. Dhanji Mavji* v. *G.Govind Jiva*, 1974 CriLJ 241 (Guj HC); *Ram Narain* v. *Bishambir Nath*, AIR 1961 Punj 171; *Chaturbhuj* v. *Nahar Khan*, AIR 1958 MP 28. *Abdullah Bhat* v. *Ghulam Mohd*, 1972 CriLJ 277 (J&K HC-FB).

[10] *Id,* s.205.

[11] *Ibid.*

[12] *Id,*s..203(2). The scheme of the provisions is that a magistrate has to disperse with the personal appearance of the accused and allow him to appear by his pleader except when the personal attendance of the accused before court is necessary in the interest of justice. See *S.R. Jhunjhuwala* v. *B.N. Poddar*, 1988 CriLJ 51 (Cal HC); *Sachida Nand* v. *Pooran Mal*, 1988 CriLJ 511 (Raj HC); *N.Dinesan* v. *K.V.Baby*, 1981 CriLj 1551 (Ker HC).

etc., are often taken into account in deciding whether the accused is entitled to exemption from personal attendance.[13]

7.4 Supply to the accused of copies of statements and other documents

The magistrate is under an imperative duty to furnish to the accused, free of cost, all copies of statements made to the police and of the documents to be relied upon by the prosecution.[14] The purpose sought to be served vide the sections is to put the accused on notice of what he has to meet at the time of the inquiry or trial and to prepare himself for his defence.[15] In a case instituted on a complaint the accused is entitled to disclosure by information.[16]

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[13] *Erafan Ali* v. *King*, AIR 1948 Pat 418: In cases which are grievous in nature involving moral turpitude personal attendance is the rule, while in cases which are technical in nature, which do not involve moral turpitude and where the sentence is only fine, exemption should be the rule. *H.R.Industries, Kottayam* v. *State of Kerala*, 1973 CriLJ 262 (Ker HC): The courts should insist upon the appearance of the accused only when it is in his interest to appear or when the court feels that his presence is necessary for the effective disposal of the case. In all trivial and technical cases where the accused are ladies, old and sickly persons, workers of factories, daily wage-earners, other labourers and busy business people or industrialists courts should invariably exercise discretion liberally to exempt such persons from personal attendance. See als, *Ravi Singh* v. *State of Bihar*, 1980 CriLJ 330 (Pat HC): *Sachidanad* v. *State of Mysore*, AIR 1969 Mys 95; *Anila Bala Devi* v. *Kandi Muncipality*, AIR 1950 Cal 350; *Tirbeni* v. *Mst. Bhagwati*, AIR 1927 All 149. The Law Commission of India, 41st Report on the Code of Criminal Procedure, 1898, p.138, para 17.5.The power to dispense with the personal attendance of the accused is exercisable in any case where the magistrate issues a summons in the first instance, and it is immaterial whether the case is a summons case or a warrant case. The power under this section is limited to the first issue of process and it cannot be invoked at any later stage. If the magistrate finds it necessary at later stage, he will have to act under and in accordance with the provisions of sec.317.

[14] *Id,s.* 207. This is in addition to where a police officer investigating the case finds it convenient to do so, he may furnish to the accused copies of all or any of the documents referred to in s.173(5). In cases where cognizance of the offence is taken otherwise than on a police report, the investigation is not ordinarily conducted by the police. Thus, naturally there would be no statements recorded by the police. Therefore the valuable right conferred to the accused to get copies of the document would not be available in such cases.

[15] *Gurbachan Singh* v. *State of Punjab*, AIR 1957 SC 623; See also *Geevarghese* v. *Philippose*, 1987 CriLJ 1605 (Ker HC); *Purushottam Jethanand* v. *State of Kutch*, AIR 1954 SC 700.

[16] Failure to comply with s.207 is a serious irregularity. However this irregularity in itself will not vitiate the trial. If it has in fact occasioned a prejudice to the accused in his defence the conviction of the accused must be set aside and fair retrial after furnishing all the required copies to the accused must be conducted. See *Narayan Rao* v. *State of A.P.*, AIR 1957 SC 737; *Gurbachan Singh* v. State of Punjab, AIR 1957 Sc 623; *Purushottam Jethanand* v. *State of Kutch*, AIR 1954 SC 700; *Bayadabai* v. *State of Maharashtra*, 1979 CriLJ 529 (Bom HC).

7.3 Concept of fair trial

It is a radical principle of law that an accused shall not be punished unless he has been given a fair trial and his guilt has been proved in such trial. The notion of fair trial cannot be explained in absolute terms like all other concepts incorporating fairness or reasonableness. Fairness is a relative concept. Thus in criminal trial fairness could be measured only in relation to the gravity of accusation, the time and resources which the society can reasonably afford to spend, the quality available of resources, the prevailing social values etc. However, leaving aside the question of the degree of fairness in criminal trial, the basic essential attributes of fair trial can be identified and studied.[17] Our judiciary has recognised that the primary object of criminal procedure is to ensure a fair trial of the accused.[18]

7.4 Adversary system

The system of criminal trial envisaged by the Code is the adversary system based on the accusatorial method.[19] In this system the prosecution representing the State accuses the defendant of the commission of some crime. The law requires the prosecutor to prove his case beyond reasonable doubt unless otherwise provided in any law for the time being in force. The law also provides for opportunity to the accused to defend himself. The Judge (or the Magistrate) more or less is to function as an umpire between the two contestants. Challenge constitutes the essence of adversary trial and

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[17] The Universal declaration on Human Rights provides under Arts.10 and 11 respectively as: "Every one is entitled in full equality to fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations of any criminal charge against him", and "Every one charged with a penal offence has the right to be presumed innocent until proved guilty according to law in public trial at which he has had all the guarantees necessary for his defence". Adopted and proclaimed by General Assembly on December 10, 1948.

[18] *Talab Haji Hussain* v. *Madakal Purushatam Mondkar*, AIR 1958 SC 376; *Ismail Sodawala* v. *State of Maharashtra*, (1975)3 SCC 140.

truth is supposed to emerge from the controverted facts through effective and constant challenges.[20] Adversary system is by and large dependable for the proper reconciliation of public interest in punishing the criminals and private interest in preventing wrongful convictions. The system of criminal trial assumes that the state using its investigative resources and employing competent counsel will prosecute the accused who in turn, will employ equally competent legal services to challenge the evidence of prosecution.[21]

7.5 Legal aid to the indigent accused

Though the adversary system envisages equal rights and opportunities to the parties to present their respective cases, before the court, such legal rights and opportunities would in practice operate unequally and harshly affecting adversely the poor indigent accused persons who are unable to engage competent lawyers for their defence. The system therefore departs from its strict theoretical passive state and confers on the accused not only a right to be defended by a lawyer of his choice, but also confers on the indigent accused person a right to get legal aid for his defence at the State's cost.[22] Failure to provide free legal aid for an indigent accused would vitiate the trial, entitling setting aside of the conviction and sentence.[23]

7.6 Presumption of innocence

It is a cardinal principle of our administration of criminal justice that the accused shall be presumed innocent unless his guilt is proved beyond reasonable

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[19] Report of the Expert Committee on Legal Aid, p.70.
[20] *Ibid.*
[21] *Ibid.*
[22] The Code of Criminal Procedure, 1973, ss.303 & 304 and the Constitution of India, Arts. 22(1) & 21 as construed by the Supreme Court in *Hussainara Khatoon (IV)* v. *State of Bihar*, (1980)1 SCC 98 declare free legal aid to indigent person as his constitutional right.
[23] *Suk Das* v. *Union Territory of A.P.*, (1986)2 SCC 401.

doubt.[24] The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden the court cannot record a finding of the guilt of the accused.[25] Every criminal trial begins with the presumption of innocence in favour of the accused. The provisions of the Code are so framed that a criminal trial should begin with and be through out governed by this essential presumption.[26] However, this principle is not absolute. It can be applied only with a pinch of salt in it.[27]

7.7 Courts to be independent and impartial

An independent and impartial judiciary is the bedrock on which the edifice of the administration of criminal justice is built. Our legal system has taken several steps to safeguard the degree of impartiality in the discharge of judicial functions:

(a) Separation of judiciary from the executive as narrated earlier,

(b) Court to be open,

Public trial in open court is undoubtedly essential for the healthy, objective and fair administration of justice. Trial held subject to the public scrutiny and gaze naturally acts as a check against judicial caprice or vagaries, and serves as a powerful instrument for creating confidence of the public in fairness, objectivity and impartiality of the administration of justice. Public confidence in the administration of such great significance that there can be no two opinions in the broad proposition that in

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[24] *Babu Singh* v. *State of Punjab*, (1964)1 CriLJ 566; *K.M. Nanavati* v. *State of Maharashtra*, AIR 1962 SC 605.

[25] *Kali Ram* v. *State of H.P.*, (1973)2 SCC 808.

[26] *Talab Haji Hassan* v. *Madhukar Purushottam Mondkar*, AIR 1958 SC 376.

[27] *Shivaji Sahebrao Bobade* v. *State of Maharashtra*, (1973)2 SCC 793: "The cherished principles or golden thread beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men go out but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community";

discharging their functions as judicial tribunals, courts must generally hear causes in open court and must permit public admission to the court room.[28]

(c) Judge or magistrate not to be personally interested in the case

It is a radical principle of law that no man shall be judge in his own case.[29] The legal requirement is that justice should be administered as to satisfy a reasonable person that his tribunal was impartial and unbiased. It is well settled that every judicial officer who is called upon to try certain issues in judicial proceedings must be able to act judicially. He should be able to act impartially, objectively and without any bias. The question is not whether a bias has actually affected the judgement. The real test is whether there exists a circumstance to which a litigant could reasonably apprehend that a bias attributable to a judicial officer must have operated against him in the final decision of the case. It is this sense that it is often said that justice should not only be done but must also appeal to be done.[30]

(d) Transfer of case to secure impartial trial:

A magistrate empowered to take cognizance of an offence may do so upon his own knowledge about the commission of any such offence.[31] However in such a case the accused must be told before any evidence is taken that he is entitled to have the case tried by another court and if he so chooses the case shall be transferred to another magistrate.[32] This is in order to inspire confidence as to the impartiality of the court in

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[28] The Code of Criminal Procedure, 1973, s.327; *Naresh Shridhar Mirajkar* v. *State of Maharashtra*, AIR 1967 SC 1, see also *Kehar Singh* v. *State (Delhi Admn.)*, (1988)3 SCC 609.
[29] *Id.*,s.479.
[30] *Shyam Singh* v. *State of Rajasthan*, 1973 CriLJ 441 (Raj HC).
[31] S.190 (1)(c).
[32] S.191.

conducting the trial. The High Court and the Supreme Court have power to transfer to achieve such objects as narrated earlier.

Right of the accused to know of the accusation: Fair trial requires that the accused person is given adequate opportunity to defend himself. Such opportunity will have little meaning, or such an opportunity in substance be the very negation of it, if the accused is not informed of the accusations against him. The Code therefore provides in unambiguous terms that when an accused person is brought before the court for trial, the particulars of the offence of which he is accused shall be stated to him.[33] In case of serious offences, the court is required to frame in writing a formal change and then to read and explain the change to the accused person.[34]

The accused person to be tried in his presence: The personal presence of the accused throughout his trial would enable him to understand properly the prosecution case as it is unfolded in the court. This would facilitate in the making of the preparations for this defence. A criminal trial in the absence of the accused is unthinkable. A trial and a decision behind the back of the accused person is not contemplated by the Code, though no specific provision to that effect is found therein. The requirement of the presence of the accused during his trial can be implied from the provisions which allow the court to dispense with the personal attendance of the accused person under certain circumstances. For instance, a magistrate issuing a summons may dispense with the personal attendance of the accused and permit him to appear by his pleader. [35] Similarly, it is required to take the evidence in the presence of the accused person.[36] The statutory

[33] *Ss. 251,240,246 and 228.*
[34] *Ss.228,240 and 246.*
[35] *S.205.*
[36] The Code of Criminal Procedure, 1973, s.273.

provisions permitting the accused to appear by his pleader are there in the Code to help the accused and not to harass him, and the discretion the judge or magistrate has in these matters is to be exercised judicially.[37]

7.8 Right of cross-examination

Evidence given by witnesses may become more reliable if given on oath and tested by cross- examination. A criminal trial which denies the accused person the right to cross- examine prosecution witnesses is based on weak foundation, and cannot be considered as a fair trial.[38]

7.9 Right to speedy trial

Every accused is entitled to have an expeditious trial. Justice delayed is justice denied. This is all the more true in a criminal trial where the accused is not released on bail during the pendency of the trial and the trial is inordinately delayed. However, the Code does not in so many words confer any such right on the accused to have his case decided expeditiously. If the accused is in detention and the trial is not completed within the period stipulated under sec. 167, from the first date fixed for hearing he shall be released on bail.[39]

In *Hussainara Khatoon* (IV) v. *State of Bihar*,[40] the Supreme Court considered the problem in all its seriousness and declared that speedy trial is an essential ingredient of 'reasonable, fair and just' procedure guaranteed by Art 21 and that it is the constitutional obligation of the State to devise such a procedure as would ensure speedy trial to the accused. The court observed:

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[37] *N. Dinesan v. K.V. Baby, 1981 CriLJ 1551 (Ker HC).*
[38] *Sukanraj v. State of Rajasthan, AIR 1967 Raj 267.*
[39] *S. 437 (6).*
[40] *(1980) 1 SCC 98.*

"The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of this Court, as the guardian of the fundamental right of the accused to speedy trial by issuing necessary directions to the State which may include taking positive action, such as augmenting and strengthening the investigative machinery, setting up new courts, building new court houses, providing more staff and equipment to the courts, appointment of additional judges and other measures calculated to ensure speedy trial."[41]

7.10 Autrefois acquit and Autrefois convict

This doctrine means that if a person is acquitted or convicted of an offence on trial he cannot be tried again for the same offence or on the facts for any other offence. This doctrine is substantially incorporated as a fundamental right in Article 20 (2) of the Constitution and embodied as a legal right in sec. 300 of the Code. When once a person has been convicted or acquitted of any offence by a competent court, any subsequent trial for the same offence would certainly put him in jeopardy and in any case would cause him unjust harassment. Such a trial can be considered anything but fair, and therefore has been prohibited by the Code.[42]

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[41] *Ibid.; Also see discussion in S. Guin v. Grindlays Bank Ltd., (1986) 1 SCC 654: 1986 CriLJ 255; Madheshwardhan Singh v. State of Bihar, 1986 CriLJ 1771 (Pat HC); Mihir Kumar Ghosh v. State of W.B., 1990 CriLJ 26 (Cal HC).*

[42] While Article 20 (2) does not in terms maintain a previous acquittal, section 300 of the Code fully incorporate the principle and explains in detail the implications of the expression "same offence". See also *Natarajan v. state, 1991 Cri LJ 2329 (Mad HC).* An analysis of sec. 300 will bring out the following: The basic rule is that '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. For the purpose of this section the term "acquittal" is explained in negative terms by saying that the dismissal of a complaint or discharge of the accused is not "acquittal". The dismissal of a complaint or the discharge of the accused is not considered as final decisions regarding the innocence of the accused. However, when a court applies a wrong provision of law erroneously, it is deemed that the order in effect is one under the provision of law applicable to the facts of the case. Where in a summons case, the magistrate passed an order of "discharge" under sec. 245(2) owing to the absence of the complainant the order of "discharge" under sec. 245(2) must be read as an order of acquittal passed under section 256.

7.11 Trial procedures, common features

The Code has adopted four distinct mode of trials, namely

(1) trial before Court of Session,

(2) trial of warrant cases,

(3) trial of summons cases, and

(4) Summary trials.

For determining the mode of trial, all criminal cases are divided in the first instance into two categories, 'Warrant Cases'[43] and 'Summons cases'.[44] Each of these two categories of cases has been further subdivided into two classes on the basis of the seriousness of the offences. The more serious amongst the warrant cases are tried according to the first mode of trial by a Court of Session, and on the other side, the less serious amongst the summons cases are tried summarily according to the fourth mode of trial. The philosophy, logic or rational, underlying this policy is that in cases relating to very serious offences it is just and appropriate to have elaborate trial procedure which would ensure and also appear to ensure, a high degree of fairness to the accused and also a high degree of precision in reaching correct conclusions. On the other hand, in cases of numerous offences of less serious nature it would be expedient to adopt simple and less elaborate procedures, and in the vast number of petty cases it becomes necessary even to have summary procedures.

It is better to see the common procedures involved in all the four modes, of trial, before going into their details.

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[43] S. 2 (x).
[44] S. 2 (w).

(1) Language of Courts.- The Constitution provides that until Parliament by law otherwise provides, all proceedings in the Supreme Court and in every High Court shall be in English.[45] However, the Governor of a State may, with the previous sanction of the President, authorise the use of Hindi, or any other language used for any official purposes of the State, in proceedings in the High Court having its principal seat in that State, but this rule shall not apply to any judgment, decree or order passed or made by such High Court.[46]

The State Government may determine what shall be, for purposes of this Code, the language of each court within the State other than the High Court.[47] This does not however mean that a witness cannot give his evidence in a language other than the court language; nor does it mean that the accused cannot give his statement in a language different from the court language. In such cases where the language used by witness or the accused is one other than the court language procedures have been provided under ss.277 and 281 for recording such evidence and statements.

7.12 Proceedings to be held expeditiously

An important aspect of fair trials is the expeditious conduct of trial proceedings. Though speedy trial is not specifically enumerated as a fundamental right in our Constitution, it has been held[48] that it is implicit in the broad sweep and content of Article 21 as interpreted by the Supreme Court in *Maneka Gandhi* v. *Union of*

[45] Art. 348 (1) (a).
[46] Art.348(2).
[47] S.272.
[48] *Hussainara Khatoon*(I) v. *Home Secretary, State of Bihar,* (1980)1SCC81.

India.[49] Speedy trial means reasonably expeditious trial.[50] Inordinate delay in trial even vitiates further proceedings.[51]

Once the cognizance of the accusations of a criminal nature is taken by the competent court, the trial has to be held with all expedition so as to bring to book the guilty and absolve the innocent. This has to be achieved with speed and without loss of time in the interest of justice.[52] The object is to avoid loss of evidence by passage of time and unnecessary harassment to the accused. It is well known that if the prosecution is kept pending for indefinite or for a long time, important evidence may be obliterated by mere lapse of time, with the result that the evidence would not be available at the time of trial.[53]

The adjournment can be for such time as the court considers reasonable. What is reasonable time in a given case will depend upon the facts and circumstances of the case. The discretion to postpone or adjourn a case is to be exercised judicially and not arbitrarily. The Code makes clear distinction between detention in custody before taking cognizance and detention in custody after taking cognizance. The former is covered by s. 167 and the latter by s. 309. The two are mutually exclusive and ought to be kept so.[54] A question arose whether the magistrate has power to remand an accused

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[49] AIR 1978 SC 597: (1978)1SCC248.

[50] *Hussainara Khatoon*(I) v. *Home Secretary, State of Bihar*, (1980)1SCC81; *Madheshwadhari Singh* v. *State of Bihar*, 1986 CriLJ 1771 (Pat HC); *State of Bihar* v. *Maksudan Singh*, 1985 CriLJ 1782; *Guin* v. *Grindlays Bank Ltd.*, (1986)1SCC654: AIR 1986 SC 289.

[51] *Union of India* v. *Mumtazuddin*, 1988 CriLJ 1320 (Cal HC); *State* v. *Maj. P.F. Roberts*, 1986 CriLJ 1415 (Gan HC); *Rohtas Kumar* v. *State of Haryana*, 1988 CriLJ 1423 (P & H HC); *Srinivas Gopal* v. *U.T. of Arunachal Pradesh*, (1988)4 SCC 36; *Kulbir Singh* v. *State of Punjab*, 1991 CriLJ 1756 (P & H HC); *N.V. Raghava Reddy* v. *Inspector of Police*, 1991 CriLJ 2144 (AP HC); *Sivakumar* v. *State of A.P.*, 1991 CriLJ 2337 (AP HC).

[52] *Ramkrishna Sawalaram Redkar* v. *State of Maharashtra*, 1980 CriLJ 254 (Bom HC).

[53] *State of Maharashtra* v. *Rasiklal K. Mehta*, 1978 CriLJ 809 (Bom HC).

[54] 41st Report, p. 212, para 24. 49.

during the period between the date of submission of police report and the date of taking cognizance.[55]

7.13 Decision on evidence partly recorded by one judge or magistrate and partly by another

The principle that the judge or the magistrate who hears the entire evidence should give the decision is an important one in the administration of criminal justice. A departure from this principle has been permitted by s. 326 apparently on the grounds of expediency. When a magistrate after hearing a case is transferred or relinquishes his office, for any other reason, his successor, but for s. 326, will have to hear the case afresh. Section 326 is harassment involved in trying the case afresh.[56]

In order to attract the provisions of s. 326, to enable a successor judge to continue a trial from the stage left by his predecessor, two conditions must be satisfied- (i) that the first judge had heard and recorded the whole or part of the evidence and

7.14 Commitment of case to court of session

The Court of Session cannot directly take cognizance of even offences triable exclusively by Court of Session. Rather, the Court of Session can deal with such cases only when the same are committed by the magistrate taking cognizance of such

[55] The court resolved it and held that the magistrate has power under s. 309 since inquiry in terms of s. 2(g) of the Code could be deemed to have commenced from the submission of police report and continued till an order of commitment was made under s. 209. *State of U.P.* v. *Lakshmi Brahma*, AIR 1983 SC 439: (1983)2 SCC 372; *Rabindra Rai* v. *State of Bihar*, 1984 CriLJ 1412 (Pat HC).

[56] *Ramadas Kelu Naik* v. *V.M. Muddayya*, 1978 CriLJ 1043 (Kant HC); *Payare Lal* v. *State of Punjab*, AIR 1962 SC 690; *Punjab Singh* v. *State of U.P.*, 1983 CriLJ 205 (All HC).

offences. Such magistrate shall perform certain preliminary functions and commit the case formally to the Court of Session.[57]

In forming the opinion as to whether a case is to be so committed the Magistrate is not to weigh the evidence and the probabilities in the case. Nor is he required to hear the accused.[58] Rather, the magistrate is only to examine the police report and other documents and find out whether the facts stated therein make out an offence triable exclusively by the Court of Session. However, it is not open to him to hold a mini trial for arriving at above such finding.[59]

If on a plain reading of material on record it does not appear to the judicial mind that any such offence exclusively triable by the court of session exists, or even prima facie or on the face of the record no such offence is disclosed at all, then in that limited field and contingency, the magistrate may decline to commit the case. Merely because the sessions court is vested with the discretionary powers to set aside a committal and to send the case back, the magistrate is not obliged to almost mechanically commit a case even if the offence does not appear to him to be triable exclusively by the court of session.[60] If made up facts unsupported by any material are reported by the police and a sessions offence is made to appear it is perfectly open to the sessions court to discharge the accused.[61]

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[57] *Id*, ss.209, 323.

[58] *State* v. Jairam, 1976 CriLJ 42(Del HC); *State* v. *Kastu Behera*, 1975 CriLJ 1178 (Ori HC); *Salecha Khatoon* v. *State of Bihar*, 1989 CriLJ 202 (Pat HC).

[59] *State of Karnataka* v. *Shakti Velu*, 1978 CriLJ 1238 (Kant HC); *State of H.P.* v. *Sita Ram*, 1982 CriLJ 1696 (HP HC).

[60] *Dattatraya Samant* v. *State of Maharashtra*, 1981 CriLJ 1819 (Bom HC).

[61] The Code of Criminal Procedure, 1973, s.227; see also *Sanjay Gandhi* v. *Union of India*, (1978) 2 SCC 39. If the offence does not appear to be one exclusively triable by a court of session, he shall not discharge the accused, but shall proceed under Chapter XIX or Chapter XX of the Code as the magistrate is deemed to have taken cognizance of offences falling under any one of the Chapters. *P.R.Murugayian* v. *J.P.Nadar*, 1977 CriLJ 1700 (Mad HC); *Izhar Ahmad* v. *State*, 1978 CriLJ 58 (All HC). No committal shall be done without the presence of the accused.[61] This requirement of the presence of the accused is not however with a view to give him an opportunity to make any representation, but only for the purpose of committing him to the court of session. The non-production of the accused before the magistrate at the time of committal is a mere irregularity and is curable under s.465(1). See also *Onkar Singh* v. *State*, 1976 CriLJ 1774 (All HC).

7.15 Approver, if any, to be examined before committal

The examination of the approver is a condition precedent for the committal. The magistrate taking cognizance of the offence is required to examine the person accepting the tender of pardon namely, the approver, as a witness.[62]

7.16 Consolidation of cases instituted on a police report and on a complaint

The Code provides provision intending to secure that private complaint do not interfere with the course of justice.[63] Sometimes when a serious case is under investigation by the police, some of the persons concerned may file a complaint and quickly get an order of acquittal either by collusion or otherwise. Thereupon the investigation of the case would become anfractuous leading to miscarriage of justice in some cases.[64] The section intends to overcome such contingency.[65]

7.17 Trial before a court of session

The accused is entitled to be defended by a counsel of his choice. In a trial before a court of session, where the accused is not represented by a pleader and where it appears to the court that the accused has not sufficient means to engage a pleader the court shall assign a pleader for his defence at the expense of the State.[66] It is also recognised as the fundamental constitutional right of every indigent accused to get a

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[62] *Id*,s. 306. It should be read in conjunction with s.209. See *Uravakonda Vijayaraj Pal* v. *State of A.P.*, 1986 CriLJ 2104 (AP HC).

[63] *Id*, s. 210; *Joseph* v. *Joseph*, 1982 CriLJ 595 (Ker HC).

[64] Joint Committee Report, p.xix.

[65] See *Man Chand* v. *State of Haryana*, 1981 CriLJ 190 (P&H HC); *Kadiresan* v. *Kasim*, 1987 CriLJ 1225 (Mad HC); *T.S. Sawhney* v. *State*, 1987 CriLJ 1079 (Del HC); *Kariappa* v. *State of Karnataka*, 1989 CriLJ 1157(Kant HC); *Joseph* v. *Joseph*, 1982 CriLJ 595 (Ker HC); *State* v. *Har Narain*, 1976 CriLJ 562 (Del HC).

[66] S.304.

free legal aid for his defence.[67] Therefore if legal aid is to be given to the indigent accused, the court must, before the commencement of the trial, make timely arrangements for selecting and assigning a competent lawyer for the defence, and give him adequate time and facilities for the preparation of the defence.

7.18 Supply of copies

The magistrate taking cognizance of the offence shall supply to the accused copies of certain documents like police report, FIR, statements recorded by police or magistrate during investigation, etc.[68] In a trial of warrant case, it is required that the magistrate conducting the trial to satisfy himself at the commencement of the trial that he has complied with the provisions regarding supply of copies to the accused person.[69] Though a trial before a court of session relates to offences which are relatively more serious, a similar provision has not been made applicable to such a trial. An accused would have the right, albeit a non-statutory right to complete disclosure of material at the threshold of a trial, even in cases otherwise than on a police report if the proceedings were preceded by police investigation. Thus, the court of session would and should, at the commencement of trial, satisfy itself that copies of documents have been furnished to the accused.[70]

7.19 Initial steps in trial

When the accused appears or is brought before the court in pursuance of a commitment of a case, the prosecutor shall open his case by describing the charge

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[67] *Hussainara Khatoon (IV)* v. *Home Secretary, State of Bihar*, (1980) 1 SCC 98; *Suk Das Union Territory of Arunachal Pradesh*, (1986)2 SCC 401.
[68] *Id.*,ss.207 & 227.
[69] *Id.*, s.238
[70] *Viniyaga International* v. *State*, 1985 CriLJ 761 (Del HC).

brought against the accused and stating by what evidence he proposes to prove the guilt of the accused.[71] The public prosecutor should thus give a brief summary of the evidence and particulars of the witnesses by which he proposes to prove the case against the accused. It is not necessary for a public prosecutor in opening the case for the prosecution to give full details regarding the evidence including the documents by which he intends to prove his case.

7.20 Discharge

If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf the judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.[72] This is a beneficial provision to save the accused from prolonged harassment which is a necessary concomitant of a practical trial.[73] The object of requiring the sessions judge to record his reasons is to enable the superior court to examine the correctness of the reasons for which the sessions judge has held that there is or is not sufficient ground for proceeding against the accused.[74] For the purpose of determining whether there is sufficient ground for proceeding against an accused, the court possesses a comparatively wide discretion.[75] Whereas a strong suspicion may not take the place of proof at the trial

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[71] The Code of Criminal Procedure, 1973, s.226.

[72] *Id*, s.227.

[73] *Kewal Krishan* v. *Suraj Bhan*, 1980 Supp SCC 499 : 1980 CriLJ 1217; *Shetiyamma Pujari Dhotre* v. *State of Maharashtra*, 1988 CriLJ 1471 (Bom HC). The words 'not sufficient ground for proceeding against the accused' clearly show that the judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. See *Union of India* v. *Prafulla Kumar Samal*, (1979) 3 SCC 4; *R.S.Nayak* v. *A.R.Antulay*, (1986) 2 SCC 716; *Ravi Shankar Mishra* v. *State of U.P.*, 1991 CriLJ 213 (All HC).

[74] *State of Karnataka* v. *L.Muniswamy*, (1977) 2 SCC 699.

[75] *State of Karnataka* v. *L.Muniswamy*, (1977) 2 SCC 699. See also *Union of India* v. *Prafulla Kumar Samal*, (1979) 3 SCC 4 : The sufficiency of grounds would take within its fold the nature of evidence recorded by the police or the documents produced before the court which *ex facie* disclose that there are suspicious circumstances against the accused so as to frame a charge against him.

stage, yet it may be sufficient for the satisfaction of the court in order to frame a charge against the accused.[76]

7.21 Framing of charges

If after such consideration and hearing the judge is of opinion that there is ground for presuming that the accused has committed an offence which –

(a) is not exclusively triable by the court of session, he may frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant cases instituted on a police report;

(b) is exclusively triable by the court, he shall frame in writing a charge against the accused.[77]

Once the case is committed to the Court of Session, it becomes clothed with the jurisdiction to try it and the mere fact that the evidence disclosed was not one

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[76] In *Union of India* v. *Prafulla Kumar Samal*, (1979) 3 SCC 4, the Supreme Court laid down that in exercising the power of discharging the accused under s.227, the following four principles are applicable.

(1) The judge while considering the question of framing the charges as the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the material placed before the court discloses grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however, if two views are equally possible and the judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused he will be fully within his right to discharge the accused.

In exercising his jurisdiction under s.227 the judge under the present Code is senior and experience court and he cannot act merely as a post office or a mouth piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This doesn't mean that the judge should make a roving inquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.; *State of Bihar* v. *Ramesh Singh*, (1977) 4 SCC 39; *Supdt. & Remembrancer of Legal Affairs* v. *Anil Kumar Bhunja*, (1979) 4 SCC 274.

[77] The Code of Criminal Procedure, 1973, s.228(1).

exclusively triable by Court of Session does not divest it of that jurisdiction.[78] The accused has an active role at the stage of framing charge.[79] The test to determine a prima facie case against the accused would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application.

7.22 Explaining the charge

Where the offence is exclusively triable by the Court of Session and a charge has been framed in writing against the accused, it shall be read and explained to the accused. The accused shall then be asked whether he pleads guilty of the offence or claims to be tried.[80] The charge should not only be read out but should also be explained to the accused in clear and unambiguous terms. If necessary, the judge may even interrogate the accused in order to ascertain whether he fully understands the responsibility which he assumes by making a plea of guilty.[81]

7.23 Conviction on plea of guilty

If the accused pleads guilty the judge shall record the plea and may, in his discretion, convict him thereon.[82] The plea of guilty must be in unambiguous terms; otherwise such a plea is considered as equivalent to a plea of not guilty.[83] If the accused wants to plead guilty he should do so personally and not through his pleader. But where the personal attendance of the accused has been dispensed with, he is allowed to appear

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[78] *Sammun* v. *State of M.P.*, 1988 CriLJ 498 (MP HC); In *Yelugula Siva Prasad* v. *State of A.P.*, 1988 CriLJ 381 (AP HC), A question arose whether under s.228 an Assistant Sessions Judge could transfer a case to an Additional Sessions Judge who has been designated as Chief Judicial Magistrate. Held, such a transfer would be valid even though the Additional Sessions Judge was senior to the Assistant Sessions Judge.

[79] *Pitambar Buhan* v. *State*, 1992 CriLJ 645 (Ori HC).

[80] The Code of Criminal Procedure, 1973, s 228(2).

[81] *Kesho Singh* v. *Emperor*, (1917) 18 CriLJ 742 (Oudh JC); The default in reading out or explaining the charge to the accused would not however vitiate the trial unless it can be shown that the non-compliance with s.228(2) has resulted in causing prejudice to the accused. *Banwari* v. *State of U.P.*, AIR 1962 SC 1198; *Aivyavu* v. *Queen-Empress*, ILR (1886) 9 Mad 61; *K.V.Sugathan* v. *State of Kerala*, 1991 CriLJ 2211 (Ker HC).

[82] The Code of Criminal Procedure, 1973, s. 229.

[83] *Queen-Empress* v. *Bhadu*, ILR (1896) 19 All 119.

by his pleader and may plead guilty through his pleader.[84] Where the statements purported to be the plea of guilt were not fully, fairly and adequately recorded by the magistrate, the conviction based on the so called plea of guilt is liable to be set aside and the case is liable to be sent back for retrial.[85] The court has the discretion to accept the plea of guilty and to convict the accused thereon. However, the discretion is to be used with care and circumspection and on sound judicial principles bearing in mind the ultimate objective to do justice to the accused.[86] Usually in cases of offences punishable with death or imprisonment for life the court would be rather reluctant to convict the accused on the basis of his plea of guilty.[87]

If the accused is convicted on his plea of guilty, the judge shall hear the accused on the question of sentence and then pass sentence on him according to law.

7.24 Procedure on pleading not guilty

If the accused pleads not guilty the judge shall fix a date for examination of witnesses, and may, on the application of the prosecution, issue any process for compelling the attendance of any witness or the production of any document or other thing.[88]

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[84] *Kanchan Bai* v. *State*, AIR 1959 M.P. 150.

[85] *Wazamao* v. *State of Nagaland*, 1983 CriLJ 57 (Gau HC).

[86] *Karam Singh* v. *State of H.P.*, 1982 CriLJ (NOC) 215 (HP HC); *Ramesan* v. *State of Kerala*, 1981 CriLJ 451 (Ker HC).

[87] *Hasruddin Mohammad* v. *Emperor*, AIR 1928 Cal 775; *Laxmya Shiddappa* v. *Emperor*, (1917) 18 CriLJ 699 (Bom HC); *Queen-Empress* v. *Bhadu*, ILR (1896) 19 All 119. If the accused is convicted on his plea of guilty his right of appeal is substantially curtailed in view of s.375. Therefore the question whether the words used by the accused amount in law to a plea of guilty becomes important. It is desirable therefore to record the exact words of the accused. The accused might have admitted all the acts alleged against him and yet, the acts alone being not adequate to constitute the offence under the penal section, the accused cannot be held to have pleaded guilty of the offence under that particular section. See *Major A.J. Anand* v. *State*, AIR 1960 J&K 139.

[88] The Code of Criminal Procedure, 1973, s. 230.

7.26 Evidence for prosecution

On the date so fixed the judge shall proceed to take all such evidence as may be produced in support of the prosecution.[89] Witnesses shall be first examined in chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.[90] The judge may in his discretion, permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witnesses for further cross-examination.[91]

It is the duty of the prosecution to examine all material witnesses essential to unfold the narrative on which the prosecution is based, whether that testimony would act for or against the case of the prosecution.[92] The words 'to take all such evidence' do not combine production of witnesses by the prosecution only upto those persons whose statements have been recorded under s.161.[93] Apart from that, it cannot be laid down as a rule that if large number of persons are present at the time of the occurrence, the prosecution is bound to call and examine each and every one of these persons. The effect of non-examination of a particular witness would depend upon the facts and circumstances of each case. In case enough number of witnesses have been examined with regard to the actual occurrence and their evidence is reliable and sufficient to base the conviction of the accused thereon, the prosecution may well decide to refrain from examining the other witnesses. Likewise, if any of the witnesses is won over by the

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[89] *Id*,s.231(1). Evidence as defined in s.3 of the Indian Evidence Act, 1872 means and includes- (i) all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;
(ii) all documents produced for inspection of the court; such documents are called documentary evidence.

[90] The Indian Evidence Act, 1872, s.138.

[91] The Code of Criminal Procedure, 1973, s.231(2).

[92] *Habeeb Mohammad* v. *State of Hyderabad*, AIR 1954 SC 52; *Stephen Seneviratne* v. *King*, AIR 1936 PC 289; *Sahaj Ram* v. *State of U.P.*, (1973) 1 SCC 490; *State of U.P.*, v. *Iftikhar Khan*, (1973) 1 SCC 512; *Banwari* v. *State of Rajasthan*, 1979 CriLJ 161 (Raj HC).

[93] *Ram Achal* v. *State of U.P.*, 1990 CriLJ 111 (All HC).

accused and as such is not likely to state the truth, the prosecution would have a valid ground for not-examining him in court. The prosecution, would not, however, be justified in not examining a witness on the ground that his evidence even though not untrue would go in favour of the accused. It is as much the duty of the prosecutor as of the court to ensure that full and material facts are brought on the record so that there may be no miscarriage of justice. The discharge of such a duty cannot be affected by the consideration that some of the facts if brought on record would be favourable to the accused. In cases the court finds that the prosecution did not examine witnesses for reasons not tenable or proper, the court would be justified in drawing inference adverse to the prosecution.[94]

The evidence of each witness shall, as his examination proceeds, be taken down in writing either by the judge himself or by his dictation in open court or, under his direction and superintendence, by an officer of the court appointed by him in this behalf.[95] Such evidence shall ordinarily be taken down in the form of narrative, but the presiding judge may, in his discretion take down, or cause to be taken down any part of such evidence in the form of question and answer.

As the evidence of each witness is completed it shall be read over to him in the presence of the accused, if in attendance or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.[96] If the witness denies the correctness of any part of the evidence when the same is read over to him, the judge may, instead of correcting

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[94] *Ram Prasad* v. *State of U.P.*, (1974) 3 SCC 388; *Shivaji Sahebrao Bobade* v. *State of Maharashtra*, (1973) 2 SCC 793; *Radhu Kandi* v. *State*, 1973 CriLj 1320 (Ori HC); *Masalti* v. *State of U.P.*, AIR 1965 SC 202; *Bava Haji Hamsa* v. *State of Kerala*, (1974) 4 SCC 479; *Darya Singh* v. *State of Punjab*, AIR 1965 SC 323; *Narain* v. *State of Punjab*, AIR 1959 SC 484; *Abdul Gani* v. *State of M.P.*, AIR 1954 SC 31; *Malak Khan* v. *Emperor*, AIR 1946 PC 16; *Banwari* v. *State of Rajasthan*, 1979 CriLj 161 (Raj HC). See also *Illustration* (g) to s.114 of the Indian Evidence Act, 1872.

[95] The Code of Criminal Procedure, 1973, s.276(1).

[96] *Id*,s..278(1). The burden of proving non-compliance of sec. 278 is on the complainant. See *Mangilal* v. *State*, 1989 CriLJ 2265 (AP HC).

the evidence make a memorandum thereon the objection made to it by the witness and shall add such remarks as he thinks necessary.[97] If the record of evidence is in a language different from that in which it has been given and the witness does not understand that language, the record shall be interpreted to him in the language in which it was given, or in a language which he understands.[98]

The evidence so taken down shall be signed by the judge and form part of the record.[99] When a judge records the evidence of a witness, he shall also record such remarks (if any) as he thinks material regarding the demeanour of such witness whilst under examination.[100] The section aims at giving some aid to the appellate court in estimating the value of the evidence recorded by the trial court. If the witness gives the evidence in the language of the court it shall be taken down in that language.[101] If he gives evidence in any other language, it may, if practicable be taken down in that language, and if it is not practicable to do so, a true translation of the evidence in the language of the court shall be prepared as the examination of the witness proceeds, and signed by the judge, and shall form part of the record.[102] Where the evidence is taken down in a language other than the language of the court, a true translation thereof in the language of the court shall be prepared as soon as practicable, signed by the judge, and shall form part of the record; but in such a case when the evidence is taken down in English and a translation thereof in the language of the court is not required by any of the parties, the court may dispense with such translation.[103] Whenever any evidence is given in a language not understood by the accused (or his lawyer), it shall be interpreted to him (or his lawyer) in a language understood by him.[104]

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[97] The Code of Criminal Procedure, 1973, s.278(2); *Mir Mohamed Omar* v. *State of W.B.*, (1989) 4 SCC 436.
[98] *Id*, s..278(3).
[99] *Id*, s. 276(3).
[100] *Id*, s.280.
[101] *Id*, s. 277(a).
[102] *Id*, s. 277(b)
[103] *Id*, s. 277(c).
[104] *Id*, s. 279.

7.27 Oral arguments and memorandum of arguments of the prosecution

The prosecutor may submit his arguments after the conclusion of the prosecution evidence and before any other step in the proceedings, including the personal examination of the accused[105]. The prosecution arguments at this stage might help the court in conducting the examination of the accused and seeking his explanations on the points raised by the prosecution.

7.28 Examination of the accused by the court

After the witnesses for the prosecution have been examined and before the accused is called on for his defence the court shall question the accused generally on the case for the purpose of enabling the accused personally to explain any circumstances appearing in evidence against him.[106] No oath shall be administered to the accused when he is so examined.[107] The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.[108] The answers given by the accused may be taken into consideration [in such inquiry or trial] and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.[109] The procedure of examining the accused is not intended to enable the court to cross-examine the accused for the purpose of trapping him or beguiling him into an admission of a fact which the prosecution has failed to establish.[110]

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[105] *Id*, s. 314.
[106] *Id*, s 313(1)(b).
[107] *Id*, s.313(2).
[108] *Id*, s.313(3).
[109] *Id*, s. 313(4).
[110] *P.Murugan* v. *Ethirajammal*, 1973 CriLJ 1256 (Mad HC); In *Pritish Nandy* v. *State of Orissa*, 1989 CriLJ 2210 (Ori HC): The word personally' in s.313(1) includes clearly that for the purpose s.313 the court cannot examine the pleader on behalf of the accused. Instead written statements of the accused can be filed.

7.29 Hearing the parties

The court shall acquit the accused if there is no evidence that the accused committed the offence.[111] The court can acquit the accused before calling upon the accused to enter upon his defence and to adduce evidence in support thereof. With a view to help the court in taking the decision in this matter, both the prosecution and the defence to address the court on the point.[112] The comments of the parties would naturally relate to the evidence adduced by the prosecution and the personal examination of the accused.

7.30 Order of acquittal

If after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the judge considers that there is no evidence that the accused committed the offence, the judge shall record the order of acquittal.[113] The object behind the section is to expedite the conclusion of the Sessions trial and, at the same time, to avoid unnecessary harassment to the accused by calling upon him to adduce evidence or to avoid the waste of public time when there is no evidence at all.[114]

7.31 Evidence for defence

Where the accused is not acquitted, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.[115] If the accused

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[111] The Code of Criminal Procedure, 1973, s.232.

[112] *Id.*, s.232.

[113] *Ibid.*

[114] *Hanif Banomiya Shikalkar* v. *State of Maharashtra*, 1981 CriLJ 1622 (Bom HC); *State of Kerala* v. *Mundan*, 1981 CriLJ 1795 (Ker HC). The section confers an important statutory right upon the accused to take his chance of acquittal up to the stage s.232. Till then he is under no duty to disclose the names of his defence witnesses. If the judge does not think it proper to acquit him under s.232, he has to call on the accused to enter on his defence and it is that stage at which the accused person is under duty to apply for the issue of process for summoning the defence witnesses. See also *Prem* v. *State of Haryana*, 1975 CriLJ 1420 (P&H HC). See also: *Queen-Empress* v. *Vajram*, ILR (1892) 16 Bom 414; *Queen-Empress* v. *Munna Lall*, ILR (1888) 10 All 414; *Rup Narain Kurmi* v. *Emperor*, AIR 1931 Pat 172; *Rahmali Howladar* v. *Emperor*, AIR 1925 Cal 1055; *State of Kerala* v. *Mundan*, 1981 CriLJ 1795 (Ker HC); *Kumar* v. *State of Karnataka*, 1976 CriLJ 925 (Kant HC); *Pati Ram* v. *State of U.P.*, (1970) 3 SCC 703; *Hanif Banomiya Shikalkar* v. *State of Maharashtra*, 1981 CriLJ 1622 (Bom HC).

[115] The Code of Criminal Procedure, 1973, s.233(1); See also *Parameswara Kurup Janardhanan Pillai* v. *State of Kearala*, 1982 CriLJ 899 (Ker HC).

applies for the issue of any process for compelling the attendance of any document or thing, the judge shall issue such process unless he considers, for reasons to be recorded, that any such application should be refused on the ground that it is made for the purpose of vexation or for delaying the ends of justice.[116] However, the court cannot, after ordering recalling of witnesses at the instance of the accused, disallow confrontation of witnesses by the accused.[117]

The accused himself is a competent witness and can give evidence on oath in disproof of the charges made against him.[118] However, he shall not be called as a witness except on his own request in writing.[119] His failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption within him at the same trial.[120]

7.32 Record of evidence

The witnesses for the defence shall be examined in the same manner as has been mentioned in the case of prosecution witnesses. Similarly the rules for recording the evidence applicable to the prosecution witnesses are equally applicable in recording evidence of the defence witnesses.

7.33 Written statement of accused

The accused, if he so desires can put in a written statement in his defence. If he puts in any such statement, the judge shall file it with the record.[121]

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[116] *Id.*,s.233(3).
[117] *T.N. Janardhanan Pillai* v. *State of Kerala*, 1992 CriLJ 436 (Ker HC).
[118] The Code of Criminal Procedure, 1973, s.315(1).
[119] *Id.*,s.315(1) Proviso (a).
[120] *Id.*s.315(1) Proviso (b).
[121] *Id.*, s. 233(2).

7.34 Steps to follow the defence evidence

The court can at any stage summon and examine any person as a court witness if his evidence appears to be essential to the just decision of the case.[122]

As the section stands there is no limitation on the power of the court arising from the stage to which the trial may have reached, provided the court is *bona fide* of the opinion that for the just decision of the case, the step must be taken.[123] The requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution.[124] What is sufficient for that necessity cannot be enumerated exhaustively or with any precision, rather it depends upon the facts and circumstances of each case.[125] The paramount consideration is doing justice to the case and not filling up the gaps in the prosecution or defence evidence.[126]

A witness so called by the court can be cross-examined by both the prosecution and the defence.[127] When a court examines a witness it is for the court to

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[122] *Id.*, s.311. It provides: "Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any such person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case".

[123] *Mohanlal Shamji Soni* v. *Union of India*, 1991 Supp(1) SCC 271.

[124] *Jamatraj Kewalji* v. *State of Maharashtra*, AIR 1968 SC 178; *Gurdev Singh* v. *State of Punjab*, 1982 CriLJ 2211 (P&H HC); *Kamal Oil & Allied Industries Pvt. Ltd.* v. *Delhi Admn.*, 1982 CriLJ 2046 (Del HC); *Balwant Singh* v. *State of Rajasthan*, 1986 CriLJ 1374 (Raj HC).

[125] *Mukti Kumar* v. *State of W.B.*, 1975 CriLJ 838 (Cal HC).

[126] *Kamal Oil & Allied Industries Pvt. Ltd.* v. *Delhi Admn.*, 1982 CriLJ 2046 (Del HC); See also *Balwant Singh* v. *State of Rajasthan*, 1986 CriLJ 1374 (Raj HC); *Chandran* v. *State of Kerala*, 1985 CriLj 1288 (Ker HC); *Kewal Gupta* v. *State of H.P.*, 1991 CriLJ 400 (H.P. HC); In *Altemesh Rein* v. *State of Maharashtra*, 1980 CriLJ 858 (Bom HC); The trial of a criminal case comes to an end only after pronouncement of the judgment. Therefore the court can summon and examine any witness as a court witness at any state till it pronounces the final judgment. In *Jarnail Singh* v. *State of Punjab*, 1990 CriLj 2310 (P&H HC): The section is wide enough to apply to all courts- original, appellate or revisional.

[127] *Rangaswami* v. *Muruga*, AIR 1954 Mad 169; *Emperor* v. *Pita*, ILR (1924) 47 ALL 147; *Mohendro Nath Das Gupta* v. *Emperor*, ILR (1902)29 Cal 387; *Chaintamon Singh* v. *Emperor*, ILR (1907)35 Cal 243.

say after such questioning as to which of the parties will be permitted to ask questions first to what extent.[128]

7.35 Arguments

When the examination of the witness (if any) or the defence is complete, the prosecutor shall sum up his case and the accused or his pleader shall be entitled to reply. Provided that where any point of law is raised by the accused or his pleader, the prosecution may with the permission of the judge, make his submission with regard to such point of law.[129] Any party may address concise oral arguments after the close of his evidence and submit a memorandum to the court setting forth concisely and under distinct headings, the arguments in support of his case before he concludes his oral arguments. It shall form part of the record.[130]

7.36 Judgment

After hearing arguments and points of law if any, the judge gives a judgment in the case.[131] The judgment is the final decision of the court, given with reasons on the question of guilt or innocence of the accused. It also includes the court's decision as to the conditions subject to which the offender is to be released without being punished as such.[132]

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[128] *Mukti Kumar* v. *State of W.B.*, 1975 CriLJ 838 (Cal HC). It has also been held that when a witness examined by the court is questioned by the parties, it cannot strictly be said he is cross-examined, for cross-examination is examination of a witness by the adverse party and when a court calls a witness he does not become a witness called by any party to the litigation.

[129] The Code of Criminal Procedure, 1973, s..234.

[130] *Id.*, s. 314.

[131] *Id.*,s.235(1).

[132] *Id.*,ss.353 to 365 govern the provisions regarding delivery and pronouncement of judgment, its language and content, various directions regarding the sentence and other post-conviction orders that might be passed, compensation and costs to aggrieved party, etc.

7.37 Post conviction proceedings

If the accused is convicted, the judge shall, unless he proceeds in accordance with the provisions as to granting probation, hear the accused on the question of sentence and then pass sentence in accordance with law.[133] Considering the character of the offender, the nature of the offence and the circumstances of the case, the judge may instead of passing the sentence, decide to release the offender on probation of good conduct.[134]

After the conviction a separate and specific stage of trial is provided and whereby the court shall hear the accused on the question of sentence.[135] Thus, every trial, if it leads to conviction gets bifurcated, namely one portion pertaining to conviction ad the other to sentence. The accused has a right of pre-sentence hearing which may not be strictly relevant to or connected with the particular crime under inquiry but may have a bearing on the choice of the sentence.[136] The social and personal data of the offender are factors to be taken into account in order to fix the quantum of sentence. Thus, the fact that the accused is the sole breadwinner of his family is a mitigating factor. While that he has a record of previous conviction is an aggravating factor.[137]

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[133] *Id.*,s. 235(2).
[134] *Id.*,s.360 & 361; The Probation of Offenders Act, 1958.
[135] *Id.*,s. 235(2).
[136] *Bachan Singh* v. *State of Punjab*, (1980)2 SCC 684; *Rajendra Prasad* v. *State of U.P.*, (1979)3 SCC 646.
[137] The hearing contemplated by s.235(2) is not confined merely to hearing oral submissions, but also intended to give an opportunity to he prosecution ad the accused to place before the court facts and materials relating to various factors bearing on the question of sentence and if they are contested by either side, then to produce evidence for the purpose of establishing the same. At the same time the court should make sure that hearing on the question of sentence is not abused and turned into an instrument for unduly protracting the proceedings. See *Santa Singh v. State of Punjab*, (1976)4 SCC 190.

The court must make a genuine effort to elicit from the accused all information which will eventually bear on the question of sentence. It is the bounden duty of the court to cast aside the formalities of the court scene and approach the question of sentence from broad sociological point of view.[138]

7.38 Procedure in case of previous conviction

Where a previous conviction is charged and the accused does not admit that he was previously convicted as alleged under the charge, the judge may after he has convicted the said accused, take evidence of the alleged previous conviction and shall record a finding thereon. However, no such finding shall be read out by the judge nor shall the accused be asked to plead guilty thereto nor shall the previous conviction be referred to by the prosecution or in any evidence adduced by it unless and until the accused has been convicted.[139]

7.39 Trial of warrant cases by Magistrate

Trial of warrant cases before a Magistrate can be done in two categories of cases, namely, cases instituted on a police report or cases instituted otherwise than on police report.

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[138] *Muniappan* v. *State of T.N.*, (1981)3 SCC 11. Therefore, the questions which the judge can put to the accused under s.285(2) and the answers which the accused makes to those questions are beyond the narrow constraints of the Evidence Act.In complying with the requirements of s.235(2) what is more important is the spirit and substance of that provision, and not just its better and form. Any sentence passed without following the requirements of the section in its letter and spirit in many case is liable to be struck down as violative of the rules of natural justice. See also *Allaudin Mian* v. *State of Bihar*, (1989)3 SCC 5; *Suryamoorthi* v. *Govindaswamy*, (1989)3 SCC 24; *Jumman Khan* v. *State of U.P.*, (1991)1 SCC 782; *Sevak Perumal*v. *State of T.N.*, (1991)3 SCC 471; See also *Tarlok Singh* v. *State of Punjab*, (1977)3 SCC 218; *Nirpal Singh* v. *State of Haryana*, (1977)2 SCC 131; *Dagdu* v. *State of Maharashtra*, (1977)3 SCC 68; *Saddurddin Khushal* v. *Asstt. Collector of Customs and Central Excise*, 1979 CriLJ 1265 (Goa JCC).

[139] The Code of Criminal Procedure, 1973, s. 236 r/w. ss.229 & s.235; *Kamya, Re*, AIR 1960 A.P. 490.

7.40 Cases instituted on a police report

When in any warrant case instituted on a police report the accused appears or is brought before a Magistrate at the commencement of the trial, the Magistrate has to satisfy himself that the accused has been supplied with all the copies of the documents which would be used against him.[140] The purpose and object of the provision has been laid down by the courts in many a case.[141] The provision is mandatory. The expression "at the commencement of the trial" means at the beginning of the trial and the trial starts when the charge is framed.[142]

7.41 Discharge of accused

If, upon considering the police report and the documents sent together with it and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers that the charge against the accused is groundless, he shall discharge the accused and record his reasons for so doing.[143]

The accused is entitled to place on record certain documents for being considered before framing charges. Similarly, a corresponding right is also vested in the prosecution.[144] If there is no ground for presuming that the accused has committed an offence, the charges must be considered to be groundless, which is the same thing as

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[140] *Id*, s.238.

[141] *Noor Khan* v. *State of Rajasthan*, AIR 1964 SC 286; *Salig Ram* v. *State*, 1973 CriLJ 1030 (HP HC); *Palagali Veeraraghavulu* v. *State*, AIR 1958 AP 301; *Viniyoga International* v. *State*, 1985 CriLJ 761 (Del HC).

[142] *Nageshwar Singh* v. *State of Assam*, 1974 CriLJ 193 (Gau HC); *Abbas Bearyv*. *State of Mysore*, AIR 1965 Mys 35; *Dharma Reddy* v. *State*, 1972 CriLJ 436 (AP HC); *Kanbi Bechar Lala* v. *State*, AIR 1962 Guj 316.

[143] The Code of Criminal Procedure, 1973, s.239.

[144] *Vinod Kumar* v. *State of Haryana*, 1987 CriLJ 1335 (P&H HC); *Alarakh* v. *State of Rajasthan*, 1986 CriLJ 1794 (Raj HC).

saying that there is no ground for framing the charges. This necessarily depends on the facts and circumstances of each case and the Magistrate is entitled and indeed has a duty to consider the entire materials.[145]

After the copies of necessary documents are supplied to the accused, he must be given a reasonable opportunity of being heard engaging a counsel before framing the charge. The expression 'the opportunity of being head' means opportunity of addressing arguments in support of their respective cases, and does not mean examination of witnesses.[146] Before charging or discharging the accused, the court has to apply its judicial mind to all the evidence in the case. The evidence which may persuade the court to hold the charge groundless, must clinching in nature and the court cannot give benefit of doubt to the accused at that stage and discharge him.[147]

7.42 Framing of charges

If upon such consideration of the police report and the documents sent along with it, the examination of the accused if any and hearing the parties, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this chapter which such Magistrate is competent to try and which in his opinion, could be adequately punished by him he shall frame in writing a charge against the accused.[148]

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[145] *Century Spinning & Manufacturing Co.* v. *State of Maharashtra*, (1972)3 SCC 282.

[146] *Mirza Mohammad Afzal Beg* v. *State*, AIR 1959 J&K 77; *Kazi and Khatib Mohammad Khan* v. *Emperor*, AIR 1945 Nag 127; *Thirtharaj Upendra Joshi* v. *State of Karnataka*, 1983 CriLJ 318 (Kant HC); *State of W.B.* v. *Sardar Bahadur*, 1969 CriLJ 1120 (Cal HC).

[147] See *Nitaipada Das* v. *Sudarsan Sarangi*, 1991 CriLJ 3012 (Ori HC); *State* v. *C.K. Gulhati*, 1982 CriLJ 1923 (J&K HC); *Jetha Nand* v. *State of Haryana*, 1983 CriLJ 305 (P&H HC); the Law Commission of India, 41st Report, p.171, para 21.3.

[148] The Code of Criminal Procedure, 1973, s. 240(1). The documents mean those referred to in s.173 consist of records of investigation which are not admissible in evidence at the trial but can be made use for limited purpose as stated in s.162. See *Raghavendrarao* v. *State of A.P.*, 1973 CriLJ 789(AP HC). The examination of the accused referred to in s.240(1) can only be with reference to documents referred to in s.173. *G.D. Chadha* v. *State of Rajasthan*, 1972 CriLJ 1585 (Raj HC). The object of examining the accused at the initial stage is to afford an opportunity to him to explain any circumstance appearing against him. However, the examination of the accused is not imperative.

If upon consideration of all the documents and other circumstances the magistrate comes to the conclusion that the accusation is without any substance then he may discharge the accused even without examining him. Examination becomes necessary when there are facts or circumstances in the documents etc., which go against the accused and which need explanation before framing charge.[149] Since the order framing the charges does substantially affect the person's liberty, it is not possible to countenance the view that the court must automatically frame the charge, merely because the prosecuting authorities consider it proper to institute the case. Thus, the court has to judicially consider the question of framing charges. It must not blindly adopt the decision of the prosecution without fully adverting to the material on record.[150] Nor should it be influenced by the counsel for the complainant.[151]

7.44 Explaining charge

In every case where a charge is framed it shall be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried.[152] The charge shall be read and explained in such a manner that the accused understands it properly.[153]

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[149] *Thirtharaj Upendra Joshi* v. *State of Karnataka*, 1983 CriLJ 318 (Kant HC); See also *Badamo Devi* v. *State*, 1980 CriLJ 1143 (HP HC); *Radhey Shyam* v. *State of U.P.*, 1992 CriLJ 202 (All HC); *Century Spinning & Manufacturing Co.*, v. *State of Maharashtra*, (1972)3 SCC 282.

[150] *Century Spinning & Manufacturing Co.*, v. *State of Maharashtra*, (1972)3 SCC 282; *Thirtharaj Upendra Joshi* v. *State of Karnataka*, 1983 CriLJ 318 (Kant HC).

[151] *Radhey Shyam* v. *State of U.P.*, 1992 CriLJ 202 (All HC); *Badamo Devi* v. *State*, 1980 CriLJ 1143 (HP HC).

[152] The Code of Criminal Procedure, 1973, s.240(2).

[153] *Jodha Singh* v. *Emperor*, AIR 1923 All 285. In *Shyam Sunder Rout* v. *State of Orissa*, 1991 CriLJ 1595, the Orissa High Court held that if the accused has been made aware of the offences, a mistake in charges while taking cognizance may prejudice the accused.

7.45 Conviction on plea of guilty

If the accused pleads guilty, the magistrate shall record the plea and may, in his discretion convict him thereon.[154] If the accused is convicted on his plea of guilty, the magistrate shall, hear the accused on the question of sentence and then pass sentence on him in accordance with law. In case where previous conviction is charged and the accused denies the same, the magistrate shall hold necessary inquiry into the issue.[155]

7.48 Fixing date for examination of witnesses

If the accused refuses to plead guilty the magistrate shall fix a date for the examination of witnesses.[156] The magistrate may on the application of the prosecution, issue summons to any of its witnesses directing his attendance or to produce any document or thing.[157] Recording evidence on the very day on which the charge is framed render the proceedings illegal.

7.49 Evidence of prosecution

On the date so fixed the magistrate proceeds to take all such evidence, oral as well as documentary, as may be produced in support of the prosecution. Nevertheless, the magistrate may permit the cross-examination of any witness to be

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[154] S.241. See also *Gannon Dunkerley & Co., Re*, AIR 1950 Mad 837; *State of M.P.* v. *Mustaq Hussain*, AIR 1965 M.P. 137; *Basant Singh* v. *Emperor*, (1926)27 CriLJ 907 (Lah HC): If the facts alleged against the accused do not constitute a crime, a plea of guilty under such circumstances is only admission of facts and not an admission of guilt.

[155] *Id*,s.248(3)

[156] *Id*,s..242(1).

[157] *Id*,s. 242(2); In *Easin Ali* v. *Abdul Obdud*, 1982 CriLJ 1052, the Calcutta High Court held that the word 'may' suggest that the magistrate has discretion in the matter of issuing summons to the prosecution witnesses; However, in *State of U.P.* v. *Babu*, 1991 CriLJ 991, the Allahabad High Court held that if the prosecution has made an application for issue of summons to its witnesses either under s.242(2) or under s.254(2), it is the duty of the court to issue summonses to the prosecution witnesses and to secure the attendance of witnesses by exercising all the powers given to it under the Code.

deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination.[158]

7.50 Record of evidence

In all warrant cases tried before a magistrate, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the magistrate himself or by his dictation in open court or, where he is unable to do so owing to a physical or other incapacity, under his dictation and superintendence, by an officer of the court appointed by him in this behalf.[159] Where the magistrate causes the evidence to be taken down, he shall record the reasons therefor.[160] Such evidence shall ordinarily be taken down in the form of a narrative; but the magistrate may, in his discretion take down, or cause to be taken down any part of such evidence in the form of question and answer.[161] The evidence so taken down shall be signed by the magistrate and shall form part of the record.[162]

7.51 Steps on completion of prosecution evidence

After the completion of the prosecution evidence, the oral arguments and memorandum of arguments can be presented on the part of the prosecution.[163] Thereafter the court shall examine the accused.[164] Consequent to the above proceedings the accused shall be called upon to enter his defence and produce his evidence.[165] If the

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[158] *Id.*, s. 242(3). *State* v. *Bhimcharan*, AIR 1962 Ori 139.
Kanshi Nath Pandit v. *Onkar Nath*, 1975 CriLJ 1090 (J&K HC); *State of Gujarat* v. *Nagin Amara Vasava*, 1982 CriLJ 1880 (Guj HC); *State of Mysore* v. *Ramu. B.*, 1973 CriLJ 1257 (Mys HC).
[159] *Id.*, s..275(1).
[160] *Id.*, s..275(2).
[161] *Id.*, s..275(3).
[162] *Id.*, s..275(4). The provisions under ss.277 to 280 shall also be complied with.
[163] *Id.*, s.314.
[164] *Id.*, s.313(1)(b)
[165] *Id.*, s.243(1).

accused, after he has entered upon his defence, applies to the magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing. However, when the accused has cross-examined or had the opportunity of cross-examining any witness before entering on his defence, the attendance of such witness can not be compelled, unless the magistrate is satisfied that it is necessary for the ends of justice.[166] If the accused puts in any written statement, the magistrate shall file it with the record.[167] The procedure as to recording of evidence is same as that adopted in the trial of warrant cases in Sessions Court.

7.52 Steps to follow the defence evidence

The court can, at any stage, summon and examine any person as a court witness if his evidence appears to it to be essential to the just decision of the case.[168] After closing the defence evidence, the defence can address concise oral argument and may submit to the court a memorandum in support of its case.[169] On conclusion of the trial judgment is pronounced.

Trial of summons case by magistrate

In a summons case the accused when appears or brought before the magistrate the particulars of the offence of which he is accused is stated to him. He is

[166] *Id.*, s 243(2).
[167] *Id.*, s 243(1).
[168] *Id.*,s.311
[169] *Id.*,s.314.

then asked whether he pleads guilty or has any defence to make. There is no need to frame a formal charge.[170] If the accused pleads guilty, the magistrate records it and convicts him at his discretion.[171] If accused does not plead guilty or the magistrate is not inclined to accept the plea of guilty tendered by the accused, he shall afford the parties concerned to adduce evidence in support on their case and pass conviction and appropriate sentence in accordance with law.[172]

7.53 Summary Trial

Any Chief Judicial Magistrate, Metropolitan Magistrate or any Magistrate of the First Class specially empowered by the High Court may try the offences stated under section 260 of the Code

All pervasive concept of fair trial.- The concept of fair trial has permeated every nook corner of the Criminal Procedure Code. This is what it should be. The major objective of the Code being to provide for fair trial in the administration of criminal justice, it is but natural that all the provisions of the Code are attuned to this goal.

[170] *Id.*,s.251.
[171] *Id.*,s.252.
[172] *Id.*,s.254,255

CHAPTER 8
CRIMINAL JUSTICE SYSTEM IN INDIA
ERRORS AND CORRECTIONS

The work so far would re-emphasise that the criminal justice system in India is nothing more than an accusatory one with underlying ideology more particularly vested in the due process model. It always gives primary importance to the individual liberty and privacy than the social need of repression of crime, even when failure of the latter would lead to develop a general disregard for legal controls among law abiding citizens.

The concept of informal fact finding is quite alien to our system. It rather prefers formal or adjudicative fact finding for determining guilt or innocence of the accused. The system in India never accepts the evidence collected by the police barring a very few exceptions[1]. It does not compromise with illegal arrest, unreasonable searches, coercive interrogation and the like.[2]

We prefer the presumption of innocence whereas, we confront the presumption of guilt with all vigour. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however is the wrongful conviction of the innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilized society[3]. Burden is always on the state to prove the charge against the accused. The interest of the accused to observe silence against incriminating questions has legal and constitutional recognition and protection.

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[1] The Code of Criminal Procedure, 1973, s. 162; the Indian Evidence Act, 1872, ss. 25, 26, 27

[2] See *Nilabathi Behara* v. *State of Orissa*, 1993 CriLJ 2899, *D. K. Basu* v. State of West Bengal 1997 CriLJ 743

[3] *Kali Ram* v. *State of H.P.*, (1973) 2 SCC 808; Dharam Das v. *State of U.P.*, (1974) 4 SCC 267; See also The Law Commission of India 14th Report on Reform of Judicial Administration, Vol. II, p. 836.

Its values cherish the concept of legal guilt over the concept of factual guilt as a corollary to its temperament towards the presumption of innocence. It has a typical adversarial form of trial procedure. Similarly the norm of equality is really a touchstone not only in the administration of criminal justice but also in the legal system as a whole in India.[4] The system affords free legal aid to the accused at its cost. It provides counsel to those accused who are unable to bear the expenditure therefor, acting upon the ultimate drive of the doctrine of equality.

Furthermore our system holds a much liberal approach in the matter of pre trial detention. Only in cases involving serious crimes it stipulates a maximum of ninety days as pre-trial detention. Nevertheless it confers wide discretion on the courts to release such pre-trial detainees on bail considering the facts and circumstances of each case.

Needless to elaborate, the criminal justice system of India has more features of the due process model. And, it has the same underlying philosophy and values as well. In certain respect it becomes more soft than even the pure due process model. The pure due process model approves electronic surveillance as a mode of collecting evidence in cases of espionage, treason or such other crimes directly affecting national security.[5] The Indian system is yet to resort to the electronic surveillance as an evidence-collecting mode since it is much reluctant to sacrifice individual liberty and privacy. Now for the first time the Prevention of Terrorism Act, 2002 has introduced it to counter terrorism.

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[4] The Constitution of India, Art.14.
[5] H. L.Packer, *The Limits of the Criminal Sanction,* 1968, p. 197.

8.1 Electronic Surveillance

Sophisticated electronic devices have now been developed which are capable of eavesdropping on anyone in most of any given situation.[6] These Orwellian prospects pose increasingly difficult problems for the criminal process as pressure from law enforcement for license to enlist these devices in the investigation of crime meets counter pressure from people who see the doom of individual freedom in a wholesale intrusion by government into the private lives of its citizens. All agree that the use of these devices for private snooping should be prevented. Beyond that, agreement ends. There is bitter and protracted controversy over whether law enforcement should be allowed to use these devices at all and, if at all, in what kinds of circumstances and under what kinds of controls.[7] Perhaps all these conflicting philosophies might have caused an untoward approach on the part of a legal system towards the electronics surveillance mechanism.

Now let us have a look at the newly introduced provisions of electronics surveillance in the Prevention of Terrorism Act, 2002. Defining in terms of the Act, electronic surveillance means interception of wire, electronic or oral communication by the investigating officer when he believes that such interception may provide, or has

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[6] *Berger* v. *New York*, 388 U.S. 41 (1967), Mr. Justice Clark writing for the Supreme Court of the United States: "Sophisticated electronic devices have now been developed (commonly known as "bugging") which are capable of eavesdropping on anyone in most any given situation. They are to be distinguished from "wiretapping" which is confined to the interception of telegraphic and telephonic communications. Miniature in size- no longer than a postage stamp (3/8" x 3/8" x 1/8")- these gadgets pick up whispers within a room and broadcast them half a block away to a receiver. It is said that certain types of electronic rays beamed at walls or glass windows are capable of catching voice vibrations as they are bounced off the latter. Since 1940, eavesdropping has become a big business. Manufacturing concerns offer voices under most any conditions by remote control. A microphone concealed in a book, a lamp, or other unsuspected place in a room, or made into a fountain pen, tie clasp, lapel button, or cuff link increases the range of these powerful wireless transmitters to a half-mile. Receivers pick up the transmission with interference free reception on a special wave frequency. And, of later, a combination mirror transmitter has been developed which permits not only sight but voice transmission up to 300 feet. Likewise, parabolic microphones, which can overhear conversations without being placed within the premises monitored, have been developed."

[7] Herbert L. Packer, *The Limits of the Criminal Sanction*, 1968, p.198.

provided evidence of any offence involving terrorist act.[8] Interception means the aural or other acquisition of the contents by wire, electronic or oral communication through the use of any electronic, mechanical or other device.[9] The evidence so collected is admissible as evidence as against the accused.[10] There are however several restrictions and limitations on the procedure to collect evidence by electronic surveillance. An interception can only be conducted by a public servant acting under the supervision of the investigating officer authorised to conduct interception.[11]

Several stages are involved in obtaining an order authorising interception. The Competent Authority to issue order authorising interception is appointed by the Central Government or the State Government.[12] An application shall be submitted before

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[8] The Prevention of Terrorism Act, 2002, s.37.

[9] *Id*, s.36(b); s.36(a) provides: " 'electronic communication' means any transmission of signs, signals, writings images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system that affects inland or foreign commerce but does not include-
(i) the radio portion of a cordless telephone communication that is transmitted between the wireless telephone hand-set and the base unit ; or
(ii) any wire or oral communication; or
(iii) any communication made through a tone only paging device; or
(iv) any communication from a tracking device";
S.36(c) provides: " 'oral communication' means any oral communication uttered by a person exhibiting an expectation under such communication is not subject to interception under circumstances justifying such expectation but such term does not include any electronic communication"; s.36(d) provides: " 'wire communication' means any aural transmission made in whole or part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of connection, between the point of origin and the point of reception (including the use of such connection in switching station) and such term includes any electronic storage of such communication."

[10] *Id*, s.45; There are two proviso to the section. The first proviso stipulates that any such evidence shall not be received unless each accused has been furnished with a copy of the order of the Competent Authority, and accompanying application, under which the interception was authorised or approved not less than ten days before trial, hearing or proceeding. The second proviso however, enables the judge trying the matter to waive the period of ten days, if he comes to the conclusion that it was not possible to furnish the accused with the above information ten days before the trial and that the accused will not be prejudicial by the delay in receiving such information.

[11] *Id*, s.42(1); Sub-sec. (2)provides that the order may require reports to be made to the Competent Authority who issued the order showing that progress has been made towards achievement of the authorized objective and the need for continued interception and such report shall be made at such intervals as the Competent Authority may require.

[12] *Id*, s.37; The State Government may only appoint an officer not below the rank of Secretary to the Government and the Central Government may only appoint an officer not below the rank of Joint Secretary to the Government as the Competent Authority.

the Competent Authority in search of the order authorising interception.[13] A police officer not below the rank of Superintendent of Police supervising the investigation of any terrorist act may only submit the application.[14] The Competent Authority may require additional oral or documentary evidence in support of the application.[15]

The Competent Authority to issue an order an order as requested or as modified authorising or approving interception if it determines that there is probable cause to do so.[16] It may reject the application as well.[17] It shall specify all the required particulars in the order auhtorising or approving interception.[18]

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[13] *Id*, s.38(1).

[14] *Ibid*; Sub-sec. (2) provides that each application shall include:-
(a) the identity of the investigating officer making the application, and the head of the department authorising the application;
(b) a statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued, including-
(i) details as to the offence of terrorist act that has been, is being, or is about to be committed;
(ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted;
(iii) a particular description of the type of communications sought to be intercepted; and
(iv) the identity of the person, if known, committing the terrorist act whose communications are to be intercepted.
(c) a statement of the period of time for which the interception is required to be maintained, if the nature of the enquiry is such that the authorisation of interception should not automatically terminate after the described type of communication has been first obtained;
(d) a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter; and
(e)where the application is for an extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

[15] *Id*, s.38(3).

[16] *Id*, s.39(1); The probable cause (a) for belief that an individual is committing, has committed, or is about to commit, a particular offence described and made punishable under sections 3 and 4 of this Act; (b) of belief that particular communications concerning that offence may be obtained through such interception; and (c) there is probable cause of belief that the facilities from which, or the place where the wire, electronic or oral communications are to be intercepted are being used or are about to be used, in connection with the commission of such offence, leased to or are listed in, the name for commonly used by such person.

[17] *Ibid.*

[18] *Id*, s.39(2). The required particulars are: (a) the identity of the person, if known, whose communications are to be intercepted; (b) the nature and location of the communication facilities as to which, or the place where, authority to intercept is granted; (c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offence to which it relates; (d) the identity of the agency authorised to intercept the communications, and the person authorising the application; and (e) the period of time during which such interception is authorised, including a statement as to whether or not the interception shall automatically terminate after the described communication has been first obtained.

The Competent Authority shall submit a copy of the order immediately after it is passed but in any case not later than seven days from the passing of the order to the Review Committee for its consideration and approval. The copy of order shall accompany all relevant underlying papers, record and his own findings in respect of the said order.[19] The Central Government or the State Government constitutes one or more Review Committee whenever necessary.[20] Every such Committee consists of a Chairperson and such other members not exceeding three and possessing such qualifications as may be prescribed.[21] The Chairperson shall be a person who is, or has been, a Judge of a High Court.[22] The interception shall be finished at the earliest pursuant to the order.[23] The Act imposes undue restriction on the authority even when it voyages to compact terrorism.

8.2 Working of Crime Control Features in India

The issue of prime importance is as to how the crime control features adopted by us are working in combating terrorism, which is one of the classes of the offences against national security. There is no choice of optimism, rather it would bring us into abysmal desperation.

The fate of the Terrorists and Disruptive Activities (Prevention) Act, 1987 which was the anti-terrorism law in force till it got lapsed in 1995. That Act also

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[19] *Id*, s.40(1).
[20] *Id*, s.60(1).
[21] *Id*, s,60(2).
[22] *Id*, s.60(3); When a sitting Judge is appointed Chairperson, the concurrence of the Chief Justice of the High Court shall be obtained.
[23] *Id*, s.41(1). It provides: "No order issued under the section may authorise or approve the interception..., for any period longer than is necessary to achieve the objective of the authorisation nor any event longer than sixty days and such sixty days period shall begin on the day immediately preceding the day on which the investigating officer first begins to conduct an interception under the order or ten days after order is issued whichever is earlier.

contained almost all provisions of crime control features which are in the Prevention of Terrorism Act, 2002. There were provisions in the TADA Act as to making confessions made in police custody admissible in evidence, presumption of guilt, conducting trial *in camera*, etc.[24] Nevertheless the reality is that out of over 75,000 persons arrested and proceeded under the Act only a little over 1% ended in conviction.[25]

We could perceive the terribleness of the disaster when we look into this history of adjudication in the light of the statistics prepared by the Law Commission of India. It gleans that during the period from 1988 till August 1999 there were 50,641 incidents of terrorist violence involving 24,761 killings in our country.[26]

Furthermore, it is highly disturbing to find that this was the law to combat the well-trained militants. The fact that most of them were mercenaries and fanatic fundamentalist terrorists inducted in to India from Afghanistan, Sudan, Pakistan and other countries aggravate our concern.[27] It is pertinent to note that the terrorism in India is a part of the international terrorism. India is one of the prime targets of international terrorists like Osama Bin Laden.[28] In view of the failure of our criminal justice system, a perception has developed among the terrorist groups that the state is inherently incapable of meeting their challenge that it has become soft and indolent.[29] Remember that this is the plight only one class of the category of offences against national security.

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[24] The Terrorist and Disruptive Activities (Prevention) Act, 1987, ss.15, 21, 10.
[25] V.R. Krishna Iyer, *A Judge's Extra-Judicial Miscellany*, pp.9, 10.
[26] Out of which 45,182 incidents of terrorist violence involving 20,506 killings were in Jammu and Kashmir during the period from 1988 till March, 1999, while remaining 5459 incidents involving 4255 killings were in other states such as Assam, Manipur, Nagaland, Tripura and Meghalaya during the period from 1996 till August, 1999. The statistics was prepared by the Law Commission of India for the purpose of its 173rd Report on the Prevention of Terrorism Bill, 2000. The portion of the working paper containing the statistics as quoted in the chapter II is appended to this thesis as Annexure-II.
[27] The Law Commission of India, 173rd Report on the Prevention of Terrorism Bill, 2000, chapter II, para 1.
[28] *Ibid.*
[29] *Ibid.*

8.3 No Judicial Interference in Investigation - Merit or De-merit?

Another indelible imprint of the criminal justice system in India is that the judiciary shall not interfere in investigation during the course of it. The principle has been reiterated in umpteen numbers of decisions.[30]

Patrick Devlin has stated that an accusatory system is primarily meant for law-abiding citizens.[31] The statement besides it being a reality, is a concern of legal luminaries that such systems are impotent in a society consisting of hardcore criminals perpetrating in organized crimes. In *Vineeth Narain v. Union of India,* [32] the Supreme Court adopted a strange criminal procedure, where the court took over the absolute control of the Central Bureau of Investigation, which was deputed to investigate into *havala* related crimes and barred the executive authorities.[33] Here the judicial discourse would show that our criminal justice is utterly inadequate to counter or even handle not only offence affecting national security but also other offences, so far as investigation process is concerned

In inquisitorial criminal justice systems whose underlying philosophy can very well be identified with that of the crime control model achieving in procuring much higher rate of conviction. Then what would have been the reasons for having such a ridiculous and desperately poor rate of conviction here when we made experience with the same principle of criminal justice process. No doubt, inquisitorial systems such as in France, Italy and Germany, these crime control values are handled by a trained legal actor called as the examining magistrate. The examining magistrate conducts the investigation of serious offence. In such cases the examining magistrate himself initiates investigation and collects all the available evidence. He is a very good

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[30] For example see State of W.B. v. *Sampat Lal*, AIR 1985 SC 195
[31] Patrick Devlin, *The Criminal Prosecution in England*, 1960, p. 56.
[32] (1998) 1 SCC 226
[33] This order was passed on 01.03.1996 by the Supreme Court.

investigator as well as adjudicator. He examines the witnesses. Upon the completion of investigation he himself prepares dossier or charge if there are sufficient grounds to send the accused for being tried.

The judicial police and the prosecutor assist the examining magistrate. The examining magistrate has full control over the proceedings as well as over the other two legal actors. The collection of evidence is never a concern of the party. The proceeding of the examining magistrate is not performed in public. Those are deemed to be judicial proceedings.

The examining magistrate collects all available evidence irrespective whether it favours or prejudices the accused. He determines the relevance and reliability of the evidence on the basis of the principle of 'intimate conviction'. Thus a principle of 'free proof' operates itself in appreciating the evidence. Thus he evidence collected by the examining magistrate is fully admissible in evidence when it is relevant for the case. Thus when the examining magistrate submits the evidence collected along with the dossier prepared by him, the adjudicating court accepts it for its face value and the chance for further examination of witnesses and collection of evidence is usually very low. The trial is nothing more than a mere scrutiny of the records and statement prepared and evidence collected by the examining magistrate so as to adjudicate the matter.

The advantage of the functioning of the examining magistrate substantively reduces the chance for prosecuting the probably innocent and escaping the probable guilty from the clutches of the criminal process.

What we need in India for effectively enforcing these crime control measures is such an examining magistrate. Thus the investigation of the offences against national

security shall be conducted by an examining magistrate who appreciates the relevance and reliability of evidence with the skill of intimate conviction.

The presence of such an examining magistrate will simplify the delicacy involved in the mode of collection of evidence such as electronic surveillance. Now we have under the Prevention of Terrorism Act, 2002, a number of authorities for imposing greater degree of accountability and restriction. If all those responsibilities are entrusted with him a lot of convenience can be achieved. He being a qualified judicial magistrate certain better credibility and responsibility can be expected and that would definitely give a better outcome.

The mechanism of electronic surveillance shall be adopted as a mode of collecting evidence in relation to the investigation of all the offences against national security.

Procuring witnesses in the trial of the cases involving organised crimes is a great task before the administration of criminal justice system. Now by virtue of the operation of Section 162 of the Code of the Criminal Procedure, 1973, statement recorded by the police during investigation can only be used for the purpose of contradicting such person if and when examined in the course of trial.[34] The Law Commission of India was constrained to recommend not to use such statements for contradicting the witness.[35] Impact of this recommendation as stated by the commission itself if that such statement recorded under section 161 of the Code of Criminal Procedure would be useful only as a record of investigation proceedings and it would not have any evidentiary value in any manner what so ever.

[34] The Indian Evidence Act, 1872, s. 145.
[35] Law Commission of India 154th Report on the Code of Criminal Procedure, 1973, Chapter II.

In the light of this situation, the perpetrators of the organised crimes can very well manage to get any person having acquaintance of facts away from the court for his being examined during trial. Thus if the examining magistrate conducts as mentioned above can very well examine any person having acquaintance of the facts, confidentially and the statements recorded by him will have every authenticity for its being admissible in evidence during trial, without further examination of such witnesses.

In such situations where an examining magistrate is in action, the legislature can adopt more open approach towards adopting any crime control measures to our administration of criminal justice system so as to combat the category of offences against national security.

The Law Commission of India wide its 43rd Report on Offences Against National Security recommended to have a consolidated enactment for dealing with all the offences against national security. It even prepared and submitted a bill called the National Security Bill, 1971 towards achieving this object. However the legislature has not acted upon that bill. This remains as a gross negligence on the part of legislature as the subsequent development of organised crimes indicate. Thus we do have a consolidate statute containing substantive and procedural provisions for combating the offences against national security.

8.4 Investigating agency

The expeditious and effective investigation is an important function in the criminal justice. The role of investigating agency is thus very much significant.[36] The investigation is highly specialized process requiring a lot of patience, expertise, training

[36] The Law Commission of India, 154th Report on the Code of Criminal Procedure, 1973, chapter II, para 1.

and clarity about the legal position of the specific offences and subject matter of investigation and socio-economic factors.[37]

Our investigating agency, namely the police, is yet to perceive fully the specialisation and professionalism required for the investigation.[38] For discharging such a task efficiently, a separate investigating wing of the police which replenishes its knowledge and skills from developing technology is a desideratum.[39]

Now the police department is understaffed and has a heavy duty to perform. The requirements of the law and order situation, *bandobast* duties, escort of prisoners to courts, patrol duties, traffic arrangements, security to VIPs, rise in crime graph in the country in general and the creation of new kinds of substantive offences have increased manifold the work of the police. Further, many a time while the investigating officer is in the midst of the investigation, he would be called away in connection with some other duty. Consequently he would be forced to suspend the investigation or hand it over to junior officer. Moreover, it happens that investigating officers are transferred without being allowed to complete the investigation in hand. Even in grave offences there is piecemeal investigation by different police officials in the hierarchy which inevitably results in variation of statements the witnesses examined and recorded at different times. Such variation would ultimately destroy the efficacy of the evidence of witnesses when examined in the court. This is a defect in the investigatorial process, advantage of which is taken by the defence.[40]

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[37] *Id*, para 2.
[38] *Ibid.*
[39] *Ibid.*
[40] *Id*, para 3.

The Law Commission of India in its 14th Report on Reform of Judicial Administration, vol.II, para 24, pp.741, 762:

"We think on the whole that there is great force in the suggestion that, as far as practicable, the investigating agency should be distinct from the police staff assigned to the enforcement of law and order. We do not, however, suggest absolute separation between the two branches. Even officers of the police department have taken the view that if an officer is entrusted with investigation duties, his services should not be required for other work while he is engaged in investigation. The separation of the investigating machinery may involve some additional cost. We think, however, that the exclusive attention of the investigating officer is essential to the conduct of an efficient investigation and the additional cost involved in the implementation of our proposal is necessary. The adoption of such a separation will ensure undivided attention to the detection of crimes. It will also provide additional strength to the police establishment which needs an increase in most of the States."

The National Police Commission bemoaned the lack of exclusive and single minded devotion of police officials in the investigation of crimes for reasons beyond their control. The Commission found on a sample survey carried out in six states in different parts of the country that an average investigating officer is able to devote only 37 percent of his time to investigatorial work while the rest of his time is taken up by other duties. Thus there is an urgent need for increasing the cadre of investigating officers and for restructuring the police hierarchy to secure, inter alia, a large number of officers to handle investigation work.[41]

[41] The National Police Commission, the Fourth Report, p.3, para 27.7.

The Law Commission has recommended that the police officials entrusted with the investigation of grave offences should be separate and distinct from those entrusted with the enforcement of law and order and other miscellaneous duties.[42] Separate investigating agency directly under the supervision of a designated Superintendent of Police be constituted. The hierarchy of the officers in the investigating police force should have adequate training and incentives for furthering effective investigations.[43] When a case is taken up for investigation by an officer of such agency, he should be in charge of the case throughout till the conclusion of the trial. He should take the responsibility for production of witnesses, production of accused and for assisting the prosecuting agency.[44]

The reasons given by the Law Commission in support if its suggestion that a separate investigating police shall be established, are as follows: Firstly, it will bring the investigating police under the protection of judiciary and greatly reduce the possibility of political or other types of interference. Secondly, with the possibility of greater scrutiny and supervision by the magistracy and the public prosecutor as in France investigation of police cases are likely to be more in conformity with the law than at present which is often the reason for failure of prosecution in courts. Thirdly, the efficient investigation of cases will reduce the possibility of unjustified and unwarranted prosecutions and consequently of a large number of acquittals. Fourthly, it will result in speedier investigation which would entail speedier disposal of cases as the investigating police would be completely relieved from performing law and order duties, VIP duties and other miscellaneous duties, which not only cause unnecessary delay in the investigation of

[42] The Law Commission of India, 154th Report on Code of Criminal Procedure, 1973, chapter II, para 9.
[43] *Ibid.*
[44] *Id*, para 7.

cases but also detract from their efficiency. Fifthly, separation will increase the expertise of investigating police. Sixthly, since the investigating police would be plain clothes men even when attached to police station will be in a position to have good rapport with the people and thus will bring their cooperation and support in the investigation of cases. Seventhly, not having been involved in law and order duties entailing the use of force like tear gas, lathi charge and firing, they would not provoke public anger and hatred which stand in the way of police- public cooperation in tracking don crimes and criminals and getting information, assistance and intelligence which the police, have a right to get under the provisions of ss.37 to 44 of the Code of Criminal Procedure.[45]

The quality of criminal justice is closely linked with the caliber of the prosecution system and many of the acquittals in courts can be ascribed not only to poor investigations but also to poor quality of prosecution.[46] There is a general complaint that the public prosecutors in lower court do not prepare cases carefully and that the quality of prosecutions is poor. Therefore, there should be careful selection and appointment of prosecutors who can closely coordinate with investigation. No doubt, they have to closely coordinate with the police system since prosecutions are conducted on behalf of the police. There should not be communication gap between the police and the prosecutors during the investigation stage. Investigation and prosecution form a continuous link process in the administration of justice and, therefore both should be closely coordinated in order to ensure successful prosecution of criminal cases. Total detachment of prosecution department from the police will not only create conflicts between the two but also result in each throwing the responsibility on the other with the

[45] *Id*, para 6.
[46] *Id*, chapter III, para 2.

result that there will not be any effective control over the maintenance of law and order or prosecution of criminals.[47]

For ascertaining whether the criminal justice system in India has the characteristic features of the Crime Control or the Due Process model, we have to observe its various stages in action.

[47] *Ibid.*

ANNEXURE I

(Chapter 2 Foot note 33)

State v. *Nalini and ors.*, (1999) 5 SCC 253, per D.P. Wadhwa, J at para 583

"Some of the broad principles governing the law of conspiracy may be summarized though, as the name implies, a summary cannot be exhaustive of the principle.

1. Under section 120-A IPC offence of criminal conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. When it is a legal act by illegal means overt act is necessary. Offence of criminal conspiracy is an exception to the general law where intent alone does not constitute crime. It is intention to commit crime and joining hands with persons having the same intention. Not only the intention but there has to be agreement to carry out the object of the intention, which is an offence. The question for consideration in a case is did all the accused have the intention and did they agree that the crime be committed. It would not be enough for the offence of conspiracy when some of the accused merely entertained a wish, howsoever horrendous it may be, that offence he committed.

2. Acts subsequent to the achieving of the object of conspiracy may tend to prove that a particular accused was party to the conspiracy. Once the object of conspiracy has been achieved, any subsequent act, which may be unlawful, would not make the accused a part of the conspiracy like giving shelter to an absconder.

3. Conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy by direct evidence. Usually, both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused.

4. Conspirators may, for example, be enrolled in a chain – A enrolling B, B enrolling C, and so on; and all will be members of a single conspiracy if they so intend and agree, even though each member knows only the person who enrolled him and the person whom he enrols. There may be a kind of umbrella-spoke enrolment, where a single person at the centre does the enrolling and all the other members are unknown to each other, though they know that there are to be other members. These are theories and in practice it may be difficult to tell which conspiracy in a particular case falls into which category. It may be however, even overlap. But then

there has to be present mutual interest. Persons may be members of single conspiracy even though each is ignorant of the identity of many others who may have diverse roles to play. It is not a part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role.

5. When two or more persons agree to commit a crime of conspiracy, then regardless of making or considering any plans for its commission, and despite the fact that no step is taken by such person to carry out their common purpose, a crime is committed by each and every one who joins in the agreement. There has thus to be two conspirators and there may be more than that. To prove the charge of conspiracy it is not necessary that intended crime was committed or not. If committed it may further help prosecution to prove the charge of conspiracy.

6. It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time before the consummation of the intended objective, and all are equally responsible. What part each conspirator is to play may not be known to everyone or the fact as to when a conspirator joined the conspiracy and when he left.

7. A charge of conspiracy may prejudice the accused if it forces them into a joint trial and the court may consider the entire mass of evidence against every accused. Prosecution has to produce evidence not only to show that each of the accused has knowledge of the object of conspiracy but also of the agreement. In the charge of conspiracy the court has to guard itself against the danger of unfairness to the accused. Introduction of evidence against some may result in the conviction of all, which is to be avoided. By means of evidence in conspiracy, which is otherwise inadmissible in the trial of any other substantive offence prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy. As observed by Judge Learned Hand "this distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders".

8. It is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement which is the gravamen of the crime of conspiracy. The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive actions evidencing their joining of the conspiracy.

9. It has been said that a criminal conspiracy is a partnership in crime, and that there is in each conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor. This means that everything said, written or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by each of them. And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incidental to and growing out of the original purpose. A conspirator is not responsible, however, for acts done by a co-conspirator after termination of the conspiracy. The joinder of a conspiracy by a new member does not create a new conspiracy nor does it change the status of the other conspirators, and the mere fact that conspirators individually or in groups perform different tasks to a common end does not split up a conspiracy into several different conspiracies.

10. A man may join a conspiracy by word or by deed. However, criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime."

ANNEXURE II

(CHAPTER 8, FOOT NOTE NO. 26)

LAW COMMISSION OF INDIA, 173rd REPORT ON PREVENTION OF TERRORISM BILL, 2000

CHAPTER II
SECURITY SITUATION IN THE COUNTRY

In its Working Paper the Law Commission had set out the following facts and figures in paragraphs 1.2 to 1.15 in chapter I. They read as follows.

1.2 The law and order situation for some years has continued to remain disturbed in several parts of India. Militant and secessionist activities in Jammu and Kashmir and the insurgency-related terrorism in the North-East have been major areas of concern. Bomb blasts in different parts of the country, including those in Tamil Nadu, constituted another disquieting feature. There has been extensive smuggling in of arms and explosives by various terrorists groups. The seizures of these items, which represent but a small percentage of the total quantities brought in indicate the kind of sophisticated arms and explosives being brought into the country illegally.

The security situation in some states/regions of the country is indicated below.

1.3 Jammu and Kashmir

There have been 45,182 incidents of terrorist violence in J&K since 1988 and upto March 1999, In this viloence, 20,506 persons have lost their lives. 3421 incidents of violence took place in Jammu and Kashmir which included 2198 cases of killing in 1997, there were 2213 killings. There were numerous cases of abductions,

robberies, extortions, explosions, incidents of arson and killings. Civilians remained the major victims of violence (1333 killed in 1996, 864 in 1997 and 416 in the year 1998 upto June). Security forces personnel, 'friendly militants' and political activists were the priority targets of the militants. There has been an increase in the number of casualties among security forces.

1.2.1 The militants are found to be well trained. Most of them are of foreign origin. Mercenaries and fanatic fundamentalist terrorists from Afghanistan, Sudan, Pakistan and other countries are being inducted increasingly into this movement. According to several reports, one of the prime targets of international terrorist leaders, like Osama Bin Laden, is Kashmir. The terrorism in India has thus become a part of international terrorism and India one of its prime targets. Their targets are security forces personnel, political activists, 'friendly militants' suspected informers and their families, as also Hindus residing in isolated pockets. They indulge in acts of demonstrative violence, mainly with the help of explosives; induction of more and more sophisticated weaponry, including anti-aircraft guns and RDX. They have extended the arc of terrorism to the Jammu region, particularly Rajouri, Poonch and Doda districts.

1.3.2 The militancy in Jammu and Kashmir has left a large number of Hindu families homeless and they had to migrate to other places outside the state.

1.4 Punjab

The State remains vulnerable to sporadic terrorist actions by the remnants of the militants, numbering about 300, who appear to the under pressure to revive the separatist movement. The militant bodies are funded and equipped mainly by overseas activists.

1.4.1 The need for high level of vigil in order to checkmate any attempts at revival of terrorism in the State, hardly need be overemphasised.

1.5 North-Eastern Region

Militant activities of various insurgent and extremist groups and ethnic tensions have kept the conditions disturbed in large areas of the North East.

1.5.1 In Assam, ULFA, Bodo and Naga militancy shows an upward trend in 1998, accounting for 735 incidents (603 killings) as against 427 incidents (370 killings) in 1997. This trend has continued in the first eight months of 1999, which has witnessed 298 incidents (208 killings). Nalbari, Nagaon and Kamrup districts remain the worst affected and Lakhimpur, Dibrugarh, Goalpara and Jorhat districts moderately affected by ULFA violence.

1.5.2 The Bodo militants were responsible for 178 incidents (215 killings) in 1997, as against 213 incidents (260 killings) in 1996, Bodo militants were also responsible for 10 explosions (22 deaths) in 1997. During 1998, an upward trend has been evident.

1.5.3 The NSCN(I) and its satellite, the Dima Halam Deogah (DHD) in NC Hills and Karbi Anglong districts and the NSCN(K) in Golaghat, Jorhat and Sibsagar districts also indulged in violent activities. There was a 'ceasefire' agreement (July 25, 1997) between the NSCN(I) and the Government of India.

1.5.4 Overall militancy in Assam showed an upswing in 1998, accounting for 735 incidents as against 427 in 1997. The upward trend has continued in the first

eight months of 1999. Police, security forces personnel and uncooperative businessmen have been the main targets of the outfits.

1.6 In Manipur, despite large scale security forces operations, there has been a sharp rise in the overall violence, involving Naga, Kuki and Valley extremists, as also ethnic groups resulting in several deaths.

1.6.1 The State witnessed a particularly high rate of security forces casualties- 111 personnel lost their lives in 92 ambushes in 1997 as against 65 killed in 105 ambushes in 1996. As against total 417 incidents and 241 killings in 1996, these groups were responsible for 742 incidents in which 575 persons were killed in 1997. In 1998, 250 persons were killed in 345 incidents. During 1999 (upto August), there have been 153 incidents claiming 100 lives.

1.7 In Nagaland, there was no let up by NSCN and its factions in its violent activities such as extortions, abductions and attacks on civillians, etc. In 1998, there were 202 incidents which claimed 40 lives. Upto August 1999, 10 persons have been killed in 126 viloent incidents.

1.8 In Tripura, violent activities of the various tribal organisations like the ATTF and the NLFT, and assorted groups of lawless elements, continued. During 1997, there were 303 violent incidents, involving 270 deaths, as against 391 incidents (178 deaths) in 1996. In 1998, 251 persons were killed in 568 violent incidents. During 1999 (till August), 417 incidents of violence have been reported, resulting in 152 deaths.

1.8.1 The violence in all above cases mostly took the form of ambushes, looting, extortion, kidnapping of ransom, highway robberies and attacks on

trucks/vehicles as well as attacks on the security forces personnel, government officials and suspected informers.

1.9 In Meghalaya, on the militancy front, the level of violence and killings by the HNLC and Achik National Volunteer Council remained almost unchanged. It is feared that in the North-East, certain development funds allocated by the Central Government have been siphoned off to fund insurgent groups. The insurgent groups in the North-East are also being helped across the country's borders with illegal arms. They were responsible for three deaths in 14 incidents in 1997 and 14 killings in 16 incidents in 1998 and 22 killings in 28 incidents in 1999 (till August 1999).

1.10 Religious Fundamentalist Militancy Religious militancy which had first raised its head in 1993 with bomb explosions in Mumbai, continue to make its presence felt. In 1997, there were 23 blasts in Delhi and three each in Haryana and Uttar Pradesh. In the year 1998, Mumbai witnessed three explosions just before the Parliamentary elections. Al- the Principal fundamentalist militant outfit of Southern India, was responsible for 17 blasts in different areas of Coimbatore (Tamil Nadu February 1998).

1.10.1 A number of miscreants, including a few Pakistan nationals and Bangladeshis, who were responsible for the blasts in North India in 1997, were arrested. Investigations have provided ample evidence of a sinister game plan to undermine the internal security and integrity of the country. Efforts are being made to forge an alliance between Muslim militants and terrorists of Punjab and J&K Bases in Nepal and Bangladesh, in addition to those in Pakistan, are being picked up from amongst fundamentalist youth for undergoing training in Pakistan as a prelude to being inducted

into Pakistan's proxy war against India. Weapons and explosives are being pumped into the country in large quantities, in pursuance of the above game plan".

Indeed, over the last few months since the Working Paper was released, the security situation has worsened. The hijacking of Indian Airlines flight, IC-814, the release of three notorious terrorists by the Government of India to save the lives of the innocent civilians and the crew of the said flight, the subsequent declarations of the released terrorists and their activities both in Pakistan and the Pakistan-occupied Kashmir, have raised the level of terrorism both in quality and extent. The repeated attacks upon security forces and their camps by terrorists including suicide squads is a new phenomenon adding a dangerous dimension to the terrorist activity in India. Even in the last two months, substantial quantities of RDX and arms and ammunition have been recovered from various parts of the country. Indeed, it is now believed that the plan for hijacking of the Indian Airlines flight was hatched and directed from within the country.

After setting out the facts in paragraphs 1.2 to 1.15 in chapter I of the Working Paper, the Commission summed up the position in the following words.

"Some time back, the Union Home Minister declared his intention to release a white paper dealing with subversive activities of the ISI. The ISI sponsored terrorism and proxy war has resulted in deaths of 29, 151 cuvukuabs, 5, 101 security personnel and 2,730 explosions. Property worth Rs.2000 crores is reported to have been damaged. Almost 43,700 kg. of explosives, mostly RDX, had been inducted and 61,900 sophisticated weapons had been smuggled into India. It is estimated that security related costs in countering ISI's activities have totalled an amount of Rs.64,000 crores (Vide

Economic Times, New Delhi, 21 December, 1998, p.2)- which could alternatively have been spent on better purposes like education, health and housing.

1.16.1 A perception has developed among the terrorist groups that the Indian State is inherently incapable of meeting their challenge that it has become soft and indolent. As a matter of fact, quite a few parties and groups appear to have developed a vested interest in a soft State, a weak government and an ineffective implementation of the laws. Even certain foreign powers are interested in destablishing our country. Foreign funds are flowing substantially to various organisations and groups which serve, whether wittingly or unwittingly, the long-term objectives of the foreign powers".

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