CRIMINAL JUSTICE SYSTEM IN PONDICHERRY - A COMPARATIVE CRITICAL STUDY OF THE PAST AND THE PRESENT

THESIS SUBMITTED TO COCHIN UNIVERSITY OF
SCIENCE AND TECHNOLOGY FOR THE
AWARD OF THE DEGREE OF
DOCTOR OF PHILOSOPHY

BY

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Certified that the important research findings included in the thesis have been presented in a Research Seminar at the Department of Law, Cochin University of Science and Technology on 4-6-1997.

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Date : 30th May 1998.

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ACKNOWLEDGEMENT

It is a great privilege for me to express my deep sense of gratitude to my **Prof. Dr.K.N.Chandrasekharan Pillai**, Director, School of Legal Studies, Cochin University of Science and Technology, Cochin for having accepted me as his student and for giving me his scholarly guidance at every stage of the work and affectionate encouragement's in pursuing and completing this study. The inspiration and encouragement that I have received from my guide are invaluable. When I completed this thesis, I realised the wisdom of the entire course of hard work which my guide made me go through by his suggestions to revise the drafts with necessary corrections. I express my humble and heartfelt thanks to him for the excellent guidance he gave me in preparing my thesis. I owe a great debt to **Prof. Dr.V.D.Sebastian**, Dean, Faculty of Law, Cochin University of Science and Technology, for the fruitful discussions I had with him during the preparation of this study. I am also indebted to **Dr.S.G.Bhat**, Professor and Principal, Dr.Ambedkar Government Law College, Pondicherry for giving me all the necessary encouragements and facilities to complete this work.

The inspiration and constant encouragement that I have received from His Lordship Honourable Justice **Dr.David Annousamy**, President, State Consumer Grievances redressal forum, Pondicherry and from my revered French criminal Law Teacher Shri **N.Krishnadathin**, Former Chief Judge, Pondicherry are invaluable. I wish to place on record my sincere thanks to His Lordship Justice Honourable Shri **M.S.Janarthanam**, Judge, High Court of Madras and Executive Chairman of Tamil Nadu, Legal Services authority, His Lordship Justice Hon'ble Shri **D.Raju**, Judge, High Court of Madras and Executive Chairman of Pondicherry Legal Services authority, His Lordship Justice Hon'ble Shri **AR. Lakshmanan**, Judge, High Court of Kerala, His Lordship Justice Hon'ble Shri **S.Jagadeesan**, Judge, High Court of Madras, His Lordship Justice Hon'ble Shri **N.Krishnasamy Reddy**, Chairman, Tamil Nadu Legal Aid Board, His Lordship Justice Hon'ble Shri **Nainar Sundaram**, Chairman, Tamil Nadu Human Rights Commission and the former Chief Justice of High Courts of Madras, Gujarat and Andra Pradesh, His Lordship justice Hon'ble **C.S.Ramulu**, Chairman, All India Justice Association, New Delhi, Her Lordship Justice Hon'ble **Martin** Judge Supreme Court, Paris, France, Shri **R.Gandhi**, Senior Counsel, High Court, Madras, Shri **G.Masilamani**, Senior Counsel, Additional Solicitor General of India, High Court, Madras, Shri **Colondaivelu**, Senior Counsel (Former Procureur de la Republic of French Criminal

Justice System) of Pondicherry, and Public Prosecutors of Pondicherry Courts for their kind words of encouragements and constructive suggestions during the course of this work.

I thank, all the faculty members of the School of Legal Studies, Cochin University of Science and Technology and every other member of the Faculty of Law, the Office Staff, the Library Staff and the Research Scholars and Students at the School of Legal Studies, Cochin University of Science and Technology for all their assistance and co-operation for the completion of my study.

I am also thankful to **Mr.K.V.V.Satyanarayana**, the Librarian and all the faculty members at Dr.Ambedkar Government Law College, Pondicherry for their active assistance and moral support given to me in my endeavour. I am also thankful to the library staff of the Judicial Department, Law Department, Chief Secretariate of Pondicherry, Supreme Court Library, High Court of Madras Library, Madras Law College Library, Madras University Library, Madras for their help extend to me to collect meterials on the subject.

I also wish to place on record my sincere thanks to Honble **S.Ramalingam**, Former Chief Judge, Pondicherry, Hon'ble **R.Govindaraj**, Former Chief Judge, Pondicherry, Hon'ble **Shahul Abdul Hameed**, Former Chief Judge, Pondicherry, Hon'ble **C.Adimonal**, Former Sub-Judge, Pondicherry, Hon'ble **S.Nadammi**, Chairman Legal Aid and Advice Board, Pondicherry, Former Sub-Judge, **E.A.Edward Kumar**, Shri.**P.Krishnaraj,** Superindent of Police, Pondicherry, Mr.**P.Ilango**, Inspector of Police for their source of information supplied to me with their enrcihed experience in the criminal Justice Administration..

I am also thankful to the Hon'ble **High Court of Madras** and the **Judicial Department**, Pondicherry for granting permission to me to continue and complete this humble work. I am also thankful to Hon'ble **Chief Judge Mr.A. John Ambrose** and other **Judicial Officers** of Pondicherry Judicial Service for their active assistance and moral support for my empirical study. I am also thankful to my Colleagues Hon'ble **D.Ramabathiran** and **E.M.K. Siddharthar** for their constant encouragement for doing this Research.

I have been greatly benefited by the critical comments and suggestions made by my colleagues of the Pondicherry Judicial Service during the final stage of the preparation of this thesis. Also I thank **Mr.R.Saravanan** of **Microsecond Computer Center** and **Mr.Sankaravadivelu** for typing out the manuscript of this thesis and special thanks to **Mr.R.Saravanan** for his sincere painstaking and prompt work in processing computer and printing this thesis within a short-time.

Thanks to Police, Politician, Public, and Advocates of the various parts of our country.

I acknowledge with gratitude the blessings of my father **Mr.K.Kothandapani** and Mother **Mrs.Indirani Ammal** and the almighty for accomplishing this humble achievement.

Last but not least My thanks are also due to my wife **Mrs.A.Santhi** and my sons **A.Arunakirija** and **A.Souriagovidan** for the patience and parenance they have shown during the course of the preparation of this thesis.

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INTRODUCTION

The Union Territory of pondicherry prior to its merger with the Indian Union was a French Colony. The erstwhile territory of Pondicherry along with its hamlets, namely, KARAIKKAL, MAHE and YANAM was administered by the French Regime. Before it was established by French in 1674 A.D. it was part of Vijayanagara Empire. Prior to this, Pondicherry was a part of the Kingdom of Chola and Pallava Kings.

During French Regime, the laws which were in force in France in relation to administration of civil and criminal justice were extended to the erstwhile territory of Pondicherry. Thus while Pondicherry stood influenced by the Inquisitorial system since the beginning of the 18th century, the neighbouring states forming part of the Indian Union since Independence came under the influence of the British system, viz. accusatorial system.

The territory of Pondicherry, for administrative reasons, came to be merged with the Indian Union in the early 60's. Following the merger, the Indian administration sought to extent its own laws from time to time replacing erstwhile French Laws, however, subject to certain savings. Thus the transitional period witnessed consequential changes in the administration of the territory, including the sphere of judicial system. Since 1963, the Union Territory of Pondicherry was brought under the spell of the Indian Legal System.

The people in Pondicherry thus have had the benefit of experiencing both the systems. Their experiences will be of much help to those who undertake comparative studies in law. The plus and minus points of the respective systems help one to develop a detachment that helps independent evaluation of the systems. The result of these studies could be relevant in revitalising our criminal justice system.

The present system is evaluated in the light of the past system. New dimensions are added by way of an empirical study also.

That the first chapter of this study highlights the historical aspects of the criminal justice system in Pondicherry during and after the French Regime. It also gives a picture about re-organisation of judicial set-up that took place from time to time from the French period to the present period.

The Second Chapter of this study brings into focus the role of functionaries under the French and Indian Criminal Justice Systems. It evaluates the functions and powers of Police, prosecutors, (prosecureur de la Republic), Judicial Officers, Prison Officers, Correctional Staff under both the systems.

The Third Chapter goes with a detailed study about the pre-trial procedures under the French and Indian systems. As the area of pre-trial procedure deals with Arrest, Remand, Bail, Investigation, Search and Seizure, a cross-section of the functionaries working at these stages have been interviewed and their views on different aspects evaluated. An empirical study by examining all the authorities and agencies including Police, Prosecutors, Judicial Officers, Public, Politicians (all experienced under both systems has also been undertaken). The role of Judicial Police, Investigating Magistrate and Public Procecutor of the French model during investigation has been evaluated.

While the Third Chapter deals with the pre-trial procedures the Forth Chapter details the Trial procedure under both the French and Indian systems. It attempts to scan every facets of the trial jurisdiction on a comparative basis by taking the past pondicherry experience. It also discusses the various relevent legislative mandates adumbrated in Criminal Procedure Code 1973, Indian Penal Code 1860, the Indian Evidence Act. 1872 on comparison with the French piece of legislation that existed during French regime.

In this forth chapter the various types and heirarchy of courts under the French System and their Trial procedures are projected. The tribunal correctionnel, Tribunal de police, Cour d' Assieses, Cour d' Appel, and court d' cassation of French model criminal courts are discussed. The powers and

functions are also detailed. These Courts powers and functions are compared in detail with those obtaining in India.

In the Fourth Chapter the constitutional rights of the accused persons and the victims of crime are also highlighted with the spell of the High Courts and Supreme Court. It is also attempted to scan and compare various types of criminal justice systems so as to have a proper appraisal of the working of the criminal justice system of the globe and thereby to find out and remodel a better system of criminal justice system for India in general and for Pondicherry in particular.

The Fifth Chapter of this study diagonises the sentencing segment of criminal justice system. It attemps to compare the mode and scheme of punishments awarded under both the past and the present systems at Pondicherry. It also critically evaluates the sentencing policy on a comparative perspective prior to proceeding for submitting its findings. The modern trend of penal policy and philosophy of reformative and rehabilitative ideology are also projected with the pragmatic practices and their results in reshaping a crimeless society.

In the Sixth Chapter, an attempt is made to evaluate the scheme of correctionel process. It also focuses the rehabilitation of offenders as a primary

objective. The role of correctional institutions and the judiciary is also highlighted.

In the Last Chapter, the conclusions drawn are put together and based on those conclusions, a few suggestions are also made which include enactment of necessary Acts for speedy procedure and disposal of criminal cases. This chapter also suggests to have various amendments in the procedural and substantive laws. That apart, it is also attempted by suggesting a scheme of new Board of Concilliation and compounding of offences with lot of arrangements to dispose of lot of petty and simple criminal cases as expeditiously as possible. It is also suggested to have pre-trial Magistrates for Criminal Investigation with the aid and help of Judicial Police Wing. That the Judicial Police Wing - a police force - is suggested for the exclusive work of the criminal judiciary. Curtailing of second appeals are also suggested.

Thus the Researcher attempted a journey of comparative research on the criminal justice delivery system and ultimately reached the destination of conclusions and suggestions which have been incorporated in the last chapter with a ray of hope that the suggested scheme, if adopted in our system, may serve its purpose - the purpose for which this empirical study was carried out.

LIST OF ABBREVIATIONS

AIR	-	All India Reporter
AJCL	-	American Journal of Comparative Law
All ER	-	All England Reports
BJC	-	British Journal of Criminology
CLR	-	Columbia Law Review
CriLJ	-	Criminal Law Journal
Crim LR	-	Criminal Law Review
CrPC	-	Criminal Procedure Code
CTC	-	Current Tamilnadu Cases
CULR	-	Cochin University Law Review
IJC	-	Indian Journal of Criminology
ILR	-	Indian Law Reporter
IPC	-	Indian penal Code
JBCI	-	Journal of Bar Council of India
JCC	-	Journal of Criminal Law and Criminology
JCC & PS	-	Journal of Criminal Law, Criminology and Police Science
JILI	-	Journal of Indian Law Institute
JPL	-	Journal of Public Law
JT	-	Judgment Today
KLT	-	Kerala Law Times
KLJ	-	Karnataka Law Journal
MLJ	-	Madras Law Journal
MLR	-	Modern Law Review
PO ACT	-	Probation of Offenders Act,1958.
SCC	-	Supreme Court Case

CHAPTER I

INTRODUCTION

PRE-FRENCH PERIOD

The Union Territory of Pondicherry prior to its merger with the Indian Union was a French Colony. It was part of the Vijayanagar before it was established by the French in 1674. Prior to its becoming part of the Vijayanagara Empire it was part of the Kingdom of Chola and Pallavas. During the reign of Pallavas and Cholas Pondicherry was a centre of learning. It had a very developed legal system and institutions of legal education. There is evidence of several educational Institutions that existed in Pondicherry.

Legal Education was accorded due importance in ancient days in Pondicherry. The Bahoor Vidyastana (College) was in existence during the eighth century. A verse in Bahoor plates mentions the Dharma Sastra College.[1] Another college at Thirubuvanai near Pondicherry was also in existence during the period of Chola Kings. In that college laws of Manu (Manusastra) was also in the curriculum of

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1. C.Minakshi. Administration and Social Life under the Pallavas (Madras), 1938 pp.205-207.

studies. The importance given to these laws in the curriculum gives the impression that these laws were in force in the territory which now forms Pondicherry.[2]

Most of the disputes used to be resolved by village assemblies during the reign of Chola Kings. These village assemblies had both civil and criminal jurisdiction. The small committees of nyayathar also settled disputes. By way of arbitration also the general disputes were resolved and some criminal offences used to be compounded. Treason was considered to be a grave offence and the same was dealt with severely. Offences like murder of the members of the royal family, non-payment of fines imposed by the king, persistent efforts to disturb the king's peace and creation of disorder in the realm, violation of royal grants and failure to pay expenses incurred for the conduct of worship of temples etc. were considered very grave offences.[3] All treason against people's organisation like the grama and the nadu were considered to be more heinous than treason against the king.[4]

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2. K.A.Nilakanda Sastri. The Cholas, Vol.II, Part-I, Page 468.

3. T.V.Mahalingam. South Indian Polity, Page-201.

4. T.V.Mahalingam. South Indian Polity, Page-201.

There was some kind of continuity so far as the legal system was conserved when Pondicherry became part of the Vijayanagara empire later. Under the Vijayanagara empire king was regarded as the fountain of justice. He was regarded as the Chief Judge. Krishnadeva Raya's Amuktamalyada declares that it is the duty of the king to hear complaints from the people in distress and redress their sufferings. But he himself did not dispense justice in all cases brought before him. There were judges who administered justice on his behalf. The Minister of the King called Pradhani actually acted as the Chief Judge. The available evidence indicates that the provincial governors held their own courts in their areas as the king did at the capital, regardless of whether a judge held court at the same place or not. Though there is no information about the distribution of judicial work between the king and other judges at the capital some records indicate that the king used not only to hear and decide the cases at the first instance but also heard appeals from the decisions of other judges.[5] The king's agents or governors dispensed with justice at the provincial courts. In the outlying parts of the empire, there were popular courts such as those of village assemblies, temple trustees, and caste elders. The village courts were manned by the village mahajanas and caste courts by the

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5. T.V.Mahalingam. Administration and Social Life Under Vijayanagar, Page-108.

elders of the respective castes. Leaders of the guild manned the courts of the guild and temple trustees decided disputes that arose in their arena.

Civil disputes were generally settled by arbitration by special judges. An officer having jurisdiction to try the case had the right to request a body of persons to conduct the trial on his behalf. But, in criminal cases a rough and ready procedure seemed to have been adopted. When a complaint was directly made to the king about a crime the king settled it then and there and also ordered the captain who accompanied him to enforce the decision.[6] Indeed, in certain cases it appears that the king occasionally acted as accuser as well as judge. The village assemblies, temple authorities and provincial governors also exercised criminal jurisdiction. The local residents sometimes tried criminal cases. There is evidence of a case having tried by several persons. For example, a collegiate court consisting of not less than twelve members tried one Aindan in absentia and pronounced sentence for having deprived God Kunaravana Perumal of 150 PON[7] from his garland. There appears to have been occasional

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6. For instance, the king Krishna Deva Raya, blinded and imprisoned his minister Saluva Timma and his sons on suspicion of their murdering the king's son Tirumala.

7. PON: It is gold coin that weighed eight grams.

recourse to trial by ordeal in criminal cases, where there was no reliable evidence available. When there was no witness to prove the offence oaths were taken. A person charged with an offence had to prove his innocence by going through one of the hazardous modes of taking oaths. He who swore that he was innocent of the offence charged against him plunged two fingers into boiling butter. It would appear that while in civil suits the plaintiff had to prove his claim against the defendant, in the criminal cases the burden of proof was on the accused. The accused's burden should have been onerous when he was tried by the village assembly, or the elders of the community to which the accused belonged as they had knowledge of the circumstances in which the crime came to be committed. The legal system imposed a sacred and religious duty on the kings to find out the truth.[8] There are numerous texts which declare that by miscarriage of justice the king will not only lose the goodwill of his subjects, but will also incur punishment for his sin.[9]

Under the Vijayanagar rulers punishments for criminal conduct were very severe. For a thief, amputation of a foot and a hand was

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8. T.V.Mahalingam: South Indian Polity, Page-213, One is remined of the "conviction in time" required if the French Magistrate before he passes sentence.

9. S.Varadacchariar: Hindu Judicial System, Page-122.

prescribed as punishment irrespective of the seriousness or the property involved in the crime. Grave crimes used to be dealt with by hanging with a hook under chin. Sometimes, the criminals were tortured to death. Treason was punishable with death. In case of theft of temple jewellery, the convict was first imprisoned and later banished from his village, with one of his hands chopped off and his lands confiscated. Apart from capital punishment, there were the common punishments of the times, like mutilation, forfeiture of property, fines and ex-communication. Compensation appeared to have been sometimes paid to the victims of crime. The King was inclined to act as accuser and judge in his own cause, perhaps because all executive power as well as, ultimate judicial power vested in him. Epigraphia Carnatica relates an instance of the State compensating individuals for injustice done to them by the state.[10] The French appear to have taken a leaf, or rather a few leaves, out of the Vijayanagar books, in matters of procedure and punishments. Indeed the French's indebtedness to Vijayanagara System was very limited though.

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10. T.V.Mahalingam: Administration and Social Life, Page-129.

PONDICHERRY : AFTER THE ADVENT OF THE FRENCH

Pondicherry had the experience of different administrative systems even after it was taken over by the French. The French established their colony in 1674; it was taken by the English in 1761. However, it was given back to French in 1765. Once again Pondicherry was retaken by English in 1778 but was restored to the French in 1816. Thus its experience with different systems of law was not something new. However, Pondicherry could retain its Indo-French System without any major interference.

The French establishments in India consisted of five small units. They were Pondicherry, Karaikal, Mahe, Yanam and Chandernagore. There was no geographical contiguity with each units apart from their linguistic diversity with general culture. Though all the five regions were scattered in various parts of our country, Pondicherry, Karaikal and Yanam were on or near the south east coast. Mahe was on the west coast while Chandernagore was near Calcutta in the north. The languages of Pondicherry and Karaikal, Yanam, and Mahe had been Tamil, Telugu and Malayalam respectively. Inhabitants of Chandernagore spoke Bengali. At present Chandernagore is not with the Union Territory of Pondicherry. The other four territories viz.,

Pondicherry, Karaikal, Yanam and Mahe are parts of the present Union Territory of Pondicherry.

French Pondicherry had an area of 293.77 square kilometers. It consisted of eight territorial administrative divisions called **"Communes"**. They were Pondicherry, Mudaliarpet, Ozukarai, Ariankuppam, Villianur, Bahoor, Nettapakkam, Mannadipet. All the eight communes in total consisted of 234 villages. Pondicherry the living monument of French Culture in India, to-day edges the coromandel coast and is bound by the South Arcot district of Tamilnadu on the west, north and south and by the Bay of Bengal on the east. Though the reigns of Pondicherry kept on changing hands between the French, Dutch and the English from 1816 onwards Pondicherry was retained by the French without any interference. It should be noted that its rulers other than the French, the English and the Dutch, did not try to replace the then existing French Law.

Karaikal, had an area of 149.20 square kilometers. It also comprised of six communes. They were Karaikal, Thirumalairayan Pattinam, Tirunallar, Neravy, Nedungadu and Kottucherry. All the six communes contain 110 villages. Karaikal is situated about 120 kilometers south of Pondicherry and is bound on three sides by Tanjore

district of Tamilnadu and on the east by the Bay of Bengal. Though this part of the Union Territory was taken over by gratien Grolard in 1793, later on it was ceded to France by the King of Tanjore for 50,000 chakras.

Mahe, had an area of 8.41 square kilometres. Among the four units of the Union Territory of Pondicherry, Mahe was the smallest unit. But it had more density of population. It is situated on the Malabar Coast, some 420 kilometres west of Pondicherry. Mahe consist of two units. It is bound in the east by the Arabian Sea and on the other sides by the Kozhikodu district of Kerala State. The other unit is an enclave in the Cannanore district of Kerala State. It formed only one commune. It was acquired from the ruler of Kadattanadu who permitted the French to keep a garrison there. Mahe was taken back from them, but the French recaptured it. Their right to territory was confirmed by a treaty concluded in 1726.

Yanam, has an area of 17.29 square kilometres. It is situated near East Godavari District of Andhra Pradesh and is more than 500 kilometres to the north east of Pondicherry. Yanam is a narrow sketch of land bound in the south by the Godavari and on the east by the

tributaries of the Godavari River. It formed one commune. It now consists of Yanam Town and six villages.

As already noted the French establishment of Chandernagore is at present not a part of the Union Territory of Pondicherry. It was 30 kilometres north of Calcutta and consisted of 9.4 square kilometres including the enclave of Groretty. On the basis of a referendum, on 19th June 1949 Chandernagore opted for merger with the Indian Union.

JUSTICE DELIVERY SYSTEM IN PONDICHERRY DURING THE - FRENCH PERIOD

The French Legal system was introduced in Pondicherry by an enactment of February 1701 promulgated by Louis XIV. By that enactment the Sovereign Council (Conseil Souverain) was set up for the administration of Justice. The Sovereign Council had jurisdiction both in civil and criminal matters. The Council was composed of Directors General of the French East India Company and in their absence, of the Directors of the establishment at Pondicherry and the merchants of the company residing in the establishment. The other body with local jurisdiction was called *conseil Superieur* and the same was constituted with capable and honest French merchants and tradesmen, who were invited to participate and hand down decisions in both civil and criminal matters. The enactment had also made

arrangements for administration of justice in certain subordinate establishments by constituting a court of first instance having sitting at the headquarters of the establishment with four for criminal matters. Appeal against the decisions of these courts were made before the Council Sovereign in Pondicherry.[11]

In the Council Superior each of the Councillors had some special functions assigned to them. The first Councillor who manned the office of the Governor in his absence was the President of the Choultry court. The Governor was appointed by the King and he was responsible to the Company for the conduct of affairs in India. He was not endowed with any authority to override the Council. The Choultry court was in charge of rendering justice to the natives. Apart from the Administrative works the first Councillor was also entrusted with the work of dispensation of justice by sitting in the Sovereign Council. During the absence of the Governor or in the event of his being ill the first Councillor used to sit as a judge as stated above. The second councillor was Commissioner of the army, the third was incharge of the stores, the fourth was incharge of armaments and the fifth acted as *procurer General.* The functions and numbers of Councillors were flexible. All the Councillors, by turn,

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11. The Conseil Supeieur when sitting as a court was referred to as Conseil Souverain: Anandaranga Pillai's Dairy, Vol.5, Page-146.

sat as Judges in the Souvereign Council which held a weekly session on Tuesdays.[12]

The right to remove the Councillors appointed by the King without assigning any reason was excercised by the Company. The vacancies occasioned by removal had to be filled in by the Company by appointing other Councillors so that administration of Justice was not brought to a stop for want of personnel. The company also made the court of Justice to function as administrative council. Sometimes, the Sovereign Council would refuse to recognise the Councillors thus appointed by the Company. It indicated that the company instead of adhering to any principle of separation of powers actually favoured a fusion of functions as being expedient to promote its commercial interests. The court of Justice, as a result, was required to function as an administrative Council as well. In view of the fact that the over-riding powers excercised by the Governor, and the conspicuous absence of the principle of separation of powers, administration of justice did not always run smoothly. Governor used to interfere with the course of justice very frequently. For instance, the case of the administrator of

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12. F.N.Lande, Etudes Sur Les Origines Judiciares dans Les Etabissements Francais de l' Inde (1859), page-6. Gnanou Diagou, : 'Arrets du Conseil Superieur de Pondicherry, Vol.III, Supplement, Page-6.

Chandernagore who was charged with a criminal offence came to be quashed though the *Conseil Superieur* authorised the prosecution of the administrator.

That the company actually favoured a fusion of functions to promote its commercial interests and the same necessitated the elimination of assessors in the tribunals. In the place of assessors new councillors were appointed and their number was increased in subsequent years to form provincial councils (*Counseils Provinciaux*) which functioned as courts in place of the tribunals set up by the enactment of 1701.

The Jurisdiction to try and decide, in the first and last instance, pertaining to all charges and disputes between the King's subjects in Pondicherry and its dependencies was given to the Council. It was also to decide the appeals from judgments rendered in Civil and Criminal matters by the tribunals of First Instance in the other French territories in India. The Council was to conform in its judgments and in its proceedings to the customs of Paris, to the special laws made and to be made for India, and to the provisions of the ordinance of 1670 in all the matters. And in all maters it had to conform to the laws and ordinances issued for the Kingdom in general. It was reiterated in the

ordinance about the familiar provision applicable to other territories in India. The ordinance of 1670 also provided that the commandants and Commissaries in some of the territories and heads of the territories to continue dispensation of justice in the first instance. Both the commandant and commissaire could invite three notables when deciding civil and criminal cases. The decisions of these tribunals were subject to appeal to the superior Council at Pondicherry. This organisation of dispensation of Justice was in vogue for few years and new set up was contemplated and provided for by law later.

The British captured Pondicherry in 1761. But the East India company was not in a position to run the administration. It incurred huge debt resulting in heavy loss to the company. Then it resolved to relinquish all its property in favour of the king of France with the understanding that he would pay its debts. The King took over the possessions of the Company by an order dated 8th April 1770. Free trade was permitted by the King in these possessions to all his subjects. The Conseil Superieur and the other provincial tribunals ceased to exercise administrative functions as the administration by the Company itself ceased to exist. Then, they again became pure judicial bodies rendering justice to the subjects of the king. By a royal enactment of 30th December 1772 the councils were reorganised.

According to this ordinance, the Council Superior which rendered judgment in the last instance was to consist of the Commandant General of the French Establishments, a Commissaire General of the French Establishments, a Commissaire General Ordonnateur, and prominent French merchants and businessmen who could be co-opted, three for civil cases and five in criminal matters.

The purpose for which the Council Superior and the Tribunals of First Instance were set up in the French councillor by the enactment of 1701 was reiterated by a royal enactment of February 1776. It stressed the fact that both were set up for the sole purpose of dispensation of justice to the subjects of the King. It was thought by the Company that it was better if the tribunals were concerned themselves with the affairs of the administration and commerce as well as matters of justice. But, the functions of the Council Superior and other tribunals with regard to the rendering of justice was restricted by the declaration of 30th September 1772. The enactment of 1776 abolished the existing council as it was felt to re-constitute and it established a new Conseil Superieur to render justice both for civil and criminal matters.

The new council was to consist of the Commandant General an Intendant, or Commissaire Ordonnateur, a Senior Officer of

Administration, who had the rank of Commissaire of the Navy, Seven permanent Councillors, one Procureur General and one Chief Graffier, two assessors, a substitute Procureur and a Commis Greffier. The King appointed the Councillors, Procureur General and the greffier. The Administrators were authorised to appoint a temporary Graffier if any vacancy arose in the office. The substitute of the Preocureur General could also be appointed temporarily by the administrators apart from appointing the Commis Greffier on the recommendation of the Chief Greffier with the approval of the Company. As per the enactment the number of members while trying criminal cases should be seven and the same could be five for the trial of civil disputes. The participation in the deliberations by the assessors were permitted only in those cases where they acted as Rapporteur. However, they could take part in the deliberations if the number of permanent Councillors present was inadequate and major issues had been set down for decision. In case of inadequacy in the number of judges, it was also provided that the laternate procurer General as well as the Chief Greffier could act as judges. The King's recognition of the need to maintain collegiate courts as well as his serious concern for the speedy dispensation of justice with public participation to the extent possible was evident with the authorisation given to the council itself to invite notables to complete

the required number of judges fixed by the edict, if the services of the officers designated could not be made readily available.

The justice delivery system in the establishments was re-organised by an ordinance of 1784. The reorganisation was done on the lines envisaged in the ordinance of 1701. The preamble of the new ordinance made it clear that the King had resorted to this to suit the needs of the public. The Council was abolished in 1776 and a new council consisting of permanent judges was established as in other colonies so as to have uniformity and to keep the proceedings of the tribunal continuous. The King, wanted to constitute the council as had been done before 1776 so as to have prompt and simple dispensation of justice with less burden on the finances of the establishments. Hence the council Superior set up by the ordinance of February 1776 was abolished.

A new superior council consisting of the Governor or Commandant General or *Indendant* or *Commissaire General Ordonnateur* was established in the place of the old one. In the absence of the above officials a senior officer in the administration or French merchants and notables above the age of 25 years were also summoned to associate with the rest in dispensing justice. The council

had a jurisdiction to try all disputes between inhabitants and residents of the town and Fort of Pondicherry, with three judges hearing civil cases and five trying criminal cases. The appeals preferred to the council from other Establishments were also heard by the same number of judges. All the matters exclusively left to the jurisdiction of the administrators as per the provisions of the ordinance of February 1776 were excluded from the jurisdiction of the council. The ordinance of February 1776 authorised the Governor or Commandant General or his representative to defer until receipt of the King's orders in execution of sentence of death. That kind of deferring was done where the Governor, the Commissaire Ordannateur and the Procureur unanimously considered that the convict could be pardoned or the sentence commuted. The Commandant and Commissaires in the terrjtories and other Chiefs (Where there was no commandant or Commissaire) were empowered to render justice in the first instance co-opting three notables in civil cases and five in criminal trials. The appeals against the judgments of this body were made to the Superior Council at Pondicherry.

CHOULTRY COURT

The choultry court (TRIBUNAL DE LA CHAUDRIE) was established in Pondicherry in 1728. This court was established for

dispensing justice to the indigenous population. It was composed of a Civil Lieutenant and two assessors, two clerks, one European and the other Indian, an Indian Process Server (Huissier) and four interpreters. This choultry court was required to administer justice to Indians according to their own laws and customs. The French administration had guaranteed the indigenous population the protection of their customs and preservation of their laws. The very idea of establishing choultry court was to comply with this promise. In criminal matters summary procedure was followed. After filing complaint or report necessary investigation would be conducted and sentence pronounced and also executed during the court session itself. The following punishments were imposed on the Indians upon conviction:-

(I) Corporal punishments laid down in the ordinances and mutilation of the ears.

(ii) Slavery for a fixed period or in perpetuity in the Islands of Bourbon and Ile de France,

(iii) Fines,

(iv) Confiscation

(v) Banishment from the territory

(vi) Flogging or whipping.

These punishments could also be imposed cumulatively. It appears that whipping was regarded as compulsory accessory to all other punishments. Certain reforms were effected in the constitution of

the Choultry court as well as in the law applicable to Indians when law de Lauriston was the Governor. An order of 30th December 1769, sought to re-organise the court and policing of the town. That court composed of a Councillor of the *Conseil Souverain* who was its president and two subdealers as assessors. The presence of the president was essential to render a judgment valid. If one of the subdealers was absent the other two members including the president, could adjudicate cases; even if both were absent, the president, could function as a court. A majority of votes determined Issues. If there was an equal division of votes as when the president and one assessor formed the bench, the voice of the president prevailed. The judgement were, however unanimous in that all judeges signed them. Two interpreters, one of whom was to be a Christian, were attached to the Choultry court. There was, however, no officer of the public ministry at the court. The court was given jurisdiction not only in disputes between Indians, but also between Indians and Europeans or Franco-Indians.[13]

The right of appeal from decisions of the Choultry court in suits the value of which was not less than 50 PAGODAS was limited by the

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13. Disputes between Europeans and Franco-Indians or between two persons belonging to either of these classes were to be adjudged exclusively by the Sovereign Council.

Governor Law de Lauriston by a regulation of 18th November 1769. The appellant was required to furnish a security (fine) proportional to the value of the suit. It was fixed that when the value of the suit was 50 PAGODAS, 25 PAGODAS were to be deposited. $33^1/_2$ PAGODAS were to be deposited when the value was 100 PAGODAS and a deposit of 50 were to be paid for the value of 200 PAGODAS. The deposit was fixed as 80 PAGODAS when the value was upto 1000 PAGODAS and one-tenth of the sum when the value was above 1000 PAGODAS. The amount of the deposit was confiscated to the Company in case of failure of appeal. Generally production of new documents at the appeal stage was prohibited. However, if the appellant produced such a document, and the *Conseil Souverain* was satisfied that it could have been produced before the court of first instance, the Conseil would accept it only on payment of an arbitrary fine which was imposed on him. This was only to discourage appeals except where important issues were involved. There was a limitation fixed for time limit for filling appeals from the decisions of the Choultry court. Those appeals were required to be filed with the Conseil Superieur within three months from the date of the judgement of the Choultry court was read out to the parties.

Within six weeks of filing the appeal, it had to be followed up in the conseil Superiur failing which it was liable to be declared as abandoned. The value of a suit for its being taken up in the last instance was fixed at Rs.200/- (480 Francs) the fine for frivolous appeals was fixed at Rs.100/- (240 Francs) irrespective of the value of the suit. The appellant was required to deposit in the Choultry court the whole amount he was adjudged liable to pay; in case of default of deposit, appeal was not to be entertained.

PROVINCIAL COUNCILS

The edict of February 1701 while establishing a *Conseil Souverain* for Pondicherry, also set up sub-ordinate Councils in the other Establishments. The Chief of the Establishments, deliberating with notable and honest residents - three in civil matters and five in criminal cases were empowered to administer justice in the first instance in their respective regions. Appeals from their decisions lay to the Council Sovereign in Pondicherry. However, without prejudice to the appeal filed, judgement rendered in the first instance could be executed on furnishing security. The provincial councils had a Procureur du Roi who exercised the same powers and functions as the Procureur General attached to the Conseil Superieur.

By the edict of 1701 the provincial councils were formed in order to exercise the judicial functions conferred on the chief of the settlements as the number of Titular Councilors who replaced the assessors was increased. In an attempt to restrict to the councils their exclusive judicial function as contemplated by the edict of 1701, King Louis by his edict of 30th December 1772, provided that the commandants and commissaries in the settlements should administer both civil and criminal justice at the first instance. They were also provided with the assistance of prominent merchants and businessmen who could be co-opted for both civil and criminal matters. To form the tribunal of civil three of them were coopted while for criminal matters the strength was fixed as five.

This was virtually abolition of the Provincial Councils, substituting for it the Commandants and Commissaires. In spite of the avowed purpose in promulgating the edict, which was to invest the council exclusively with judicial powers, it is clear that by leaving those powers in the hands of administrative officers who could select any three or five persons of their liking, judicial and executive functions were again being given to the same persons. Under the edict of 1701 as it was actually brought into operation, same body of persons carried on both executive and judicial functions. The saving grace of the edit was the provision

for appeal to the Sovereign Council in Pondicherry from the decisions of these provincial tribunals.

CHAMBER OF CONSULTATION

The Chamber of Consultation was established by a regulation of the 27th January 1778. It consisted of eight Indians of not less than 25 years of age known for their integrity and their knowledge of the "usage of customs" of the country and of the different castes so that they would be in a position to express opinion on matters referred to them. The Chief Administrators of the Colony used to appoint them. They were to meet at the Choultry Court as often as necessary to deliberate upon and decide matters referred to them for consideration by the Superior Council or by the Civil Lieutenant or by the Police Lieutenant. While reaching at a decision, the Chamber was expected to conform to the laws, manners and customs of the country if the matter related to marriage, inheritance, wills and partitions or to rights and privileges of the caste, temples or endowments. If a matter relating to a relative of a member was to be adjudicated, he was required to withdraw from deliberation. This was only to avoid any possible bias in the decision. Neither the Chamber nor a member should ask for or demand or receive anything for whatever reason, from the parties whose cause was referred to the Chamber for its opinion. It was enacted in the

regulation. It's violation would attract exemplary punishment. Thisensured strict compliance at all times. The said regulation also imposed on the Chamber and on each of its members the task of preparing a code of Tamil laws and a compilation of native customs including those peculiar to each caste. After a period of 40 years of its functioning the Chamber was abolished in October 1827 and it was later replaced by the Advisory Committee on Indian Law in 1828.

ANNEXATION OF PONDICHERRY TO THE BRITISH TERRITORY

The Superior Council consisting of a president, four councillors, four assessors, one Procurer General, one alternate Procurer, one Greffier, and two assistant clerks could not function long, as Pondicherry was captured by the British on the 21st August 1793. From 1793 to 1816, for 23 years, when Pondicherry was under the British, laws in force before the Capture were continued in operation. Judicial organisation also underwent no change, for nearly four years from 1793.

In 1796 however the British Governor suspended the work of the courts. In 1797 the courts were re-established with some modifications in their organisation. The Superior council was to have now five councillors; one of them to be appointed by the Government of Madras.

Governor's appointee was to be the president. The office of the Procureur General was retained. The jurisdiction of Council was limitted territorially to the four establishments in the presidency of Madras. The Council was not given jurisdiction to decide disputes between British subjects or try cases relating to public revenue. The Government of Madras set up a court of revision or cassation consisting of the Commandant of Pondicherry, the president of the council Superior the senior most member of the council Superior, and two prominent residents. It was a court of appeal. A bench of three judges was necessary to hear a petition for revision. Among the three, one of them was to be either the Commandant or the president of the council Superior. It could retry the case; it could also quash the impugned decision. However, it did not entertain petitions for revision of judgements given in appeal by the Consul superieur from the decisions of the Choultry Court. To decide the disputes between French residents, Greeks or other foreigners a court of administrator was constituted. It was composed of the Commandant of Pondicherry and the president of the Council Superior. The Governor in Council in Madras heard the appeals from the decision of the court of administrator. British subjects were excluded from its jurisdiction.

The Treaty of Amiens (1802) restored Pondicherry to the French. But in 1805 it had again fallen into the hands of the British and the Governor established a court of Judicature in the place of Superior Council. This court consisting of three judges and two assessors could constitute a court to try criminal cases also when the offence was alleged to have been committed at Pondicherry or at one of its nine dependant villages. The assessors had the right to participate in these trials along with the three judges. In criminal trials the number of judges was to be at least five, but in special circumstances it could be seven by co-opting two or more assessors. The court was to meet three times a year to try criminal cases, on the first Mondays in April, August and December. The three Principal Judges were empowered to choose one or more assessors from among the respectable European residents, if the five members of the court were not available. No sentence of death was permitted to be carried out without the prior approval of the Governor in Council in Madras. The court of Judicature was set up by Article 78. The Regulation of 5th May 1805 stated expressly that the formal procedure of the court should be as far as possible, those of the former (French) court in Pondicherry. The laws, customs and usages previously in force would be generally regarded as the principles on which the court of Judicature should base its

procedure and regulation and that its decisions should be regulated according to them.

The British Administration put an end to the practice of appointing assessors in the Choultry court as early as in June 1795. After a decade, the Choultry court was also abolished. A few police regulations were adopted on the 15th May 1805. Some Civil disputes were resolved by arbitration at the bureau of the police which used to summon the heads of the disputant castes to decide the issue according to their own laws and customs. The settlement arrived at by respectable persons were required to be obeyed and an undertaking for the same was to be given prior to the settlement talks. During these days when certain organisational changes were effected, Indo-French law continued to be administered by the British so that when Pondicherry was restored to the French in 1816, no difficulty in the continued operation of the law was felt.

RE-ESTABLISHMENT OF JUDICIAL SET UP BY THE FRENCH AFTER 1816

The Council Superior and the provincial councils were re-established by the French on 8th February 1817. The council was renamed as Royal Court in 1819. Some meterial changes in the

Judicial organisation of the establishment were effected by a Royal ordinance of 23rd December 1827. It established a court of Justice of peace at Pondicherry with jurisdiction over Pondicherry and its three dependencies. The court was composed of the Lieutenant of police who acted as judge, an alternate judge and a Greffier. The Court functioned as a police court in criminal cases involving minor offences (Contraventions de Police) and a court of the Justice of Peace in civil disputes. When the court sat as a Police court the functions of the Ministere public were to be performed by the Inspector of Police. A tribunal of first instance at Pondicherry with the same territorial jurisdiction as that of the court of the Justice of Peace was set up by the ordinance. The tribunal consisted of a King's judge and two assistant judges. A king's Procurer, two Greffiers, one European and the other Indian and a clerk were attached to it. In case of absence or inability of the King's judge to attend to his work, an Assistant Councillor, appointed by the Administrator General was to officiate for him. It had jurisdiction to decide civil actions, personal or pertaining to movables in the first and last instance. It heard and decided in the first instance civil cases relating to real property and mixed actions, as well as personal actions and those relating to movables where the value of the suit exceeded 480 francs.

An ordinance of 26th May 1827 had already laid down that the Lieutenant of Police could deal with the following matters, with no possibility of appeal, when the value of the suit did not exceed Rs.10/- (24 Francs) and with possibility of appeal when the value of the claim exceeded that amount:-

(a) civil actions for slander, brawls, assault and battery

(b) action for damage caused either by men or by animals to fields, fruits, and crops.

(c) payment of worker's wages, servant's wages and execution of the respective undertakings of masters and of their servants or workers.

(d) shifting of boundary marks, encroachment on lands, trees, trenches and other enclosures committed during the year, encroachments upon rivers used for irrigation of fields committed during the year and all actions for possession,

(e) repairs incumbent on the tenant, and

(f) compensation claimed by tenant farmer or lessee for non-enjoyment when the right to compensation was not disputed and dilapidation (degeneration) alleged by the owner.

The disputes arising between Indians on personal matters, chattels or commercial matters and disputes in which one of the parties or both were Foreigners not domiciled in the territory could be brought

before the Police court irrespective of the pecuniary value of Rs.20/- (48 Francs) and with possibility of appeal when the value of the claim exceeded the amount. It was provided by the ordinance mentioned above. The police court was also given jurisdiction to try police offences, thefts, swindles, brawls, assault and battery and infringement of **ordinances** and regulations relating to direct and indirect taxes. Appeals in civil as well as police matters lay to the court of first Instances. Decisions pertaining to certain matters of caste were however expressly exempted from the appellate jurisdiction of the court. The ordinance of 26th May 1827 declared:-

> "Special disputes other than those relating to interests and claims arising in the familities of Indians or in the same caste about ceremonies, marriages, funerals and other matters called matters caste are brought before the police judge and referred either to the Advisory Chamber or to the assembly of caste or of relatives for being considered there and decided upon in conformity with the custom, such decision being then confirmed with the custom, such decision being then confirmed by the judge, fully or partly, as necessary. But with respect to some major disputes which may arise between one or more castes about their worship, customs or privileges, the police can deal with them only on special authorisation of the Administrator who alone is competent to decide them."[14]

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14. Article 6 of the ordinance of 26.05.1827.

It was provided in the ordinance that one of the judges of the tribunal at Karaikal was to be a Licentiate in Law and was to be entrusted with investigations, examinations, orders and all proceedings in civil and criminal matters, in addition to his functions as judge Commissioner and judge Rapporteur. However, no changes were introduced in the composition or jurisdiction of tribunals of First Instance in the other French establishments in India. The Choultry court which was in existence for nearly a hundred years was abolished and all cases pending before that court were to be transferred to the tribunal of First Instance. And whenever called upon by the courts the Advisory Chamber was to continue to function and was to give advice. The jurisdiction of the King's court was to hear appeals in civil matters from decisions of the Tribunals of First Instance in various French establishments in India. It was also to hear appeals in correctional and criminal matters from judgements of tribunals from French establishments other than Pondicherry and its dependencies.

For Pondicherry and its dependencies, the King's court was the court of First and Last Instance in Correctional and criminal matters. As per the ordinance, if the councillors and assistant Councillors were unable to attend to their works, notables could officiate. The composition of King's court when sitting to try criminal cases was

slightly changed by the Royal ordinance of 11th September 1832. It was provided that the bench of seven judges required to give decisions in criminal matters should be composed of four Magistrates (Judges) of the court and three prominent residents. Thus public participation was assured.

LAWS IN FORCE IN THE 18TH CENTURY

From the practice of the courts set up by the French in the 18th century, it may be gathered that the laws in force at the time they took over Pondicherry Administration, were the rules of Dharma-Sastra as varied by customs among Hindus. Quranic laws along with local customs appear to have been applicable to the Muslims. The French were eager to follow the customary laws while administrating justice to the Indians under them. The French Administration had guaranteed to Indians the application of their own laws and customs. The Regulation of 30th December 1769 specifically stated:-

> "The nation having undertaken from the very beginning of its establishment in Pondicherry to try the local native inhabitants and other Indians who had recourse to French courts, according to their own customs and usages, the Lieutenant General is required to conform in this regard, to the practice followed until this day by the civil bench of the Choultry Court."[15]

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15. Title II, Article 16 - Reglement du 30 December 1769. See E.Falgayrac: Legislation de l' Inde Tome II, P.4.

according to French law. The Criminal laws prevent in India were not accepted as stated in the regulation.[16] The other regulation of 18th November 1769 laid down certain rules derived from local usages.[17] It was thus provided that all Hindu and Christian natives who exchanged palm-leaves or letters for loans observe the law of **PANCHAREDIPATIRAM** as was traditionally done. The rule required that the creditor and the debtor as well as two witnesses and the scribe sign the palm leaf or letter that was exchanged.

SYSTEM OF JUDICIAL ORGANISATION AND ITS RE-ORGANISATION

Prior to 1963 for a period of hundred and twenty years that is, from 1842 the Judicial Organisation in the French Indian establishments was based on an ordinance of 7th February 1842 as amended from time to time. The said ordinance sought to re-organise the whole system of judiciary. For instance, Article-4 expressly stated that judges could not disturb in any manner the work of the administrative bodies, nor summon before them administrators, on account of their functions, as otherwise they could be charged with abuse of authority. This obvious separation of powers was a great

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16. Ibid Article 17, See also the Regulation of 27 January 1778.

17. Arret de Reglement of 1769. Article 12. Also see F.N.Lanude Manuel du Droit Indou - 1869 Edition, PP.190-191.

revolutionary change from the position adopted by the sovereign council over a century before. This ordinance was amended in certain details, among others, by a decree of 29th July 1939 which downgraded the court of appeal into a Superior tribunal of appeal, by the decree of Ist March 1879 that gave extended jurisdiction to the courts of Justice of peace in Mahe and Yanam. By the decree of 11th May 1934 the courts of Justice of Peace with the ordinary jurisdiction was abolished. The decree of 22nd August 1928, made certain substantial changes.

The courts in the French establishments as constituted before the de facto cession in 1954 consisted of the following:-

(a) Superior tribunal of appeal (Tribunal Superieur de appeal) at Pondicherry with a president, two other judges, and a procereur de la Republique (Public Prosecutor).

(b) Tribunal of First Instance, Second Class, at Pondicherry with a president, a judge, and assistant judge (Judge Suppleant) and a Procureur de la Republique. Tribunal of First Instance, third class, at Karaikal, with a president, an Assistant judge and a procureur de la republique.

(c) Courts of Justice of peace with extended jurisdiction at Mahe and Yanam, each consisting of one judge and a Greffier.

The Procureur de la Republique at the Superior Tribunal of appeal performed the functions of the head of the judicial department.

With the abolition of the courts of the Justice of Peace with ordinary jurisdiction, the right of appeal of the litigants whose case involved small pecuniary value or who were convicted of minor infractions of the criminal law was taken away from them. The right of appeal of higher court was not disputed; but it was considered unnecessary to have an appeal where the pecuniary value of the suit or the penalty likely to be imposed was insignificant. Those disputes were sought to be placed, under the decret of 22nd June 1934, before a judge belonging to the second degree of jurisdiction, that is, the president of the Tribunal of First Instance. These justices with enhanced competence had the same jurisdiction in civil matters. When the justice of peace with enhanced competence sat as Police Tribunal (Tribunal de Simple Police) to try persons charged with petty offences, they could impose a sentence of simple imprisonment for five days or a fine of 15 francs. There was no provision for appeal from such sentences. The Superior Tribunal of appeal at Pondicherry however, acted in these petty matters as a court of cassation, in place of the Cour de Cassation at Paris.

With the cession of the French establishments to the Indian union powers of cassation vested in the Cour de Cassation were transferred to the High Court of Judicature at Madras.

EXTENSION OF CENTRAL ENACTMENTS TO PONDICHERRY

As the Government of France had transferred its administrative powers in French establishments to the Union of India the Union Government extended the application of a number of central enactments to these establishments with a view to providing for proper administration. In the year of de fato cession as many as forty-four enactments were extended to the establishments by the French establishments (Application of laws) Order, 1954 issued under the provisions of the Foreign Jurisdiction Act 1947.

After the adoption of the Constitution (Fourteenth Amendment) Act 1963, which made these establishments a component unit of the Indian Union and turned them into what is known as the Union Territory of Pondicherry, all enactments passed by Parliament automatically apply to this territory except where the legislature specifically provides for the exclusion of the territory from the application of an enactment. As the Central enactments passed prior to the date of the de jure cession did not apply to Pondicherry, various methods were adopted to

extend the application of such enactments to the Union Territory. Provision was made to bring into operation in Pondicherry 160 central enactments by 1st October 1963, by the adoption of the Pondicherry (Laws) Regulation, 1963. This regulation covered many important pieces of legislation such as the Code of Criminal Procedure 1898, the Indian Evidence Act 1872 and the Indian Penal Code 1860. The extension of these enactments necessitated a reorganisation of the machinery established for the Administration of Criminal Justice in the territory. Further under the provisions of the Pondicherry Administration Act, 1962, ten central enactments were extended to the Union Territory between 1962 and 1967.

As early as in 1963, the Code of Criminal Procedure, 1898 and the Indian Evidence Act 1872, were extended to Pondicherry necessitating adoption of provisions of these newly extended enactments by the criminal justice system. This has again brought about substantial changes in the judicial organisation of the Territory, bringing it in line with the set up in other parts of India, and especially in the neighbouring state of Tamilnadu.

RE-ORGANIZATION OF JUDICIAL SET-UP

Upon the introduction of the Indian Penal Code and the Code of Criminal Procedure into Pondicherry from 1st October 1963, it became necessary to re-constitute the Criminal courts in the Territory. Consequently, a court of sessions and a few Magistrate's courts were set up. The Union territory was brought under one sessions division and the former Superior Tribunal of appeal was constituted as a court of sessions and the President of the tribunal was appointed as principal sessions judge, the two judges as additional sessions judges and the Procureur de la Republiqur, as public prosecutor. The President of the tribunal was also designated as the head of the Judicial Department.

The Tribunal of First Instance at Pondicherry and Karaikal were turned into Assistant Session's Judge's court with the president of the Tribunal appointed Assistant and Sessions Judge. The investigating Judge (Judge d' Instruction) of the territory at Pondicherry was appointed District Magistrate and the Assistant Judge (Judge Suppleant). A First Class Magistrate and the Procureur de la Republique, (Public Prosecutor) were also appointed. The Justice of Peace in Mahe and Yanam who presided over courts with extended jurisdiction (Competence etendue) were made First Class Magistrates.

These were all at the beginning of the switch over of criminal justice delivery system from the French to the Indian system.

THE PRESENT SETUP - THE CRIMINAL COURTS

At present there are four sessions courts in the Union Territory of Pondicherry. Out of the four, three are at the head quarters of Pondicherry and the remaining one is at Karaikal. Among the three at Pondicherry two are additional like that of Karaikal and the other one is the Principal sessions Court. The Principal Sessions Court is presided over by the Chief Judge. He is the Chief of the Judicial Department of the Union Territory of Pondicherry. The powers and duties of the Sessions Courts are same like that of the sessions court of the State of Tamil Nadu as the Pondicherry Judiciary is under the control and supervision of Madras High Court. Appeals are also made from the sessions courts of Pondicherry to the Hon'ble High Court of Judicature at Madras as it is the appeallate court. The practice and procedure of criminal courts are as per the Criminal Procedure Code of India, 1973.

There is also a principal Assistant sessions judge. At present the Principal Sub-Judge is vested with the power of the Principal Assistant Sessions Judge. The Chief Judicial Magistrate is also an Assistant Sessions Judge. There is a Chief Judicial Magistrate at

Pondicherry for the whole of the Union Territory. At the head quarters in Pondicherry there is a sub-divisional Judicial Magistrate court apart from three sub-divisional Judicial Magistrate's court each at Mahe, Karaikal and Yanam. There are two Judicial First Class Magistrates Courts one each at Pondicherry and Karaikal. There are no special Magistrate courts at present. Additional Sessions Judges of Pondicherry are having their sessions sittings at Mahe and Yanam in the model of camp courts.

Though we could see French personal laws being enforced in the Union Territory of Pondicherry even today there is no such use or practice of French Criminal Procedure. The whole criminal justice delivery system throughout the Union Territory has been tailored to the Indian system.

Thus Pondicherry is the place in India which had the fortune or misforture of having been subjected to different legal systems quite frequently. At first it was the local customs and the laws of Chola/Pallava kings that existed in Pondicherry. Later it came under the spell of Vijayanagara empire the laws of which were not that alien to the Pondicherians. However when Pondicherry came under the British and French Rulers Pondicherians experienced the impact of both the

major systems of Europe - the accusatorial system and the inquisitorial system. Subsequent temporary change of hands of the Administration between the French and the British also did have some impact on the legal system though the British was not that enthusiastic in overturning the Indo-French system prevalent in Pondicherry. Indeed, the French tried to inject the Indian Law. But so far as criminal law and - procedure were concerned the French did not adopt the Indian law at all.

The accession of Pondicherry to the Indian Union has had important and interesting results on the legal system. The French Institution came to be restructured and new institutions sprang up in accordance with the Indian Law. This has overturned many an institution which installed public confidence in Pondicherry.

Many Pondicherians do have the nostaligic feeling that the French system was far Superior to the present system. But, understandably, this view is not being shared by others who have had no experience with the earlier system. Many however argue that there are many aspects of French Law which could be fruitfully adopted in our system to make it foolproof.

Comparative law is used to describe the process or method by which two or more legal systems are compared with a definite aim.[18] Comparative research in the field of criminal justice is necessary on two counts. It can be established at the pragmatic level that certain procedures and operations in other societies can be usefully adopted in our own; and at the theoretical level, important advances can be made in criminology through a comparative study of the patterns of crime and their prevention.[19]

Every society attempts to work out practical solutions to legal and operational problems in the administration of criminal justice in consonance with its political philosophy, experience, resources and the state of society itself. What is conceived as appropriate for one may not be suitable for another. At the same time, a rigid adherence to a particular system, despite persisting deficiencies and failures, represents staticity; on the other hand, changes which are transplanted abruptly without reference to the socio-cultural milieu may do more

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18. See H.C.Gutteridge, Comparative Law: An Introduction to the Comparative Method, (1946), Institute of Legal Study and Research, Cambridge.

19. See George F. Cole, S.J.Frankowski and Mark G. Gertz, 'Comparative Criminal Justice, (1981), Major Criminal Justice Systems, Sage Publications, London.

harm than good. Either of these extremes can distort the capability of a system. Yet, keeping both the constraints in view, learning from our own experience and of others is the hallmark of wisdom. The legal system, by its nature and tradition, has a tendency to function in an ivory tower. It tends to develop liking for its institutions and dislike for those of other systems. Lepaulle is right when he observed this:

> "When one is immersed in his own law in his own country he is unable to see things from outside; he has a psychologically unavoidable tendency to consider as natural, as necessary, as given by God, things that are simply due to historical accident, temporary social situations".

The Criminal justice system in India is a transplanted system which has taken root through an accident of the history. It is a common feature of all countries which were once colonial possessions of the western powers. In main, the legal systems in the developed world are either the Anglo-Saxon or continental systems which accept the broad principles of liberalism and the socialist system which is more attuned to socio-economic imperatives than individual freedoms. It is visualised that in the near future, a third type might emerge to serve the needs of the people of Africa and Asia which might have characteristics akin to western liberalism and the socialist structures.

As noted earlier, the Indian criminal justice system derives much of its structure and content from the legal system of England. The Indian statutory laws - I.P.C. and Cr. P.C. were drafted by British jurists in the middle of the last century have over the years become cumbersome and dilatory.

This situation has prompted scholars to undertake comparative studies in law. And, Pondicherry which had been the testing ground of both the systems provide the appropriate background for such meaningful comparative studies.

This chapter provides the groundwork for the study involving evaluation of the effectiveness of the respective systems not only through an analysis of the various provisions in the substantive and procedural laws, but also by an examination of the efficacy and efficiency of the various institutions in the context of public opinion and impressions gathered by way of empirical researches.

CHAPTER II

FUNCTIONARIES UNDER THE FRENCH AND THE INDIAN CRIMINAL JUSTICE SYSTEMS

(a) Police Under the French System in Pondicherry

Before the advent of the French some kind of civil police system was in existence in the Union Territory of Pondicherry and some features of it were allowed to continue during the French regime. The maintenance of law and order was entrusted with the 'Nayinar' who were the native Chieftains. De la Farelle mentions that the nawabs who visited Pondicherry were warmly received by the *nayinar* or *grant prevot* outside the town.[1] The office of the Nayinar was hereditary. However, a person found guilty of embezzlement would not be allowed to be a Nayinar. All the expenses of the Nayinar were borne by a levy on the goods and foodgrains entering the town by land or sea. As per the regulation of the sovereign council dated 20th March 1768 the levy on cotton, cloth, paddy, ghee, oil, groceries, fruits and vegetables was fixed at one per cent. The Nayinar got one-fourth of the levy. Governor Dupleix availed himself the services of these local Chieftains to patrol

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1. E.Lennel de la Farella: Memories et correspondence du Chevalier et du General de la Ferella, p.87.

the town during night to prevent robbery and thefts. Villages were guarded by Chieftains with the assistance of pions who were empowered to arrest soldiers deserting the French army and also to apprehend enemy soldiers found within the limits of the French Territory.

The Chief Police officer (grand privet) maintained a body of mounted police (marechausée) for patrolling the town during night. On these days thefts and murders were few. One could move about the town at any time in the night without fear. So impressed was *Le Gentil* that he affirmed that it was not so even in Paris which could boast of a well maintained machinery.[2] He described the Police under the regime of Law as remarkable. It was further stated by Le Genlil that the police du rues (traffic police) was responsible for the protection of natives (Pondicherry Indians).

In Karaikal, petty Land lords known as *visiadars* performed the functions of police. As detection of thefts was their main responsibility, they often behaved like petty tyrants, plundering their own villagers and extorting ransoms from travellers. Hereditary right was followed for the

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2. Le Gentil: Voyage dans les mers de l'Inde, Tome I (1779), p. 634.

office of visiadars. Once, the French company had to intervene by force in the functioning of two Visiadars who claimed the right to exercise the functions of the police in a few villages taken over by the Company.[3]

The police organisation at Pondicherry was dealt by the reglement of 30th December 1769.[4] It was replaced by the reglement of 20th June 1778 promulgated by the arrete of the 4th July 1778. The head of police force called as the Lieutenant de Police, was responsible for maintenance of law and order. He also sat in judgement over disputes which fell within the competence of the Choultry Court with jurisdiction extending over Pondicherry and its dependencies. The Nayinar had to report to the Lieutenant de Police the important events happening in the town and the details of Europeans entering or leaving the town. He was also responsible for rounding up prostitutes and for taking cognisance of unauthorised sale of slaves.[5]

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3. F.N.Lande: Etudes Sur Les Origines Judiciaries dams les establishments Francais dans le Inde, PP.10-11.

4. The full text of this Regulation is not available.

5. Arrets du Conseil Superieur de Pondicherry, Tome III, pp.449-460.

The Lieutenant Police was responsible for maintaining peace and order in the markets, looking into complaints by masters against their servants, the use of correct weights and measures, inspection of shops, public eating places and slaughter houses, cleanliness of streets, destruction of dangerous buildings, etc.

For maintaining peace and order in the town and for apprehending the thieves the *Nayinar* retained as many pions as were required. He arrested those who had been running gambling houses and kept a watch over gamblers. He was also empowered to arrest delinquents and produce them before Bureau Municipal. Night patrol was organised by him with the help of Talayaris (Taillards) to arrest suspects who were found disturbing public peace after 10.00 p.m. The arrested persons were produced before the Bureau Municipal on the next day with a report stating the cause of their detention.[6] As for the Armed forces, Francois Martin had decided as early as in 1676 to utilise the services of natives alongwith the European soldiers to defend Pondicherry against attacks by Maratha and Mughal forces. It was only in 1740 under Governor Dumas that the company assumed the role of a military power.

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6. Arrets du Conseil Superieur de Pondicherry, Tome V, (1790-1794), pp.128-176.

Some minor changes were effected in the 1778 police regulation in 1786 and 1788. The outcome was Reglement General de Police of 1790. The police in the town and its outskirts was charged with the newly formed municipality. The Nayinars supplied pions to the municipality as usual. The supervision of the markets were with the Maniagars who kept a watch over supplies reaching the town and reported on its adequacy or otherwise. The offences like use of false weights and measures, adulteration, etc. were vested with the Inspector of Municipality who takes cognisance of the same for referring to the Bureau Municipal for annulment. The *Sergent de Ville* who accompanied the Inspector of Police while on patrol duty and the officers of Municipality during patrolling were empowered to arrest and produce all delinquents before the bureau of Municipality.

In 1742, the appellation of Sipaye was accepted for the first time when Dupleix organised the first unit of police effectively. It was found by him that the number of European soldiers at his disposal was too inadequate to accomplish his design of establishing French Supremacy in South India. Hence he decided to utilise members of the Kshatriya castes and Muslims to strengthen the ranks of his army. Some of the Maratha cavalrymen and negro regiments well known for their blind loyalty to their masters were also maintained by him. In 1748, the Delhi

Emperor conferred on Dupleix the title of Khan Mansubder Nabab Mazaffer which entitled him to raise an army and gave him right over life and death of all subjects within his domain and he also raised an army from among the native population who proved to be excellent fighters capable of great sacrifices.

The 1763 peace treaty in Europe brought down the strength of the French military force in Pondicherry to six battalions. The battalions were replaced by Pondicherry Regiment with eleven infantry companies and two autonomous artillery. Ten of these infantry companies consisted of 'fuseliers' and the eleventh one of 'Grendiers'. Though all Grendiers belonged to the 'Paria' community the caste distinction which was maintained in the army was done away with as a sequel to the Royal ordinance of 28th January 1776. That ordinance which was introduced by Jean Law declared that recruitment to the army should be carried out without any distinction of caste or creed. The number of companies was reduced to ten and eleventh company consisting exclusively of 'parias' being absorbed into the other units. In 1783 there were five battallions of 1,003 men each and each battalion was headed by an European Commandant assisted by an European and a native officer. As it was desired by the King of France the number of Sipayes was reduced to 600. During the revolution they

were left with more police duties as bulk of the forces consisting of European had returned to France.

The police force came under the head of *commissaire judge de police* as the French regained the territory in 1816. Pondicherry and its dependencies, vix, Saram, Pakkamudaiyanpet, Ozhukarai, Olandai, Pudupalayam, Thengathittu and Ariankuppam areas came under his Jurisdiction. In the remaining areas of Pondicherry and the districts of Bahur and Villianur the Service due Domaine headed by *Receveur du domaine* was in charge of the Police. The *Commissaire judge de Police* referred the caste maters to the Governor. The town of Pondicherry was divided into five "Quarters" known as *Thana de Police* and each of them were manned by a *Thanadar* who was assisted by Pions. The law and order was maintained by them including the watch over the cleanliness of streets and thoroughfares. The Thanadars reported to the Nayinar about the dead bodies found on the thoroughfares or salvaged from water, incidents of fires, murders, serious Offences, sedition and unlawful assembly of persons. The pions and Thanadars were empowered to arrest delinquents, but, they had no power to release them without the approval of the *Commissaire Juge de Police*. From 26th October 1827, the jurisdiction of the *Tribunal de la Police* was extended to Karaikal town and all its

dependencies. *Juge de Police* had the control over the Karaikal town. The Cotwals of Grand Aldee and of the other four maganams viz, Tirunallar, Nedungadu, Nallazhandur and Kottucherry were empowered petty judges to exercise the powers conferred on the bechecars of Villianur and Bahur to take cognisance of certain categories of offences and pronounce judgements thereon. The Bechecars were charged with police duties in the districts of Villianur and Bahur. From 1st March 1844, the administration took away the Magisterial and police powers from the Cotwals and the same was conferred on the Bechecars of the four Maganams of Karaikal. This was after seeing the efficiency by the Bechecars of Villianur and Bahur districts. They were assisted by pions whose strength was from 39 to 40 in 1845. One Chief pion and 39 pions consisted the personnel. The police set up in Pondicherry underwent a major re-organisation in 1856 and it was decided to entrust the police administration in the hands of senior officer holding responsible position. It was also decided to appoint a Mayor for Pondicherry for Municipal organisation. The Justice of Peace of Pondicherry was declared as Mayor of the town and he had the control over police. However he had to function under the authority of *Ordonnateur* officiating as *Directeur de l' Interieur.* The Justice of Peace became the Mayor and the office of *Directeur de la Police* was held by him. Hence, he exercised control over the municipal police,

traffic and prisons, maintained peace among the various castes and kept a vigil over incoming and outgoing foreigners. The *Ordonnateur* and the *Procureur General* were furnished with a monthly report by the Mayor about the law and order situation in the town and in the districts. The duties of administrative and municipal police was carried out by the Inspectors, Nainard, Palegar and Thalavayes. The Chief Bechacars of Villianur and Bahur officiating as *Nainard* and the seconds-bechacars acting as *Paleagar* and *Talearis* exercised the powers of administrative police in their respective districts. The exclusive control of rural police was under the chief Bechecars.

Two posts of Inspector of police were created by abolishing the post of commissioner of police during the new dispensation. Both the inspectors who controlled the entire area of Pondicherry were also assisted by the Nayinar, Paleager and pions whenever there were breaches of peace. They also kept a watch over weights and measures and gambling dens apart from inspecting the prison and supervising the market. The maintenance of peace and order was with the thalavayes in their jurisdiction. The police administration in Pondicherry region was divided into eight divisions. They were (1) Abisekapakkam, (2) Ariyankuppam, (3) Alankuppam - Kalapet, (4) Bahur, (5) Olandai, (6) Ozhukarai, (7) Sarampakkam - Odiyambattu, (8)

Villianur with the residence of Thalavayes (Inspector of Police) located in the respective area viz, (1) Thavalakuppam (3) Ariyankuppam, (3) Kalapet, (4) Bahur, (5) Olandai, (6) Muthirapalayam, (7) Muthialpet, and (8) Villianur.

Besides attending the duties of judicial police, the Paleagar also functioned as Inspector of Police of security and also represented the Nainar on certain occassions. A check on the quantum of supplies arriving in the district of Pondicherry and night patrol was carried out either by the inspector or by Nainard or by the Paleagar in turn according to a schedule drawn up by the Mayor. In the district of Pondicherry the Nayinar exercised control over the Thalavayes, the Chief Pions and Sous Chef-Pions the pions and night patrolmen. Special powers on matters of worship, customs and privileges of the Indians were exercised by the Nayinar. The matters relating to employers and employees fell within his purview. The register of interpreters, policemen (Pions), workmen, metis, cooks, gardener, thotties etc., was maintained by him in order to make their services available whenever required. He also inspected the hotels and reported the functioning of unauthorised gambling houses to the inspectors.

The two Cotwals placed under the joint supervision of the inspector, Nainard and Paleagar maintained law and order in the market. They ensured the proper maintenance of stalls and the availability of commodities. They were assisted by Aminahs who maintained an account of the foods entering, sold or remaining unsold in the town and prevented the use of false weights and measures on requisition by travellers. They placed at their disposal, Palanquin bearers, coolies, carts and bullocks at the prescribed prices. The Mayor, the Inspectors, the Nainars, the Bechecars, the Paleagars, the Bechecars en second, the Thalavayes and the Thaleari also formed part of the Judicary and such were subordinate to the *ministere public.* The *Code d' Instruction Criminelle* and the local *arretes* defined their duties and responsibilities. Within a month of this re-organisation, the cadres of night patrolmen and pions of police were dissolved, and were organised into a single corps consisting of Thabedars, Thanadars and Gardes de Police in the order of hierarchy. The responsibility of maintaining of law and order, prevention of crimes and enforcement of laws and regulations in force in the town and its dependencies were with the corps who are divided into *"Esconades or Postes."* The organisation of the personnel of Gardes de Police was dealt with by the arrete of 3rd April 1865.

The functions of the Mayor and Directeur of Police earlier vested in the juge de paix (Justice of Peace), were taken away with effect from 1st September 1873 and the person newly appointed by the Governor on the same date as the Mayor was declared *Chef du Service de la Police*. In 1873 on Ferrier, Juge de Paix, Officiating as Mayor and Directeur of Police, was appointed Chef de service of Yanam. The change of nomenclature did not alter in any way the functions hitherto performed by the Mayor as Directeur de la Police, except the abolition of the title. The accumulation of the functions of three officials vested with one in the year 1856 stood reduced to that of two functionaries in 1873. The police set up was widened on 25th April 1876 in order to include the police organisation hitherto under the control of Bereau du Domaine. The Bechecar-en-chef and Bechecar-second, the police functionaries of Bureau de Domaine, had extended jurisdiction of the Bahur and Villianur districts. A new system of hierarchy and unity of command was devised with a *Directeur de la Police* at the top to be assisted by two commissaires de Police in the district of Pondicherry and two Commissaires de Police in the districts of Bahur and Villianur. During those period the candidates of 'respectable' castes alone were eligible for recruitment to the police. Their nature of functions covered the administrative police, the municipal police, the rural police and the judicial police.

The nayinar stationed at Pondicherry looked after the administrative and judicial police. Hence, their responsibilities and activities were confined only to the claim or complaints made by native population. All Thalavayes were assigned to the district of Pondicherry, Thabedars and Thanadars were also placed under the Nayinar's control. Their daily reports were perused and reported by him to the *Directeur de la Police.* On the other hand the Paleagar was responsible for crime investigation and such other functions connected with the judicial police. The availability of commodities and their movements were watched by him with the assistance of Cotwals. The Ordonnateur - *Directeur de l' Interieur* had the control over the *Directeur de la Police Judiciare* taking orders from the *Procureur General* or *Procureur de la Republique.* He also exercised control over the prisons. The commissaires de la police were also Officers de la Police Judiciare who took their orders from the Directeur de la Police. Their subordinates were incharge of administrative and rural police in the districts of Bahur and Villianur. However, they enjoyed as much power as exercised by the Commissaires de Police within the area of their jurisdiction apart from maintaining a watch over foreigners, Corwas, beggars, etc, found in the area. As the arrete 1876 was partly modified on 2nd May 1877, pending the establishment of a Municipal

organisation, the posts of the Mayor and the Directeur de la Police were abolished.

Then the *Chef du Service des Contributions,* head of the revenue department took over the functions of the Mayor and the Functions of the police were centralised in the Bureau de l' Ordonnateur, Director de l' Interieur. The arretes of 2nd June 1878, 8th may 1885 and 1st February 1886 brought about minor changes subsequently. However a separate brigade was formed in 1884 to carry out the functions of the municipal police in Pondicherry and the local denominations like Paleagar, Cotwals, etc, were given up since May 1885. On 1st March 1889 the administrative, judicial and municipal police of Pondicherry region were brought under a joint set-up concurrently responsible to the *Directeur de l' Interieur, Procureur General* and all *Maires* (Mayors) respectively. The *Commissaire de Police General* became the highest police official. The municipal brigade was placed under the orders of the Mayor of Pondicherry. The caste restrictions for recruitment to police were removed and the responsibilities of the various officers were defined.

Subsequent amendments were made in 1897 and later on in 1906, in the arrete of 1st March 1889. A separate brigade was set-up on the 28th May 1886 to attend the functions of Municipal police in Karaikal. The Police administration of Karaikal region was streamlined by a series of arretes.[7]

Also, the police set up in Mahe and Yanam was established and administered in accordance with the arretes. The control over the administrative and judicial police was conferred on the *Commandant d' armes* by the arrete of 3rd November 1906, and the same paved the way for the rationalisation of the Cadre and distribution personnel. In 1907 a common cadre was created for the police forces in Pondicherry and Karaikal establishments and during the month of April the office of the *Commissaire de Police* was shifted to the *caserne des Ciphahis*.

The Governor took over as *commandant de la Place* on 20th September 1861 and the Military Officials were placed under his direct control. Further changes in the set-up of the armed forces was made during 1867. For the first time in 1908, the armed police came to have

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7. Arretes dated 3rd April 1865, 20th June 1872, 11th April 1877, 9th February 1884, 18th May 1885, 1st February 1886, 11th June 1891, 20th February 1892, 1st July 1893, 8th February 1896, and 31st May 1990.

a small unit of mounted police. In 1910 the Municipal brigade was abolished and those found fit were absorbed into *Gendamerie Indigene*. But in 1921, it was abolished on the ground that it did not meet the actual requirements of the French possessions in India. The Governor was then authorised to provide for an alternative Force to carryout the functions of the administrative, judicial and municipal police. Consequent upon the abolition of *Gendameri Indigene* a new police force was organised on 23rd July 1921 to discharge the administrative, judicial and municipal police duties under a *Chef de Service* assisted by another officer. The police personnel consisted of a superior cadre of Inspecteur, *Sons-Inspecteur adjudants* and a lower cadre of *Brigadiers and Gardes*. This police force consisted of three formations viz, *Police Generale*, *Police de la Surete* and *Agents Cyclistes*. The functions of the administrative police municipal police and judicial police were looked after by *police generale*. The administrative police had the responsibility of enforcing rules and regulations of the land. It also maintained vigilance over public warships, sedition, public cleanliness and press, etc. The functions of Judicial police were defined by the penal code. The municipal police looked after public hygiene and the demolition of dilapidated buildings. There was also a formation called '*Police de Reserve*' to guard the

Government Houses the Prisons, etc, and to attend fire fighting operations.

It was the Third Company of the eleventh Regiment of Infanterie Coloniale force established in 1900 that was brought to Pondicherry to meet the situation, in the context of the labour movement in 1936. The events from 1937 had proved the inefficiency of the local police to maintain law and order in the establishment. In the year 1947 an important change took place in the police force when *Le service de la Police et de la Surete* was converted into Section *de la Gendarmerie Auxiliaire Inigene*. (Compagnie de Cipahis) and Section de la *Gendermarie Auxiliare Indigene* were brought under a unified command to be known as *Forces Publiques des establissement francais dans* l' *Inde*. Consequent to this reform, it placed both the wings under a unified command and thereby facilitated a reduction in the number of police personnel. This helped the government to reduce expenditure and give effective training to the limited force. All kinds of law and order problems in the establishments were tackled by both the Armed police and Civil police. After merger of Pondicherry in the Indian union the entire police force in the territory of Pondicherry was placed under the command of an Inspector General of Police. He was an Officer of the rank of Superintendent of Police from Tamilnadu. The police force

in Pondicherry and Karaikal functioned under the supervision of a Superintendent of Police and the armed police functioned under the direct control of a commandant. To assist the local police, a company of the Malabar special police was also stationed at Pondicherry. In accordance with the French regulations the police administration was carried on till 30th September 1963. After the extension of Indian laws to the territory of Pondicherry from 1st October 1963, Police administration followed the provisions of the Indian Police Act, 1861.

The Police System under the French

There were various independent police forces under the French System. Every police force was divided into two classes,: the 'Police judiciare' and the 'Police Administrative'. The Police judiciare were charged with investigation of crimes for collecting evidence and tracing the offenders. The police administrative were responsible for maintaining law and order. They came under the control of the administrative authorities, like the Marie or the Prefet in the first instance. The police judiciare were subject to the control of the procurer de la Republique, unless pre-trial inquiries were being made by a juge d' Instruction, in which case they came under the control of the latter, acting under his orders, and powers delegated by him. The division between the two types of police was not absolutely rigid and a

member of the Police Administrative seeing a criminal offence being committed would proceed to deal with the matter as if he were a member of the Police Judiciare.[8]

The municipal police were controlled by local authorities: surete National were ultimately responsible to the Minister of the Interior; the *campagnie Republicane de Securite* was responsible to the Minister of the Interior; the *Gendamarie* was controlled by local authorities.

In the police Judiciare, officers have much greater powers than the ordinary members (Agents). Their power included reporting direct to the Procureur de la Republique, instituting enquiries on their own initiative, receiving delegated powers from a juge d' Instruction and in certain urgent cases, commencing formal judicial enquiries prior to the arrival of the Procureur de la Republique or juge d' Instruction. The ordinary members (Agents) of the police judiciare merely had the power to decide whether an offence had been committed, took statements and reported through their superior officers to the Procureur de la

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8. In Paris, the Police Judicature are organised into geographical units, each 'arrondissment' containing 3 or 4 Commissariots' each headed by a Commissaire who is an office of the Police Judiciare. The Parisian Police Judicial affairs, offences concerning minors, etc. and a Brigade Territorial, consisting of experts, for dealing with very serious or complex cases. Depending on the circumstances of each case, the investigation may be made either by the local Police judiciare or by a specialist section, or the Brigade territorial.

Republique. The officials of Maire, forestry officials, the Procureur de la Republique and numerous others who were not members of the police force also had the powers of Officers of the Police Judiciare.

The majority of criminal offences were reported by the public to the police, who in turn reported it to the Procureur de la Republique. The police were the commonest source of the Procurere's information. In Paris and other large cities of France the Procureur insisted that all offence made known to the police were in turn reported to him, regardless of whether there was enough evidence to identify the accused, and as a result the Procureur could follow the progress of the police inquiries if he so desired. In provincial areas, other Procureurs left the police with more discretion, and apart from serious offences, they only insisted that offences were reported when there was sufficient evidence to identify an accused although the Procureur only might decide that no further proceedings should be taken. A report known as a *Procedure* was sent by the police to the Procureur. It contained the name and personal details of the accused, the nature of the charge, and a summary of the facts of the case which commenced with summary usually made by a commissaire. The summary (Rapport) was followed by process Verbaux. The said process verbal was a formal document, usually pressured by an officer of the police judiciare

recording the steps he had taken or the evidence he had obtained. It must be written shortly after the events had been recorded and transmitted to the Procureur with the minimum of delay: It was necessary that it was dated with the name, address and signature of the author.[9]

The police report submitted to the procureur usually contain 'Proces verbaux' recording of following - interviews of the witnesses by an 'officer' of the police judiciaire, where-in the officer gives the personal particulars of the witness, the time and the place of interview. It also contained the verbatim statements of witnesses, the questions put to the witnesses with the answers thereto and signature of both the witnesses and the 'Officer'. The said report also contained the particulars about the seizing of things by the officer, the initial interview of the accused by an 'Officer' of police judiciaire and the information about his detention to custody from time to time with brief reason. In that process verbal signatures of both the Accused and the Officer would be made. After the final enquiry the entire police report will be transmitted to the procureur.

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9. Proces verbaux' are survival of the times when illiteracy was common, so that a witness required to give his evidence verbally to the authorities who give recorded the same immediately on receipt.

THE POLICE AND THEIR FUNCTIONS UNDER THE PRESENT SYSTEM

The Police Act of 1861 purports "to reorganise the police and to make it a more efficient instrument of the prevention and detention of crime."[10] The police force, thus is expected to be efficient both in prevention and detection of crime. Section 23 of Police Act, requires every police officer to prevent the commission of offence.[11] It also prescribes the duties of every police officer and one of the duties mentioned is to collect and communicate intelligence affecting public peace. Every state Government establishes its own police force consisting of such number of officers and men in such manner as the State Government may decide from time to time. The Inspector General of Police is vested with the overall administration of police in the entire state. The district Superintendent of Police administers the police force for districts under the general control and direction of the district Magistrate who is usually the Collector of the District. The criminal procedure code confers specific powers like power to make arrest, search, etc., on the members of the police force who are enrolled as police officers. The officers in charge of the police stations have been given wider powers as they are required by the code to play a pivotal role in the investigation and prevention of crime. The police

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10. *Rajkumar* Vs. *State of Punjab*, 1976, Cr.L.J.39.

11. *Avadi Giri* Vs. *State* (1963) Cr.L.J.826; 1963 All Cr.R.138.

officers superior in rank to an officer in charge of a police station can exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such a station house officer within the limits of his station.[12] Section 22 of the police Act of 1861 lays down that every police officer shall, for all purposes of police Act be considered to be always on duty:[13] In short it is the duty of the police to prevent the commission of crimes, to maintain peace, law and order, and to collect such evidence as would be sufficient to bring home the guilt of the accused in a court of law, to decide whether a charge should be laid in a court of law and to present the available evidence in a court of law.[14] It is for the court to decide whether the accused is guilty or not.

A police officer is under no obligation to arrest a man against whom proceedings have been directed unless he believes that there are sufficient grounds for apprehending him. It is the duty of every police officer to prevent the commission of cognizable offence. Under

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12. See Section 6 of Cr.P.C. (1973).

13. *State of Haryana* Vs. *Phula Ram* (1972) 74 LR 1004.

14. See Section 23, Police Act 1861.

section 149 of the Criminal Procedure Code, a police officer shall, to the best of his ability, interpose and prevent the commission of such offences.

A police officer can apprehend or arrest only those persons "Whom he is legally authorised to apprehend" and that too on sufficient grounds. The legal authority to arrest is circumscribed by the provisions of section 51 of the code of Criminal Procedure and can be exercised only in cases of cognizable offences, where their commission cannot be otherwise prevented.[15]

The Police Act 1949 created a new police force for the Union Territories following the pattern of Police Act of 1861. The Police Act 1888 also enables the Central Government to create a special police district embracing parts of two or more states and to extend to every part of such district the powers and jurisdiction of a police force belonging to a state specified by the Central Government. The same could be done with the concurrence of the State Government concerned.

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15. *Mohamed Ali v. Sri Ram Swarup*, AIR 1965 All 161 at 165.

The Criminal Procedure Code of India confers the powers to make arrest, search, etc., on the members of the police force apart from the wider powers to the police officers incharge of police stations. The term police station is defined under section 2(s) of the Criminal Procedure Code[16]. It has been purposely broadened to show the importance of the duties of the Station House Officer and the concern of the code for their prompt discharge, As per section 36 of the Cr. PC, police officers superior in rank to an officer incharge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by the such officer within the limits of his station.

After investigation of the case if the Investigation Officer of the case finds it as a suitable case for trial, he lays charge sheet against the suspects and thereafter trial is started by the courts. During the course of investigation apart from arrest in cognizable cases and search police also recovers the case properties involved in that case so as to prove the case in the court of law.

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16. Section 2(S) of the Criminal Procedure Code 1973.

(b) ROLE OF THE PROSECUTORS - UNDER THE FRENCH SYSTEM

The French System of public prosecution hinges upon the public prosecutor (Procureur de la Republique). His functions and responsibilities were multifarious. They were:-

1. Receiving of complaints about the alleged criminal offences both from the police and from general public.
2. Taking of all necessary steps to investigate the alleged offences, sudden or suspicious deaths, fires, train accidents explosives etc. for these duties he had all the powers of the police. He could also direct the police to carryout those duties.
3. After investigation of an offence, he had wide powers of discretion to decide what future action should be initiated. It was he who decided the question whether or not a *juge d' Instruction* should be asked to investigate the offence.
4. He had to conduct all proceedings, in person, in the tribunal correctional and he was responsible for all proceedings in the tribunal de police. He had great freedom, during trial, to state his personal views, or to drop proceedings. Although the court might continue the case despite the wishes of the Procureur, in practice it would never do so. His views were given due importance.

5. The Procureur had the responsibility of enforcing the sentence, if the accused was sentenced.

6. He had the discretion as to whether or not to appeal the disposed cases.

7. He had a general duty of ensuring maintenance of law and order in his district. For this purpose he must keep himself informed of what was happening by means of regular reports from the police. Specifically, he received reports of all events likely to give rise to future troubles and crimes that could be committed in his area.

8. He also had a number of functions not connected with criminal law. They included taking interest in any civil case concerning legal status, the management of affairs on behalf of minors or other persons suffering from legal incapacity or any other civil law case where the court itself decided that the views of the procureur should be obtained. He also had a supervisory role over 'avocats' and could report any breaches of discipline to the local faculty. He dealt with the requests for changes of name, and permission to marry underage or without parental consent. He also had some supervisory duties in connection with mental hospitals apart from assisting in the award of legal aid in civil cases.

9. He, as an independent 'Magistrate' could protect the public against any over zealous activity of the police. By judicious use of his decision to take proceedings, he ensured that the courts were not over-burdened with cases unworthy of pursuit.

In a nutshell, the Procureur had the responsibility of investigating criminal offences and instituting proceedings.

In the Tribunal de police (police courts) the procureur de la republique conducted the cases on behalf of the prosecution if the offence carried a penalty in excess of ten days imprisonment or a fine of 400 francs; For the other offences the prosecution was conducted by a senior police officer (Commissaire)[17] specially designated for this task by the procureur general. The Procureur de la Republic had power to control, supervise and to intervene in prosecutions conducted by the senior police officers.

In the *Tribunal Correctionel* the *Procureur de la Republic* conducted the prosecution with the help of deputes (subsituts)

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17. In Paris, such commissaires have legal qualifications; elsewhere this task is merely undertaken as part of normal duties.

depending upon the size of the court. They were divided into three divisions each headed by a 'procureur adjoint'. Each division was subdivided into sections, each section having a specialised function - e.g. financial cases, sex offences, etc., The administration was controlled by a 'Secretariat' which had two substitutes and premier substitute. In addition, there was clerical and Secretarial staff.

The prosecution was conducted by the *procureur general de la Cour d' Appel*, as the *cour d' Assises* those situated at Pondicherry as a *cour d' appel.* If the court is situated elsewhere, the procureur de la republique conducted the prosecution. But, in some exceptional cases, the procureur general from the nearest Cour d' Appel also conducted the prosecution in such courts. In Cour d' Appel the public prosecution was conducted by *Le Parquet Pre's de la cour d' Appel*, consisting of a Procureur general, 'avocats generaux' and 'avocats deputes'. For court appearances the 'avocats generaux' are preferred and the 'avocat deputes' are preferred for administration.

In the *Cour de Cassation* the prosecution on behalf of the State was conducted by Le Parquet Press de la Cour de Cassation, consisting of the Procureur general and Seventeen 'avocat generaux'.

The right to investigate and prosecute was given to the Procureur de la Republique. The Ministere Public was responsible for undertaking all prosecutions on behalf of the state. He appeared in all criminal courts and all decisions of a criminal court must be made in his presence. He appeared in all criminal courts and all decisions of a criminal court must be made in his presence. He also ensured that the court's, decision was enforced. He was responsible to and subject to the control of the Minister of Justice who issued instructions concerning administration, the general conduct of prosecutions, or specific instructions, concerning a particular case. The minister of Justice being a politician with no legal training, paid great attention to the advice and suggestions of the Procureur who was considered to be an expert in this field.

The Minister of Justice issued circulars through his Ministry advising how particular types of cases should be handled.

2. PROSECUTOR - UNDER THE INDIAN SYSTEM

Though the immediate victim of a crime may be only an individual, crime is considered to be an act against the society as a whole. That is why the state comes to the rescue of the victim and represents him in the criminal courts. The representation is done by

the public prosecutor. Thus the public prosecutors and Assistance public prosecutors conduct also appears as State Counsel in criminal appeals, revisions and other matters in the court of sessions and High Courts. They also have the authority to appear and plead before any court in cases entrusted with them. Apart from giving advice to the police or other Government departments when required they also can withdraw from the prosecutions against any person with the consent of the court.[18]

As per the Criminal Procedure Code, 1973[19] for every High Court, the Central Government or the State Government, shall, after consultation with the High Court, appoint a public prosecutor and may also appoint one or more additional public prosecutors, for conducting prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be, 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.

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18. Section 321 of the Criminal Procedure Code of 1973; See also *Sheonandan Paswan* V. *State of Bihar*, (1987) 1 SCC 288; *Mohd.Mumtaz* v. *Nandhini Satpathy* (1987) 1 SCC 279; See also *State* v. *Ganesan* 1995 Cr L J 3849 (Mad HC).

19. Section 24 of the Criminal Procedure Code 1973.

For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more additional Public Prosecutors for the district.[20]

The District Magistrate shall in consultation with the Sessions Judge prepare a panel of names of persons, who are, in his opinion, fit to be appointed public prosecutors or Additional Public Prosecutors for the District. No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate. However, in a state where a regular cadre of Prosecuting officers exists, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such cadre. If in the opinion of the State Government, no suitable person is available in such cadre for such appointment, the Government may appoint a person as Public Prosecutor, as the case may be, from the panel of names prepared by the district Magistrate. However a person shall be eligible to be appointed as a Public Prosecutor or as an Additional Public Prosecutor only if he has been in

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20. It has been categorically rules by the Supreme Court that the office of the Public Prosecutor assumes much importance and that appointments to them should not be dependant on the whims and fancies of the state governments; *Sri Rekha Vidyadri* v. *State of U.P.* (1991) 1 SCC 212.

practice as an advocate for not less than seven years. The Central Government or the State Government may also appoint, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor, for the purpose of any case or class of cases.

The State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the courts of Magistrates. The Government may also appoint one or more Assistant Public Prosecutors for the purpose of conducting any case or class of cases relating to its area/sub jail in the courts of Magistrates. But, no Police officer shall be eligible to be appointed as an Assistant Public Prosecutor. The District Magistrate may appoint any other person to be the Assistant Public Prosecutor incharge of the case. Provided that a Police Officer shall not be so appointed, (a) if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted; or (b) if he is below the rank of Inspector.[21]

The appointments of the Public Prosecutors are made by the Government for a tenure of 3 years. There is one Public Prosecutor

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21. Section 25 of Cr.P.C.

and two Additional Public Prosecutors at the Pondicherry District. There is an additional public prosecutor at Karaikal District. There are six Assistant Public Prosecutor for the Judicial Magistrate Courts for the whole of the Union Territory. Out of them three are at the Head Quarters. The remaining criminal courts at Karaikal, Mahe and Yanam are served by one Assistant Public Prosecutor each from among the remaining three.

The Public Prosecutor and the two additional public prosecutors are stationed at the Head-Quarters while the other Additional Public Prosecutor is at Karaikal. There are three sessions courts at the Head-quarters of Pondicherry and one Sessions Court is situated at Karaikal. There is a Chief Judicial Magistrate Court at Pondicherry apart from a Sub-Divisional and a First Class Judicial Magistrate Court. For each court there are separate Assistant Public Prosecutors for conducting the cases. Out of the six Assistant Public Prosecutors of the state, at Present two are full time salaried persons. Till their retirement they can hold the office. Others are only part-time officers whose tenure is subject to renewal after the expiry of the contract. Recently one Assistant public prosecutor is deputed as Deputy Director of prosecutions at the Directorate of Prosecutions.

The whole system of Public Prosecution at Pondicherry is now controlled and supervised by the Directorate of Prosecution, headed by a Director of Prosecution. There is also a Deputy Director of Prosecution to assist the Director of Prosecution. Both of them were appointed on deputation basis. A senior sub-judge is deputed as the director of public prosecutions while the office of the Deputy Director of prosecution is filled up by deputing an Assistant Public Prosecutor.

(c) APPOINTMENT OF PRESIDING OFFICERS OF THE CRIMINAL COURTS AND THEIR FUNCTIONS :

UNDER THE FRENCH SYSTEM

There was a hierarchy of criminal courts in French system. The court of cassasion was the Apex Court and under it were the courts of appeal (Cour d" Appel), session court (cour d' assises) , correctional courts (Tribunal Correctionnel) and the police courts (Tribunal de police). Apart from these courts there was also a section of court d ' appel by name Chambre d' accusation to decide the remittance of cases to the to the Cour d' accusation. The Apex court was only at Paris.

There were two methods of entry into service as Magistrate. One was direct recruitment and the other was by entering L' Ecole Nationale de la Magistrateture through an examination. The latter

method was more common. There was an Ecole Nationale de la Magistrate at Pondicherry. Those who wanted to Join the court joined this institute so as to become magistrateture.

(a) DIRECT ENTRY:

An 'avocat' (advocate) with ten years experience might apply to become a magistrate and such applications were considered by a commission constituted for selection. Direct entry was considered as a desirable alternative to entry from L' Ecole, since it allowed widening of the spectrum of candidates to the Magistrate. By tradition, some Magisterial posts had always been given to distinguished men of law. By custom, one of the foremost professors of law was always appointed as a judge in the court of cassation.

(b) L' ECOLE NATIONALE:

The 'Le Centre National d' Etudes Judiciares' of France was called as L' Ecole Nationale and it was established in Bordeaux in 1958 to place the Magistrate on a similar footing with other branches of public service, such as the diplomatic crops, which had similar establishments. L' Ecole was a success from the outset and except 20% to 25% of 'Magistrates' strength qualify in this way. The candidates must posses a *Licence en droit*, to obtain entry. Apart from

some exceptions the maximum age was fixed as 27 years. Prior to entry, the candidate if he wished, might pursue a preparatory course run by the *Institus d' etudes Judiciares'* during the third year of his university studies at any of the universities, but that course was not a compulsory one. A competitive examination was conducted for the candidates who possessed the basic entry qualifications to sit for the same. The entry examination was both written and oral. The written part consisted of five or six hour papers on civil law, criminal law, translation from a foreign language, and a general subject of political, social or economic importance. The oral part was conducted by a board composed of a general subject of political, social or economic importance. The oral part was conducted by a board composed of the President of the court of cassation, a member of the Conseil d' Etate, two law professors, a serving Magistrate and in certain cases the head of a department in the Ministry of Justice. On various legal subjects the candidate was examined and he might also be asked the questions of general nature to see how he responded under stress. However, some well qualified candidates might be admitted by dispensing with such examinations. A Candidate successful in the examination was called as 'Auditeur de Justice' and had certain rights and privileges. He was subject to the control of the Minister of Justice from whom he received

salary and other financial allowances, including the cost of robes, etc. He had to take magisterial oath.

The 'Auditeur' underwent a course, at L' Ecole, lasting twenty eight months made to fit him for his Magisterial duties by giving him specialist training so as to broaden his general experience and outlook. He would be attached to an 'Avocat', a Notaire, the police and either a prison or Juvenile detention centre for the first six weeks of the training. Thereafter he was taught legal procedure and other legal topics of current interest and importance, covering a wide-field, the common market, drugs, labour relations, psychiatry, forensic medicine, etc. Private study, visits, seminars, group discussions and lecutres by experts are also attended. Two months of the course are always spent at the Courts for examining the functions of a 'Magistrate'. The course may vary from year to year in its content. At the conclusion of the course, the 'Trainee Magistrate' spent sixteen months obtaining practical experience, spending three months in the office of a procureur de la Republique, three months with a judge, two months with a juge d' Instruction and one month with a juge des enfants. During the course, the trainee Magistrate would perform most of the functions of the Magistrate such as conducting simple criminal trials, sitting on the bench as one of the three Judges, etc. Apart from this, the trainee

must spend fifteen days working as a labourer in a factory, in a bank, and in local government all intended to give him a personal insight into the problems and activities of the everyday world. During the last two months of the course the candidate (Auditeur) would visit various French institutions such as the Ministry of Justice, Le senat, L' Assemblee Nationale. As a general rule the candidate was asked to select one of the limited number of specified subjects of topical interest such as drugs or road accidents, and would examine all aspects of the problem. For instance, if he chose drug trafficking, he would visit psychiatric hospitals, accompany the police, assist in the drafting of any new legislation, attend parliamentary debates, and participate in any conferences on the subject. At the end of the course at L' Ecole, the 'auditeur' (Trainee Magistrate) underwent written and oral examinations of a very practical importance. The L'Ecole was in existence at Pondicherry. Those who wished to become Judicial officers could pursue the course at Pondicherry itself.

APPOINTMENT AND DUTY STRUCTURE

After completing their training, the magistrate - trainees were placed on a list in order of merit which was published in the Journal Official. Successful candidates were then appointed to function in the second grade of the lower division of the judiciary by the President of

the Republic on the recommendation of the Minister of Justice. Officers in the second grade, lower division, were chiefly judges of courts of first instance and the courts of grand instance, and the deputy procurators. In the upper were chief judges of the court of Grand Instance in the Department at Paris, the Presidents, Vice Presidents, procurators and Deputy procurators of courts of Grand instance, and judges-Directors in courts of first instance. In the lower division of the first grade were mainly judges of courts of appeal; in the upper division were mainly judges of the court of Appeal at Paris, the Vice-President of the court of court of Grand Instance in the Department of Paris, Presidents of Chambers and advocates General in courts of Appeal. Above these two grades were placed chiefly by judges of the courts of cassation, first presidents of courts of Appeal and procurators general in these courts and Presidents of Chamber in the court of Appeal of Paris and Advocates-General in the court.

Thus, Judicial Officers served either as judges or as Procurators who form the '*parque*'. They might move freely from one role to other. Those who actually held judicial position might be transferred or even promoted only with their consent. A commission of promotion used to prepare list of officers eligible for promotion. Promotions were given every year. The French term 'Magistrate' embraced both the judiciary

and the public prosecutor. The judiciary was known as the 'Magistrature assise' or Ministere Public' or the Magistrature debout or more commonly 'Le parquet'. The judiciary and the public prosecutor had equal privileges, status and salary. Interchange between the two branches was simple and common. In name, a judge or public prosecutor regarded himself as first and foremost a 'Magistrate', the particular duties whether they be on the bench or on prosecution being of secondary importance and not conferring any rank or privilege over the other. The prosecutor did not regard himself as being inferior to the judge; on the contrary, the judge, being equal in status to the prosecutor was independent of him and was not required to comply with his requests or suggestion. Both the judges and the prosecutors used to sit on the same level, and wear similar robes and the prosecutors would stand when addressing the courts. As the French courts had a bench of three judges, it followed that there were approximately three times as many judges as prosecutors. Some of the Magistrates were also posted in the administrative post in the Ministry of Justice.

In the French judiciary there were no part-time offers or lay Magistrates. There were only full time judicial offices manned by professional Magistrates. Except for the Chambre Criminelle de la

Cour de cassation, most judges were both in civil and criminal courts. The role of the judge in court was to elicit all the evidence by examining the accused and the witnesses to decide any legal issues; to decide on the verdict and sentence. Once appointed, a judge could not be removed from office unless he committed any serious offence or breach of duty or became infirm. Breaches of discipline were considered by the Conseil Superieur de la Magistrature of which the president was the President de la Republique, and the Vice President was the Minister of Justice. The Conseil' had nine other members, of whom seven were Senior Magistrates.

The salary and status given to the senior president of the Tribunal de Grande Instance (Tribunal Correctionel) were identical to those given to the Procureur de la Republic in the same court. The salary and status given to a Magistrate dependended on his grade and not on whether he was on the bench or acting as Prosecutor. A newly appointed Magistrate would start on the lowest salary scale of the second grade and move to the next highest scale each year, so that even without promotion he would reach the top scale on the second grade; in due course, he would automatically be placed on the first greade and after 23 years of service he might reach the salary scale third from the top of the first grade, which was the highest he might go

without promotion. A personal 'Report' was kept on every Magistrate starting with his entry to L' Ecole Nationale. In it, the assessments such as Knowledge of the law, relations with the public, ability to organise were rewarded by giving marks. Promotions were made upon the applications made by the Magistrate in the event of arising of a vacancy after a careful verification of Dossier of the candidates. Tenure of the office of Magistracy was optional at the age of 60 and compulsory at the age of 67. However, there was an exception that the compulsory age was 70 years, for the 'Cour de Cassation'. Political activity by a Magistrate was not permitted and the same was being debated from time to time. Magistrates might take part in scientific, artistic or literary works but they might not hold any other professional or salaried post. On permission they might take part in other activities provided the same did not detract from the dignity or independence of the post of Magistrate. A Magistrate could not be appointed in a district in which during the preceding five years he had practised as an avocat or Avove or Notaire. From time to time he must have been appointed to take part in the fact-finding Commissions.

THE PRESENT INDIAN SYSTEM

Besides the High Courts and the Courts constituted under any law, other than the Criminal Procedure Code 1973, there are, in every state the following classes of criminal courts. They are:-

(a) Court of session.

(b) Judicial Magistrates of the First Class and, Metropolitan areas Metropolitan Magistrates.

(c) Executive Magistrates.

JUDICIAL MAGISTRATES - POWERS, FUNCTIONS AND APPOINTMENT

There are Metropolitan Magistrates in Metropolitan areas and magistrates of First in other areas. The Metropolitan Magistrates are appointed by the High Court and the jurisdiction and powers of these courts extend throughout the said Metropolitan area. One among the Metropolitan Magistrate was appointed as Chief Metropolitan Magistrate. If necessary Additional Chief Metropolitan Magistrates are also appointed by the High Court.

The court of a Magistrate of 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. The court of 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 both. The Metropolitan Magistrate shall have the powers of a Magistrate of the First Class.

CHIEF JUDICIAL MAGISTRATES, ADDITIONAL CHIEF JUDICIAL MAGISTRATES AND SPECIAL JUDICIAL MAGISTRATES

In every district (Not being a metropolitan area), the High Court appoints a Judicial Magistrate of the first class to be the Chief Judicial Magistrate. He is subordinate to the sessions Judge; and every other judicial Magistrate is subject to the general control of the sessions Judge and subordinate to the Chief Judicial Magistrate. The CJM from time to time, makes rules or give special orders, consistent with the criminal procedure code, as to the distribution of business among the judicial Magistrates sub-ordinate to him.

Subject to the control of the High Court of Chennai, the Chief Judicial Magistrate from time to time defines the local limits of the areas within which the Magistrates appointed under section 11 or under section 13 of Cr P.C. might exercise all or any of the powers with which they might respectively be invested under the code. The court of a special Magistrate might hold its sitting at any place within its local area. Except as otherwise provided by such definition, the jurisdiction

and powers of every such Magistrate extends throughout the district. The court of a Chief Judicial Magistrate might pass any sentence authorised by law except a sentence of death or of imprisonment for life or imprisonment for a term exceeding seven years.

To-day, in Pondicherry, the post of Chief Judicial Magistrate is filled by an officer of the rank of Senior sub-ordinate Judge promoted from the Munsif-Magistrate cadre. So far, no direct recruitment to the post of Chief Judicial Magistrate has been made. There is no additional Chief Judicial Magistrate either at Pondicherry. The appointment of all the Judicial Magistrtes of Pondicherry are made by the High Court of Madras.

The High Court of Chennai may, if requested, by the Central or State Government so to do, confer upon any person who holds or has held any post under the Government, all or any of the powers conferred or conferrable by or under this code on a judicial Magistrate of the first class or of the second class, in respect to particular areas or the particular classes of cases, in any local area, not being a metropolitan area. Pondicherry is not a metropolitan city. No such power shall be conferred on a person unless he possesses such qualification or experience in relation to legal affairs as the High Court may by rules,

specify. Such Magistrates are called Special Judicial Magistrates. They are appointed for such term, not exceeding one year at a time. At present there is no special magistrates at Pondicherry.

EXECUTIVE MAGISTRATES

The separation of judiciary from the executive is a constitutional requirement. In every district and in every Metropolitan area, the State Government appoints as many persons as it thinks fit to be executive Magistrates and appoints, one of them to be the District Magistrates.[20] The State Government may also appoint any Executive Magistrate to be an Additional District Magistrate who shall have such of the powers of the District Magistrate as may be directed by the State Government. An Executive Magistrate is also posted for the sub-division and he is known as sub-Divisional Executive Magistrate. These executive Magistrates are appointed for performing Magisterial functions allotted to the Executive. The collector of Pondicherry is the ex-officio District Magistrate. A Deputy Collector is designated as Additional District Magistrate. Other Deputy Collectors, according to the need are posted as sub-divisional Executive Magistrate .

PUBLIC PROSECUTORS

At Pondicherry the Public Prosecutors are appointed by the Government for a period of 3 years. A person having minimum standing at the Bar, belonging to political party of the popular Government is usually appointed to the post of Public Prosecutor. But the Assistant Public Prosecutors are appointed by the Government on recommendation made by the UPSC. They are full time salaried officers as in the neighbouring state of Tamilnadu which is also controlled by the High Court of Madras. But, at present in Pondicherry the Director of public prosecutions have control over them.

CORRECTIONAL STAFF UNDER THE FRENCH SYSTEM

In Pondicherry during the French regime the Nayinar who was responsible for maintenance of law and order also held the prisoners under his custody. However, it was not known as to how long this arrangement continued. Prior to the beginning of the nineteenth century it was found that those responsible for the maintenance of prisons as well as the custody of prisoners were also responsible for maintenance of law and order. During 1827, the prison system had undergone a change and the convicts and the under-trial prisoners were confined separately. The system of extracting work from prisoners of Low Castes was abolished and the work was made

obligatory for all the prisoners. The Arrete of 1st March 1807 placed the penitentiary institutions in Pondicherry under two categories viz., Prison des Blancs, and Prison Generale, each of which was placed under the control of a regisseur who looked after the administration of the prison placed under his care.[a] The Prison des Blances was meant for the detention of Europeans, their descendants and 'Topas' sentenced to undergo solitary confinement as well as correctional or simple imprisonment. Besides, it was also meant to lodge undertrials among Military personnel and sailors who were as far as possible confined separately. That the Prison General was meant for all categories of native prisoners sentenced to solitary confinement or to correctional imprisonment. The Prison General was also meant for the individuals sentenced to work in the *Atelier de Discipline*. Those sentenced to hard labour were put separately. There was no separate prison for female prisoners who were confined either in the Prison des Blancs or in the Prison Generale, as the case might be. However, the female prisoners were allowed to keep with them their children below three years in case they were remanded after confirmation of the confinement.

Maintenance of inventory of all belongings of the prisoners, their classification discipline and maintenance of accounts, etc., were with

the Regisseurs. The Regisseurs were appointed by the Governor on the recommendation of the Ordonnateur *Directeur de I' Interieur* and the other staff was appointed by the *Ordonnateur Director de I' Interieur* in consultation with the Regisseur. The ration money was paid to the Regisseur of prisons des Blancs who was responsible for the preparation food. Food was prepared under his supervision in a common kitchen by prisoners who were paid wages at the rate of eight rupees per day. Half of the food was served at 11 a.m. and the remaining half reserved for the evening meal. Pregnant women were eligible for additional ration and those admitted in the dispensary were allowed the diet prescribed by the doctor. The natives sentenced to undergo imprisonment for more than one year were entitled to a dhoti at the end of the twelfth month and the Europeans were given one Shirt, one part and a short jacket if they so desired.

In the prison des Blancs, the prisoners were provided with wooden or an iron cot, a mattress, a pillow and a blanket while in prison general only a mat and a pillow were supplied. It was compulsory for all convicts to work. On request under trials were provided with the work. The infirm and the aged among the prisoners were exempted from work. The prisoners were engaged in the manufacturing of ropes, caps, thatties, besides other handicrafts as determined by the

Administrators. The convicts were eligible for only one third of the wages earned by them to meet their own expenses or remit to their family. The remaining was credited to their savings account and handed over to them at the time of their release.

Prisoners were allowed to receive visitors only on Sundays between 10.00 a.m. and 4.00 p.m. and such visit could last for two hours at the maximum. For visiting ordinary prisoners it was necessary to obtain permission from the competent authority of the judiciary. For visiting the convict prior permission was to be obtained from the administrative authority. The prisoners undergoing rigorous imprisonment and solitary confinement and gallery-slaves were allowed to see only their nearest relatives and that too rarely upon an authorisation issued in consideration of their good conduct and efficiency in work. Medical facilities were provided by the Government. There was a dispensary in the prison under the overall supervision of the Regisseur. On the recommendation of the Regisseur, the prisoners of good conduct were allowed to perform the duties of a nursing orderly whenever the situation warranted. All prisoners were usually attended to in the dispensary itself, but were admitted to hospital on the recommendation of the Doctor whenever, afflicted by serious illness. A student of medicine attached to the prisoners, assisted by a Homme

de Peine, performed the duties of a nurse. All breaches of discipline were dealt with severely and the prisoners of good conduct were rewarded. Those who found guilty of indiscipline were subjected to various types of punishments such as cut in ration, solitary confinement, etc. The prisoners with good conduct were encouraged by officers of position of trust, remission of sentence, slackening of chains in case of convicts, permission to use tobacco and betal, etc. They were also permitted to wear a badge on the sleeves of their right arm as a token of good conduct.

In order to assist the government in the administration of the prisoners, a three member body called commission de Surveillance consisting of a representative each of the Ordonnateur Directeur de L' Interviur, the Procureur General and the Maire (Suppleant de la Justice de Paix) was constituted. Though the Commission had no power to arrive at any decision on prison administration, it inspected the prisons from time to time and maintained a close watch over prison hygiene, diet, discipline, maintenance of registers, distribution and execution of work, relationship between staff members and prisoners, etc. It forwarded its recommendations to the Administration proposing modifications which it considered desirable for the welfare of the prisoners. Though the Commission was required to meet only once in

a month, its member had to visit the institution at least once in a week. Apart from the members of the commission, an Inspector of Police also visited the prisons everyday. In the Register Specially kept in the office the president of the Commission, its members or the Inspector of Police recorded their observations if any. Every year in the month of December, the commission had to submit a report to the Administrator.

RE-ORGANISATION OF PRISONS DURING THE FRENCH RULE

In 1876, an Inspection team visited Pondicherry from France and submitted a report to the *Ministere de la Marine et des Colonies*. On the basis of the report, the Ministry advised the governor to take appropriate measures to re-organise the prisons in all the establishments. In order to subject the prisoners to better discipline and enforce the penal provisions more effectively, the Arrete of 4th February 1889 sought to strengthen the staff of prison Generale as per the advice of the Commission de Surveillance des Prisons. Another order of the same day required the medical officer to visit the prison every morning and to stay there from 8.00 a.m. to 9.00 a.m. and to record daily his observations on sanitary conditions in the prison and the condition of sick prisoners in the dispensary. A five member committee was constituted in March 1899, to work out a Regiment of work, for prisoners. It studied the nature of work to be assigned to

prisoners both inside and outside the prison. The Arrets of 1st March 1867 which continued to govern the penitentiary institutions in Pondicherry were no more found to be in harmony with legislation in France which had undergone many important changes. This put the administration in an embarrassing situation. Apart from this, the commission de Surveillance des Prisons had also stressed the need to revise the rules and regulations so as to bring them on line with the new concepts of prison administration.

As a consequence of this situation the Arrete of 30th May 1899 placed the prisons under the administrative control of the Secretarire General. In the other establishments, the respective Administrators had direct control over the prisons. The commission de Surveillance was replaced by the commission Superieure des Prisons and it was to inspect the prison and to offer its views on their functioning. It has to submit a report to the Governor once in six months about the general condition of the Prisons. In each of the outlying establishments also, a Commission de Surveillance was set up under the presidentship of the respective administrator.

The responsibility for the enforcement of all decrets, arretes and relements governing prisons rested with the Regisseur who was

assisted by a Gardien-Chef. He was responsible especially for the maintenance of discipline among prisoners and for carrying on the internal administration of the prison. According to the Arrete, the prison Generale came to have three wings known as Maison d' Arrete, Maison de Justice and Maison de Correction, for the detention of all kings of prisoners and under trials. It also provided for separate enclosure for men and women in all the three wings. The prisoners sentenced to death and banishment were to work compulsorily. But it was optional for all the other prisoners. They had to work for ten hours a day. The order also further specified the punishments for dis-obedience mis-behaviour towards warders, drunkenness, unwillingness to work, etc. However, the prisoners were provided with better clothing's. Natives sentenced with imprisonment for more than an year were entitled to two stuff jackets, two sarees in the case of female prisoners. Europeans were supplied with two stuff-jackets, two short trousers, a pair of shoes and a straw hat in the case of male prisoners and two gowns, two Chemises, a pair of stockings, a pair of shoes and a straw hat in the case of female prisoners. The dispensary attached to the prison was provided with a consultation-cum-operation chamber, a pharmacy, a kitchen and wards for the sick. It was placed under the control of a doctor nominated by the Governor.

REORGANISATION BEFORE MERGER

Before merger, for the last time the penitentiary establishments were re-organised by the arrete of 20th February 1942. That order placed the prisons under the authority of the Governor (Chief of the Colony). As the representative of the Governor the Chef du Bureau des Finances, was responsible for the overall control of the prisoners. The Chef du Bureau Militaire had to inspect the prisons to ensure that discipline was maintained and that the supervisory staff were properly carrying out their duties. The order further re-constituted the Commission Superieure des Prisons in Pondicherry and the Commission de Surveillance in the other outlying regions.

YOUNG OFFENDERS IN THE PRISON

There was no prison exclusively meant for young offenders. They were put in the general prison. This made them to get contaminated with hardened criminals. In 1866, the administration decided to keep the young offenders away from the adult prisoners. The order of 26th October 1866 declared the present Botanical Garden as an Agricultural settlement where young prisoners from Pondicherry could be placed under strict discipline and put to agricultural works. They were provided with clothing, wages, medical facilities, etc. The doctor attached to the prison General attended these young prisoners.

This penitentiary establishment which was originally under the control of the Aide Botaniste was transferred in 1906 to the case of the Gardien Chef who administered it as per the orders of the Regisseur of Prison Generale. But, after 1942, the young offenders were housed in General Prison only. As the Children's Act 1961 was extended to Pondicherry, in the year 1968, a special school and observation Home were established at Ariyankuppam and the young offenders accused of isolates of children Act were detained in the observation Home. The position remains the same though the Juvenile Justice Act 1986 came to be made applicable to in Pondicherry.

ADMINISTRATION OF PRISONS UNDER THE PRESENT SYSTEM

The order of 20th February 1942 continued to govern the prison administration even after merger. The prisons were placed under the direct control of the Inspectorate General of Police under the overall administrative control of the Home Department. The Superintendents of Police in Pondicherry and Karaikal exercised the functions of the Controller of Prisons in addition to their normal duties in their respective regions.

After the introduction of the Indian Penal Code and the Criminal Procedure Code, in October 1963, the control of the Inspectorate

General Code, of Police on the Penitentiary establishment got discontinued. The controller of Weights and Measures was declared by the Government as the controller of Prison for the Pondicherry region. The Administrators of Karaikal and Mahe were declared as controllers of Prison for Karaikal and Mahe regions. The Chief Medical Officer in Yanam was vested with the duty of controlling the prison at Yanam. Consequent upon the appointment of Superintendent of jails in January 1967, the duties of Controller of Prison for Pondicherry region were transferred to him. During May 1986 (a) The Prisons Act, 1894, (b) The Prisoner's 1900 (c) The Identification of Prisoners Act, 1920, (d) The Transfer of the Prisoners Act, 1950 and (e) The Prisoners (Attendance in Courts) Act, 1955, were extended to the Territory of Pondicherry.

The various provisions of the said Central Acts conferred powers on the Administration and in exercise of the same he framed two sets of rules viz., the Pondicherry Prison Rules 1969 and the Pondicherry Sub-Jails Rules 1969. With the extension of the Central enactment in 1968, and the enforcement of the Pondicherry Prison Rules 1969, the Prison Generale situated in the centre of the Pondicherry town was designated as Central Prison and the Prison in Karaikal was classified as a 'Special Sub-Jail and those at Yanam and Mahe as sub-jails. The

rules were brought into force by setting the administration of penal institutions in the Territory on the pattern followed in Tamilnadu.

Under the new set up the Chief Superintendent of Jails is responsible for the proper enforcement of all rules and statutory mandates in the territory. He is also responsible for the execution of all sentences imposed on the prisoners under his charge and he is assisted by one Deputy Superintendent and two Assistant Superintendents.

Arrangements were made with the Government of Tamilnadu in 1969 and with those of Kerala and Andra Pradesh in 1968 for the transfer of long-term prisoners from the sub-jails in Karaikal, Mahe and Yanam, to the jails in Tamilnadu, Kerala and Andra Pradesh respectively as the sub-jails were meant for loging short-term prisoners only.

Similarly arrangements were also made in 1969 for the transfer of habitual and long-term prisoners sentenced to more than five years from Pondicherry to the jails in Tamilnadu since the central prison in Pondicherry did not have facilities to lodge such prisoners at that time. However the maintenance charges of those prisoners were borne by

the Pondicherry administration. But, the prisoners were treated according to the rules and regulations in force in the state to which the prisoners were transferred.

The Deputy Superintendent of Jails in Karaikal is incharge of the Karaikal Sub-jail. He, at present performs the duties of a jailer with the assistance of Head wardens and warders. The Sub-jails in Mahe and Yanam are under the control of a Sub-Assistant Superintendent each who functions as a jailer under the control of the Chief Medical Officer of the respective regions.

Consequent upon the extension of Indian laws from 1st October 1963, there is a sharp decline in the total daily average of intake of prisoners in the jails. This decline is in respect of undertrail Prisoners. It is learnt that this was the outcome of the liberal granting of bail after extension of Indian Laws. There were several restrictions in granting bail during the French period.

THE BOARD OF VISITORS

The Board of Visitors is established to ensure the proper application of rules and regulations governing the management of prisons. It consists of Official and non-official members and it has a

duty to keep close watch on all aspects of jail management, including training, diet, health, rehabilitation and recreation of prisoners. The Board headed by the District Magistrate consists of, besides officials, a member of the Legislative Assembly, a Member of Parliament, a Medical Practitioner, a Lawyer, and two female social workers. The members of the Board are not only free to visit the jail on any working day as per the roaster prepared by the Chairman, but also entitled to record their findings for necessary remedial action by jail authorities. Complaints and petitions, if any, from the prisoners are received by the Board. It is also to inspect food and ensure quality. The Board is also to verify the punishment register.

Prisoners having good behaviour are entitled for ordinary remission apart from special as well as government remissions. They are also released on emergency or ordinary parole, to enable them to maintain contacts with their family on important occasions. These are all done by the Advisory Board specially constituted under Chairmanship of the District Magistrate. The Advisory Board is required to meet at least once in six months and is empowered to review the cases of prisoners and recommend their release either conditionally or unconditionally or on compassionate grounds and to extend to them necessary help at the time of their release.

RE-SOCIALISATION

Every prisoner is free to follow the tenets of his persuasion. Catholic prisoners are allowed to participate in holy mass offered by a visiting priest. Moral discourses are arranged from time to time for the benefit of prisoners. The sisters of St.Joseph de Cluny visit the female prisoners. As a step towards their rehabilitation prisoners are given training in some trade or handicraft. However the number of prisoners fit to work is not considered adequate enough to set up any industrial unit in the central prison.

The Central Prison in Pondicherry is provided with a library. For recreation the prisoners are provided with news-papers and magazines and radio. Apart from this film shows are also arranged.

After-care programmes are also available to the released prisoners so as to make them to adjust with the society. This is done by the probation officers and also by some welfare organisations. The Probation officers appointed under the probation of offenders Act 1958 report on after-care and follow up actions with regard to the released prisoners.

Thus the erstwhile system of Administration of Criminal Justice with its various organs like police, prosecutors and prison authorities had undergone some changes to suit the requirements of changed law.

CHAPTER III

PRE-TRIAL PROCEDURES UNDER THE FRENCH AND THE INDIAN SYSTEMS

Pre-trial procedures involving arrest and investigation assume much importance under both the systems. In fact it is at this stage that the systems, reflect their differences, more prominently.

Pre-trial Procedures under the French System

Under the French Criminal Procedure the pre-trial inquiries play a predominant role. In Pondicherry under the French administration there were three types of pre-trial inquiries. They were 'l' enquete flagrante', 'l' enquete preliminaire' and 'l' information judiciare'. Out of these three pre-trial inquiries the first two were conducted by the police and the procureur de la Republique and the third was conducted by a juge d' instruction.

The type of inquiry known as 'l' enquete' was done when the offence was a 'crime' or 'delit' and was either been detected while actually being committed, or which was committed then recently. The procecureur would not treat an offence as 'flagrant' unless it was reported to the authorities immediately on discovery. If no accused was arrested within 15 or 21 days, the procureur would decide it and instruct

the police to continue their inquiries. It was thereafter known as 'Preliminaire' and not 'flagrant'. The Role of the procureur in 'l' enquete flagrant' thus depended upon the timing of request for intervention by a juge d' instruction.[1]

Arrest and Remand

Under the French system the police could prohibit any person from leaving the scene of crime till the termination of their initial inquiries.[2] The police could request any person to attend a police station, the procure could authorise the police to use force to compel his attendance. Apart from this, the police might, without the procureur's authority, take into custody any person whose identity they wanted to verify, or against whom substantial incriminating evidence existed. This type of custody was called 'garde a' vue'. A person detained under 'garde a vue' was not entitled to legal advice or legal representation during his detention and he could be questioned by the police freely.[3]

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1. It is sometimes suggested that one of the reasons why the procureur delays the intervention of the judge d' instruction is that the latter is frequently encumbered with too much work. By retaining control of the inquiry, the procureur can be more selective as to which cases he wishes the judge d' instruction to investigate. Since however, all 'crimes' must be investigated by a juge d' instruction, this reasoning could only apply to 'delits'.

2. In cases of extreme urgency, such as if the witness is dying, an 'officer' of the police judiciaire may put the witness on oath before taking his statement.

3. It should be remembered that 'l' enquete flagrante' and therefore the power to detain 'garde a vue', only applies to offences classed as 'crimes' or delits.

An 'officer' of police judiciaire alone could order for the detention of 'garde a vue'. A person arrested could be detained for twenty four hours only. However, the procureur could authorise further detention of twenty four hours, if there was substantial incriminating evidence against the said person. Without such written authorisation by the procure, the period of detention was strictly limited to twenty four hours only. If several offences were being investigated simultaneously all involving the same person, he might still be detained for one period of 'garde a vue'.

A record of each 'garde a vue' giving its time of its commencement, total duration, the duration of any examinations and details of what took place, threat and the reasons why the person was detained etc., should be kept by the police. Apart from that individual records, the police must have maintained a composite register giving details of 'garde a vue' detentions. The Register must have contained the name and personal particulars of the detainee, the exact time of the commencement and termination of the detention, of offence being investigated, and the timings of any examination of the detainee.[4] The

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4. It was noted that in Paris, the average time for the examination of the accused was 15-30 minutes. A possible explanation may be that this was the time taken to dictate any statement made by the Accused, exclusive of any prior 'conversations', etc.

individual record and the register was to be signed by the person detained. Any refusal to sign the same was to be noted. Each year, the procureur examined the registers so as to ensure the strict observance of the provisions concerning 'garde a vue'.

Detentions beyond twenty four hours would be dealt with seriously. The officer responsible for the same was liable to be disciplined. As the illegal detention was a criminal offence, the 'officer' concerned was liable for criminal prosecution. The procureur, except in the cases of flagrant breaches, would not normally institute such proceedings unless he received complaints from the illegally detained persons. It was the duty of the procureur to notify the 'officer's superior in the police force the death of suspects by 'garde a vue', as this allowed the police to question the suspects in the absence of counsel. If a juge d' instruction was in-charge of the inquiry, the police did not have the power to question the suspect in the absence of lawyer. In such cases the police could arrest the suspect only on the instructions of the juge d' Instruction. The effect of the question and the answers thereto might well be more restricted if the accused's lawyer was present, as was accused's right when appearing before a juge d'

Instruction.[5] Unless substantial incriminating evidence already existed against a suspect, it would be pointless for the police to arrest him in the hope of gaining a confession, since failure to do so would only result in the accused's release at the end of the period of detention.

The power to arrest and detain under 'garde a vue' was also much more limited than under 'l' enguete flagrant'. Since the police was not present at the scene of the offence at the time of its discovery, they could detain anyone there. They could only use detention 'garde a vue' if such detention was 'necessary for the inquiry' and could not force to effect such detention. There were various rules concerning the operation of 'garde a vue' which must be strictly observed. Only an 'officer' of police Judiciarie could order such detention. If several offences were being investigated, simultaneously all involving the same person might still only be detained for one period of 'garde a vue'. The period commenced when the person was first taken into custody. So he could not 'willingly' attend a police station for several hours and only technically and formally be detained 'garde a vue' at the end of that period. The procureur might order that any person detained 'garde a vue' be medically examined, and in any case where the 'garde

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5. Except for his first formal appearance.

a vue' had been extended beyond twenty four hours, the persons detained might make a similar request. The purpose of such examination was not to obtain evidence, but rather to ensure that the person was medically fit to be detained, or as a safeguard against police brutality. Detention by 'garde a vue' would be terminated when the purpose for detention had been accomplished, or the maximum period had expired, which - ever was earlier.

L' Enquete preliminaire type of enquiry was aged where the offence was not 'flagrant' (thus not permitting the use of 'l' enquete flagrante) and as an alternative to investigation by a juge d'instruction (although such an investigation may follow on an (enquete preliminaire). It was used in all 'contraventions' and in all cases where the offence was not reported as soon as it came to light, obvious example, of which were frauds. The person detained must have been found in a public place, unless the police had the occupier's consent to enter a building. In other words, if the suspect was in his house, he could refuse police entry, and if he was in the street, he could refuse to accompany the police. The police could only request a witness or suspect to attend the police station and that person had the right to refuse. If a suspect agreed to come to the police station and was

detained 'garde a vue' the police could not bring him before the procureur at the end of the period of 'garde a vue'.

If the police wish the accused to be detained, they will have to make a request to the procureur to ask a juge d'instruction to take over the inquiry in the hope that the juge d' Instruction will order that the accused be detained. All the steps had to be taken before the end of the period of 'garde a vue'. The 'enquete preliminaire' would come to an end when the procureur ordered no further proceedings, cited the accused to court, or request a judge d' instruction to take over the inquiry.

Warrants of Arrest

The juge d' Instruction had the powers to issue a warrant of arrest for the arrest of the Accused who had not already been arrested by the provisions of the police powers of 'garde a vue'. There were three types of warrants - the 'mandat de comparution', the 'mandat d'amener and the 'mandat d' arrest.

The 'mandat de comparution' was not so much a warrant as a request by the juge to the accused to appear before him. Normally, it would not be used in serious cases, or if the juge thought the accused

was liable to ignore it. It was only a form of request made to accused for requiring his appearance, before the Juge d' instruction, for hearing him about the accusation. But, in view of the less serious nature of the offence mentioned in it, it might be ignored by the accused. If the Accused failed to appear, the juge would then issue a 'mandat d'amener', having first invited the procureur to give his views on the issue of such a warrant.

A 'mandat d'emener' might only be issued if the offence was at least a 'delit' punishable by imprisonment. The warrant authorised the police to arrest the accused, using force if necessary, but such an arrest might not be effected in a private house between the hours of 8 p.m, and 6 p.m. As soon as the accused was arrested, he was brought before the juge d' instruction, or if that was impossible, was detained in a police station in the interim. If the juge d' instruction did not examine the accused within twenty four hours of his arrest, the procureur might request the president of the court or judge nominated by him to conduct such an examination. If no examination was made or if no such request was made, the accused must be freed from custody.

In the event of an accused being arrested more than 200 kilometers away from the juge's office, the accused would be brought

before the nearest procureur. After verifying the identify of the accused the procureur would tell him about his rights either to make or to not to make a declaration.

If the accused makes a declaration, the procureur would note it, and then ask the accused if he wished to be transferred before juge d' instruction who issued the warrant, or preferred to remain in custody where he was until the juge's decision was known. If the accused agreed to be transferred, this was done immediately. However, if he wanted to stay in custody where he was, the procureur would send all the available information, including any declaration made by the accused, to the juge who issued the warrant. The juge on receipt of this information might then order that the accused be brought before him, or might order his release. The release would be ordered if the juge thought that the wrong person had been arrested or the accused's explanation clearly proved his innocence.

The warrant of 'mandat d' arrest' was basically the same as a 'mandat d' amener', but was used where the accused had fled or gone abroad. The main difference was that the accused must be brought before the juge within forty eight hours of his arrest and not within twenty four hours as in the case of 'mandat d' amener'.

To sum up, under the French Law a warrant of arrest was issued only against an absconding person and carried with it an order of remand. Such a warrant was issued by an investigating judge. Warrant was issued only when summonses to appear were found not effective in the circumstances of the case.

In cases of offences committed in their presence, the prosecutor or the investigating police officers were entitled to remand the accused persons. In such cases the accused persons should be produced directly before the trial court expeditiously. Otherwise, only the investigating judge could pass an order of remand. Such an order of remand was passed upon the demand of the prosecutor and the latter could appeal against an order refusing remand. The accused person had no right of appeal against an order of remand; he could only apply for being released on bail.

The maximum period of remand is four months, the period after the order of committal is not included in that period of four months. This period of four months may be extended by an order with reasons.

The release on bail is a matter of right after a period of five days in all offences punishable with imprisonment of less than 2 years,

unless the concerned person was already sentenced to imprisonment for more than three months. Such order was issued without any application by the accused on the request of the prosecutor or suo motu by the investigating judge, provided the accused person undertook to appear at the appointed date and to keep the investigating judge informed of his change of abode. If no order was passed as described above, the person on remand might apply for it. His application was communicated to the procurateur and order passed thereupon by him within five days. Release of the accused in such a case was granted with or without surety. A surety might be required to be given not only in respect of the undertaking to appear whenever required but also for the eventual payment of costs, fine, compensation and restitution. An order of release might be revoked not only for failure to appear but also on discovery of new incriminating facts and circumstances. An order of remand would continue to be valid after the end of the investigation and in such a case it was the court which decided upon the application for release on bail. If the matter was before the court of Cassation the Court which decided last on the matter on merits would be competent.

Medical examination of the arrested person - by the order of the Procureur

The procureur might order that any person detained 'garde a vue' be medically examined, and in any case where the 'garde a vue' had been extanted beyond the twenty four hours, the person detained might make a request for medical examination. The purpose of the medical examination was to ensure that the person was medically fit to be detained. It was also for the safeguard against the Third - Degree methods by the police.[6] The procureur was also having the power to order for expert medical examination at any time, without the consent of the accused. A person detained by 'garde a vue' must be treated properly, both mentally and physically and must have an opportunity for proper rest between Medical examinations and questioning.

Investigation

The first step in the prosecution of an offender for most offences was investigation (information) conducted by an examining magistrate[7] (juge d' instruction).[8] Different procedures were provided for the

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6. In Paris the procureur usually orders a few such examinations each year; about 5% of the persons detained make such request.

7. French code de procedure penal, article 79.

8. A juge d'instruction can not initiate an enquiry unless requested to do by the procureur de la Republique or by a 'partie civile'. The procureur requests the juge d'instruction to intervene by means of a written request known as a "requisitrire introdctif".

prosecution of each class of offences. Different procedures were designed to provide a measure of protection for the accused commensurate with the severity of the penalty that might be incurred should a conviction resulted.

Preliminary investigation conducted by the examining magistrate was an essential part of judicial process. Its function was the very important one of channelling cases to the trial court that had jurisdiction over the type of offence of which the accused could most reasonably be expected to be convicted. This function was not known in the common law as a separate step.

Under the French Criminal Justice System there were two ways in which a case might be initiated. If a complaint accompanied by a claim for civil damages was filed the magistrate had jurisdiction to proceed with this investigation. If a claim for damages was not filed with the complaint it must be forwarded to the local prosecutor. If he decided to pursue the matter he so notified the examining magistrate. It was upon his initial application (requisitoire introductif) that the jurisdiction for investigate was based. Once the investigation started, the magistrate was free to inquire into any offence related stated in the

complaint or application and might proceed to investigate any person who might appear to be involved. Persons who were ordered to appear and give evidence must do so, subject to a penalty for non-appearance, as for contempt. The accused was not put on his oath as were other witnesses, and he might have the assistance of counsel if he chose. Witnesses other than the civil claimant[9] were not entitled to the assistance of counsel at these hearings unless they were advised that they were being investigated. The magistrate was required to warn them should that be the case. The proceedings were not open to the public. The proceedings were in writing or promptly reduced to writing, and were not adversary in form (sans contradictoire), except in a very limited sense.

Investigation by a judge was mandatory under the French criminal justice system, in cases specified by law. In other matters it was left to the discretion of the prosecutor or the investigating judge. The investigating judge was seized en rem of the act of offence. His duty was to ascertain the existence of the fact, its offending character

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9. The 'Partie civile' - Any person who has sustained damage or loss as a result of a criminal offence had a choice of three courses of action under the French Criminal Systems - raising a separate civil action, or entering appearance in the criminal action action, or entering appearance in the criminal action (which will then settle the civil issues) or instituting criminal proceedings against the accused (the procureur subsequently taking responsibility for the prosecution, leaving the prosecution, leaving the victim to pursue his civil claim which would be decided in the course of criminal proceedings.

and to find out the culprit. He was not bound by the version of the prosecutor or that of the civil party. His endeavour was to find out the truth with all means at his disposal. He gathered evidence which incriminated the accused persons as well as that exonerated them, and he reached his conclusion after weighing the evidence.

The procedure of investigation in brief was summarily as follows:

At the first appearance the accused was informed of the act imputed to him. His plea, if any, was obtained after his being informed that he was not bound to make any declaration. The accused was then provided with a counsel, if he did not have one, unless he refused such assistance. The accused was then examined in the presence of his counsel who was entitled to peruse the record which was to be at his disposal on the date preceding the examination. So the accused was aware of what the examination was going to be about. The counsel could speak only if permitted by the judge. The examination was an essential step unless the investigating judge found the accused prima facie innocent or the accused had made complete, detailed and cogent admissions found convincing by the investigating judge.

The judge then took all necessary steps for the purpose of investigation; hearing of witnesses, visit to the place of occurrence, search etc. Neither, the accused nor the counsel would be present at this stage. From this stage started the period of confrontation. Whenever there was a substantial variation in the versions given by the accused and the witnesses and from one witness to another the investigating judge put the accused and the witness or witnesses found to be at variance in the presence of each other to bring home to the difference in their stand, in order to obtain their explanatory answers. This process of confrontation was very much used in French Criminal Justice System and was found to be an efficient tool in the discovery of truth. The presence of the counsel of the accused was not mandatory at this stage but he might be allowed to be present at the discretion of the investigating judge and it was usually granted.

The whole process of investigation was recorded by an officer attached to the investigating judge. The answers were signed by accused or the witnesses according to the case and the answers during the stage of confrontation were signed by both the persons confronted.

After the investigation the investigating judge passed provisional order communicating the records to the prosecutor for his final stand.

The counsel for the accused and the civil party had a right to formulate their remarks. Upon receiving the order of the prosecutor, the judge passed an order of acquittal when no case was made out and such an order operated as res judicate unless appealed against. Otherwise, he passes an order of committal to the court of petty matters or to the correctional court. If the offence was a crime he made an order of reference to the committal bench of the court of appeal which, in turn, would decide in camera, on records only, without hearing the parties, whether the case should be committed to the sessions Court or not and passed orders accordingly. Final orders of the investigating judge were appealable before the committal bench.

They are notified to the parties with notice to their Counsels. The order of the committal bench was subject to revision by the court of Cassation.

The investigation under the French system need not end in a formal charge against anyone. During his investigation, the magistrate might find that the statute of limitations had run (prescription penale) and that he had, therefore, no jurisdiction (ordonnance de refus d'informer). The magistrate might, in his order closing the investigation, find that there were no charges enough to justify prosecution, that the

facts as shown did not constitute an offence, or that it was not appropriate to prosecute (ordonnance de non-lieu).

Appeals might be taken from orders of the examining magistrate to the indicating chamber of the local court of appeal. The prosecutor might appeal from any order of the magistrate. The accused might appeal orders assuming jurisdiction, permitting civil claims to be filed, allowing extended preventive detention, or refusing provisional release (bail). A civil party might appeal from an ordinance de non-lieu, orders refusing to investigate, and other orders that he could show as prejudicial to his civil interests.

If the magistrate found that it was an appropriate case for prosecution, he issued an order for transfer (ordonnance de renvoi). If the offense charged was a petty offence the case was transferred to a police court (tribunal d'instance, sitting for penal matters) for trial. If the offence was a misdemeanour, it was transferred for trial to the appropriate court of primary jurisdiction (tribunal de grande instance). If a felony was involved, it was the indicting chamber of the local court of appeal that dealt with it first.

The indicting chamber (chambre d' accusation) of the court of appeal had exclusive jurisdiction to order the trial of felonies. The action of the indicting chamber was designed to be expeditious. The prosecutor general of the court of appeal was required to submit the case to the court within ten days, and the court was supposed to dispose of the case as promptly as possible. The Court considered only the report of the magistrate's investigation, petitions of the prosecutor, and briefs submitted by the civil parties and the accused. Under the French Criminal Procedure counsel for the civil party and the accused might appear to argue their client's positions, and the court might summon the accused. No other witnesses were heard, however.

ROLE OF THE PUBLIC PROSECUTOR IN INVESTIGATION UNDER THE FRENCH SYSTEM

During the fourteenth century, the kings of France began to employ 'procureurs' in the principal courts for the purpose of protecting the king's interest, enforcing penalties and collecting fines (the money going to the Royal Treasury). As the King's authority extended, the powers of the procureur correspondingly increased, so that the procureur had the responsibility of investigating criminal offences and instituting proceedings. It was at this time, by reason of the powers of investigation of the procureur du Roi, that the inquisitorial system

replaced the accusatorial system under which the responsibility for instituting proceedings lay with the victim of the offence. With this development, the procureur du Roi became known as the 'Ministere publiqe'. The French Revolution did not abolish the 'Ministere public'. But dispossessed it of some of its powers which were given to another magistrate called 'l' accusateur public'. This innovation proved to be undesirable and at the end of the Revolution, the 'Ministere public' was restored to its former status, which was virtually the same today. The right to investigate and prosecute was given to the 'procureur Imperial' today known as the procureur de la Republique. The 'ministere publice' was responsible for undertaking all prosecutions on behalf of the state; he must appear in all criminal courts and all decisions of a criminal court must be made in his presence. It was the prosecutor who ensured that the court's decisions were enforced.

The Police and the Public Prosecutor

The procureur de la Republique can not issue direct orders to the police, he merely gave advice, directions and instruction, but failure to follow such instructions would probably lead to disciplinary action against the officer or member concerned. The procureur was 'on call' permanently and would usually attend the locus of any serious crime of which he must be notified by the police as soon as it was discovered.

He normally supervised the police work closely, including checking of their records. While the attitude of individual procureurs might vary, most insisted that the police report all criminal offences to them, whether or not the person responsible could be identified or traced. The police were thus deprived of the power to decide that no proceedings should be taken because of lack of evidence. The procureur maintained a personal 'dossier' on each 'officier' of the 'police judiciare' in which he assessed the 'officier's ability and any other pertinent information.

The police were also subject to the control of their superior officers and through them the control of the 'maire', 'prefet' and government minister. The 'prefet' also maintained a dossier' on each 'officier', which for promotion purposes, was probably more important than the dossier compiled by the procureur. This control by the administrative authorities had many critics, who would prefer that completed control should be given to the criminal authorities, and in particular to the procureur and the judge instruction. A further criticism was levelled against the multiplicity of police forces which could result in members from different forces all investigating the same affair at the same time independently of each other.

When the procureur is in charge of the investigation (either because he had not requested intervention by a juge d'instruction or because he was awaiting his arrival) he might visit the locus of the crime and give detailed instructions to the police judiciaire concerning the obtaining and preserving of evidence. Unofficially he might even suggest which police officer should be made responsible for certain duties; but this depended on his personal relationship with the police. He might give written observations and questions for the police to anwser; such writings being known as ,Notes Dossier'. He might order an 'expertise' - i.e. use of experts - to examine aspects of the evidence. This would include ballistic, handwriting and analytical experts, usually it was the medical expert who were frequently, summoned and examined.

Post Mortal examinations under the direction of Procureur

Post mortem examinations would usually be preceded by an X-ray of the whole body. Only one doctor would be employed if the cause of death seemed straightforward, regardless of the degree of foul play. For example, if it was obvious that death occurred by shooting, stabbing, etc. it was called straight-forward cause of death. On the other hand, if the cause of death seemed dubious or complex, the procureur would employ two doctors. Even if the accused had been

arrested prior to the post mortem, he might not be represented by a lawyer or a doctor at the post mortem itself. The procureur would however order that any relevant parts of the body should be retained for evidential purposes. As a general rule, the defence did not contest expert evidence, since the procureur would employ sufficient experts to give a result beyond all reasonable doubt. In one celebrated case, where a female died as a result of stab wounds in the back, the first expert suggested that the wounds could have been self inflicted. The procureur asked for the opinion of a second expert who disagreed with the first. Eventually the procureur instructed a total of seven experts to give their opinions, who while not agreeing in full, eventually gave as their consensus that the wounds might possibly had been self-inflicted. As a result it was decided that the accused should not be sent for trial on a charge of murder owing to lack of evidence.

Order of search and Seizure

The procureur could order an 'officier' of the police judiciaire to seize any weapons or tools apparently used in the commission of the offence and show them to any person who appeared to be responsible for the offence (if present at the locus) for identification purposes.[10] If it

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10. The 'officier' may do this on his own initiative if the procureur has not yet intervened to take charge of the inquiry.

seemed that evidence might be obtained by examining documents or other objects in the possession of any person who appeared to be responsible for the offence, the procureur might order the 'offcier' to search that person or his domicile[11] - For example if the police found someone in possession of explosives, they might search his house and any evidence they found might be used, even if it related to entirely different offences. There was a similar power for searching houses and any evidence collected there from might be used, even if it related to entirely different offences. There was similar power to search the house of any person who appeared to be in possession of documents or other evidence. Such searches must be carried out in the presence of the householder or his nominated representative, failing which in the presence of two witnesses chosen by the police it should be noted, that all that was required was the householder's presence (if possible) and not his consent. Such consent was only required if the search took place between 9 p.m and 6 a.m.[12]

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11. 'Domicile' includes any places where the person resides. The 'officier' may make such a search on his own initiative if the procureur has not yet intervened to take charge of the inquiry.
12. There are some minor exceptions to this rule concerning timing - notably offences concerned with prostitution. With regard to the general power of search, there are certain restrictions if the premises concerned are occupied by a person such as a lawyer or doctor who is bound by rules of professional secrecy.

Power of the Procureur to Question the Accused

When the accused appeared before the procureur, he had the right to question the accused if the procureur so desired. During such questioning the accused might not be legally represented. The purposive this questioning was to ensure that there was evidence of prima facie case and that if it was not there proceedings should not be taken against an innocent person. The accused had an opportunity to put forward any explanation, which, if accepted by the procureur, might lead the procureur to drop the proceedings and release the accused immediately. The examination was not intended as a means of extracting a confession or obtaining further evidence against the accused. The procureur would normally commence questioning by confirming the accused's personal particulars. Thereafter he would ask him a few questions about the main facts of the case. If the accused denied the charge against him, the procureur would not normally cross - examine him at length, leaving the function to the trial judge or a juge d'instruction, depending on the disposal of the case. If the accused made a statement, or answered any question, the procureur would dictate this in narrative form to a clerk or typist and the accused would sign the statement, as will the procureur. This was done in the form of a 'proces verbal'. The procureur would then decide how to dispose of the case and would tell the accused of his decision. The choices of

action available to the procureur were (a) to take no further proceedings and release the accused, (b) to release the accused to be cited to court later, (c) if the offence was classed as a 'delit' and no further inquiries were necessary, place the accused before the court the same day or the following day. This last mentioned procedure was known as 'flagrant delit' (not to be confused with 'enquete flagrant'). The procureur would issue a warrant called a 'mandat depot' authorising the detention in custody of the accused until his court appearance. In addition to telling the accused that this would be done, the procureur would tell the accused that he would have a right to legal advice and that when he appeared in court, he would have the option to ask for an adjournment to allow him to prepare his defence. The accused would sign a note that he had been given this advice by the procureur.[13] (d) the procureur may order that the accused be taken immediately before a juge d'instruction, while at the same time, the procureur would request the juge d'instruction to investigate the offence. This course would always be followed if the offence was a 'crime'. It would also be adopted if the offence was a 'delit' but further inquiries were necessary which the procureur estimates could best be made by a juge

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13. For court proceedings dealing with 'flagrant delit'. The examination by the procureur takes place in private. The only persons present being the police escorting the accused, the procureur and his clerk. The public is not admitted.

d'instruction. If the offence was a 'delit', requiring further minor inquiries, it was desirable that the accused be detained in custody (e.g. because he had not fixed place of abode). The procureur would only place an accused before the court by means of 'flagrant delit' procedure if no further inquiries were necessary, and apart from such procedure, the procureur had no, powers to order that an accused be detained in further custody, although a juge d'instruction might order such detention.[14]

If the suspect was brought before the procureur for examination, that terminated 'l' enquete flagrante' by one of the means above described. Should the suspect not be arrested and brought before the procureur, 'l' enquete flagrante' might be terminated by the procureur deciding that no further proceedings should be taken, or ordering that the police should continue their inquiries by means of 'l' enquete preliminaire'. If the offence was a 'crime', or serious offence, or if it was obvious that further inquiries were necessary, the procureur would

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14. Very occasionally an accused person who is not in custody will come direct to the procureur rather than the police to 'give himself up', usually the case being a 'crime passionnel'. The procureur will question the accused, then dispose of the case in one of the ways above described. Since the accused is not of the ways above described. Since the accused is not in custody at the time of the questioning, he may be legally represented by the relatives.

terminate 'l' enquete flagrante' by requesting a juge d'instruction to take over the investigation.

Powers of the Procureur in 'L' Enquete Preliminaire'

The powers given to the procureur and the police were considerably restricted than in 'l' enquete flagrante'. The procureur, in general, had the same power to order examination by experts (on the fiction that such an examination could not be delayed), but the police did not have this right (which they had in 'l' enquete flagrante' prior to the intervention of the procureur). The powers to search premises and seize evidence were much more limited, the consent of the occupier in writing being essential. This written consent usually took the following form:

> "Knowing that I could object to the visit to my house, I give you my express consent to go there, make a search, and take as productions anything you judge to be of use to the present inquiries".

If the occupier refused to give this consent, the police were powerless and could only report the matter to the procureur who might then request the intervention of a judge d'instruction who could order that the search be made.

Discretion of the Procureur to order 'No further Proceedings'.

In all cases classed as 'crimes' the procureur must request an investigation by juge d'instruction, and in cases classed as 'delits' he had a discretionary right to request such an investigation. If the juge d'intruction had not made an investigation and if there were no legal bars to taking proceedings, the procureur had a discretion as to whether or not to institute criminal proceedings. The following factors might have a bearing on how he exercised this discretion. If the victim of the offence instituted the proceedings, the procureur had no discretion, except to comment at the trial, giving his views as to the desirability of the prosecution and its conduct by the 'partie civile'. In cases where the victim did not institute proceedings, in certain instances, the procureur might only prosecute if he had the concurrence of the victim of the offence. Cases falling into this class usually involved matrimonial disputes. In certain other circumstances, the procureur, while not required to do so by law, would not normally institute proceedings unless he received a formal complaint from the victim, although such a practice depended on the attitude of the individual procureur. The cases covered by this practice usually included minor road traffic accidents, the issuing of cheques without sufficient funds to cover them where the amount was less than 100

francs or the victims was subsequently re-imbursed,[15] and cases of relatively minor importance. The procureur, waiting to see if any complaint was made to him by the victim, would mark such cases 'classer en etat' and if such a complaint was received he would then decide whether or not to prosecute. If no such complaint was received, the case was treated in the same way as if it had been marked 'No proceedings'. While to this very limited extent the action of the procureur depended on the attitude of the victim, he was in no way bound by the victim's wishes unless the latter himself instituted criminal proceedings.

In some cases involving pornographic literature, the procureur was required to obtain the views of a commission before instituting proceedings. The commission consisted of former 'magistrats', a professor of law, and representatives from the Department of Education and associations designed to protect the rights of authors, public morality and family life. The commission whose deliberations were not open to the public must be consulted if the literature had not

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15. The practice concerning 'bounced cheques' is particular to Paris, but illustrates the point. Approximately 160,000 such cases were marked 'no proceedings' in Paris in 1979. Under a law coming into effect in 1972, anyone issuing a cheque which is not met by the bank will be given an immunity from prosecution if he makes payment to the victim within 10 days and pays a sum equal to 10% of the amount involved.

illustrations, the author and editor were not identified and a copy had not been lodged with the 'depot legal' (which received copies of all printed matter for record purposes). All of these conditions must be present, otherwise whether or not the commission was consulted was left to the discretion of the procureur. The role of the commission was purely advisory and while giving its views on the nature of the literature and the desirability of a prosecution, it was not meant to exclude expert evidence at the trial, nor were its views binding on the procureur. In certain other types of offence, such as breach of peace control regulations and merchant marine offences, the procureur should notify the appropriate government department of his intention to prosecute, but this did not affect his decision as to whether or not to prosecute.

All the above cases only fractionally impinged on the wide discretion given to the procureur to decide whether or not to institute criminal proceedings. Even where there was no legal bar to proceedings, where the accused had been identified and there was sufficient evidence to justify proceedings (which was often a question of law or interpretation of the evidence), the procureur still had the discretion to refuse to prosecute ('classer sans suite'), and was not required to state the reasons for his decision. The most common

reasons underlying such a decision were that the offence was of a trivial nature ('ne trouble pas suffisamment ;'ordre public') or that the taking of criminal proceedings would be out of all proportion to the offence itself-such as a case involving a respectable middle aged woman committing a minor shoplifting offence, or a road accident where the only person injured was the driver or his wife. The decision to mark a case 'classer sans suits' was not final and might be reviewed if further evidence came to light. It also did not found as a judicial decisions, and hence could not be founded on for a plea of 'res judicate'. The procureur had no discretion to order 'no further proceedings' if proceedings were ordered by a juge d' instruction or the Chambre d'accusation, when the procureur must institute proceedings regardless of his views of the case.

EVIDENTIARY VALUE OF STATEMENT MADE BY THE ACCUSED TO THE POLICE AND THE PROCUREUR

Under the French criminal proceedings an accused had the privilege not to answer incriminating questions. On the other hand, a witness in the judicial phases of a criminal proceeding did not have this privilege. Besides, the privilege did not apply to interrogations conducted by the police on their own. It thus became important to

determine the status of the person who was subjected to an interrogation.

For the purposes of a criminal investigation, the police could legally take a person into custody (garde a vue) for periods totalling forty-eight hours without bringing him before a competent magistrate. During this period the judicial police officers were permitted to interrogate the person in custody, but in order to prevent abuses they were required by law to state in their report the duration of the interrogations and the duration of the intervals between them. In addition, the person detained might ask for a medical examination which must be granted if he was kept in custody for more than twenty-four hours.[16] Nevertheless, a person so detained by the police was not considered an accused. On the other hand, he did not appear to be under a legally enforceable obligation to answer questions which were unrelated to his identity.[17] Ordinarily, he would not refuse to answer questions asked to him by the police.

16. Patey, "Recent Reforms in French Criminal Law and Procedure", 9 Int'l. and Comp. L.Q.383, 390-91.

17. Under the Code of French Criminal Procedure judicial police officers (in cae of a flagrant crime or misdemeanor) and agents could summon and question all person who were capable of furnishing information about the facts or about seized documents or objects and that persons so summoned were obligated to appear and answer questions. If they did not satisfy these obligations, notice thereof was given to the public prosecutor (procureur de la Republique) who could compel them to appear by using the police force. Thus, it could be seen that even in the situation envisaged by Article 62 the only sanction for refusing to answer police questions was to be forcibly brought before the procureur.

The police could legally compel a person to answer questions only when he was being questioned as a witness under oath by virtue of a rogatory commission from an investigating judge. Eventhen, they might not question a witness under oath the person who has been formally charged, that is, the accused, or a person who is strongly of being guilty. In proceedings involving serious or grievous crimes the judicial phase started with the preliminary judicial investigation (instruction preparatoire) conducted by the investigating judge (juge d'instruction) or by the judicial police by virtue of a commission from the judge.

If the preliminary judicial investigation was initiated by a complaint filed by a private party accompanied by a claim for damages, the guilty party expressly named in the complaint could refuse to answer as a witness, and insist on being formally charged. Once, of course, he was formally charged, it was clear that he was the accused.

If the preliminary judicial inquiry was initiated by a "requisitoire introductif" by the public prosecutor which expressly named a person as the allegedly guilty party, the party named in it was ordinarily considered the accused. Under exceptional circumstances, however, for example when the judge had convincing proof that the prosecutor

was mistaken with regard to the identity of the person named in the requisition, the judge might nevertheless question such person as a witness under oath.

Under the French Criminal Procedure all facts concerning both the offence and the person alleged to have committed should be placed before the court. This aim is achieved by making detailed pre-trial inquiries.[18]

No accused person could plead guilty when the case was called in court, so it followed that all court proceedings were trials. A French court would only reach its decision after an examination of all facts regardless of the attitude of the accused.[19] In practice the accused could always indicate that he did not dispute the evidence against him, and while the evidence would still be examined, the examination would be of a much more cursory nature, great use being made of leading questions and statements given by witnesses prior to the trial. The trial itself would be shorter, and there would be no sense

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18. That a person expressly named in a complaint filed by a private party may consent to be interrogated as a witness under oath.

19. Although in the tribunal de police, when dealing with minor cases, the court merely asks the accused if he admits the facts, and if he do so, the court proceeds to penalty, without any examination of the evidence.

of animus or dispute. Since, the accused was not expected to plead quality as all accused persons were presumed innocent until found guilty.[20]

The onus of proving the guilt was on the prosecution; it was not discharged by a confession by the accused. The police, the procureur, the jude d'instruction and the court-all had the power to examine the accused, who might not be legally represented when being questioned by the police or the procureur.[21] During such examinations it was illegal to use threats, force, or other improper means to obtain a confession. Furthermore, the accused was entitled to refuse to answer any question put to him and could not be compelled to do so. Accused persons frequently availed themselves of this right when being examined by the police. Courts seem to regard confessions obtained by the police with suspicion, especially if such confessions were subsequently retracted. It was accepted that false confessions could be obtained due to mental illness, the desire for notoriety, an attempt to protect some other person, improper pressure by the police, or a

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20. An exception to this rule is when the accused is charged with certain offences classed as 'contraventions', when he will be assumed to be guilty until he proves his innocence.

21. Nor on his first appearance before a juge d'instruction, when normally the examination is of a formal nature, the facts of the case not being discussed.

simple misunderstanding of a question or answer. A confession was therefore regarded merely as part of the evidence, which might or might not be supported by other facts. The judge had complete freedom as to what value should be given to a confession-he might consider it enough by itself to convict the accused, or he might accept only part of it, or he might reject it in its entirety.

It appeared to be a novel procedure under the French Criminal Justice system that the investigation was done by the investigating magistrate who recorded the statements of the accused and the witnesses. The statement recorded were placed before the court for perusal of the presiding officer for arriving at a just and fair conclusion. It was also pertinent to note that any statement made to the procureur de la Republic could be placed before the court for assessment and it was also taken into consideration by the court.

Admissibility of evidence

The purpose of Criminal trial under the French system was to discover the truth by placing all the available information before the court. In consonance with this purpose French law allowed all types of evidence to be adduced before the court. There were few exceptions

to this rule. Hearsay evidence was not admissible. With regard to evidence obtained irregularly, such as by the unlawful actions of a police officer, there were no fixed rules, each case being decided on the merits, but in general, the trend was to admit such evidence. If, however, a judge were to act on information secretly disclosed to him by a party to the case and not disclosed to the other parties, such information would not be accepted. The court would not admit evidence obtained unfairly or improperly. Evidence would not be admitted if it had been obtained by hypnosis, truth drugs, impersonation or other improper means. Tape recorded conversations would only be admitted if the court was satisfied as to the accuracy of the recording process.

The prosecution, defence and 'partie civile' all had rights to cite witnesses, and all persons cited were competent to give evidence (although not all do so under oath).[22] All witnesses might be compelled to give evidence. Accused and his spouse might refuse to answer questions, the court however would be free to comment on their silence and draw any conclusion therfrom.[23] Another exception concerns

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22. Juveniles, persons with an interest in the case, etc., do not take the oath.

23. The court may also consider earlier statements made by the accused to the police or to a juge d'instruction.

witness such as doctors who were required by law to observe professional secrecy. On authority stated that even if a witness in this class agreed to give evidence in violation of the law of professional secrecy, such evidence would be inadmissible. The rule of secrecy did not apply to journalists who could be compelled to reveal their sources. Any witness refusing to give evidence was liable to be fined. A witness who had been specifically paid for giving evidence might only be heard if none of the parties to the case objected.

In theory all evidence should be given verbally at the trial, but in practice this rule only applied to the cour d'assises, and even there the rule was not always strictly enforced. In the tribunal de police and the tribunal correctional the court would hear any witness' who had been cited, supplementing such evidence with information contained in the 'dossier' or the police report. In some trials in these courts there were no witnesses, and the accused was questioned and the evidence evaluated on the contents of the 'dossier', the relevant parts being read aloud by the presiding judge.

THE PRIVILEGE OF THE ACCUSED PERSONS AGAINST SELF-INCRIMINATION UNDER THE FRENCH CRIMINAL JUSTICE SYSTEM

Recognition of the Privilege

Under the French system an accused was considered to have the privilege against self incrimination.[24] The French criminal produce expressly recognised the privilege by article 114 although it pertained only to the investigation conducted by the investigation judge. The said article provided that at the time of first appearance, the investigating judge determined the identity of accused, told him that he was free not to make any statement. Though the article related only to the first appearance before the investigation judge, it seemed well understood (though not spelled out in the literature) that the accused's privilege recognised by that article extended to all judicial phases of a criminal proceeding. Whether an accused who was in police custody had the privilege was not clear. In any case police had no legal means to compel anyone to answer questions which were unrelated to his identity.[25]

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24. Neither in France or Germany nor in the Netherlands is the privilege a constitutional right. In these countries, it is right included in their codes of Criminal Procedure. Vouin, "The Privilege under Foreign Law, France", 51 J.Crim. L., C. & P.S.169 (1960); Gorphe, "L'Appreciation des Preuves en Justice", 215 (France 1947); Vidal & Magnol, Cours de Droit Criminel et de science penitentiaire II 1070 (France 1949).

25. Vouin, Police Detention and Arrest Privileges, France", 51 J. Crim. L., C. & P.S. 419-429 (1960).

The Privilege and its Scope

It was not the privilege which restrained the accused from making a sworn statement. Rather it was a related policy which sought to avoid putting the accused in the dilemma of committing perjury or incriminating himself because statement made under those circumstances were considered untrustworthy.[26] Furthermore, in recognition of the fact that an accused who fought for his freedom would lie, an accused who did lie did not commit a crime.[27] There was no question that the privilege afforded an accused at least the right to remain silent at the face of questioning by the police, by prosecuting officials, and by judges.[28] However, unlike in common law systems the

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26. See Minkenhof, Nederlandse Strafvordering, 23, 222-23 (2nd ed. 1948): Van Bemmelen, Strafordering, Leerboek Van het Netherlands Strafprocesrecht, 358 (6th ed. 1957); Hamson er vouin, "Le process Criminel en Angleterre et en France". 23 Revue International de Droit Penal 177, 189 (1952); Garraud, precis de Droit Criminel 818 (France". 23 Reveue International de Droit Penal 177, 189 (1952); Garraud, precis de Droit Criminel 818 (France, 15th ed. 1934); Hammelmann, The Evidence of the Prisoner at his Trial; A comparative Analysis, 27 Can. B.Rev. 1949).

27. See Minkenhof, note 11, Of.cit., *Supra.*, at 22; Garraud, note 11, *Op.cit. Supra* at 818; Meyer, "German Criminal Procedure; The position of the Defendant in Court", 41 A.B.J. 592, 666 (1955); Hammelman, note 11, *supra* at 656.

28. See Meyes, "Scientific Criminal Investigation Techniques Under Dutch Law", 51 J. Crim.: ., C. & P.S.553, 653-657 91960), who claims that the unwritten prohibitions in Dutch law against regarded as deriving from the privilege against self-incrimination". (Emphasis Supplied); Clements, "Privilege against self-incrimination, Germany," 51 J. Crim. L., C. & P.S.172, 173 91960), to the effect that some German cases and legal writers "have stretched the protection of the suspect from self-incrimination beyond his privilege of silence, and have developed the principle that the suspect is under no obligation to make active contribution to his conviction (such as furnishing a handwriting sample, or surrendering objects of evidentiary value)".

accused could not avoid submitting himself to judicial interrogations which were not only considered a means of arriving at the truth, but also an opportunity for the accused to exculpate himself.

Under the French system, everyone was under a legal obligation to disclose his identity to the police. Furthermore, several articles of the Code of Criminal Procedure provided that the accused be interrogated about his identity. For example, the code of French criminal procedure provided that in cases involving serious crimes (which would be tried in the Cour d' Assises) the investigating judge determined the identity of the accused at the accused's first appearance during the preliminary judicial investigation. It also provided for a similar determination by the public prosecutor (procureur de la Re'publique) in cases where the accused was arrested more than 200 kilometers from the official seat of the investigating judge who issued the arrest warrant. The French criminal procedure further provided that the presiding judge or one of his co-judges (assesseurs) interrogate the accused about his identity in advance of trial.[29] There were also articles of the code which provided that the presiding judge of the "tribunal correctional" (the court having

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29. See Kock, "Criminal Procedure in France", 9 Am. J.Comp.L, 253, 258 (1960).

jurisdiction over misdemeanours) and the judge of the "tribunal de police" (the police court which tried minor offense) to determine the identity of the accused. However, the Code did not seem to provide for a penalty should the accused refuse to identify himself. Nevertheless, it was not likely that an accused would refuse. Such action could only prejudice him, because it would be noted in his dossier and inevitably come to the attention of the court in the event he was tried. In fact, an accused under the French system would rarely refuse to answer question put to him by a judge.[30]

However, the privilege did not provide the accused with immunity from being searched, photographed, finger printed, physically and mentally examined, shaved, measured, and subjected to like procedures. In France, Germany, or Netherlands, the accused might not be forced to submit to nacre-analysis or to lie detector tests. In Germany, statements obtained by virtue of such tests may not be used even if they were administered with the consent of the accused. This was the practice in Pondicherry also.

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30. See Anton , "L' intruction Criminelle", 9 Am.J.Comp.L.441, 448, 449 (1960); Bedford, "Truth and Consequences of French Justice", Esquire, June 1961, pp.73-76.

At the end of the eighteenth and the beginning of the ninettenth century, French criminal procedure underwent a series of reforms which culminated in the Cod'd Instruction Criminelle of 1808.[31] The original impetus which led to these reforms came from the eighteenth century philosophers led by Voltaire, Montesquieu, and Beccaria. They protested against the brutalities of the criminal procedure which were oriented to extracting the accused's confessions. Although torture was abolished in the French system in 1788, the first wholesale reform did not take place until 1791. This reform not only relied heavily on English procedure, but drew also inspiration from American ideas. Shortly thereafter many of the reforms were abolished, and in 1808 the original version of the Code d' Instruction Criminelle was enacted. The Code represented a compromise between the pre-revolutionary inquisitorial procedure and the accusatory procedure adopted from England. Pre-trial procedure with the exception of the legalized torture was essentially that of the Ordonnance Criminelle of 1670 which, with some exceptions, had continued in effect. The procedure at the trial,

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31. See Ploscowe, "The Development of present-Day Criminal Procedures in Europe and America", 48 Harv, L.Rev.433, 453-462 (1935). Note that although the code d'Instruction Criminelle was recently renamed "Code de Procedure Penale", with some exceptions its basic structure has not been changed.

however, was modelled along the English lines. The Code abolished the accused's obligations to take the oath and to answer questions, and, since there were no longer any legal means to force an accused to answer, it, in effect, created the privilege. The reforms which survived to be incorporated in the Code had their roots in the desire to abolish the brutalities of the old procedure, especially interrogation under torture, for the purpose of extracting a confession. It had become evident that confessions obtained by the threat or use of force were not freely made and it tended to be lacking in trustworthiness. But despite the privilege, in effect, contributing to possibility of the trustworthy statements from the accused, the policy of the privilege in French system is not to ensure trustworthiness, but to prevent the accused from being subjected to undue psychological pressure or to physical abuse. That the policy of the privilege is thus limited is evident from the fact that an accused who lied during interrogations did not incur separate criminal liability.[32]

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32. Note, if the accused's lying comes to the attention of the court, the Court in determining sentence is likely to take it into consideration.

The Privilege is only for the Accused

The accused formally charged (inculpe) alone had this privilege. Also, a witness in the judicial phase of a criminal proceeding did not have the privilege. Besides, the privilege did not apply to interrogation conducted by the police on their own behalf. It thus became important to determine the status of the person who was subjected to interrogation.

The police, for criminal investigation, could legally take person into custody (garde a vue) for periods totalling forty-eight hours without bringing him before a competent magistrate. During this period the judicial police officers were permitted to interrogate the person in custody, but in order to prevent abuses they were required by law to state in their report the duration of the interrogations and the duration of the intervals between them. Apart from this, the person detained might ask for medical examination which must be granted if he was kept in custody for more than twenty-four hours. Nevertheless, a person so detained by the police was not appear to be under a legally enforceable obligation to answer questions which were unrelated to his identity. Ordinarily, of course, he would not refuse to answer questions asked him by the police.

In proceedings involving serious or grievous crimes the judicial phase started with the preliminary judicial investigation (instruction preparatoire) conducted by the investigating judge (Juge d'instruction) or by the judicial police by virtue of a commission from the judge. The police might legally compel a person to answer their questions only when questioning a person as a witness under oath by virtue of a rogatory commission from an investigating judge.

If the preliminary judicial inquiry was initiated by a *requisitoire introductif* by the public prosecutor which expressly named a person as the allegedly guilty party, the party named in it was ordinarily considered the accused. Under exceptional circumstances, however, for example when the judge had convincing proof that the prosecutor was mistaken with regard to the identity of the person made in the requisition, the judge might nevertheless question such person as a witness under oath. In the preliminary judicial investigation initiated by a complaint by a private party accompanied by a claim for damages, the guilty party expressly named in the complaint might refuse to answer as a witness, and insist on being formally charged. Once, he was formally charged, he was considered the accused.

The French criminal procedure provided for the preliminary judicial inquiry (whether initiated by the prosecutor or by a private party) directed against an unknown person.

> "The investigating judge in charge of an investigation, the magistrates and judicial police officers acting by virtue of a rogatory commission (from the investigating judge) might not, for the purpose of defeating the rights of the defense, question a person concerning whom there was evidence which was serious and consistent with guilt".

In cases not proceeded by a preliminary judicial investigation, the judicial proceedings were begun by petitioning the court to issue an order directing the accused to appear (citation directe). This order was served on the accused or at his domicile. In these cases there was no question who the accused was. In conclusion, notwithstanding the privilege it often happened that between the time suspicion falls on a person and his formal accusation he was interrogated by the police or judicial officials as a witness under oath; this is so as not to run afoul of the rule that an accused may only be interrogated by the investigating judge after having been notified by the judge that he is free not to make any statement and of his right to choose counsel.

Notification of the Privilege to the Accused

French Code of Criminal Procedure as applicable to Pondicherry required that the accused be notified of the privilege. This notification was only required at the first appearance of the accused (as the accused) before the investigating judge.[35] At this time the accused might have been, and often had been, already interrogated by the police, and by the prosecuting and judicial authorise in another capacity without the benefit of counsel and without having been notified that he would not legally be compelled to make any statements. Thus, in many cases the notification requirement had not have practical value, especially to those ignorant of the law. The fact that in practice the person who really was the accused was not notified of his right to claim the privilege seemed consistent with the French view that the interrogation was a device to provoke statements which might incriminate as well as exculpate.[36] However, once a person was

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35. See Steven & Levasseur, Note that failure to give the required notification not only invalidates the accused's deposition at his first appearance, but also all subsequent proceedings in the case. Apparently, it does not prevent the institution of a new proceeding against the accused.

36. Article 71 of the code of Criminal Procedure which in the case of a flagrant misdemeanour (delit flagrant) punishable by imprisonment provides for the interrogation of the accused by the public prosecutor without notification that he is free not to Article 70 of the Code of Criminal Procedure provides that in the case of a flagrant felony (crime flagrant), where the investigating judge has not yet taken charge of the matter, the public of having participated In the crime, and Immediately interrogates the person so brought before him. If such person appears of his own free will accompanied by his defence counsel. This appears to be the only situation in advance of the judicial phase of a criminal proceeding where a person is entitled to the benefit of counsel. See Vouin, "police interrogation Privileges and Limitations, France,: 52 J.Crim. L., C. & P.S., 57, 58 (1961).

formally considered the accused, he had the right not to be interrogated until he had consulted with counsel. This was often an empty formality in practice however.

An accused who remained silent generally would run the risk of being taken into custody to await trial (detention preventive). Investigating judges, who is any event were quite unsparing in imposing this type of custody, would be even more so inclined when they were confronted with a recalcitrant accused. Although the prosecution had the burden of proof and the accused was presumed innocent till proven guilty, under French law, all evidence-including the demeanour and attitude of the accused, was subject to the uncontrolled evaluation of the court. This, in effect, imposed an obligation on the accused to furnish an explanation. Accordingly, although his silence itself did not legally amount to a tacit confession or admission of guilt, it would not only result in the court drawing an inference adverse to the accused but also reinforce the evidence introduced by the prosecution. In any event, the prosecution at the trial would make most of the accused's silence.

Witnesses under the French criminal cases did not have privilege against self incrimination, and thus there was no problem of waiving it. The witness did not waive the privilege by answering a particular question, incriminating or otherwise. He might at any time refuse to answer all or some questions, even if he answered the very same question during an earlier stage of the proceedings.[37] The questions previously answered by the accused found their way to the trial court through reports included in the dossier.

In practice the privilege does not afford a great deal of protection to the accused, and it was generally not claimed. The average accused did not know that he was not obliged to answer when interrogated by police or judicial officials.

The privilege amounted to little more than a check on the excesses which could be sometimes committed during the interrogations of an accused. The reason for the privilege's ineffectiveness seemed to lie in the fact that continental criminal procedure did not emphasise an independent investigation, but was still essentially inquisitorial in its orientation, despite the abolition of legalised torture and the introduction of safeguards for the accused. In short, its emphasis was on obtaining the accused's confession from his own mouth. It was this orientation which explained why the privilege never achieved the stature it achieved in the common law world.

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37. Note that in France an accused fearing the danger of adverse consequence from total silence will in practice often evade or leave unanswered a particular question. He may even lie. See Hammelman, the evidence of the prisoner at his trial; A comparative Analysis, 27 Can. B.Rev. 652 (1949).

PART - II

PRE-TRIAL PROCEDURES UNDER THE PRESENT INDIAN SYSTEM

The pre-trial procedures under the CPC, 1973 could be considered to be under the control of the police force. Investigation is the main task assigned to the police. Though the judiciary has been assigned supervisory role, it cannot take over the investigation process.[1] A magistrate is kept in the picture at all stages of police investigation, but he is not authorised to interfere with the actual investigation or to direct the police how that investigation is to be conducted.[2]

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1. *State of Bihar* V. *J.A.C.Saldhana*, 1980 SCC (Cri) 272, 286.

2. 41st Report, Vol.1, p.67, para 14.2.

ARREST

Arrest means physical restraint put on a person as a result of allegation of accusation that he has committed a crime or an offence of quasi-criminal nature.[3] A ordinary and natural sense, arrest means the apprehension or restraint on the deprivation of one's personal liberty. The question whether one is under arrest or not does not depend upon the legality of the arrest but upon whether he has been deprived of his personal liberty to go wherever he pleases. The essential elements to constitute arrest are that there must be an intent to arrest under the authority, accompanied by seizure or detention of the person in the manner known to law, and that the restraint is so understood by the person arrested. In order to effect arrest actual seizure or touching of the body is not necessary but at the same time mere utterance of a strong word or sound, a gesture of the index finger or the hand, the sway of the hand or even the flicker of an eye are enough to effect arrest, unless of course the person concerned submits to the custody of the arrester.[4]

Section 41(1) of the criminal procedure code confined only to the power to arrest and extends to both cognizable and non-cognizable

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3. *State of Punjab V. Ajaib Singh*, AIR 1953, SC 10.
4. *Roshan Beevi* V. *Jt. Secretary, Govt. of Tamil Nadu*, 1984, Cr.LJ, 134.

offences; but it would not empower the police officer to investigate into the case if the offence involved is non-congnizable, without the order of a competent magistrate under S.155(2) of CrPc.[5] Thus preventing a person's movements and from moving according to his will amount to arrest of such person.[6]

Arrest may be necessary not only for the purpose of securing the attendance of the accused at the time of trial, but it may become necessary 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. Arrest may sometimes become necessary for obtaining the correct name and address of a person committing a non-cognizable offence. A person obstructing a police officer in discharge of his duties is also liable to be arrested to put a stop to such obstructions. Likewise a person escaping from lawful custody is liable to be arrested and re-taken in to custody.

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5. *Avinash* V. *State of Maharastra* (1983) Cr. L.J. 1833 (Para 9) Bom.

6. *Kaser Otmar* V. *State of T.N.* 1981 Mad LW (Cri) 158 (Mad HC).

The code of criminal procedure contemplates two types of arrests: (a) arrest made in pursuance of a warrant issued by a magistrate; and (b) arrest made without such warrant but made in accordance with some legal provision permitting such arrest.

Arrest -how Made:

Arrest is a mode of formally taking a person in police custody, but a man may be in custody in other ways, e.g. Surveillance or restrictions on the movement of a person.[7] Arrest is complete where there is submission to custody by word or action. Actual touching of the body of the person to be arrested is not necessary.[8]

Section 46 of the Cr.P.C. explain how arrest could be made. Arrest being a restraint of the liberty of a person, it can be effected by actually touching the body of such person or by his submission to the custody of the person making arrest. An oral declaration of arrest without actual contact or submission to custody will not amount to an arrest.[9] The submission to custody may be by express words or may

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7. *Sardar* V. *State*, 1970, Cr.L.J, 325.

8. *M.K.Cheriyan* V. *D.Hohnson*, 1969 Ker LT, 597: 1969 Ker LR 826.

9. *Harmohanlal* V. *Emperor*, 30 Cri. LJ. p.128.

be indicated by conduct.[10] If a person makes a statement to police officer, accusing himself having committed an offence, he would be considered to have submitted to the custody of the police officer.[11] If the accused proceeds towards the police station as directed by a police officer, he would be held to have submitted to the custody of the police officer.[12]

In case there is forcible resistance to or attempt to evade arrest, the person attempting to make arrest may use all necessary means for the same. Whether the means used for arrest were necessary or not would depend upon whether a reasonable person having no intention to cause any serious injury to the other would have used to effect his arrest. Any resistance or obstruction to lawful arrest has been made punishable under sections 224, 225, 225-B of IPC.

Though persons making arrests can use all necessary means for the purpose, they have not been given any right to cause the death of

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10. *Paramhansa* V. *State*, AIR 1964 Ori 144.

11. *Santokhi Beldar* V. *Emperor*, 34 Cri. LJ 349, 351 (Pat H.C).

12. *Roshan Beevi* V. *Secretary to Govt. of Tamil Nadu*, 1984 Cri.LJ 134 (FB) (Mad HC).

a person who is not accused of an offence punishable with death or imprisonment for life.[13] Persons arrested shall not be subjected to more restraint than is necessary to prevent his escape.[14]

ARREST WITH WARRANT

A magistrate taking congnizance of an offence can issue a warrant for the arrest of the accused as provided under S.204 of Cr.P.C. read with S.87 of Cr.Pc. A warrant of arrest is a written order issued and signed by a magistrate and addressed to a police officer or some other person specially named, and commanding him to arrest the body of the accused person named in it.

When a warrant is directed to police officer for execution outside jurisdiction, he cannot endorse it to another police officer outside jurisdiction of the court which issued the warrant.[15]

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13. Section 46(3) of Cr.P.C.

14. Section 49 of Cr.P.C. and See *Aftimesh Rein* V. *Union of India*, 1988; SCC (Cri) 900, *D.K.Basu* v. *State of W.B.* (1987). SCC Wherein the Supreme Court has issued detailed instances citing various decisions; Also see Citizens for Democracy represented by its *Presendent* v. *State of Assam* (1996). SCC.

15. *Kunwar Sen* v. *State of U.P.* 1968 All Cr. 409.

Warrant to arrest is to be issued strictly according to law because it effects deprivation of the personal liberty.[16] The warrant of arrest must bear the signature of the magistrate, else it will be invalid.

A warrant of arrest remains in force till it is executed, or cancelled by the court issuing it. Accordingly it has been held that it would not be invalid simply on the expiry of the date fixed by the court for the return of the warrant.[17] A 'Bailable' warrant can be issued both in case of bailable and non-bailable offences. If the non-bailable offence is only of a technical nature, then in case of such an offence it would be appropriate to issue 'a bailable warrant'.[18]

A warrant directed to any police officer can also be executed by any other police officer whose name is endorsed upon warrant by the officer to whom it is directed or endorsed.[19] However, this rule will not control the special procedure provided by SS,78-81 for the execution of warrants outside that local jurisdiction of the court issuing the same. A

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16. *Jugal Kishore More* v. *C.P.Magistrate*, AIR 1968 Cal. 220.

17. *Emperor* v. *Binda Ahir*, 29, Cri.LJ, 1008 (Pat HC).

18. *Marula Sidda* v. *Emperor*, 12. Cr.1.LJ.30.

19. Section 74 of the Cr.P.C.

warrant of arrest can be executed at any place in India. When a warrant of arrest is to be executed outside the local jurisdiction of the court issuing it, the procedure laid in SS 78-81 shall be followed.

Every person is bound to assist a police officer reasonably demanding his aid in arresting or preventing the escape of any other person whom such police officer is authorised to arrest. Section 38 of the Cr.P.C. empowers a private citizen to assist a person other than a police officer in the execution of a warrant directed to such person.

ARREST WITHOUT WARRANT:

The exigencies of the circumstances may require a person to be arrested without warrant if such person is reasonably suspected to have committed a serious cognizable offence. Arrest without warrant could also be possible even in less serious offences if the accused does not give his correct address. At time without warrant arrests could be made by police. In certain exigencies private citizens can also effect arrest without warrant. Section 41 and 42 of Cr.P.C. confer wide powers on the police for making arrests without warrant under special circumstances.

Section 41 of the Cr.P.C. reads as follows:-

41(1) Any police officer may, without an order from a Magistrate and without a warrant, arrest any person.

(a) 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; or

(b) Who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house breaking; or

(c) Who has been proclaimed as an offender either under this code or by order of the State Government; or

(d) In whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) Who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape; from lawful custody; or

(f) Who is reasonably suspected of being a deserter from any of the Armed forces of the Union: or

(g) Who has been concerned in or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exist, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition or otherwise, liable to be apprehended or detained in custody in India; or

(h) Who, being a released convict, commits a breach of any rule made under sub section (5) of section 356; or

(I) For whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specified the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

(e) Any officer in charge of a police station may, in like manner, arrest or cause to be arrested any person, belonging to one or more of the categories of persons specified in section 109 or section 110 of Cr.P.C.

Section 42 of Cr.P.C. lays down:

42(1) when any person who, in the presence of a police officer, has committed or has been accused of committing a non-cognizable

offence refuses, on demand of such officer to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.

(2) When the true name and residence of such person have been ascertained, he shall be released on his executing a bond, with or without sureties, to appear before a magistrate if so required.

Provided that, if such person is not resident in India, the bond shall be secured by a surety or sureties resident in India.

(3) Should the true name and residence of such person not be ascertained within twenty four hours from the time of arrest or should he fail to execute the bond, or, if so required, to furnish sufficient sureties, he shall forthwith be forwarded to the nearest magistrate having jurisdiction.

The Supreme court also recently issued the following instructions in *D.K.Basu* v. *State of W.B.*[19a]

19a. (1997) 1 SCC 416; 1997 SCC (Cr 1) 92.

(1) The police personnel carrying out the arrest and handling the interrogation of the arrested should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrester must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a menu of arrest at the time of arrest and such memo shall be attested by atleast one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall be also be countersigned by the arrestee and shall contain the time and date of arrest.

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

(4) The arrest should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any

present on his/her body must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

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

(6) Copies of all the documents including the memo of arrest referred above should be sent to the Illaqa Magistrate for his record.

(7) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout interrogation.

(8) A police control room should be provided at all districts state head quarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest, within 12

hours of effecting the arrest and at the police control room it should be displayed on a conspicuous Notice Board.

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

INVESTIGATION

Investigation means collection of evidence and starts the police officer initiate steps after having come to know about the commission of a cognizable offence.[20] It involves ascertainment of facts, shifting of materials and search for relevant data.[21]

Once the police officer forms an opinion that there are grounds for investigation it stands. The other subsequent acts are deemed to have been taken during investigation.[22] The writing of F.I.R. may be done subsequently.[23]

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20. *Radhey Sham* V. *State* (1972) 74 Punj LR (D) 228.
21. *State* V. *Paraswar* AIR 1968 Ori.20.
22. *D.Sirajuddin* V. *Govt. of Madras*, AIR 1968 Mad. 117.
23. *V.Rugmini* V. *State of Kerala*, 1987, Cr.LJ, 200 (Ker).

(I) Proceeding to the spot;

(ii) Ascertainment of the facts and the circumstances of the case;

(iii) Discovery and arrest of the suspected person.

(iv) Collection of evidence relating to the commission of the offence which involves

(a) An examination of various persons (including) the accused and recording to their statements, if the I.O thinks it necessary.

(b) The search of places, seizure of things considered necessary for the investigation and to be produced at the time of the trial: and

(c) Formation of opinion as to whether it is a fit case for the accused to be sent up for the trial and, if so, taking steps to file charge sheet.[24]

Thus investigation includes discovery and arrest of the suspected offender and the search of places and seizure of things considered necessary for the preparation of the case, inquiry or trial.

The police is the principal agency for carrying out the investigations of offences. To make this agency an effective and efficient instrument for criminal investigations, wide powers have been

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24. *H.N.Rishbud* V. *State of Delhi*, AIR 1955, SC 196. also see *Vijayaragavan* V. *C.B.I.*, 1984 Cri.L.J. 1277 (Ker Ji).

given to the police officers.[25] Apart from the duty of the public to give information to the police in respect of certain serious offences, an investigating police can require the attendance of persons acquainted with the facts and circumstances of the case under investigation.[26] He can examine witnesses and record their statements.[27]

The Apex court has extensively considered the parameters of S.161(2) Cr.P.C. and the scope and ambit of Art.20(3) of the constitution in Nandini Satpathy case.[28]

According to the Apex court, the accused person cannot be forced to answer questions merely because the answers thereto are not implicative when viewed in isolation and confined to that particular case. He is entitled to keep his mouth shut if the answer sought has a reasonable prospect of exposing him to guilt in some other accusation actual or imminent, even though the investigation under way is not with reference to that.

Tendency to expose to a criminal charge is wider than actual exposure to such charge. In determining the incriminatory character of

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25. Code of Cr. P.C. and Police Act, 1861.
26. S.160 of Cr.P.C.1973.
27. S.161 of Cr.P.C, 1973.
28. *Nandini Satpathy v. P.L.Dani*, (1978) 2 SCC p.424.

an answer the accused is entitled to consider - and the court while adjudging will take more of - the setting, the totality of circumstances, the equation, personal and social, which have a bearing on making an answer substantially innocent but in effective guilty in import. However factful claims, unreasonable apprehensions and vague possibilities cannot be the hiding ground for an accused person. He is bound to answer where there is no clear tendency to criminate.

Compelled testimony, has been considered as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like. Frequent threats of prosecution if there is failure to answer may take on the complexion of undue pressure violating Art. 20(3). Legal penalty by itself not amount to duress but the manner of mentioning it to the victim of interrogation may introduce an element of tension and tone of command perilously hovering near compulsion.

Apart from these main principles, the Apex court also addressed itself to the further task of concretising guidelines with a view to give full social relevance to this judgement.

(1) 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. This requirement will obviate the overreaching of Art.20(3) and S.161(2).

(2) The police must invariably warn - and record that fact - about the right to silence against self-incrimination; and where the accused is literater take his written acknowledgement.

(3) After an examination of the accused, where lawyer of his choice is not available, the police official must take him to a magistrate, doctor or other willing and responsible non-partisan official or non-official and allow a secluded audience where he may unburden himself beyond the view of the police and tell whether he has suffered duress, which should be followed by judicial or some other custody for him where the police cannot reach him. That collocutor may briefly record the relevant conversation and communicate it to the nearest magistrate.

While the police officers have the power and also the duty to investigate into all cognizable offences, they are enjoined not to investigate the non-cognizable offences without the order of a

competent magistrate. It is pertinent to note that the power to investigate is not conferred on every police officer. Only an officer in charge of a police station or other officer of a higher rank has been empowered by the code to investigate.[29]

INVESTIGATION BY AN AUTHORISED PRIVATE CITIZEN

Any person aggrieved by the commission of any cognizable offence need not necessarily go to the police for taking action. He can, directly submit a complaint to a magistrate. The magistrate may thereupon take cognizance of the offence and proceed to take steps for the investigation of the complaint against the accused person. This alternative procedure is useful, particularly when the police officers, for one reason or other, are indifferent or likely to be indifferent towards the investigations; or are colluding with or shielding the offender. In such circumstances the magistrate taking cognisance has power to direct an investigation to be made by a person other than a police officer.[30] Such person shall have for that investigation all the powers conferred by the

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29. Section 156 of Cr.P.C., 1973.

30. Section 202 (1) of Cr.P.C., 1973.

criminal procedure code on an officer in charge of a police station except the power to arrest without warrant.[31]

The system of filing private complaints are available under the present system. The private complaints directly made to the magistrates are attended to immediately and the criminal is booked to face the charges made by the magistrate.

Under the Indian System of Investigation the police after receipt of the information about the commission of a cognizable crime starts investigation by visiting the scence of crime, arresting the suspects, examining the witnesses collecting the case properties and material objects, preparing Mahazar and seizure memos to send the same to the trial magistrate for preserving for obtaining experts opinion. But in non-cognizable cases the investigation is done only after obtaining of permission from the having jurisdiction.

For the purpose of investigation the police officer can require the attendance of the witnesses, examine them and record their statements

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31. Section 202 (3) of Cr.P.C. 1973.

under the French system an examining Magistrate carries out all these duties. There is no scope for statement being recorded by the police under the French model. Since under the French system it is the magistrate to records the statements, they are made admissible in evidence.

During investigation the police are empowered to do search and seizure of the case properties and material objects involved in the case. Since the police commits mistakes a number of cases in which the accused are acquitted. Police quite often connects improper search and seizure and the trials get vitiated.

There are also lot of criticisms about the recording of statements by the police as it is seldom recorded by examining the witnesses. It is found that these statements of witnesses are recorded by the police themselves without even examining the witnesses. It is often found that gallons of writer's ink is wasted by the desk work for nothing.

Though S.161 (2) of Cr.P.C. requires a person, to answer truly all questions (relating to the case under investigation) put to him by the investigating police officer, that section as Well as Art.20(3) of the constitution of India gives protection to such person against questions

which would have a tendency to expose him to a criminal charge. The accused person may remain silent or may refuse to answer when confronted with incriminating questions. It is clearly provided under Article 20(3) of the constitution that no person accused of any offence shall be compelled to be a witness against himself. In this connection the Supreme Court has held that the area covered by Art.20(3) and S.161(2) is substantially the same and S.161(2) of the Cr.P.C. is parliamentary gloss on the constitutional clause.[32]

ROLE OF PROSECUTION IN INVESTIGATION

The Director of Public prosecutions in Pondicherry assisted by a Deputy Director of Public Prosecutions advises and helps the police with regard to investigations. As and when any difficulty arises with regard to a complicated issue of criminal investigations the Directorate of public prosecutions comes to the rescue of the police and set things right.

It is a matter of regret that the public prosecutors and the Assistant public prosecutors are not extending any advice or assistance to the police during investigation. It is also worth noting that no police

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32. In nandini Satpathy case the Supreme Court has extensively considered the parameters of S.161(2) of the Cr.P.C. and the scope and ambit of Art.20(3) of the constitution.

officer seeks the advice and assistance of the public prosecutions. The public prosecutors are discharging the duties of conducting of cases alone in the criminal courts and they are not evincing any interest to teach and equip the police personnel to conduct the investigations in a proper manner so as to find out the real perpetrator of the alleged crime.

This practice of public prosecution totally differs from the French system, where the procureur de la republique played a predominant role in helping the investigating magistrate to have a fair and correct investigation.

MEDICAL EXAMINATION OF ACCUSED AT THE INSTANCE OF POLICE

Provisions have been made under S.53 of the criminal procedure code, 1973 for facilitating effective investigation by authorising an arrested person to be examined by a medical practitioner. It may afford evidence about circumstance under which the alleged offences have been committed. A person who has been arrested but later on enlarged on bail may also be medically examined

under this section. Such examination is not hit by Art.20(3), of the constitution of India.[33]

The arrested persons suspected to have committed any offence are produced before Registered Medical Practitioners for medical examination. The examination of these persons upon the request of the police are made by the medical practitioners and the same will afford evidence as to the commission of an offence. The female offenders are being examined by or under the supervision of female medical practitioners. It is usually resorted to where the accused is alleged to have committed sexual offences. The clinical examination of victims of crime and treatments to their wounds are done by the Medical practitioners upon the request made by the police officers prior to their production before the magistrates for remand.

An empirical study conducted in Pondicherry reveals is that the police officers seldom make requests to have medical examination of the accused persons directly. But in cases and counter cases.[34] Where both the parties sustain injuries they are produced before the Medical Officers for first aid and treatment which are ultimately treated

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33. *Ananth Kr.* V. *State of A.P.*, 1977 Cr.LJ, 1797.

34. Section 159 & 160 of I PE.

as an evidence to proceed further with the accused victims (Both the parties will be arrayed as accused and both might have sustained injuries during the alleged commission of affray by either or against other).

The power to compel an accused to submit to medical examination is hedged in various conditions. The object obviously is to balance the conflicting interests of the individuals and the society. It has been held that S.53 of Cr.P.C is not violative of Art.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 in accordance with the provisions of S.53 of Cr.P.C.[35] In that pronouncement the principles laid down by the Supreme Court in Kathi Kalu case have been reiterated.[36]

EXAMINATION OF ACCUSED BY MEDICAL PRACTITIONER AT THE BEHEST OF ACCUSED

As per section 54 of the Cr.P.C. whenever a person after being arrested is produced before a magistrate and alleges at any time during the period of his detention during custody that the examination of his

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35. *Anil A.Lokhande* V. *State of Maharashtra* 1981, Cri.LJ 125 (Bom HC).

36. AIR, 1961, SC 1808.

body will afford evidence which will disprove his commission of offence then the Magistrate shall direct him to be examined by a medical practitioner unless the Magistrate considers the request is vexatious or made to the delay investigation etc. Even in cases where accused does not make any such prayer it is the duty of the magistrate to arrange particularly when he is not assisted by a lawyer.[37] When an accused is produced by the police with a request to the Magistrate to medically examine him, it is the duty of the medical practitioner to examine the accused and to give a report upon the direction made by the magistrate.[38]

It is considered necessary and desirable "that a person who is arrested should be given the right to have him examined by a medical officer when he is produced before a Magistrate or at any time when he is under custody, with a view to enabling him to establish that the offence with which he is charged was not committed by him or that he was subjected to physical assault.[39]

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37. *Sheela Barse* V. *State of Maharastra* AIR, 1983, SC 378: 1983 Cr.LJ 642: (1983) 1 Crimes 602.

38. *Mukesh Kumar* V. *State* (Delhi Administration) 1990 Cr.LJ 1923 (Del); 1990 Rajdhani LR 41.

39. Joint Committee Report on Criminal Procedure, P.IX.

According to the Supreme Court, the arrested accused person must be informed by the Magistrate about his right to be medically examined in terms of S.54 of criminal procedure code, 1973.[40]

In Pondicherry the accused persons produced before the Magistrates for initial remand when enquired about their requirement for medical examination used to ask for medical examination on the plea that they were subjected to third-degree methods by the police. An empirical enquiry disclosed that the accused are manhandled and assaulted by police while attempting to extract confessions. Those injuries that are all sustained by the accused during investigation are shown by the police as injuries sustained during the course of commission of the alleged crime.

To put a full stop to these kind of police torture and assaults it is felt not to entrust police to record confessions of the accused which are normally used by the police to fix the suspect in the alleged crime under the weapon of section 24 of the evidence set.

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40. *Sheela Barse* V. *State of Maharashtra*, 1983 SCC (Cri) 353.

EVIDENTIARY VALUE OF STATEMENTS GIVEN TO POLICE DURING INVESTIGATION

Every statement recorded by police officer during investigation is neither given on oath nor is tested by cross-examination. According to the law of evidence the facts stated therein are not considered as substantive evidence.[41] But if the person making the statement is called as a witness at the time of trial, his former statements according to the normal rules of evidence could be used for corroborating his testimony in court or for showing how his former statement was inconsistent with his deposition in court with a view to discredit him.[42]

Section 162 of the Cr.P.C. prohibits the use of the statements made to the police during the course of the investigation for the purpose of corroboration. It is based on the assumption that the police cannot be trusted for recording the statements correctly and that the statements cannot be relied upon by the prosecution for the corroboration of their witnesses as the statements recorded might be of self serving nature. There is not a total ban on the use of the statements made to police officers.[43] The defence is not deprived of an

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41. *Sewaki* V. *State of H.P*, 1981 Cr.LJ. 919.
42. See Sections 157 and 145 of the Indian Evidence Act, 1872.
43. As would be seen from the proviso to S.162(1), and Sub-Sec.(2) of S.162 of Cr.P.C.

opportunity to discover what a particular witness said at the earliest opportunity. The object of the section 162 Cr.P.C is to protect the accused both against overzealous police officers and untruthfull witnesses.[44]

It has been ruled by the Supreme Court that S.162 does not provide that evidence of a witness in the court becomes in admissible if it is established that the statement of the witness recorded during investigation was signed by him at the instance of the police officer.[45] The bar created by S.162 Cr.P.C. in respect of the use of any statement recorded by the police during the course of investigation is applicable only where such statement is sought to be used "at any inquiry or trial in respect of any offence under investigation at the time when such statement was made".

If any such statement is sought to be used in any proceeding other than an inquiry or trial or even at an inquiry or trial but in respect of an offence other than that which was under investigation at the time when such statement was made, the bar of S.162 would not be

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44. *Khatri (IV)* V. *State of Bihar*, 1981 SC (Cri) 503, 508.

45. *State of U.P.* V. *M.K.Anthony 1985*, SCC (Cri) (105).

attracted. Section 162 of Cr.P.C is enacted for the protection of the accused. The bar created by S.162 has no application in a civil proceeding or in a proceeding under Art.32 or 226 of the constitution. It has also no application under S.452 of the code for disposal of property.

It is immaterial whether the statement recorded under S.161 Cr.P.C. amounted to a confession or admission. The statements falling under S.32(1) and S.27 of the Evidence Act are exceptions to this rule. A dying declaration recorded by a police officer during the course of investigation becomes relevant under S.32 of the Evidence Act in view of the exemption provided by S.162(2).[46]

THE PONDICHERRY EXPERIENCE

In the course of the study the police, prosecutors and the presiding officers of various criminals courts of Pondicherry were interviewed. It is advocated by the personnel who worked under French regime that the recording of statements by the police U/S 161 of Cr. P.C. is a total waste of time and energy of the police. They admit

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46. *V.Thomas* V. *State of Kerala, 1974*, Cri.LJ 849, 854 (Ker HC).

that now the statements are prepared by the police themselves without examining the real and actual witnesses on whose name they are prepared. Mr.Ilango, a Retired Inspector of police who worked both under the French and Indian system wonders why the 161 Cr.P.C. statements are recorded by the police as the same is not admissible in evidence.

It is also experienced by the prosecutors that none of the statements recorded under section 161 by the police ever tallied with the depositions made by the prosecution witnesses. It is often found that lot of criminal cases are ending in acquittal upon a finding that the deposition of the witnesses of prosecution are totally different with the recorded statement by the police which indicates that the statements of the witnesses are simply prepared by the Head constable of the police station with their own imagination without going to the spot or examining the witnesses.

BAIL

Bail involves release of the arrested on somebody's surety or on his own after assuring that he shall be available in the court for trial.

Under the Cr.P.C. 1973 offences have been categorised into Bailable and non-bailable. They are put in the schedule.

Under the code of criminal procedure, 1973[47] the officer incharge of the police station is bound to release the person accused of a bailable offence.[48] Thus bail is considered to be right of the accused in bailable offences whereas grant of bail to persons accused of non-bailable offences is at the discretion of the presiting officers.[49]

As the pre-trial incarceration and under-trial incarceration are considered to be wasteful and expensive to the exchequer it is worthwhile to release the accused on bail the with an undertaking from the sureties to send or produce the accused for facing the trial at a later stage.

POWER TO GRANT BAIL IN BAILABLE CASES

The general conditions and principles to be considered to grant or refuse bail, includes nature of offence, circumstances of the cases

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47. S.436 of the Cr.P.C.

48. AIR 1965, AP 444.

49. AIR 1981 SC 368; 1989 Cr.L.LJ.Noc.149.

possibility of absconding by the accused, possibility of tampering with the prosecution case and witnesses.[50]

Bail can be granted by the presiding officers at any stage of the proceedings provided that it must be assured that the presence of the accused for facing the trial is assured.

Ordinarily bail granted under S.436 of Cr.P.C. cannot be cancelled on a police report.[51] However, the court has jurisdiction to cancell the Bail. The High Courts also have inherent power to cancel the bail.[52]

WHEN BAIL BE TAKEN IN CASE OF NON BAILABLE OFFENCES

As discussed above the criminal procedure code[53] gives discretion to the court to grant bail to the accused regarding non-bailable offences subject to the restrictions under sub-sections (1), (2) and (6) of Section 437 Cr.P.C.[54] Section 437 of Cr.P.C. limits the

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50. 1988(2) Crimes 581.
51. 1985 (1) Ori.L.R.586; AIR 1967 All, 393.
52. AIR 1958 SC 376.
53. S.437 of Cr.P.C.
54. 1980 Cr.L.J.588 (A.P).

jurisdiction of the Magistrate in case of offences punishable with death or imprisonment for life except in the case of children, women, sick or infirm persons.

Thus, when any person accused of or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court, other than High Court or Court of session, he may be released on bail by imposing certain conditions.

It is pertinent to point out that the grant of bail in non-bailable cases is exclusively within the jurisdiction and discretion of the courts and the police are not empowered to entertain those non-bailable offers. It is also noteworthy note that the power to impose conditions has been given to the court and not to any police officer.

The power to impose conditions can only be exercised when the offence is punishable with imprisonment, which may extend to seven years or more; or where the offence is one under Chapter VI (Offences against the State), Chapter XVI (Offences against human body), or Chapter XVII (Offences against property) of the Indian penal code; or

where the offence is one of the abetment of, or conspiracy to, or attempt to commit any such offence as mentioned above:

Habitual offenders or persons previously convicted of serious offence are not released on bail ordinarily. But, persons under the age of sixteen years or women or sick or infirm may be released by recording special reasons for releasing them.

There is no principle analogous to res-judicata is applicable to bail applications and successive applications are maintanable.[55] Thus an application for bail renewed for the subsequent time for fresh consideration is maintainable.[56]

CANCELLATION OF BAIL GRANTED IN NON-BAILABLE CASES

On breach of the condition already imposed bail can be cancelled.[57] However, generally, it would be cancelled on application and not by the court suo motu.[58] Though the court is empowered to cancel the bail, such power must be exercised with great caution and in appropriate cases only.[59] The courts should not cancel the bail unless

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55. 1985(1) Guj. LR.127.
56. 1992 (2) Cri.LR.832; 1988 Cr.L.L.J.749.
57. 1982 Cr.L.J.2148.
58. 1993 Cr.L.J.1550 (Bom).
59. AIR 1978 SC 961; 1978 Cr.LJ.701.

it is satisfied that the accused will tamper with the prosecution witnesses.[60]

DIRECTION TO GRANT ANTICIPATORY BAIL TO THE PERSON APPREHENDING ARREST

The term anticipatory bail is a misnomer because S.438 Cr.P.C. Contemplates an order releasing in accused on bail in the event of his arrest and not in anticipation of arrest.[61] Thus an application for anticipatory bail could be moved only if arrest by police is anticipated. The distinction between an order of bail and order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest.[62]

The object of anticipatory bail is to relieve a person from unnecessary apprehension or disgrace. That the intention of the legislature expressed in section 438 of Cr.P.C. is that when any person has a reason to believe that he may be arrested on an accusation of

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60. AIR 1952 J & K 28; 1974 Cr.LJ 5 26.

61. AIR 1977 SC 366; 1977 Cr.L.J. 225.

62. *Gurbaksh Singh Sidha* V. *State of Punjab* (1980) 2 SCC. 565.

having committed a non-bailable offence, he may apply to High court or court of session.[63]

Anticipatory bail is not to be granted as a matter of rule. It is to be granted only when the court is convinced that the person is of such a status that he would not abscond or otherwise misuse his liberty.[64] The Law Commission considered the need for such a provision and observed:

> "The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in fail for some days. In recent times, with the accenteration of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain imprison for some days and then apply for bail".[65]

The Law commission also expressed the view in its subsequent report that the power to grant anticipatory bail should be exercised in very exceptional cases. The commission also observed:

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63. De, Purna Chandra, 1975 Cr.LJ.1815.

64. *Narsinglal Daga* V. *State of Bihar*, 1977 Cr.LJ, 1776.

65. 41st Report, p.321, para 39.9.

"In order to ensure that the provision is not put to abuse at the instense of unscrupulous petitioners, the final order should be made only after notice to the public prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice.[66]

Be that as it may it can not now be asserted that this provision is not abused to-day. Indeed, the case law signifies evidence to the contrary.

Section 438 of Cr.P.C. does not require that the offence for which the anticipatory bail is asked for has been registered with the police. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet made.[67] That the filing of FIR is not a condition precedent to the exercise of power under S.438 of Cr.P.C.[68] For the grant of Anticipatory Bail there must a disclosure of a reasonable belief that the applicant may be arrested for an allegation of commission of a non-bailable offence.

The legislature has conferred a wide discretionary power to the High Court and the court of session for the grant of Anticipatory bail.

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66. 48th Report, p.10 para 31.
67. *Gurbaksh Singh Sibbia* V. *State of Punjab (1980)* 2 SCC 565.
68. *Suresh Vasudeva* V. *State, 1978* Cri. LJ, 677 (Del HC).

However, the courts, while granting anticipatory bail should record reasons for doing so.[69] Similarly, if the anticipatory bail is refused, reasons for doing so has also to be recorded.

About the parameters and the considerations that should weigh to grant of anticipatory bail the Supreme Court laid down criteria:

In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, the taking advantage of the order of anticipatory bail be will flee from justice, such an order would not be made. But the converse of these propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala files; and, equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerable or rejecting anticipatory bail. The nature

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69. *State of Maharashtra* V. *Vishwas Shripati Patil, 1978* Cri.LJ 1403 (Bom HC).

and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail.[70]

The High Court or court of session may, while granting anticipatory bail, impose conditions as mentioned in S.438(2) of Cr.P.C. There is also possibility to impose certain conditions not provided in the provision, if the same is required to safeguard the rights of the accused and the police investigating the case.

It is also noteworthy that there cannot be a 'blanket order' of anticipatory bail. 'If an order of direction is issued under S.438(1) of Cr.P.C. to the effect that the applicant shall be released on bail' whenever arrested for whichever offence whatsoever, such a direction would amount to a 'blanket order" of anticipatory bail which could not give any concrete information to the police. It would be fair to give

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70. 1980 SCC (Cri) 465 at 488; 1980 2 SCC 565; 1980 Cr.L.J, 1125.

notice to the prosecution for having an opportunity to oppose the application for anticipatory bail.[71] However, there cannot be any anticipatory bail after the arrest of the accused. After arrest, the accused must seek his remedy for bail Under Section 437 or S.439 of I.P.C, if he wants to the released on bail from arrest effected.[72]

The anticipatory bail granted for an accused shall be effective till the conclusion of trial unless it is cancelled by the competent courts.[73]

Anticipatory bail is not granted in dowry death cases, socio-economic offences, FERA and TADA cases etc. as they are all considered to be serious crimes affecting the public morals and the wealth of the nation.

CANCELLATION OF ANTICIPATORY BAIL

The court making an order of Anticipatory bail alone is entitled to cancell or recall the same.[74] Thus the anticipatory bail granted by the

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71. *Balchand Jain* V. *State of M.P.* (1976) 4 SCC 572.

72. 1980 SCC (Cri) 465 at 490.

73. *Rama Sewak* V. *State of M.P*, 1979 Cr.LJ 1485, 1490 (MPHC).

74. *State of Maharashtra* V. *V.S.Patil*, 1978 Cr.LJ. 1403.

High Court, can be cancelled only by the High Court under section 439 (2) of Cr.P.C.[75] However, Supreme Court can impose conditions for the anticipatory bail granted by the High Court.

The anticipatory bail can also be cancelled where the investigations were not properly done and in granting the bail important events and allegations were ignored.[76] The principles evolved for cancellation of post-arrest bail are equally applicable for the cancellation of anticipatory bail.

To sum up, it is pertinent to note that both under the French and the Indian system pre-trial procedures are very different. While the French system concentrates on the question of fact finding at the investigation stage itself with the office of the investigating magistrates the Indian systems postpones the determination of guilt to the trial stage on with the intention that the guilt should be decided judiciously. However the investigation by police under the Indian system is having its own drawbacks which presumably do not exist under the French system. The French seems to place confidence in the impartiality of

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75. 1977 Cr.LJ 492.

76. 1991 Cr.LJ 33 (M.P).

their investigating magistrates who supervised the investigation corrected by the Judicial Police. Whereas the Indian system does not seem to place any faith in the impartiality of its police determination of 'prima facie' case should be done by its magistrates.

CHAPTER IV [PART I]

TRIAL PROCEDURE UNDER THE FRENCH SYSTEM

French criminal procedure as enforced in Pondicherry was a blend of the inquisitorial procedure of the ancient regime and the English accusatorial system introduced by the Revolution. Its development from these two sources made it vital in achieving effective repression of crimes and at the same time protection of the individual.

The basic principle underlying French criminal procedure was that all the facts concerning both the offence and the offender was placed before the court so that it might judge the person's guilt so accused. This aim was achieved by making detailed pre-trial inquiries; by examining the personality of the accused; and by placing the onus of eliciting the evidence at the trial on the judge rather than on the parties to the case.

Great emphasis was laid on the pre-trail inquiries which allowed an investigation into anything that might have a bearing on the case. In serious cases, these inquiries were made by an independent 'magistrate' known as the juge d'instruction. The accused might also

be examined together with any evidence in his favour or witnesses he wishes to call[1], and while he cannot be compelled to answer any question or reveal his defence, it was in the obvious interest of an innocent person to allow the facts in his favour to be fully investigated. Any unjustifiable attempt by an accused to reserve his defence until the trial while finding out the strength of the case against him in advance, was liable to be looked on with suspicion. It was claimed that an exhaustive investigation into the evidence before the trial not only ensures that all facts both against the accused and in his favour are made known, but also lessens the risk of an innocent person being sent to trial. A court of law, restricted to trial proceedings was by necessity more restricted in the scope of the inquiries. By making the facts the subject of prior investigation, the issues between the parties are clearly identified, and there was less risk of one party manipulating the evidence by producing new evidence at the trial, thus placing his opponent either without an opportunity to reply, or to produce existing contradictory evidence. The inquiries, while thorough, in no way pre-judged the case. While the attempt was made to resolve any conflict in the evidence, or at least ascertain where the difference lies, the trial court alone had the right to interpret the evidence and decide on issues

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1. This does not mean that the rights given to the defence were not jealously safeguarded.

of credibility. Pre-trial inquiries were made in private, and it was only at the trial that the evidence was examined in public and made the subject of comment. The inquiries merely established whether or not there was sufficient evidence, which if believed, would constitute a case for the accused to answer, and if there be such a case, that was sent for trial before the appropriate court. To that extent only, they resemble English committal proceedings. It can, of course, be argued, that committal for the trial only after detailed inquiries will produce a presumption of the accused's guilt. The answer usually given to this argument is that the pre-trial inquiries do not seek to pre-judge the case, being solely designed to ensure that the full facts of the case were made available to the trial court which alone had the right to interpret and assess the evidence and thus decide on the question of guilt or innocence.[2]

The purpose of a French criminal trial is to judge the accused - 'on jude l'homme pas les faits'. Hence the court does not concentrate on the evidence, leaving it to the accused to take the initiative in regard

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2. With regard to the effect on a jury, the vast majority of cases were taken in the tribunal correctional where there was no jury. The acquittal rate in the tribunal correctional was in the region of 5%, but some of these were due to legal reasons.

to this defence. The accused was examined in relation to the dossier and it was the accused who was on trial rather than an objective assessment as to whether or not the prosecution has proved its case against him. It was therefore considered essential to have a proper understanding of the accused in order to interpret his actions, judge his credibility and if convicted, determine his degree of guilt when deciding on sentence (which is considered as an integral part of a guilty verdict). Although penalties were fixed with certain limits, the French attitude was that the punishment should fit the criminal, not the crime.[3] All the facts concerning the background and personal life history of the accused (including any previous convictions) were made known to the court before it reaches its judgement. Bad character should not however be considered as a factor when deciding on the issue of guilt. In cases where the pre-trial inquiry had been conducted by a juge d'instruction, especially if the offence is a 'crime' the accused's background was fully investigated, otherwise such information was provided by the police and by the accused himself.

The results of the pre-trial inquiries-both into the facts and into the personality of the accused-here compiled into a 'dossier'. It was

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3. Unfortunately a rising crime rate often gives rate given rise to exemplary sentences in the hope of deterring others.

essential that all parties to the case be kept informed of the progress of the inquiries, therefore all parties had access to the 'dossier' to study the contents thereof. This was an additional reason why the accused must be examined before the trial, for otherwise the 'dossier' would provide an unbalanced version of the evidence, containing only the presection case. Moreover, an unscrupulous accused, if not subject to prior examination and having learned the full details of the case against him, could wait until the trial or produce false evidence consistent both with the prosecution case and his innocence, such evidence not having been subjected to the same pre-trial scrutiny and verification.

The 'dossier' was given to the president of the court prior to the trial, and while the evidence at the trial was not restricted to the facts contained in the 'dossier', if the pre-trial inquiries were properly made, the evidence will more or less follow the 'dossier'.[4] The duty of eliciting the evidence at the trial was given to the judge, rather than leaving the presentation of the evidence in the hands of parties who have an interest in the outcome of the case. The judge thus played a predominant role in French criminal trials, examining the accused and

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4. At the cour d'assises, the jury does not have access to the 'dossier', and can only rely on the evidence presented orally in the court.

the witnesses (although the parties may suggest questions) and taking all other steps which he deemed necessary to find the truth. To prevent any evidence being with held from the court by virtue of some legal provision, virtually no evidence other than hearsay was excluded as inadmissible on the grounds of incompetency or irrelevancy.

By these means, French criminal procedure attempted to ensure that the 'the truth, the whole truth and nothing but the truth' was sought and ascertained before and during the trial by means of detailed impartial inquiries. Hence the system was described as inquisitorial, rather than accusatorial where it is left to the prosecution to accuse an individual, producing evidence to justify its accusation, while the individual has the sole responsibility of deciding how to answer the charge. French lawyers tend to criticise the accusatorial system in that it leaves the pre-trial investigations, and more important, the presentation of the case in court in the hands of one of the parties of the case. This leaves the way open to suppression of the evidence by one of the parties (either because certain evidence is unfavourable to his case, or does not seem worthwhile-pursuing) and to manipulation of the evidence and distortion of the truth by the way in which it is presented in court. To overcome this difficulty complete intellectual

honesty was required from both the persecution and the defence, which was difficult to obtain in view of their opposing roles. Under French system the judge was regarded as impartial, as he advocated neither the prosecution nor the defence view.

In the French system of criminal procedure an accused person cannot 'plead guilty' at the trial court. Hence, all the court appearance take the forms of trials. As there was no occasion prior to the trial when the accused may be brought before the court to state his response to the charge against him, the trial time was the only time when the court might consider any objection by the accused to the competency or relevancy of the proceedings or any other plea in bar of trial.

COMPETENCY TO TRY AND OBJECTIONS TO THE PROCEEDINGS

An objection might be taken on the grounds that the court is not competent to try the offence in that it has no jurisdiction so to do. The power of the court was bound by territorial limits, for the tribunal correctional either the offence must have been committed within the geographic area over which the court has jurisdiction, or one of the accused must normally be domiciled in that area, or one of the accused must have been arrested there. The court was further limited to deal

with a specific type of offence, for example, the tribunal de police not dealt with a 'delit'. Objections were also be taken if the proceedings were not commenced within the time limits determined by statute-namely ten years for 'crimes', three years for 'delits' and one year for 'contraventions'. A criminal court not decided a question of legal status (legitimacy, marriage, nationality, etc.) if this was involved in a criminal charge, and must await until the appropriate civil court has decided such issues.

A criminal proceedings might not be instituted against an accused who was insane, whether such insanity occurred at the time of the offence, or at the time of the trial. Another plea which would successfully bar criminal proceedings was 'res judicata'. If a criminal court had already decided on the same matter-i.e. the same accused, offence, etc. - subsequent criminal proceedings might not be based thereon. Thus an accused acquitted of murder, could not be re-tired for the same offence under the 'nomen juris' of culpable homicide. As a general rule only the verdict of a criminal court would act as 'res judicata'. The decision by the procureur not to prosecute was regarded as an administrative decision and not the verdict of a court. The decision of a juge d'instruction might in some cases act as 'res judicata'.

THE GLIMPSES OF FRENCH TRIAL PROCEDURE

In some special matters, like traffic or excise, departmental officers were empowered to record offences in the nature of misdemeanour detected by them. Such officers took oath before the court before assuming charge. The record so prepared was believed by the court till the contrary was proved. The accused person who was given a copy of the record has to exculpate himself by adducing evidence which could be rebutted by the officer concerned. Vary rarely those records were challenged. The accused person pleaded quietly or some exception. If he challenges the content of the record and proves it to be false, the recording officer becomes immediately liable to criminal prosecution.

In ordinary matters the court was seized by a committal order when the investigation process had been gone through or by direct summons by the prosecutor or the civil party. As far as the trial was concerned, there was of course some difference according to the category of offences. But the common essential features were as follows; The charge was read out to the accused and his reply obtained. If he pleaded guilty the court might accept the plea of guilty. Otherwise, the evidence of the civil party, if any, was produced and then that of the prosecutor. Any person could be a witness except the

informant when the law allowed a reward. Similarly, the civil party and the co-accused could not be competent witnesses, if there is no objection by the accused or the public prosecutor. The witnesses were examined by the court. They were confronted with the accused and also with one another in respect of the variations in their depositions. Questions might be put by the accused or his Counsel, the prosecutor and the civil party to the witnesses through the court. Similarly, questions might be put to the accused by the prosecutor and also the civil party through the court. The accused was then examined by the court. At that stage he could produce his evidence, if any.

The civil party then presented his arguments. The public prosecutors pronounced his indictment and proposed to the court the punishment to be imposed. The counsel for the accused presented his arguments and the accused was heard in person.

A memorandum of the substance of the depositions and confrontations were prepared by an officer of the court. The judges were thus totally free in their endeavour to discover the truth.

The prosecutor had the duty to prove all the ingredients of the offence and the absence of the exceptions raised by the accused.

Similarly, the latter had to prove his plea, if any. Neither the prosecution nor the accused needed to prove his case. The court could not base its finding on the absence of proof by them and rest content with saying that they have failed to prove their respective cases. It had to come to its own conclusion through its own effort. It should complete, to the extent possible, the evidence produced by both the sides and neglect neither what was inculpating nor what was exculpating the accused. It had the unfettered rights to take all steps for *the manifestation of truth* which was the key word in the French Criminal justice process. The limits assigned to the court were only those dictated by the honour and conscience of the judges.

Once a criminal action had been brought before the court whether by the public prosecutor or a civil party it could not be withdrawn. The withdrawal of the civil party would affect only the civil action. The criminal action started at his instance or even rejected initially by the public prosecutor would however continue and the public prosecutor had to perform his duty till the end. It was for the court to decide, at any stage, upon its own satisfaction, whether to discharge the accused or not. It was thus seen that the court was vested with great powers and responsibility, though the matter was first processed

by two judicial officers namely the Public Prosecutor and the Investigating Judge.

TRIBUNAL CORRECTIONAL AND ITS TRIAL PROCEDURE

There was four methods by which a case might be brought before the tribunal correctional: direct citation, voluntary appearance, remitting by the juge d'instruction (or chambre d'accusation) and 'flagrant delit' procedure.

Direct Citation:

This was the commonest method for instituting proceedings and was used when the accused was not in custody. Once the procureur has obtained all the information he required about the offence, he would obtain personal details about the accused (such as his full name, date ad place of birth, parents' name, marital status, children, nationality, military service, employment, domicile, education, reputation and any other relevant facts) by writing in the first instance to the police in the accused's home town. At the same time, the procureur would obtain a record of any previous convictions relating to the accused.[5]

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5. Any previous convictions must be carefully examined to see if they act as an aggravation to the offence, possibly thus changing its classification from a 'contravention' to a 'delit' or a 'delit' into a 'crime'.

The procureur would then complete a form known as a 'ordre de citation' or 'cedule' giving the accused's name and address, the name and address of any 'partie civile' (if known), the names and address of any witnesses whom the procureur wished to be cited, and the charge against the accused. The 'ordre de citation' would then be sent to an officer of the court known as a 'huissier' (or 'huissier-audiencier') asking him to cite the accused and witnesses for a specified date. If the 'partie civile' was instituting the proceedings, he did so in the same way.

The 'hissier' would then serve a citation on the accused personally, the citation giving the time, date and place of the trial, and a copy of the charge as contained in the 'orde de citation' drafted by the procureur. If the accused was not at home, but the 'huissier' was satisfied that the address was correct, the 'huissier' might serve the citation on another inmate of the house. Should this not be possible, the 'huissier' would leave the citation at the office of the local mayor and at the same time send a registered letter to the accused telling him what had been done. It was then the responsibility of the accused to collect the citation and it was presumed that he had received the citation until the contrary is proved. The 'huissier' will complete an execution of service specifying how service was effected. One of the

difficulties of the last method of service was that if the post office was unable to deliver the registered letter, they will retain if for fifteen days, leaving a note for the accused to this effect. If the accused was unable or unwilling to collect the letter, or did not receive the note from the post office, he would have no knowledge of the citation. Furthermore the 'huissier' not knew that the letter had not been received until fifteen days had elapsed. Since the minimum notice that must be given to an accused about his trial was five days, the case might be called in court prior to the 'huissier' being informed that the letter was not delivered, and since it was presumed that the accused had been properly cited, when the accused failed to appear, he might be judged in his absence[6]. In such circumstances, the first knowledge of the proceedings by the accused would be the day of enforcement of the penalty. He would however be entitled to appeal and have the case re-heard by means of a process known as 'l'opposition'.

If the 'huissier', in attempting to effect service found that the accused did not reside at the specified address, he would report to the procureur who might instruct the police to trace the accused. Should the police unable to do so, the procureur must either drop the case, or

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6. Although the court may decide to continue the case and order that the accused be cited again.

place the matter before a juge d'instruction who alsone has the power to issue a warrant for the accused's arrest.

Voluntary Appearance

In theory, the accused could present himself voluntarily before the court and thus dispense with the need for a formal citation. In some provincial areas, the procureur might send a registered letter to the accused instructing him to come to court, using this method as an alternative to a formal citation, which would only be used if the accused failed to appear. In practice however, most procurers would prefer to cite the accused direct in the first instance, and the only use to which voluntary appearance was put was where the accused presented himself in answer to a citation in which some legal flaw was used.

Permission by the juge d'instruction or chambre d'accusation

If the case was remitted for trial by the juge d'instruction, the procureur after lodging the 'dossier' with the clerk of court, would either cite the accused to attend for trial (if liberated), or arrange that he be brought to the court (if in custody). While a remit from the chambre d'accusation was more uncommon, it would occur where such proceedings had been ordered on an appeal from a juge d'instruction;

or if the chamber decided that the offence was a 'delit' and not a 'crime'; or if the offences concerned consisted of various charges some of which were 'crime' and some were 'delits' and the accused's whereabouts were unknown. In such circumstances the cour d'assises might try the accused in his absence by a procedure known as 'contumace', which can obey be used for 'crimes'. While the cour d'assises may try a 'delit' along with a 'crime', it might not do so in the absence of the accused, and the chambre d'accusation in such a case might decide to remit the 'delit' to the tribunal correctional which may judge a 'delit' in the absence of the accused.

Flagrant delit procedure

If at the end of 'enquete flagrante' where the accused was in custody and the procureur decides that no further inquiries were required, the procureur may bring the accused before the court for trial forthwith. One disadvantage of this method was that the procureur did not have time to obtain further details concerning the accused's background and must rely on what was contained in the police report. At the same time as he decides on such procedure, the procureur would order the 'police judiciaire' to instruct witnesses to attend the trial, which means that witnesses might only receive a few hours' notice. In many cases, however, the procureur would decide that no witnesses

are necessary. If an essential witness did not appear, the court could either adjourn the case, or the procureur sends the case before a juge d'instruciton. The accused had the right to ask for an adjournment of three days to prepare his defence. The court must inform the accused of this right and his reply must be noted. The court might adjourn the case on its own initiative to obtain further information, in which case it had the discretion to liberate the accused or detain him in custody.

One of the difficulties about 'flagrant delit' procedure was that the accused must be brought before the court on the day on which the procureur made his decision, or at the latest, on the following day, which meant that if necessary, a special court might require to be convened on a Sunday or public holiday. Nevertheless 'flagrant delit' procedure was commonly used especially in busier areas.

ACCUSED'S PERSONAL APPEARANCE

If an accused person had been detained in custody prior to the trial, he would obviously be present at the trial proceedings. Should he not be in custody, an accused might request the court to deal with the case in his absence, usually by writing a letter to the president of the court. The letter might contain any mitigating factors, or the accused might be represented by a lawyer who would give such factors. Such a

course was only competent if the maximum penalty for the offence was less than a fine plus two year's imprisonment[7]. The court might still insist on the personal appearance of the accused and on receipt of a letter from him, might adjourn the case, ordering him to appear in person.

If the accused had been properly cited, and either failed to attend or write a letter, he would be judged in his absence-i.e., by default-but later might have the right to have the case reheard.

Should an accused person failed to behave during trial proceedings and continually interrupted them, the president of the court had a discretion to remove him from the court, the trial then proceeded in his absence. At the end of the proceedings, the clerk of the court would read him an account thereof.

If there were several accused, the president might request one or all of them to leave the court while a witness was being examined, and then question each accused separately concerning the witness's

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7. In exceptional case the court may allow this to be done when the penalty is greater, but this is very rare. The court may also visit the sick bed of an accused too ill to attend court.

evidence. In such a case, the president must subsequently inform the accused what took place in his absence.[8]

Acused's examination

After the president has ordered the trial to begin and the accused has answered his name, the president would normally commence the proceedings by examining the accused. The examination might often commence with the president explaining to the accused the nature of the trial proceedings, and the rights available to him, unless the accused is legally represented. He will then question the accused about his identity and background history, including any previous convictions. The president was in possession of the 'dossier' (if the case has been to investigation by a juge d'instruction). The amount of personal detail elicited depends on the case and the attitude of the president.

The president would then read aloud the details of the charge and question the accused about it. He might read aloud excerpts from the witnesses' statements (to the police or juge d'instruction) and would

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8. While this rule is specifically given for the court d'assises, it is understood it also applies to other criminal courts.

consider all the facts of the case, both against the accused and in his favour. If the accused disagrees with a statement made by a witness, or gives evidence contrary to it, the president will frequently question him vigorously-in the same manner as cross-examination at an English trial. He would certainly do so if he thinks the accused is lying or withholding evidence. He may ask the accused to demonstrate his evidence by referring to any sketch plans or other real evidence that is produced. While the president must be impartial, eliciting all evidence in the accused's favour to the same degree as any evidence against him, and must not indicate his opinions as to the guilt or innocence of the accused, the president's role was that of an investigating judge, and not as an arbitrator between the parties to the case. At the conclusion of the examination, the procureur might question the accused; the lawyer for the 'partie civile' and the accused's lawyer might suggest questions for the president to put to the accused (whether or not depended on the discretion of the president). If the president agrees, he may rephrase the question, or may merely tell the accused to answer it. Provided the examination by the president had been thorough, the number of such questions will be relatively few, and frequently none was suggested.

Throughout the examination, the accused, who did not take the oath, could refuse to answer any question put to him, but the court was then free to comment on his silence and draw any conclusions it wishes therefrom.[9] If the accused was in custody he would remain with his police escort in special compartment-similar to the 'dock' in an English court, but if he was at liberty, he would answer questions while standing at the bar of the court, sitting nearby when not being examined.

The other two judges also had the right to question the accused but this was seldom done.

Examination of the Witnesses

After examining the accused, the president would examine any witnesses who had been cited, in any order he thought appropriate. The prosecution, 'partie civile' and defence might all cite witnesses to the trial[10] by requesting the 'huissier' to do so. Failure to comply with a citation was a criminal offence to be punished by a fine and an award of expenses incurred on the witness's non-attendance; the witness was

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9. The Court may also consider any statement made by the accused to the police or a juge d'instruction.

10. If an accused could not afford to pay witnesses expenses, the president might order this to be done at public expense. In appeal courts, the only witnesses heard are those cited by the court itself.

also liable to be arrested and brought to court. If necessary the court might attend a witness's sick bed to hear his evidence. A witness attending court was entitled to any expenses incurred and was immune from civil or criminal proceedings on any matter arising from his evidence in court. All persons might be compelled to attend court and give evidence in court. But the following person might not give evidence on oath (a) children aged less than sixteen years, (b) persons with criminal records (excluding minor road traffic offences, etc.) (c) any person related to the accused, (d) anyone with a direct personal interest in the outcome of the case (including the 'partie civile') and (e) any persons suffering from a loss of civil right (which was a penalty for certain criminal offences).

Since the court might base it's decision on facts contained in the 'dossier' or police report, the procureur would frequently refrain from citing any witnesses. He was most likely to take this action if there had been an investigation by a juge d'instruction, on the grounds that it was pointless to put the witness to further inconvenience and that the juge had already investigated the case fully. Even it was clear from the 'dossier' that the accused disagrees with such evidence, the procureur might still decide not to cite the witnesses. If however, there had been no such pre-trial investigation, especially where 'flagrant delit'

procedure was being used, the procureur would usually cite any witness whose evidence he estimated would not be accepted by the accused since such evidence had not been fully examined before the trial[11]. Although whether, all or any of the witnesses for the prosecution were cited to court depended on the decision of the procureur (and the attitude of individual procureurs may vary), the court had an over-riding right to adjourn the case and decide to hear the witnesses in person if it was not satisfied with the contents of the 'dossier' or the police report. A complainant whose evidence did not seem to be in dispute would usually be notified of the trial by the procureur (thus giving him an opportunity to enter appearance as 'partie civile') but would not normally be cited as a witness. If the court insisted on proceeding in the absence of a witness whose presence was claimed by one of the parties to be essential, that party had the right to appeal at the conclusion of the trial.

When a witness was present in court, the president would normally hear him. The president would ask him his identity and

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11. When using 'flagrant delit' procedure, the procureur would cite the witnesses by means of the police. This was also the method used in all cases where the witness was a police officer.

whether or not he had any relationship to any of the parties to the case. He would then administer the following oath

> "Do you swear to tell all the truth ad nothing but the truth?' to which the witness answer-- 'I swear'".

The president would then tell the witness to give his evidence in narrative form. In principle, the president would only interrupt to clarify any ambiguities, leaving any questions at the end of the narration. The president would examine the witness on any further points he wants brought out, and would question him about any contradictory evidence (including that of the accused) often reading such statements to him verbatim. The president might also confront witnesses giving conflicting evidence and question them jointly. If a witness's evidence contradicts that of the accused, the president may interrupt the witness to question the accused further. The president may also question the witness about any prior statement he made to the police, the juge d'instruction or any other person. In theory, a witness should give his evidence without the aid of notes, but this rule is no strictly adhered to. At the conclusion of the president's examination the procureur may question the witness and the parties to the witness (in exactly the same way and with the same effect as at the end of the examination of the accused).

Prior to deposing, witnesses are kept out of court and separated from witnesses who have already given evidence and who remain in court. A brief record of the witness's evidence was made by the clerk of the court. The president would normally start with the witnesses for the 'partie civile'. They were heard before any witnesses for the defence. Expert witnesses were often heard last and they took a different oath -- 'Do you swear to give an account of your inquiries and findings on your honour and conscience? The defence might adduce evidence at any stage of the proceedings, whether or not such evidence was disclosed during the pre-trial inquiries, although if such evidence has to be accepted as credible, a reason should be given if necessary why such evidence was not made known during the pre-trial inquiries.

Since perjury was a criminal offence, a witness who have given evidence under oath and was suspected of lying, would usually be invited to remain in court and given a chance to retract his evidence. If he does so, he might not be prosecuted for perjury. All cases of perjury must be reported to the procureur who would decide what action should be taken. Although witnesses give evidence on oath before a juge d'instruction no perjury proceedings might be based on a statement made to a juge d'instruction. In general, it should be noted that with regard to the placing of evidence before the court, there was a marked

absence of procedural rules, the court being given as much freedom as possible to obtain all the fact about the case. This was in accordance with the inquisitorial nature of the proceedings.

Conclusion of Evidence and Closing of Addresses

At the conclusion of the evidence, the 'partie civile' had the right to make a closing address, in which he would review the evidence and comment thereon. He would usually ask the court to convict the accused and it was not uncommon for him to use very forceful terms in making this demand. He would then concentrate on any civil issues, often addressing the court at great length and sometimes stressing the suffering and inconvenience he had sustained as the victim of the offence. The procureur would address the court after the 'partie civile' and he might also review and comment on the evidence, his remarks are often very brief. He would usually give his views as to an appropriate sentence (which, of course, the court may ignore).

The defence would then address the court, either asking for an acquittal, or urging points that should be considered in mitigation. The accused might have septa lawyers to deal with the criminal and civil aspects of the case (in which case both may address the court), but he

was not represented by the counsels separately for criminal case and civil case, the closing address would deal with both the aspects.

The 'partie civile' and the procureur had the right to address the court further in reply to the defence, in which case the defence might make a final speech, as the defence must always have the right to the last word.

Finding

After listening to the closing addresses the court might adjourn the trial to obtain further evidence, or adjourn to consider its verdict, or may proceed to give its verdict immediately.

If the court decided that it required further information (perhaps as a result of what was said in a closing address, or to verify some fact given in mitigation, or to clarify the evidence), the court would adjourn the hearing to a later date. The court might then request the procureur to make further inquiries, giving him (or the other parties) the right to cite further witnesses to the adjourned date. As an alternative, the court would appoint one of the three judges to make further inquiries, in which case, the judge has the power of a juge d'instruction, and could

order an examination by experts, issue instructions, to the police by means of 'commissions rogatoires', etc.

Should the court adjourn merely to consider its verdict, this might be for a period of several minutes or several days--fourteen days being not uncommon. In deciding on its verdict, the court must consider whether or not it is competent to judge the offence.[12] All verdicts must be motivated--i.e. must specify the legal reason on which they are based. The verdicts available to the court are; not guilty, guilty, guilty by default (non appearance of the accused) or absolution.

If the verdict was guilty, the court might specify any factor which aggravate or mitigate the offence. The court might also find the accused guilty of an offence other than the one specified in the charge (for example it may find the accused guilty of theft although he was charged with fraud). The sentence must be pronounced at the same time of the verdict. The sentence must be within the limits specified by law, but the reasons for deciding on a particular sentence need not be given. If the verdict was not guilty, the court might award the accused

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12. While the tribunal correctional has competence to judge a 'contravention', it may not judge a 'crime'. If it holds that the offence should be classed as a 'crime', the court will remit the case to the procureur to allow him to commence proceedings in the cour d'assises. The proceedings in the tribunal correctional will not act as 'res judicata' since no verdict might be given.

damages against the 'partie civile' if the latter was responsible for instituting the proceedings and the court decides he acted vexatiously. Expenses and damages may not be awarded against the procureur.

A verdict of 'absolution' was very exceptional and only available in a restricted number of cases, mainly where one of the accused ceased to participate in the offence at the outset and thereafter attempt to prevent his co-accused continuing in their acts. A verdict of absolution had the same effect as an acquittal.[13] At the same time as deciding on verdict and sentence, the court would settle any civil issues. If the accused got acquitted, the court could not make an award of damages against him in favour of the 'partie civile'; should he be convicted, such an award might be made, the court not being bound by the specification and amounts of the civil claim.

In certain instances, the procureur was required to give notification of a conviction to a particular body or person, for example if the accused was a doctor, lawyer, school teacher, policeman, member

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13. Except in the cour d'assises where an accused given such a verdict may still lose the civil claim and have an award of damages made against him.

of the armed forces, etc., the procureur must notify the appropriate governing or disciplinary body.

TRIBUNAL DE POLICE - PROCEDURE

The tribunal de police had competence to judge offences classed as 'contravention's' which were divided into five classes. Some minor 'contravention's', such as parking offences might be disposed of without the need for court proceedings. The accused paid a fixed penalty known as 'l' amende forfaitaire' to the policeman collecting, the fine on the spot, and could purchase a stamp to the value of offence. If the accused was unable or unwilling to pay the penalty, sent the same to the appropriate authorities within certain time limits. If the accused failed to pay the penalty he was either cited to court, or dealt with by a shortened form of proceedings known as 'procedure simplify'. The latter proceedings were competent where there was no civil claim, the maximum fine was less than 400 francs, there were no previous convictions to aggravate the offence, no other offences where committed at the same time, inquiries has not been commenced by a juge d'instruction, and statute did not prohibit the use of such proceedings--all of which conditions had to apply. The police lodged the complaint within ten days. The judge determined the fine (known

as 'i' amende de composition') within five days. The clerk of court notified the accused of the fine within fifteen days, the accused having a further fifteen days to pay the fine. If the accused paid the fine, he could not later lodge an appeal and the offence counted as a conviction for record purposes. If the accused failed to pay the fine, he was cited to attend court, and the case was dealt with in the usual way.

The 'amende de composition' was replaced by a system known as the 'ordonnance penale'. By this procedure the court might convict the accused without the necessity of a trial or any form of hearing. The accused had, however, a right of appeal by means of 'l' opposition'.

French Code Penal States that -

> "All cases falling within the jurisdiction of the tribunal de police may be dealt with my means of an 'ordonnance penale', even where the accused has a previous conviction for an analogous offence".

(There were some minor exceptions to this rule). Therefore although the 'ordonnance penale' might be used for offences which attract only a monetary penalty, extended its use to cover offences which carry a penalty of imprisonment as an alternative to a fine, or which entitled the court to impose disqualification from driving. However, if the judge decided that imprisonment was the only appropriate penalty, he would

return the case to the procureur de la Republique who would then re-commence proceedings in the normal way (i.e. by direct citation).

The use of 'l' ordonnance penale was not compulsory and the procureur had a discretion to proceed in the normal way or by the 'ordonnance penale'.

Where he decided to proceed by means of an 'ordonnance penale' he would lodge the police report with the judge, together with written submissions giving his views on the appropriate penalty.

The judge was not bound by written submissions. Furthermore if the judge decided to examine the case more fully by means of a trial, or that a penalty other than a monetary one should be imposed, the judge would return the case to the procureur so that he could proceed to trial in the usual way. Where the procureur had taken proceedings by way of an 'ordonance penale' and the judge decided that the case might be disposed of by such procedure, the judge had discretion as to the amount of the fine (provided it is within the minimum and the maximum limits proscribed by law) to be imposed.

The judge would base his decision on the facts submitted by the procureur in the form of a police report. This report might contain a minimal amount of information about the accused's personal circumstances. The judge's decision did not require to be accompanied by the reasons there for (which is the normal rule). It was not necessary to serve a notice to the accused by registered post. Since the procureur might appeal (by means of 'l' opposition') against sentence within ten days of the determination of a case, the notice of the court's decision was not posted to the accused until a period of ten days had elapsed.

After the decision had been notified to the accused by registered letter and he had acknowledged receipt, the accused had a period of thirty days from the date of notification to lodge an appeal.

(The 'ordonnace penale' procedure differed from a trial in the absence of the accused. The latter proceedings took the form of a trial in open court after the accused had been cited and had failed to appeal which he was given by 'ordonnance penale'). Once the penalty had been intimated to the accused, he had the following choice of action.

Firstly - He might pay the fine and not exercise his right of appeal. If he followed this course, the 'ordonnance penale' had the same effect as a decision given at the end of a normal trial. The case was thus disposed of without the necessity of personal appearance by the accused.

Secondly - The accused might fail both to pay the fine and to appeal. In these circumstances, the accused, by failing to appeal would be taken as acquiescing to the court's decision and steps would be taken to enforce payment of the fine, unless it could be shown that the accused in person did not receive intimation of the court's decision - (for example, if the registered letter was accepted by the accused's wife or other member of this household). In case no personal intimation had been received the accused had the right to appeal within a period of ten days of the court's decision coming to his personal knowledge, no matter how he learned of it. With regard to enforcing the penalty, it should be noted that this was not done by the court, but by an official employed by the Ministry of Finance. If the accused was unable to pay the fine immediately, he must arrange with the office whether time was to be allowed for payment, or whether payment by instalments was acceptable. It was only whether payment by instalments was acceptable. It was only where the accused failed to pay, that the

procureur would order the police to arrest the accused and took him to prison where he would serve an alternative period of imprisonment.

Thirdly - The accused might exercise his right to appeal, in which case the matter was remitted to the court for trial and the decision given by the 'ordonnance penale' was set aside. The accused would be cited to attend for trial but, if he failed to do so, the trial would proceed in his absence, in which case the court had no option but to re-impose the finding and sentence pronounced by means of the 'ordonnance penale'. The accused might not lodge any subsequent appeal (except on a point of law) by means of a 'pourvois en cassation'.

The effect of l'ordonnance penale' on the rights of the 'partie civile' was as follows;

Should the 'partie civile' institute criminal proceedings prior to the court deciding the criminal case by means of an 'ordonnance penale', then the latter procedure was incompetent. On the other hand, where a decision had been made by an 'ordonnance penale' and procureur has lodged an appeal, the 'partie civile' may still lodge a civil claim after the original decision but before the court had decided on the appeal (i.e. before the re-trial), in which case the court might also give a decision

on the civil issues. Finally where a 'partie civile' only lodges his claim after the case had been decided by an 'ordonance penale' and no appeal had been taken by the procureur, the tribunal de police was competent to decide the civil case even although the criminal case had been concluded. However, when a civil claim was lodged after the criminal case had been decided by an 'ordonnance penale', the tribunal de police or any court before which the claim was pursued, was not bound by the decision of the criminal court.

Trials in the Tribunal de Police

All accused appeared before the court by means of direct citation (although 'voluntary appearance' may be used to cure any defect in the citation). While a remit from the juge d'instruction or chambre d'accusation was competent it was exceedingly uncommon. No accused would be brought to the court in custody since the police power of arrest ('garde a vue') did not apply to 'contravention's'. While in theory, the trial proceedings were identical to the tribunal correctional, in practice it depended on how the 'contravention was classified. Should it fall into the first four classes, the accused was presumed to be guilty unless he established his innocence. These offences included most minor road traffic infractions such as exceeding the speed limit, ignoring traffic lights, etc. The accused would step

forward when his name was called in court, the president would ask if he admitted the offence, and if he did, he would be fined--the entire proceedings lasting less than ten seconds. If he had an explanation to make, the president would listen to the same and either ignore it, accepted it or adjourn the case for a fuller hearing at a later date.[14] While the prosecution in court was represented by a 'police commissaire', the procureur had the overall responsibility and would intervene if required. Should some difficult legal point arise, the court would almost certainly adjourn the proceedings to allow the procureur an opportunity to take over the conduct of the proceedings.

If the 'contravention' tell within the fifth class (which covers such offences as assaults, road accidents causing injury, etc.) the prosecution was conducted by the procureur in person. This class of 'contravention's' were formerly 'delits', but were reduced by statute to 'contravention's' because of the pressure of business in the tribunal

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14. In Paris, extensive use is made of modern techniques for dealing with such road traffic offences. The police have cars equipped with an apparatus for photographing moving vehicle offences, the photograph showing the time and if need be the speed of the vehicle. The owner of the offending car will be presumed to be the driver until the former proves to the contrary. If the owner is a company, it must disclose the particulars of the driver. Paris deals with approximately 32 million such cases per annum. While the prosecution process has effectively been reduced to a system which is in the hands of the police, the procureur has overall control, and it is he who deals with any legal point or other difficulty arising from a case.

correctional and the relatively minor nature of the offences compared with the other case taken in that court. They were however dealt with in exactly the same way as 'delits' in so far as the pre-trial inquiries or court proceedings were concerned. In the trial in the tribunal correctional, since the offences triable there include road accidents there was often a 'partie civile'[15]. The civil issued may often play a larger role in the trial than the criminal, and since lengthy and detailed written submissions were often made concerning the civil claim, the court would frequently adjourn for fourteen days to consider its verdict, sentence and finding on the civil claims. There were two points of interest in such cases. Firstly it was quite common in a road accident case involving two accused and several civil claimants representing injured parties, for the entire trial proceedings (covering the criminal and civil aspects) to be concluded within one hour. Secondly, because of the rules of prescription the institution of criminal proceedings could not be delayed, the trial would frequently take place before any injured party had fully recovered or before the full extent of the civil liability could be known. In such case the court might make an interim award

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15. As in the tribunal correctional, a motor insurance company can make appearance as 'partie civile', hence the accused may be defended by two lawyer, one representing the criminal interests and the other concerned with defending the civil claim.

of damages, continue the case (if need be to several times) on the civil aspect of the case, until the full extent of the civil liability is known.

TRAIL PROCEDURE - COUR D'ASSIES

When the chambre d'accusation decided that a case to be tried in the cour d'assises, the 'dossier' was sent to the clerk of that court, and a copy of the remit was served on the accused. The remit gave a summary of the facts of the case and of the accused's background. The accused was interviewed by the president of the cour d'assises prior to the trial. If he was at liberty, he must give himself into custody on the day before his first examination, but if he was in custody, he would be transferred to the prison nearest the court, if not already there. The president would have the accused brought to his chambers in order to examine him. While the public were not admitted, the accused's legal adviser might be present, as may the procureur general (who in practice never attends). The 'partie civil' and his lawyer might not be present. The purpose of the examination was to allow the president to verify the accused's identity, that he had received a copy of the remit from the chambre d'accusation and to ensure he was legally represented. If the accused did not have a lawyer, the president would arrange for one to be appointed. In very exceptional cases, the accused might request that he be represented by a parent or friend,

who was competent. At this examination the facts of the case would not be discussed, although there was nothing to prevent an accused protesting his innocence. A record of the examination was made, being signed by the clerk of the court, the president and the accused.

At any time before the start of the trial, the president had a discretion to order further inquiries if he thinks such a course was necessary. He may make such inquiries personally, or delegate this task to one of the other judges or to a juge d'instruction. The president might order a separation or joinder of trials, provided that in the case of joinder, the other trial or accused must have been put down for the same session. On his own initiative, or on the motion of the procureur general, the president might adjourn the trial to a later session.

The prosecution must notify the defence of any witness it sought to call at least twenty-four hours before the start of the trial; the defence had a similar obligation to notify both the prosecution and the 'partie civile'; the 'partie civile' must notify the defence, but need not notify the prosecutor, nor need the prosecutor notify him. Failure to give the above notification would entitle the party not notified to object to the witness at the trial, but the president had discretionary right to allow the witness to be heared. Each accused was sent a copy of each witness's

statement and each expert report before the start of the trial, and the accused's lawyer has right of access to the 'dossier'. A list of potential jurors must be sent to the accused at least forty-eight hours before the trial, although minor amendments might be made to the list at a latter time. The trial might not take place within five days of the first examination of the accused by the president unless the defence waive this right.

The trial commenced with the president asking the accused his full name, date and place of birth, address and occupation. As the accused was in custody he would be in the dock with his police escort. The clerk of court then reads out the names of all potential jurors to ensure that all are present. All the names were then put into an urn, and the president draws nine names therefrom. As each juror's name was called, he takes his place on the bench, four sitting on one side of the three judges and five on the other. The prosecution was allowed four peremptory challenges of jurors, and the defence five, regardless of how many accused there were.[16] No reason was given for the

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16. If there were more than five accused, they would draw lots as to who may exercise the challenge - Mazurier, C.di Cass. 15 December 1959. As a general rule, the prosecution would not challenge a juror, accepting the jury as it was ballotted. However, some juror had prosecutors may challenge a juror at the latter's request if the juror has some urgent personal business to attend to on the day of the trial.

challenging. If the trial seems to be extremely long, the president had a discretion to order that one or two extra jurors be allotted. These supplementary jurors would sit beside the original jurors being then able to replace any of the original jurors who falls ill, etc., during the course of the trial. After the jury had been selected the president reads out their names and administers the oath--'do you swear and promises before God and man to examine with the most scrupulous attention the charges brought against (the accused); not betray either the interests of the accused person or those of society which accuses him; not to communicate with any person until after you have reached your verdict; to be guided neither by hate, malice, fear nor affection; to come to your decision after hearing the charges and defences according to your conscience and personal conviction with the impartiality and resolution of an honest, free man; and to maintain the secrecy of your deliberations even after the termination of your duties'. Each juror in turn replied 'I so swear'.

During the course the trial of juror might ask the president to put specific questions to the accused or witnesses, and if authorised by the president, may put such questions in person--such an occurrence being very rare. The part of the oath requiring the jurors 'not to communicate

with anyone' means that the jurors must not discuss the facts of the case with anyone else prior to reaching their verdict. The jurors must pay close attention to the proceedings--for example a juror falling asleep could render the proceedings null and void. A juror must not display prejudice to any party to the case, nor indicate in any way that he had prejudged the cases. A juror breaking one of these rules could invalidate the entire trial, in which case the president would probably stop the proceedings and order that they be recommenced at the next session.

The 'huissier' (who was responsible for citing the witnesses) would then read out the names of the witnesses, each answering to his name. If any witness was absent, and if all the parties agreed to proceed in his absence, the president might allow the trial to continue, failing which he would adjourn the trial to the next session. If any of the parties had brought a witness to court who had not been cited, he would intimate the presence of this witness, at the same time explaining why the witness was not properly cited and intimated to the other parties, who at this stage might object to the witness. Normally the president would not give a ruling until later. All witnesses would then be taken from the court to the witness room.

The clerk of court then read the remit from the chambre d'accusation in full. The president would commence by examining the accused, followed by the witnesses--the procedure being the same as in the tribunal correctional. The oath administered to the witnesses was slightly different, the witnesses swearing 'to speak without hatred or fear, and to tell the whole truth and nothing but the truth'. As a general rule no record was kept of the evidence in the cour d'assises since no appeal was competent, but the president may order the clerk of court to note the evidence of a witness making contradictory statements.

The principal difference between the cor d'assises and the tribunal correctional was that since the jury did not have access to the 'dossier' all the evidence should be placed before the court orally. In other words any witness whose evidence was to be given to the jury for consideration, must be cited to court and examined. With regard to the accused's background, such evidence was elicited during the examination of the accused. The president of the cour d'assises also had a discretionary power to 'take all steps which he believed to be useful in order to discover the truth', which was not given to presidents of inferior courts.[17] This power included the parties, to call for further

17. Although the president of an inferior court may adjourn the trial to obtain further information.

productions to be logged, order any document (including anonymous letters) to be read aloud, order an examination by experts and gave the jury anything which might assist them in their deliberations (for example sketch plan, written statements by witnesses, etc.). Such a power, however, did not allow the president to break the rules of procedure (for example he might not place evidence before the court if it had been improperly obtained). The president might not use this power to adjourn the trial to a later date, except on cause shown and with the consent of all the parties.

At the conclusion of the evidence, the president would frequently adjourn the court for thirty minutes after which the parties to the case would address the court. The procedure was exactly the same as in the tribunal correctional except that since the parties were addressing a lay jury the address would tend to be longer and more reasoned. After the lawyer for the defence had finished his address, the president normally asked the accused in person if they had anything further to say.

The president then addressed the jury. He would determine the issues for the jury to decide, reducing the same to questions for the jury to answer. In theory the questions should always be read aloud to the

court, but the parties may dispense with such reading, and in practice, while it depends on the attitude of the individual president, the questions were seldom read aloud in many courts. The questions must be formed in such a way as to be capable of being answered by a simple affirmative or negative. The basic questions were -- 'Is the accused guilty of... (specifying the offence in detail)?; 'Was the offence accompanied by ... (specifying aggravating circumstances)'.; 'Were there any mitigating circumstances in the accused's favour?' The president then tells the jury -- 'The law does not require judges to account for the means by which they are convinced, nor does it prescribe rules by which they must assess the sufficiency of evidence; the law only required that they asked themselves in silence, infreflection and with a sincere conscience what impression the evidence brought against the accused and his defence thereto had made upon them. The law only asked them one question which encompassed their entire duties-- 'Are you thoroughly convinced?'. This formula was also prominently displayed in the retiring room.

The jury, the president and the other two judges then retired to the same room to consider verdict and sentence. No one might enter or leave the jury room until this was given. In their deliberations, they might not consider any evidence that had not been given orally at the

trial. The court (i.e. judges and jury) must answer each of the president's questions. This was done by writing 'Yes' or 'No' on a slip of paper which was folded and put into an urn. This ensures secrecy of the votes. The president then counted the votes. Any blank paper or one that was indistinct, or did not answer by a simple 'Yes' or 'No' would be counted as a vote in favour of the accused. After the voting, the ballot papers were burnt. Every answer unfavourable to the accused must have at least eight votes to be binding--thus requiring at least the majority of the lay jurors. The verdicts could be guilty, or not guilty or 'absolution'--as in the tribunal correctional.

If the verdict was guilty, the court then proceeded to vote on sentence, which must be within the minimum and maximum limits specified by the law. Each person wrote down what he thought was an appropriate sentence and the voting was dealt with in the same way as when voting on the verdict--except a simple majority (i.e. seven votes) was sufficient to determine sentence. If on the first ballot, there was no majority, the most severe proposed sentence was struck off, and the matter again voted on--this procedure being followed until a majority was obtained.

The answers to all the questions and the sentence were noted, the note being signed by the president and the foreman of the jury. The court then reconvened and read the questions and answers, including the sentence, to the accused. If the accused was convicted, the president would inform him briefly of the steps he might take if he wished to appeal.

Should there be a civil claim, the court would adjourn briefly, then reconvene without the jury. The parties to the case might then address the court further in relation to the civil claim. The procureur general also had such a right; he seldom exercised it though. The court might have appointed one of the judges to investigate the civil claim, in which case he would give his report at this stage. The court normally then adjourned to consider the civil claim, it reconvened to give its decision. The court could still award damages against the accused if he was acquitted or given a verdict of 'absolution'.

The clerk of court must write a minute with the verdict, sentence and statutory provisions contravened. Within three days after the verdict, he must write a further minute, recording the proceedings (but not the evidence). Both minutes were to be signed by the president.

It should be noted that no appeal was competent from the cour d'assises, except to the cour de cassation on a point of law.

'Contumace' - Trial in Absence

'Contumace' was a procedure whereby the cour d'assises might try an accused in his absence if he failed to appear for trial. The trial was held without a jury, and the court only considered the dossier, not hearing evidence from the witnesses. If the accused was convicted and was arrested before the time for enforcing the penalty prescribed, he must be re-tried in the normal way. The main effect was that all the accused's possessions were sequestrated and all civil claim was settled. A subsequent re-trial would however lift the sequestration and reconsider the civil issues. 'Contumace' was not frequently used, especially since persons accused of 'crimes' were invariably detained in custody awaiting trial. If an accused had been liberated and failed to appear for trial, the court would normally proceed by 'contumace', rather than adjourn the trial, the court having no power to issue a warrant for the accused's arrest.

THE 'PARTIE CIVILE'

While the 'partie civile' was not directly concerned with the administration of justice, it is appropriate that mention should be made here its position in criminal proceedings.

Any person who had sustained damage or loss as the result of a criminal offence had a choice of three courses of action - raising a separate civil action, or entering appearance in the criminal action (which would then settle the civil issues) or instituting criminal proceedings against the accused (the procureur subsequently taking responsibility for the prosecution, leaving the victim to pursue his civil claim which would be decided in the course of the criminal proceedings.

These rights were partly the vestiges of an accusatorial system where the victim (and not the public prosecutor) had the responsibility of seeking justice in the courts and partly a remedy against in action on the part of the public prosecutor.

The following person might act as 'partie civile' - the victim (who had an option to proceed, not to proceed or settle); the heirs of the victim (who has an option to proceed, not to proceed or settle); the heir of the victim (in their own right if the offence caused the death of the

victim, otherwise only quad any rights appertaining to the victim) any other person to whom the victim had assigned has rights of action. Although the general rule was that only persons who have personally and directly suffered loss (and the Cour de Cassation tends to interpret this rule strictly when judging on the competence of civil claims), there were various exceptions, notably - fire insurance companies acting on behalf of the victim of a fire; accident insurance companies, in certain cases, where the victim had suffered loss due to homicide, assault or negligence; motor insurance companies, and other statutory exceptions including the social security ministry which might sue the accused in respect of any injury benefits paid to the victim as a result of incapacity following on the criminal offence.

The right to recover damages from an accused person was not without point. If the accused went to prison, the payment of any damages awarded against him may be enforced on his release; if he is not sent to prison, the award may be enforced immediately. The decision to enforce payment of an award of damages, how payment should be made, and whether partial settlement should be accepted etc., are left to the 'partie civile' but the remedies at his disposal include

arrestment of the accused's wages.[18] The ground on which a 'partie civile' might claim damages could be material or moral, but courts tended to disallow claims if the damage was too remote, or if the state protected the same interests.

Choice of action available to the 'partie civile'.

With regard to the choice of action available to the victim of a criminal offence, the raising of a separate civil action was usually avoided where possible, since apart from the fact that it would be listed until the criminal case is settled, civil procedure in French system tends to be lengthy, cumbersome and expensive. As a result, most victims prefer to join their civil claim to the criminal action, by entering appearance as 'partie civile' after criminal proceedings have been instituted. Such appearance might be entered before the trial, with the juge d'instruction if he is making pre-trial inquiries, or at the trial itself. The victim thus benefited from the criminal action, having a right of audience at the trial which would settle any civil issue. To this extent the victim, as pursuer in the civil aspect of the case, acted as an additional prosecutor.

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18. See the case of Vigne, 1954 - the accused was charged with fraud in connection with butcher meat. The court held that the Union of Family Associations of the Department of Herault had no locus standi in entering a civil claim since the state is responsible for protecting public health.

Institution of Criminal Proceedings by the 'partie civile'

As an alternative to entering appearance in the criminal action, if no such action has already been opined, or if the procureur de al Republique refuses to prosecute, the victim might himself institute criminal proceedings. Once proceedings had been opened in this way, the procureur must take over the conduct of the prosecution, regardless of his views thereon and even if he had previously decided not to prosecute. If the offence was classed as a 'contravention' or a 'delit', the 'partie civile' would cite the accused to attend court, having first applied to the procureur for a date for the appearance. The procureur would normally obtain any record of the accused's previous convictions, background information, and any police report that happens to exist. If no such police information exists the procureur will normally rely on the case prepared by the 'partie civile'. At the trial diet, while the procureur was technically responsible for the conduct of the prosecution, he would normally leave it to the 'partie civile' to conduct the case, restricting his part in the proceedings to commenting on the case. In the course of the trial, should it appear that further investigations were necessary, or should the procureur decide to take a more active part, he might suggest that the court adjourn the case part-heard to a later date, having made it plain that he was not responsible for the initial institution of the proceedings. If the offence was classified as a 'crime'

the 'partie civile' could not cite the accused to court, but must appear before a judge d'instruction and enter a formal complaint known as a 'plainte avec constitution de partie civile'. The judge would order intimation of this to the procureur and the judge must than proceed to investigate the complaint unless he thought it was incompetent to do so. The 'partie civile' had the option of pursuing this course if the offence was classed as a 'delit'.

The raising of the criminal action by the 'partie civile' prevents the same accused from being subsequently prosecuted for the same offence by the procureur, even if fresh evidence came to light, but once proceedings had been instituted by the 'partie civile', he lost all control over the course thereof, should he later wished them dropped.

As a general rule, before instituting criminal proceedings himself, the 'partie civile' would either enquire of the procureur if the latter contemplated proceedings, or would make a complaint ('plainte') to the procureur in the hope that this would cause the procureur to institute such proceedings, thus allowing the 'partie civile' to enter subsequent appearance in regard to the civil claim.

Right of the 'Partie civile'

Regardless of whether he enters appearance in the criminal action, or institutes the criminal proceedings himself, the 'partie civile' had following rights at the trial: to be legally represented; to suggest questions to be put to the accused or witnesses; to cite witnesses; to give evidence without taking the oath; to submit a case which the court must answer; at the conclusion of the evidence, to give his views thereon (his 'summing up' being before that of the prosecution and defence); in the cour d'assises, to address the court on the civil issues outwit the presence of the jury - i.e. after the criminal aspect of the case has been decided. If the case is investigated by a juge d'instruction, the 'partie civile' may refuse to be questioned except in the presence of his lawyer (who has a right of access to the 'dossier' recording the juge's investigation); comment on a request by the accused to be released from pre-trial custody; ask for expert evidence to be obtained; appeal certain decisions of the juge d'instruction, of which he must be given notice and finally he has right of audience before the chambre d'accusation when such appeals were being considered, and when the chambre was deciding on the question of committal for trial.

Criminal Appeals under the French System

There were four methods of appealing against the Judgement of a French criminal court. Appeal to the cour'd' appel, appeal to the cour de cassation ('pourvois en cassation') were the two common methods of appeal proper. There was also a method of appeal available when the accused was judged in his absence ('l' opposition) and an extremely rare type of appeal to the cour de cassation known as 'pourvois en revision'. The means of appeal available depended on the circumstances of the case, but all had the effect of suspending execution of sentence until appeal was decided.[19]

Appeal to the cour d' Appel

At Pondicherry the cour d' appel had jurisdiction to hear appeals against any Judgment rendered in the tribunal correctional, and any judgement of the tribunal de police (if the sentence exceeds five days' imprisonment or a fine of sixty francs). It could not consider an appeal against Judgment of the cour d'assises.

An appeal might be considered before the termination of the trial in the interior court if the appeal concerned a refusal to liberate the

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19. Unless in exceptional cases where the court ordered the sentence be executed as soon as it is pronounced.

accused from custody (i.e. after the case had been remitted for trial by the Judge d' instruction) or any decision by the inferior court concerning a preliminary plea, which if upheld would have the effect of terminating proceedings before the trial proper had started. (Please such as Jurisdiction, amnesty, prescription, insanity, etc). Appeal concerning pre-trial custody would be considered within 24 hours of appeal being lodged, otherwise the time limit for deciding an appeal was one month.

An appeal might be lodged against the verdict or sentence of the inferior trial court. While the cour d' appel would normally consider both these matters, it was always open to the party lodging the appeal to indicate which particular aspect of the case he appealed against, in which case the cour d' appel would not concentrate its deliberations on that aspect. An appeal might not be taken to the cour d'appel if an appeal by way of 'd' opposition' was competent, until the proceedings by 'l' opposition' have been decided.

An appeal right be lodged by the accused, the 'partie civile', the procureur de la Re'publique or the procureur General, and if one party lodged an appeal, that entitled the others to lodge counter-appeal. If the accused preferred appeal and there was no counter appeal, the

cour d' appel might not increase his sentence. In practice therefore the procureur de la Republique would always lodge a counter appeal, so that the cour d' appel had the power to increase or decrease sentence as it deemed fit. If there were several accused, of whom only one lodged an appeal, the procureur would probably lodge notice of appeal concerning all accused. Should he only lodge a counter appeal against the one accused who had appealed, then that accused could claim in the cour d'appel that he only played a minor part in the commission of the offence and that his co-accused were the main culprits.

Apart from right to lodge a counter appeal, the procureur might appeal on his own initiative, even if such an appeal concerns sentence only (which was known as an appel a' minina'). Furthermore in certain exceptional instances where the procurear thought that the sentence imposed was unjust, he might even appeal in the interests of the accused. For example, if an accused judged in absence lodged an appeal by way of 'l' opposition' giving new facts indicating his innocence, of fails to appear for the hearing he would be rendered with the original sentence. In such circumstances if the procureur accepted that the accused was innocent, he might lodge an appeal which would result in acquittal of the accused. The procureur might also appeal if he

thought the sentence was improper or illegal, since it would be his duty otherwise to enforce such a sentence.

If the procureur or the accused appealed, the court might not increase any award of damages made to the 'partie civilie', but should the 'partie civilie' appeal, the award might be increased upto the limit originally asked by him plus any further loss incurred due to the delay in enforcing payment of the award. If the partie civile alone had preferred appeal, the cour d' appel might only consider the civil aspect of the case, but might not decrease the award made by the inferior court. When the partie civilie' preferred appeal against an acquittal verdict, the procurer would also normally lodge a similar appeal (since failure to do so would merely entitle the cour d'appel to award damages if it upheld the appeal, but not to convict the accused), but if the original proceedings were instituted by the 'partie civile' the procureur would normally lodge such an appeal.

All notice of appeals were lodged to the clerk of the court within ten days of the pronouncement of the Judgement. The accused who was undergoing imprisonment lodged appeals through the governor of the prison who forwarded the same to the clerk of the court. The procureur general had a general power to lodge an appeal within two

months of the Judgement. There were minor exceptions to the ten-day rule-such as where the accused was not present in court at the time of the Judgement.

The appeals were heard by the cour d' appel (or more accurately by the chambre des appeals correctionnels de la cour d' appel) which would normally appoint one of its Judges to investigate the case and make a report thereon. Those reports merely concerned the facts of the case, and did not give the Judge's opinions. At the appeal hearings the courts considered the report. The court might also re-examine the accused (which was quite frequently done) and had a discretion to re-hear the witnesses. If would also examine the notes of the evidence took by the clerk of the original court, but never considered fresh evidence. The appeal hearing virtually involved a re-trial of the case, the procedure was the same as in the tribunal correctional, unless the parties stated that the appeal referred to one aspect of the case only.

At the end of the hearing the court might uphold the original verdict, or modified it or rejected the appeal. When the court acquitted the accused it also awarded damages to him. But it was most unusual. It was decided that there was a procedural irregularity in the original proceedings, the appeal itself acted as a fresh trial and a verdict and

sentence was made. If it was held that the offence was a 'crime' and therefore that the trial in the tribunal correctional was incompetent, the cour d' appel would set aside the original verdict and reported the case formally to the prosecutor who then had a discretion to commence proceedings leading to a fresh trial in the cour d' assises. When the cour d' appel found that the tribunal police dealt with an offence classed as a 'delit', the cour d' appel itself tried those cases.

Cour de cassation - 'purvois en cassation'

The cour de cassation was the Apex court under the French system. There was no cour de cassation at Pondicherry. All the appeals from Pondicherry were taken to the cour de cassation at Paris in France. Appeals were taken to the cour de cassation at Paris on a point of law provided no other appeal procedure was competent. For example, an appeal might not be taken against the ruling of a judge d' instruction since such appeals might not be taken to the chambre d' accusation. But an appeal was competent against a decision of the chambre d' accusation. An appeal was not taken from the tribunal correctional, since such appeals were competently taken in the cour d' appel. Appeals were also taken directly from tribunal de police if the sentence was less than five days imprisonment or a fine of sixty francs, since in such cases no appeal might be taken to the cour d'appel.

Appeals might also be direct from the cour d'assess. The appeals were preferred on the point of law - i.e. procedure.

In the court of cassation appeals were preferred by any party provided he had been prejudiced by the decision or acting's of the inferior court. Notice of appeal was lodged within five days of the judgement being given in the inferior court, unless a valid reason was given for the belated lodging. The notice of appeal was lodged with the clerk of court by notifying the same to other parties. Caution for expenses must be given and the full grounds of appeal were lodged within ten days. If the sentence of the original court was more than six months imprisonment, and the appeal was taken by the accused, he must be given himself into custody unless the original court allows otherwise.

The appeals were heard by the chamber criminelle de la cour de cassation which would first hear a factual report by one of the Judges and then heard the parties to the case. The general procedure was as in the cour d' appel. The court was not restricted to consider the aspect of the case that was appealed but might consider any aspect of procedure, but it might not consider the civil aspects of the case unless

the 'partie civile appeals, and likewise might consider the civil aspects if the 'partie civilie' alone appeals.

The court had the powers to refuse appeal because the appellant failed to appear at the hearing or abandoned his appeal, it also had powers to refuse the appeal because the appeal itself was incompetent, or on the merits of the appeal itself. The court would also pointed out that if an irregularity had occurred, but that the irregularity was so trivial or technical that the original judgement should stand. If however the irregularity was grave and caused prejudice to the appellant, the court might annual the earlier judgement.

Then the cour de cassation would remit the case for retrial to another court. For example - if the case came from the tribunal correctional it would be remitted to a tribunal correctional composed of different judges from the original court, or if the cour de cassation decided that the offence was a 'crime' it remitted the case so that it could be tried in the cour d'assises.

The court to which a case was remitted was not bound by the decision of the cour de cassation. For example - the trial court might decide it was incompetent to deal with the offence. If the court did not

follow the ruling of the court de cassation, a second appeal might be taken on the same grounds to the cour de cassation. At the second hearing in the cour de cassation, the court would sit with a full bench of thirty-five judges (chambres reunies), the court not being bound by its own previous decision. The final decision of the cour de cassation must be and was followed in the court to which the case is again remitted for trial.

In addition to the above type of appeal, the procureur general had the right to appeal to the cour de cassation merely with a view to obtain a decision to clarify the law. In such a case, the decision of the court could not affect any of the parties to the case. The Minister of Justice could also instruct that such an appeal be taken at any stage in the proceedings and if this was done the decision of the court could not be applied if adverse to any of the parties to the case.

L' Opposition

The procedure known as 'l' opposition was practiced at Pondicherry during the French system. It was not so much an appeal, but merely a means to have the case re-tried. It was applied in the case of tribunal de police and tribunal correctional where the accused had been judged in his absence. Such an accused might request the

court to re-hear the case in his presence. It was only competent when the absence of the accused was due to the fact that he was not properly cited, or had no knowledge of his citation. L' opposition proceedings were commenced within ten days of the accused receiving notification of the court's judgement. To commence such proceedings all that was required was that the accused should notify the procureur that he wishes to appeal by means of 'l' opposition. Then the original verdict was reduced and the proceedings re-commenced as if the first trial had never taken place. The accused was cited to attend the new trial and if fails to attend the original judgement would be re-affirmed and there would be no further 'l' opposition under any circumstance.

Pourvois en Revision

A 'pourvois en revision' was a means of appeal whereby the cour de cassation might reduce a verdict of guilty because of new evidence coming to light after the trial. There are instances where these types of revisions were also preferred to the cour de cassation at Paris from Pondicherry. This type of appeal was competent in a case of murder where it was later proved that the victim was alive. It was also possible when if another person was subsequently convicted for the same offence, thus making it impossible for the accused to be guilty. It was also possible where if a witness at the trial was later convicted of

perjury in regard to his evidence, provided knowledge of the perjury was not available at the original trial.

The accused, or the prosecutor used to apply to the Minister of Justice who would set up a commission consisting of three directors (i.e. heads of departments) of the Ministry of Justice and three 'magistrates' from the cour de cassasion to examine the new facts. Depending upon the advice of the commission, the Minister of Justice might recommend that the case be brought before the cur de cassation by means of a pourvois en revision'. The court might then base its decision on the evidence available or might instruct further inquiries (having the power to issue 'commissions rogatorres' to the police, etc.).

When the court granted the appeal it had a choice of action. It might reduce the earlier judgement and remit the case for re-trial. It the accused was convicted again he could not be sentenced more than the sentenced imposed at the first trial. Alternatively, the count had reduced the earlier judgement and terminated the proceedings without ordering a re-trial. The court adopted the later course if the accused was clearly innocent or if no criminal offence was committed or if a re-trial was impossible.

If the second course was adopted, the accused was liberated, any fire or damages paid by him would be reimbursed, the court decision was widely published in an attempt to restore his reputation, and he might be paid compensation from the public funds.

In sum, in French Pondicherry, there was no elaborate examination of witnesses in court. Whatever examination carried out was immediate. The judge heard the witnesses and put questions to them. Lawyers were not allowed to intervene or heckle or influence a witness while he was deposing in court. If the counsel had any questions he was required to reduce them in to writing and pass them on to the presiding officer who exercised discretion in deciding whether the questions were relevant or not. It was unthinkable in the continental system for any lawyer to cast aspersions on the character of witnesses. It was in this way that the presiding officer played a pivotal role in ascertaining the facts of the case. Needless to say, this procedure was pre-eminently responsible for quick disposal of criminal cases. In addition, the judgements were generally short and it depended upon the skill and capacity of the judge to write them without omitting the essentials.

The French code of Criminal Procedure permitted pre-trial detention when detention was the only means of protecting the evidence or preventing coercion or influencing the witnesses or when such determining is necessary in the interest of public order. This provision has since been modified by the introduction of a pre-detention procedure called control judiciary which gave greater discretion to the examining magistrates and provided for conditions release.

CHAPTER IV [PART II]

TRIAL PROCEDURE UNDER THE PRESENT INDIAN SYSTEM

Under the Indian criminal procedure it is obligatory that evidence for the prosecution and defence should be taken in the presence of the accused. A Trial is vitiated by failure to examine the witnesses in the presence of the accused.[1] If a fair trial is the main object of the criminal procedure, any threat to the continuance of a fair trial must be immediately arrested. If an accused person by his own conduct puts the fair trial into jeopardy it would be the primary and paramount duty of criminal courts to ensure that the risk to the fair trial is removed and criminal courts are allowed to proceed with the trial smoothly and without any interruption or obstruction.[2] The idea of a fair criminal trial has been accepted as a universal human rights.[3] Thus, in the common law model of Indian Criminal trial, fair trial is not only adopted but also worshipped.

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1. *B.Singh* V. *State of Orissa*, 1990 Cr LJ 397 (ori).

2. *Hassain (I)* V. *State AIR* 1958 S.C. 376; State V Anantha Singh 1972 Cr. I LJ.

3. See Articles 10 and 11 of the Universal Declaration of Human Rights adopted and proclaimed by the General Assembly of the U.N. On December 10, 1948.

THE ACCUSATORIAL TRIAL PROCEDURE

It is a cornerstone of adversary system that an accused is presumed innocent unless and until proved guilty beyond reasonable doubt. The State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. A common law trial is and always should be an adversary proceeding. Thus, the presumption of the innocence of the accused is transformed into court room procedure in the common law adversary system.

THE JUDGES ROLE

An important feature of the accusatorial type of procedure is that the judge is expected to be independentant, impartial, and competent in conducting the trial.

The criminal procedure code has also made the provisions for separation of judiciary from the executive. It also provide for keeping the courts open,[4] judge or magistrate not to be personally interested in the case, transfer of cases to secure impartial trial if felt necessary. In

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4. *Kehar Singh* V. *State (Delhi)* 1988 3 SCC 609.

order to achieve the object of fair trial, measures have been made to have competent judges of integrity and character through hierarchy of criminal courts. Thus the adversary model of criminal trial is aimed at the foremost notion of fair trial.

ROLE OF COMPETENT LAWYERS

For the purpose of finding out the real perpetrator of the criminal act and to punish the guilt the State has taken much care by appointing public prosecutor and Assistant Public Prosecutors. The Prosecutors play a pivotal role in assisting the trial judge to find out the real culprit.

The accused must also be represented by a lawyer of his choice. Article 22[1] OF THE CONSTITUTION provides that no person arrested shall be denied right to consult and to be defended by a legal practitioner of his choice. Section 303 of Cr.P.C. provides that any person accused of an offence before a criminal court, or against whom proceedings are instituted, may of right to be defended by a pleader of his choice.

It has been held that the right to consult a lawyer for the purpose of defence begins from the time of arrest of the accused person and even before actual beginning of the trial. The right to counsel is

recognised because of the obvious reason that ordinarily an accused person does not have the knowledge of law and professional skill to defend himself before a court of law wherein the prosecution is conducted by a competent and experienced prosecutor.

The criminal procedure code has made provisions to provide a lawyer to the indigent accused person in a trial before a court of session ; the code also enables a State Government to extent this right to any class of trials before other courts in the State.[SECTION 304 of Cr.P.C.].[5]

In *Hussainara Khatoon* v. *State of Bihar*[6] the Supreme Court, after referring to the constitutional directive contained in Article 39-A regarding equal justice and free legal aid, and also approvingly referring to the creative interpretation of Article 21 of the Constitution of India as propounded in its earlier decision in MENEKA GANDHI VS UNION OFINDIA[7], has explicitly observed as follows;

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5. Section 304 of Cr.P.C.

6. (1980) 1 SCC 91.

7. (1978) 1 SCC 248.

> "The right to free legal services is, therefore , clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or in communicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course the accused person does not object to the provisions of such lawyer."[8]

It is now made as an obligation on the trial courts, to inform the accused that if he is unable to engage a lawyer on account of poverty, he is entitled to obtain free legal services at the cost of the State.[9]

The venue of trial is considered to be one which must be one convenient to the accused. The criminal procedure code provides for the same. Under the accommodative system of criminal trial the accused is presumed innocent till the prosecution proves its case beyond all the reasonable doubts. The burden is on the shoulder of the prosecution to the case against the accused. Mere suspicion about any information or evidence will be given benefit to the accused who gets the benefit of doubt and escapes from the clutches of law under the reason that the prosecution had failed to prove its case beyond all the reasonable doubts.

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8. *Husssainare Khatoon v. State of Bihar* (1980) 1 SCC 98, 105.
9. *Suk Das* V. *Union Territory of Arunachala Pradesh* (1986) 2 SCC 401.

TRIAL AND THE RIGHTS OF THE ACCUSED.

So as to have the trial in a fair manner the criminal procedure code recognised some rights to the accused person. They are,[1] Right to know about the accusation [2] Right to be tried in his presence[3]Right to have evidence to be taken in his presence[4] Right to have a competent legal practitioner of his choice[5] Right to cross examination prosecution witnesses [6] Right to adduce evidence in defence etc.

SPEEDY TRIAL

In every inquiry or trial the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun the same shall be continued from day to day until all the witnesses in attendance have been examined unless the court finds the adjournment of the same beyond the following day to be necessary for the reasons to be recorded. [Section 309[1] of Cr.P.C.

Article 21 of the constitution guaranteed speedy trial as an essential ingredient of 'reasonable, fair and just' procedure. It is the constitutional obligation of the State to devise such a procedure as would ensure speedy trial to the accused.[10]

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10. *Hussainara Khatoon (IV) v. State of Bihar* (1980) 1 SCC 98, 107; *Sheela Barse v. Union of India* (1986) 3 SCC 632; *Raghubir Singh v. State of Bihar* (1986) 4 SCC 481.

In Suk Das v. Arunachal Pradesh[11] the Supreme Court held that Article 21 of the constitution implicitly requires the state to make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situation. The only qualification would be that the offence charged against the accused is such that on conviction it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation.

DIFFERENT TYPES OF CRIMINAL TRIALS

The criminal procedure code of 1973, provides different types of criminal trials for various kinds of criminal cases. There are more elaborate, simple and less elaborate trial procedures for various kinds of offences according to their seriousness and less seriousness.

Classification of criminal cases has been made for making a primary decision as to the type of trial procedure to be adopted in respect of any criminal case. The code of criminal procedure provides for four types of trial procedure. They are[1] trial before a court of

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11. (1986) 2 SCC 401.

session, [2] trial warrant cases by magistrates, [3] trial of summons cases by magistrates, and [4] summary trials. Both the trial before the court of sessions and warrant cases by magistrates are tried under the procedure of warrant cases and the remaining two are tried in a summons cases trial.

Section 272 of Cr.P.C. empowers the State Government to determine what shall be the language, for the purpose of each court within the State other than the High court. However the depositions and evidence adduced by the witness in their mother tongue will be translated to the language of the court. The dossiers of case records are translated to the language known or understandable by the accused so as to have a fair trial.

Section 311 of Cr.P.C enables the criminal courts, at any stage of any trial or inquiry to summon any person as a witness, or examine any person in attendance, though not summoned as a witness or recall or re-examine any person who has been already examined.[12]

The code of criminal procedure also enables the courts to order payment of expenses of complainants and witnesses.[13]

12. See *Balwant Singh v. State of Rajasthan* 1986 Cri LJ 1374 (Raj HC).
13. Section 312 of Cr.P.C.

COMMISSIONS FOR EXAMINATION OF WITNESS

For a fair trial, in the course of any inquiry or trial if it appears to the court that the examination of a witness is necessary for the ends justice, and that the attendance of such a witness can not be produced without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the court may dispense with such attendance and may issue a commission for the examination of the witness.[14] The issuing of commission is a judicial one and should not be lightly or arbitrarily exercised.[15]

SPECIAL RULES OF EVIDENCE.

The code of criminal procedure has arrangements for deposition of medical witnesses. The deposition of a civil surgeon or their medical witness, taken and attested by a magistrate in the presence of the accused, or taken on commission in the manner mentioned may be given in evidence in any inquiry or trial, although the deponent is not called as a witness.[16]

Section 292 to 296 of Cr.P.C. enables the courts to accept the evidence of officers of Mint, scientific experts, etc.

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14. Section 284(1) of Cr P.C.
15. *Dharmanand Pant v. State of U.P.* AIR 1957 SC 594.
16. Section 291 (1) of Cr P.C.

RECORD OF EVIDENCE IN THE ABSENCE OF THE ACCUSED

Section 299 of the Cr.P.C. provides two exceptions to the normal rule contained in Section 273 of Cr.P.C. that all evidence is to be taken in the presence of the accused person. These exemptions reads as follows:

> [a] If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the court competent to try such person for the offence complained of may, in his absence examine the witnesses produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case would be unreasonable.[17]
>
> [b] If it appears that an offence punishable with death or life imprisonment has been committed by some unknown person, the High court or the sessions judge may direct that any magistrate of the first class may hold an inquiry and examine any witness can give evidence concerning the offence. Any deposition so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of India.[18]

For proper appreciation of evidence given at any inquiry or trial, the concerned magistrate or judge may, at any stage of such inquiry or trial, after due notice to the parties, visit and inspect any place in which

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17. Section 291 (1) of Cr P.C.

18. Section 299 (2) of Cr.P.C.

an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view. The magistrate shall then without unnecessary delay record a memorandum of any relevant fact observed at such inspection. For this local inspection the judge or magistrate should exercise his discretion to visit and inspect the place at a particular stage obviously depends on the facts and circumstances in each case.[19]

That apart the procedure also enables the courts to require the attendance of a prisoner for answering to a charge of an offence, or for examining him as witness for any inquiry or trial by ordering the officer-in-charge of the prison for producing the accused from prison.

DUTY OF THE COURT TO EXAMINE THE ACCUSED PERSON

The section 313 of Cr.P.C empowers the court to examine the accused after evidence for the prosecution has been taken. The object of empowering the court to examine the accused is to give him an opportunity of explaining any circumstances which may tend to incriminate him and thus to enable the court, in case where the accused is undefined, to examine the witnesses in his interest.[20] The

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19. *Abdul Karim v. State of Maharashtra* 1974 Cri LJ 514 (Bom HC).

20. Report of the Select Committee, (1882); Hos-sein Buksh, (1980) 6 Cal 96; Shakur, (1944) Mad 304; *Sudhakar Saranghi* V. *State*, 1992 Cr. LJ 1866 (Ori); *Kabul* V. *State of Rajasthan*, 1992 Cr LJ 1491 (Raj.

object of questioning an accused person by the court is to give him an opportunity of explaining the circumstances that appear against him in evidence. If for example, some article is found in the accused's house which points in an emphatic manner to the accused's responsibility for the crime, he should be given an opportunity of offering an explanation of the presence of that article in his house.[21] Only the accused person can be examined under this section.[22]

The examination of an accused under this section is quite a different thing from taking the plea of the accused which is done at an earlier part of proceedings. The object of the two sections are entirely different.[23]

The supreme court has held that the proposition that a pleader authorised to appear on behalf of the accused can do all acts which the accused himself can do is too wide. At the close of prosecution evidence the accused must be questioned and his pleader cannot be examined in his place.[24] Where the advocate of an accused was

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21. Duraiswami, (1946) Mad 659; Maruti, (1956) Hyd 148; Karunakaran, (1960) Ker 1202; *Keki Bejonji v. State of Bomay*, AIR 1961 SC 967: (1961) 2 Cr LJ 37.
22. Bibhuti, AIR 1969 SC 381: 1969 Cr LJ 654.
23. *Rai Mohan Mandal v. Narmada Dasi*, (1950) 2 Cal 85.
24. Bibhuti, AIR 1969 SC 381, 384: 1969 Cr LJ 654.

examined u/s 313 Cr.P.C instead of the accused himself, the supreme court set aside the order and directed the Magistrate to proceed with the case after recording the statement of the accused personally as it could not be dispensed with in a warrant case.[25]

Where the evidence against the accused consists of circumstantial evidence only, it is of the utmost importance that the various circumstances which clinch the issue against him should be put to him and an explanation called for from him.[26]

The Supreme court has held that an accused should be properly examined under this section and if a point in the evidence is considered important against the accused and the conviction is intended to be basedupon it, then it is right and opportunity of explaining it if he so desires. Where the appellant along with the co-accused were charged only u/s 302 read with s. 34,I.P.C. and s. 394, I.P.C., and the facts constituting the abutment by the appellant were not put to him in his examination u/s 313, Cr.P.C the same could not be used against him.[27] A duty is cast upon the courts to question the accused properly and

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25. *Usha K. Pillai v. Raj K.Shrinivas*, AIR 1993 SC 2090: 1993 Cr LJ 2669.

26. Dibia, (1954) 2 All 65.

27. *Sunder v. State of U.P.*, 1995 Cr. LJ 3481 (All).

fairly so that the exact case that the accused has to meet is brought home to him in clear words and thereby an opportunities given to him to explain any point.[28]

This is an important and salutary provision and should not be slurred over. It is not a proper compliance with this section to read out a long string of questioned and answers made in the committal court and ask the accused whether the statement is correct. A question that kind is misleading. In the next place, it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material circumstance which is intended to be used against him.[29] Rolling up several distinct matters of evidence in a single question by the Sessions Judge is also irregular.[30] However, every error or omission in complying with the section would not vitiate the trial.[31] An admission made by the accused should be read as a whole, it should not be so dissected that one part which is inextricably connected with the other is used and the other is not taken into consideration.[32] Broadly stated the

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28. *Parichhal v. State of Madhya Pradesh*, AIR 1972 SC 535: 1972 Cr LJ 322.
29. Tara Singh, (1951) SCR 729: AIR 1951 SC 441: 52 Cr LJ 1491.
30. Rana Shankar Singh. AIR 1962 SC 1239: (1962) 2 Cr LJ 296.
31. *Ajit Kumar Chowdhary* v. *State of Bihar*, AIR 1972 SC 2058: 1972 Cr LJ 1315.
32. Dadarao, AIR 1974 SC 388.

true position is that asking a few omnibus questions for the sake of brevity is as much inconsistent with this section as asking unduly detailed and large number of questions.[33]

The Supreme Court has also held that the duty of a Sessions Judge to examine the accused is not discharged by merely reading over the questions put to the accused in the Magistrate's Court and his answers, and by asking him whether he has to say anything about them. It is also not a sufficient compliance with the section to ask the accused generally that, having heard the prosecution evidence what he has to say about it. He must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and the questions must be fair and must be couched in a form which an ignorant or illiterate person may be able to appreciate and undstand.[34] The counsel of the accused need not be consulted by the court on the nature and circumstances or type of question to be put to the accused.

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33. Jai Dev and Hari Singh, AIR 1963 Sc 612: (1963) 1 Cr LJ 495.

34. Ajmer Singh, (1953) SCR 418: AIR 1953 SC 76: 1953 Cr LJ 521.

Pro-section can however bring it to the notice of the court if any incriminating circumstance is not put to the accused.[35]

The Supreme Court has further held that in order that a conviction may be set aside for non-compliance with the provisions of this section, it is not sufficient for the accused merely to show that he was not fully examined as required by the section, but he must also show that such non-compliance has materially prejudiced him.[36] If the State relies in the Supreme Court on any particular circumstance as being sufficient to sustain a conviction, it will be open to an accused to plead in answer that the particular circumstance was not put to him in his examination under this section or S.281.[37] In a murder case, the accused was clearly questioned on the point of motive in his statement U/s.313 Cr.P.C., the Supreme Court held that it could not be said that the accused was totally unaware of the accusation with regard to the motive part, and so no prejudice had been caused to him.[38] Where the accused was deaf and dumb, and no explanation was sought regarding

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35. *Mir Mohd. Omar v. State of West Bengal*, 1989 Cr LJ 2070: AIR 1989 SC 1785.

36. Bijoy Chand Potra, (1952) SCR 202; *Labhchand Jain v. State of Maharashtra*, AIR 1975 SC 182: 1975 Cr LJ 246.

37. Kaur Sain, AIR 1974 SC 329, 332.

38. *S.C. Bahri v. State of Bihar*, AIR 1994 SC 2020: 1994 Cr LJ 3271.

the evidence of the prosecution or no interrogation as to the facts appearing against him was held, it was held that the accused was prejudiced by such failure of the Court.[39] Even if there was any defect in the examination of the accused under Cr.P.C., the defect amounted merely to an irregularity and was not such as to call for an interference with the orders passed by the court below especially when no complaint on this ground was raised before the High Court.[40] Where it was not put to the accused at the time of recording his statement that during the assault, one of the accused had sustained injuries, it was held that the trial was not vitiated only on that omission as the accused was not prejudiced thereby.[41]

The Madras High Court was of opinion that the section did not apply to summons-cases though there is no objection to the Magistrate questioning the accused and in complicated cases it may be a desirable course to take.[42] The same was the view of the Rangoon High Court.[43] But the High Courts of Bombay,[44] Calcutta,[45] Allahabad,[46]

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39. *Joda Sabaran v. State*, 1982 Cr LJ 1926 (Ori).
40. *C.T.Muniappan v. State of Madras*, AIR 1961 SC 175: (1971) 1 Cr LJ 315.
41. *Siddalingappa v. State*, 1993 Cr LJ 397 (Kant).
42. *Ponnusamy v. Ramasamy*, (1923) 46 Mad 758 FB.
43. Nga La Gyi, (1931) 9 Ran 506 FB.
44. Fernandez, (1920) 45 Bom 672: 22 Bom LR 1040; Gulabjan, (1921) 46 Bom 441: 23 Bom LR 1203.
45. Bechu Lal Kayastha, (1926) 46 Bom 441: 23 Bom LR 1203.
46. Kacho Mal, (1925) 27 Cr LJ 405: AIR 1926. All 358; Sia Ram, (1934) 57 All 666.

Patna[47] and Lahore[48] have held that the Magistrate is bound to examine the accused in a summons-case, and the omission to do so vitiates the trial. The *proviso* now makes it clear that the section applies to summons cases as well, the only exception being the case where personal attendance of the accused has been dispensed with.

This section is wide in its language and does not limit the power of the Court to examine the accused at any particular stage. The Court can examine him as often as it thinks it necessary to do so, to enable the accused person to explain any circumstances appearing against him in the evidence, the object of the section being to see whether the accused can give an innocent explanation of the facts spoken to against him. There is nothing in the language of the section which would prevent the Court from examining the accused even after the defence evidence has been recorded.[49]

This section must be read subject to the provisions of s.205. Hence, where a Magistrate exercises the power given to him by s.205 of dispensing with the personal attendance of the accused and permits him to appear by his pleader, the Magistrate is not bound to question

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47. Gulam Rasul (1921) 6 PLJ 174: 2 PLT 390.
48. Muhammad Bakhsh, (1922) 4 PLJ 230.
49. Rusi V. Nakhyatramalini, (1953) Cut 623.

the accused personally.[50] The court need not record the reasons while dispensing with the examination of the accused.[51]

In a summons case, discretion lies with the Magistrate whether to dispense with the examination of the accused under section 313. His personal appearance was dispensed with under section 205 or 317. The accused could not claim as of right that he should not be examined or that the counsel should be examined.[52]

The section applies to a summary trial,[53] in a summons-case[54] or a warrant case.[55] It is not necessary, in such a trial, for the Court to record the questions put to the accused person or his answers.[56]

The section does not apply to proceedings under ss.125 and 126,[57] or to additional evidence taken at the instance of the appellate Court, though the accused may be questioned in regard to such additional evidence, but if he is not, there is no legal ommission.[58]

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50. Jaffar, (1934) 36 Bom LR 433; C.M. Raghavan, (1951) Mad 636.
51. *Udayanath Barik v. State of Orissa*, 1989 Cr LJ 2216 (Ori).
52. *Sachachida Nand v. Pooran Mal*, 1988 Cr LJ 511 (Raj).
53. Mohammed Hossain, (1914) 41 Cal 743; Karam Din, (1933) 15 Lah 60.
54. Kondiba Balaji, (1940) 42 Bom LR 695; Fernandez, (1920) 22 Bom LR 1040, 45 Bom 672.
55. Mahomed Hossain, supra; Sia Ram, (1934) 57 All 666.
56. Parsotim Das, (1927) 6 Pat 504; Sia ram, supra.
57. Vithaldas, (1928) 30 Bom LR 957: 52 Bom 768; Mehr Khan v. Bakht Bhari, (1928) 10 Lah 406.
58. Narayan Keshav, (1928) 30 Bom LR 651: 52 Bom 699; Saiyid Mohiuddin, (1925) 4 Pat 488.

The section applies to a trial before the Sessions Judge even when the accused has been questioned on the case generally by the committing Magistrate.[59]

In an appeal, a Judge would not be acting according to law in acquitting an accused on the ground that the facts found in the case constitute an offence other than what the accused has been charged with. He should either remand the case for re-trial after framing the proper charge where the accused had no opportunity of meeting the same, or if justified by the facts found convict the accused of such charge though not actually framed, if he had sufficient opportunity of meeting the same.[60] The Court in its examination under s.313 cannot question the accused about a previous conviction before convicting him for the offence of which he is charged. The Court ought not to take any notice of such previous conviction while reaching the conclusion regarding his guilt.[61] In a murder case, the circumstance alleging dissension between the accused and the deceased a few days prior to the offence cannot be the subject-matter of examination under s.313.[62]

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59. Raju Ahilaji, (1907) 9 Bom LR 730.

60. *Gobardhan Chandra v. Kanai Lal*, (1953) 2 Cal 133.

61. *M.Y.Patil* v. *Maharashtra*, 1978 Cr LJ 1163 (Bom).

62. *Panchu Nahak* v. *Orissa*, 1985 Cr LJ 1633 (Ori).

A Court can not use statements recorded under s.161 of the Code as substantive evidence and thereby put questions to the accused under s.313.[63] The expedient course adopted by the trial court on remand by dispensing with the recording of the statement of the accused is not permissible. Even if the accused and the counsel agree that the statement under section 313 of the Cr.P.C. be not recorded, the trial court is bound under the law to record that statement.[64]

Under section 205 of the Cr.P.C. at the conclusion of the trial, the Magistrate directed the accused to appear personally before the court for recording his statement as contemplated by section 313 of the Code. The accused requested that his statement be recorded through his counsel. The Magistrate rejected this request. The High Court refused to interfere. On appeal to the Supreme Court it was stated by the accused that he would not raise any plea of prejudice, caused to him by non examination at a subsequent stage of the trial. The Supreme Court set aside the order of the Magistrate.[65]

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63. *Sewaki* v. *H.P.*, 1981 Cr LJ 919 (HP).

64. *Dal Chand v. State of Delhi*, 1989 Cr LJ NOC 33 (Del).

65. *Chandu Lal v. Puran Mal*, 1989 Cr LJ 296: AIR 1988 SC 2163.

Accused as a competent witness

Section 315 Cr.P.C lays down that can accused person is a competent witness for the defence and like any other witness he is entitled to give evidence on oath in disproof of the case laid against him by prosecution. If further provides that the court cannot draw any adheres inference from his non-examination as a witness.[66] But if an accused voluntarily examines himself as a defence witness, the prosecution is entitled to further examine him and such evidence can be used against co-accused.

Power to Proceed Against other Persons Appearing to be Guilty of Offence

The code of criminal procedure under its section 319 empowers the court to proceed against any person not shown or mentioned as accused if it appears from evidence that such person has committed an offence for which he could be tried together with the main accused against whom on inquiry or trial is being held. It authorised the court to issue a warrant of arrest or summons against such person if he is not attending the court; and, if he is so attending, to detain such person for the purpose of inquiring into or trial of the offence which he appears to have committed.

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66. R.B.Chowdhari, AIR 1968 SC 110: 1968. Cr.LJ. 95; Baidyanath Prasad Shrinivastrava, AIR 1968 SC 1393: 1968 Cr.LJ 1650.

The proceedings against such person shall be commenced *de novo*, and the witness must be reheard. Otherwise, the case proceeds as if such person had been an accused when the Court took cognizance of the offence upon which inquiry or trial was commenced. Section 319 is not sole repository power of the Sessions Court to summon an additional accused. It is the duty of the court to punish the real culprit. There is no reason why such power should be exercised at the late state of the evidence contemplated by section 319. The power to summon material witnesses can be exercised by the court at any stage of enquiry.[67]

Where during the trial of a murder case, the complicity of few more persons was revealed, and warrants for their arrest were issued for trying them along with the other accused, it was held that s.319 Cr.P.C. gives ample powers to the court at any stage of any inquiry or trial of the offence to take cognizance and add any person not being an accused before him and try him along with others.[68] Where during the trial of a Vanaspati ghee dealer under Food Adulteration Act, 1954, the Magistrate issued summons to the manufacturer also to be tried jointly,

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67. *Mahendra Kumar* v. *State of Madhya Pradesh*, 1987 Cr LJ 1450 (MP).

68. *Dulichand* v. *State of Rajasthan*, 1993 Cr LJ 827 (Raj).

the Supreme Court held that there was no embargo on the Magistrate during the trial of an offence to issue notice to the manufacturer for holding joint trial.[69] It has been held that a person who has been an accused in the case and discharged, cognizance against him can not be taken u/s. 319 Cr.P.C. even if the material before the Court during the trial showed that the accused appeared to be guilty. The discharge was subject to provision of s.398, Cr.P.C.[70]

Oral arguments and memorandum of arguments

Code enables the parties to a proceeding to address oral arguments and also entitles them to submit in writing a memorandum to the court setting forth, in brief, arguments in support of their case, which would form part of the record. It also empowers the court to regular irrelevant and unnecessarily doborate arguments.

Power to post pone or adjourn proceedings

Section 309 of Cr.P.C. authorities the magistrate, after

This section authorizes a Magistrate, after taking cognizance of the offence or commencement of trial, for reasonable cause, to remand an accused person to jail. It relates to adjournment of proceedings in

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69. *Delhi Cloth and General Mills Ltd.* v *State of M.P.*, 1996 Cr LJ 424 (SC).

70. *Vishwanath v. State*, 1996 Cr LJ 1955 (Raj).

inquiries and trials and has nothing to do with the police investigation and contemplates a remand to jail and not to police custody.[71] The detention by the police is altogether different from the custody in which an accused person is kept under remand given under this section. The detention by the police under s.167 cannot exceed in all fifteen days including one or more remands.[72] The custody under this section is quite different from the custody under s.167. The custody under this section is intended for under-trial prisoners.[73] It is absolutely necessary that persons accused of offences should be speedily tried so that in cases where the accused persons are not released on bail, they do not have to remain in jail longer than is absolutely necessary.[74]

Where an accused is in judicial lock-up and the police wants him to be removed to the police custody under s.167 in connection with the investigation in another case, the Magistrate can hand over the accused to the police for purposes of investigation.[75] An order of

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71. Krishnaji, (1879) 23 Bom 32; Rama, (1902) 4 Bom LR 878; Legal Remembrancer, *Bengal* v. *Bidhindra Kumar Ray*, (1949) 2 Cal 75.

72. Engadu, (1887) 11 Mad 98.

73. Nagendra Nath, (1923) 51 Cal 402; *Babubhai Purushottamdas v. State of Gujarat*, 1982 Cr LJ 284 (Guj).

74. *Hussainara Khatoon v. State of Bihar*, 1979 Cr LJ 1045: AIR 1979 Sc 1360.

75. Sukh Singh, (1954) 4 Raj 413.

remand under s.309 can be passed by a Magistrate after filing a charge-sheet and before a formal order of taking cognizance is passed.[76]

The Supreme Court has held that this section requires a Magistrate, if he chooses to adjourn a case, "to remand by warrant the accused in custody" and provides further that every order made under this section by a Court shall be in writing. Where a trying Magistrate adjourned a case by an order in writing but there was nothing in writing on the record to show that he made an order remanding the accused to custody, it was held that the detention of the accused after the order of adjournment was illegal.[77] Illegality of the detention order does not entitle the accused to be released on bail.[78] Where bail was sought in a murder case on the ground that remand order was invalid u/s.309(2), Cr.P.C. as reasons for adjournment were not given and also proper authorisation for detention was not made out, the Allahabad High Court refusing bail held that reasons contemplated need not be detailed one; but merely indicate as to why the case was adjourned on

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76. *Rabendra Rai v. Bihar*, 1984 Cr LJ 1412 (Pat.).

77. Ram Narayan Singh Singh, (1953) SCR 652: AIR 1953 SC 277: 1953 Cr LJ 1113.

78. *Mahesh Chand v. State of Rajasthan*, 1985 Cr LJ 301 (Raj).

a particular date. It was sufficient that the Presiding Officer was on leave or he had been transferred. The court said that the present detention was valid and the accused could not get benefit of any technical error in the past.[79] In a trial by the Special Judge, the Advocate for the accused applied for adjournment on the ground of illness of the Senior Counsel, application was returned by the Court. The court also examined the witnesses and asked the Advocate to cross-examination which he was not prepared for and thereupon the court discharged the witness. It was held that the Advocate should have been given time to prepare for cross-examination by adjourning the hearing of the case.[80]

Where a criminal case for cheating and forgery was going on, a civil suit was also filed concerning the same cause of action, and the criminal case was sought to be stayed, it was held that the mere pendency of civil proceedings can not *ipso facto* block criminal proceedings and its stay cannot be justified only on this ground.[81]

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79. *Lokendra v. State of U.P.*, 1996 Cr LJ 67 (All).

80. *Himachal Singh v. State of Madhya Pradesh*, 1990 Cr LJ 1490 (MP).

81. *Court on its Motion* v. *Kailash Rani*, 1993 Cr LJ 2109 (P & H).

Framing of Charge in Criminal Trial

The provisions relating to "charges" are intended to provide that "the charge" shall give the accused full notice of the offence charged against him.

The purpose of a charge is to tell an accused person as precisely and concisely as possible of the matter with which he is charged and must convey to him with sufficient clearness and certainty what the prosecution intends to prove against him and of which he will have to clear himself.[82] Sections 211 to 214 give clear and explicit directions as to how a charge should be drawn up. It has been repeatedly held that the framing of a proper charge is vital to a criminal trial and that this is a matter on which the Judge should bestow the most careful attention.[83] Material on record not showing *prima facie* case, it was held that there was no application of mind on part of the Magistrate. Hence order framing the charge was set aside.[84]

In summons-cases no formal charge need be framed but in warrant-cases, if the Magistrate is of the opinion that a *prima facie* case

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82. Mannalal, AIR 1967 Cal 478.
83. Balakrishnan, (1958) Ker 283. *Pratap Singh v. State of Rajasthan*, 1996 Cr. LJ 4214 (Raj), enough evidence and extra-judicial confession of cheating, charge framed, justified.
84. *The State* v. *Ajit Kumar Saha*, 1988 Cr LJ NOC 2 (Cal).

has been made out, a charge must be framed. Mere mention of a section under which a person is accused without mentioning the substance of the charge amounts to a serious breach of procedure.[85] Where the accused was charged of an offence under s.292(1) of the I.P.C. and the charge-sheet contained the word "obscene" but did not contain other words in the section, it was held that since the law used a specific name for the offence and that name had been used, the chargesheet was not defective.[86] Defect in the charge vitiates the conviction.[87] No hard and fast rule can be laid down as to the effect of an omission in the charge-sheet on the conviction of the accused. It will depend upon the merits of each case.[88] In a criminal trial charge is the foundation of the accusation and every care must be taken to see that it is not only properly framed but that the evidence is available in respect of the matters put in the charge.[89] It is a basic principle of law that before summoning a person to face a charge and more particularly when a charge-sheet is actually framed, the Court concerned must be equipped with at least *prima facie* material to show that the person who

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85. *Court in its own motion v. Shankroo*, 1983 Cr LJ 63.

86. *State v. Basher*, 1979 Cr LJ 1183 (Knt).

87. *Dal Chand v. State*, 1982 Cr LJ 1477.

88. *Bhim Sen v. Punjab*, AIR 1976 Sc 281: 1976 Cr LJ 293.

89. *Ramrkishna v. Maharashtra*, 1980 Cr LJ 254 (Bom) (DB).

is sought to be charged is guilty of an offence alleged against him.[90] If *prima facie* case cannot be established, then framing of the charge amounts to illegal exercise of jurisdiction. Where the two accused were separately charged of committing murder in furtherance of a common intention, but in the charge framed against one accused, the name of the other was not mentioned, but the charges were read over to each of the accused in the presence of the other accused, it was held that this defect in the framing of the charge was a mere irregularity.[91]

Alteration of Charge

The court may alter or add to the charge at any time before judgement is pronounced. It may be done even at the appellate stage before the pronouncement of the judgement of appeal. But it must exercise a sound and wise discretion in so doing. If it wishes to strike out any of the charges it should do so concluding the trial, and should give the accused an opportunity of making such defence as he thinks fit; otherwise the trial is vitiated.

Even if there is an omission to frame a proper charge at the commencement of the trial, if that omission is discovered

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90. *Nohar Chand v. Punjab*, 1984 Cr LJ 886.
91. *State of Karnataka v. Eshwaraiah*, 1987 Cr LJ 1658 (Knt).

subsequently, it can be remedied by framing appropriate charge at any time before the judgement is pronounced Section 216 of Cr P.C. enables the counts to alter the charges.

The Supreme Court has said: ".... the criminal procedure code gives ample power to the courts to alter or amend a charge... provided that the accused has not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about that charge or in not giving him a full opportunity of meeting it and putting forward any defence open to him, on the charge finally preferred against him."[92] To quote Lord Porter from the privy council decision in *Thakur Shah v. Emperor*,[93] the alteration or addition is "always, of course, subject to the limitations that no course should be taken by reason of which the accused may be prejudiced either because he is not fully aware of the charge made or is not given full opportunity of meeting it and putting forward any defence open to him on the charge finally preferred".

It is also possible that where the accused person is charged of an offence consisting of several particulars, some of which when combined and proved form a complete minor offence, he may be

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92 Kantilal AIR 1970 SC 359, 362-363: (1970) 3 SCC 166.

93 AIR 1943 PC 192.

convicted of minor offence though he was not charged with such minor offence.[94] When a charge containing more heads than one is framed against the same person, and when a conviction has been had on one or more of them, the complainant, or the prosecutor may, with the consent of the court with draw the remaining charge or charges, or the court of the own accord may stay the inquiry into, or trial of, such charge of changes. Such withdrawal shall have the effect of an acquittal on such charge or charges, unless the conviction be set aside, in which case the said court may proceed with the inquiry into, or trial of, the charge or charges so with drawn.[95]

Chapter XXI of the code of criminal procedure lays down the provisions relating to summary trials.[96]

Summary Trials

According to section 260(1) of the code of criminal procedure 1973, and chief judicial magistrate, any metropolitan magistrate and any magistrate of first class specially empowered by the High Court

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94 S. 222(1) of Cr.P.C.

95 Section 224 of Cr.P.C.

96. S.260 of Cr PC, 1973.

may, if he thinks fit, try in a summary way all or any of the offences mentioned in the code.

Summary trial is a short-cut and speedier procedure to try and dispose off certain petty nature of cases.

The resort to summary trial procedure is only a measure to save time. The offences which could be tried in a summary way are classified as follows:

(i) offences not punishable with death, imprisonment for life or imprisonment for a term exceeding two years;

(ii) theft, under S.379, S.380 or S.381 of the IPC, where the value of the property stolen does not exceed two hundred rupees;

(iii) receiving or retaining stolen property, under S.411 of the IPC, where the value of the property does not exceed two hundred rupees;

(iv) assisting in the concealment or disposal of stolen property, under S.414 of the I.P.C., where the value of such property does not exceed two hundred rupees;

(v) offences under SS.454 and 456 of IPC.

(vi) insult with intent to provoke a breach of peace, under S.504 and criminal intimidation, under s.506 of the Indian penal code.

(vii) abutment of any of the foregoing offences;

(viii) any attempt to commit any of the foregoing offences, when such attempt is an offence;

(ix) any offence constituted by an act in respect of which a complaint may be made under S.20 of the cattle Trespass Act, 1871.[97]

During the course of a summary trial, if it is felt by the magistrate that it is undesirable to try it summarily the magistrate shall recall any witnesses who may have been examined and proceed to rehear the case in the manner provided by the code of criminal procedure. It is also note worthy to note there that the maximum punishment that can be awarded in a summary trial proceedings in only 3 months.

It is also pertinent to note that simply because a case triable summarily does not necessarily mean that the judicial officer empowered to try it in a summary way must try it summarily. The magistrate has the discretion to decide it, the discretion however is to be used judicially having regard to the CP. cumstances of each case. In serious or complicated cases it would not be just and proper to have summary trials.[98] However, if an offence can be tried summarily, then

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97. S.260 (1) of Cr PC 1973.

98. *Parameshwar Lall Mitter v. Emperor*, AIR 1922 pat 296.

merely because an accused person happens to be a Government servant and his conviction would result in dismissal from service causing serious loss to him, the magistrate shall not refuse to try him summarily.[99]

That apart it is also pertinent to note here that S.262 of Cr.P.C is applicable to a summary trial prescribed by S.12AA(1) (f) of the essential commodities Act 1981[100] or S.138 of the customs Act, 1963.[101]

Preparation of Magistrate's Record in Summary Trials

In every summary trial case there must be a record of triable prepared and maintained by the summary trial magistrate. In the form prescribed for the same by the appropriate state government the particulars like -

(a) the serial number of the case;

(b) the date of commission of ;

(c) the date of the report of complaint;

(d) the name of the complaint (if any);

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99. *Jagmalaram v. State of Rajasthan*, 1982 Cri LJ 2314, (Raj HC): but see contra *Ram Lochan v. State*, 1978 Cri LJ 544, 545 (All HC).
100. *P.P. v. Anjaneyula* (1986) Cr.Lj. 1456 (para 18) A.P. (D.B.).
101. *Ruli* V. *Assist Collector*, (1986) Cr.LJ. 1931 (H.P.).

(e) the name, parentage and residence of the accused.

(f) the offence complained of and the offence (if any) proved, and in cases coming under cl. (ii) cl (iii) or cl (iv) of S.260 (1) of code, the value of the property in respect if which the offence has been committed;

(g) the plea of the accused and his examination (if any)

(h) the finding;

(i) the finding;

(j) the date on which proceedings terminated, all to be furnished.

It is also the duty of the summary trial courts to give the substance of the offence by mentioning necessary facts which formed the offence.[102]

The cases in which the accused does not plead guilty the magistrate shall pronounce a judgement of brief statement of reasons for the finding. Both the record and the judgement shall be prepared separately.[103]

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102. *Court on its suomotu motion* v *Sh.Shankroo*, 1983 Cri LJ 63, 64 (HP Mc).

103. *Sankaran v. Rasheed*, 1980 MLJ (Cr) 227.

Summary trial implies speedy disposal. By summary case is meant a case which can be tried and disposed of at once. Summary trial is not intended for a contentious and complicated case which necessitates a lengthy inquiry.

The object of summary trial is to have a record sufficient for the purpose of justice but not so long as to impede speedy disposal of cases. Procedure prescribed for trial of summons - cases should be followed (s.262). At the conclusion of the trial the Magistrate enters the accused's plea and the finding in a form prescribed by Government. No formal charge is framed. There is no appeal in such a trial if a sentence of fine only not exceeding two hundred rupees has been awarded. There can be an application for revision to the High Court.

In general it will apply to offences not punishable with imprisonment for a term exceeding two years. It will also apply in cases of specific offences mentioned in cls. (ii) to (ix) of sub-s. (1).

The Magistrates empowered to try cases summarily are: (a) Chief Judicial Magistrate, (b) Metropolitan Magistrate, (c) Magistrate of the first class (specially empowered by the High Court) and (d)

Magistrate of the second class (specially empowered by the High Court in a limited number of cases - see the next section).

1. It is in the discretion of a Magistrate to try any of the offences specified in the section in a summary way. Whether a case is trible summarily or not must be determined by the offence complained of[104] and the testimony of the complainant.[105] If a case is a complicated one, it should not be tried summarily,[106] If the accused is deaf and dumb it is convenient to try him summarily.[107]

Where an accused is charged with two offences, one of which is triable summarily, and the other not so triable, it is not open to a Magistrate to discard the latter charge, and to proceed to try the case summarily.[108]

2. This section does not enable the Magistrate to try any case or class of cases which he is not otherwise competent to try. It

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104. Jagjivan, (1987) 10 All 55; *Bishu Shaik V. Saber Mollah*, (1902) 29 Cal.409.

105. Fanidra Nath Chatterjee, (1908) 36 Cal 67.

106. Hari Gopal, (1895) Unrep Cr C 778, Cr R No. 42 of 1895; Dina Nath, (1913) 35 All 173; Rustomji, (1921) 23 Bom LR 984.

107. Deaf and Dumb Man, (1906) 8 Bom LR 849.

108. *Ramanund Mahton v. Koylash Mahton*, (1885) 11 Cal 236; *Sheo Bhajan Singh v. Mosawi*, (1900) 27 Cal 983.

empowers him to try the cases that he is already competent to try by a particular procedure.[109] For trial of offences u/ss.14, 4A and 14AA of the Employees Provident Funds Act (19 of 1952) the trial courts ought not to have tried summarily even if the accused desired to plead guilty.[110] In a summary trial the procedure laid down by this Chapter should be strictly observed. A summary trial is summary only in respect of the record of its proceedings and not in respect of the proceedings themselves which should be complete and carefully conducted.

Offences to be tried summarily need not be punishable under the Penal Code. Offences under special or local Acts can be tried summarily if they fulfill the condition of punishment laid down in this clause, e.g., Bengal Abkari Act.[111] The imprisonment may be simple or rigorous.

If the mode of trial is sought to be altered in the midstream on the ground that the offence is such which cannot be tried in a summary way, the trial must from its inception be conducted in the regular manner.[112]

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109. *Balachand* v. *Madsam Municipality*, AIR 1960 MP 20.
110. *State of Maharastra v. Shiva Prakash Seth*, 1993 Cr LJ 2777 (Bom).
111. Baidanath Das, (1878) 3 Cal 366 FB.9. D.N.Patel, 1971 Cr LJ 1244.
112. D.N.Patel, 1971 Cr LJ 1244.

Procedure for Trial of a Summons Case

In a summons case, as and when an accused is produced or brought before a magistrate, he is asked either to plead guilty or to offer defence. But it is not necessary to frame a formal charge. Instead the accused is served with a notice.

There is no any framing of formal charges in the summons cases. But the accused will be examined with the allegations levelled against him. It is for the accused either to plead guilt or claiming to be tried. The record prepared by the magistrate must show the particulars which were explained or stated to the accused by the magistrate.[113]

That the statement so made to the accused should make it: (1) that he is about to be put on the trial, and (2) as to the offence or facts constituting the offence with the commission of which he is accused.[114]

Conviction Upon the Plea of Guilty

If the accused pleads guilty the guilty plea made by him will be recorded by the magistrate with the very words used by the accused.

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113. *Mulkraj Chabra* v. *Nagpur Corporation AIR 1965*, Bom. 30.

114. *S.Lase of Mysore* v. *Shivanna 1972*, Cr. LJ 1146.

However the magistrate has discretion to accept or not to accept the plea of guilty. If the magistrate decides to accept the plea of guilty he can call evidence to decide the question of sentence.[115] However, prior to accepting the plea of guilty, the magistrate should get satisfied himself that the accused has understood the charges or the substance of the accusation made against him and the concerned accused has after understanding the same has pleaded guilty and also after realising the consequences of that follow after the guilty plea.[116] In petty cases the guilty plea are made without appearing before the magistrate, in the through messenger or by a letter with the fine specified in the summons.

If the accused pleads not guilty of the allegation and claims to be tried the magistrate shall then take all such evidences as may be produced in support of the prosecution. If necessary, on the application of the prosecution, the magistrate may issue summons to any witness necessary for the conduct of the examination of them so to present the memorandum of the same. After the completion of the examination of witnesses the accused will be questioned as per section 313 of Cr.P.C.

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115. *Emperor* V. *J.K. Abhyankar AIR 1931*, Bom. 195.

116. *State of Karnataka* v. *M.S.Ganagi 1979*, Cr.LJ 1482.

with regard to the incriminating circumstances in the evidence if any adduced by the witnesses. If the accused wants to have his defence evidence he would also examine them. There after the arguments are advanced which should be followed by a Judgement.

TRIAL OF WARRANT CASES BY MAGISTRATES

There are two category of warrant cases. They are (1) cases instituted on police report and (2) cases instituted otherwise than on a police report.[117]

In the case of cases instituted on a police report, no question of examining witnesses arises before framing charge.[118] Hence, no question of recalling any prosecution witness for cross-examination arises before the accused enters on his defence; the cross examination of prosecution witnesses is to be completed before the enters on his defence, though for ends of justice, the magistrate may permit him to cross-examine further.[119]

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117. Sections 238 and 244 (1) of Cr.P.C. 1973.

118. Section 242 of Cr.P.C. 1973.

119. Section 243 (2) of Cr.P.C. 1973.

In the case of cases instituted by way of complaints[120] the prosecution witnesses are examined before framing charge.[121] After the charge is framed, the accused is entitled to recall prosecution witnesses for cross-examination,[122] before the accused enters upon his defence and produces his evidence.[123]

A warrant case is a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. Cases tried before a court of session are all warrant cases except the cases of defamation tried under section 237 of Cr.P.C.

Warrant Trials are a little more complicated than summary trial or summons trials. In warrant cases trial by magistrates, after police investigation a challan is prepared and presented to the court under section 173 of Cr.P.C.

The charge sheet so presented is checked and registered with the court and the accused is summoned. On the day of first

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120. Section 244 of Cr.P.C. 1973.
121. Section 246 of Cr.P.C. 1973.
122. Section 247 of Cr.P.C. 1973.
123. Ibid.

appearance of the accused before the court, he is supplied with copies of the police report, FIR and statements of witnesses recorded under section 161 of Cr.P.C. in compliance with the provisions of section 207 of Cr.P.C, the Magistrate, if considered necessary, can give both the accused and the prosecution an opportunity of being heard and if he feels that charge against the accused is groundless, he can discharge the accused. Otherwise, he may proceed to frame charges.[124] After framing of charges the accused is asked to plead guilty or to defend himself. If the accused pleads guilty to the charge he is convicted.[125] Otherwise next stage in the case, i.e., recording of prosecution evidence follows. Against the accused is questioned with regard to the incriminating circumstances in the evidence and his statement is recorded.[126] At that stage the accused has to say something regarding prosecution evidence or he can say about this idea to produce his defence evidence.

If the accused wishes to present evidence in his defence, the witnesses or other evidence is summoned at his request and deposition recorded.[127] There upon the final arguments are heard from both

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124. Section 240, Cr.P.C. 1973.
125. Section 241, Cr.P.C. 1973.
126. Section 313, Cr.P.C. 1973.
127. Section 243 and 247 of Cr.P.C.

prosecution and defence and judgement is pronounced. If the case ends with a conviction the arguments on the point of sentence are heard. Finally, in such cases the orders of sentence are passed in open court.

The trial of complaint cases does not differ much from that of a case filled by the police. The only major difference is that after receiving the complaint, if the presiding officer thinks fit he may record some evidence of the complaint and his witnesses if any present to substantiate the complaint before taking any other step. Such evidence is generally known as pre-charge evidence.[128] This is practiced both in warrant and summons cases. That the difference between a sessions trial and a trial by magistrate's court is that of committal proceedings. In the cases instituted upon complaint, and on any day fixed for the hearing of the case if the complaint is absent, if the offence alleged in the case is not a cognizable and compoundable one the magistrate may discharge the accused. Compensation can also be ordered for accusation without reasonable case.

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128. Section 244 of Cr.P.C. 1973.

Cases Instituted on a Police Report

The underlying purpose in prescribing this procedure is to ensure speedy disposal of warrant - cases instituted on police reports without in anyway prejudicing the accused. Section 238 of Cr.P.C casts a duty on the Magistrate to satisfy himself that he has complied with the provisions of S.207. Cr.P.C. viz. furnishing the accused free of cost copies of the documents refereed to in that section without delay.

A report made by an Excise Officer is not the same thing as a police report and a magistrate cannot proceed under this section in a case instituted on a police report made by an excise officer, unless an Act of State itself contains a specific provision deeming the report of an excise Officer to be such report.[129] Section 239 of Cr.P.C. enjoins upon the Magistrate to record his reasons for holding the change against the accused to be groundless and discharging him. This is simply because his order or discharge is subject to revision by the higher courts. There were sufficient documents and evidence indicating that *prima facie* charges were made out against the accused but those documents and evidence were neither referred nor considered and the Magistrate discharged the accused on the ground that nobody represented the

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129. Aship Miyas, AIR 1969 SC 4. (1969), SC WR 489.

state including the official entrusted with the work of supervising the State litigation or any advocate including the District Government Counsel. It was held that the order of discharge was liable to be set aside.[130]

Before discharge is ordered three preliminary steps ordered three preliminary steps are gone through : (1) consideration of police report and the document referred to in section 173 of Cr. PC and which are furnished to the accused; (ii) examination, if any, of the accused as the magistrate thinks necessary (iii) giving prosecution and the accused an opportunity of being heard and then to consider whether charge is groundless[131]. The discharge contemplated under section 239 Cr. PC is thus a statutory right and a third party cannot have any say in the matter.[132] Where in a conspiracy and misappropriation case involving case and gold of the Tirupathy temples magistrate, after examing witnesses and summoning more evidence at the time of preliminary inquiry, discharged the accused, the high court set aside the order of discharge and remanded the case back for trial holding that the

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130 *State of U.P.* v. *Titendra Kumar Singh*, 1987 Cr. LJ 1768 (All).

131 *State of Mizoram v. K.Larunata* 1992 Cri LJ 970 (Gan HC).

132. *R.Balakrishna Pillai v. State* 1995 Cri. LJ 1244 (Ker HC).

reasoning of the magistrate was clearly erroneous and basis of the incident could not be brushed aside by calling as a mistate.[133]

Where fresh material was found to proceed against the discharged accused in a fresh trial, the Magistrate was held to be competent to take cognizance. It did not amount to review of discharge order.[134]

When after considering the entire material referred to in S.239, the Magistrate is of the opinion that the accused has committed an offence, which he is competent to try and adequately punish, then he shall frame in writing a charge. The charge shall then be read and explained to the accused and he shall be asked whether he is guilty or claims to be tried. The provisions of section 239 and section 240 of the Cr.P.C. give the magistrate the power to go beyond the document filed under section 173 of the Cr.P.C.[135]

Conviction on the plea of faults

It is not obligatory on the part of the magistrate to convict the accused if he pleads guilty. Magistrate may proceed with the trial.

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133 *Public Prosecutor H.C. of A.P. v. Kundavaram Chandrachari* - 1996 Cri LJ 1540.

134. *Vijaya Bai v. State of Rajasthan.* 1990 Cr.LJ 1754 (Raj).

135. *Alarakh v. State of Rajasthan* 1986, Cr LJ 1794 (Raj).

Evidence for Prosecution

The court may on application by the prosecution, issue summons to compel attendance of prosecution witness or to compel production of any document or any thing. This power may be exercised by the court suo motto. It seems, the court may, where the prosecution is negligent or guilty of latches, refuse to exercise this power.[136]

On the date fixed for hearing, the Magistrate shall take evidence which may be produced by the prosecution. The prosecution, however, is not bound to produce all the witnesses mentioned in the First Information Report. Only material witnesses considered necessary by the prosecution for unfolding the prosecution story need be produced without unnecessary and redundant multiplicity of witnesses.[137] Section 242 Cr.P.C. is mandatory. The magistrate cannot, therefore, refuse to examine other witnesses after examining some o them on the ground that their evidence cannot improve matters and order acquittal.[138]

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136. Mangilal, 1974 Cri LJ 221.

137. Raghubir Singh, AIR 1971 SC 2156: 1971 Cr LJ 1468.

138. Ramjevak, 1969 Cr LJ 1452; *K.Srinivasan v. V.A.Rajagopalan*, 1971, Cri LJ 159.

Evidence for Defence

Section 243 of Cr. P.C. lays down that after the prosecution evidence is over as laid down in the proceeding section, the accused shall be called upon to enter upon his defence. If the accused applies to the Magistrate to issue process for calling any witness for examination or cross-examination or for the production of any document or thing, the magistrate shall issue.[139] process unless - (1) he considers that such application is made for the purpose of veration or delay or defeating the ends of justice; or (2) the accused had, prior to entering upon his defence either cross - examined or had the opportunity of cross - examining any witness. In the former case, the magistrate is required to record his reasons in writing for refusal to issue process[140] and in the latter, the magistrate may, if statistical that it is necessary for the ends of justice to compel such attendance, issue process. The magistrate may require the accused to deposit reasonable expenses which may be incurred by the witness.

However the accused does not have the capacity or means to pay the necessary expenses, the court may except him from depositing

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139. See *T.N. Janardhanan Pillai v. State* 1992 Cri LJ 436 (Ker. HC); *Basudev Purohit v. Republic of India* 1996 Cri LJ 3867 (Ori HC).

140. Sat Narain Singh (1981) 3 All 392; *Manmohan Dashidar v. B.B.Chowdry.*

the amount for such expenses.[141] Where a magistrate directed the accused to deposit Rs.3,000, towards expenses for summoning the defence witness without giving any reason, the Orissa High Court set aside the order, sent back the case for considering the matter afresh.[142]

Cases Instituted Otherwise than on Police Report

Evidence for prosecution - Preliminary hearing

Sections 244 to 247 of Cr. P.C. deal with warrant cases instituted otherwise than on a police report. When the accused is brought before a magistrate, he should proceed to hear the prosecution and take all such evidence as may be such evidence as may be produced. The Magistrate should also summon such persons whom the prosecution wishes to give evidence to support its case.[143] Such evidence must be taken in the manner said down in S.138 of the India Evidence Act and if the accused so desires he cannot be refused on opportunity to cross-examine the witness produced in support of the prosecution. The opportunity allowed by the legislature to the accused in S.246(4) of cross examining witness for the prosecution after the

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141. Vankateswara Rao *V.* (1924) 51 Cal 1044 State of A.P. 1979 Cr LJ 255 (AP).

142. Basudeo Purohit v. Republic of India, 1995 Cr. LJ 3867 (Ori.).

143. Jethalal V. Khimji, (1973) 76 Bom LR 270.

charge has been framed can not be substituted for the opportunity to which he is entitled when the witnesses are examined and before the charge is framed.[144]

The fact that the prosecution does not keep all its witness present when the accused appears before the magistrate does not necessarily mean that the prosecution does not want to examine all of them. The magistrate should before closing evidence and framing the charge, ask the prosecution whether it wants more of its witnesses to be examined in support of the complaint. Failure to do so results in non-compliance with sub S(1).[145] Unlike under section 252(2) of the old code of 1898, under the new section 244(2) the magistrate is not under an obligation to summon any witness on his own. It is now the responsibility of the prosecution to more the magistrate by an application to issue a summons to any of its witnesses directing Zion to attend or produce any document or other things.[146] Court can permit examination of witness not mentioned in the list of witnesses. It is not necessary that all witnesses named in the list should have been examined before granting such permission.[147]

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144 Syed Mohammad Husain Afqar V. Mirza Fakhrulla Beg (1932) 8 Luds 135; K.L., Bhasin *V.* Sundar Singh, 1972 Cr. LJ 367.

145. *Yeslodabai Keshav* v. *Bhaskar*, (1972) 74 Bom LR 717: 1973 Cr LJ 1007.

146. *Parveen Dalpatrai Desai v. Gangavishindas Rijharam Bajaj*, 1979 Cr LJ 279 (Bom).

147. *Nawal Kishore Shukla v. State of Uttar Pradesh* 1992 Cr LJ 1554 (All).

In a complaint case under the Income Tax Act for an offence triable as a warrant case, an order of discharge merely because the witnesses did not turn up in response to the summons was held illegal. The Gauhati High Court held that where the complainant made successive prayers for issuing summons to witnesses, it was bounden duty of the Magistrate to exhaust all his powers for securing the attendance of the witnesses before dismissing the case.[148] The High Court set aside the rejection of an application for examining witness given in a supplementary list holding that the complainant was a right to examine all witnesses.[149]

Where a magistrate refused to summon some witnesses other than those named in the list of witnesses appended to the complaint and rejected the application due to mention of a wrong provision of law, the A.P. High Court set aside the order holding that the complainant has a right to examine some more witnesses and the court is bound to summon them.[150]

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148. *P.N.Bhattacharji v. Kamal Battacharaji*, 1994 Cr.L.J. 2924 (Gau).

149. *Jamuna Rani v. Krishna Kumar*, 1993, Cr LJ 32 (AP).

150. *Jamuna Rani v. Krishna Kumar*, 1993, Cr LJ 1405 (AP).

When Accused shall be Discharged

In a warrant case instituted otherwise than on a police report, discharge and acquittal are two different concepts. The word "discharge" is used in sections 239 and 245. Normally, a person cannot be discharged unless the prosecution evidence has been taken and the Magistrate considers for reasons to be recorded that no case is made out gainst the accused. Sub-section (2) of s.245 is an exception to this rule in so far as it empowers the Magistrate to discharge the accused at any previousstage if he considers that the charge is groundless.[151] Sub-section (1) enables the Magistrate to discharge an accused after taking all the evidence produced by the prosecution. Since his order is subject to revision, he is required to record his reasons in writing. The Magistrate cannot pass an order of discharge until he has examined all the witnesses of the prosecution and such an order passed only after examining the complainant, and not all the witnesses, will be illegal.[152] The order of discharge passed exclusively on the basis of material in cross-examination and without considering other vital pieces of evidence and documentary evidence

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151. *Kaliappan v. Munisamy*, 1977 Cr. LJ 2038 (Mad).

152. *Yesgidavau v, Vgasjarm* (1972) 74 Bom Lr 717: 1973 Cr LJ 1007.

on record held sufficient to make out a *prima facie* case. The order was set aside.[153]

While considering scope of s.245, trial court shall not go into meticulous consideration of material produced. It has to see whether a *prima facie* case has been made out or grounds exist to connect the accused to the alleged offence.[154] In a food adulteration case, the Magistrate had discharged the accused before framing of charge, as in his view no case was *prima facie* made out. The reason given was the cash-memo of the alleged adulterated article itself mentioned that 'goods sold were not meant for human consumption'. The High Court **reversed** the order holding that the factum of purchase was not disputed and printing 'not meant for human consumption' was only a clever device to get over the provisions of the Food Adulteration Act and to make the Act a dead letter.[155] In a dowry-death case, the Delhi High Court refused to order for discharge of the accused simply because C.F.S.L. negatived the test for common poison, observing that the deceased died in mysterious circumstances, which will be gone into

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153. *Mani Kant Sohal v. P.K.Banthia*, 1991, Cr LJ 1247 (Bom).

154. *S.Bangarappa v. G.N.Hegade*, 1992 Cr LJ 3788 (Knt).

155. *State of Orissa v. Ramwatar Agarwall*, 1995 Cr LJ 2053 (Or).

at the time of evidence.[156] Where a trial Magistrate discharged the two accused in a private complaint case u/ss.420/120 I.P.C., for inducing the complainant to part with Rs.50,000 for purchasing shares, the High Court reversed the order, but the Supreme Court restored the Magistrate's order discharging the accused holding that the ingredients of cheating u/s. 415 I.P.C. were not made out on the facts of the case.[157]

This sub-section enables a Magistrate to discharge the accused at any previous state of the case if he considers the charge to be groundless. "Groundless" means that the evidence is such that no conviction can be rested on it, and not that the evidence does not disclose any offence whatsoever. A Magistrate is not bound to examine all the witnesses that may be tendered or available before taking action under this sub-section.[158] But, this sub-section does not clothe the Magistrate with an arbitrary, power of discharge. There must be ground or material on record to come to the conclusion that no offence is made out.[159] The reasons must be recorded. Non-

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156. *Kishore Kumar v. State*, 1993 Cr LJ 253 (Del).

157. *Prabhat Kumar Bose v. Tarun Kanti Baghchi*, AIR 1994 SC 960.

158. *Kashinatha Pillai v. Shanmugam Pillai*, (1929) 52 Mad 987; Muhammad Ibrahim Haji Moula Baksh, (1941) Kar 345.

159. *Muhammedu v. Balkrishna*, (1964) 2 Cr LJ 92; *Gopala Panicker* v. *Kesavan*, AIR 1966 Ker 243.

appearance of the complainant himself is a valid ground for discharging the accused.[160]

The Magistrate cannot discharge an accused under s.245(2) i he has himself issued the process under s.204, unless he has examined some additional evidence which could pursuade him to change his mind.[161] If on the face of the complaint or the evidence recorded under sections 200 and 202, Cr.P.C., there is technical defect which makes the complaint not maintainable by the complainant, the Magistrate can discharge the accused under section 245(2) without taking any additional evidence.[162]

Under s.245 the Magistrate is required to consider the evidence with a view to forming *prima facie* case for conviction. He cannot go into the pors and cons of the evidence which is yet to be produced.[163] Where *prima facie* case was made out, charges should be framed.[164] If

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160. *Nabaghan v. Brundaban*, 1989 Cr LJ 381 (Ori); *State of Madhya Pradesh v. Punamchand*, 1987 Cr LJ 1232 (MP).

161. *Luis de Piedade Lobo v. Mahadev*, 1984 Cr LJ 513 (Bom).

162. *Vishva Nath v. 1st Munsif, Lower Criminal Court*, (Bahraih), 1989 Cr LJ 2082 (All).

163. *Hukamichand v. Ratanlal*, 1977 Cr LJ 1370 (Knt).

164. *R.S.Nayak v. A.R.Antulay*, (1986) 2 SCC 756: 1986 Cr LJ 1922: AIR 1986 SC 2045.

an offence is exclusively triable by the Court of Sessions, the Magistrate has no power to record the prosecution evidence much less to discharge the accused.[165] In a case, the father-in-law was prosecuted for abetting suicide by the daughter-in-law. Since there was neither any specific stance of cruelty nor the accused was present at the time of suicide, nor was any other material on record to make out prima facie case against the accused, if was held that discharge was rightly directed.[166]

Procedure where accused is not discharged

The section enables a Magistrate to frame a charge (1) after the evidence for the prosecution under s.244 is over or (2) at any previous stage, if the Magistrate forms the opinion that a *prima facie* case has been made out against the accused.[167] The charge so framed must be read and explained to the accused so that he understands the nature of it thoroughly.[168] Where the charge was not properly explained to the accused, the High Court set aside the conviction and ordered a new trial.[169]

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165. *Malleshappa v. Nellankatappa*, 1979 Cr LJ Noc 9 (Knt).
166. *Surmitra v. Sewak Ram*, 1995 Cr LJ 3141 (HP).
167. Publish Ghosh, 1973 Cr LJ 510; *Ratilal Mithani v. Maharashtra*, AIR 1979 SC 94: 1979 Cr LJ 41.
168. Vaimbilee, (1880) 5 Cal 826.
169. Aiyavu, (1885) 9 Mad 61.

After a charge has been drawn up the accused is entitled to have the witnesses for the prosecution recalled for purposes of cross-examination. This section gives the Magistrate no discretion in the matter. It is the duty of the Magistrate to require the accused to state whether he wishes to cross-examine, and if so, which of the witnesses for the prosecution whose evidence has been taken.[170] But it is open to the accused to say that he wants all the witnesses for further cross-examination, in which case he need not give the names.[171] The fact that there has already been some cross-examination before the charge has been drawn up does not affect this privilege. It is only after the accused has entered upon his defence that the Magistrate is given a discretion to refuse such an application on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.[172]

The section does not prohibit the accused from cross-examination the witnesses for the prosecution before the charge is framed.[173] As a matter of practice or discretion Magistrates should permit some cross-examination before framing a charge.[174]

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170. Varsai Rowther, (1922) 46 Mad 449, 462 Fb; *Mohd. Qasim v. Gokul Tewari*, 1963 Cr LJ 346.
171. Ramji Jadav, (1963) 2 Cr LJ 560.
172. *Zamunia v. Ram Tahal*, (1900) 27 Cal 370; Nasarvanji, (1900) 2 Bom LJR 542.
173. Sagal, (1893) 21 Cal 642.
174. Lachhmi Narain, (1931) 54 All 212.

Sub-section (6) enables the prosecution to examine witnesses, who have not been examined, or whose names have not been disclosed, before the charge is framed. If the accused desires time to enable him to cross-examine witnesses whose names have not been disclosed, it is open to the Magistrate to give time, just as it is open to him to give the prosecution time to ascertain the antecedents of the witnesses produced by the accused at the trial without the assistance of the Court.[175] S.246(6) gives to the accused the right to cross examine the additional witnesses. This right is similar to the right envisaged under clause (5). Clause (6) requires the Magistrate not to discharge the additional witnesses unless and until they are cross examined and re-examined. When the Magistrate rejected the petition for recalling the additional witnesses for the purposes of cross examination, it amounted to denial of the right given by clause (6), to the accused to cross-examine the additional witnesses and such resulted in miscarriage of justice.[176]

Thereafter the accused shall be called to enter upon his defence and produce his evidence; and the provisions of s.243 Cr P.C. shall apply to the case.

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175. Nagindas Narottamdas, (1942) 44 Bom LR 452: (1942) Bom 540.
176. *Taddi Rama Rao v. Kandi Asseervadam*, 1977 Cr LJ NOC 259 (AP).

Conclusion of Trial

Under s.245 a Magistrate is empowered to discharge the accused if the case for the prosecution is not proved. But after the framing of a charge the accused must either be acquitted or convicted. He cannot then be discharged. Even if he discharges the accused, the discharge will amount to an acquital.[177] If, however, the Magistrate finds the accused guilty then, in case he does not proceed in accordance with the provisions of either s.325 (cases where the magistrate cannot pass sentence sufficiently severe) or s.360 (cases where he releases the accused on probation or after admonition), he passes sentence on the accused after giving him a hearing regarding the sentence. Section 248 would apply when some evidence has been let in and when such evidence is not satisfactory. Acquittal under this section is at the conclusion of a real trial. But when no evidence is forthcoming from the prosecution, if the prosecution finds itself in the predicament of not being able to produce any evidence in support of its case, but still does not formally withdraw from prosecution, the only course open to the court is to record clearly the circumstances, draw the conclusion that the course of action of the prosecution tantamounts

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177. *T.Sriramula v. K.Veerasalingam*, (1914) 38 Mad 585. *Swarnalata Sarkar* v. *W.B.*AIR 1996 SC 2158: 1996 Cr LJ 2885, discharge not allowed on the ground of delay when the delay was due to the accused's conduct in raising matters and disputes at interlocutory stage.

to a withdrawal from prosecution and acquit the accused under section 321(b), Cr.P.C.[178]

Sub-section (3) deals with the procedure when a previous conviction is charged and the accused does not admit such previous conviction.

Unless the prosecution is vitiated by a fundamental defect such as lack of necessary sanction, an order or acquittal must be based on a finding of not guilty which can be arrived at after appreciation of evidence. If after framing the charge the Magistrate without allowing the prosecution to examine all the witnesses suddenly discharges the accused, such discharge is really an acquittal and is illegal.[179] Where a complaint is dismissed for want of evidence before the framing of charge, it is not acquittal but discharge and a fresh complaint is not barred.[180]

Sub-section (2) enjoins that the Magistrate must hear the accused on the question of sentence. Hearing does not mean mere

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178. *Valliappan v. Valliappan*, 1989 Cr LJ NOC 64 (Mad).

179. *Ratilal Bhanji Mithani v. Maharashtra*, AIR 1979 SC 94: 1979 Cr LJ 41.

180. *Sudershan Prasad Jain v. Nem Chandra Jain*, 1984 Cr LJ 673 (All).

oral submission but also includes production of material bearing on the sentence.[181]

Where a Magistrate discharges an accused person, under this section, on account of the absence of the complainant, he does not apply his mind to the evidence in the case. The order is passed, not on a consideration of the merits of the case, but merely because the complainant was absent at the time fixed for the hearing of the case. Such an order of discharge is not a Judgment[182] within the meaning of s.362 of the Code and consequently the Magistrate is not debarred from reviewing such an order.

The word "Judgment", as used in the Code, is "the expression of the opinion of the Judge or Magistrate arrived at after due consideration of the evidence and of the arguments". It is open to the complainant in such a case to file a fresh complaint.[183] A fresh complaint can lie on the same facts when the previous complaint has been dismissed under s.203 or when the accused person has been discharged under s.245 or this section of the Code.

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181. *Baburao Chandavar v. State*, 1977 Cr LJ 1980 (Del).
182. *Singh v. Singh*, AIR 1961 Manipur 34.
183. *S.A.Irani v. Yarriah*, (1956) Hyd 763; *Hafisulla Mia v. Ugam Thakur*, AIR 1962 Pat 12.

Once a Magistrate dismisses the complaint and acquits the accused on the ground of non-appearance of the complainant, he has no jurisdiction to restore and revive the dismissed complaint on a subsequent application of the complainant. The Code does not permit a magistrate to exercise inherent jurisdiction which he otherwise does not have. Filing of a second complaint is, however, possible.[184]

A distinction must be drawn between cases in which the order of discharge is passed after appreciation of the evidence with a view to determine the guilt or innocence of the accused and those in which the proceedings are terminated merely for some technical reason, such as the absence of the complainant. When a Magistrate has applied his mind to the facts of the case and discharged the accused, because in his opinion the evidence does not prima facie establish the guilt of the accused, the order amounts to a Judgment within the meaning of s.362 of the Code, and it is not open to a Magistrate to review it. In other cases, such as those falling under this section the order of discharge is not a decision given on merits and is not a Judgment under s.362, and consequently the Magistrate is not debarred from reviewing it, setting it aside and reviving the old complaint.[185]

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184. *A.S.Gauraya v. S.N. Thakur*, (1986) 2 SCC 709: 1986 Cr LJ 1074: AIR 1986 SC 1440.

185. Wasudeo Narayan, (1949) 51 Bom LR 578; *Rayappa v. Shivamma*, AIR 1964 Mys 1; *Smt. Rangamoyee v. Sudhi Kumar*, AIR 1965 Tripura 29.

If the complainant is absent on the day fixed for the hearing of the case, the Magistrate may, in his discretion, discharge the accused if the offence is (1) compoundable (see s.320) or (2) non-cognizable. Otherwise he should proceed with the trial.[186] It cannot be contended that both the conditions namely that the offence should be compoundable and it should be cognizable should be satisfied before the provisions of s.249 could be invoked. If either of the two conditions is satisfied, the provisions of s.249 would apply.[187] Under s.256 the accused is generally entitled to acquittal if the complainant is absent but under this section the Magistrate has a discretion and may proceed with the case.[188] Similarly, if a charge is framed and the complainant dies subsequently, the Magistrate must proceed with the case.[189] In a private complaint after the framing of the charge the Magistrate cannot discharge the accused due to default of appearance by the complainant.[190]

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186. See Nanaji, (1890) Unrep Cr C 524, Cr. R. No.54 of 1890; *Govinda Das v. Dulall Dass*, (1883) 10 Cal 67; *Hafisulla Mia v. Ugam Thakur*, AIR 1962 Pat 12.

187. *Ganesh Narayan Dangre v. Eknath Hari Thampi*, 1978 Cr LJ 1009 (Bom).

188. U.Tin Maung, (1941) ran 224; Narayana Naiek, (1931) 54 Mad 768; Laipal Singh, (1962) 1 Cr LJ 175.

189. Hornapla, (1966) Manipur 1; *Ashwini Kumar* v. *Dwijen*, AIR 1966 Tripura 20.

190. Ranchhod Bawla, (1912) 37 Bom 369; 14 Bom LR 61.

In a warrant-case in respect of a non-compoundable offence, it is not competent to the Magistrate on a private complainant's offering to withdraw from the prosecution, to enter an order of acquittal.[191]

Compensation for accusation without reasonable cause

The object of the section is not to punish the complainant, but, by a summary order, to award some compensation to the person against whom, without any reasonable ground, the accusation is made - leaving it to him to obtain further redress against the complainant, if he seeks for it, by a regular civil suit or criminal prosecution.[192] When two accused are guilty of the same offence, no compensation can be given by one accused to the other accused.[193]

This section may be applied in summons - cases, whether tried summarily or not.[194] Where a complaint alleges an offence which is exclusively triable by the Court of Session as well as an offence which is triable by a Magistrate, and after inquiry the Magistrate finds that the

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191. *Chinnathambi Mudali v. Salla Gurusamy*, (1904) 28 Mad 310; Nazo, (1943) Kar 103; *Hafisulla Mia v. Ugam Thakur*, Supra.

192. *Beni Madhub Kurmi* v. *Kumud Kumar Biswas*, (1902) 30 Cal 123, 128 FB.

193. Govindan, (1958) Mad 665.

194. Basava, (1887) 11 Mad 142.

complaint was not justified, he has power to award compensation under this section in respect of that part of the complaint which he has full power to deal win.[195]

TRIAL BEFORE A COURT OF SESSION

After taking cognizance of a case by a Magistrate having competency the offences exclusively triable by a court of sessions are committed to the sessions court[196] later a court of sessions is not to take cognizance of any offence. But it can take cognizance of an offence in respect of deformation of a high dignitary or a public offcial.[197] There is a special procedure which has to be adopted for trial of such matters in which direct cognizance was taken by the sessions court.[198]

Every trial before a court of sessions shall be conducted by a public prosecutor.[199] The public prosecutors are appointed by the popular governments for a period of 3 years tenure.[200] In a trial before

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195. Mool Chand, (1944) 20 Luck 49.

196. Section 290 of Cr. P.C. 1973.

197. Section 199 of Cr. P.C. 1973.

198. Section 237 of Cr.P.C.1973.

199. Section 225 of Cr.P.C. 1973.

200. Section 24 of Cr. P.C. 1973.

a court of session, if it appears to the court of session that the accused has not sufficient means to engage a pleader, it can assign a pleader for the defence of the accused at the expense of the State.[201]

After laying charge sheet the accused are provided with the free copies of documents of the case[202] with a direction to appear before the session court for facing the trial.

In pursuance to committal of a session case,[203] the public prosecutor opens his case by describing the charge brought against the accused and also states by what evidence he proposes to prove the guilt of the accused.[204]

At this stage, after hearing the submissions of the accused and the prosecution, if the sessions judge considers that there is no sufficient ground for proceeding against the accused, he discharges the accused by recording his reasons for doing so.[205]

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201. Section 304 of Cr.P.C, 1973.

202. Section 207 of Cr.P.C, 1973.

203. Section 209 of Cr.P.C, 1973.

204. Section 226 of Cr.P.C. 1973.

205. Section 227 of Cr.P.C. 1973.

It is a novel measure to dispose of a case by discharge at the initial stage itself if there is no sufficient ground to proceed further.

According to the Apex Court,[206] the following four principles are applicable in regard to the exercise of the power of discharging the accused under section 227 of Cr.P.C.:

1. That the judge while considering the question of framing the charges has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a *prima facie* against the accused has been made out.
2. Whether the material placed before the court discloses 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 room to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

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206. Union of India V. P.K.Smal (1979) 3 SCC 4.

4. That in exercing his jurisdiction under S.227 the judge who under the present code is a senior and experienced court 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 however does not mean that the judge should make a ring inquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

The session judge after hearing both the prosecution and the defence and upon satisfaction that there are grounds to proceed further for trial can frame the charges against the accused by explaining the same to the accused. The accused will be asked whether he pleads guilty of the offence or claims to be tried.

If the accused pleads guilty, the judge records the plea and may, in his discretion, convicts him.[207] The plea of guilty must be in unambiguous terms or otherwise such a plea is considered as equivalent to a plea of not guilty.[208]

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207. Section 229 of Cr.P.C, 1973.

208. *Queen Empress v. Bhadu ILR*, 1896 1917, 119.

If the accused is convicted on his plea of guilty, the judge shall unless he proceeds in accordance with the provisions of S.360 of Cr.P.C. hear the accused on the question of sentence, and then pass sentence on him according to law.[209] This is the procedure to be followed after the order of conviction.

In cases where the accused refuses to plead or does not plead or claims to be tried or is not convicted under Section 229 of Cr.P.C. the judge shall fix a date for the examination of witnesses. There after on the application of the prosecution he may issue any process for compelling the attendance of any witness or the production of any document of thing.

After completion of necessary of evidence the same procedure of warrant is adopted and after questing u/s 313 of Cr P.C. about the incriminating circumstances in evidence. At that stage after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, if the judge considers that there is no evidence that the accused committed the offence, the judge acquits the accused under section 232 of Cr.P.C.

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209. *Majar A.J. Anand v. State*, AIR, 1960 J & K, 139.

If the accused is not acquitted u/s 232 of Cr.P.C. he may adduce any evidence for supporting him claim. After recording the same the trials gets concluded and the arguments are advanced by both the sides. Therefore the judge pronounces his Judgment on the basis of the evidence available on record.

Trial Before a Court of Sessions Role of Public Prosecutor

Public Prosecutor means any person appointed under s.24 and will include any person acting under his direction. The Public Prosecutor may avail himself of the services of counsel engaged by a private individual.[210] It was held by the Supreme Court that the judge while considering the question of the framing of the charges under sec.227 of the Code had the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not *prima facie* case against the accused has been made out.[211]

Application for discharge by the accused even before actual trial began, was not liable to be dismissed as premature. It is no doubt true that there is no specific provision in the Code as to when exactly an

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210. Narayan M. Pendshe, (1874) 11 BHCR 102.

211. *Union of India v. Prafulla Kumar Smal*, AIR 1979 SC 366: 1979 Cr LJ 154.

application can be made by an accused for being discharged. The application will have to be disposed of on merits.[212]

Evaluation of material and documents is done only to find out whether the facts emerging therefrom disclose all the ingredients of alleged offence at the time of the framing of charge.[213]

It has been earlier that no elaborate committal proceedings before the Magistrate is necessary. When it appears to the Magistrate that the case is triable by the Court of Session, he commits the case to that Court, sends records, documents and articles to it, remands the accused to custody or grants him bail and notifies the Public Prosecutor. The Public Prosecutor opens his case before the Sessions Court by describing what charge is brought against the accused and stating by what evidence he will prove the guilt of the accused.

Discharges

If the Judge after going through the record and documents submitted, and after hearing the prosecution and the accused comes to

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212. *Sheitiyamma P. Dhotre v. State of Maharashtra*, 1988 Cr LJ 1471 (Bom).

213. *Niranjan Singh Punjab v. J.B. Bija*, 1990 Cr LJ 1869: AIR 1990 SC 1962.

the conclusion that no sufficient ground exists to proceed against the accused, he shall discharge him. The reasons, however, should be recorded in writing. Where there was a long delay in lodging the F.I.R., no evidence, medical or otherwise to corroborate the only infirm and improbable evidence of prosecutrix existed, and no reasonable circumstances were there to show the commission of the offences of rape, it was held that the accused deserved to be discharged of the charges u/s. 376, I.P.C.[214]

After the stage of framing a charge there can be only one of the two conclusions to the trial, either the accused is convicted or acquitted. If after framing of charge, no evidence is led on the basis of which court could convict the accused, then only an order of acquittal can be passed, and not of discharge.[215] Before framing a charge, the Court needs not undertake an elaborate inquiry. It needs only to consider whether no sufficient grounds exist for proceeding against the accused. If it is so found, the accused will be discharged otherwise charge shall be framed and the accused be put to trial.[216]

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214. *Priya Sharan Maharaj v. State of Maharashtra*, 1995 Cr LJ 3683 (Bom).

215. *State of Maharashtra v. B.K. Subba Rao*, 1993 Cr Lj 2984 (Bom).

216. *Tulsa Bai v. State of Madhya Pradesh* 1993 Cr. LJ 368 (MP).

"There is no sufficient ground for proceeding" mean that no reasonable person could come to the conclusion that there is ground whatsoever to sustain the charge against the accused.[217] Case committed to the Sessions Court was made over to the Assistant Sessions Judge for disposal. The Assistant Sessions Judge finding the case not exclusively triable by the Sessions Court, transferred it under section 228 to the Additional District Judge designated as Chief Judicial Magistrate. It was held that transfer was valid.[218] Where the owner of an open field, from which opium was recovered, was implicated solely because he was the owner of the field, the High Court quashed the order framing charge and the owner accused was directed to be discharged.[219]

It was observed by the Supreme Court that the standard of test and judgement which is to be finally applied before the recording of a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under section 227 or 228 of the Code. At that stage the court is not to see whether there is sufficient ground for conviction of the accused. It has to see whether

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217. Century Spinning and Manufacturing Co., (1970) 72 Bom LR 585.

218. *Y.Siva Prasad v. State of A.P.*, 1988 Cr LJ 381 (AP).

219. *Soorajamal v. State of M.P.*, 1992 Cr LJ 3206 (MP).

the trial is sure to end in his conviction.[220] At the time of framing of charge, it is not necessary for the prosecution to establish beyond all reasonable doubts that the accusation is bound to be brought home against him. The purpose of ss.227 and 228 is to ensure that the Court should be satisfied that the accusation is not frivolous and there is some material for proceeding against him.[221]

In finding out a *prima facie* case not only the F.I.R. or complaint but even the statements of the witnesses recorded under section 161 are to be taken into consideration by the court.[222] Where the trial Judge discharged five accused holding that there were not sufficient grounds to proceed against them u/ss. 3(iii) and 4(iii) read with ss.5 and 5 of the TADA Act, though charges against them were framed under various other offences under the I.P.C., the Supreme Court set aside the discharge holding that there were sufficient materials on record to make out *prima facie* case under TADA Act against the accused and directed the Designated Court to proceed with the trial by framing charges under TADA Act also.[223] Where a Special Judge, Scheduled Castes and

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220. *State of Bihar v. Ramesh Singh*, AIR 1977 SC 2018: 1977 Cr LJ 1606.
221. *State Bank of India v. Satyanarain Sarangi*, 1992 Cr LJ 2635 (Ori).
222. *Mohd.Aquil v. State of Delhi*, 1988 Cr LJ 1484 (Del).
223. *State of Karnataka* v. *S.Eshar Singh*, AIR 1993 SC 1374: 1993 Cr LJ 1028.

Scheduled Tribes (Prevention of Atrocities) Act, dropped the charge of attempt to murder u/s.307, IPC and discharged the accused, the Rajasthan High Court set aside the order in view of the existence of *prima facie* case against the accused as was apparent from the injuries on the victim and statements of his eye-witnesses.[224] In a dowry death case, the father of the victim girl lodged an F.I.R. unfolding dowry demand and torture and the witnesses revealed estranged relationship between the husband and wife, it was held that the trial Judge was justified in refusing to discharge the accused as strong suspicion against the accused-husband legitimately existed and the framing of the charge against him was not illegal.[225]

The duty enjoined upon the Sessions Judge by section 228(1), to order the transfer of a case to the Chief Judicial Magistrate for trial after he has framed the charge against the accused, is only direct and not mandatory. When the Sessions Judge did not frame a charge before transferring a case, it was held that the omission would not render the transfer illegal.[226]

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224. *Kishan Singh* v. *State of Rajasthan*, 1996 Cr LJ 251 (Raj).

225. *Sangam Keshri Das v. State of Orissa*, 1996 Cr LJ 2170 (Ori).

226. *State* v. *Y.V.Mehra*, 1988 Cr LJ 1488 (HP).

Once the case is committed to the Sessions Court, it becomes clothed with the jurisdiction to try it and mere fact that the offence disclosed is not one exclusively triable by the Sessions Court does not divest it of that jurisdiction.[227]

Framing of Charges

Before framing a charge, the court should properly evaluate the material and documents placed before it and apply its mind to find out whether any fact in the F.I.R. or statements of witnesses disclosed the ingredients of the alleged offence.[228] A *prima facie* case should be made out. There must be grounds for forming the opinion that the accused had committed the crime.[229] Where the charge was found mechanically framed and defective, the conviction was set aside.[230] It the Sessions Judge is of opinion that an offence has been committed but that offence is not exclusively triable by him, he frames a charge against the accused and transfers the case to the Chief Judicial

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227. *Sammun v. State of M.P.*, 1988 Cr.LJ 498 (MP).

228. *Prem Kumar v. State*, 1994 Cr LJ 3641 (Knt).

229. *State of Maharashtra v. Som Naththapa*, AIR 1996 SC 1744: 1996 Cr LJ 2448, a large number of accused involved, the order indicated reasons for not charging some of them but gave no reasons why others were being charged, order without application of mind, not proper.

230. *Pati Ram v. State of U.P.*, 1994 Cr LJ 3813 (All).

Magistrate. Where he finds that the offence is exclusively triable by his Court he frames a charge in writing against the accused.

Where a charge u/s. 302/34 I.P.C. and an alternative charge u/s. 304B were framed and the accused was convicted u/s.302, I.P.C., and the alternative charge u/s. 304B I.P.C. was cancelled, the Delhi High Court held that the cancellation of charge after evidence was led was illegal. It did not amount to acquittal and had no effect on the case. Accordingly the High Court, while setting aside the conviction u/s.302 I.P.C., convicted the accused u/s.304B I.P.C.[231] In a case under Prevention of Corruption Act, 1988 the accused was alleged to possess assets disproportionate to his known sources of income, wherein income of his wife from her daily and other allowances as Member of the Lok Sabha was not taken into account, the Orissa High Court quashed the charge against the accused framed by the Special Judge, holding that if the income of the wife by way of allowances would be taken into consideration, the whole assets would be accounted for. The prosecution against the accused was to be quashed.[232] Where the accused put his penis into the mouths of two tender-aged girls and

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231. *Prakash Chander* v. *State*, 1995 Cr LJ 368 (Del).

232. *Janki Ballav Patnaik v. State of Orissa*, 1995 Cr LJ 1110 (Ori).

attempted to penetrate into the private parts of the girls after fingering them, it was held that the charges under sections 377 and 376 read with s.511 I.P.C., were rightly framed by the trial Court.[233] Where in a dacoity case, the accused was neither named in the F.I.R., nor identification parade was held to enable the witnesses to identify him, nor any witness named him nor any article was recovered from his possession, but the only evidence against him was that he was named by a co-accused before the police, which was not legally provable being hit by ss.25 and 26 of the Indian evidence Act, 1872, the High Court set aside the charge framed against him u/ss.395/397 I.P.C.[234] The Allahabad High Court has held that it is not lawful to dispose of the objection, while framing charge, by saying that the matter would be considered at the time of evidence, as the trial court at this stage had to see if there was any *prima facie* material to sustain the allegation, and if not, the accused was entitled to be discharged.[235]

Where the accused could not at all be connected with the burning incident, which took place all of a sudden, as stated by the

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233. *Kartar Singh v. State*, 1993 Cr LJ 1483 (Del).

234. *Annant Kumar v. State of M.P.*, 1993 Cr LJ 1499 (MP).

235. *G.I.Punwani v. State*, 1995 Cr LJ 3884 (All).

deceased-wife herself, charges u/ss.302/304/498 I.P.C. were quashed.[236]

Where it was, urged that the trial court could not peruse 'case-diary' before framing a charge, the Calcutta High Court held that 'police-diary of a case' has become synonymous with 'case-diary', which includes the documents, the copies of which are to be supplied to the accused u/s. 207 Cr.P.C., there is no illegality if the trial judge perused such documents, before framing a charge.[237]

Conviction on the Plea of Guilty

The plea of guilty only amounts to an admission that the accused committed the acts alleged against him. It is not an admission of guilt under any particular section of the criminal statute.[238] Therefore, if the facts proved by the prosecution do not amount to an offence, then the plea of guilty cannot preclude an accused person from agitating in the High Court the correctness of his conviction.[239] The accused should plead by his own mouth and not through his counsel or pleader.[240] Any

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236. *Sham Sunder v. State of Himachal Pradesh*, 1993 Cr LJ 3631 (HP).

237. *Hemanta Kumar Mondal v. State of West Bengal*, 1993 Cr LJ 82 (Cal).

238. Major Anand, AIR 1960 J & K 139.

239. Bantra Kunjanna, AIR 1960 Mys 177.

240. Sursing, (1904) 6 Bom LR 861.

admission made by his pleader is not binding on him.[241] But different considerations may arise where the personal attendance of the accused has been dispensed with the he is permitted to appear by pleader.[242]

The accused can plead guilty under this section, or he can claim to be tried under s.230, or he can refuse to plead. The plea of "not guilty" is not recognized by the Code[243] and it amounts to a claim to be tried. Where the plea of guilty was recorded without explaining the offence alleged, it was held that the conviction based on such a plea could not be sustained and must be set aside.[244]

Where a person, accused of murdering his wife did not plead guilty at the time of the framing of charge, but subsequently confessed his crime in the open court, which was recorded by the trial judge himself and again reiterated his plea of guilt in his statement u/s. 33 Cr.P.C., it was held, dismissing his appeal, that applicability of s.229 Cr.P.C. could not be restricted to a particular date or occasion and the

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241. Sangaya, (1900) 2 Bom Lr 751.

242. Kanchan Bai, AIR 1959 MP 150.

243. Nirmal Kanta Roy, (1914) 41 Cal 1072.

244. 1979 Bom LR 41.

plea of guilt might be advanced by an accused at any stage of the trial after framing of the charge.[245]

It is the practice of the Sessions Courts in the Bombay State never to accept plea of guilty to a capital charge. There is, however, no reason why, if proper safeguards are taken, such a plea should not be accepted. Such safeguards must include the accused's representation by counsel who must be in a position to answer the questions of the Court, with regard to whether the accused knows what he is doing and the consequences of his plea and also a medical report or medical evidence upon him.[246] When an accused pleads guilty, conviction on that basis is not barred merely because a serious offence providing grave sentence is involved. The rule of prudence however requires that a man should not be convicted for such an offence without recording the evidence.[247]

The Court has a discretion to convict the accused when he pleads guilty or to proceed with the trial. The proper exercise of this discretion is of considerable importance in the case of persons tried

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245. *Ram Ishun v. State of U.P.*, 1996 Cr LJ 441 (All).

246. Abdul Kader Allarakhia, (1946) 49 Bom LR 25 SB.

247. *Tyron Nazarath v. State of Maharashtra*, 1989 Cr LJ 123 (Bom).

jointly, when some plead guilty and the others claim to be tried.[248] When the accused pleads guilty he may be convicted, or evidence taken as if the plea had been one of "not guilty", and the case decided upon the whole of the evidence including the accused's plea. When such a procedure is adopted, the trial does not terminate with the plea of guilty. It does not strictly end until the accused has been either convicted or acquitted or discharged. As a matter of practice Judges prefer not to act on the plea of guilty in murder cases[249] lest the evidence may disclose that the facts proved do not, in law, constitute an offence of murder, but some lesser offence.[250]

Date for Prosecution

The accused may not plead or refuse to plead, or he may claim to be tired or he may plead but the Judge in his discretion may not convict him. In all these cases the Judge fixes a date for the examination of witnesses and if necessary issues process to compel attendance of witnesses or production of document or other thing.

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248. Khandia, (1890) 15 Bom 66.

249. Chinna Pavuchi, (1899) 23 Mad 151; Chinia Bhika, (1906) 8 Bom Lr 240; Laxmya Shiddappa, (1917) 19 Bom LR 356; Bhadu, (1896) 19 All 119; Vishwanath, (1945) Nag 492; *Mahanlal Devanbhai Chokshi* v. *J.S. Wagh* 1981 Cr LJ 454.

250. In re, Gavisiddappa, AIR 1968 Mys 145.

The pleas that arise in criminal trials are four (1) *autrefois acquit* (previous acquittal) see s.300); (2) *autrefois convict* (previous conviction) (see s.300); (3) pardon (see s.306); and (4) not guilty. The first three are special pleas and must be proved by the accused, the fourth is a general issue and must be disproved by the prosecution.

The Orissa High Court has held that the persons not interrogated by the police u/s. 161 Cr.P.C. may also be summoned by the court as witnesses.[251]

Evidence for Prosecution

The witnesses should be examined orally. It is not sufficient, even with the consent of the pleader for defence, to put in depositions taken before the Magistrate or the police and allow witnesses to be cross-examined upon them.[252] Similarly, evidence taken before a Sessions Judge in one criminal trial cannot be treated as evidence in similar criminal cases before the same Judge involving the same accused even with the consent of the advocate.[253] The only legitimate

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251. *Bhima Muduli v. State of Orissa*, 1996 Cr LJ 1899 (Ori).

252. Subba, (1885) 9 Mad 83.

253. Koli raja Sarwan, (1966) 7 Guj LR 544.

object of the prosecution is to secure not a conviction but to see that justice be done.

The prosecution should lay before the Court all material evidence available to it for unfolding its case; but it will be unsound to lay down a general rule that every witness must be examined even though his evidence may not be very material or even if it is known that he has been won over or terrorised.[254] Prosecution is not bound to produce all the witnesses. Only the material witnesses considered necessary for unfolding the prosecution story need be produced.[255]

If the prosecution gives up one of the material eye-witnesses on the ground of close relationship with, and being won over by, the accused, his non-examination cannot be said to destroy the fabric of the prosecution case which is proved by the evidence of other eye-witnesses and corroborated by other evidence.[256] Where it is alleged that the prosecutrix and her husband were sleeping just 20 feet apart, when rape was committed and she had narrated everything to him, and

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254. Masalti, AIR 1965 SC 202: (1965) 1 Cr LJ 226; Bava Hajee, AIR 1974 Sc 902: 1974 Cr LJ 755.

255. *Pirthi* v. *State of Haryana*, 1993 Cr LJ 3517 (P & H).

256. Soma Bhai, AIR 1975 SC 1453: 1975 Cr LJ 1201; Prem, (1975) 77 Punj LR 313; *Jodha Khoda Rabbi v. State of Gujarat*, 1992 Cr LJ 3298 (Guj).

he had attested the F.I.R. made by the victim, it was held that the failure to examine the husband before the court to corroborate her evidence was certainly fatal to the prosecution and adverse inference could be drawn.[257] Where a witness was declared hostile by the prosecution, part of his evidence which was in conformity with the other evidence could be relied upon.[258]

The Judge can permit cross-examination of any witness to be deferred. There was sufficient evidence on record against the defendants. The investigating officer was not examined as a witness. The evidence of the investigating officer was essential to provide the missing link in the prosecution evidence. Non-examination of the investigating officer resulted in denying an opportunity to the defence to test the veracity of the prosecution and its witnesses. It was held that the conviction was not sustainable.[259]

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257. *Vijayan v. State*, 1993 Cr LJ 2364 (Mad).

258. *Ramachit Rajbhar v. State of West Bengal*, 1992 Cr LJ 372 (Cal).

259. *Hazari Choubey v. State of Bihar*, 1988 Cr LJ 1390 (Pat.).

Acquittal

The Judge records an order of acquittal if after (a) taking the evidence for the prosecution, (b) examining the accused and (c) (i) hearing the prosecution and (ii) defence on the point, he considers that there is no evidence that the accused had committed the offence.

The words "there is no evidence" are not to be read as meaning "no satisfactory, trustworthy or conclusive evidence". If there is evidence the trial must go on to its close.[260]

In a Sessions Trial u/ss. 302/394/457 I.P.C., the accused in his statement u/s.313 Cr.P.C. said, "there is no evidence", in answer to a question, 'whether they have any evidence', the Kerala High Court held that there is no need to question the accused about his evidence at this stage. It was further observed, that in a Sessions Trial, the Code of Criminal Procedure, 1973 envisages two stages after the examination of the accused. First is, hearing both the parties on the point, whether there is no evidence against the accused. If it is so found, the accused has to be acquitted u/s.232 Cr.P.C. If there is some evidence, the second stage comes and the accused be called upon to enter his

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260. Vijram, (1892) 16 Bom 414; Munna Lal, (1888) 10 All 414.

defence u/s. 233 Cr.P.C. Only then, the entire evidence be evaluated and its reliability by determined. Both the stages in the trial ought to be prominently recorded either in the Judgment or in the proceedings papers.[261] Where a Sessions Judge dropped the proceedings against the accused after framing a charge against him due to non-availability evidence, it was held that a court has no power to drop the proceedings after framing a charge and it has either to acquit or convict an accused.[262]

Entering Upon Defence

If the accused is not acquitted under the previous section then the Judge calls upon him to enter on his defence. This is not a mere formality but is an essential part of criminal trial. An omission on the part of the Judge to do so occasions failure of justice and is not curable under s.464.[263] The provision in subsection (1) is mandatory.[264] The Kerala High Court set aside the conviction and remanded a murder case back as the accused was not afforded an opportunity to adduce his defence as required by s.233 Cr.P.C.[265]

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261. *Shivamani v. State of Kerala*, 1993 Cr LJ 23 (Ker).
262. *Kisan Sewa Sakhari Samiti Ltd.* v. *Bachan Singh*, 1993 Cr LJ 2540 (All).
263. Imam Ali Khan, (1895) 23 Cal 252.
264. *P.K.J. Pillai v. State of Kerala*, 1982 Cr LJ 899 (Ker).
265. *Bhadran v. State of Kerala*, 1993 Cr LJ 1966 (Ker).

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264. *P.K.J. Pillai v. State of Kerala*, 1982 Cr LJ 899 (Ker).
265. *Bhadran v. State of Kerala*, 1993 Cr LJ 1966 (Ker).

The accused may apply for issue of process to compel attendance of witnesses or production of documents or things and the Judge, unless he considers the application to be vexatious or made for the purpose of delay or defeating the ends of justice, shall issue such process. The Judge should record his reasons for refusal. It may be noted that under s.230 the Judge "*may* issue any process" on the application of the prosecution for compelling attendance of witnesses etc. In this action refusal to issue process on specific grounds is mentioned. It seems the word "may" denotes discretion on the part of the Judge in s.230 Right o the court to deny an opportunity for defence evidence is limited to cases where it is satisfied, for reasons to be recorded in writing that the application should be refused on the ground that it is made vexatiously or for the purpose of causing delay as defeating the ends of justice.[266] Where the Sessions Judge did not actually call upon the accused to enter on his defence in terms of s.233 Cr.P.C., but the accused was questioned as to whether he had any evidence to lead and the accused replied in the negative, it was held that no prejudice could be said to have caused to the accused and the conviction could not be set aside on the ground of not following strictly the procedure u/s.233 Cr.P.C.[267]

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266. *T.N.Janardhanan Pillai v. State of Kerala*, 1992 Cr LJ 436 (Ker).
267. *Majid Khan v. State of Karnataka*, 1993 Cr LJ 907 (Knt).

After the close of defence evidence there will be arguments by the both the sides. And considering the possibilities of releasing the offender under section 360/361 Cr.P.C. he may convict and sentence the offender. Indeed, as discussed in earlier chapters, the accused[268] will be heard on the question of sentence. The convict is entitled to appeal against this sentence or punishment. The prosecution is also given a chance to challenge the sentencing order on the question of inadequacy of sentence.

APPEALS

One component of fair procedure and natural justice is the provision for reviewing the decisions of criminal courts for the purpose of correcting possible mistakes and errors in such decisions. The reviewing process not only provides for a corrective mechanism against real errors but it is also useful to inspire better confidence in the public mind regarding the administration of justice. The reviewing of a decision can be made by the very court which gave the decision or it can be done by superior courts. Obviously it is more expedient if the reviewing is done by a superior court.

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268. Section 235(2) of Cr.P.C.

The Code provides for a review either by way of an 'appeal' or by way of a 'revision..

The appeal as a corrective device would obviously be less relevant in cases where the chances of error are remote. Further, appeal means additional time and expense in the final disposal of the case. Therefore, though the right of appeal is integral to fair procedure, natural justice and normative universality,[269] the Code, as a policy, prefers to allow the right in the specified circumstances only. According to Section 372, no appeal shall lie from any judgement or order of a criminal court except as provided by the Code or by any other law.

APPEAL FROM CONVICTIONS

No appeal in certain cases

Consistent with the general rule that 'no right of appeal unless specifically provided by law', the Code has made definite provisions regarding the circumstances in which an appeal shall lie. However

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269. See the observations of the Supreme Court in *Madhav* v. *State of Maharashtra*, (1978) 3 SCC 544: 1978 SCC (Cri) 468, 476: 1978 Cri LJ 1678.

these provisions have been delimited by disallowing categorically the right of appeal in certain cases. It will be convenient to consider those cases first.

No appeal in petty cases. - According to Section 376, there shall be no appeal by a convicted person in the following cases:-

(a) Where the only sentence is one of imprisonment up to six months, or of fine up to Rs.1000, or of both, and is passed by a High Court;

(b) Where the only sentence is one of imprisonment up to three months, or of fine up to Rs.200, or of both, and is passed by a Court of Session or a Metropolitan Magistrate;

(c) Where the only sentence is one of fine up to Rs.100, and is passed by a Magistrate of the first class;

(d) Where the only sentence is one of fine up to Rs.200, and is passed in a summary trial by a Chief Judicial Magistrate, a Metropolitan Magistrate, or a Magistrate of the first class specially empowered by the High Court.

It may be noted that even in the above cases an appeal may be brought if any other punishment is combined with any such sentence. However, such sentence shall not be appealable merely on the ground:-

1. that the person convicted is ordered to furnish security to keep the peace; or

2. that a direction for imprisonment in default of payment of fine is included in the sentence; or

3. that more than one sentence of fine is passed in the case, if the total amount of fine does not exceed the amount here in before specified in respect of the case.

No appeal from conviction on plea of guilty:- Where an accused person has pleaded guilty and has been convicted on such plea, there shall be no appeal:-

1. if the conviction is by a High Court; or

2. if the conviction is by a Court of Session, Metropolitan Magistrate, or Magistrate of the first or second class, except as to the extent or legality of the sentence (S.375).

When a person is convicted by any court on the basis of his own plea of guilty, he cannot and should not have any grouse against the conviction and hence is not entitled to appeal from such a conviction. The accused can be said to have pleaded guilty only when he pleads guilty to the facts contributing ingredients of the offence without adding anything external to it.[270] If the plea of guilty is not a *real* one and is obtained by trickery, it is not a plea of guilty for the purposes of the above rule. A person, by pleading guilty, does not commit himself to accept the punishment that would be passed by the court. Therefore, he is not denied the right to challenge the extent or legality of the sentence.

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270. See *State of Gujarat* v. *Dinesh Cnandra*, 1994 Cri LJ 1393 (Guj HC).

But even this limited right of appeal is not allowed in such a case if the sentence is passed by a High Court. Because in that case the sentence is unlikely to suffer any serious infirmity.

Appeals to Superior Courts

Subject to the restrictions mentioned in the above Para 1, any person convicted of an offence may appeal in accordance with the provisions given below. Further, if two or more persons are convicted in one trial, and any of them is entitled by law to prefer an appeal, then according to Section 380, all or any of them convicted at such trials shall have a right of appeal.

(1) Appeal to the Supreme Court: (a) Any person convicted by a High Court in the exercise of its extraordinary *original* criminal jurisdiction may appeal to the Supreme Court. (S.374(1)); (b)Where the High Court has, on appeal reversed an order of acquittal and sentenced an accused person to death or to imprisonment for life or to imprisonment for a term of 10 years or more the accused may appeal to the Supreme Court. (S.379); (c) According to Article 132(1) of the Constitution, an appeal shall lie to the Supreme Court against the decision of a High Court, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the

Constitution; (d) According to Article 134(1) of the Constitution, an appeal shall lie to the Supreme Court from any decision of a High Court if the High Court - (I) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or (ii) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or (iii) certifies under Article 134-A that the case is a fit one for appeal to the Supreme Court; (e) According to Article 136, the Supreme Court *may* grant special leave to appeal from any decision of a court or a tribunal; (f) According to the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 an accused person may prefer an appeal as of right to the Supreme Court against an order of the High Court sentencing him/her to an imprisonment for life or for a period of not less than ten years. Such an order of the High Court should either be a reversal of an order of acquittal or where the High Court has withdrawn a case from a subordinate Court to itself for trial and sentenced the accused to imprisonment for a term specified above.

(2) *Appeal to the High Court* - Subject to the restrictions mentioned in Para 1 above, any person convicted on a trial held by - (a) a Sessions Judge or Additional Sessions Judge; or (b) any other court in

which a sentence of imprisonment for a term exceeding 7 years has been passed against him or against any other person convicted at the same trial, may appeal to the High Court. [S.374(2)].

(3) *Appeal to the Court of Session.* - Subject to the restrictions mentioned in Para 1 above, and as otherwise provided above in respect of an appeal to a High Court, any person. (a) convicted on a trial held by a Metropolitan Magistrate, or Assistant Sessions Judge, or Magistrate of the first class or second class, or (b) sentenced under Section 325,[271] or (c) in respect of whom an order has been made or sentence has been passed under Section 360[272] by any Magistrate, may appeal to the Court of Session. [S.374(3)].

APPEAL AGAINST INADEQUACY OF SENTENCE

In any case of conviction on a trial held by any court other than a High Court, the State Government may direct the Public Prosecutor to present an appeal to the High Court against sentence on ground of its inadequacy. The Central Government may also direct the Public

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271. S.325 deals with the procedure for the transfer of a case to the Chief Judicial Magistrate, when the Magistrate trying the case considers that he has no power to pass sentence sufficiently severe.

272. As mentioned in previous lecture, S.360 deals with release of offenders on probation of good conduct or after admonition.

Prosecutor to present such an appeal to the High Court if the conviction is in a case in which the offence has been investigated by the Delhi Police Establishment constituted under the Delhi Special Police Establishment Act, 1946, or by any other agency empowered to make investigation into an offence under any Central Act (other than this Code). In every such appeal, the High Court has to give reasonable opportunity to the accused of showing cause against the enhancement of the sentence. In a case where the accused has filed his appeal and the court issued notice for enhancement of sentence it may not be correct to say that the accused should be heard before enhancing the sentence. Because he should be getting adequate opportunity to represent for his acquittal. And the High Court under Section 401 read with Section 397 and Section 386 will have power to enhance the sentence.[273] The *accused*, while showing such a cause, *may plead for his acquittal* or *for the reduction of* the sentence. [S.377].

A High Court alone is empowered to entertain any appeal against the inadequacy of the sentence. This would help in securing uniform standards in awarding punishments.

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273. *Sirajkhan Bauddinkhan* v. *State of Gujarat*, 1994 Cri LJ 1502 (Guj HC).

By way of Articles 132, 134 and 136 of the Constitution,[274] it may be theoretically possible to present an appeal to the Supreme Court against the inadequacy of the sentence passed by the High Court.

APPEAL AGAINST ORDER OF ACQUITTAL

(1) The State Government may direct the Public Prosecutor to present an appeal to the High Court from an *original* or *appellate* order of acquittal passed by any court (other than High Court) or from an order of acquittal passed by a Court of Session in revision [S.378(1)].

(2) In any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946, or by any other agency empowered to make investigation into an offence under any Central Act (other than this Code), the Central Government *may also* direct the Public Prosecutor to present an appeal to the High Court from any order of acquittal passed by any court other than the High Court. [S.378(2)].

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274. See the articles and the explanations for them in the Constitution of India.

(3). Such an appeal shall be entertained only with the leave of the High Court [S.378(3)]. The High Court has got discretion to grant or not to grant leave to appeal against acquittal. This discretion has to be exercised judiciously and leave should not be refused without giving reasons.[275]

(4) In a case instituted upon a complaint, if a complainant wants to present an appeal against an order of acquittal, he can do so after obtaining from the High Court special leave to present such an appeal [S.378(4)]. If the complainant is a public servant an application for the grant of such special leave must be presented to the High Court within six months from the date of the order of acquittal. If the complainant is any other person, such an application for grant of special leave must be presented within sixty days from the order of acquittal. [S.378(5)].

(5) If the application of the complainant for grant of such special leave is refused, no appeal from the order of acquittal shall lie even at the instance of any Government whatsoever. [S.378(6)].

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275. *State of Maharashtra* v. *Vithal Rao Pritirao Chawan*, (1981) 4 SCC 129: 1981 SCC (Cri) 807.

(6) By making use of Articles 132, 134 and 136, it may be possible to present an appeal to the Supreme Court against the order of acquittal passed by the High Court.[276]

Appeal against an order of acquittal is an extraordinary remedy. Where the initial presumption of innocence in favour of the accused has been duly vindicated by a decision of a competent court, an appeal against such decision of acquittal means putting the interests of the accused once again in serious jeopardy. It has been further explained by the Supreme Court that while dealing with an appeal against acquittal the appellate court has to bear in mind: first that there is a general presumption of innocence in favour of the person accused in criminal cases and that presumption is only strengthened by the acquittal. The second is, every accused is entitled to the benefit of reasonable doubt regarding his guilt and when the trial Court acquitted him, he would retain the benefit in the appellate court also.[277] Therefore, the above restrictions on the preferring of an appeal against acquittal to the High Court are intended to safeguard the interests of the accused person and to save him from personal vindictiveness.

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276. *See* the decisions in *Arunachalam* v. *P.S.R.Sadanantham*, (1979) 2 SCC 297: 1979 SCC (Cri) 454: 1979 Cri LJ 875: AIR 1979 SC 1284 and *P.S.R.Sadanantham* v. *Arunachalam*, (1980) 3 SCC 141: 1980 SCC (Cri) 649: AIR 1980 SC 856.

277. *See* observations in *Dhanna* v. *State of M.P.*, 1996 SCC (Cri) 1192; *Lal Mandi* v. *State of W.B.*, (1995) 3 SCC 603.

The provisions regarding the leave of the High Court to file an appeal against the order of acquittal have been found desirable and expedient against the somewhat arbitrary exercise of the executive power of the Government to file such appeals.[278] No doubt, the High Court has got full discretion to grant or not to grant leave to appeal against acquittal. However, the entertainment of the appeal by the High Court against an acquittal will be justified only under special circumstances,[279] and quite obviously this discretion will have to be used judicially and not arbitrarily.

An appeal from an order of acquittal must be filed within the period of limitation prescribed by Article 114 of the Schedule of the Limitation Act, 1963. For the extension of the period of limitation, and for exclusion of time in computing the period of limitation, Sections 5 and 12 of that Act would be useful.

REVISION

The provisions for reviewing the decision of a criminal court are essential for the due protection of life and liberty and are rooted in the

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278. *See* Joint Committee Report, p.xxvi.

279. *Umedbhai* v. *State of Gujarat*, (1978) 1 SCC 228: 1978 SCC (Cri) 108, 112: 1978 Cri LJ 489; *See* how the judicial discretion was exercised in *Delhi Municipality* v. *Madan Lal*, 1979 Cri LJ 426 (Del HC).

conception that men including the Judges and Magistrates are fallible. Appeal as a review procedure was discussed earlier in Lecture 16. In cases where no appeal has been provided by law or in cases where the remedy of appeal has for any reason failed to secure fair justice, the Code provides for another kind of review procedure, namely, 'revision'. Very wide discretionary powers have been conferred on the Court of Session and the High Court for the purpose of 'revision'. While making provisions for extensive powers of revision for ensuring correctness, legality, and propriety of the decisions of criminal courts, the Code has also taken care to see that this review procedure does not make the judicial process *unduly* cumbersome, expensive or dilatory.

Power to call for and examine the record of the lower court

According to Section 397(1), the High Court or a Sessions Court may call for and examine the record of any proceeding before any inferior criminal court situate within its local jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding or order of such inferior court.

On examination of such record if the High Court or the Sessions Court considers any corrective action necessary, it has ample powers to do so under Sections 398-401.

The 'proceeding' referred to in Section 337(1) above includes any judicial proceeding taken before any inferior criminal court even though it may not relate to any specific offence. The expression 'inferior criminal court' only means judicially inferior to the High Court (or Sessions Court). All Magistrates, whether executive or judicial, and whether exercising original or appellate jurisdiction shall be deemed to be inferior to the Sessions Judge [Explanation to Section 397(1)].[280] The Sessions Judge is also inferior to the High Court within the meaning of Section 397(1), and the High Court may call for and examine the record of any proceedings before a Sessions Judge.[281]

The High Court or the Sessions Court may, when calling for such record under Section 397(1), direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be

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280. A Collector passing an order of confiscation or otherwise under the Essential Commodities Act or the Government constituting as an appellate authority under that Act cannot be considered as inferior criminal court. See *G.C.Venkateswarlu* v. *State of A.P.*, 1986 Cri LJ 1713 (AP HC).

281. *Ramachandra* v. *Jambeswar*, 1975 Cri LJ 1921, 1922 (Ori HC); *Thakur Das* v. *State of M.P.*, (1978) 1 SCC 27: 1978 SCC (Cri) 21, 28: 1978 Cri LJ 1.

released on bail on his own bond pending the examination of the record [S.397(1)]. The provisions regarding bail have already been discussed in Lecture 8.

Only one revision petition either to Sessions Court or the High Court

Section 397(3) provides that if an application for revision has been made by any person either to the High Court or to the Sessions Judge, no further application by *the same person* shall be entertained by either of them. The object is to prevent a multiple exercise of revisional powers and to secure early finality to orders. The decision of the Sessions Judge, if he is approached first, is made final and conclusive.[282] In a case where the Sessions Court is the appellate court, if the appeal has been rejected by it, a revision may lie to the High Court.[283] A person aggrieved by the Sessions Judge's decision in revision would have no right to approach the High Court again in revision.[284] Such being the position under the (new) Code, any rule or

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282. *Chhail Das* v. *State of Haryana*, 1975 Cri LJ 129, 130 (P&H HC). See also *Ramachandra Puja Panda Samant* v. *Jambeswar Patra alias Jamuna Patra*, 1975 Cri LJ 1921. (Ori HC); *Deena Nath* v. *Daitari Charan*, 1975 Cri LJ 1931, 1932 (Ori HC). Also *Deepti* v. *Akhil Rai*, (1995) 5 SCC 751.

283. *Asghar Khan* v. *State of U.P., 1981* SCC Supp.78: 1982 SCC (Cri) 146.

284. *Jagir Singh* v. *ranbir Singh*, (1979) 1 SCC 460: 1979 SCC (Cri) 348, 352, 353: 1979 Cri LJ 318; *Chhedilal* v. *Kamla*, 1978 Cri LJ 50 (All HC); *Swetamber Jain Sampraday* v. *Digambre Amnay*, 1982 Cri LJ 701 (Raj HC); *Baban* v. *Sambamurthy*, 1980 Cri LJ 248 (AP HC).

practice which requires such a person to first approach the Sessions Judge before going to the High Court would be out of place.[285]

It may, however, be noted, that the restriction on further revision as contained in Section 397(3) is confined to a second revision application filed by the *same* person only.[286]

Power of court of revision to order inquiry

On examining the record (or otherwise), the court of revision may direct the Chief Judicial Magistrate to make, or to cause to be made through any other Subordinate Magistrate, further inquiry into any complaint which has been dismissed under Section 203 or Section 204(4), or into the case of any person accused of an offence who has been dis-charged. However, the court of revision shall not make any such direction for inquiry into the case of any person *who has been discharged* unless such person has had an opportunity of showing cause why such direction should not be made [S.398].

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285. *Satyanarayana* v. *Kantilal*, 1976 Cri LJ 1806, 1812 (Guj HC). *See* also *P.Abbulu* v. *State*, 1975 Cri LJ 139 (APHC); *Madhavlal* v. *Chandrashekhar*, 1976 CriLJ 1604 (Bom HC). *See* for contrary view, *Arun Kumar* v. *Chandanbai*, 1980 Cri LJ 601 (Bom HC).

286. *Ramchandra* v. *Jambeswar*, 1975 Cri LJ 1921, 1923 (Ori HC).

Sessions Judge's powers of revision

These powers are contained in Section 399 which provides as follows:

> "(1). In the case of any proceeding, the record of which has been called for by the Sessions Judge himself, he may exercise all or any of the powers which may be exercised by the High Court under Section 401(1).
>
> (2). Where any proceeding by way of revision is commenced before a Sessions Judge, the provisions of sub-sections (2), (3), (4) and (5) of Section 401 shall so far as may apply to such proceeding, and references in the said sub-sections to the High Court shall be construed as a reference to the Sessions Judge. A revision by the complainant to the Sessions Court against acquittal of the accused by the trial court is held to be entertainable with special leave.[287] This applies to a prosecution even if it was instituted by the police and not on the basis of a complaint.[288]
>
> (3). Where any application for revision is made by any person before the Sessions Judge, the decision of the Sessions Judge thereon in relation to such person shall be final and no further proceedings by way of revision at the instance of such person shall be entertained by the High Court or any other court.
>
> It would appear from Section 399(3) above that, while a person has the choice to move either the High Court or the Sessions Judge under Section 397, if he chooses to go before the Sessions Judge he cannot thereafter go before the High Court even if the Sessions Judge rejects his revision application. Therefore, the rule of practice under the old Code that except under exceptional circumstances the High Court would not entertain a revision application unless the Sessions Judge was moved in the first instance, is inconsistent with the scheme of the

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287. *Dharamaji Gangaram Gholem* v. *Vinoba Sona Khode*, 1992 Cri LJ 870 (Bom HC).

288. *R.Jagadish Murthy* v. *Balaram Mohanty*, 1992 Cri LJ 996 (Ori HC).

present new Code; any instance on following the old rule of practice hereafter would result in the destruction of the right of a person to move the High Court under Section 397. The rule of practice followed by many High Court cannot any longer be followed in view of Section 397(3) and Section 399(3).[289]"

High Court's powers of revision

(1) *Specific powers* - The High Court may, in its discretion exercise any of the powers conferred on a court of appeal by Sections 386, 389, 390 and 391or an a Court of Session by Section 307 (power to tender pardon to the accused person) and, when the Judges composing the court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by Section 392. [S.401(1)].

Sections 386, 389, 390, 391 and 392 referred to above have already been discussed in Lecture 16, Paras 5-8.

The revisional powers of the High Court are very wide and no form of judicial injustice is beyond their reach. The powers are entirely discretionary.[290] The section does not create any vested right in the

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289. *P.Abbulu* v. *State*, 1975 Cri LJ 139, 140-141 (AP HC); *Kesavan* v. *Sreedharan*, 1978 Cri LJ 743 (Ker HC) (FB); *Satyanarayana* v. *Kantilal*, 1976 Cri LJ 1806 (Guj HC). *See* for contrary view, *Arun Kumar* v. *Chandanbai*, 1980 Cri LJ 601 (Bom HC).

290. This also includes exercise of power under S.427 of the Code of specify whether the sentences shall run concurrently or consecutively. See *V. Venkateswarlu* v. *State of A.P.* 1987 Cri LJ 1621 (AP HC).

litigant, but only conserves the power of the High Court to see that justice is done and that the subordinate courts do not exceed their jurisdiction or abuse their powrs.[291]

(2) *Restrictions on invoking the revisional powers* - The High Court can exercise its revisional powers *suo motu*, that is, on its own initiative, or on the petition of any aggrieved party or even on the application of any other person. However, there are two limitations:

(i) As seen earlier in Section 399(3), where any application for revision is made by any person before the Sessions Judge no further proceeding by way of revision *at the instance of the same person* shall be entertained by the High Court.

(ii) Secondly, in a case where an appeal lies but no appeal has been brought, then according to Section 401(4), no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

These restrictions, it may be noted, apply only in cases where the High Court's revisional powers are invoked by *any aggrieved party*.

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291. *Pranab Kumar Mitra* v. *State of W.B.* AIR 1959 SC 144: 1959 Cri LJ 256. *See* also *Rajeshwar Prasad* v. *State of Bihar*, 1972 Cri LJ 258, 261 (Pat HC) (FB): AIR 1972 Pat 50.

In a case where one party appealed to the sessions and the other invoked the revisional jurisdiction of the High Court praying for the transfer of the appeals from Sessions Court to the High Court to be heard along with the revision, it was held that though in exceptional circumstances it could be permitted, in the circumstances of the case, the revision petition should be kept pending till the disposal of the appeal by the Sessions Court.[292] The restrictions do not apply when the High Court acts *suo motu.* The High Court, as an effective instrument for administration of criminal justice, keeps a constant vigil and wherever it funds that justice has suffered, it takes upon itself as its bounden duty to *suo motu* act where there is flagrant abuse of the law.[293]

(3) *How the powers are exercised.* - The exercise of the revisional jurisdiction is discretionary and the powers under Section 401(1) are to be used only in exceptional cases where there is a glaring defect in the procedure or there is manifest error on point of law and

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292. *Jogi Naidu* v. *Kayalada Venkataramana*, 1986 Cri LJ 963 (AP HC).

293. *Nadir Khan* v. *State*, (1975) 2 SCC 406: 1975 SCC (Cri) 622, 624: 1976 Cri LJ 1721. See also *Ramesh Chandra* v. *A.P.Jhaveri*, (1973) 3 SCC 884: 1973 SCC (Cri) 566, 570: 1973 Cri LJ 201; *Ramesh Chandra Arora* v. *State*, AIR 1960 SC 154: 1960 Cri LJ 177; *Ratan Singh* v. *State of M.P.*, 1977 Cri LJ 673, 675 (MP HC); *Eknath* v. *State of Maharashtra*, (1977) 3 SCC 25: 1977 SCC (Cri) 410, 413: 1977 Cri LJ 964. *See* also *T.V.Hameed, In re*, 1986 Cri LJ 1001 (Ker HC).

consequently there has been a flagrant miscarriage of justice.[294] Ordinarily while exercising the revisional jurisdiction the High Court would not interfere with the concurrent findings of the courts below on a question of fact. But where the finding of fact is vitiated so as to cause miscarriage of justice as, for instance, when it is based on no evidence, or where evidence has been overlooked or evidence has not been considered in its true perspective, the court will and must interfere.[295] However, in cases where no appeal has been provided and a revision petition is the only remedy, the court of revision will be more careful in appreciation of evidence. It is true that the revisional jurisdiction does not postulate re-appreciation of evidence, but that should be appreciated in the light of the limitation on the right to go in appeal.[296]

While exercising the powers of revision the court has to work under two statutory limitations: (i) As seen earlier the powers of revision shall not be exercised in relation to any interlocutory order

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294. *Amar Chand* v. *Shanti Bose*, (1973) 4 SCC 10: 1973 SCC (Cri) 651, 657: 1973 Cri LJ 577; *Narain Prasad* v. *State of Rajasthan*, 1978 Cri LJ 1445, 1451: AIR 1978 Raj 162 (FB). Also see *Ayodhya Dubey* v. *Ram Sumer Singh*, 1981 Supp SCC 83: 1982 SCC (Cri) 471: 1981 Cri LJ 1016; *Manu Nehera* v. *State of Orissa*, 1988 Cri LJ 1911 (Ori HC).

295. *Narayan Tewary* v. *State of W.B.*, AIR 1954 SC 1954 Cri LJ 1808; *Santokh Singh* v. *Izhar Hussain*, (1973) 2 SCC 406: 1973 SCC (Cri) 828, 834: 1973 Cri LJ 1176; *Jagir Kaur* v. *Jaswant Singh*, AIR 1963 SC 1521: (1963) 2 Cri LJ 413, 417.

296. *Islamuddin* v. *State*, 1975 Cri LJ 841, 842 (Del HC).

passed by any inferior criminal court. [S.397(2)]. (ii) The High Court exercising its revisional jurisdiction shall have no authority to convert a finding of acquittal into one of conviction. [S.401(2)].

Considering the limitation contained in (ii) above, it is incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial.[297] This is all the more necessary when the State had not thought it fit to appeal to the High Court against the finding of acquittal and when the High Court is exercising revisional jurisdiction at the instance of a private party. The Supreme Court has held in a number of decisions that the revisional powers of the High Court to set aside the order of acquittal (and ordering retrial) at the instance of the private parties should be exercised only in *exceptional cases* where there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice.[298]

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297. *K.Chinnaswamy Reddy* v. *State of A.P.*, AIR 1962 SC 1788: (1963) 1 Cr LJ 8, 11; *Logendranath Jha* v. *Polailal Biswas*, AIR 1951 SC 316: 52 Cri LJ 1248, 1250; *Mahendra Pratap Singh* v. *Sarju Singh*, AIR 1968 SC 707: 1968 Cri LJ 865, 867; *Khetrabasi Samal* v. *State of Orissa*, (1969) 2 SCC 571, 575: 1970 Cri LJ 369; *Dhirendra Nath Mitra* v. *Muthunda Lal Sen*, AIR 1955 SC 584: 1955 Cri LJ 1299.

298. *D.Stephens* v. *Nosibolla*, AIR 1951 SC 196: 52 Cri LJ 510, 512; *Satyendra Nath Dutta* v. *Ram Narain*, (1975) 3 SCC 398: 1975 SCC (Cri) 24, 26: 1975 Cr LJ 577; *Akalu Ahir* v. *Ramdeo Ram*, (1973) 2 SCC 583: 1973 SCC (Cri) 903, 906, 906, 907: 1973 Cri LJ 1404; *Changanti Kotaiah* v. *Gogioni Venkateswara Rao*, (1973) 2 SCC 249: 1973 SCC (Cri) 801, 808: 1973 Cri LJ 978; *Fakir Chand* v. *Komal Prasad*, (1964) 2 Cri LJ 74, (SC). Also see *Manijan Bibi* v. *Nameirakpam Mangi Singh*, 1988 Cri LJ 1438 (Gau HC).

It is only in glaring cases of injustice resulting from some violation of fundamental principles of law by the trial court, that the High Court is empowered to set aside the order of acquittal and direct a retrial of the acquitted defendant. This power should be exercised with great care and caution.[299]

(4) *Opportunity to a party of being heard.* - (I) As seen earlier a revisional court cannot direct further inquiry against any person who has been discharged unless that person has had an opportunity of showing cause why such direction should not be made. (Proviso to Section 398). (ii) Similarly the revisional court shall not pass any order to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence. [S.401(2)].

These provisions are consistent with the basic principle of natural justice, namely, *audi alteram partem* (no man should be condemned unheard). Subject to the above-said two rules the court of revision has been given discretion in the matter of hearing any party by Section 403 which provides as follows:

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299. *Bansilal* v. *Laxman Singih*, (1986) 3 SCC 444: 1986 SCC (Cri) 342: 1986 Cri LJ 1603.

> "Save as otherwise expressly provided by this Code, no party has any right to be heard either personally or by pleader before any court exercising its powers of revision; but the court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader."

When a court of revision revises a case, it shall certify its decision to the lower court concerned and the court shall thereupon make such orders as are conformable to the decision so certified.[300]

As the criminal justice system in India at present is totally followed and practiced at Pondicherry and there is no any deviation from the practice and procedure adopted at Pondicherry.

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300. Section 405 of Cri.P.C.

CHAPTER - V

SENTENCING

The main purpose of criminal law is prevention of crimes. It is attempted to be achieved through several means. The criminal justice system has its machinery to take preventive measures such as police surveillance, security proceedings etc. The Courts try to achieve prevention of crimes by way of ensuring imposition of punishments on the criminals. And the prison system, a part of the justice system carries out the punishment. Among these steps for the prevention of crimes, it is really the sentencing part which assumes much importance.

Sentencing is a complex function. Keeping the main aim of prevention in vision the court has to consider a large number of questions while imposing a particular sentence on an individual. It has to give consideration to the personality of the offender, the seriousness of the offence i.e. the intensity of the harm caused to the society; probable impact the particular sentence may have on the society and the individual, etc. At times, the court is placed in a dilemma; namely whether to go for one that has some proportionality to the seriousness of

the offence to signify the societal disapproval and deterrence or to go for a punishment that is deterrent on the offender.

The importance of sentencing has been succinctly spelt out thus: Sentencing a man may be and often is decisive as to his fate. Therefore it seems to be a fair demand on society that its organs, the courts of justice, should not use their enormous powers on the citizens lightheartedly, but be fully aware of the consequences of their decisions.[1]

Criminal Justice System has responded to the crimes differently at different points of time and at present it has a good number of punishments prescribed for various offences with varied objectives. The determination of the choice of an appropriate sanction out of the many permitted by law in a particular situation is of enourmous consequence to the individual offender as it is to the society at large.

Judiciary is the institution through which society expresses its correctional predictions. The philosophy of sentencing accepted by the society is reflected in the sentencing process. While the offender's life,

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1. Olod Kinberg - Sentencing (1965).

liberty or property and his entire future hinges on the outcome of the sentencing process, it is also bound to have some impact on the social interests - the primary concern of the criminal Justice system. The sentencing of offender is not an end in itself but rather the initiation of a meaningful process that other organs will carry on. As already mentioned, the sentence will not only affect merely the individual sentenced and those immediately connected with him but also the wider society of which he forms part.

Sentencing under the common law system and under the French system are different in several respects. The main difference is with reference to the courts' role in overseeing the implementation of the sentences.

Generally speaking, while the French system ensures that the imposition of sentence involves almost all functionaries under it, the common law system entrusts the implementation part to the prison staff after the courts have imposed the sentence. Since Pondicherry experienced both procedures it is interesting to see how the society reacted to both the systems in the correctional context.

Under the present system the courts have ample discretion in sentencing. The indeterminate sentencing scheme provided for in the penal code as well in other pieces of legislation gives the courts ample powers to select a sentence which they consider appropriate.

The current thinking on sentencing stressing the desirability of selecting a sanction that suits the personality of the offender rather than the seriousness of the offence has thrown open enough opportunities for the Indian Courts to decide the questions on sentencing.

The amendments effected to the provisions in the criminal procedure code of India, 1973, such as SS 235(2) 248(2) and 255(2)[2] enabling the courts to go for pre-sentence hearing further empowered them to be the deciding authorities. The provisions such as Sections 360-361[3] of Cr.P.C. have also further enhanced the position of courts in sentencing the offender. The appellate judiciary plays an effective role in streamlining sentencing. Uniformity in sentencing is also being achieved by the appellate courts in India.

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2. Code of Criminal Procedure.

3. Ibid.

Sentencing under the French Criminal Justice System

The sentences applicable to each offence were determined with the limits fixed by the code penal. The modalities of enforcement of the provisions was described in the code de procedure penal. The court could suspend the sentence provided the accused has not been previously convicted of a 'crime' or a delit. During the period of suspension the court may impose certain conditions on the accused. If the accused was not convicted of a 'crime' or 'delit' and sentenced to more than two month's imprisonment during the period of five years after which the suspended sentence was pronounced, the sentence subject to the suspension would not be enforced. A suspended sentence did not affect any award of damages or expenses against the accused, who was required to pay them. If the accused committed any offence during the period of suspended sentence, the earlier suspended sentence would be treated as previous conviction.

For certain offences, the code penal allowed the court to deprive an accused of certain civil rights such as the right to vote to dispose his property or to practice particular profession. In the case of sentence to life imprisonment the accused was deprived of his right to dispose of his property. The court could also order confiscation of goods used in the commission of or gained as the result of a criminal offence. The

law allowed the court to banish the accused from Pondicherry to certain areas outside Pondicherry. The court could sometimes order that details of the offence and conviction be prominently displayed in certain areas like the hometown of the accused. However, there was discretion for the courts to ignore these penalties with the measures of suspended sentence and probation.

If fine was imposed an official called 'percepteur' employed in the Ministry of Finance was entrusted with responsibility of collecting the same. The procurer was not responsible for collecting the fine. After imposition of fine and after the expiry of the appeal time, the accused might make arrangements with the 'percepteur' for the time limits and methods by which the fine was to be paid. If the accused failed to pay the fine, the 'percepteur' would request the Procureur to order arrest of the accused. Then the procurer would instruct the police to arrest the accused and take him to prison where he would be detained for a specified period. The accused could avoid going to prison if he paid the fine on the spot, or if the 'percepteur' agreed to a further arrangement for payment thereof.[4] However, there were exceptions for the aged

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4. The 'percepteur' had such a power to grant extension of time for payment of fine.

and indigent persons. If the accused was aged between 60 and 70 years and failed to pay the fine, the alternative period of imprisonment was halved. If he was aged over seventy years no alternative of imprisonment could be enforced.

In certain circumstances, the alternate period of imprisonment might be halved, if the accused could prove that he was a man of no means.[5] If the accused was already serving a sentence of imprisonment, the alternative period for non-payment of fine would only commence when the first term had expired. The arrears of fine after the death of the accused were be regarded as debt, against his estate. The court had no control over how a fine was paid. If proceedings were instituted by a 'partie civile' and the accused was convicted, the court had a discretion to award expenses against an accused. Such a course was uncommon. If the accused was ordered to pay damages to the victim then the responsibility of enforcement of the same was with the victim. But, for non-payment of damages an accused could be sent to prison.

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5. Authenticated document from the department of Contribution (Revenue) to be produced.

When the court imposed a sentence of imprisonment, it might not be executed until the time limits for lodging an appeal had expired,[6] or unless the court specifically ordered that the sentence be executed forthwith. The sentence must not exceed one year's imprisonment.

Imprisonment for life was imposed for certain offences. Imprisonment was always back-dated to include any time in custody awaiting trial. The way in which the sentence was served was controlled by a 'magistrate' called the judge 'application des paines, as soon as the sentence of imprisonment was executed. Normally a prisoner would start by being given work to do in his cell. He might then pass through various stages, including working outside the prison for government contractors etc. He might be placed on semi-liberty whereby he was allowed to work outside the prison and was only detained with working hours and at week ends and public holidays. Ultimately he would be released on conditional liberty. The procureur pronouncing the sentence must be consulted before the release of the prisoner on conditional liberty.

The procureur was responsible for enforcing the sentence. The

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6. It need not wait until the expiry of the two month time limit given to the Procureur general to lodge an appeal against a Judgment to the tribunal correctional.

procureur had no discretion to decide whether or not to enforce the sentence. When the sentence imposed by the tribunal correctional or the tribunal de police, the procureur de la Re'publique would enforce the sentence.[7]

The time limit allowed to an accused to lodge an appeal with the cour de causation was three days. The sentence might be enforced in the courd' assises within three days of its imposition. In the tribunal correctional, if the accused was present in court when the sentence was pronounced, the sentence might's be enforced after the expiry of ten days. The ten days time was the time limit for lodging an appeal with the cour d' appeal.

If the sentence of imprisonment was prounced in the absence of the accused, the 'huissier'[8] would serve a notice on the accused informing him about the court sentence. The same rules applied to service of notice as applied to service of a citation to the accused to attend trial. The sentence became enforceable within ten days of personal service. If this had not been effected, the sentence

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7. The enforcing of sentence was vested with the Procureur de la Re'publique.

8. Process server empowered to serve the processes.

enforceable within ten days of the accused signing the receipt for the delivery of the registered letter informing him the notice has been left at the local major's officer. Ten days time was the limit for appealing against a judgement by default by means of the appeal procedure known as L'opposition.[9] If service of the notice was not effected, then the Procureur might instruct the police to trace the accused. If the accused was not traced within five years and if the penalty had not been extinguished by prescription, the penalty might be enforced on the accused without notification. The time limit for enforcement of penalty for crimes, delit and contravention's were 20 years, 5 years and 2 years respectively.

If the accused was not already in custody, the Procureur would send an extract of the court's verdict and sentence to the police, with instructions to arrest the accused and take him to prison. If the accused lived outside district of the Procureur, he would send the extract to the Procureur having jurisdiction requesting him to enforce the penalty. However, when the penalty of imprisonment became enforceable, and the accused was in custody, the sentence would begin to run from the date when the accused was taken into custody before the trial.

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9. The procedure under which it was done was known as L'opposition.

For the offences like, particide, premeditated murder, illtratement of children with intent to kill, willful fire raising of an occupied house, wrongful detention accompanied by physical torture, perjury in the trial of an offence carrying the death penalty, kidnapping a child less than 15 years of age when the child died and for certain types of robbery and theft death penalty might be imposed. However, in practice juries in such trials often found some mitigating circumstances which avoided the death penalty being imposed. Apart from that the president de la Re'publique might grant a reprieve by exercising his discretion. Apart from the above mentioned punishments like loss of civil rights, fines imprisonment, death penalty there was a big list of the punishments in French Law. They are Reclusion, civic degradation, interdiction, incapacity to give and receive gratuitously, forfeiture of property, publication of judgement, local banishment, loss of civil and family rights, prohibition to practice specified professions, confiscation of one or more vehicles, confiscation of arms, cancellation of driving licence, prohibition to drive certain vehicles, prohibition to possess and carry specified arms, cancellation of hunting permit and work of public interest etc.

The modality for imposition and the quantum of sentence to be imposed on the accused after conviction were detailed in the French

Penal Law. However, when extenuating circumstance existed the court on satisfaction of the same could go for a reduced sentence.[10]

Under the French criminal justice system, the inquiry was not only on the presence of the ingredients of the offence but also on all the surrounding circumstances of the case. This kind of enquiry did help the court to choose an appropriate sentence. This also helped persons accused of grave offices to build up a case for extenuating circumstances which might exist in their favour instead of total denial. In that way, even in cases of felony a correctional punishment could be pronounced, on the contrary when the convict happened to be a recidivist the court used to pronounce a sentence higher than the normal punishment, in felony cases. In case of misdemeanour, for a recidivist, the minimum would be the maximum fixed by law for first offenders and the maximum would be double the normal. In cases of violation by recidivists there was no aggravation of sentence.

For the first offenders there were several provisions to mitigate the sentence. The court had power to fully exonerate the first offenders when it appeared to it that the accused had re-settled in normal life, that

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10. See, French Legal Systems by Justice David Annousamy. P.80.

he had repaired the loss caused by him and that the trouble arising out of the offence had ceased. The court could adjourn the pronouncement of sentence when it appeared to it that the convicted person was getting resettled in normal life and the injury caused by him was being repaired. Finally, the court could exonerate the convict from any punishment prescribed by law.

When one examines these provisions and practices it seems there was public participation in the process of sentencing. In the sentencing segment the participation was open to the public unlike the present Indian System. In the French System the question of sentence was determined by the prosecutors, and jury alongwith the Presiding Officers.

Sentencing under the Indian Model

In olden days, sentences were fairly standardized. Fixed specific punishments for offences were laid down by the law, and once a verdict of guilty was rendered the judge merely ordered the execution of the appropriate sentence in choosing the punishment, was dependents on the seriousness of the offences. In other words, the criminal justice system stressed on the prevention of crimes by way of deterrence rather than by way of reformation of the offender. There

was no scheme under which the sentencing Judge could choose penalties designed for reformation and rehabilitation of the offenders.

Now, the position has changed as a consequence of changes in societal reactions to crime and criminals; the rethinking process about the crime and punishment is continuing. The trend for adoption of reformative and rehabilitative measures to make the accused to become a good citizen is on. Draconian notions and passion for retribution are yielding to "Mankind's concern for kindness".[11] At present, it is believed that the sentence must suit the offender, rather than the offence, so that he can return to the society as a law abiding citizen. Thus sentencing requires considerations beyond the nature of the crime and circumstances surrounding it.[12]

Sentencing starts after conviction and awarding of an appropriate sentence involves a lot of considerations. It is also found now, that longer the sentence of imprisonment the lesser are the chances of re-socialization in the community. The nature and the length of the sentences have direct bearing upon the future of the

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11. *Chawla* v. *State of Haryana*, AIR 1974 SC 1039.

12. *Mohammed Giassudin* V. *State of Andhra Pradesh*, AIR 1977 SC 1926.

offender. The proper sentence imposed by the court will determine the effectiveness of correctional measures.

The first issue which a court has to decide after finding an accused person guilty is to determine whether the offender needs to be dealt with by penal sanction or by rehabilitative measures. Rehabilitation is totally different from retribution and deterrence. If the punitive approach is decided in favour of punishment the normal punishments available are fine, imprisonment or death sentence in extreme cases. If 'Reformation' is made as a choice, the further issue is to choose between alternatives like probation and other measures. In case of the imposition of imprisonment or fine, the quantum of the sanction shall also have to be fixed. The various parts of the sentencing decisions are referred to as the primary and secondary decisions.[13]

The Report[14] of the Indian Law Commission identified the various considerations to be made in sentencing. The same have been cited with approval by the Supreme Court in its subsequent rulings. The Law Commission's views on sentencing are worth-note. They run thus:

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13. See, Thomas. Principles of sentencing - Heinmann, London, 1970.

14. 47th Report of Law Commission.

"A proper sentence is a composite of many factors, including the nature of the offence, the circumstances extenuating or aggravating - of the offence, the prior criminal record, if any, of the offender, the age of the offender, the professional and social record of the offender, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the possibility of return of the offender to normal life in the community, the prospect for the rehabilitation of the offencer, the possibility of treatment or of training of the offender, the possibility that the sentence may serve as a deterrent to crime by this offender or by others, and the present community need, if any, for such a deterrent in respect to the particular type of offence involved".[15]

Sentencing in India - Various Forms

The courts derive their sentencing power from the criminal procedure code.[16] The offences are divided into two heads: (1) offences under the Indian Penal Code, and (ii) Offences under any other law.

Offences under the Indian Penal Code may be tried by

(a) The High Court, or

(b) The court of sessions, or

(c) Any other court by which such offence is shown in the first schedule of criminal procedure code to be triable.[17]

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15. 47th Report of Law Commission of India.

16 Criminal Procedure Code, 1973.

17 Section 26 of Cr.P.C.

An offence under any other law shall be tried by the court, empowered by such other law to try it.

In India the sentencing process is totally a judicial determination and the courts have to pass definite sentences. In the matter of sentencing of offenders, law confers wide discretionary powers on the judges.[18] The substantive law normally indicates the maximum punishment to be awarded for an offence and then leaves it to the discretion of the court to pass an appropriate sentence within the maximum limit. For instance, in case of murder punishment is provided under Section 302 of Indian Penal Code, which reads as follows:

"Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to live".

In this 'form of the sentence', the court can exercise its discretion only within the four corners of the relevant section and can award sentence only in the 'definite form'. High Courts can pass any sentence authorised by law.[19] Sessions Judge or Additional Sessions Judge

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18. The maximum punishments provided in the substantive law enables the Judges to award punishments with their discretion.

19. Section 28(1) of Cr.P.C.

can pass any sentence authorised by law, but death sentence shall be subject to the confirmation by the High Court[20] Assistant Sessions Judge can pass any sentence except (i) death (ii) imprisonment for life (iii) imprisonment for more than 10 years.[21] Chief Judicial Magistrate/Chief Metropolitan Magistrate Can pass any sentence authorised by law, except a sentence of death or imprisonment for life or imprisonment for more than seven years.[22] Metropolitan Magistrate or First Class Magistrate can award imprisonment for not more than three years or fine not exceeding Rs.5000/- or both,[23] The Second Class Magistrate can award imprisonment for not more than 1 year or fine not exceeding Rs.1000 or both.[24]

The code of criminal procedure also conferred the right of appeal.[25] upon the party which is aggrieved by the judgement of the criminal court. Criminal appeals to the Supreme Court under the criminal procedure code were regulated by the constitution.[26] Article 134 of the Indian Constitution provides:

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20. Section 28(2) of Cr.P.C.
21. Section 28(3) of Cr.P.C.
22. Section 29(1) of Cr.P.C.
23. Section 29 (2) of Cr.P.C.
24. Section 29 (3) of Cr.P.C.
25. Chapter XXIX of Cr.P.C. (S.S.- 372-394).
26. See Seervai, H.M., Constitution Vol.II (1968) 1015.

An appeal shall lie to the Supreme Court from any Judgement, final order or sentence in criminal proceedings of a High Court in India, if the High Court: (a) has an appeal reversed an order of acquittal of an accused person and sentences him to death, or any court subordinate to its authority has in such trial convicted the accused person and sentenced him to death: or (b) certifies that the case is a fit one for appeal.

The higher appellate or revisional court, under the criminal procedure code, was the High Court. The law has undergone a significant change in the present criminal procedure code, 1973, which provides for appeals to the Supreme Court in the following circumstances: (i) Any person convicted on a trial held by a high court in its extra ordinary original criminal jurisdiction may appeal to the Supreme Court.[27] (ii) Where the High Court has an appeal reversed an order of acquittal of an accused and convicted him and sentenced him to death or to life imprisonment for life or to imprisonment for 10 years or more, he may appeal to the Supreme Court.[28]

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27. Section 374 (1) of Cr.P.C.

28. Section 379 of Cr.P.C.

Thus, if a case is tried by the Sessions Judge who has convicted and sentenced the accused to death, an appeal shall lie to the Supreme Court under Art.134(1) of the constitution, after the High Court has rejected the appeal to it under the provisions of the criminal procedure code. The Supreme Court observed in *Ram Kumar Pande v. The State of Madhya Pradesh*, that no certificate of the High Court is required for an appeal, where an acquittal has been converted into a conviction under S.302/34 Indian penal code and the sentence of life imprisonment has been imposed on the accused. In such cases appeal lies as a matter of right to the Supreme Court under the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970.

Punishments for sentencing of offences are contained in more than 200 Indian Statutes. However, the bull of the offences and punishments are to be found in the Indian penal code: Section 53 of the code provides the following kind of punishments:

(a) Death (b) Imprisonment for life

(c) Imprisonment 1. Rigorous ; 2. Simple.

(d) For feiture of property

(e) Fine

Death Sentence

The question, whether the state has a right to take away a man's life, has always been agitated and its validity has offen been questioned. However, in *Bachan Singh* V. *State of Punjab*,[29] the Supreme Court by a majority Judgement upheld the validity of death sentence as punishment for murder. The majority ruled out that provision of death - sentence as an alternative punishment under S.302 of the Indian Penal Code could not be held to be unreasonable and against public interest. It did not violate either the letter or sprit of Article 19 of the constitution. The court observed:

> "..... It could not be said, that the constitution framers, considered death for murder or the prescribed traditional mode of its execution as a degrading punishment which will defile 'the dignity of the individual', within the contemplation of the preamble to the constitution .... It can not be said that the death penalty for the offence of murder violated, the basic structure of the constitution.... It did not contravene Article 21 which guarantees life and personal liberty...."[30]

An analysis of the provisions of the Indian Penal Code shows that law vests in the Judge a wide discretion in the matter of awarding a

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29. AIR 1980 SC 898.

30. Mr.Justice P.N.Bhagawati in his dissenting opinion said, that he was unable to agree with the conclusions of the majority. He further observed, that S.302 I.P.C. in so far as it provided for imposition of death penalty an alternative to life sentence, was violative of Arts.14 and 21 of the constitution of India and therefore, ultravires and void.

sentence and as such the award of death penalty is left to the discretion of the court.[31] However, under S.303 of the Indian Penal Code, there was no choice with the Court except to award a death sentence. But the Supreme Court of India in *Mithra v.. State of Punjab*, Struck down S.303. I.P.C. on the ground that it violates Art.14 and 21 of the constitution. The court observed that the mandatory sentence of death prescribed by S.303 with no discretion left to the court to have regard to the circumstances which led to the commission of a crime is relic of ancient history and is void, the court held that:

> "S.303 violated Art.14 which guaranteed equality before law as also Art.21 of the constitution which provides that no one shall be deprived of his life or liberty except in accordance with the procedure established by law".[32]

Though the Supreme Court has upheld the death sentence as constitutional, it is to be awarded in 'rarest of the rare cases".[33] It is to be imposed only when the life imprisonment appeared to be an altogether inadequate punishment having regard to the circumstances of the crime and option to award life imprisonment could not be conscientiously exercised.[34] As regards the mode of executing the

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31. Tandon M.P. and Tandon R., the Indian Pencal Code (1980). See also. Pillai P.S.A. Criminal Law (1979) 21-28.
32. Constitution of India under Article 14 and 21.
33. *Bechen Singh* V. *State of Punjab*. AIR 1980 SC 898.
34. Section 354(8) of Cr.P.C.

sentence of death, law provides that when any person is sentenced to death, the sentencing court shall direct that he be hanged by neck till he is dead.[35]

The constitutional validity of the mode of "execution of death sentence by hanging by rope" was challenged on the ground that it is a cruel and barbarous method of executing a death sentence, which is violative of Art.21 of the constitution.[36] The court rejected the contention and held that executing death sentence by rope does not violate Art.21 of the constitution. The court held that neither electricution, nor even the lathel injection has any distinct or demarcating advantage over the system of hanging.[37]

The sentence of death can be executed only when it has been confirmed by the High Court. In order to confirm. the death sentence the High Court has to proceed in accordance with the provisions of law,[38] and has to ensure that the order passed by the sessions court is correct and for this purpose the High court has to examine the entire

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35. Code of Criminal Procedure, 1973.

36. *Deena* V. *Union of India*, AIR 1983. SC 115.

37. Ibid.

38. Sections 375 and 376 of Cr.P.C.

evidence for itself.[39] The Indian legislature as well as the Judiciary have shown their aversion towards the execution of death sentence and it is exercised only in very exceptional cases.

The framers of the Indian penal code were of the view that capital punishment ought to be used sparingly. The position of capital punishment in the penal code has not changed as such in more than hundred years of its existence but the trend in the direction of the abolition of capital punishment in many countries has affected legislative as well as Judicial thinking on the subject. The legislative thinking is reflected in some subtle changes in the criminal procedure code during the last two decades or so. Before the amendment of the criminal procedure code of 1898 in 1955 it was obligatory for a court to give reasons for not awarding death sentence in a case of murder. The amendment of 1955 did away with the requirement of assigning reasons for not giving death sentence in an appropriate case. Under the 1973 code, the court has to record reasons for awarding death sentence. It is evident that the provisions regarding death sentence have gradually been liberalised in favour of guilty persons.

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39. *Subhash and another v. State of U.P.*, AIR 1976 SC 1924.

The liberal judicial attitude has also been responsible to a great extent for the gradual reduction of capital sentence in the recent past as will be evident from the following:

It may be worthwhile to take note of certain general principles which have emerged in relation to capital punishment in India. They may be summed up as follows:

1. Brutality involved in a murder as an aggravating factor may indicate capital punishment.

2. A murder after due premeditation and planning may call for death sentence.

3. Provocation given by the accused to the offender even if nor sufficiently 'grave and sudden' to reduce the offence to culpable homicide not amounting to murder under Exception 1 to section 300 of the I.P.C. may still be treated as a mitigating circumstance to warrant life imprisonment in preference to death sentence.

4. Murder committed on the spur of a moment where no enmity between the convict and the deceased is involved may not be punished with death. Such cases are not necessarily covered otherwise by exception 4 to section 300, I.P.C. which reduces the offence of murder to culpable homicide not amounting to murder

punishable with life imprisonment upto ten years Irresistible impulse has also been accepted as a mitigating factor.[40]

5. Age or sex itself is not generally enough to reduce the sentence of death to life imprisonment though there are some cases where youth of the offender has been accepted as a mitigating factor.[41] The Indian Penal Code Amendment Bill, 1972 contains the following provision:

The sentence of death shall not be passed on a person convicted of a capital offence if at the time of committing the offence he was under eighteen years of age and death is not the only punishment provided by the law for the offence.[42]

6. If an appeal is made against the conviction for murder to the High Court and the Juges agree on the question of guilt but differ on sentence, it is usualy not to impose death penalty unless there are compelling reason for the extreme punishments.[43]

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40. *Gulab Souba v. State of Maharashtra*, (1971) 3 SCC 931.

41. See *Prem Narain v. State*, AIR 1957 All 177. See also the general observations by the Supreme Court on capital punishment in *Ediga Anamma v. State of A.P.*, (1974) 4 SCC 443. 1974 SCC (Cri) 479. Where it was said that where the murderer is too young or too old, the clemency of penal justice helps him.

42. Clause 20 of the bill.

43. *Pandurang v. State of Hyderabad*, 1955 Cri LJ 572.

7. Another factor which has sometimes been accepted as one of the mitigating circumstances is the delay involved in the final disposal of the case by the appellate courts. The reason advanced is that the mental torture caused to the convict due to the death sentence hovering over him for a long time may be considered as a mitigating factor. A possible criticism is that delay in the disposal of the appeal depends upon a number of fortutious circumstances linked with the legal process, and as such, have no relevance to the question of death sentence. The Supreme Court has said that the value of such delay as a mitigating factor depends upon the features of a particular case. The court observed that the issue cannot be divorced from the diabolical circumstances of the crime itself.[44]

Some of the above mentioned principles can be illustrated by the decisions of the High Courts and Supreme Court.

In *Suna v. State*, a young man of twenty years was found guilty of an offence under Section 380 of I.P.C. for commiting theft of bycycle and a few clothes. The accused was released on admonition under section 3 of the probation of offenders Act, 1958 by assigning justification that he had no previous convictious and the theft was

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44. *Lajar Masih v. State of U.P* 1976 SCC (Cri.) 195.

committed on a sudden temptation without any prior planning or design.[45]

In *Ghanshyam* has v. *Municipal Corporation of Delhi*,[46] the benefit of probation was given on the ground that the conviction was based on an offence committed many years before the disposal of the appeal by the Supreme Court. The alleged offence was committed in 1965 and the final disposal by the Supreme Court was in 1975.

Though the Supreme Court refused to apply the provisions of probation of offenders Act, 1958 in case of a person convicted under the prevention of Food Adulteration Act[47] because of imperatives of social defense and the improbabilities of moral proselytisation, it appeared that the court was not always averse to probation even in such cases.

The English courts have frequently shown extreme liberality in granting probabtion to persons who were 'intermediate recidivists'. But the attitude of the Indian courts in comparison appeared to be extremely cautious.

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45. AIR 1967 (Ori) 4.
46. (1975) 4 SCC 82; 1975 SCC (Cri) 744.
47. *Tejani* v. *Dange*, (1974) 1 SCC 167: 1974 SCC (Cri) 87.

In *Kamroonisa v. State of Maharashtra*[48], for example, the benefit of probation was not given the appellant was arrested in 1971 while moving in a local train in suspicious circumstances but was released on bond of good behaviour for a sum of Rs.100/- subsequently she was convicted for theft of a gold necklace and was sentenced to 18 months rigorous imprisonment and a fine of Rs.500/- and 6 months' imprisonment in default of payment of fine. The appellant stated before the probation officer that she had committed similar thefts on two or three occasions but those thefts were undetected. The Supreme Court held that though at the relevant time she was under 21 years of age, it was not a proper case for probation having regard to the nature of the offence and character of the deceased appellant.

In *Utham Singh* v. *State*[49], the accused was convicted under Section 292 of Indian Penal Code, for being in possession, for the purpose of sale, three packets of playing cards with obsecene photographs and sentenced to six months' rigorous imprisonment and a fine of Rs.500/- The Apex Court declined to interfere with the sentence on the following justification:-

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48. (1975) 3 SCC 272; 1974 SCC (Cri) 880.
49. (1974) 4 SCC p.590.

"The accused is married and is said to be 36 years of age. Having regard to the circumstances of the case and the nature of the offence and the potential danger of the accused's activity in this nefarious trade affecting the moral of the society, particularly of the young, we are not prepared to release him under section 4 of the probation of offenders Act. These offences of corrupting the internal fabric of the mind have got to be treated on the same footing as the cases of food adulteration and we are not prepared to show any leniency.....".[50]

Thus in spite of the existence of laws enabling the courts to avoid incarceration of offenders they have not been extending the benefits of these laws indiscriminately. The discretion vested in them is being exercised, generally speaking, in a fair manner.

The Indian Courts have of late been wearing out a sentencing policy with the philosophy of karuna and leniency in dealing with offenders. In awarding extreme penalty of death the Supreme has evolved the category of 'rarest of rare case' so that the number of such cases could reduced to the maximum.

In *Shiva Ram and another v. State of U.P.*[51] the Supreme Court held that the case squarely fell within the ambit of 'rarest of rare case's taking into account the manner of commission of crime, its motive and

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50. Ibid.

51. 1998 Cr LJ 76.

its magnitude. Death sentence was confirmed as the accused convict planed to take revenge upon the victim by murdering him.

In *State of U.P. v. Abdul and Others*[52] the Supreme Court applied another rule evolved by itself for reducing the number of death penalty. In case of excruciating delay the Supreme Court held in several cases that the death penalty should be commuted to Life imprisonment. In Abdul's case court held that in view of passage of time of 7 years the death sentence awarded was liable to be commuted as life imprisonment.

The Court was however not swept away by the wave of leniency. In other cases demanding harsh response, it refused to be lenient. For example, in *Rakesh Singha* v. *State of H.P.*[53] the plea of the appellants to the effect that he has settled in life after serving the punishment imposed by the trial court was rejected by the Supreme Court. In spite of the lapse of 8 years after the occurrence, the Supreme Court did not reduce the sentence. Nor was it ready to enhance the sentence on the state's appeal for further enhancement.

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52. 1997 Cr LJ 2997.

53. (1996) 9 SCC 89: 1996 SCC (Cri) 930 1996 Cri LJ 2311.

In *State of M.P.* v. *Phivendra Kumar* the Supreme Court commuted the death sentence as the accused was enjoying acquittal ever since High Court's Judgement (about 14 years back) as it can not be imposed.[54] It is opined by the Apex Court that the trial court Judgment was challenged before the High Court and the High Court to lot of time from the date of conviction and the death sentence was past for an offence alleged to have been committed by the accused prayer to 14 years. It is also opined that for the past 14 years from the date of conviction and sentence of death the accused was leading a life that he will be hanged. But when the matter when for appeal it took 14 years which appears to be an alarming delay which should not be ordinarily encouraged in a case in which death punishment is involved. Hence the Supreme Court took a view to commute the sentence from death to life imprisonment.

In *Surja Ram v. State of Rajasthan*[55] the Supreme Court held that in a case of death sentence, whether a case is rarest of the rare case - court has to balance aggravating and mitigating factors and exercise its discretionary judgement. It also observed that it has not

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54. (1997) 1 SC. 93; 1997 SC. Cri 54.

55. (1996) 6 SC. 271: 1996 SC. (Cri) 1314.

only to keep in view rights of the criminal but also rights of the victim and the society at large.

In *Ravji v. State of Rajasthan*[56] the Supreme Court justified the death sentence. It observed that after murdering five persons including wife and three minor sons, the appellant attempted to murder his own mother and wife of a neighbour. The offence committed in a conscious state of mind and in a cool and calculated manner without any provocation was to be dealt with, according to the court with extreme penalty of death.

In *Krishan v. State of Haryana*[57] the Supreme Court held that felonious propensity of an offender can be taken into consideration but cannot be made the sole basis for awarding extreme penalty of death. In the circumstances of the case death sentence imposed upon the appellant was commuted to imprisonment for life.

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56. (1996) 2 SC. 175: 1996: 1996 SC. (Cri) 225. AIR 1996 SC 787; See also *G.Vijayavarthna Rao* v. *State of A.P.* (1996) 6 SC. 241: 1996 SC. (Cri) 1290: AIR 1996 JC 2791: 1996 Cr LJ 151; and *Kanta Tiwari* v. *State of M.P.* (1996) 6 SC. 250: 1996 SC. (Cri) 1298: AIR 1966 SC 2800: 1996 Cr LJ 4158.

57. 1997 SC. Cri 648: AIR 1997 SC 2598: 1997 Cri LJ 3180. Also see, *Devendran* v. *State of Tamil Nadu*, 1997, 11 SC. 720; see also *Mukund* v. *State of M.P.* (1997) 10 SC. 130: 1997 SC. (Cri) 799: AIR 1997 SC 2622: 1997 Cri LJ 3182.

The Supreme Court in majority of cases has considered the mode and manner in which the offence has been committed as deciding factors in commuting the death sentence. The court has modified the sentence in the cases, where there was no premeditation on the part of the accused. But the court has refused to interfere with the sentence in cases where the act of the accused was deliberate, preplanned, cruel and inhuman, brutal, cold blooded, against the public servant, against an innocent and unarmed person, and against a witness.

An analysis of the above and other decisions of the Supreme Court makes it clear that the court has shown its general tendency towards the "life imprisonment" over that of the death sentence, except in some cases, where the act of accused was very gruesome.

Imprisonment

Now, imprisonment is the main and most important 'form' of the punishment. In primitive societies, either the imprisonment was unknown or if known it was very rare. Imprisonment as a method of punishment is comparatively a modern development, getting off to a slow start in the 16th century. It became the major punishment in the 19th, 20th centuries. In 20th century certain substitutes for

imprisonment have been developed. Imprisonment is ordinarily confinement of a person in a penitentiary or goal by way of punishment. But such confinement must necessarily be in a place.[58] Any place, where in a person under lawful arrest for a supposed crime is restrained of his liberty, whether in the common goal, or in the house of a constable or private person, or the prison with ordinary walls is formally prison within the statute, for imprisonment is nothing else but a restraint of liberty.[59]

Thus a man can be imprisoned in his own house, if he is not permitted to go outside or if his liberty is curtailed. In India, besides the Indian Penal Code, imprisonment figures almost in all other penal statutes. The Indian Penal Code provides for the following kinds of imprisonment:

1. Imprisonment for life;
2. Imprisonment for a period of 14 years;
3. Imprisonment which may extend to 10 years with or without fine;
4. Imprisonment of 7 years with or without fine;
5. Imprisonment of 5 years with or without fine.

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58. Crour H.S. Penal Law of India vol.1 (1972) 380.

59. Ibid.

6. Imprisonment upto 3 years or fine or both;

7. Imprisonment which may extend to 2 years with or without fine.

8. Imprisonment which may extend to 1 year or fine or both; and

9. Imprisonment which may extend to 6 month or 3 months or 1 month to or fine or both.

Among the various kinds of imprisonment for life needs more discussion. "Imprisonment for life"[60] ordinarily connotes imprisonment for the whole of the life that is for the remaining period of the convicted person's natural life. Unless the appropriate government passes an order remitting the balance of sentence, the life convict is not entitled to automatic release on completion of fourteen years' imprisonment.

Dr.Gour,[61] while commenting on S.57 of the Indian Penal Code observed that not only for the purpose of calculating fraction of terms of imprisonment, but also for the purpose, of sentence itself, 'imprisonment for life', has now come down to mean imprisonment for 20 years. But, Dr.Gour has cited no authority for his comments. On the contrary Mayne,[62] is of the view that S.57 of the Indian Penal Code, strictly is limited to calculation of fractions.

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60. The code of criminal procedure (Amendment Act 1955) substituted the words 'imprisonment for life' for the words 'transportation'.
61. Gour, H.S.
62. See Mayne, J.D. : Criminal Law of India (1904) 22.

The sentencing court must regard a sentence of imprisonment for life, as running throughout the remaining period of convict's natural life Dr.Nigram[63] has observed, that Dr.Gour's interpretation of the 'imprisonment for life' along with the misreading of S.55 of I.P.C. and S.35(2) of Cr.P.C.,[64] gave rise to wrong impression that a sentence of 'life imprisonment' meant imprisonment for a maximum period of 20 years.

This confusion created by such an interpretation of the 'life imprisonment', was cleared up, by the judicial committee of the privy council in *Pandit Kishore Lal v. Emperor*[65] when their Lordship observed:

> ".... Life convict was not entitled to be discharged after serving out 14 years' imprisonment, even assuming that sentence was regarded to be one for 20 years imprisonment and subject to remissions for good conduct....".

Their Lordships further added that they were not to be taken as meaning that life sentence must and in all cases be treated as one of not more than 20 years, or that the convict was necessarily entitled to

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63. Nigam R.C. : Law of Crimes in India. Vol.I (1965) 234-36.

64. Act V of 1898.

65. AIR 1954, P.C.64.

remission. In *Gopal Vinayak Godse* V. *State of Maharashtra*,[66] the Supreme Court laid down that a prisoner sentenced to life imprisonment was bound in law to serve the life term in prison, unless the said sentence was commuted or remitted by appropriate authority under the relevant provisions of law. Recently, the Supreme Court in *State of M.P.* v. *Rathan Singh and Others*,[67] observed, that from a review of the authorities and statutory provisions of the Code of Criminal Procedure, the following propositions emerge:

First, that a sentence of imprisonment for life does not automatically expire at the end of 20 years, including the remissions, because the administrative rules framed under the various Jail Manuals or under the Prisons Act, cannot supersede, the statutory provisions of the Indian Penal Code. Thus a sentence for 'imprisonment for life' means a sentence for the entire life of the prisoner, unless the appropriate government chooses to exercise its discretion to remit either the whole or a part of the sentence under S.401 of the Code of Criminal Procedure.

Secondly, the appropriate government, has the undoubted discretion to remit or refuse to remit the sentence, and where it refuses

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66. AIR. 1961 SC 64.

67. AIR 1976 SC 1552.

to remit the sentence, no writ can be issued directing the government to release the prisoner.

Thus from the above discussion and other judgements[68] of the different courts, it is now clear that a 'sentence for life' would continue till the life time of the accused, as it is not possible to fix a particular period of the prisoner's death; so any remission given under the Rules, could not be regarded as a substitute for a sentence of Imprisonment for life. The Rules framed under the Jail Manuals or Prisons Act, do not affect the total period which the prisoner has to suffer, but merely amount to administrative instructions regarding the various remissions to be given to the prisoner from time to time in accordance with the rules. The question of remission of a part of it lies within the exclusive domain of the appropriate government. A prisoner cannot be released automatically on the expiry of 20 years.

In the cases, where the imprisonment for life stands as an alternative with that of the death sentence, there is no option for the courts, except to award the 'life imprisonment', provided they will not go for the death sentence. The Supreme Court in *Shamim Rahmani* v

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68. *Sita Ram Borelal* V. *State of Madhya Pradesh.* AIR 1969 M.P.252 and *State of Madhya Pradesh and State of Punjab* v. *Ajith Singh.* AIR. 1976 SC 1855.

State of U.P.[69] observed that from the view point of common ethics, or morality, one may say that Shamim, committed no sin in shooting dead a man like Gautam, although she was contributing in the act of Gautam's lust for her. But in the eye of law, she committed the offence of murder, punishable under S.302 of the Indian Penal Code. Further the Supreme Court in respect of the sentence of 'imprisonment for life', awarded by the trial court, observed:

> "Even if we wished we could not reduce the sentence of 'life imprisonment' imposed on her, as that is the minimum sentence provided under S.302 of the Indian Penal Code".

Thus in cases, where the accused persons have been convicted for murder, they have to suffer imprisonment for life, even if they are in their twenties,[70] because the punitive strategy of our penal code does not wish to consider these facts as they all fall outside its scope.

Further, the Penal Code has not specified the quantum of the punishment in some offences, such as abutment.[70a] and Criminal attempts[70b]. In such offences, the sentence is to be fixed in

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69. AIR 1975 SC 1883.

70. *Shivaji Sahebrao* v. *State of Maharashtra*. AIR 1973 SC 2622.
71. Gour, H.S: Penal Law of India. Vol.I (1972) 381.

70a. Section 109 of I.P.C.

70b. Section 511 of I.P.C.

accordance with the nature and gravity of the offence, which has been abetted or attempted. Also some sections of the Indian Penal Code provide the punishment in addition to what is provided for the offence itself or in the preceding sections. For instance, S.345, which deals with the wrongful confinement of a person, for whose liberation the writ has been issued. S.293, which deals with the sale, etc., of obscene objects to young persons, provides punishment of imprisonment, which may be of either description and which may extend to three years and with fine which may extend to two thousand rupees. The section further provides, that in the event of second or subsequent conviction, the punishment of imprisonment, which may be of either description for a term which may extend to seven years and also with fine which may extend to five thousand rupees. In other words S.293, in the event of second or subsequent conviction, provides for the enhancement of the punishment.

However, the Code except in two cases has not fixed the minimum sentence. No doubt, it was originally proposed to fix both minimum as well as maximum sentence in several cases, but the propriety of prescribing a minimum sentence in all cases was questioned by the Select Committee. Considering the general terms in

which the offences had been defined, and the presence of mitigating circumstances, which may render adherence to the prescribed minimum, a matter of hardship and even injustice, it was ultimately resolved to fix only the maximum, the apportionment of sentence in each case, being left to the discretion of the judge.[71] Further, the imprisonment is of two kinds, simple and rigorous. In case of the former the convicted person is not put to any kind of work or labour. In the case of rigorous imprisonment, the convicted person was put to hard labour such as grinding corn, digging earth, drawing water and the like. But, now such hard labour has been replaced by the various correctional treatment methods, which enable the prisoner to regain a sort of self-confidence.

The sentence of imprisonment is followed by a number of hardships and difficulties for the prisoner as well as his family. The court, no doubt has wide discretion to fix the sentence in accordance with the particular case, but the legislature provides no guidelines for it. Consequently, it becomes very difficult for the sentencing judges, to personalize the sentence from the reformative angle. The usual trend of the trial courts, is to award the maximum possible sentence.

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71. Gour, H.S. Penal Law of India. Vo.I (1972) 381.

It seems that sentencing judges have difficulty in adjusting the sentence in accordance with the individual needs. The Supreme Court in *Mohammad Giasuddin* v. *State of Andhra Pradesh*,[72] observed that the Indian Penal Code still lingers in some what compartmentalized system of punishment simple or rigorous, fine and of course, capital sentence. There is a wide range of choice and flexible treatment which must be available to the judge, if he is to fulfill his tryst with curing the criminal in a hospital setting. In an appropriate case, actual hospital setting may have to be prescribed as a part of the sentence. In another case, liberal parole may have to be prescribed as a part of the sentence. In the third category, engaging in certain types of occupation or even going through meditational drills or other courses may be part of sentencing prescription.

Besides, the punishments, as we have discussed above, the Indian Penal Code, also provides for the 'forfeiture of property' and 'fine'.

Thus in spite of the existing laws enabling the courts to avoid incarceration of offenders they have not been extending the benefit of

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72. AIR, 1977 SC 1926.

these laws indiscriminately. The discretion vested with them is being exercised, generally speaking, in fair a manner.

Forfeiture

It is very ancient in its origin. It was meant mostly for the rich in British days in our country.[73] But this punishment has long since become obsolete and is no longer favoured by the sociologists. Ss.61 and 62 of the Indian Penal Code, which provide for absolute forfeiture of all the property of the offender, were repealed in 1921.[74] There are, however, three cases in which specific property of the offender is liable to forfeiture such as: (a) where depredation is committed on territories of any power at peace with the Government of India, such property as is used or intended to be used in committing such depredation is liable to forfeiture in addition to sentence of imprisonment and fine (S.126); (b) where the property is received knowing the same to have been taken in the commission of depredation on the territories of any power at peace with government of India or in waging war against any Asiastic power at peace with the government of India, the property so received is liable to forfeiture (Ss.125 and 127); and (c) a public servant unlawfully buying or bidding for property forfeits the property so purchased (S.169).

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73. Nigam, R.C.: Law of Crimes in India. Vol.I (1965) 243-43.
74. Criminal Law Amendment Act (XVI of 1921).

S.452 of the Criminal Procedure Code, 1973 empowers the courts to make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

Obscene books, cards and dice seized in gambling, weapons used in assault, tools used in burglary, smuggled goods like gold, wire, opium, all are instances of articles which can be confiscated under this section. Dr.Nigam[75] has observed that this section is loosely worded and therefore requires careful construction. The penalty of forfeiture of property has also been accompanied with punishment of fine.

Fine

The penalty of fine has been specified in a number of offences under the Indian Penal Code. It also stands as an alternative to the sentence of imprisonment, in majority of the cases. The authors of the Code state that the punishment of fine is for all offences to which men

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75. Nigam, R.C.: Supra Note 130.

are prompted by cupidity; it is a punishment which operates directly on the very feeling which impels men to such offences. As regards the imposition of fine as sentence, the Penal Code may be divided into the following four parts:

(a) Offences in which the fine is the sole punishment and its amount is limited;

(b) Offences in which the fine is an alternative punishment but its amount is limited;

(c) Offences in which it is an additional imperative punishment, but its amount is limited; and

(d) Offences in which it is both imperative punishment and its amount is unlimited.

This classification would clearly show, how the Indian Penal Code has carried out its express intention in imposing the quantum of fine.

The sentence of fine is allied to forfeiture of the property. It is, indeed, forfeiture of money by way of penalty. It was justified by the Law Commission on the ground of its universality, though they admitted that its severity should be proportionate to the means of the offender, because the fine not only affected him but also his dependents. The

Supreme Court in *Adamji Umar Dalal* v. *State*,[76] laid down that in imposing fine it was necessary to have as much regard to the pecuniary circumstances of the accused as to the character and magnitude of the offence. Thus where a substantial term of imprisonment has been inflicted, excessive fine should not be inflicted to it, save in exceptional cases. The Supreme Court in the above case reduced the fine to fifteenth part of what was awarded by the trial court and laid down that the court must always bear in mind the proportion between an offence and the penalty. Further the Court,[77] observed that where a law permits a sentence of fine as an alternative, there is no need for a sentence of imprisonment at all, if it is thought that the offence does not merit it. It is quite unnecessary to impose fines on persons who have been sentenced to death or for substantial terms of imprisonment.

The courts are also empowered under S.64 of the Indian Penal Code to award the sentence of imprisonment in default of payment of the fine. However, the following four rules regulate the character and duration of period of sentence of imprisonment in default of payment of fine. First, when an offender is sentenced to the punishment of fine,

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76. AIR 1952 SC 14. In this case appellant was sentenced to six months imprisonment with fine of Rs.15,000 for black marketing. The Supreme Court on appeal reduced the fine to Rs.1,000 only.

77. *In re* Shankarappa AIR. 1958 A.P. 380.

the court may direct that the offender shall in default of payment suffer a term of imprisonment, which may be in excess of any other imprisonment to which he may have been sentenced for that offence or to which he may be liable under a commutation of sentence.[77a] Secondly, when the offence is punishable with imprisonment as well as fine, the imprisonment in default of payment of fine shall not exceed one-fourth of the term of imprisonment which is maximum fixed for offence.[77b] Such extra imprisonment in default of payment of fine may be of any description, that is simple or rigorous.[77c] Thirdly, where the offence is punished with fine only, the imprisonment in default of payment of fine shall be simple and in accordance with the following scale laid down by Section 67:

(a) Fine of Rs.50 or less.... Imprisonment of 2 months or less

(b) Fine of Rs.100 or less.... Imprisonment of 4 months or less

(c) Fine above Rs.100 .... Imprisonment of six months or less.

However, the Supreme Court in *Bashiruddin Ashraf* v. *State of Bihar*[78] laid down that the term of imprisonment shall not in any case

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77a. Section 64 of I.P.C

77b. Section 65 of I.P.C.

77c. Section 66 of I.P.C.

78. AIR. 1957 SC. See also Nigam, R.C.: Supra note 130 at 247.

be in excess of the Magistrate's power under the Criminal Procedure Code.[79] Lastly, the imprisonment in default of payment shall terminate whenever, the fine is either paid or levied by the process of law.[79a] A proportional payment or levying of fine causes a proportional reduction of the term of imprisonment.[79b]

It is clear from the foregoing discussion, that the Code empowers the sentencing judge to award either a term of imprisonment or a fine or both. Where long term imprisonment is given to convicts, it is not desirable that in addition to imprisonment a sentence of fine should be passed upon them, for sentence of fine will be burden upon their family and in case of non-payment of fine it will further stretch the length of imprisonment. The decision of the United States Supreme Court, in *Willie E. Williams* v. *State of Illinois*,[80] is an eye-opener in this respect. In this case an indigent prisoner was convicted in Illinois Court for petty theft and was awarded the maximum sentence of one year's imprisonment and pound 500 as fine. In default of the monetary payment in accordance with the provisions of the Statute, he was supposed to remain in the jail, after the expiration of the substantive

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79. Criminal Procedure Code 1898 S.29.
79a. Section 68 of I.P.C.
79b. Section 69 of I.P.C.
80. AIR. 1971 U.S.S.C. 63.

term of imprisonment, in order to "work-off" the monetary obligation at the statutory rate of pound 5 per day. The trial court denied the petition in order to vacate the sentence of fine. The supreme Court of Illinois, affirmed the decision of the trial court, holding that there was no denial of equal protection of the law by continuation of imprisonment upon the indigent's inability to pay the fine and court costs.

In appeal, the Supreme Court of the United States, vacated the judgement and remanded the case. Chief Justice Burger, expressing the view of seven members of the court, held that there was an impermissible discrimination, violative of the 14th Amendment of the Constitution, when the aggregate imprisonment of an indigent state prisoner, exceeded the maximum period fixed by the statute, governing the offence involved and resulted directly from an involuntary non-payment of a fine or court costs. In the light of this very judgement, it can be rightly said, that if a poor prisoner is imprisoned for non-payment of fine in addition to the substantive imprisonment, it will be the violation of the spirit, underlying the Art.14 of the Indian Constitution. Further, it will undermine the modern correctional philosophy which aims at the re-socialization of the prisoners.

The fine if recovered from the prisoner is to be deposited in the chest of the State. But, our Supreme Court in recent years has shown a new trend and has given due consideration to victimology. In *Mohinder Pal Jolly* v. *State of Punjab*,[81] the court directed that the fine if recovered would be paid to the widow of the deceased. Similarly in other cases,[82] the Supreme Court ordered the amount of fine to be paid to the dependents of the deceased. The objective underlying these judgements is nothing but to provide some monetary help to the victims or their dependents, in order to pave the way for the re-socialization of the offenders.

From the foregoing discussion, it is clear that the sentencing judge in India is not in a position to award indefinite or indeterminate sentences. Generally the sentence under the Indian Penal Code is one of a relative indeterminateness with a high fixed maximum and with absolutely no statutory guidelines for the magistrate, except such as he may glean through judicial decisions, which themselves may be too variable to serve as precise leading strings. As the maximum punishment is with the discretionary power of the presiding officers the punishment are also differs each officer to officer and also each case to

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81. AIR 1979 SC 577.
82. *Guruswamy* v. *State of Tamil Nadu* AIR. 1979 SC 1177 and *Bhupendra Singh* v. *State of Madras* AIR 1981 SC. 1240.

other case. The Indian Penal Code over hundred years old, is hardly conscious of the remarkable strides made in modern penology and does not articulate the current thought on sentencing policy. Justice Krishna Iyer, observed:[83]

> "Sentencing is a means to an end, a psycho-physical panacea to cure the culprit of socially dangerous behaviour. Penal strategy, must therefore strike a sober balance between sentimental softness towards the criminal, masquerading as a progressive sociology and the terror-cum-torment oriented sadistic handling of the criminal, which is actually in many cases the sublimated expression of judicial severity although ostensibly imposed as deterrent to save society from further crimes. Social defence, through reformation of the criminal, a task to perform of which psychology and sociology are auxiliary tools, is what strikes one as the primary object of punishment."[84]

Thus the sentencing judge must give due importance to the objectives underlying the sentencing policy. In other words, the sentencing court must not simply confine to the letter of law, in order to award a proper sentence but must also pay due attention to the spirits of law.

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83. Iyer, V.R.K.: Perspective in Criminology, Law and Social Change (1980) 85-86.

84. Ibid.

DISPARITY IN SENTENCING

As discussed above, sentencing is the most critical point in the administration of criminal justice. It is critical because nowhere in the entire legal field the interests of the society and those of the individual offender are at stake than in the system of sentencing.[85] It has been rightly pointed out[86] that the system lacks efficacy, if it fails in its essential function of protecting society by deterring offenders. It lacks credibility, if it does not reflect 'the mood and temper of society' towards misconduct of the offender and thereby ratify and reinforce the values of the society.

The principles of justice get eroded where the offender receives a particular sentence not on consideration of the offender's personality and guilt but on consideration of the judge's personality and ideology. Another significant case of disparity in sentences is lack of unanimity among sentencing judges as to the purpose of the sentences. The disparity not only offends principle of justice, but also effects the rehabilitative process of offender and may create problems like indiscipline and riots inside the prison.[87] The disparity in sentences

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85. See Siddiqui, M.Z., "The Problem of Disparity in Sentencing", *Indian Journal of Criminology*, Vol.9, No.2 (July 1981) 72.

86. *Ibid.*

87. Tappan, P.W., *Crime, Justice and Correction* (1960) 446; See also Dawson, R.D., *The Sentencing: The Decision as the Type; Length and Conditions of Sentence*, (1969) 216.

limits the correctional efforts to develop sound attitudes in offenders. The two prisoners who are involved in a similar offence and under the identical circumstances will hardly respond to the correctional treatment methods, if they are awarded different sentences.[88] Such prisoners feel that they have been unfairly treated in sentencing process and usually reject all efforts to rehabilitate them. They are in fact unlikely to respect many of the society's institutions concerned with the administration of criminal justice. In *Asgar Hussain* v. *The State of U.P.*[89], the Supreme Court observed that the disparity in sentencing creates hostile attitude in the mind of the offenders and reduces the chances of their resocialization as the offenders feel that they have been discriminated.

However, the problem of disparity or inequality in sentences is not a new phenomenon. Studies have been conducted in the United States, England, Canada on disparity in sentencing of offenders.[90] In India, Dr.Chhabra's study[91] provided insight in to the problem of disparity. He observed that only two factors, namely, 'plea of guilt' and

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88. *Ibid.*

89. AIR 1974 SC.

90. See Siddiqui, M: Z., *Supra* note 54.

91. See generally Chhabra, K.S., *Quantum of Punishment in Criminal Law in India.* (1970) 175-86.

'nature of crime' have bearing on the mind of sentencing judges. He further pointed out that in the use of various disposition methods, the courts widely differed. It has been found that illogical variations in sentences given by various judges are explicable only by the personal differences of the judges.[92] Further, Dr.Siddiqui's study[93] discloses wide variations in 'sentencing patterns of criminal courts' in different parts of the country, not only in regard to the length of prison sentences, but also in the use of different dispositions. The study also revealed that the influence of human equation in sentencing is as great as in any other human field of judgement.

Justice demands like cases be treated alike.[94] Centuries ago Aristotle declared, that 'injustice arises when equals are treated unequally and also when unequals are treated equally'.[95] Sentencing is an emergent branch of justice. Disparity in sentences defeats the objective of modern correctional philosophy. The developed countries have taken various measures in order to avoid it. In India, the elaborate system of appeal and revision as well as hearing on the

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92. *Ibid.*

93. See generally Siddiqui, Z.Z., *Supra* note 17.

94. Hart, H.L.A., *Punishment and Responsibility*, (1968) 24.

95. *Ibid.* at 128.

sentence to some extent are helpful in curbing the disparity in sentences.

HEARING ON THE SENTENCE

The sentencing disparity creates a host of problems in the administration of justice.[95a] In order to minimize the chances of 'disparity in sentencing' and to adjust the sentence in accordance with the individual needs of the offenders, various steps have been taken.

The Law Commission, in its 41st Report,[96] recommended the insertion of S.235(2) in the Criminal Procedure Code, which enables the accused to make representation against the sentence to be imposed, after conviction has been passed. The commission justified the insertion of S.235(2) as under[97]:

> "It is now being increasingly recognised, that a rational and consistent sentencing policy requires the removal of several deficiencies in the present system. One of the such deficiencies is the lack of information as to the characteristics and background to the offender.... We are of the opinion, that taking of evidence as to the circumstances relevant to sentencing should be encouraged and both the prosecution and the accused should be allowed to co-operate in this process...."

95a. See Siddiqui, M.Z., *Supra* note 17.

96. See *Santa Singh* v. *The State of Punjab*, AIR. 1976 SC 2386.

97. *Ibid.*

The concept underlying this new provision is that the accused may have some grounds to urge for giving him consideration, in regard to the sentence, such as that he is the bread-earner of the family and the court may not be aware of it during the trial. This is also to ensure that the accused should get a fair trial in accordance with the accepted principles of natural justice. It has been rightly pointed out that the provisions of S.235(2) Cr.P.C., 1973 are salutary in their nature and contain one of the cardinal features of natural justice, namely that the accused be given an opportunity to make a representation against the sentence to be imposed upon him.[98] It has been further observed that the Statute has sought to achieve a socio-economic purpose and is aimed at attaining the ideal principles of proper sentencing in a rational and progressive society.[99] The Supreme Court in *Tarlok Singh* v. *State of Punjab*, observed:

> "...The object of S.235(2) is to give a fresh opportunity to the convicted person to bring to the notice of the court, such circumstances as may help the court in awarding an appropriate sentence having regard to the personal, social and other circumstances of the case...."[100]

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98. *Ibid.*

99. *Ibid.*

100. AIR 1977 SC 1747.

The humanist principle of individualizing punishment, to suit the person and the circumstances is best served by hearing the offender, even on the nature and quantum of the punishment. In this respect Chief Justice Chandrachud's observation in *Shiv Mohan Singh* v. *The State (Delhi Administration)* are relevant:

> .... The heinousness of the crime was a relevant factor in the choice of the sentence. The circumstances of the crime, especially social pressures which induces the crime is another consideration.... These and the other like factors, can be brought to the knowledge of the court, only when an opportunity of being heard is given to the convicted person..."[101]

The Supreme Court of Indian in *Dagdu and Other* v. *State of Maharashtra*, has very aptly emphasized the importance of "hearing on the sentence" in the following words:

> ".... The right to be heard on the question of sentence has a beneficial purpose for a variety of facts and considerations bearing on the sentence, can in the exercise of the right be placed before the court, which the accused prior to the enactment of the Code 1973, had no opportunity to do. The social compulsions, the pressure of poverty, the retributive instinct to seek an extra-legal remedy to a sense of being wronged, the lack of means to be educated in the difficult art of an honest living, the parentage, the heredity all these and similar considerations can hopefully and legitimately, tilt the scales on the propriety of sentence. The mandate of S.235(2) must therefore be obeyed in its letter and spirit..."[102]

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101. AIR 1977 Sc 949.

102. AIR 1977 SC 1579.

There are large number of factors which go together and ultimately produce an appropriate sentence. Adequate material relating to these factors is to be brought before the court, in order to enable it to pass an appropriate sentence. This material may be placed before the court by means of affidavits, but if either of the party disputes the correctness or veracity of the material, to be produced by the other, an opportunity is to be given to the party concerned, to lead evidence for the purpose of bringing such material on record after testing its veracity.

If the trial court for any reason, omits to hear the offender on the 'question of sentence' and the offender makes a grievance of it, in the higher court, it would be open to that court to remedy the breach by giving a hearing on the question of sentence. The opportunity has to be real and effective, which means the accused must be permitted to adduce before the court all the data which he desires to adduce on the question of sentence.[103] For this purpose, it is not necessary to send the case back to the Sessions Judge or Sentencing Court, because in many cases it may lead to more expenses, delay and prejudice to the cause of justice. The Supreme Court in *Tarlok Singh* v. *State of Punjab*,[104] observed, that in such cases it may be more appropriate for

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103. *Ibid.*

104. *Supra* note 72.

the appellante court to give an opportunity to the parties in terms of S.235(2) to produce the material they wish to adduce instead of going through the exercise of sending the case back to the trial court. This may in many cases help reduce delay. The claim of due and proper hearing is to be harmonized with the requirement of expeditious disposal of proceedings.

Post-conviction orders

In every criminal trial, when the court finds the accused guilty, it has to punish the accused in accordance with law.[105] However, having regard to the age, character, antecedents or physical or mental condition of the offender, and to the circumstances in which the offence was committed, the court *may* istead of sentencing the accused person to any punishment, release him after admonition or on probation of good conduct under Section 360 of the Code or under the provisions of the Probation of Offenders Act, 1958.

In recent times, there has been an increasing emphasis on the reformation and rehabilitation of the offender as a useful and self-reliant member of society without subjecting him to the deleterious effects of

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105. See Ss.235(2), 248(2), 255(2).

jail life.[106] On the other hand there are occasions when an offender is so anti-social that his immediate and sometimes prolonged confinement is the best assurance of society's protection. In such cases, the consideration of rehabilitation has to give way, because of paramount need for the protection of society.[107] It is not easy to reconcile these conflicting demands. As has been rightly observed by the Supreme Court, guilt once established, the punitive dilemma begins.[108] While exercising the discretion in respect of post-conviction orders, some statutory guidelines have been given to courts by Sections 360, 361 and the Probation of Offenders Act, 1958.

(a) Section 360

An analysis of Section 360 will bring out the following points:

(1) Release on probation of good conduct

Having regard to the age, character or antecedents of the offender, and the circumstances in which the offence was committed, if the court convicting the accused person considers it expedient to

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106. See Statement of Objects and Reasons appended to the Probation of Offenders Bill, 1957.

107. See the observations of the Law Commission of India in its 47th Report on "The Trial and Punishment of Social and Economic Offences", at p.85, para 10:3.

108. *Ediga Anamma* v. *State of Andhra Pradesh*, (1974) 4 SCC 443, 449: 1974 SCC (Cri) 479, 485: 1974 Cri LJ 683.

release the offender on probation of good conduct (instead of sentencing him at once to any punishment), it *may* direct the offender to be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the court may fix and in the meantime to keep the peace and be of good behaviour. Such a release is permissible only if the following conditions are satisfied:

(a) there is no previous conviction proved against the offender;

(b) when the person convicted is a woman of any age, or any male person under twenty-one years of age, the offence of which he or she is convicted is not punishable with death or imprisonment for life;

(c) when the person convicted is not under twenty-one years of age, the offence of which he is convicted is punishable with fine only or with imprisonment for a term of seven years or less.

No Magistrate of the second class, unless he is specially empowered, can release an offender on probation as mentioned above; however, if such a Magistrate considers that the offender should be so released, he may transfer the case to a Magistrate of the first class who may thereupon take such action as is appropriate as to sentencing the offender or releasing him on probation.

(2) Release after admonition : Having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, the court may, after convicting the accused person, release him after due admonition. Such a release is permissible only if the following conditions are satisfied: (a) there is no previous conviction proved against the accused person;(b) the offence of which the accused is convicted is either (i) theft (ii) theft in a building, or (iii) dishonest misappropriation, or (iv) is punishable under the IPC with not more than two years' imprisonment, or (v) is one punishable with fine only.

Section 360 is intended to be used to prevent young persons from being committed to jail, where they may associate with hardened criminals, who may lead them further long the path of crime, and to help even men of more mature years who for the first time may have committed crimes through ignorance, or inadvertence or the bad influence of others and who, but for such lapses, might be expected to be good citizens. It is not intended that this section should be applied to experienced men of the world who deliberately flout the law and commit offences.[109]

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109. *in re Titus*, AIR 1941 Mad 720, 723-24: 43 Cri LJ 3; *Ibrahim v State*, 1974 Cri LJ 993 (All HC).

Section 360 itself makes it quite clear that it shall not affect the provisions of the Probation of Offenders Act, 1958[110]. According to Section 18 of the Probation of Offenders Act, 1958 read with Section 8(1) of the General Clauses Act, 1897, Section 360 of the Code would cease to apply to the States or parts thereof in which the Probation of Offenders Act is brought into force.[111] However, the offender can be still released after admonition or on probation of good conduct under Sections 3 and 4 of the Probation of Offenders Act which is wider in its scope than the provisions of Section 360. In that case also the court will have to use discretion on the same lines as in cases under Section 360.

(B) No imprisonment in case of young offenders: The discretion given to the court in passing post-conviction orders has been restricted to some extent in favour of young offenders below 21 years of age.[112]

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110. See S.360(10).

111. See *State of Kerala* v. *Cehllappan George* 1983 KLT 811.

112. Section 3 of probation of offenders Act 1958. The Act enables the courts to grant release or release on probation in certain cases instead of sentencing them to imprisonment, section 3 enacts:- "notwithstanding any thing contained on any other law for the time being in force, the court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4, release him after due admonition".

According to Section 6 of the Probation of Offenders Act, if the court finds such young offender guilty of an offence punishable with imprisonment (but not with imprisonment for life), it shall not sentence him to imprisonment without satisfying itself that it would not be desirable to release the offender after admonition or on probation of good conduct; and if the Court, after such satisfaction, passes any sentence of imprisonment, it shall record reasons for doing so.

It may also be noted that wherever the Probation of Offenders Act is applicable, the court can call for the report of the Probation Officer and the officer would then be under a duty - to inquire, in accordance with any directions of a court, into the circumstances or home surroundings of any person accused of an offence with a view to assist the court in determining the most suitable method of dealing with him, and submit reports to the court.[113]

(Contd., 112) : Section 4 lays down:- "notwithstanding anything contained in any other law for the time being in force, the court may instead of sentencing him at once to any punishment, direct that he be released on his entering into bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the mean time to keep peace and be of good behaviour".

Section 12 of the Act series the fundamental cause of reformation in as much as it helps the offender not to be branded as a criminal and instead, to get rehabilitated in the society. But unfortunately this section has been receiving a very restrictive interpretation from the Indian judiciary including the Supreme Court. It is time and again interpreted to mean that this section does out obliterate the fact of conviction.

113. See S.14 of the Probation of Offenders Act, 1958.

The report of the Probation Officer would be of considerable importance in making appropriate sentencing decisions.

Treatment of Juvenile Offenders

The Juvenile Justice Act, 1986 was passed with an object to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent Juveniles and for the adjudication of certain matters relating to and disposition of delinquent Juveniles[114]. To achieve the object, several provisions are provided for in the Act. Provisions are made for the establishment of competent authorities and institutions such as Juvenile Court, and Juvenile Welfare Boards with necessary powers[115] to deal with the problems of Juveniles. Boards are provided with special powers to deal with the neglected Juveniles. Similarly to deal with the delinquent Juveniles. Juvenile Courts are empowered to try are issue appropriate orders. Provisions are also made to punish any person who causes a Juvenile unnecessary mental or physical suffering etc., for a term which may extend to six months of imprisonment or fine or with both (S.4).

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114. See preamble of Juvenile Justice Act, 1986.

115. Section 7 of Juvenile Justice Act, 1986.

Juvenile courts do not sentence the delinquents to jail. Nor are they otherwise punished. They are in fact sent to the Juvenile homes for treatment with a view to getting them reformed.

Execution of Sentences - Sentence of death

When a sentence of death is passed by the Court of Session and on reference is confirmed by the High Court under Section 368, or when a sentence of death is passed by the High Court in appeal or in revision, the Court of Session shall, on receiving the order of the High Court, cause the sentence to be carried into effect by issuing a warrant in the prescribed form[116] to the officer in charge of the jail for the proper execution of the sentence.[117, 118]

When the sentence of death has been duly executed, the officer executing the same shall return the warrant to the Court of Session, with an endorsement under his hand certifying the manner in which the sentence has been executed (S.430).

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116. See Form No.42, Second Schedule. *See* also *A-G of India* v. *Lachmma Devi*, AIR 1986 SC 364, in which the Supreme Court declared public hanging barbaric and violative of Article 21 of the Constitution.

117. Section 413 of Cr.P.C.

118. Section 414 of Cr.P.C.

Sentence of imprisonment for life or of imprisonment

For the execution of the sentence of imprisonment for life or of imprisonment, the court passing such sentence is to send a warrant to the jail in which the person so sentenced is to be confined, along with such person.[119] In cases where the accused is not present in court, the court shall issue a warrant for his arrest for the purpose of forwarding him to jail and in such a case, the sentence of imprisonment shall commence on the date of his arrest. (S.418(2)).

In case of each prisoner a separate warrant for the execution of the sentence of imprisonment showing definite period shall be sent to the officer in charge of the jail and the same shall be logged with him[120]

Pre-conviction detention to be set-off against the sentence of imprisonment -

Where a person has been convicted and sentenced to imprisonment for a term (not being an imprisonment in default of payment of fine), the period of detention, if any, undergone by him

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119. It has been ruled by the Supreme Court that warrants for detention should specify the age of the person to be detained. See *Sanjay Suri* v. *Delhi Administration*, 1988 Supp SCC 160: 1988 SCC (Cri) 348: 1988 Cri LJ 705.

120. Section 419 and 420 of Cr.P.C.

during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set-off against the term imposed on him on such conviction and his liability to undergo imprisonment shall be restricted to the remainder (if any) of the term of imprisonment imposed on him.[121]

The period of detention which Section 428 allows to be best-off against the term of imprisonment imposed on the accused on his conviction must be during the investigation, inquiry or trial in connection with the "same case" in which he has been convicted.[122] But Section 428 is absolute in its terms. It provides for set-off of the pre-conviction detention of an accused person against the term of imprisonment imposed on him on conviction, whatever be the term of imprisonment imposed and whatever be the factors taken into account by the court while imposing the term of imprisonment.[123]

Till some time a person sentenced to imprisonment for life could not get the benefit of set-off under Section 428 as, according to the

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121. See *Bagdaram* v. *State of Rajasthan*, 1989 Cri LJ 414 (Raj HC).

122. *Govt. of A.P.* v. *A.V.Rao* (1977) 3 SCC 298, 303: 1977 SCC (Cri) 508, 513: 1977 Cril LJ 935. Also see *Gulam Mustafa* v *State of Rajasthan*, 1995 Cri LJ 266 (Raj HC).

123. *B.P.Andre* v. *Supdt. Central Jai, Tihar*, (1975) 1 SCC 192, 198: 1975 SCC (Cri) 70, 76: 1975 Cri LJ 182.

courts, "imprisonment for life" could not be taken as, "imprisonment for a term" as required under Section 428.[124] Benefit of set-off was not given even to those life convicts whose sentence to imprisonment for life was later commuted to imprisonment for a fixed term by the order of the State Government under Section 433, since the sentence of imprisonment for a term in such cases was not one imposed by a court on conviction as contemplated by Section 428.[125]

It has later been categorically ruled by the Supreme Court that imprisonment for life is imprisonment for a term for the purpose of application of Section 428 and the life convicts would be entitled to the benefit of set-off under Section 428.[126]

Sentence of Fine

Execution by issuing a warrant for levy of fine:

The court imposing a sentence of fine may -

(a) issue a warrant for the levy of the amount of fine by attachment and sale of any movable property of the offender; and/or

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124. *Rajahusein* v. *State of Maharashtra*, 1976 Cri LJ 1294 (Bom HC); R.A. *Rehman* v *State of Maharastra*, 1978 Cri LJ 214, 218 (Bom HC); *Bhimsen* v *State of Rajasthan*, 1977 Cri LJ 696 (Raj HC); *Kartar Singh* v. *State of Haryana*, (1982) 3 SCC 1: 1982 SCC (Cri) 522: AIR 1982 SC 1439.

125. *R.A.Rahman*, Supra Note 11l; but see contra *Abdul Azad* v *State*, 1976 Cri LJ 315, 317 (Cal HC).

126. *Bhagirath* v. *Delhi Administration*, (1985) 2 SCC 580: 1985 Cri LJ 1179.

(b) issue a warrant to the Collector of the district, authorising him to realise the amount as arrears of revenue from the movable or immovable property or both, of the defaulter.

If the sentence directs that in default of payment of fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue such warrant for the levy of fine unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under Section 357.[127]

A warrant issued by any court under clause (a) above [i.e., under S.421(1)(a) may be executed within the local jurisdiction of such court, and if endorsed by the District Magistrate concerned, it shall authorise the attachment and sale of any such property outside the local jurisdiction of the court issuing the warrant.[128]

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127. Section 421(1) of Cr.P.C.

128. Section 422 of Cr.P.C.

SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES

Suspension or remission of sentences

Apart from the powers conferred on the President of India and the Governors of States by Articles 72 and 161 of the Constitution to suspend, remit or commute any sentence, Section 432 of the Code empowers the appropriate Government[129] to suspend or remit sentence as follows:-

1. When a person has been sentenced to punishment for an offence, the appropriate Government may, at any time and with or without conditions, suspend the execution of a sentence or remit the whole or part of the punishment.

2. On receiving any application for the suspension or remission of a sentence, the appropriate Government may require the court concerned (i) to state its opinion (with reasons) as to whether the application should be granted or refused, and also (ii) to forward with the statement of such opinion a certified copy of the record of the trial.

3. The appropriate Government may cancel the suspension or remission of a sentence, if in its opinion the condition for granting such suspension or remission is not fulfilled; the offender may thereupon, if at large, be arrested by any police officer (without a

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129. As explained by S.432(7), the expression "appropriate Government" means -

warrant) and remanded to undergo the unexpired portion of the sentence.[130]

(a) in cases where the sentence is for an offence against any law relating to a matter to which the executive power of the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced.

4. The condition on which the sentence is suspended or remitted may be one to be fulfilled by the offender or one independent of his will.

While commuting sentence for fine, the courts usually impose conditions non-compliance of which may revive the sentence.[131]

It may be noted that on breach of any condition of suspension or remission, the sentence is not automatically revived. It is only when the government chooses to pass an order of cancellation of the suspension or remission that the convict is arrested and is required to serve the unexpired portion of the sentence.[132]

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130. See discussions in *Krishnan Nair* v. *State of Kerala*, 1984 Cri LJ 58 (Ker HC).
131. See *Sukumaran Nair* v. *Food Inspector*, 1995 Cri LJ 3651 (SC); 1995 Cri LJ 2126 (SC).
132. *Shaikh Abdul Azeez* v. *State of Karnataka*, (1977) 2 SCC 485, 488: 1977 SCC (Cri) 378, 382: 1977 Cri LJ 1121.

There have been a number of decisions by various High Courts reversing executive orders, ordering premature release of prisoners on one ground or the other.[133] The courts have ruled that the appropriate government has power to classify the prisoners for the purpose of granting remission.[134] But this does not mean that the Court can grant special remission to the offenders belonging to Scheduled Castes and Scheduled Tribes.[135] Its power to grant premature release is subject to Section 433-A.[136] No special consideration is, however, to be extended to dignitaries like MLAs, in granting premature release.[137] The courts have been considering various aspects such as the heinousness of the crime[138] or the possibility the offender[139] getting reformed etc., in granting or not granting premature release.

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133. See *Veeramchaneni Raghavendra Rao* v. *Govt. of A.P.*, 1985 Cri LJ 1009 (AP HC); *Sudesthamma* v. *State of A.P.*, 1985 Cri LJ 1890 (AP HC); *Bir Singh* v. *State of H.P.*, 1985 Cri LJ 1458 (Hp HC); *Rakesh Kaushik* v. *Delhi Admn.*, 1986 Cri LJ 566 (Del HC); *Baljit Singh* v. *State of Punjab*, 1986 Cri LJ 1037 (Punj HC); *Jayant Veerappa Shetty* v. *State of Maharashtra*, 1987 Cri LJ 1298 (Bom HC).

134. *Satish Kumar Gupta* v. *State of Bihar*, 1991 Cri LJ 726 (Pat HC).

135. *State of M.P.* v. *Mohan Singh*, (1995) 6 SCC 321.

136. *Charanjit Lal* v. *State (Delhi Admn.)*, 1985 Cri LJ 1541 (Del HC); *Diwan Singh* v. *State of Haryana*, 1990 Cri LJ 2364 (P & H HC); *Sitabai* v. *State of M.P.*, 1990 Cri LJ 2704 (MP HC).

137. *Thirumalareddy* v. *Thamasamma*, 1992 Cri LJ 3016 (AP HC).

138. *Jalandhar Singh* v. *State of Punjab*, 1991 Cri LJ 1772 (P&H HC).

139. *Jadhu alias Jadua Bhoi* v. *State of Orissa*, 1992 Cri LJ 2117 (Ori HC).

Under the law as it stands, a person sentenced to imprisonment for life is bound to serve the life term in prison unless the appropriate authority commutes or remits the sentence in the exercise of the powers given under Sections 432-433 of the Code.[140] As the sentence of imprisonment for life is a sentence of indefinite duration, the remission earned according to the rules under the Prison Act does not in practice help such a convict as it is not possible to predicate the time of his death. Such remission probably may help the government in deciding to exercise its power to remit the remaining part of the sentence of life imprisonment.[141]

Commutation of sentence

The appropriate government may, without he consent of the person sentenced, commute -

(a) a sentence of death, for any other punishment provided by the Indian Code;

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

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140. *Gopal Vinayak Godse* v. *State of Maharastra*, AIR 1961 SC 600: (1961) 1 Cri LJ 736, 740; *Samba Ji* v. *State of Maharastra*, (1974) 1 SCC 196, 197: 1974 SCC (Cri) 102, 103: 1974 Cri LJ 302.

141. *Gopal Vinayak Godse* V. *State of Maharashtra*, AIR 1961 SC 600: (1961) 1 Cri LJ 736, 740; Maru Ram v. Union of India, (1981) 1 SCC 107: 1981 SCC (Cri) 112: 1980 Cri LJ 1440.

(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) a sentence of simple imprisonment, for fine (s.433).

While commuting sentence for fine, the courts usually impose conditions non-compliance of which may revive the sentence.[142] It may be noted that Sections 54, 55 and 55-A of the Indian Penal Code confer similar powers on the Government.

Restriction on powers of remission or commutation

Notwithstanding anything contained in Section 432 (i.e., *supra* Part II, Para 1 above) where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under Section 433 into one one of imprisonment for life, such person shall not be released from prison unless he had served at lest fourteen years of imprisonment. (S.433-A)[143] The Supreme Court his reiterated that it is the

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142. See *Sukumaran Nair* v. *Food Inspector*, 1995 Cri LJ 3651 (SC): 1995 Cri LJ 2126 (SC).

143. This provision is not applicable to a juvenile offender confined in a borstal school in A.P.State. See *State of A.P.* v. *Vallabhapuram Ravi*, (1984) 4 SCC 410: 1984 SCc 9Cri) 635: 1984 Cri LJ 1511. But it is applicable to a juvenile offender confined in a borstal school in Haryana. See *Subash Chand* v. *State of Haryana*, (1988) 1 SCC 717: 1988 SCC (Cri) 259: (1988) 15 Judicial Reports 506.

prerogative of the appropriate Government to grant premature release. It overruled High Courts' orders granting release to murder convicts before the completed fourteen years' sentence.[144]

The Supreme Court of India has upheld the constitutional validity of Section 433-A.[145]

There have been decisions which tend to water down the severity of Section 433-A. For example, the M.P. High Court has come up with the thesis that the periods of sentence served by prisoners without absolute freedom such as conditional release may be treated as imprisonment that could be counted towards the 14 years required under Section 433-A.[146]

CONCLUSION

The emprical study on the working of the Presiding Officers of various criminal courts of Gujarat, Assam, Karnataka, Kerala, Tamil Nadu, Uttar Pradesh, Punjab and Haryana, Delhi and Pondicherry with

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144. (1996) 7 SCC 492, see *Union Territory of Chandigarh* v. *Charanjit Kaur*, 1996 SCC (Cri) 484 and *State of Punjab* v. *Kesar Singh*, 1996 SCC (Cri) 1034: (1996) 5 SCC 495.

145. *Ashok Kumar Golu* v. *Union of India*, (1991) 3 SCC 498.

146. *Babu Pahalwan* v. *State of M.P.*, 1990 Cri LJ 2704 (MP HC); *Ramesh* v. *State of M.P.*, 1992 Cri LJ 2504 (MP HC); *Karan Singh* v. *Stte of H.P.*, 1993 Cri LJ 3751 (HP HC). But also see reasoning in *Shaikh Abdul Azeez* v. *State of Karnataka*, (1977) 2 SCC 485.

regard to the sentencing pattern was undertaken. The following conclusions emerging out of the story.

1. There is no encouragement from the appellate courts in adopting the reformative measure while sentencing.

2. The probation officers do not co-operate and co-ordinate for the effective implementation of probation.

3. No reports are submitted by the probation officers about the result of the convict released on probation.

4. There is no proper infrastructure for the probation office and no adequate training is given to the probation officers.

5. Probation conditions are seldom followed by the probationers.

In order to eradicate this unpleasant situation in the sentencing process suitable amendments to the probation Act and the criminal procedure code are required.

Though there are various theories of punishments like deterrence retribution, utilitarian and reformation it seems the Indian Courts favour reformation.

The whole goal of punishment is curative. Accent must be more and more on rehabilitation rather than on retributive punitivity inside the prison.[147] The policy of the law in giving a very wide secretion in the

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147. AIR 1978 S.C.480 *Nedella* V. *Rao State of A.P.*

matter of punishment to the judge has its origin in the impossibility of laying down standards. But in final analysis, the exercise of judicial discretion is the safest possible safeguard.[148]

The sentencing segment of French disappeared after the extension of Indian Laws to Pondicherry.

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148. *Jagtnonan* v. *State of U.P.* AIR 1973 SC 947.

CHAPTER VI

CORRECTIONAL PROCESS

INTRODUCTION

Correctional machinery is an integral part of the criminal justice system. If the purpose of the system is to achieve prevention of crimes the system cannot afford to leave the correctional and rehabilitative aspect unattended. Both the French system and the common law system provide for the establishment of correctional machinery. But their approaches are different. While the French system seems to treat this machinery as part and parcel of the system both English and the Indian systems seem to treat correctional machinery as part of the Executive Branch of the Government. Naturally the Indian Cr.P.C. does not contain procedures dealing with such aspects as the French Cr.P.C. The Indian system takes care of such things in prison Act, prisoners Act, Jail Manual etc. It is interesting to see how the French Pondicherry differed from the Indian Pondicherry in the matter of correction and rehabilitation and what impact does this has on the public.

DEVELOPMENT OF CORRECTIONAL PHILOSOPHY:

Man's approach to criminals can be conveniently summarised as a succession of four R's. Revenge, Restraint, Reformation and Reintegration. With the addition of each 'R' important changes were made in correctional process.

Until about the middle of the eighteenth century, *Revenge* was the primary response to crime. Correction was motivated principally by punishment and retribution, the State taking upon itself the tasks of vengeance that earlier had fallen to a victim's reighbours or kinsmen. Banishment and corporal and capital punishment were techniques employed on offenders for their transgressions. It was also believed that corporal punishments and execution would exorcise the evil spirits that were seen as the cause of a person's criminal tendencies, thereby preventing harm and contamination of the innocent.

In the late eighteenth and early nineteenth centuries, an important revolution in correctional philosophy took place by the growth of western democracy and the influence of contemporary rational philosophers and legal scholars. Criminals came to be seen not as possessed by evil, but as persons who had deliberately chosen to violate the law because it gave them pleasure or profit.

The need for a rational and equitable correctional system was felt in the eighteenth century. Under such view, reactions to crime should be rationally based on a pleasure pain principle. Less punishment for less severe crimes and harsh punishments for serious crimes was the motto. Punishment commensurate with the severity of the crime came up in this context as the major correctional tool. It also posed a better substitute for corporal and capital punishment in the light of humanitarianism, which had become the prevalent approach of the time.

Then, correctional institutions became places for "reflection in solitude leading to repentance and redemption". Simultaneously, it was thought that institutionalisation would be a lessor, evil teaching that crime does not pay. Thus, *Restraint* was the correctional philosophy during this period, and the architectural designs of correctional institutions were such that communicating within and without were reduced to the minimum.

Reformation, the third was introduced in the nineteenth century and early twentieth century. The spirit of reformation was reflected as early as in 1870. When American prison Association (known as the American correctional Association) established as its goal: "reformation

not vindictive suffering, is the purpose of penal treatment". This second revolution came about as a direct response to the inadequacy of institutionalisation, but it has gained impetus through the growth of Freudian psychology and the social sciences' Institutionalisation had not worked as an impartial and uniform reaction to crime. At the same time, the number of inmates confined continued to increase, resulting in increasingly overcrowded institutions. Treatment, rather than punishment, was called for; professionalism and specialization rather than a generalized response came to be accepted. The Reformatio movement thus introduced a complex approach to corrections extending far beyond just confinement and punishment. Many of today's correctional systems and programmes are the product of the Reformation era, although there are varying degrees of sophistication in their practices.

However, reformation is still part of the present approach in corrections, although it does not constitute the ultimate goal. A fourth revolution apparently has come, bringing in this concept of Reintegration. The general feeling is that focus only upon reforming the offender is inadequate and restrictive. Successful rehabilitation is a two-sided coin, including reformation on one side and reintegration on the other. Corrections must develop approaches which prepare the

offender to deal with compelling pressures that are exerted upon him by person living in his community, by social, educational and economic pressures, and by our overall culture and subcultures. Only by such preparation offenders will successfully return to society as productive citizens.

Rehabilitation as a Primary objective

The intended goal of corrections today is to protect society by controlling offenders and preventing crime. Restraining the offender in custody protects society from crimes which he might otherwise commit; nevertheless, the constraint is merely temporary. Incarceration, custody, or institutionalization still has a role in the system, but it has come to be the least desired or the last resort. Actually, offenders cannot be confined indefinitely, and this fact is obvious since the same laws which convict also provide for release. To be positive and truly "correctional", corrections must aim at returning offenders to society as law-abiding, tax-paying citizens. To achieve this end, the functions of correctional systems and programmes should lead to rehabilitation and reintegration equipping the offenders to return to society as productive, law-abiding citizens and, consequently re-establishing the community's acceptance and faith. Even when incarceration is inevitable, treatment

rather than custody should be the ultimate objective during confinement, in order to facilitate the return of the offender to society.

Thus, rehabilitation is the primary objective in corrections; but in order to prevent recidivism which is a measure of failure in rehabilitation, a secondary, if not equally important, target is reintegration - community acceptance of the offender. The above objectives are the basis upon which the existing correctional systems and programs are constructed and they signify, too, the direction toward which correctional improvement must move.

Correctional Process under the French System in Pondicherry

It was after a finding of guilt that the courts in French Pondicherry convicted and sentenced the offenders. The courts could also suspend the sentence. The special chapter on correctional process in French Criminal Procedure Code was made applicable. There were two kinds of suspension of sentence; simple suspension and suspension with probation. The simple suspension might be granted when the convicted person had not been sentenced during the previous five years to a deprivational or infamous punishment or to a punishment of imprisonment above two months. Simple suspension might be granted in respect of sentence of correctional and regulatory

punishments for felony or misdemeanour violation. However, it was not applicable to punishment of imprisonment for less than 10 days or of fine of less than 600 francs or to complementary punishments. If during a period of five years the convicted person who was granted the benefit of simple suspension of sentence did not commit an act of felony or misdemeanour which carried a deprivational punishment or a correctional punishment without suspension of sentence, the sentence originally awarded with simple suspension was considered as cancelled ab intio and would not be shown in the extract of his *casier judiciarie*[1] On the contrary if he is convicted for the second time he is called upon to receive the first sentence which would be added to the second one. However in special cases, the court might by special decision rule that the new sentence would not entail the cancellation of suspension of sentence previously granted.

The suspension of sentence with probation may be granted in case of sentence for imprisonment for felony or misdemeanour. The period of probation would be of a minimum of three years and maximum of five years. The court would also decide that the suspension would apply only to part of the sentence.

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1 Record report of cases.

Suspension of sentence with probation can be granted to a convicted person even previously sentenced to imprisonment for a period of six months or less. It could not be granted a second time for a person who was enjoying the benefit of such suspension for a previous offence. A person who was enjoying the benefit of a simple suspension of sentence may be granted suspension of sentence with probation for a new offence. In that case, the two sentence get joined and the suspension with probation becomes applicable to both.

Decision to modify the sentence - The Role Played by the French Courts

After pronouncing the sentence, regulatory and correctional punishments might be adjourned for a short period or allowed to be served by installments, for serious reasons of a medical, professional or social nature. In case of imprisonment, the decision was taken by the special judge if the period was less than three months, or by the court if the imprisonment was for a longer period.

Long-term punishments might be reduced in respect of an accused who showed clear signs of social readaptation. Such reduction was automatically given to all persons who pass academic or professional examination successfully. The sentence pronounced

might get modified by free pardon, amnesty, short-term adjournment, reduction of sentence and conditional liberation.

Parole
(Conditional Liberation)

Parole might be granted to all prisoners who served one half of their terms. Repeaters might be parolled after serving two thirds of their terms. Persons sentenced to criminal detention (tutelle penale) might be parolled after serving three fourths of their terms. Those sentenced to life imprisonment might be parolled after serving fifteen years.

When the conviction imposed was below three years of imprisonment, parole might be granted by a judge of supervision (juge de l' application des peines) after hearing the commission on supervision (commission de l' application des peniner). Where the conviction exceeded three years, parole might be granted by Minister or Justice on the recommendation of the judge of supervision after hearing the commission.

Once the convict had served the term making him eligible for parole, his case was reviewed once in a year with a view to granting him parole. If parolled, he would be subjected to conditions and to

supervision. Normally the conditions imposed are that he should not commit new offences requiring conviction and not leave the permanent residence without informing the supervisor. Supervision would extend over the remainder of his term of imprisonment and may exceed it by one year. In case of parole granted to a person sentenced to imprisonment for life, supervision was imposed for a term between five and ten years. Where the parolled complies with all the conditions of parole, his release was final and his imprisonment was deemed to have ended on the day of his release on parole.

Where the parolled person does not comply with the conditions of parole or where he was convicted of a new offence, parole may be revoked in full or in part. He would then have to serve the remaining period or a part therefore of as determined by the particular authority that gave him parole.

Probation

The French Criminal Justice System gave maximum importance to the execution of sentences. In fact the system did not seem to have treated it as an executive function. The French allocated the work of supervision of execution of sentence to a special Judge. This special judge supervised probation. In each *Tribunal de grande instance* there

was a special judge to supervise probation. The duty of the special judge was exclusively to monitor and supervise the way sentences were executed and ensure better individualisation of the punishment taking into account the change in the behaviour of the convict. The special judge was assisted by a probationary commission over which he presided. There were a number of probation officers and special assistants in the probationary commission.

The duties of probation machinery were two-fold. One was supervision and the other was assistance. Supervision would consist of the obligation cast on the convicted person to appear before the judge or the probation officer whenever summoned. Measures of assistance were provided by the State to induce the convicted person to get resettled in life. It consisted mostly of facilities for education in the professional field.

The court would also, in addition to these general measures, prescribe for each convicted person special measures corresponding to his socio-economic condition and the offence committed by him. For instance, the court might direct to follow a course, academic or professional, to reside at a specified place, to subject himself to medical care or a cure of disintoxication, to pay maintenance to his family

members, to pay damages to the victims of the offence etc. The court also would direct him not to drive certain types of vehicles, not to appear in liquor shops, race courses, night clubs, gambling places etc.

The probation conditions might be modified by the court whenever it appeared necessary. The court could also extend the period of probation when the convicted person had not satisfactorily behaved himself during the period of probation or when he became guilty of a fresh offence for which he was sentenced without the suspension of the previous sentence being cancelled. If the convicted person followed the directions carefully and if it appeared that normal resettlement in life had become a fact, the period of probation could be reduced.

During the period of suspension of sentence with probation, if the convicted person committed an act of felony or misdemeanour for which he was sentenced either to deprivation or correctional punishment the court could order cancellation of the totality or part of suspension previously granted. In that case the convict was called upon to undergo the portion of sentence for which suspension was cancelled in addition to the last sentence pronounced.

If the convicted person without committing any new offences during the probation period completes the period of probation satisfactorily the sentence suspended with probation was cancelled ab initio and the entry there-of would be struck off from the records.

If the convicted person did not behave well and omitted to follow the conditions imposed in the order of suspension during the period of probation, he would be called upon to undergo the sentence by cancelling the suspended sentence already ordered in his favour.

Suspended sentence as a correctional measure

There was a difference between probation and suspended sentence. In suspended sentence a sentence of imprisonment or fine was pronounced but the execution of it was suspended for a period. In the case of probation no sentence is mentioned. Therefore, the difference between a probationer and one under suspended sentence was that while the former did not know the exact punishment which would be inflicted upon him in case of violation of the terms of probation, the latter was fully aware of the nature and quantum of the punishment which could be enforced.

As already discussed, Suspended sentence was employed in Pondicherry. However, under the French system the use of suspended sentence was confined to offenders not previously imprisoned for crimes or delicts. Punishments like death sentence, banishment, loss of civil rights or certain types of long-term imprisonment could not be suspended. The period of suspension was five years, and if during this period the offender was not convicted of a further crime the conviction was wiped out and the sentence lapsed. If, on the other hand, he was so convicted, the sentence would be automatically enforced.[2]

Indeterminate sentence

For violation of various crimes maximum and minimum punishments were provided by law. It was the function of the courts to determine the length of imprisonment within the limits set up by the legislature after a person had been found guilty of an offence. In 'Indeterminate sentence' the courts let the question of the period of imprisonment to the discretion of the authorities executing the punishment. The decision to release the offenders at the appropriate time was to be taken by the prison authorities when satisfied that the offender had been reformed. In reality, the sentence was

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2. Nigel walker: Crime and Punishment in Britain, pp.171-172.

'indeterminate' only when no minimum or maximum period of imprisonment is laid down. But in actual practice the minimum and maximum limits were set out by the court before the commencement of the imprisonment. This technique of indeterminate sentencing was employed under the French system.

Correctional Services - in India

Correction remained a word almost unknown to most law abiding citizens, and there was also a tendency to think that imprisonment was the total correctional process. As such, corrections carried the immediate task of maintaining custody of the offenders and the long-range goal of treatment, rehabilitation, and reintegration. For these purposes, the correctional process offered three alternatives-probation, institutionalisation and parole. Each of these three facets of corrections involved a system of organisational and complex of administrative agencies, personnel, physical facilities, operational techniques as well as decision-making. In addition, either to fulfill specific ends or an alternative to institutionalization there were various programmes dealing with individual needs of the offender.

Under the modern correctional philosophy, it was believed that function of the penal institutions was to find out the means, so as to

reshape the interests, attitudes, habits and the total character of prisoners[3] in order to reintegrate them in the society on their release from the penal institutions.

All these institutions, penal and otherwise were so organised that the elements within them could lead some sort of harmonious co-existence and not to degenerate into chaos. In addition to providing control and custody of offenders, penal institutions also undertook the task of their rehabilitation and re-socialisation. It is aptly pointed out by Justice Fazal Ali thus:

> "... The modern concept of punishment and penology has undergone a vital transformation and the criminal is not now looked as a grave menace to the society which should be got rid of but is a diseased person suffering from mental malady or psychological frustration due to sub-conscious reactions and is therefore to be cured and corrected rather than to be destroyed....".[4]

Prison as a Correctional Institution in India

In the beginning imprisonment was a mode of custody of undertrial persons. Under-trial persons were locked up for years together before they were put up for trial. In India Jails were established as early as in 1597. These jails were places where

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3. Tannenbaum, F: Crime and the Community (1951) 293.

4. Fazal Ali J.

prisoners were hurled up together. It was in the 18th century that prisons were built of the cellular type. But as the prisoners could not stand the tortures of solitary confinement, they were put in group confinement, and thus an important change in the prison system took place.

The main purpose of imprisonment are those of (a) disabling the offender from being danger to society, by locking him up (b) preventing prospective offenders by the threat of long term lock-up and (c) reforming the offenders under healthy and transforming conditions. It has been realized that imprisonment, in order to be an effective reformation method of dealing with offenders, must be long term imprisonment, or imprisonment for at least a sufficient time, so as to give the prison officials sufficient opportunities of successfully dealing with the offender for his reeducation and rehabilitation.

Short-term sentences are considered worse as they do not have any correctional value. Moreover, short term sentence may lead to congestion in prison and thus expose the offender to the danger of contamination in prison by letting him come into contact with hard and rough offenders. It is now felt that short term imprisonment may be

substituted by fine or by releasing the offender on probation under the advise of probation officer.

It has been suggested that treatment and rehabilitation oriented punishments should be encouraged by abolishing the short-term punishments. However, it is to be noted that in India even today we resort to short - term imprisonment.

Prisons and jails - are the most well-known correctional institutions. Despite the fact the other alternatives are considered more desirable than incarceration, treatment - oriented institutionalization is an indispensable part of the entire correctional system.

Most of the institutions in India are almost entirely custodial in a physical sense, and the constructions are such as to depersonalize and regiment the inmates. Traditionally these institutions are located far away from urban and populated centre, and are built of stone, steel and concrete, for security and custody. However in Pondicherry it was situated at the heart of the city. Internally, the architectural structure consisted of long corriders, repeated doorways, and desecrated cells or open dormitories. Water, lighting and sanitation facilities very poor.

All these culminate in adverse living conditions for the inmates Overcrowdedness, noise pollution, inadequate ventilation, and monotony of colour and structure, aggravate the feeling of loss of freedom and independence and help to nourish rackets, violence, corruption, coerced homosexuality, and other abuses. In England exhaustive enquires are made of the convict's family history, his past record and mental state and classification of prisoners is done on the basis of these details by a body of experts.[5] In India we do not have such arrangements.

Prison Community : Some Judicial Pronouncements

Absence of a statutory framework providing for correction of offenders has led the judiciary in India to develop prison jurisprudence around constitutional provisions. The Supreme Court, very recently in a number of cases, has taken serious note of the prison brutalities and has denounced such practices. In *Sunil Batra* v. *Delhi Administration*,[6] Constitution Bench of the Supreme Court, brushed aside its attitude of passiveness towards prison administration. In *Rakesh Kaushik* v. *B.L. Vig, Superintendent Central Jail, New Delhi*,[7] the petitioner alleged that

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5. L.W.Fox. : The Modern English Prisons, p.76.

6. AIR 1978 SC 1675.

7. Supra note 92.

his life in jail was subjected to intimidation, by over-bearing 'toughs' inside, that he was forced to be a party to misappropriation of jail funds by bribery of officers, that homosexual and sexual indulgence with the connivance of officials were going on, that smuggling in and out was frequent, that drug racket was common, that alcoholic and violent misconduct by gangs like those involved in bank robbery and other notorious cases were a menace to quieter prisoners, and that the reformation of prisoners was defeated by such super crime syndrome. The court, in the light of these allegations observed:

> "Making a large margin for unveracious dilution, still if a fragment of truth survives, something is rotten in the State of Denmark - This court's writ must remove from Tihar's face such indelible stain and incurable wound".

And it took some positive steps to overhaul jail administration through its judgments. Appreciating the perils of incarceration at times the courts avoided sending people to prison. It expressed its disgust in Abdul Qayum thus[8]:

> "... to sentence a person to imprisonment, would itself achieve the object of associating him with hardened criminals, which association, the courts thought, was a good ground for denying

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8. AIR 1972 SC 214. The accused was approximately 18 years of age and was physically and mentally normal. Though he was illiterate, but he had vocational aptitude for tailoring and was working in the Bihar Tailoring works. The lower courts denied the benefit of probation to appellant on the ground that he is either a hardened or is associated with hardened criminals.

him the benefit of being released on probation... we have no doubt that if he is released on probation of good conduct, there is a hope of his being reclaimed and of offerded the opportunity to live a normal life of a law abiding citizen...".

The Supreme Court[9] in respect of the influence of the prison community, remarked that the campus of correction had degenerated into a human zoo. The court admitted that the Tihar Jail, had come up for unhappy judicial notice too often in the past. The court further stressed:

> ".... the human rights of common prisoners are at a discount and, in our Socialist Republic, moneyed 'B' class convicts operate to oppress the humbler inmates. The court lastly raised the issue, can there be inequality in prison too on the score of social and financial status? Bank robbers in 'B' class, because they are rich by robbery and nameless little men in 'C' class. - Art.14 of the Constitution is suffocated if this classification is permitted, and that according to rule itself, is prevalent as this court has even in earlier cases pointed out. This court must act, will act, to restore the rule of law and respect the residual fundamental rights of any harassed petitioner... as to protect the caged inmates from torture, gross or subtle is the function and duty of the courts".

The penological purpose being to convert the offender into a non-offender, it will be a mockery of criminal justice if young lads are walled in and caged in the hope that cruelty will correct.[10] In the prison, where all that happens is sex starvation, brutalization, criminal companionship, dehumanised cell drill under "zoological' conditions.[11]

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9. *Rakesh Kaushik* v. *B.L.* Vig. Supra note 92.
10. *Ram Prasad Sahu and Others* v. *State of Bihar*, AIR 1980 SC 83.
11. *Phul Singh* v. *State of Haryana* AIR, 1980 SC 249.

At the time of release, the prisoner comes out as an embittered enemy of society and its values with an indelible stigma as convict stamped on him. A potentially good person, is "successfully" processed into a hardened delinquent, thanks to the prison system in such cases. The court must restore the man.[12]

The Supreme Court maintained this trend in a number of cases,[13] and pin-pointed the effects of the long-term imprisonment, and has preferred the benefit of probation, in order to avoid the criminogenic influence of the sub-culture of the prison community[14]. The court, in *Daulat Ram* v. *The State of Haryana*,[15] also observed the avoidance of long- term imprisonment.

In short the imprisonment punishes the offender in a variety of ways, extending far beyond the simple fact of incarceration. Institutions form a set of harsh social conditions to which the population of

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12. Ibid.
13. *Surender Kumar* v *Sate of Rajasthan* AIR 1978 SC 1048 and Kakoo v. State of Himachal Pradesh AIR 1976 SC 1991.
14. Ibid.
15. AIR 1972 SC 2434.It is observed: "... In sentence of imprisonment, there is a grave risk, to the prisoners attitude to life, to which they are likely to be exposed, as a result of their close association with the hardened and habitual criminals, who may happen to be the inmates of the jail. Their stay in the jail in such circumstances might well attract them towards a life of crime instead of reforming them. This would clearly do them more harm than good and for that reason, it would perhaps also be to an extent pre-judice the larger interests of the society as a whole....".

prisoners must respond or adapt itself,[16] failing which the days of imprisonment are multiplied and result in the breakdown of the prisoner.

Prisons in India are not governed uniformly, every State applying different rules and regulations. In 1959, a Model Prison Manual was prepared by the Government of India for the purpose of updating and revising the State Manuals. It was also meant to lead uniformity to rules and regulations as also to the procedure and punishment. Twenty years later, Inter-State Conference admitted that the Model Prison Manual had yet to be implemented in most of the States. Except in States of Karnataka, Andhra Pradesh and Maharashtra, the Jail Manuals have remained archival documents.

An overall view of the contemporary prison scene has proved it beyond doubt that prisons of today have miserably failed to correct the prisoners. They are victims to poor living conditions, unhygienic food and subject to various kinds of torture and limitation during the period of their incarceration. They suffer silently. No body knows what happens to the prisoner behind high walls and iron bars. The political leaders or high ranking administrative officials visit Jails casually. The occasion

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16. Wheeler, S. : "Socialization in the correctional Communities" American Sociological Review NO.26 (Oct. 1961) 699-712.

for such visit is either ceremonial or official inspection. They get warm welcome, nice treatment followed by entertainment aporgramees. Rarely they get scope to know the hard realities of prison life. Therefore, it is necessary that press social workers and voluntary organisations should be give the chance to visit jails regularly. This may eradicate some evils of jail life.

Fine and Correctional Administration

Fine as an alternative to short-term imprisonment is a treatment measure, but as a source of state treasury it is an injudicious form of punishment. It should be assessed according to the means of the offender. Whenever the maximum or minimum limits are fixed, within which the country may adjust the amount of the means of the offender, these should be revised according to the changed conditions so that fines fixed retain their original values.[17]

A fine is a pecuniary penalty imposed upon a person convicted of a crime. The imposition of financial penalty in the form of a fine or forfeiture of property has been a common method of punishment since a long time in Western as well as Eastern civilization.[18]

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17 Dhillon, M.K. *Practices and Principles of Non-Institutional,* The Lucknow Law Journal, Vol. XIII, 1967-68, p.278.

18 Caldwell, R.G., *Criminology,* The Ronald Press Company, New York, 1956 p.426.

At first, Criminals were not fined by the court, but in some cases they were permitted to pay a certain sum as a substitute for the penalty imposed. This meant, in effect, 'that the offender made an end, finem facere to his imprisonment'.[19]

The study also revealed that though the Probation system[20] has effectiveness but the implementing agency in our country is not efficiently implementing the system. Therefore, for more effective and efficient working of the probation system is necessary in our country as an integral part of administration of criminal justice because it is a viable alternative to costly[21] and less effective prison system.

Parole

Parole is the release of an offender from a penal institution after he has served part of his sentence, under supervision by the State and under prescribed conditions which, if violated, permit his reimprisonment. Parole, then, is one way to try to continue to remain in the community the correctional programme begin in the institution and

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19 Ibid.

20. The Probation systems and the administration of the same including admonition, releasing on probation have been discussed in detail in the early Chapter V - sentencing. Thus the same is not reproduced here. Refer Chapter V for probation system and other connected matters.

21. Probation of offenders Act 1958.

to help offenders make the difficult adjustment to release without jeopardizing the community. Supervision of the offender in the community by probation or parole without institutionalisation poses advantages of alleviating the burden on institutions, and being more community and treatment-oriented. Consequently, on the one hand there is the tendency that probation will be used increasingly in the future; on the other hand, indeterminate sentencing is becoming popular so that offenders can be placed under parole as early as possible.

The decision to release a person on parole is generally taken by a parole Board. In India, under the rules in force in some of the States the opinion of the police department is also given due consideration in taking the decision. The crucial question faced in making the decision, one way or the other, is to be able to make the prediction regarding the outcome of the release. This involves the examination of issues such as whether the convict had profited by his stay in the institution, whether he was so reformed that he was unlikely to commit another offence, what his behaviour was in the prison, whether any suitable employment awaited him on release, whether he had a home or other places so, whether he told the truth when he was questioned by the parole board, how serious his crime was and in which circumstances it

was committed, his appearance when interviewed by the board and what behaviour he had demonstrated if he was already on parole in connection with another imprisonment.

Courts and parole

Courts in India have shown increasing interest in the use of parole by issuing directives to the prison administrations in appropriate cases.

In *Dharmbir* v. *State of U.P.*[22] the appellant had been awarded life imprisonment for the offence of murder. There was no scope for the reduction of period of imprisonment but the court found parole desirable in the circumstances of the case. According to the directions given to the State Government and the Jail Superintendent, the prisoners were to be permitted to go on parole for two weeks, once a year throughout the period of incarceration provided their conduct while at large was found to be satisfactory.

Under the French system the court involved itself at all stages of correctional process. The French Cr.P.C. stands proof to this. But,

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22. (1979) 3 Sec. 645: 1979 SCC (Cri 862.

Indian courts have been following a hands off doctrine so far as penal administration was concerned. As a result of several public interest litigation starting from Sunil Butra the Indian Supreme Court revolutionized its attitude towards correctional administration and brought new life to many a prisoner languishing in Indian Jails.

The Judicial system is involved with corrections from the time it passes sentence until that sentence is served. The operation of parole, probation and penal institutions all fall within the scope of its review. The court's sentencing power gives the judiciary the right to ensure that its instructions are fairly implemented by the correctional board and authorities.

It is obvious that the judicial system depends on professional correctional administrators for its efficiency in terms of reformation and prevention. The recent decisions relating to the rights of the convicts constitute a minor revolution in the law. Judicial response to problems in corrections is of more than theoretical or academic interest. The response is important because of the impact it has had and will continue to have on the direction of penological practices.

As an integral part of the criminal justice system corrections must operate closely in conjunction with police and the judiciary. The practices of the above said two branches have significant bearings on the viability of correctional administration. The French system ensured concerted acts from all these branches to an appreciable extent. Now, because of the extensions provided by the decisions of the courts, it should be possible for the Indian systems to keep up what was left by the French System.

CHAPTER - VII

CONCLUSIONS AND SUGGESTIONS

Law and legal institutions seems to have profound influence on the attitudes and impressions of the people. They are in fact part of the culture and as such have the tendency of being inextricably associated with the people's thoughts and actions.

If a particular society has evolved or embraced willingly or otherwise a legal system it becomes very difficult for the society to change it. There will be a tendency for many people to retain the system as a whole. If compelled by circumstances to change it they may concede only small changes. If at all total change is found necessary, society may resort to a slow and steady process so that the impact of change could be cushioned.

For a comparativist Pondicherry is a unique territory which have had the fortune of experiencing more than one system of criminal justice administration. Prior to its annexation to the French, it had the Indian system of criminal justice. Thereafter for a while the French

system or a blend of the Indian and the French and then intermittently the English system till finally it embraced the French system in toto.

Under the French system of criminal justice Administration, the judge, prosecutors, police officers, court clerks, prison guards, and probation officers were members of French National Civil Service. The judges and prosecutors were treated as Magistrates and they belonged to one service and were recruited by way of a national competitive examination. They were inducted into the services after a comprehensive training for two years at the National Magistrates' School in France. Those who underwent the training in the school were posted at Pondicherry.

The presiding judges were of two categories-examining magistrates and sentencing judges. The examining magistrates were entrusted with the responsibility of handling pre-trial proceedings including decisions regarding detention and preparation of cases. The sentencing judges not only dealt with the matters of adjudication but also with rehabilitative work like parole and probation. The independence of the judiciary was guaranteed by way of fixed tenure of service.

Under the French system plea- bargaining was unacceptable. While shutting out the controversial American practice of plea-barganing, the French system also avoided the unsavoury feature of the defence justice. However it accepted the need for reducing the heavy calendar loads by adopting alternative procedures through a process known as 'correctionalisation'. That amounted to reducing the charge from a serious crime to a less serious one resulting in imposition of minor sentence. The distinctive feature of this practice was that the initiative used to be taken always by the judge and it could be resorted to if the complainant agreed to the procedure. This system functioned in Pondicherry very well. Under the French criminal justice delivery system the principles of restitution and victim compensation were incorporated. Naturally these were also incorporated in the system that prevailed in Pondicherry.

The judicial supervision of the investigation process under the French Pondicherry was remarkable. It was the examining magistrate who prepared the documents of case after investigation. Both the defence and the prosecution were entitled to suggest to him about new lines of investigation, new witnesses to be called for examination etc., The personality of the offender, his character, previous convictions ,if any, were all gone into by the examining magistrate for preparing the

dossier of the case. Much of the time of the examining magistrate was spent in the conduct of examination.

It was on the orders of the examining magistrate that pre-trial detainees were released. The accused was otherwise required to remain in jail during investigation. However, the examining magistrate's rejection of the accused's request for release could be appealed against in the chamber of Accusation.

The French Administration seemed to have emphasized the need for pre-trial detention as a safeguard against tampering of evidence. The prosecutor also played a very active role in investigation, trial and execution of sentences.

The present Indian system differs in several ways from the French system. The primordial position of the examining magistrate has suffered erosion. The special position of the prosecutor and police has also undergone change. In fact , the investigation is conducted by the police and neither the public prosecutor nor the judiciary has any right to interfere with the work of the police. However, judiciary has stepped into many an area of investigation breathing vitality into the whole system, public prosecutor does not have the status that is enjoyed by

him under the French system. These changes -fundamental in the French system-have evoked reproach and approbation alike. An empirical inquiry into the public's approach was therefore conducted and the following conclusions and suggestions have been made.

There is no need to switch over to the French or a mixed system of criminal justice by throwing out the existing one. The existing one serves the purpose Except for a few dilatory procedures and practices the system seems to work smoothly. In fact upon a comparative study of various systems it is found that the present Indian system of common law model is the best for a fair administration of criminal justice.

However, in tune with the latest trend of legal systems, it would be better if some of the good features of the French system are incorporated into the existing system. Some suggestions for adoption in Pondicherry are detailed below. Suggestions for changes in the Indian legal system are also made separately.

SPECIFIC SUGGESTIONS FOR PONDICHERRY CRIMINAL JUSTICE DELIVERY SYSTEM

1) A separate wing for process service attached with the criminal court as in the civil court practice could be made for avoiding delays in service of processes.

2) A separate police wing may be assigned to all the criminal courts exclusively for execution of warrants of arrests and for production of the arrested persons before the courts to avoid delay in disposing of the criminal cases.

3) All the summons cases should be tried summarily without any irregular proceedings.

4) A separate police wing for assisting investigation of the crime should be set up under the control of Director of Public Prosecutions. This would avoid delay in investigations.

5) The present system of having monthly Lok Adalat should be held every week for conciliation and settlement of compoundable offences.

6) The new scheme of the conciliatory jurisdiction introduced by the National Legal Services Authorities Act should be adopted in the criminal courts where there would be lot of possibilities to have amicable settlement upon conciliation. The courts sitting for Lok Adalat should be empowered to release the offenders under the probation of offenders Act. 1958.

7) It is suggested that a criminal justice Academy be established at Pondicherry to impart instructions and training to all the Judicial Officers dispensing criminal Justice. Such training may help the Judicial Officers in adopting the latest thinking on sentencing and treatment of Offenders.

8) Computerization of latest case laws of Supreme Court and High Courts must be made available to all the criminal courts of Pondicherry by Electronic mechanical devices system. Each court should be provided with a computer for feeding latest decisions and case laws for speedy analyses of cases.

9) Sitting hours of the trial courts should be modified as 10.30 a.m. to 1.00 p.m. and 2.30 p.m. to 4.30 p.m.

10) All the Administrative works of the Presiding Officers of the Criminal courts should be attended only between 4.30 p.m. to 5.30 p.m.

11) All the Saturdays except the second Saturdays must be made as working days.

12) Courts' sitting hours should not be used for giving dictations of orders and judgements. It has to be done at the residence of the Presiding Officers out of office hours as practiced in the state of Tamil Nadu.

13) All the courts should be provided with modern mechanical devices like, computers, photocopier etc. so as to prepare and furnish the copies of the judgements and orders on the same day of pronouncement.

14) Measures may be taken to place the case properties and material objects involved in criminal cases before the Presiding Officers, prior to the commencement of the trial. There should not be any search of them after commencement of trial.

15) To avoid delay in disposing of criminal cases, no expert need be summoned during the course of trial. Their depositions of statements and documents could be made use of for advancing arguments by both the counsels.

16) Both in the court of Magistrates and in the court of Sessions, trial should be conducted on a day to day basis.

17) All the witnesses of the prosecution must be produced by the police on the appointed day. The appearance of absentee witnesses shall be dispensed with by the Presiding Officer, if he finds no justification for adjourning the matter.

18) The cases in which the accused could not be secured for facing trial may also be tried in absentia and the judgements pronounced. If the case ends with conviction, the sentence should be serve[illegible] the accused as and when he is appearing or apprehende[illegible] the police. This could avoid repeated adjournments o[illegible]pending criminal cases.

19) An autonomous body like Directorate of Forensic Science Laboratory should be set up with its branches at each district headquarters for speedy investigation with the help of experts.

20) All the witnesses produced or appearing on a particular day appointed for their examination must be examined without any adjournments. Statements of the witnesses must be transcribed by typewriting in the open court itself.

21) To avoid any threat to the life of the under trial prisoner produced on the date of hearing, adequate security measures should be made in the courts. A separate room may be provided for guarding them at the courts.

22) After completion of trial, arguments should be advanced on the next working day and the judgements must be delivered not later than the third working day after advancing of arguments.

23) The de-facto complainants must be directed to be present at the time of pronouncing judgement and compensation if any ordered, should be paid by the court on the same day itself. The court will have to collect the fine amounts from the convicts.

24) Periodical inspections should be made in the prison by the Chief Judicial Magistrates so as to have control over the prison staff.

25) Prevention of crime could be better achieved by entrusting the work of educating the public with legal aid machinery.

A SCHEME OF NEW PROCEDURE SUGGESTED FOR REMODELING THE EXISTING INDIAN SYSTEM

The new scheme and procedure suggested below is also given in Appendix in the form Figures.

All the suggestions suggested above for the Pondicherry Criminal Judiciary is also suggested for Indian Criminal Judiciary so as to make the system more effective.

As and when there is a report of commission of a crime it has to be immediately reported to the pre-trial Magistrates by the complainants directly or through some agents or by third parties. The pre-trial Magistrate should be stationed at every place and stations where police stations are situated. The pre-trial Magistrate will have to be provided with Investigation Police Force at each centre. There should be no role for the ordinary police force in crime investigations. Thus, it needs to create a new set up of police force for criminal investigation. They may be called investigation police. It must be exclusively for criminal investigation under the control and supervision of the pre-trial magistrates. The Pre-trial Magistrate should be in the cadre of First Class Magistrate. For that, office of the Pre-trial Magistrate should be established.

The pre-trial magistrate shall make necessary enquiry and upon satisfaction that a prima facie case is established he may conduct the investigation or cause it to be investigated by the investigation police. The registering of FIR and entering the cases in General Diary etc. should be made by the said police under the direction and supervision of the pre-trial Magistrate.

The investigating police have to be vested with the powers of arrest, search and seizures and to enquire about the commission of a crime. But there should not be any recording of statements by them (as followed under the present system u/s 161 of criminal procedure code). The examination of the victim and the witnesses if any during the days of investigation must be done only by the pre-trial magistrates at their office. The sworn information of the victim and witnesses if any, are to be recorded by the pre-trial magistrate. Upon perusing the deposition and testimony of documents magistrate shall have the discretion to commit the matter for trial to the ordinary court of Magistrates. This is already possible under the existing procedure of private complaints where the magistrate under section 200 of Criminal Procedure code entertains the matter directly and take cognizance of the matter after examining the complainant on oath.

If the pre-trial magistrate is satisfied with the allegations about the commission of a crime after apprehending the suspect with the help of investigating police he may refer the matter to the conciliatory Board for settlement provided the parties so will. The other cases should be sent to trial courts for trial. As such, there shall be no recording of confessional statements as permitted under the present systems.

There must be a Director of public Prosecutions (Deputed from the judiciary from and among the senior most subordinate judges) for supervising the functions of Investigating Police and pre-trial Magistrate. The matters relating to remand, Bail, release of the accused, dying declarations, 164 Cr.P.C statements and the like should be looked after by the pre-trial Magistrate himself. They will have to commit the cases ripe for trial to the trial courts or to the conciliation Boards. Then the trial courts should try the cases in accordance with the trial procedures.

In short, the present system should place the pre-trial Magistrate to be incharge of investigation into crimes with the help of a separated wing of the police. In other words, what is required is to adopt the French model of judicial supervision of criminal investigation.

PROSECUTION

As discussed above, there must be independent Directorate of Public Prosecution. There should be District Public Prosecutors in every district. No police officer should assume the office of Director of public Prosecutions. A competent judicial officer of the rank of Subordinate-Judge should be deputed as Directorate of Public Prosecutions. The pre-trial Magistrates in every police station jurisdiction limits should be supervised by the Director of Public Prosecutions. He shall also give advice to them as and when necessary about the matters of investigation.

The scheme of prosecution also needs to be streamlined. In each and every court of Magistrates, qualified and well trained Law Graduates with practical experience in handling criminal cases should be posted permanently as Assistant Public Prosecutor. They must also take care of the notice on bail applications and other connected matters emanating from pre-trial magistrates. In each and every court of sessions, qualified permanent public prosecutors like that of Assistant Public Prosecutors should be posted. The existing practice of appointment by the popular government for a specific term should be done away with. Instead a Public Prosecutor should be selected and appointed on a regular basis. Then it could be possible to have a fair

public prosecution. In the existing system of appointment by the popular government (political parties) there is also a possibility for the victim of rival political party to suspect that with the aid and help of the public prosecutor of the same political party the accused may go scot-free without conviction. That apart, there is also no justification to have the public prosecutors for limited tenures when the Assistant Public Prosecutors are appointed permanently. There would be accountability if a permanent government employment of Public Prosecutor is required to conduct the serious cases. The delay in political appointment causing hardship to the litigants will also come to an end if the public prosecutor is appointed permanently like the Assistant Public Prosecutors.

INVESTIGATING POLICE OR JUDICIAL POLICE

It is suggested to create an investigating police force - a wing of police personnel, exclusively for investigation of criminal cases. They must be placed under the control and supervision of the `Director of Public Prosecutions' who should also have supervisory jurisdiction over the pre-trial magistrates. The pre-trial magistrates should be made the superior authority for conducting investigation. The investigating police should be made as subordinate to both the pre-trial magistrates and the Director of Public Prosecutions.

The investigating Police force may be formed with one Superintendent of Police for every sessions division and one circle Inspector for every pre-trial magistrates jurisdiction with adequate subordinate staff and police personnel. The statements made by the witnesses and accused should be recorded only by the pre-trial magistrates and not by the Investigating Police.

The Investigating Police should be entrusted with the duty of arresting persons for production before the pre-trial magistrates for investigation, production of witnesses, collection of material objects and case properties, search and seizure of documents and weapons involved in the cases. They also may be entrusted with the duty of service of summons and executing of warrants of arrests.

PRE-TRIAL MAGISTRATES

As suggested above it is better to have an independent pre-trial magistrate exclusively for criminal investigation and to refer the matter either for conciliation or for trials. The investigating Police must be made to assist the pre-trial magistrates in their investigation process. It should be made that all the investigations are conducted by the pre-trial magistrates who must be empowered to examine and record the

statements of the witnesses by obtaining the signatures of them in it. If the said pre-trial magistrates after conclusion of their investigation decides, that a case is fit for proceeding further with a prima-facie information, the matter may be either referred to the Board for concilliation or for trial courts according to the nature of the allegations of the offences committed.

There may be classification of offences like, petty offences, crimes, heinous crimes etc. with which the referring of the cases to the proper forum could be made. All the offences considered as petty should be transmitted to the Board called Board of Concilliation and compounding of petty offences.

As per this scheme all the information about the commission of a crime of whatever nature should only be lodged or made to the pre-trial magistrate. Hence, near every police station it is necessary to have an office of the pre-trial magistrates.

All the statements by the witnesses should be recorded by the pre- trial magistrates in an open hall in the presence of the Assistant Public Prosecutor. The magistrate recording statement must put his signature in the statement of witnesses recorded and the Assistant

Public Prosecutor must countersign it. The pre-trial magistrate should not be cited as a witness by either side and they must be empowered to claim immunity for their quasi-judicial functions.

BOARD OF CONCILIATION AND COMPOUNDING OF OFFENCES

It is suggested to introduce a pre-trial conciliation and compounding Board where both the accused and the victims of offences could be brought together and with the advice of the Board the disputes could be settled without referring the matter to the court of magistrates. This may be made upon the option being made by the parties. For that purpose, it is suggested, it requires to have creation of Boards in every pre-trial magisterial jurisdiction. The Board should have three members among whom one must be a Judicial Member deputed from the rank of Judicial First Class Magistrate. He should be made the Chairman of the Board. Out of the remaining two one must be a woman member with the working knowledge of law, and the other must be a retired professor of law of a University. The tenure of office must be made as 3 years and all must be paid equal salary. That the appropriate state government may appoint the members and the Judicial member should be deputed/ appointed by the Governor of the State in consultation with the High court having control over the subordinate Judiciary of the State. The Board may act as village

panchayat with the supervision and control of the Chief Judicial Magistrate.

The orders of the Board must be final and there should not be any appeal to any forum from the orders of the Board. It is already provided in the National Legal Services Authorities Act that there cannot be any appeal against the decision derived upon conciliation. That could be taken as a justification in not permitting any appeal upon the decision of the Boards.

Those matters which could not be disposed off either by compounding or by conciliation as a result of unwillingness of either of the parties should be transferred to the court of magistrates which could dispose off them according to law. Boards must be vested with the powers of compensating the victims of crimes.

If the above suggested system is introduced the present practice of protracted trial of the simple offences by wasting the time of the court, prosecutors, defence counsels and witnesses could be saved. That apart, the conciliation may not only make speedy disposal measures of criminal complaints but also have deterrent effect in view of the volunteered conciliated disposition. It is the need of the hour to

extend the conciliatory jurisdiction to the criminal cases not only to minimise the work load of the trial courts but also to avoid hardship to both the parties.

BAIL

Grant of bail at the pre-trial stage should be the concern of trial magistrates. During trial, bail could be granted by the boards and courts so that the pre-trial magistrate could concentrate on the investigation of the matters pending with him.

SUGGESTIONS FOR TRIAL PROCEDURE- COURT OF MAGISTRATES

It is suggested to post a senior first class magistrate [CHIEF JUDICIAL MAGISTRATE] in every district courts under the new scheme. This could be made as lower trial court with all powers except to award death and life imprisonment. As it is suggested to enhance the power of the magistrate courts so as to try all the matters except those that are having death or life imprisonment, there must be separate both Assistant and additional public prosecutors to conduct the cases in each courts. Any appeal from the judgement of the court of magistrates could only be presented before the high courts which would be made competent to entertain the first and final appeals from the court of magistrates. These appeal should be heard and decided by a

three judges bench of the high courts specially constituted for the same. There should not be any further appeal to the supreme court. The High court would be made as the final appellate court for the court of magistrates.

SUGGESTIONS - FOR PRACTICE AND PROCEDURE DURING TRIAL IN THE MAGISTRATE COURTS

For trial at the court of magistrates all the court of magistrates all the cases sent by the pre-trial Magistrate to the court of all magistrates should be posted for a hearing of the accused on the first day when the complainant also must be required to be present. After providing the copies of case dossiers to the accused, charges if any, should be framed at once and if there is no change the accused will have to be discharged at once.

After charging the accused if he is willing to go for compounding he may be permitted to do so if the other party is also willing. Compensation to the victim should be ordered to be paid by the accused. For payment of fine time may be granted. The fine amounts should be paid to the victims directly by the accused.

If there is no possibility for compounding, the matter will have to be adjourned and posted for Trial by fixing a date. On the fixed date it

must be made compulsory for the trial. Likewise the defence counsel should also be directed to finish cross- examination of all the witnesses on the same day. At any event the adjournment of any part-heard matters if needed must be in the next working day. There should be no repeated adjournments for enabling the police to produce the witnesses. If the witnesses are not produced promptly it should be possible for the court to dispense with their presence and decide the case.

It is also suggested to have trials both in the magistrate courts and sessions courts continuously, without any long adjournment , day by day. It is also suggested there should not be any examination of any witness on chief, as the chief was already done by the examining magistrate while examining the witnesses for recording their statements. Those statements will have to be placed before the courts for cross examination only by both the parties.

After completion of trial, on the next working day the arguments by both the prosecutor and defence counsel may be advanced. After arguments are over it should be possible to pronounce judgements after three days of the arguments.

COURT OF SESSIONS

It is suggested to have the existing model of sessions courts at every sessions division. For every sessions court there must be a permanent public prosecutor appointed by the government for conducting cases. As there is no any appellate jurisdiction suggested for the sessions courts, the sessions courts will have to concentrate on the trial matters as stated for the Magistrates Courts. There should not be any adjournment of the trial in a sessions case. The matters will have to be heard day-by-day till the disposal of the same. However, the death penalty, if ordered, it is subject to confirmation by the Supreme Court and Supreme Court must be made as the appellate court to sit on the judgement of the sessions court.

It is suggested to curtail the second appeals from the judgments of the trial courts. This would avoid unnecessary and vexatious appeals often preferred by the convicts to drag on the cases so as to escape from the clutches of law for an intermediate period.

The whole system of compounding of offences under section 320 of Cr.P.C should be reconsidered by the law makers to extend the benefit of compounding to all types of offences except those which may pave way for controlling the docket explosion. In this connection it may

be pertinent to note that the legal services authority Act also attempt to advocate the same.

PRESENCE OF VICTIM/DEFACTO COMPLAINANT DURING PRONOUNCEMENT OF JUDGMENT

Under the present system the defacto complainant/injured do not have any chance to know about the outcome of his complaint. He may be required to appear before the court at the time of the pronouncement of Judgment so as to know the outcome of the case.

COMPENSATION TO VICTIMS

It is submitted that the State being in charge of the protection of the rights and interests of the people, should have the responsibility of indemnifying the victims. The present measure provided under Section 357 of Cr.P.C. DOES NOT WORK WELL. If any offence is made out and the matter is sent for trial, irrespective of the result of the case the victim of the case should be compensated by the State. However the fine amounts collected could be deposited in the treasury. Compensation must be adequate to make good the losses sustained by the victim including the loss of earning and compensation for mental agony suffered.

Thus a blending of some features of the French System with the present Indian system alone can help us to regain the confidence and add vitality to our system.

APPENDICES

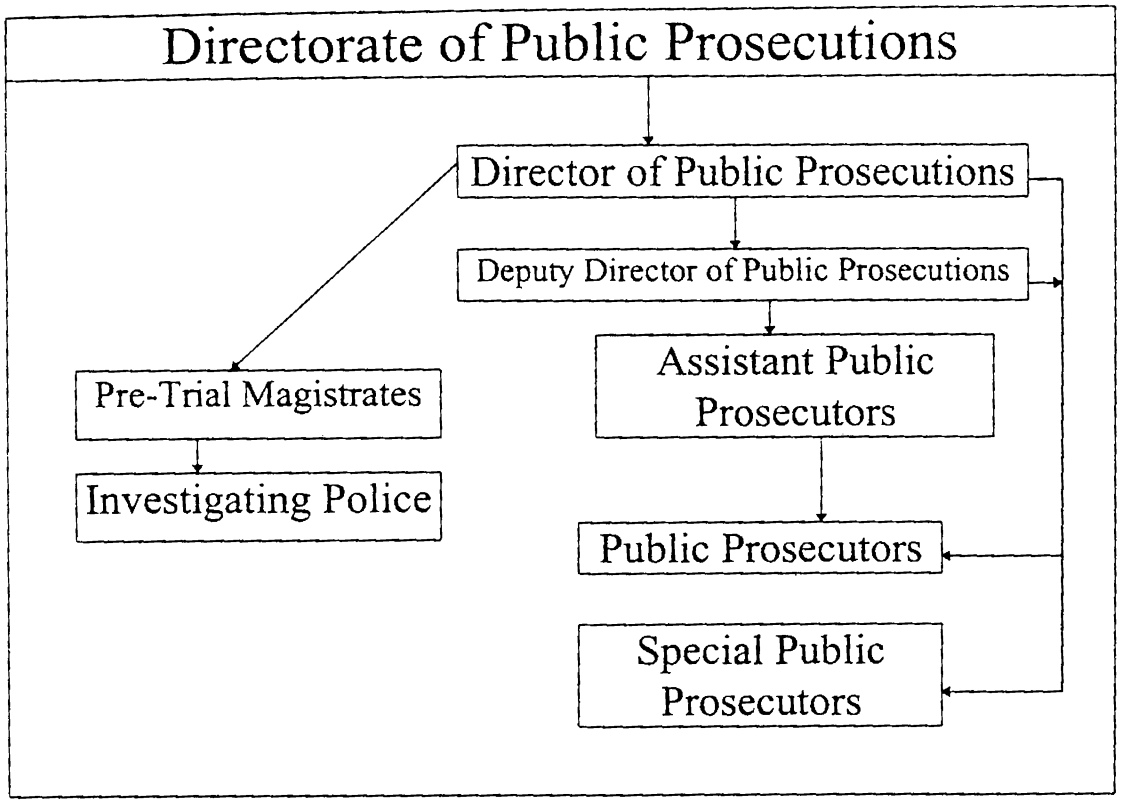

Figure 1

1. The Director of Public Prosecutions in every state should be posted on Deputation from and among the members of the serving Sub-Judges. They may have supervison and overall control of the prosecuting machinery.
2. The D.D.P. to be posted in every District who would be having immediate supervision and control of all the Public Prosecutors and the Assistant Public Prosecutors and Special Public Prosecutors. On the advice of the D.O.P. they must be deputed from the Cadre of serving sub-Judge.
3. Pre-Trial Magistrate shall be entrusted with the Prosecutorial discretion and also to do the same with the advice of the D.O.P and D.D.P. He must be a deputed Judicial Officer of First Class Magistrate Cadre.
4. Investigating Police to act only under the direction and supervision of the Pre-Trial Magistrate. A Superintendent of Police must be heading the Unit.

D.O.P. - Director of Prosecutions

D.D.P. - Deputy Director of Prosecutions

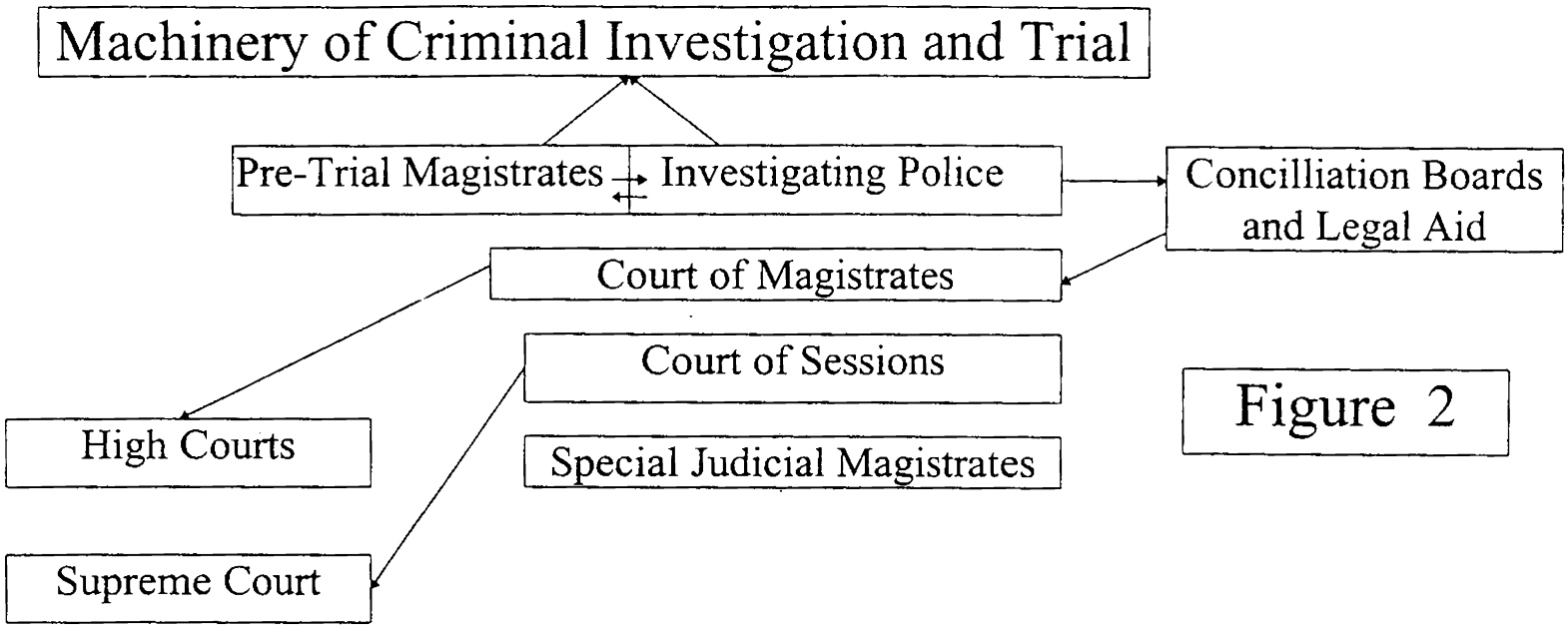

Figure 2

1. Information as to all commission of crimes irrespective of their nature to be made to the Pre-Trial Magistrates - No police to receive informations. He must be a deputationist from Judicial Department of the cadre of Judicial First Class Magistrate.
2. After receiving complaints, the Pre-Trial Magistrate to direct and assign the investigation police who will have all powers and duties as available at present in the existing system except the recording of statement of witnesses and confessions of the accused which must be done and recorded by the Pre-Trial Magistrates. The 161 Cr.P.C. statement, 164 statement, Dying Declarations to be made only to Pre-Trial Magistrate. Remand and Bails in bailable cases to be looked after by the pre-trial magistrates. After investigation and Enquiry to send for concilliation or to courts for trial - prosecut orial discretion have to be with the Pre-Trial Magistrates.
3. If there is no possibility of settling the matters through the Board of Concilliation, the matters will have to be referred to the court of Magistrates or Court of Seesions as the case may fbe for disposal according to law.
4. The Board of Cocilliation - extended with the concilliatory jurisdiction have to be entrusted with the duty of disposing of criminal cases which are all fit for concilliation. This would not only deter the criminal behaviour but also lead for a reformative and rehabitative rebirth of the accused.
5. The High Courts and the Supreme Court should be made to hear the first appeals from the courts of Mzgistrates and Sessions respectively by giving a go bye to the existing procedure. Thus the second appeals are curtailed and the Constitutional Courts burden is reduced.

QUESTIONNAIRE FOR JUDICIAL OFFICERS/PUBLIC PROSECUTORS/POLICE OFFICER/ADVOCATES

1. Name

2. Address

3. (a) Education Qualifications
   (b) Research Experience, if any -

4. Official Status, if any -

   (a) Past

   (b) Present

5. If you had worked under the French System, (especially criminal justice system) kindly indicate the total period of service and designations.

6. How are you selected?

7. Did you have any opportunity to work both the French and Indian Systems?

8. If so, kindly indicate the duties you were charged with under the respective systems.

9. Kindly given an outline of the hierarchy of courts and prosecutorial machinery then existing under the French System.

10. Were the offences classified?

    If so, indicate the different classes of offences and the mode of investigation and trial of different classes.

11. Was there any division in the police force as judicial police and non-judicial police?

12. If so kindly indicate the duties assigned to these divisions.

13. Do you think that this devision of Labour had any impact on the quality of the Investigation?

14. What do you feel about the role of the prosecutors in the then existing French System?

15. Kindly give an outline of the procedure that followed when an accusation was made against a person.

16. What were the rights of the arrested accused persons under the French System?

17. Were the accused persons permitted to be represented by a lawyer at the time of Investigation?

18. Was there right to counsel during trial.

19. Were the Defence Attorneys effective in safeguarding the interest of the Accused?

20. What was the evidentiary value of statements given to the police?

21. Kindly give a general outline of the questioning of witnesses by police.

22. People have the general impression that under the French System, protection against self incrimination has no place - some feel that the burden of proof is on the Accused. But these are denied by others. What do you think about the impressions kindly give reasons for your answers.

23. What do you think about the Public particiation in the French System? Was it adequate? Give reasons for your answer.

24. Was the scheme for civil remedies effective.

25. Do you think that judgments delivered by the French Judges were convincing?

26. Did you feel any difficulty in carrying out your duties during the period of transition? If so, kindly indicate the difficulties experienced by you?

27. Could you perceive the feelings of different functionaries when the French System was ceased out? If so what according to you was the feelings of the ordinary public on the change over?

28. Could you find any remenants of the French System now in the Judicial Administration If so, please indicate.

29. What is your impression about the percentage of convictions under the French System?

30. What do you feel about the efficacy of the respective systems?

31. Have you had any chance to be involved in any criminal case as an accused/witness.

32. If so, do you feel that you were dealt with rightly under the French System?

33. Were you punished under French System? If so do you think that you were rightly punished?

34. Have you had any chance to be involved in any criminal case as accused/witness under the present system?

35. If so, do you feel that you were dealt with rightly under the Indian System?

36. If you were involved as an accused/witness in both the system, kindly indicate your impressions on the efficacy of the respective systems in ensuring punishments/protecting the rights of the accused.

37. Do you feel that the police and prosecutor under the present system should undergo change? If so indicate your suggestions.

38. As a person who worked as police officer/prosecutor/judge/advocate under the French system, what do you feel about the introduction of the present system of criminal justice administration?

39. Do you canvass for any change? If so, what change?

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