

PAPER III
COMPARATIVE CRIMINAL PROCEDURE & PENOLOGY:
TREATMENT OF OFFENDERS

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UNIT 1.

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1.0 Objectives

After studying this unit the student will be able to understand the

1. The Hierarchy of criminal courts and their jurisdiction
2. Functioning of Nyaya Panchayats in India
3. Existing of Panchayats in tribal areas

4. Working of Organisation of prosecuting agencies for prosecuting criminals
5. Relation of Prosecutors and the police

1.1.Introduction:

According to the Constitution of India, the role of the Supreme Court is that of a federal Court, guardian of the Constitution and the highest Court of appeal.

There are 18 High Courts in the country, three having jurisdiction over more than one State. Among the Union Territories Delhi alone has a High Court of its own. Other six Union Territories come under the jurisdiction of different State High Courts.

There are district Courts in almost every district of the States and under the District Court there are Court of Session or Session Court, Court Chief Judicial Magistrate (CJM), Court of Judicial Magistrate First Class (JMFC).

The latest in the reforms in the structure of the Indian judiciary is the Gram Nyayalayas. The Gram Nyayalayas seems to be a combination of the objectives of several special courts in disparity to the regular stress on the adversarial trial.

The new enactment for the tribal people is equally important.

Public Prosecutor is an important figure in conducting cases fairly he has to be fair and take every decision without any fear or fervour.

1.2 Topic Explanation

1.2.1 Hierarchy of criminal courts and their jurisdiction

The Supreme Court of India is the highest court and is a body constituted by the Constitution itself. The High Courts of respective states are also provided by the Constitution. The other criminal courts their power and functions are provided by the Cr. P. C.

1.2.1.1. The Supreme Court of India.

The Supreme Court is the apex Court of India. It is established by Part V, Chapter IV of the Constitution. Articles 124 to 147 of the Constitution of India lay down the composition and jurisdiction of the Supreme Court of India.

The original Constitution of 1950 envisaged a Supreme Court with a Chief Justice and 7 Judges - leaving it to Parliament to increase this number. In the early years, all the Judges of the Supreme Court sat together to hear the cases presented before them. As the work of the Court increased and arrears of cases began to cumulate, Parliament increased the number of Judges from 8 in 1950 to 11 in 1956, 14 in 1960, 18 in 1978 and 26 in 1986. As the number of the Judges has increased, they sit in smaller Benches of two and three - coming together in larger Benches of 5 and more only when required to do so or to settle a difference of opinion or controversy.

The Supreme Court of India comprises the Chief Justice and 30 other Judges appointed by the President of India. Supreme Court Judges retire upon attaining the age of 65 years. In order to be appointed as a Judge of the Supreme Court, a person must be a citizen of India and must have been, for at least five years, a Judge of a High Court or of two or more such Courts in succession, or an Advocate of a High Court or of two or more such Courts in succession for at least 10 years or he must be, in the opinion of the President, a distinguished jurist. Provisions exist for the appointment of a Judge of a High Court as an Ad-hoc Judge of the Supreme Court and for retired Judges of the Supreme Court or High Courts to sit and act as Judges of that Court.¹

¹ <http://supremecourtindia.nic.in/history.htm>

The Supreme Court has original, appellate and advisory jurisdiction. Its exclusive original jurisdiction extends to any dispute between the Government of India and one or more States or between the Government of India and any State or States on one side and one or more States on the other or between two or more States, if and insofar as the dispute involves any question (whether of law or of fact) on which the existence or extent of a legal right depends. In addition, Article 32 of the Constitution gives an extensive original jurisdiction to the Supreme Court in regard to enforcement of Fundamental Rights. It is empowered to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari to enforce them.

The Supreme Court has been conferred with power to direct transfer of any civil or criminal case from one State High Court to another State High Court or from a Court subordinate to another State High Court. The Supreme Court, if satisfied that cases involving the same or substantially the same questions of law are pending before it and one or more High Courts or before two or more High Courts and that such questions are substantial questions of general importance, may withdraw a case or cases pending before the High Court or High Courts and dispose of all such cases itself. Under the Arbitration and Conciliation Act, 1996, International Commercial Arbitration can also be initiated in the Supreme Court.

The appellate jurisdiction of the Supreme Court can be invoked by a certificate granted by the High Court concerned under Article 132(1), 133(1) or 134 of the Constitution in respect of any judgement, decree or final order of a High Court in both civil and criminal cases, involving substantial questions of law as to the interpretation of the Constitution. Appeals also lie to the Supreme Court in civil matters if the High Court concerned certifies: (a) that the case involves a

substantial question of law of general importance, and (b) that, in the opinion of the High Court, the said question needs to be decided by the Supreme Court. In criminal cases, an appeal lies to the Supreme Court if the High Court (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to imprisonment for life or for a period of not less than 10 years, or (b) has withdrawn for trial before itself any case from any Court subordinate to its authority and has in such trial convicted the accused and sentenced him to death or to imprisonment for life or for a period of not less than 10 years, or (c) certified that the case is a fit one for appeal to the Supreme Court. Parliament is authorised to confer on the Supreme Court any further powers to entertain and hear appeals from any judgement, final order or sentence in a criminal proceeding of a High Court.²

1.2.1.2. The High Courts

The High Court stands at the head of a State's judicial administration. Each High Court comprises of a Chief Justice and such other Judges as the President may, from time to time, appoint. The Chief Justice of a High Court is appointed by the President in consultation with the Chief Justice of India and the Governor of the State. The procedure for appointing Judges is the same except that the Chief Justice of the High Court concerned is also consulted. They hold office until the age of 62 years and are removable in the same manner as a Judge of the Supreme Court. To be eligible for appointment as a Judge one must be a citizen of India and have held a judicial office in India for ten years or must have practised as an Advocate of a High Court or two or more such Courts in succession for a similar period.

Each High Court has power to issue to any person within its jurisdiction directions, orders, or writs including writs which are in the nature of habeas

² <http://supremecourtofindia.nic.in/jurisdiction.htm>

corpus, mandamus, prohibition, quo warranto and certiorari for enforcement of Fundamental Rights and for any other purpose. This power may also be exercised by any High Court exercising jurisdiction in relation to territories within which the cause of action, wholly or in part, arises for exercise of such power, notwithstanding that the seat of such Government or authority or residence of such person is not within those territories.

Each High Court has powers of superintendence over all Courts within its jurisdiction. It can call for returns from such Courts, make general rules and prescribe forms to regulate their practice and proceedings and determine the manner and form in which book entries and accounts shall be kept.³

1.2.1.3. Constitution of Criminal Court and their territorial jurisdiction

The criminal courts are constituted according to the Criminal Procedure Code (Cr.P.C) 1973.

Classes of Criminal Courts⁴.-

Besides the High Courts and the Courts constituted under any law, other than this Code, there shall be, in every State, the following classes of Criminal Courts, namely:-

- (i) Courts of Session;
- (ii) Judicial Magistrates of the first class and, in any metropolitan area, Metropolitan Magistrates;
- (iii) Judicial Magistrates of the second class; and
- (iv) Executive Magistrates.

Territorial divisions⁵.-

(1) Every State shall be a sessions division or shall consist of sessions divisions; and every sessions division shall, for the purposes of this Code, be a district or

³ <http://supremecourtfindia.nic.in/jurisdiction.htm>

⁴ Section 6 Cr. P. C. 1973

⁵ Section 7

consist of districts: Provided that every metropolitan area shall, for the said purposes, be a separate sessions division and district.

(2) The State Government may, after consultation with the High Court, alter the limits or the number of such divisions and districts.

(3) The State Government may, after consultation with the High Court, divide any district into sub-divisions and may alter the limits or the number of such sub-divisions.

(4) The sessions divisions, districts and sub-divisions existing in a State at the commencement of this Code, shall be deemed to have been formed under this section.

Metropolitan areas⁶.-

(1) The State Government may, by notification, declare that , as from such date as may be specified in the notification, any area in the State comprising a city or town whose population exceeds one million shall be a metropolitan area for the purposes of this Code.

(2) As from the commencement of this Code, each of the Presidency-towns of Bombay, Calcutta and Madras and the city of Ahmadabad shall be deemed to be declared under sub-section (1) to be a metropolitan area.

(3) The State Government may, by notification, extend, reduce or alter the limits of a metropolitan area but the reduction or alteration shall not be so made as to reduce the population of such area to less than one million.

(4) Where, after an area has been declared, or deemed to have been declared to be, a metropolitan area, the population of such area falls below one million, such area shall, on and from such date as the State Government may, by notification, specify in this behalf, cease to be a metropolitan area; but notwithstanding such cesser, any inquiry, trial or appeal pending immediately before such cesser before any Court or Magistrate in such area shall continue to be dealt with under this Code, as if such cesser had not taken place.

⁶ Section 8

(5) Where the State Government reduces or alters, under sub-section (3), the limits of any metropolitan area, such reduction or alteration shall not affect any inquiry, trial or appeal pending immediately before such reduction or alteration before any Court or Magistrate, and every such inquiry, trial or appeal shall continue to be dealt with under this Code as if such reduction or alteration had not taken place.

Explanation.- In this section, the expression “population” means the population as ascertained at the last preceding census of which the relevant figures have been published.

Court of Session⁷.-

(1) The State Government shall establish a Court of Session for every session division.

(2) Every Court of Session shall be presided over by a Judge, to be appointed by the High Court

(3) The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session.

(4) The Sessions Judge of one sessions division may be appointed by the High Court to be also an Additional Sessions Judge of another division, and in such case he may sit for the disposal of cases at such place or places in the other division as the High Court may direct.

(5) Where the office of the Sessions Judge is vacant, the High Court may make arrangements for the disposal of any urgent application which is, or may be, made or pending before such Court of Session by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by a Chief Judicial Magistrate, in the sessions division; and every such Judge or Magistrate shall have jurisdiction to deal with any such application.

(6) The Court of Session shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify; but, if, in any particular case,

⁷ Section 9

the Court of Session is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sittings at any other place in the sessions division, it may, with the consent of the prosecution and the accused, sit at that place for the disposal of the case or the examination of any witness or witnesses therein.

Explanation.- For the purposes of this Code, “appointment” does not include the first appointment, posting or promotion of a person by the Government to any Service, or post in connection with the affairs of the Union or of a State, where under any law, such appointment, posting or promotion is required to be made by Government.

Subordination of Assistant Sessions Judges⁸.-

(1) All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction.

(2) The Sessions Judge may, from time to time, make rules consistent with this Code, as to the distribution of business among such Assistant Sessions Judges.

(3) The Sessions Judge may also make provision for the disposal of any urgent application, in the event of his absence or inability to act, by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by the Chief Judicial Magistrate, and every such Judge or Magistrate shall be deemed to have jurisdiction to deal with any such application.

Courts of Judicial Magistrates⁹.-

(1) In every district (not being a metropolitan area), there shall be established as many Courts of Judicial Magistrates of the first class and of the second class, and at such places, as the State Government may, after consultation with the High Court, by notification, specify.

(2) The presiding officers of such Courts shall be appointed by the High Court

⁸ Section 10

⁹ Section 11

(3) The High Court may, whenever it appears to it to be expedient or necessary, confer the powers of a Judicial Magistrate of the first class or of the second class on any member of the Judicial Service of the State, functioning as a Judge in a Civil Court.

Chief Judicial Magistrate and Additional Chief Judicial Magistrate, etc¹⁰.-

(1) In every district (not being a metropolitan area), the High Court shall appoint a Judicial Magistrate of the first class to be the Chief Judicial Magistrate.

(2) The High Court may appoint any Judicial Magistrate of the first class to be an Additional Chief Judicial Magistrate, and such Magistrate shall have all or any of the powers of a Chief Judicial Magistrate under this Code or under any other law for the time being in force as the High Court may direct.

(3) (a) The High Court may designate any Judicial Magistrate of the first class in any sub-division as the Sub-divisional Judicial Magistrate and relieve him of the responsibilities specified in this section as occasion requires.

(b) Subject to the general control of the Chief Judicial Magistrate, every Sub-divisional Judicial Magistrate shall also have and exercise, such powers of supervision and control over the work of the Judicial Magistrates (other than Additional Chief Judicial Magistrates) in the sub-division as the High Court may, by general or special order, specify in this behalf.

Special Judicial Magistrates.-¹¹

(1) The High Court 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 second class, in respect to particular cases or to particular classes of cases or to cases generally, in any district, not being a metropolitan area:

¹⁰ Section 12

¹¹ Section 13

Provided that 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.

(2) Such Magistrates shall be called Special Judicial Magistrates and shall be appointed for such term, not exceeding one year at a time, as the High Court may, by general or special order, direct.

Local jurisdiction of Judicial Magistrates¹².-

(1) Subject to the control of the High Court, the Chief Judicial Magistrate may, from time to time, define the local limits of the areas within which the Magistrates appointed under section 11 or under section 13 may exercise all or any of the powers with which they may respectively be invested under this Code.

(2) Except as otherwise provided by such definition, the jurisdiction and powers of every such

Magistrate shall extend throughout the district.

Subordination of Judicial Magistrates¹³.-

(1) Every Chief Judicial Magistrate shall be subordinate to the Sessions Judge; and every other Judicial Magistrate shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Judicial Magistrate.

(2) The Chief Judicial Magistrate may, from time to time, make rules or give special orders, consistent with this Code, as to the distribution of business among the Judicial Magistrates subordinate to him.

Courts of Metropolitan Magistrates¹⁴.-

(1) In every metropolitan area, there shall be established as many Courts of Metropolitan

Magistrates, and at such places, as the State Government may, after consultation with the High Court, by notification, specify.

¹² Section 14

¹³ Section 15

¹⁴ Section 16

(2) The presiding officers of such Courts shall be appointed by the High Court

(3) The jurisdiction and powers of every Metropolitan Magistrate shall extend throughout the metropolitan area.

Chief Metropolitan Magistrate and Additional Chief Metropolitan Magistrates¹⁵.-

(1) The High Court shall, in relation to every metropolitan area within its local jurisdiction, appoint a Metropolitan Magistrate to be the Chief Metropolitan Magistrate for such metropolitan area.

(2) The High Court may appoint any Metropolitan Magistrate to be an Additional Chief Metropolitan Magistrate, and such Magistrate shall have all or any of the powers of a Chief Metropolitan Magistrate under this Code or under any other law for the time being in force as the High Court may direct.

Special Metropolitan Magistrates¹⁶.-

(1) The High Court 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 Metropolitan Magistrate, in respect to particular cases or to particular classes of cases or to cases generally, in any metropolitan area within its local jurisdiction:

Provided that 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.

(2) Such Magistrates shall be called Special Metropolitan Magistrates and shall be appointed for such term, not exceeding one year at a time, as the High Court may, by general or special order, direct.

¹⁵ Section 17

¹⁶ Section 18

(3) Notwithstanding anything contained elsewhere in this Code, a Special Metropolitan Magistrate shall not impose a sentence which a Judicial Magistrate of the second class is not competent to impose outside the Metropolitan area.

Subordination of Metropolitan Magistrates¹⁷.-

(1) The Chief Metropolitan Magistrate and every Additional Chief Metropolitan Magistrate shall be subordinate to the Sessions Judge; and every other Metropolitan Magistrate shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Metropolitan Magistrate.

(2) The High Court may, for the purposes of this Code, define the extent of the subordination, if any, of the Additional Chief Metropolitan Magistrates to the Chief Metropolitan Magistrate.

Executive Magistrates¹⁸.-

(1) In every district and in every metropolitan area, the State Government may appoint as many persons as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate.

(2) The State Government may appoint any Executive Magistrate to be an Additional district Magistrate, and such Magistrate shall have all or any of the powers of a District Magistrate under this Code or under any other law for the time being in force.

(3) Whenever, in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the executive administration of the district, such officer shall, pending the orders of the State Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate.

(4) The State Government may place an Executive Magistrate in charge of a sub-division and may relieve him of the charge as occasion requires; and the

¹⁷ Section 19

¹⁸ Section 20

Magistrate so placed in charge of a sub-division shall be called the Sub-divisional Magistrate.

(5) Nothing in this section shall preclude the State Government from conferring, under any law for the time being in force, on a Commissioner of Police, all or any of the powers of an Executive Magistrate in relation to a metropolitan area.

Special Executive Magistrates¹⁹ .-

The State Government may appoint, for such term as it may think fit, Executive Magistrates, to be known as Special Executive Magistrates for particular areas or for the performance of particular functions and confer on such Special Executive Magistrates such of the powers as are conferrable under this Code on Executive Magistrates, as it may deem fit.

Local jurisdiction of Executive Magistrates²⁰ .-

(1) Subject to the control of the State Government, the District Magistrate may, from time to time, define the local limits of the areas within which the Executive Magistrates may exercise all or any of the powers with which they may be invested under this Code.

(2) Except as otherwise provided by such definition, the jurisdiction and powers of every such Magistrate shall extend throughout the district.

Sub ordination of Executive Magistrates²¹ .-

(1) All Executive Magistrates, other than the Additional District Magistrate, shall be subordinate to the District Magistrate, and every Executive Magistrate (other than the Sub-divisional Magistrate) exercising powers in a sub-division shall also be subordinate to the Sub-divisional Magistrate, subject, however, to the general control of the District Magistrate.

(2) The District Magistrate may, from time to time, make rules or give special orders, consistent with this Code, as to the distribution of business among the

¹⁹ Section 21

²⁰ Section 22

²¹ Section 23

Executive Magistrates subordinate to him and as to the allocation of business to an Additional District Magistrate.

1.2.2. Nyaya Panchayats in India:

The Gram Nyayalayas Act was passed in January 2009 (got President's assent on 7 January 2009) to provide for the establishment of Gram Nyayalayas at the grass roots level for the purpose of providing access to justice to the citizens at their doorsteps and to ensure that opportunities for securing justice are not denied to any citizen by reason of social, economic or other disabilities and for matters connected therewith or incidental thereto.

The 114th Law Commission of India back in 1986 proposed the Gram Nyayalaya as a different court. The report recommended the concept of the Gram Nyayalaya had two objectives. While addressing the pendency in the subordinate courts was the major objective, the other objective was the introduction of a participatory forum of justice. To make it participatory the Law Commission recommended that the Magistrate be accompanied by two lay persons who shall act as Judges, that the legal training of the Magistrate will be complemented by the knowledge of the lay persons who would bring in the much required socio-economic dimension to adjudication. It was proposed that such a model of adjudication will be best suited for rural litigation. However the participatory aspect has been set aside in the current Act and we find the Gram Nyayalaya manned by the regular Judicial First Class Magistrate. The Law Commission also observed that such a court would be ideally suited for the villages as the nature of disputes coming before such a court would be 'simple', 'uncomplicated' and obviously would be easy for solution and that such disputes should not be trapped in procedural claptrap.

This act extends to whole of India except the State of Jammu and Kashmir, the State of Nagaland, the State of Arunachal Pradesh, and the State of Sikkim and to the tribal areas of the country. The Tribal area under this act

means the area specified in Part I, II, IIA, and III of the table below paragraph 20 of the sixth Schedule to the Constitution within the State of Assam, the State of Meghalaya, the State of Tripura and the State of Mizoram, respectively.

Establishment of Gram Nyayalaya

The State Government shall, after consultation with the High Court establish one or more gram Nyayalaya for every Panchayat. Such establishments shall be in addition to the 'courts established under any other law for the time being in force'. The State Government shall, in accordance with this act specify the local limits of the area of jurisdiction, as well as increase or reduce or alter such limits of a Gram Nyayalaya.

The Nyayadhikari, shall preside the matters of dispute in the Gram Nyayalaya, and shall be appointed in consultation with the High Court. Any person eligible to be appointed as a judicial magistrate of first class shall be qualified to be appointed as Nyayadhikari. It is specifically mentioned in the act that appropriate representation shall be given to the members of Schedule Castes, the Scheduled Tribes, women and such other communities as may be specified in the notification by the State Government. Also the salary and other allowances and the terms and conditions of services shall be as of the Judicial Magistrate first class.

The Nyayadhikari shall not preside in the matters which he has interest or is otherwise involved or is related to any party to such proceedings. If it is so he shall refer the matter to the District Court or Court of Sessions, which shall subsequently transfer the matter to other Nyayadhikari. It shall be the duty of the Nyayadhikari periodically the village under his jurisdiction and conduct trials or proceedings. If the Gram Nyayalaya decides to hold mobile courts outside its headquarters it shall give wide publicity as to the date and place where it proposes to hold mobile court.

Jurisdiction of Gram Nyayalaya. –

The Gram Nyayalaya shall exercise both civil and criminal jurisdiction in the manner and to the extent provided under this Act. And act according to the Code of Criminal Procedure, 1973 or the Code of Civil Procedure, 1908 or any other law for the time being in force.

The Gram Nyayalaya may take cognizance of an offence on a complaint or on a police report and shall-

- (a) try all offences specified in Part I of the First Schedule; and
- (b) try all offences and grant relief, if any, specified under the enactments included in Part II of that Schedule.
- (c) shall also try all such offences or grant such relief under the State Acts which may be notified by the State Government under sub-section (3) of section 14.

At the end of the trial, if the decision is not by consensus between the parties, the Presiding Judge shall draw a brief statement of the dispute, the evidence led, the decision and the reasons in support of the decision. It shall be signed by all the three Judges. In the event of a difference of opinion, the decision of the majority will be binding. On a question of law, the view expressed by the Presiding Judge shall be binding on the lay Judges.

If the *Gram Nyayalaya* finds that it has no jurisdiction, it may make over the case to the District Court having jurisdiction for transfer of the case to the Court having jurisdiction.

As a first step, it is advisable to retain the procedure prescribed in the Code of Criminal Procedure, 1973 for trial of offences before the *Gram Nyayalaya*. An attempt, however, should be made to devise a still simpler procedure which may stand the test of Article 21 of the Constitution. The Evidence Act as such *stricto sensu* would not apply.

The parties appearing before the *Gram Nyayalaya* will be entitled to appear through lawyers of their desire both in civil and criminal proceedings. But the *Gram Nyayalaya* shall not adjourn the case, or change the venue, to accommodate the lawyer. The proposed National Legal Services Act should assign two lawyers to be attached to each *Gram Nyayalaya* who would be independent of party influence and who would assist as court officers in disposal of the disputes, and also would be readily available to the parties if they so desire.

The *Gram Nyayalaya* will have power to :

- (a) enforce the attendance of any person and examine him on oath;
- (b) compel the production of documents and material objects;
- (c) issue commissions for the examination of witnesses or if the witness is unable to appear before it on account of physical incapacity; and
- (d) do such other things as may be prescribed.

The proceedings before the *Gram Nyayalaya* shall be conducted in the State language permitting the dialect of the locality to be used. Records shall be maintained in the State language and copies shall be furnished to those who desire the same. The decision shall be, if not by consent of the parties, recorded in the language of the court. No court fee shall be levied in the proceedings before the *Gram Nyayalaya*.

No appeal would lie against any decision of the *Gram Nyayalaya* except the one in which at the end of a criminal trial a substantive sentence is imposed. A revision petition would lie to the District Court of the district in which the *Gram Nyayalaya* is functioning. Only errors of law can be corrected by this revisional forum. Even if it comes to the decision that another view is possible, it would have no jurisdiction to interfere with the decision of the *Gram Nyayalaya*. A decision by peers should not be interfered with by a court presided over by a Judge considering the matter from a purely technical legal approach.

An appeal would lie to the Sessions Court against the decision by a *Gram Nyayalaya* in a criminal case in which a substantive sentence of imprisonment has been imposed. The appeal would be both on questions of fact and of law. The appeal should be dealt with according to the provisions of the Code of Criminal Procedure applicable to the appeals entertained against the decision of a Judicial Magistrate, First Class. Any other view is likely to infringe Article 21 of the Constitution.

The jurisdiction of the *Gram Nyayalaya* is exclusive to the extent that in respect of matters covered by the jurisdiction conferred on the *Gram Nyayalaya*, the jurisdiction of any other court is ousted; such jurisdiction is not optional.

A simple method for execution of its orders must be provided for. The nature of the execution would depend upon the relief granted by the decision of the *Gram Nyayalaya*. Depending upon the relief granted, the fruits must be made available forthwith or soon thereafter. No prayer for granting interim stay till the party aggrieved by the decision prefers a revision petition should be entertained.

All authorities — revenue, police, forest — operating at village and Tehsil level should be put under an obligation to assist the *Gram Nyayalaya* in discharging its functions and performing its duties. Failure on their part shall be treated as misconduct, and a *Gram Nyayalaya* should be empowered to take effective action against such defaulting authority.

For a uniform pattern of functioning of the *Gram Nyayalayas*, a simple code may have to be drawn up by the State Government in consultation with the High Court.

A liaison officer with a legal background should be appointed and attached to each *Gram Nyayalaya*. It shall be his duty to move around the villages regularly and as soon as he comes across violation of individual or group rights, on their behalf, take recourse to the court. A statutory provision

shall be made not permitting his *locus standi* to be questioned by the party against whom the action is commenced.

Every *Gram Nyayalaya* will be furnished with a copy of a list drawn up by the State Government of non-governmental voluntary organisations operating in rural areas. The *Gram Nyayalaya* may enlist their help in reconciliation proceedings before resorting to adjudication. The list may also be useful in selecting the panel of lay Judges. This will make the participatory process far more effective.

The treble objects behind devising this new forum for resolution of disputes at grass-root level is to provide a participatory system of justice; expeditious disposal of disputes; and justice taken to the doorstep of the people.

Salient Features Gram Nyayalaya Act, 2008

- *Gram Nyayalayas* are aimed at providing inexpensive justice to people in rural areas at their doorsteps;
- The *Gram Nyayalayas* shall be court of Judicial Magistrate of the first class and its presiding officer (Nyayadhikari) shall be appointed by the State Government in consultation with the High Court;
- The *Gram Nyayalayas* shall be established for every Panchayat at intermediate level or a group of contiguous Panchayats at intermediate level in a district or where there is no Panchayat at intermediate level in any State, for a group of contiguous Panchayats;
- The Nyayadhikaris who will preside over these *Gram Nyayalayas* are strictly judicial officers and will be drawing the same salary, deriving the same powers as First Class Magistrates working under High Courts;
- The *Gram Nyayalaya* shall be a "Mobile Court" and shall exercise the powers of both Criminal and Civil Courts;
- The seat of the *Gram Nyayalaya* will be located at the headquarters of the intermediate Panchayat, they will go to villages, work there and dispose of the cases;

- The *Gram Nyayalaya* shall try criminal cases, civil suits, claims or disputes which are specified in the First Schedule and the Second Schedule to the Act;
- The Central Government as well as the State Governments have been given power to amend the First Schedule and the Second Schedule of the Act, as per their respective legislative competence;
- The *Gram Nyayalaya* shall follow summary procedure in criminal trial;
- The *Gram Nyayalaya* shall exercise the powers of a Civil Court with certain modifications and shall follow the special procedure as provided in the Act;
- The *Gram Nyayalaya* shall try to settle the disputes as far as possible by bringing about conciliation between the parties and for this purpose, it shall make use of the conciliators to be appointed for this purpose;
- The judgment and order passed by the *Gram Nyayalaya* shall be deemed to be a decree and to avoid delay in its execution, the *Gram Nyayalaya* shall follow summary procedure for its execution;
- The *Gram Nyayalaya* shall not be bound by the rules of evidence provided in the Indian Evidence Act, 1872 but shall be guided by the principles of natural justice and subject to any rule made by the High Court;
- Appeal in criminal cases shall lie to the Court of Session, which shall be heard and disposed of within a period of six months from the date of filing of such appeal;
- Appeal in civil cases shall lie to the District Court, which shall be heard and disposed of within a period of six months from the date of filing of the appeal;
- A person accused of an offence may file an application for plea bargaining.

1.2.3. Panchayats in tribal areas:

Village level democracy became a real prospect for India in 1992 with the 73rd amendment to the Constitution, which mandated that resources, responsibility and decision making be passed on from central government to the lowest unit of the governance, the Gram Sabha or the Village Assembly. A three tier structure of local self-government was envisaged under this amendment.

Since the laws do not automatically cover the scheduled areas, the Panchayat (extension to the scheduled areas) Act hereinafter to be referred as PESA act was in acted on 24 December 1996 to enable Tribal Self Rule in these areas. The Act extended the provisions of Panchayats to the tribal areas of nine states that have Fifth Schedule Areas. Most of the North eastern states under Sixth Schedule Areas (where autonomous councils exist) are not covered by PESA, Act as these states have their own Autonomous councils for governance. The nine states with Fifth Schedule areas are: Andhra Pradesh, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, Maharashtra, Madhya Pradesh, Orissa and Rajasthan.

The PESA Act gives radical governing powers to the tribal community and recognizes its traditional community rights over local natural resources. It not only accepts the validity of “customary law, social and religious practices, and traditional management practices of community resources”, but also directs the state governments not to make any law which is inconsistent with these. Accepting a clear-cut role for the community, it gives wide-ranging powers to Gram Sabhas, which had hitherto been denied to them by the lawmakers of the country.

Gram Sabha are endowed specifically with the following powers-

- (i) the power to enforce prohibition or to regulate or restrict the sale and consumption of any intoxicant;
- (ii) the ownership of minor forest produce;

- (iii) the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribes;
- (iv) the power to manage village markets by whatever name called;
- (v) the power to exercise control over money lending to the Scheduled Tribes;
- (vi) the power to exercise control over institutions and functionaries in all social sectors;
- (vii) the power to control over local plans and resources for such plans including tribal sub-plans;

Rights of Indigenous People

“Indigenous people around the world have sought recognition of their identities, their ways of life and their right to traditional lands, territories and natural resources; yet throughout history, their rights have been violated.” United Nations Permanent Forum on Indigenous Issues, October 2006

In last six decades India has achieved significant milestones in the areas of economic growth, cultural assimilation and global political interests. However, within the purview of development the tribal affairs have been shoved under the shelf to serve the vested interest of some. The poor tribes have been made to feel like aliens in their own indigenous lands. Over the decades the process of development has frequently led to a progressive erosion of their traditional rights over their land resources including the forests. This can be aptly ascribed to the lacunae in the laws, faulty implementation, and rapacious exploitation by the unscrupulous traders, money-lenders, etc.

Constitution and the Tribal

In India most of the tribes are collectively identified under Article 342 (1&2) as Scheduled Tribes and right to self-determination guaranteed by Part X : The

Scheduled and Tribal Areas – Article 244: Administration of Scheduled Areas and Tribal Areas.

(1). The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State (other than the states of Assam, Meghalaya, Tripura and Mizoram).

(2). The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam, Meghalaya, Tripura and Mizoram.

The Indian Constitution is supposed to protect tribal interests, especially tribal autonomy and their rights over land, through Fifth and Sixth Schedules. Scheduled Areas of Article 244(1) are notified as per the Fifth Schedule and Tribal Areas of Article 244(2) are notified as per the Sixth Schedule. Sixth Schedule contains provisions as to the administration of tribal areas in the states of Assam, Meghalaya, Tripura and Mizoram. This law gives enormous freedoms to the autonomous regions and districts in terms of legislative and executive power. The law notes that each autonomous region shall have its own autonomous Regional Council and every autonomous district its own autonomous District Council.

The Panchayats (Extension to the Scheduled Areas) Act, 1996.

This is an Act to provide for the extension of the provisions of Part IX of the Constitution relating to the Panchayats to the Scheduled Areas, enacted by Parliament in the Forty-seventh Year of the Republic of India.

In this Act, unless the context otherwise requires, “Scheduled Areas” means the Scheduled Areas as referred to in Clause (1) of Article 244 of the Constitution.

Extension of part IX of the Constitution

The provision of Part IX of the Constitution relating to Panchayats is hereby extended to the Scheduled Areas subject to such exceptions and modifications as are provided in Sec. 4.

Exceptions and modifications to part IX of the Constitution

Notwithstanding anything contained under Part IX of the Constitution, the Legislature of a State shall not make any law under that Part which is inconsistent with any of the following features, namely:-

(a) a State legislation on the Panchayats that may be made shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources;

(b) a village shall ordinarily consist of a habitation or a group of habitations or a hamlet or a group of hamlets comprising a community and managing its affairs in accordance with traditions and customs;

(c) every village shall have a Gram Sabha consisting of persons whose names are included in the electoral rolls for the Panchayat at the village level;

(d) every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution;

(e) every Gram Sabha shall

i. approve of the plans, programmes and projects for social and economic development before such plans, programmes and projects are taken up for implementation by the Panchayat at the village level;

ii. be responsible for the identification or selection of persons as beneficiaries under the poverty alleviation and other programmes;

(f) every Panchayat at the village level shall be required to obtain from the Gram Sabha a certification of utilisation of funds by that Panchayat for the plans, programmes and projects referred to in clause(e);

(g) the reservation of seats in the Scheduled Areas at every Panchayat shall be in proportion to the population of the communities in that Panchayat for whom reservation is sought to be given under Part IX of the Constitution;

Provided that the reservation for the Scheduled Tribes shall not be less than one-half of the total number of seats; Provided further that all seats of

Chairpersons of Panchayats at all levels shall be reserved for the Scheduled Tribes;

(h) the State Government may nominate persons belonging to such Scheduled Tribes as have no representation in the Panchayat at the intermediate level or the Panchayat at the district level:

Provided that such nomination shall not exceed one-tenth of the total members to be elected in that Panchayat;

(i) the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before re-settling or rehabilitating persons affected by such projects in the Scheduled Areas; the actual planning and implementation of the projects in the Scheduled Areas shall be coordinated at the State level;

(j) planning and management of minor water bodies in the Scheduled Areas shall be entrusted to Panchayats at the appropriate level;

(k) the recommendations of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory prior to grant of prospecting licence or mining lease for minor minerals in the Scheduled Areas;

(l) the prior recommendation of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory for grant of concession for the exploitation of minor minerals by auction;

(m) while endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with-

(i) the power to enforce prohibition or to regulate or restrict the sale and consumption of any intoxicant;

(ii) the ownership of minor forest produce;

- (iii) the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe;
- (iv) the power to manage village markets by whatever name called;
- (v) the power to exercise control over money lending to the Scheduled Tribes;
- (vi) the power to exercise control over institutions and functionaries in all social sectors;
- (vii) the power to control over local plans and resources for such plans including tribal sub-plans;
- (n) the State Legislations that may endow Panchayats with powers and authority as may be necessary to enable them to function as institutions of self-government shall contain safeguards to ensure that Panchayats at the higher level do not assume the powers and authority of any Panchayat at the lower level or of the Gram Sabha;
- (o) the State Legislature shall endeavor to follow the pattern of the Sixth Schedule to the Constitution while designing the administrative arrangements in the Panchayats at district levels in the Scheduled Areas.

Continuance of existing laws on Panchayats:

Notwithstanding anything in Part IX of the Constitution with exceptions and modifications made by this Act, any provision of any law relating to Panchayats in force in the Scheduled Areas, immediately before the date on which this Act receives the assent of the President, which is inconsistent with the provisions of Part IX with such exceptions and modifications shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until the expiration of one year from the date on which this Act receives the assent of the President;

Provided that all the Panchayats existing immediately before such date shall continue till the expiration of their duration unless sooner dissolved by a resolution passed to that effect by the Legislative Assembly of that State or, in

the case of a State having Legislative Council, by each House of the Legislature of that State.

1.2.4. Organisation of prosecuting agencies for prosecuting criminals

“the purpose of a criminal trial is not to support at all costs a theory but to investigate the offence and to determine the fault or innocence of the accused and the duty of the Public Prosecutor is to represent not the police but the Crown and his duty should be discharged by him fairly and fearlessly and with full sense of responsibility that attaches to his position.”

- Patna High Court in *Kunja Subidhi and anr. vs. Emperor* (30 Cr.L.J. 1929)

The criminal justice system in India is responsible for prosecution of offenders on behalf of Victims. Victim has Right to a fair trial. In criminal justice system the prosecutor plays important role in a trial. A special feature of the administration of justice in the field of criminal law is that only a Public Prosecutor can prosecute the case against an accused. This is reflected in the mandate contained in section 225 of the Code of Criminal Procedure. There is no exception to this rule. Any private counsel engaged by the injured, or any advocate briefed by the relatives of the deceased however influenced they may be, is not entitled to conduct the prosecution in the sessions cases.

Public prosecutor is defined in section 2(u) of the Code as ‘any person appointed under section 24 and includes any person acting under the direction of the Public Prosecutor. Thus a special Public Prosecutor also would be a Public Prosecutor in respect of a particular case or a class of cases for which he is appointed.

Law Commission of India in its 14th report on judicial administration while dealing with the subject of prosecution agency made certain

recommendations in Para 12 of Ch XXXV of Vol.11, relevant extracts are reproduced below-

‘It is obvious that by the very fact of that being members of the police force and the nature of duties they have to discharge like bringing a case to Court, it is not possible for them to exhibit that degree of detachment which is necessary in a prosecutor. It is to be remembered that their promotion in the department depends upon the number of convictions they are able to obtain as prosecuting officers. We therefore suggest that as a first step towards improvement, the prosecuting agency should be completely separated from the police department. These recommendations of the law commission were accepted by the Central Government and the parliament by enacting the Code of Criminal Procedure 1973 (Act 8 of 1974) made the necessary provision in Section 24 and 25 of Cr.P.C.

1.2.4.1. Prosecutors and the police

Various Courts have held that the prosecution and the police are completely different agencies and neither should control the other. Simply put, the prosecution cannot be part of the investigation and the police cannot direct or be part of the prosecution. During the investigation stage, and till the filing of charge-sheet, the investigating agency is in control of the proceedings. Once the charge-sheet has been filed in the Court, the Public Prosecutor (PP) takes over. However given that both are to play complementary roles in the justice system, it is clear that there needs to be an effective and efficient working relationship between the two agencies, e.g. the advice of the PP can and should be sought by the police before filing the charge-sheet. This working relationship, however, cannot be an argument for control of the prosecution by the police - a situation that existed till 1973 when the Criminal Procedure Code was amended.

Prior to independence there was no requirement for the PP to be a lawyer, and the posts were generally held by police officers. This system worked in a

colonial state where the prosecutors were crucial in suppressing and criminalizing the struggle for independence. Various reports of the Law Commission in 1958 and 1969 recommended the setting up of an independent prosecution agency. While this was not completely heeded by the Government, in the new Cr.P.C. w.e.f April 1974, the PP was required to be an advocate with a minimum of seven years practice.

Public Prosecutors²².- (1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor for conducting, in such Court, any prosecution, appeal or other proceeding on behalf of the Central or State Government, as the case may be.

(2) For every district the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district.

(3) 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 as the Public Prosecutor or Additional Public Prosecutor for the district.

(4) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears on the panel of names prepared by the District Magistrate under sub-section (3).

(5) A person shall only be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) or sub-section (2), if he has been in practice as an advocate for not less than seven years.

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

²² Section 24

Assistant Public Prosecutors²³.- (1) The State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the Courts of Magistrates.

(2) Save as otherwise provided in sub-section (3), no police officer shall be eligible to be appointed as an Assistant Public Prosecutor.

(3) Where no Assistant Public Prosecutor is available for the purposes of any particular case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor in charge of that 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.

1.2.4.2. Withdrawal of prosecution.

Under Section 321 Cr.P.C. the public prosecutor has the power to withdraw a case at any time before the judgement is pronounced. There is no clear indication in the Code however as to how this power is to be exercised. Case law has indicated that while the power to withdraw can be exercised by the PP only on the request of the State government or complainant, the decision whether to withdraw or not is only that of the PP and cannot be delegated to any other - including the State government.

The full bench of the Kerala High Court in *Deputy Accountant General Vs State of Kerala*²⁴ held that by incorporating the section in the statute book the legislature gave a wide power to the public prosecutor to withdraw an accused from the prosecution. When the parliament conferred the wide discretion envisaged under section 321 of Code on a Public Prosecutor a special confidence has been reposed in his high office that the discretion would not be

²³ Section 25

²⁴ AIR 1970 Cr. L.J. 966

exercised unfairly or defeating the administration of the criminal justice. Hence the prosecutor should apply his mind independently and must be fair to the accused also.

It has been the consistent policy of the appellate Courts that it is the prerogative of the public prosecutor to recommend withdrawal of prosecution. Indeed, this prerogative right is to be exercised with the permission of the Court. And it is the impression, having regard to the case law, that if the public prosecutor comes up with the proposal of withdrawal independently, i.e., without being influenced by the government, the Court may grant permission. In *Sheonandam Paswan v. State of Bihar*²⁵ and in *Mohd. Mumtaz v. Nandini Satpathy*²⁶, the Supreme Court ruled that the public prosecutor can withdraw a prosecution at any stage and that the only limitation is the requirement of the consent of the Court. Even when reliable evidence has been adduced to prove the charges, the public prosecutor can seek the consent of Court to withdraw prosecution. The Court specifically ruled that it should be seen whether application for withdrawal is made in good faith, in the interests of public policy and justice and not to thwart or to stifle the process of law.

1.3 Questions for Self learning :

- 1 Discuss the Hierarchy of criminal courts and their jurisdiction in India.
- 2 How does the Nyaya Panchayats in India Function?
- 3 Is the existence of Panchayats in tribal areas healthy for our judicial system?
- 4 How does the organisation of prosecuting agencies for prosecuting criminals work?
- 5 Do the Prosecutors and the police work together? Why?
- 6 What kind of jurisdiction does the Supreme Court have?

²⁵ AIR 1987 SC 877

²⁶ AIR 1987 SC 863

- 7 Name the three High Courts having jurisdiction over more than one State.
- 8 What is power function and jurisdiction of the District Court?
- 9 Which matters are tried with CJM Court?
- 10 What are the powers of JMFC?
- 11 Which the highest authority of prosecution?
- 12 What is the role of a Public Prosecutor?

1.4. Let us sum up

The Supreme Court and the High Courts of respective states are provided by the Constitution. The other criminal courts are provided by the Cr. P. C. It is important to have a systematic divisions so that there is no confusion with respect to the hierarchy of courts, jurisdiction, power and functions. Besides the Courts there is also provision of Nyaya Panchayats in India as well as Panchayats in tribal area. This is because the promise of the constitution to every citizen that the justice will be done, and it will be fair. And therefore for smooth conduction of the courts Public Prosecutors are appointed so that the criminals are booked and innocent is protected.

1.5. Glossary

1. Court: the entity created by law to do justice.
2. Tribal area: The Cr. P. C. is not applicable but the government of the respective state may make it applicable.
3. The Criminal Procedure Code: law of procedure, it is not a penal enactment, it lays down the procedure to be followed under any enactment having penal provisions.

1.6. References

1. Ratanlal and Dhirajlal, *the Code of Criminal Procedure*, Wadhawa and co.,17th edition 2002 reprint 2003.
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UNIT 2.

Pre-trial Procedure.

2.0 Objectives

2.1. Introduction

2.2 Topic Explanation

2.2.1 Arrest and questioning of the accused.

2.2.2 The rights of the accused

2.2.3 The evidentiary value of statements/ article seized/ collected by the police

2.2.4 Rights to counsel

2.2.5. Role of the prosecutor and the judicial officer in investigation

2.3 Questions for Self learning

2.4. Let us sum up

2.5. Glossary

2.6. References

2.0.Objectives

After studying this unit the student will be able to.....

1. Understand the law related to arrest and questioning of the accused.
2. The rights of the accused
3. The evidentiary value of statements/ article seized/ collected by the police
4. The rights of accuses to counsel
5. Role of the prosecutor and the judicial officer in investigation

2.1. Introduction

Arrest involves restriction of liberty of a person arrested and therefore, infringes the basic human rights of liberty. Nevertheless the Constitution of India as well as International human rights law recognises the power of the State to arrest any person as a part of its primary role of maintaining law and order. The

Constitution requires a just, fair and reasonable procedure established by law under which alone such deprivation of liberty is permissible.

Although Article 22(1) of the Constitution provides that every person placed under arrest shall be informed as soon as may be the ground of arrest and shall not be denied the right to consult and be defended by a lawyer of his choice and S.50 of the Code of Criminal Procedure, 1973 (Cr. PC) requires a police officer arresting any person to “forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest”. In actual practice these requirements are observed more in the breach.

2.2 Topic Explanation

2.2.1 Arrest and questioning of the accused.

Though not defined in any law in India; however, the term arrest is ‘*an apprehension of a person by legal authority resulting in deprivation of his liberty*’. In English law, arrest consists of the actual ‘seizure’ or ‘touching of a person’s body’ with a view to his detention. Supreme Court has defined the term arrest, in *State of Punjab v. Ajaib Singh*²⁷, as it appears in Article 22 of the Constitution of India- ‘*indicating physical restraint of a person under the authority of the law in respect of an alleged accusation or default or violation of the law.*’

Arrest may be affected with warrant or without warrant. Arrest with warrant is dealt with in chapter –VI under sections 70 to 81 of Cr.P.C. so, the scope of the present chapter is broadly confined to arrest without warrant. The following officers/personnel are empowered to arrest without warrant Viz.

- (A) Any Police officer ,
- (B) The officer-in-Charge of a Police Station

²⁷ AIR 1953 SC 10

- (C) Private person
- (D) Magistrate
- (E) Armed force Personnel.

(A) Any Police Officer, of whatever rank, may without an Order from a Magistrate and without a warrant, a person on fulfilment of the conditions laid down in section, 41,42, 123 (6), 151 and 432 (3) of Cr. P. C.

(1) Under Section 41 (i);

(a) any person concerned in cognizable offence or against whom reasonable complaint made or credible information received or reasonable suspicion exists.

(b) any person having implement of house of house breaking without excuse.

(c) any proclaimed offender.

(d) any person suspected to be in possession of stolen property.

(e) any person who obstructs a police officer on duty , or who has escaped or attempts to escape from custody.

(f) any deserter from Army , Navy or Air Force .

(g) for commission of offence outside India , if it is an offence in India .

(h) any released convict committing a breach of rule made under section 356 (5) Cr.P.C.

(i) for whose arrest requisition has been received from another police officer.

(2) Under section 42, when a non – conizable offence is being committed by the accused in his view and the accused refuses to give his name and address or gives a false name or address.

(3) Under section 123 (6), when the person released violates the condition of releases .

(4) Under section 151, to prevent the commission of a cognizable offence, if designed by the person.

(5) Under section 432 (3), any person whose suspension of remission of sentence has been cancelled by State Govt.; owing to his failure to fulfil any condition.

(6) Under the Local and Special Laws which authorize the arrest without warrant, e.g. U/s 34 of the police Act 1861, U/S 64 of the Forest Act 1927, U/S 20 of the Arms Act 1959, U/S 30 of the Explosive Act 1884, U/S 59 (2) and 3 of the Delhi Police Act 1978, U/S 14 of the Foreigners Act, 1946 and U/S 128 of the Motor Vehicles Act 1939.

As per the Criminal Procedure Code of India, the person can be arrested under following grounds, The Code of Criminal Procedure, 1973 [as amended by the Criminal Law (Amendment) Act, 2005, the Code of Criminal Procedure (Amendment) Act, 2005], confers wide powers on the police to arrest, with or without warrant, interrogate and search, seize property, record statements of witnesses, get confession recorded by a Magistrate, etc. The police exercises all such powers in the course of investigation of crimes (SS 154 to 173 of the Code) or in the course of general law and order maintenance function.

Investigation powers of the police can arise in any of the three ways:

(a) on receiving information relating to the commission of a cognizable offence from an informant (Under S. 154(1)),

(b) on receiving order from any magistrate to investigate (Under S. 156(3)), and

(c) on receiving information from any source about commission of a cognizable offence within his jurisdiction (Under S. 156(1)).

Since the power to arrest entails serious infringement with the physical liberty of a person, there are several provisions under the Cr. P.C. for guiding it, such as Ss. 41 to 60, S. 151, etc. These provisions not only empower the police but also provide the necessary inbuilt safeguards against abuse of power of arrest as contained in S. 50 (arrestee to be informed of ground of arrest and of right to bail), S.50A (obligation to inform about the arrest and place of detention to a

nominated person), S.54 (medical examination on the request of the arrestee), S. 56 (arrestee to be brought before a magistrate or a Police Officer without undue delay) S.57 (arrestee to be produced before a judicial authority within twenty four hours) and S.59 (arrestee to be discharged only by an appropriate judicial order), etc. Like the power of arrest the police are conferred with the power to interrogate, search and the seizure the property involved in criminal design. Power to interrogate witnesses can be exercised in the pre-arrest stage under Ss. 160, 161 and 162 or in the post-arrest stage either in police custody or in the judicial custody. Similarly, search and seizure may be conducted in terms of general provisions under Ss. 93-105 or special powers of search and seizure after arrest under Ss. 51-52 of the Code

2.2.2 The rights of the accused

While effecting arrest, the enforcement authority *shall not*:

1. Arrest a person without warrant, unless there is a reasonable satisfaction about the person's involvement in a cognizable offence. Ss.41 Cr.P.C.
2. Arrest a person u/s 151 Cr. P.C, to prevent the commission of cognizable offence, unless the officer concerned has a knowledge of design of such person to commit any cognizable offence and it appears to such officer that the commission of the offence cannot otherwise be prevented. S.151
3. When a person is arrested without warrant, the officer may handcuff the accused only if he is satisfied that it is necessary to do so, and he may do so only till the accused is taken to the police station and thereafter his production before the Magistrate. Any use of fetters thereafter can only be under the orders of the Magistrate. *Citizens for Democracy v State of Assam (1995) 3 SCC 743*
4. Use more force than is necessary to restrain of the Const. an arrested person. S.49 Cr. P.C and Art. 21 of Constitution.

5. Perform public display or parade the person & arrested at any cost. Art. 5 of the Universal Declaration of Human Rights, 1948. Art. 10 Of the International Covenant on Civil & Political Rights, 1966.

While effecting arrest, the enforcement authority shall:

1. Ensure that no person is deprived of his/her right to life or personal liberty, except in accordance with a procedure established by law. Art. 21 of the Constitution.

2. Ensure that the arrestee is informed of the full particulars or the grounds for arrest Art. 22 (1) of the Constitution.

3. Ensure that no person is denied the right to consult and be defended by a legal practitioner of his/her choice. S.50 A (1) Cr. P. C

4. Ensure that the accused is produced before the nearest Magistrate within 24 hours, excluding the time taken for travelling from the place of arrest to the Magistrate's court. S.57 Cr. P.C.

5. Ensure that a person arrested without a warrant for a bailable offence is informed that he/she is entitled to be released on bail, so that he may arrange for sureties. S.50 (2)

6. Ensure that a friend or relative or other person who is known to him/ her and is likely to take interest in his/her welfare, is informed about the fact of arrest and the place where he/she is being detained. S.50-A (1)

7. Ensure that an entry of fact about the person informed regarding the arrest has to be made in a book to be kept in a police station about which the Magistrate is duty bound to enquire. S.50 A (3) & S 50 (A) (4)

8. Ensure that the identity of the police officer effecting arrest must be clearly indicated.

9. Ensure that, if at the time of arrest, some injuries are found on the person of the arrestee, the same must be specified in the Arrest Memo and the arrestee must be got medically examined. S.53

10. Ensure that no woman is arrested after sunset and before sunrise, except in exceptional circumstances for which a prior permission of a Magistrate is necessary. S.46 (4)

11. Ensure that while effecting arrest of a woman, a woman police officer should be associated, as far as practicable, and due regard must be had to the dignity of the arrestee.

12. Ensure that no force or beating is administered under any circumstances while effecting arrest of a juvenile or a child.

2.2.3 The evidentiary value of statements/ article seized/ collected by the police

S.25 of IPC bars confessions made to police officers by accused persons. The purpose of S.25 is to ensure that police officers do not extort confessions by using illegal means of coercing, torturing, or otherwise forcing accused persons to make confessions, which may or may not be true. This danger in criminal trials has been recognised as far back as in 1884. (*Queen Empress v. Babu Lal*, (1884) ILR 6 All 509) In *Babu Lal's case*, the court recorded that S.25 of the Evidence Act had been drafted with a view that the malpractices of police officers in extorting confessions from accused persons, in order to gain credit by securing a conviction, had to be stopped / nullified. Conditions have since still not improved, however, and S.25 is a valuable right available to an accused person and acts as a deterrent to the police from attempting to extort or otherwise coerce accused persons. In addition, S.25 protects the constitutionally guaranteed rights against self-incrimination. Customs and excise officers, while acting in their *quasi*-criminal capacity, have been held to be exempt from the rule under S.25. (*State of Punjab v. Barkat Ram*, AIR 1972 SC 276) Statutes like TADA and POTA have departed from the rule in S.25, and permit confessions made to senior police officers as being admissible under strict safeguards.

Under S.26 IPC, no confession made by any person while in the custody of a police officer, unless made in the immediate presence of a Magistrate, shall be proved as against such person. This section can be considered to be an extension of the principle enshrined in S.25, and is based on the same fear that the police may illegally coerce or force an accused to confess, if not to the police then to someone else. It may be noted that the term 'custody does not mean actual arrest. S.27 provides that where any fact is discovered as a consequence of information received from an accused person while in the custody of a police officer, such information that relates distinctly to the fact discovered may be proved. This section is used by investigating agencies to make what are known as 'disclosures'. It is important that the information should lead to a recovery since if the police already knew about a material object in a particular place, the section has no application. S.27 is founded on the principal that if a confession made by an accused person is supported by the discovery of the fact, such confession inasmuch as it relates to the discovery of the fact, can be presumed to be true and not extracted.

Whereas according to S.27, partly due to its language, has been understood to be a proviso to Ss.25 and 26. In *Pulukuri Kotayya v. King-Emperor*, AIR 1947 PC 67, the Privy Council held: "*Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to, and thereupon so much of information as relates distinctly to the fact thereby discovered may be proved.*" In *State of Bombay v. Kathi Kalu Oghad*, AIR 1960 SC 1125, an eleven-judge bench of the Supreme Court held that statements admissible under S.27 would not fall within the prohibition of A.20(3) of the Constitution unless

compulsion has been used in obtaining the information. The constitutionality of this provision was challenged in *State of Uttar Pradesh v. Deoman Upadhyay*, AIR 1960 SC 1125. The Supreme Court held that S.27 does not violate A.14 of the Constitution inasmuch as there is a valid distinction between persons in custody and person not in custody and they do not require identical protection. In a recent decision, *Smt. Selvi & Others v. State of Karnataka*, 2010 (4) SCALE 690, the Supreme Court has ruled that compulsory brain mapping, narco analysis, and lie detection tests are unconstitutional as they violate individual rights. Information obtained through such tests was sought to be made relevant under S.27 of the Act, but the Supreme Court held that only such information that was obtained after an accused voluntarily agreed to be tested would be admissible.

In *State v. Navjot Sandhu & Afsan Guru*, (2005) 11 SCC 600, a question was raised by the accused as to the admissibility of tape recorded evidence / phone taping/ recordings that were obtained in violation of due process of law under the Telegraph Act. The Supreme Court held that the non-compliance or inadequate compliance with the provisions of the Telegraph Act does not, *per se*, affect the admissibility and cited the decisions of *R. M. Malkani v. State of Maharashtra*, 1973 Cri. L. J. 228. Courts in India, while dealing with the issue of admissibility of illegally obtained evidence (for example, from an illegal search of a premises or a person), have held that even if evidence is obtained by illegal means, it could be used against a party charged with an offence. A Constitution Bench of the Supreme Court in *Pooranmal v. Director of Inspection*, (1974) 1 SCC 345, has also approved of this principle.

2.2.4 Rights to counsel

The following are the rights of an arrested person guaranteed under the Indian Constitution as well as under the Criminal Procedure Code, 1973,

Right to be informed of the grounds for arrest:- In every case of arrest with or without a warrant the person arresting shall communicate to the arrested person, without delay, the grounds for his arrest (Art, 22 (1) of the Constitution of India, Secs. 50 (1), 55, 75 of Cr.P.C.).

Right to be informed of right to bail:- The arrested person must be informed of his right to be released on bail when he is arrested without warrant in a bailable offence (Sec. 50 (2) & (436)).

Right of not being detained for more than 24 hours without judicial scrutiny:-

In case of every arrest the person making the arrest is required to produce the arrested person before the Magistrate within 24 hours from the time of arrest. The time required for journey from the place of arrest to the court of magistrate will be excluded in computation of the duration of 24 hours (Art. 22 (2) of the Constitution and section 57),

Right to consult a legal practitioner:-

Both the Constitution and the provisions of Cr.P.C. recognize the right of every arrested person to consult a legal practitioner of his choice (Art. 22 (1) and Sec. 303)

Right of an arrested indigent person to free legal Aid and to be informed about it In, **Khatri (II) Vs, State of Bihar, (1981) I S.C.C. 627**, the Supreme Court has held that the State is under a constitutional mandate (implicit in Art,21) to provide free legal aid to an indigent accused person, and that this constitutional obligation to provide legal aid does not arise only when the trial commences but also when the accused is for the first time produced before the Magistrate as also when he is remanded from time to time. The Supreme Court

has gone a step further in, **Suk Das VS Union Territory of Arunchal Pradesh, (1986)2 S.C.C 401**, where in it has been categorically laid down that unless refused, failure to provide free legal aid to an indigent accused would vitiate the trial, entailing setting aside of the conviction and sentence. The accused shall be assigned a pleader for his defence, by the court, at the expense of the state when he has not sufficient means to engage a pleader (Sec. 304).

Recent Cases- Law on Arrest

1. In, *Sheela Barse Vs. State Of Maharashtra, (1983) 2 S.C.C. 96*; the Supreme Court held that the arrested accused person must be informed by the magistrate about his right to be medically examined in terms of sections 54 of the Cr.P.C.
2. In, *Arvind Singh Bagga Vs. State Of U.P & Others, 1995(1) 173*, The Supreme Court has deprecated the high handedness, illegal arrest and illegal detention of female witness (named as Nidhi) in custody and the state of U.P. was directed to take immediate steps to launch criminal prosecution against all the Police Officers involved in the sordid affair. The Supreme Court has also directed the state of U.P. to pay compensation of Rs. 10.000/- to Nidhi and Rs. 5.000/- to each of the other persons, who were illegally detained and humiliated for no fault of theirs.
3. In, *Anup Singh Vs State Of Himchal Pardesh, Air 1995 Sc 1941*. The Supreme Court held that the Officer In charge of Police Station, who was not physically present all the time during confinement of deceased in the police station, can not escape his criminal liability by passing the buck on the constables (who were actually responsible for the death of the deceased), because criminal deeds committed by the constables are deemed to have been committed with his tacit consent and connivance. Accordingly, officer in charge of police station, (Aunp Singh, ASI) was convicted along with the two constables.

4. In, *D.K. Basu v. State of West Bengal*, The Hon'ble Supreme Court has given the following guidelines, for the police officers regarding arrest of persons, when the Executive Chairman, Legal Aid Services, West Bengal addressed a letter to the Chief Justice of India drawing his attention to certain news items published in various news papers relating to custodial violence. The letter was treated as a writ application under Article 32 of the Constitution and the case was treated as public interest litigation.

The guide lines are as follows:-

I. The Police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel's who handle interrogation of the arrestee must be recorded in a register.

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

III. A person who has been arrested or detained and is being held in custody in a police station interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

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

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

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

VII. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at the 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.

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

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

X. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

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

XII. Failure to comply with the requirements herein above mentioned shall apart from rendering the concerned official 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. These requirements are in addition to the Constitutional and statutory safeguards and do not detract from various other direction given by the courts from time to time in connection with safeguarding all the rights and dignity of the arrestee.

Further, the Supreme Court has directed that the amount of compensation, to the victim, as awarded by the writ court and paid by the state to redress the wrong done, may in a given case be adjusted against any amount which may be already paid to the claimant by way of damages in civil suit.

2.2.5. Role of the prosecutor and the judicial officer in investigation:

In India, we have a public prosecutor who acts in accordance with the directions of the judge. Normally, the control of entire trial is in the hands of the trial judge. Investigation is the prerogative of the police. A Public Prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure, 1973. She/he is not a part of the investigating agency. However, it is generally believed that traditional right of *nulle prosequi* is available to the prosecutor. A Prosecutor must be considered as an agent of justice. A Public Prosecutor should place before the Court whatever evidence is in her/his possession, their fundamental duty is to ensure that justice is delivered and in pursuance of this they should lay before the court all relevant evidence including the evidence that favours the accused. The duty of a public Prosecutor is not merely to secure the conviction of the accused at all costs but to place before the court whatever evidence is in the possession of the prosecution, whether it be in favour of or against the accused and to leave the court to decide upon all such evidence, whether the accused had or had not committed the offence with which he stood charged.³¹ It is as much the duty of the Prosecutor as of the court to ensure that full and material facts are brought on record so that

there might not be miscarriage of justice.

Article 22(2) provides that every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest and no one shall be detained in custody beyond the said period without the authority of a magistrate. The magistrate can pass order of remand to authorise the detention of the accused in such custody as such magistrate thinks fit, for a term not exceeding 15 days in the whole. Justice Bhagwati summed up the purpose of these safeguards in

Khatri II vs State of Bihar (1981) 1 SCC 627 “This healthy provision enables the magistrates to keep check over the police investigation and it is necessary that the magistrates should try enforcing this requirement and where it is found disobeyed, come down heavily upon the police... There is however, no obligation on the part of the magistrate to grant remand as a matter of course. The police have to make out a case for that. It can't be a mechanical order”.

Right to be examined by a medical practitioner The Magistrate can direct for medical examination of the arrested person on fulfilment of the following conditions;

- (a) the medical examination will disprove the commission of any offence by him or
- (b) establish the commission of any other offence against his body (Sec. 54)

2.3 Questions for Self learning

1. Discuss the procedure with respect to arrest and questioning of the accused.
2. What are the rights of the accused? Discuss with help of decided case laws.
3. What is the evidentiary value of statement of accused given to police?
4. What is the evidentiary value of article seized/ collected by the police?
5. What are the rights of accused after arrest?

6. How important is the role of the prosecutor and the judicial officer in investigation?
7. What is meant by arrest and custody? Is arrest different from Custody?
8. What are the safeguards of on arrestee under the Indian Constitution as well as under the universal declaration of human rights (1948)?
9. Write a critical note on 'hand cuffings'.
10. Who are empowered to arrest a person without warrant under the Cr.P.C. 1973?
11. What are the procedural safeguards of a female accused on arrest and search?
12. Can An M.P. or M.L.A. be arrested? If so, state procedure of it?
13. Explain the rights of an arrestee?
14. What are the consequences of illegal arrest and use of third degree method by the Police?
15. What are the Do's and Dont's on the part of police officer, to observe, regarding arrest?
16. What are the guidelines for the police officers regarding arrest, which are enumerated by the Supreme Court in D.K. Basu Vs State of West Bengal?
17. Students are advised to study the following cases on arrest
 - (1) *State of Punjab Vs. Ajaib Singh*, AIR 1953 SC 10.
 - (2) *Directorate of Enforcement Vs. Deepak Mahajan*, AIR 1994 SC 1775.
 - (3) *State of Maharashtra Vs. Shoba Ram*, AIR 1966 SC 1910.
 - (4) *Prem Shankar Shukla Vs. Delhi Administration*, AIR, 1980 SC 1535.
 - (5) *Sunil Gupta Vs. State of M.P.* 1990 SCC (Cr.) 440.
 - (6) *Sunil Batra Vs. Delhi Administration*, AIR 1978 SC 1675.
 - (7) *Christian Community Welfare Council of India Vs. Govt. of Maharashtra*, 1995 Cr. L.J. 4223 (Bom.)
 - (8) *Judicial officers Service Association Vs. State of Gujarat*, AIR 1991 SC 2176.

- (9) *Khatri (II) Vs. State of Bihar*, (1981) 1 SCC 627.
- (10) *Suk Das Vs. Union Territory of Arunachal Pradesh* (1986) 2 SCC 401.
- (11) *Joginder Kumar Vs. State of U.P.*, AIR, 1994 SC 1349.
- (12) *Sheela Barse Vs. State of Maharashtra*, (1983) SCC 96.
- (13) *Arvind Singh Bagga Vs. State of U.P. and others* 1995 (1) SCJ 173.
- (14) *Anup Singh Vs. State of Himachal Pradesh*, AIR 1995 SC 1941.
- (15) *D.K. Basu Vs. State of West Bengal*, 1997 (1) J.

2.4. Let us sum up

Police Officers are entrusted with wider powers of arresting a person without warrant. But this power of arrest must be in accordance with Law not otherwise. Arrest is undoubtedly a serious interference with the fundamental right of the personal liberty of the citizen, which includes an arrestee or an accused, guaranteed under Articles 21 and 22 of the Constitution of India and it has to be strictly in accordance with the Law so as to be escaped, the arresting authority, from punishment.

In order to exercise effectively the power of arrest by a police officer, he must be well versed with legal provisions relating to arrest, Supreme Courts guidelines and its decisions on arrest up to date, particularly, when arresting women, children, judicial officers, M.L.A's & M.Ps and public servants etc. Moreover, the police should enforce the provisions relating to arrest firmly and impartially without fear of favour, malice or vindictiveness. And also the police should project their image as the protector of Human Rights.

As per sections 330 and 331 of IPC Physical torture of an accused during interrogation is an offence and hence punishable from 7 to 10 years imprisonment.

Article 5 of the Universal Declaration of Human Rights and Article 20(3) of the Indian Constitution, Section 29 of the Police Act, 1861 and Rule 3 of the Police code of Conduct forbid such physical torture on the accused.

2.5. Glossary

Arrest: depriving a person to move freely for a purpose of either seeking some information about the crime.

Custody: taking care, protection, guardianship of minor or venerable person, in case of property or responsibility taking charge of, and in case of offender or accused it is detention

Arrest warrant : permission granted to the concern authority to arrest certain person.

2.6. References

1. Batuklal, *The Code of Criminal Procedure*, Central law Agency, 2nd edition 2008
 2. Ratanlal and Dhirajlal, *The Code of Criminal Procedure*, Wadhwa &Co., 16th ed. Reprint 2003.
 3. N.D. Basu, *The Code of Criminal Procedure*, Ashoka Law House, 9th ed. 2001.
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UNIT 3.
Procedure.

3.0 Objectives

3.1. Introduction

3.2 Topic Explanation

- 3.1 The accusatory system of trial and the inquisitorial system
- 3.2 Role of the judge, the prosecutor and defence attorney in the trial.
- 3.3 Admissibility and inadmissibility of evidence
- 3.4 Expert evidence
- 3.5. Plea bargaining

3.3 Questions for Self learning

3.4. Let us sum up

3.5. Glossary

3.6. References

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3.0 Objectives

After studying this unit the student will be able to understand the

1. the accusatory system of trial and the inquisitorial system functions
2. Role of the judge, the prosecutor and defence attorney in the trial.
3. admissibility and inadmissibility of evidence
4. An Expert evidence and how important is it.
5. Appeal of the court in awaiting appropriate punishment
6. Plea bargaining

3.1. Introduction

There are two main legal systems in the Western world; the Adversarial system (Common law or Accusatorial system) and the Inquisitorial system (Civil Law or Continental system)

A Public Prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure, 1973. She/he is not a part of the investigating agency.

Right to be defended as per Section 303 of Cr. P.C. and Article 22(1) of the constitution of India provides a right to all the accused persons, to be defended by a pleader of his choice.

The advocates of the court, the judges or the machinery helping the investigation needs some expert of respective branches may be forensic, ballistic, finger prints, handwriting, economics, psychology etc. these experts can be invited by the court during the hearing of the matter thus recording their statements as expert opinion.

Plea bargaining allows the accused to bargain with the court on the sentence that will be awarded

3.2 Topic Explanation

3.1 The accusatory system of trial and the inquisitorial system

There is a common consensus among academics that there are two main legal systems in the Western world; the Adversarial system (Common law or Accusatorial system) and the Inquisitorial system (Civil Law or Continental system). The adversarial system of trial is where two equal parties - the prosecution and the defence - present their cases orally in court. The adversarial system places the courts in a position where it is neutral, therefore, the state does not dispense justice, but rather provides a platform for justice to be carried out.

Caenegem, (1999) States that in the Inquisitorial trial system the priority is centred on 'outcomes', where the emphasis in the adversarial trial system is on the actual 'process'. Caenegem suggests the Inquisitorial viewpoint is that the search for truth is its ultimate goal. Therefore, the Inquisitorial system's perspective is that an independent officer of the state, whether they are a judge

or a prosecutor, who remains impartial, is the best person to seek and find the truth. (Dammer and Fairchild, 2005)

The adversarial system places the courts in a position where it is neutral; therefore, the state does not dispense justice, but rather provides a platform for justice to be carried out. (Fairchild, 2001) In this system both legal representatives are an essential and indispensable part of the trial process. An adversarial approach to justice goes on the assumption that the truth will best be served if both parties are allowed to put their cases forward in front of a jury. (Pakes, 2004,p: 81) The Judge in an adversarial system looks at the evidence to determine whether it has been gathered in accordance with the law, and a Judge decides that proper criminal procedure has not been followed and that evidence has been obtained illegally, through deception, then they have the power to exclude it from the trial proceedings. (Fairchild and Dammer, 2005)

In the Inquisitorial system, the accused has the right to silence; however, rarely are they allowed to exercise this right, as the main aim of the inquisitorial system is to find the truth through intensive investigation from all components of the criminal justice system including the accused. Therefore, the accused is expected to cooperate fully with the investigation in order for the truth to be uncovered. (Sworden, 2006) Unlike the adversarial system, where the judge is neutral, the judge in the Inquisitorial system is the main player, who is expected to conduct the investigation alongside the prosecutor and the police and give his verdict based on all the evidence that has been collected and subsequently presented to him in a dossier at a private pre-trial. (Fairchild, 1993) Whereas an Inquisitorial judge will be fully aware of the case before the accused is brought before them, the Adversarial judge would never be allowed access to, or any previous knowledge of, the accused as it could be seen to induce bias.

3.2 Role of the judge, the prosecutor and defence attorney in the trial.

3.2.1. Role of the judge in the trial.

Judges play many roles. They interpret the law, assess the evidence presented, and control how hearings and trials unfold in their courtrooms. Most important of all, judges are impartial decision-makers in the pursuit of justice. We have what is known as an adversarial system of justice - legal cases are contests between opposing sides, which ensures that evidence and legal arguments will be fully and forcefully presented. The judge, however, remains above the fray, providing an independent and impartial assessment of the facts and how the law applies to those facts. Many criminal cases are heard by a judge. The judge is deciding whether the evidence is credible and which witnesses are telling the truth. Then the judge applies the law to these facts to determine whether an allegation in criminal cases, has been established on a balance of probabilities or whether there is proof beyond a reasonable doubt, that the suspect is guilty.

If the defendant is convicted of a crime, the judge passes sentence, imposing a penalty that can range from a fine to a prison term depending on the severity of the offence.

3.2.2. The Role of the Prosecutor:

The role of the Prosecutor is not to single-mindedly seek a conviction regardless of the evidence but his/her fundamental duty is to ensure that justice is delivered. The responsibilities and duties of prosecution as follows:

The ideal Public Prosecutor is not concerned with securing convictions, or with satisfying departments of the State Governments with which she/he has been in contact. He must consider herself/himself as an agent of justice.

The Allahabad High Court had ruled that it is the duty of the Public Prosecutor to see that justice is vindicated and that he should not obtain an unrighteous conviction. The purpose of a criminal trial being to determine the guilt or innocence of the accused person, the duty of a Public Prosecutor is not to represent any particular party, but the State.

The prosecution of the accused persons has to be conducted with the utmost fairness. In undertaking the prosecution, the State is not actuated by any motives of revenge but seeks only to protect the community. There should not therefore be “a seemly eagerness for, or grasping at a conviction.

A Public Prosecutor should not by statement aggravate the case against the accused, or keep back a witness because her/his evidence may weaken the case for prosecution. The only aim of a Public Prosecutor should be to aid the court in discovering truth. A Public Prosecutor should avoid any proceedings likely to intimidate or unduly influence witnesses on either side.

A Public Prosecutor should place before the Court whatever evidence is in her/his possession. The duty of a public Prosecutor is not merely to secure the conviction of the accused at all costs but to place before the court whatever evidence is in the possession of the prosecution, whether it be in favour of or against the accused and to leave the court to decide upon all such evidence, whether the accused had or had not committed the offence with which he stood charged.

It is as much the duty of the Prosecutor as of the court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice.

The duty of the Public Prosecutor is to represent the State and not the police.

A Public Prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure, 1973. She/he is not a part of the investigating agency.

She/he is an independent statutory authority. She/he is neither the post office of the investigating agency, nor it's forwarding agency; but is charged with a statutory duty.

The purpose of a criminal trial is not to support at all cost a theory, but to investigate the offence and to determine the guilt or innocence of the accused and the duty of the Public Prosecutor is to represent not the police, but the State and her/his duty should be discharged by her/him fairly and fearlessly and with a full sense of responsibility that attaches to her/his position.

There can be no manner of doubt that Parliament intended that Public Prosecutors should be free from the control of the police department.

A Public Prosecutor should discharge her/his duties fairly and fearlessly and with full sense of responsibility that attaches to her/his position.

The Patna High Court held that purpose of a criminal trial is not to support a given theory at all costs but to investigate the offence and to determine the fault or innocence of the accused and the duty of the Public Prosecutor is to represent not the police but the State and her/his duty should be discharged by her/him fairly and fearlessly and with full sense of responsibility that attaches to her/his position.

The Andhra Pradesh High Court had ruled that prosecution should not mean persecution and the Prosecutor should be scrupulously fair to the accused and should not strive for conviction in all these cases. It further stated that the courts should be zealous to see that the prosecution of an offender should not be given to a private party. The Court also said that if there is no one to control the situation when there was a possibility of things going wrong, it would amount to a legalised manner of causing vengeance.

A Public Prosecutor cannot appear on behalf of the accused .It is inconsistent with the ethics of legal profession and fair play in the administration of justice for the Public Prosecutor to appear on behalf of the accused.

No fair trial when the Prosecutor acts in a manner as if he was defending the accused, It is the Public Prosecutors duty to present the truth before the court. Fair trial means a trial before an impartial Judge, a fair Prosecutor and atmosphere of judicial calm. The Prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system.

The statutory responsibility for deciding upon withdrawal squarely vests unwavering with the Public Prosecutor and should be guided by the Criminal Procedure Code. The statutory responsibility for deciding upon withdrawal squarely vests on the Public Prosecutor and is entirely within the discretion of the Public Prosecutor. It is non-negotiable and cannot be bartered away in favour of those who may be above her/him on the administrative side.

The Criminal Procedure Code is the only master of the Public Prosecutor and he has to guide herself/himself with reference to Criminal Procedure Code only. So guided, the consideration which must weigh with her/him is, whether the

broader cause of public justice will be advanced or retarded by the withdrawal or continuance of the prosecution.

The sole consideration for the Public Prosecutor when she/he decides a withdrawal from a prosecution is the larger factor of administration of justice, not political favours nor party pressures nor like concerns.

3.2.3. Role of the defence attorney in the trial.

In a democratic society even the rights of the accused are sacrosanct, though accused of an offence, he does not become a non-person. Rights of the accused include the rights of the accused at the time of arrest, at the time of search and seizure, during the process of trial and the like.

The Malimath Committee on the rights of the accused was of the opinion that “the rights of the accused include the obligation on the part of the State to follow the due processes of law, a quick and impartial trial, restraint from torture and forced testimony, access to legal aid etc”.

Whereas, Right to be defended as per Section 303 of Cr. P.C. and Article 22(1) of the constitution of India provides a right to all the accused persons, to be defended by a pleader of his choice. Though it is not a right available to all the accused but to certain category of accused Legal aid at State expense in certain cases is provided. So where, in a trial before the Court of Session, the accused is not represented by a pleader, and the court believes that he does not have sufficient means to engage a pleader, it shall assign a pleader for his defence at the expense of the State, under section 304 of Cr. P. C.

The element of Natural Justice i.e. both sides shall be heard, or *audi alteram partem* and the right of the accused to cross-examine the witnesses and his right to legal representation are comparable. Another significant right would be the ‘Rule against bias’, a person cannot be a judge in his own cause. This is an elementary Natural Justice principle which is also the right of the accused in the

present day's criminal justice system. Therefore it is the duty of the defence attorney to defend his client without any prejudice. It is his moral as well as legal duty.

3.3 Admissibility and inadmissibility of evidence

The Indian Evidence Act deal with Admissions, as per sec 17 Admission is defined as "An admission is a statement, oral or documentary or contained in electronic form²⁸, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances hereinafter mentioned".

Whereas sec 18 states that Statements made by a party to the proceeding, or by an agent to any such party, whom the court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions. Also Statements made by parties to suits suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

Further as per sec 18 Statements made by: -

- (1) By party interested in subject-matter: - Persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or
- (2) By person from whom interest derived: - persons from whom the parties to the suit have derived their interest in the subject matter of the suit, are admissions, if they are made during the continuance of the interest of the persons making the statements.

²⁸ Ins. By Information Technology Act, 2000 (Schedule – 2). W.E.F. 17-10-2000.

Sec 19 Admission by persons whose position must be proved as against party suit: - Statements made by persons whose position or liability, it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Illustration

A undertakes to collect rents for B.

B sues A for not collecting rent due from C to B.

A denies that rent was due from C to B.

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

Sec 20 Admission by person expressly referred to by party to suit: - Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Illustration

The question is, whether a horse sold by A to B is sound.

A says to B – “Go and ask C, C knows all about it”. C’s statement is an admission.

Sec 21 Proof of admissions against persons making them, and by or on their behalf: - Admissions are relevant and may be proved as against the person who makes them or his representative in interest; but they cannot be

proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases: -

- (1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third person under section 32.
- (2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.
- (3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustration

- (a) The question between A and B is, whether a certain deed is or is not forged, A affirms that it is genuine, B that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

- (b) A, the Captain of a ship, is tried for casting her away.
Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statement, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

- (c) A is accused of a crime committed by him at Calcutta.

He produces a letter written by him and dated at Lahore on that day, and bearing the Lahore postmark of that day.

The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under section 32, clause (2).

- (d) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

- (e) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skillful person to examine the coin as he doubted whether it was counterfeit or not, and that the person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

Sec 21 When oral admissions as to contents of documents are relevant: - Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

Sec 22 A: When oral admission as to contents of electronic records are relevant²⁹.

Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question.”

Sec 23 Admission in civil cases when relevant: - In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

Explanation: - Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

Section 33 provides adequate grounds and justifications for its part as an exception, to the requirements of direct evidence in oral evidence as given in the Indian Evidence Act. Through strict imposition of its requirements of the right and opportunity of cross-examination being available to the adverse party, this exception satisfactorily avoids the pitfalls of hearsay evidence and removes all elements of unfairness and questions of lack of credibility. The method in which the evidence under Section 33 is acquired and accepted adds to its relevance.

Although the rule against hearsay evidence is established and adhered to in most circumstances, there exist exceptions to it in order to deal with such situations where inadmissibility of such evidence would lead to the miscarriage of justice.

This provision in no way seeks to discourage the production of witnesses before the court for giving evidence however in situations where it is strictly proven that the witness cannot be present, it seeks to do away with the handicap that would inevitably be present if the evidence were to be made inadmissible in circumstances where it would have a major role to play in proving the truth of facts pertinent to the case at hand.

²⁹ Ins. By Information Technology Act, 2000 (Schedule – 2). W.E.F. 17-10-2000.

3.4 Expert evidence

The advocates of the court, the judges or the machinery helping the investigation needs some expert of respective branches may be forensic, ballistic, finger prints, handwriting, economics, psychology etc. these experts can be invited by the court during the hearing of the matter thus recording their statements as expert opinion. As per the Indian Evidence Act the opinion of expert is admissible.

Who can be called as an expert:

Expert is a person having special knowledge of the subject about which he or she is testifying. The role of the expert witness is to assist and determine the issues in dispute by furnishing the court with scientific information, which is likely to be outside the knowledge and experience of judge. The person must gain the acceptance of the court and normally testify about facts rather than the law. The judge should ensure that the expert is qualified on the disputed issue and only relevant and reliable opinions are accepted from him/her. There is no threshold test in common law for the admissibility of expert evidence which takes into account its reliability and it is on the judge's discretion to accept it or not.

Elements of Expert Evidence- if evidence tendered as expert opinion evidence is to be admissible:

1. It must be demonstrated that there is a field of "specialized knowledge".
2. there must be an identified aspect of that field in which the witness demonstrates that by reason of special training , study or experience , the witness has become an expert.
3. the opinion preferred must be "wholly or substantially based on the witness's expert knowledge.

4. so far as the opinion is based on facts “observed” by the expert ,they must be identified and admissibly proved by the expert.
5. so far as the opinion is based on “assumed” or “accepted” facts , they must be identified and proved in some other way.
6. it must be established that the facts on which the opinion is based form a proper foundation for it, and the expert’s evidence must explain how the field of “specialized knowledge” in which the witness is expert ,and on which the opinion is “wholly or substantially based” applies to the facts assumed or observed so as to produce the opinion propounded.

As per the Indian Evidence Act the following sections are important:

Sec 45 Opinion of experts: - When the Court has to form an opinion upon a point of foreign law or of science or art, or as identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art or in questions as to identity of handwriting or finger impressions are relevant facts.
Such persons are called experts.

Illustrations

- (a) The question is, whether the death of A was caused by poison.
The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died are relevant.
- (b) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the Act, or that he was doing what was either wrong or contrary to law.
The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of

knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

- (c) The question is whether A wrote a certain document. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons are relevant.

Sec 46 Facts bearing upon opinions of experts: - Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinion of experts, when such opinions are relevant.

Illustration

- (a) The question is, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that person, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison is relevant.

- (b) The question is, whether an obstruction to a harbour is caused by a certain seawall.

The fact that other harbours similarly situated in other respects, but where there were no such sea walls began to be obstructed at about the same time, is relevant.

Sec 47 Opinion as to handwriting, when relevant: - When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the

person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation: - A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Illustration

The question is, whether a given letter is in the underwriting of A, a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising him thereon. The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C nor D ever saw A write.

Sec 47 A: Opinion as to digital signature when relevant³⁰.-When the court has to form an opinion as to the digital signature of any person, the opinion of the Certifying Authority which has issued the Digital Signature Certificate is a relevant fact.”

³⁰ Ins. By Information Technology Act, 2000 (Schedule – 2). W.E.F. 17-10-2000

3.5. Plea bargaining

Plea Bargaining is an extensively ubiquitous practice which facilitates expedite the legal process. Plea bargaining allows the accused to bargain with the court on the sentence that will be awarded. The significant aspect is that the facts stated in an application for plea bargaining of Chapter XXIA, in the Code of Criminal Procedure, 1973, containing Sections 265 A to 265L, which deal with plea bargaining. Strictly speaking plea bargaining is a wider connotation

What is plea bargaining?

As per the detailed Report of Law Commission of India (144th), plea bargaining, in its most traditional and general sense, refers to pre-trial negotiations between the defendant, usually conducted by the counsel and prosecution, during which the defendant agrees to plead guilty in exchange for certain concession by the prosecutor.

Categories of plea bargaining

Plea bargaining falls into two distinct categories depending upon the type of prosecutorial concession that is granted. The first category is “*charge bargaining*” which refers to a promise by the prosecutor to reduce or dismiss some of the charges brought against the defendant in exchange for a guilty plea. The second category is “*sentence bargaining*” which refers to a promise by the prosecutor to recommend a specific sentence or to refrain from making any sentence recommendation in exchange for a guilty plea.

As per the 144th report of Law Commission of India, which was published in the year 1991, both the methods will affect the dispositional phase of the criminal proceedings by reducing defendant’s ultimate sentence; but after 15 years, finally India also realized the necessity of the law on plea bargaining and an important Amendment was introduced in the Criminal Procedure Code, 1973 in the year 2005, which came into force in the year 2006.

Cases of plea bargaining in India

The first case of plea bargaining in Mumbai was recently published in 'Times of India', wherein, a Grade-I employee of RBI, was accused of siphoning off Rs 1.48 crore from the RBI by issuing vouchers against fictitious names from 1993 to 1997 and transferring the money to his personal account. He was arrested by the CBI in the year 1997, and released on bail in November the same year. The case came up before special CBI judge, Mumbai and charges were framed.

The accused, by taking benefit of *Amendment (2006) in Law of Plea-Bargaining under Criminal Procedure Code, 1973 Chapter-XXI A (Section 265-A to 265-L)* moved an application before the court stating that he was 58 years old and would seek plea bargaining. The court directed the prosecution and victim to file their response to his plea bargaining application. Though, after hearing arguments of prosecution, the trial court rejected the application for plea bargaining *but it has opened the doors for a new hope to the other accused/under trials, who have been facing trials of their petty cases for several years, may now resort to plea bargaining.*

In other significant case of *Vijay Moses Das Vs. CBI (Criminal Misc. Application 1037/2006)*, Utrakahnd High Court (Justice Praffula Pant) in March 2010 allowed the concept of plea bargaining, wherein accused was charged under section 420, 468 and 471 of IPC. In the said case, Accused supplied substandard material to ONGC and that too at a wrong Port, which caused immense losses to ONGC, who got the investigation done through CBI by lodging a criminal case against the accused. Despite the fact that ONGC (Victim) and CBI (Prosecution) had no objection to the Plea bargaining Application, the trial court rejected the application on the ground that the Affidavit u/s (265-B) was not filed by the accused and also that the compensation was not fixed. The Hon'ble High Court allowed the Misc. Application by directing the trial court to accept the plea bargaining application.

Procedure and Significant Aspects of plea bargaining

1. An accused for an offence may file application for plea bargaining (voluntarily) in the court, in which such offence is pending for trial.
 2. Application should have brief description of the case with an affidavit by stating (a) it's a volunteer move by him/her after understanding the nature of punishment; (b) he/she has not been previously convicted by a court in a case in which he had been charged with the same offence.
 3. After receiving application, court shall issue notice to prosecution or the complainant & to the accused to appear in the court on the fixed date.
 4. In presence of all parties, court shall examine the accused *in camera* (i) application is filed voluntarily (ii) court shall provide time to prosecutor/complainant to work out a mutually satisfactory disposition of the case, which may include compensation to the victim (Guidelines for mutually satisfactory disposition are given in section 265-G).
 5. If the above conditions are not met by any of the parties, court may proceed with the trial.
 6. Once the aforementioned Report under section 265-D is filed, court will dispose of the case (section 265-E) by pronouncing Judgment in open court by (a) awarding compensation to the victim, hearing accused on quantum of punishment, releasing the accused on probation of good conduct etc.
 7. Judgment passed under section 265-F shall be final and no appeal (except SLP Article 136 & Writ Petition in Article 226-227 of Constitution of India) can be filed against such judgment.
 8. Statement of accused cannot be used except plea bargaining u/s-265-B.
- We should also keep in mind that the *judgment delivered in a case of plea bargaining is final and no appeals are allowed against such verdicts (Section 265-G)*. The accused may also be released on probation if he is a first-time offender.

Though, the introduction of ‘plea bargaining in Indian judicial system’ has profoundly been criticized by a group of society including intellectual and legal experts with the argument that it will demoralize the public confidence in criminal justice system and will also lead to conviction of innocent, inconsistent penalties for similar crimes and lighter penalties for rich and influenced people. On the other hand, plea bargaining concept has been welcomed by the other groups of society as a revolutionary judicial reform in India, since the entire world including US, Europe and most of the Asian countries have already introduced and implemented the law of plea bargaining and hence India cannot refrain for this law. We hope that the overburdened criminal courts of India will get a relief with the law of ‘plea bargaining’ and the criminal judicial system will also speed up its disposal of the pending cases.

3.3 Questions for Self learning

- 1 How the accusatory system of trial and the inquisitorial system functions?
- 2 What is role of the judge, the prosecutor and defence attorney in the trial?
- 3 What is admissibility and inadmissibility of evidence?
- 4 What is Expert evidence and how important is it?
- 5 What is Plea bargaining?

3.4. Let us sum up

An adversarial approach to justice goes on the assumption that the truth will best be served if both parties are allowed to put their cases forward in front of a jury. In the Inquisitorial system, the accused has the right to silence; however, rarely are they allowed to exercise this right, as the main aim of the inquisitorial system is to find the truth through intensive investigation from all components of the criminal justice system including the accused. Therefore, the accused is

expected to cooperate fully with the investigation in order for the truth to be uncovered. Judges play many roles. They interpret the law, assess the evidence presented, and control how hearings and trials unfold in their courtrooms. Most important of all, judges are impartial decision-makers in the pursuit of justice. The ideal Public Prosecutor is not concerned with securing convictions, or with satisfying departments of the State Governments with which she/he has been in contact. He must consider herself/himself as an agent of justice. Rights of the accused include the rights of the accused at the time of arrest, at the time of search and seizure, during the process of trial and the like.

3.5. Glossary:

Fair trial: a trial without bias, where both the parties are given equal opportunity to present their side.

Expert: The definition of an expert may be referred from the provision of Sec.45 of Indian Evidence Act that an 'Expert' means a person who has special knowledge, skill or experience in any of the following----

- 1) foreign law,
- 2) science
- 3) art
- 4) handwriting or
- 5) finger impression and such knowledge has been gathered by him—
 - a) by practice,
 - b) observation or
 - c) proper studies.

3.6. References:

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UNIT 4.

Preventive Measures in India

4.0 Objectives

4.1. Introduction

4.2 Topic Explanation

4.3 Questions for Self learning

4.4. Let us sum up

4.5. Glossary

4.6. References

Unit 4

4.0 Objectives

After studying this unit the student will be able to understand about ...

1. The Provisions in the Criminal Procedure Code with respect to preventive measures
2. Special enactments with respect to preventive measures.

4.1. Introduction

The personal liberty of a person is sacrosanct and state authority cannot be permitted to take it away without following the procedure prescribed by law, otherwise it would be violative of the fundamental rights guaranteed under articles 21 and 22 of the constitution. Article 21 grants right to life and liberty, Article 22 protects a person against arrest and detention in certain cases. Preventive detention is an imprisonment that is not imposed as the punishment for a crime, but in order to prevent a person from committing a crime, if that person is deemed likely to commit a crime. Preventive detention refers to the situation when a person is deprived of their liberty and held in custody though they have not been charged with a recognizably criminal offence or tried within a reasonable time. The term encompasses detention pursuant to national

legislation as well as detention carried out without any legal basis. It does not include pre-trial detention of persons held on genuine criminal charges.

Preventive detention is not punitive but a precautionary measure. Preventive justice consists in restraining a man from committing a crime, which he may commit but has not yet committed, or doing some act injurious to members of the community, which he may commit but has not yet done. In almost every case where preventive justice is put in force, some suffering and inconvenience may be caused to a suspected person. That is inevitable. But the suffering is inflicted for something much more important than his liberty or convenience namely, for securing the public safety and defence of the realm.

According to the Webster's World Law Dictionary, "preventive detention is a confinement of an accused person pending trial, under terms of a statute authorizing denial of bail to defendants charged with having committed certain offenses and/or are considered to be a danger to themselves or to the public at large."

4.2 Topic Explanation

4.2.1. Provisions in the Criminal Procedure Code

Purpose of Preventive detention.

Preventive detention is an anticipatory measure and does not relate to an offence, while the criminal proceedings are to punish a person for an offence committed by him. They are not parallel proceedings. The object of the law of preventive detention is not punitive but only preventive. It is resorted to when the Executive is convinced that such detention is necessary in order to prevent the person detained from acting in a manner prejudicial to certain objects, which are specified by the concerned law. The action of the Executive in detaining a person being only precautionary, normally the matter has necessarily to be left

to the discretion of the executive authority. It is not practicable to lay down objective rules of detention. The satisfaction of the Detaining Authority may act on any material and on any information that it may have before it. Such material and information may merely afford for a sufficiently strong suspicion to take action, but may not satisfy the tests of legal proof on which alone a conviction for offence will be tenable. The compulsions of the primordial need to maintain order in society without which the enjoyment of all rights, including the right to personal liberty of citizens, would lose all their meanings, provide the justification for the laws of preventive detention. Laws that provide for preventive detention posit that an individual's conduct prejudicial to the maintenance of public order or to the security of State or corroding financial base provides grounds for satisfaction for a reasonable prognostication of possible future manifestation of similar propensities on the part of the offender. This jurisdiction has at times been even called a jurisdiction of suspicion. The compulsions of the very preservation of the values of freedom of democratic society and of social order might compel a curtailment for individual liberty. Thomas Jefferson once said, "To lose our country by a scrupulous adherence to the written law would be to lose the law itself, with life, liberty and all those who are enjoying with us, thus absurdly sacrificing the end to the needs". This, no doubt, is the theoretical jurisdictional justification for the law enabling preventive detention. But the actual manner of administration of the law of preventive detention is of utmost importance. The law has to be justified by striding the right balance between individual liberties on the one hand and the needs of an orderly society on the other. (Union of India v. Chaya Ghoshal, AIR 2004 SC 428) .

Constitutional validity of preventive detention in India.

Preventive detention is coming under the purview of clause 3 of Article 22 of our constitution of India. The Constitution permits the Parliament and the State

Legislature to enact Preventive Detention Acts under Entry 9 of the Union List. The Parliament has power to pass laws relating to Preventive Detention for reasons connected with defence, foreign affairs or the security of India and also in respect of persons subjected to such detention. Both the Parliament and the State Legislatures have under Entry 3 of the Concurrent List power to pass laws in respect of the Preventive Detention for reasons connected with the Security of State, the maintenance of public order or the maintenance of supplies and services essential to the community and persons subject to such detention. The constitutionality of the Preventive Detention Act, 1950 was challenged in A.K.Goplan's case (AIR 1950 SC 27.). The Act was held to be valid. Kania C.J. said: "Preventive detention in normal times, i.e. without the existence of an emergency like war, is recognized as a normal topic of legislation in List I, Entry 9 and List III, entry 3 of Schedule 7. Even in the Chapter on Fundamental Rights, Article 22 envisages legislation in respect of preventive detention in normal times. The provisions of Article 22 (4) to (7) by their very wording leave unaffected the large powers of legislation on point and emphasis particularly by Article 22 (7) the powers of the Parliament to deprive a person of a right to have his case considered by an Advisory Board. Part III and Article 22 in particular are the only restrictions on that power and but for those provisions the power to legislate on the subject would have been quite unrestricted. Parliament could have made a law without any safeguard or any procedure for preventive detention. Such an autocratic supremacy of the legislature is certainly cut down by Article 21." The law of preventive detention has therefore now to pass the test not only of Article 22, but of Article 21 and if the constitutional validity of any such law is challenged, the court would have to decide whether the procedure laid down by such law for depriving a person of his personal liberty is reasonable, fair and just. Public Order— The true distinction between the areas of 'public order' and 'law and order' lies not in the nature or equality of the act, but in the degree and extent of its reach upon

society. The distinction between the two concepts of 'law and order' and 'public order' is a fine one but this does not mean that there can be no overlapping. Acts similar in nature but committed in different contexts and circumstances might cause different reactions. In one case it might affect specific individuals only and therefore touch the problem of law and order, while in another it might affect public order. The act by itself therefore is not determinant of its own gravity. It is the potentiality of the act to disturb the even tempo of the life of the community, which makes it prejudicial to the maintenance of public order. (Ashok Kumar v. Delhi Administration, AIR 1982 SC 1143).

Article 22. Protection against arrest and detention in certain cases

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice

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

(3) Nothing in clauses (1) and (2) shall apply

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention

(4) No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub clause authorized the detention of any person beyond the maximum period prescribed by any law made by parliament under sub clause (b)(7); or

(b) Such person is detained in accordance with the provision of any law made by the parliament under sub clauses (a) and (b) of clause 7.

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers being against the public interest to disclose

(7) Parliament may by law prescribe

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub clause (a) of clause (4).

Article 22 guarantees three rights. First, it guarantees the right of every person who is arrested to be informed of the cause of his arrest; secondly, his right to consult, and to be defended by a lawyer of his choice. Thirdly, every person arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours and shall be kept in continued custody only

with his authority. All these rights are without any qualifications and are, therefore, in absolute terms.

There are, however, two exceptions to the universal application of the rights guaranteed under the first two clauses of Article 22. These relate to

- (1) Any person who is for the time being an enemy alien; or
- (2) Any person who is arrested or detained under any law providing for preventive detention.

In case of a person arrested or detained under a law providing for preventive detention, special provisions are contained in Clauses (4) to (7) of Article 22.

The first exception was accepted by the Constituent Assembly without any opposition as it embodied a sound principle. For instance, if India were at war with another country, considerations of national security may demand the arrest and detention of a person who is the citizen of the enemy country.

He may not be given the rights guaranteed under Article 22 (1) and (2). But no such easy justification is available for the second exception which provides for preventive detention even during normal times. Discussion on this clause in the Constituent Assembly was stormy and acrimonious.

The reasons for the introduction of such a clause were explained by Dr. Ambedkar thus:

"It has to be recognised that in the present circumstances of the country, it may be necessary for the executive to detain a person who is tampering either with public order or with the Defence Services of the country. In such case, I do not think that the exigency of the liberty of the individual shall be placed above the interests of the State."

Dr. Ambedkar's explanations, however, failed to satisfy a considerable section of the Assembly who criticised the provision in strong terms.

Replying to the debate, Dr. Ambedkar laid emphasis on the special safeguards embodied in the Constitution even when a person is arrested and detained under

a preventive detention law. He said:

"If all of us follow purely constitutional methods to achieve our objective, I think the situation would have been different and probably the necessity of having preventive detention might not be there at all. But I think in making a law we ought to take into consideration the worst and not the best. There may be many parties and persons who may not be patient enough to follow constitutional methods but are impatient in reaching their objective and if for that purpose (they) resort to unconstitutional methods, then there may be a large number of people who may have to be detained by the executive to prepare the cases and do all that is necessary to satisfy the elaborate legal procedure prescribed. Is it practicable?"

Dr. Ambedkar, however, pointed out the safeguards provided in the Constitution to mitigate the rigours of an apparently absolute power of preventive detention permitted under Article 22 (3).

First, every case of preventive detention must be authorised by law. It cannot be at the will of the executive.

Secondly, no law of preventive detention shall normally authorise the detention of a person for a longer period than three months.

Thirdly, every case of preventive detention for a period longer than three months must be placed before an Advisory Board composed of persons qualified for appointment as Judges of a High Court. Such cases must be placed before the Board within the three months period. The continued detention after three months should be only on the basis of a favourable opinion by the Board. The only exception to this provision is when Parliament prescribes by law the Circumstances under which a person may be kept in detention beyond three month even without the opinion of the advisory board.

Fourthly, no person who is detained under any preventive detention law can be detained indefinitely. There shall always be a maximum period of detention

which Parliament is required to prescribe by law.

Fifthly, in cases which are required to be placed before the Advisory Board, the procedure to be followed by the Board shall be laid down by Parliament.

Sixthly, when a person is detained under a law of preventive detention, the detaining authority shall communicate to him the grounds on which the order has been made. It should also afford him the earliest opportunity of making a representation against the order.

The greatest safeguard, according to Dr. Ambedkar, is that preventive detention takes place only under the law. It cannot be at the will of the executive. It is also necessary to make a distinction between different categories of cases. There may be cases of detention where the circumstances are so serious and the consequences so dangerous that it would not even be desirable to permit the members of the Board to know the facts regarding the detention of any particular individual.

The disclosure of such facts may be too dangerous to the security of the State or its very existence. But even here there are two mitigating circumstances. First, such cases will be defined by Parliament. They are not to be arbitrarily decided by the executive. Secondly, in every case there shall be a maximum period of detention prescribed by law.

Central legislation for preventive detention: The Code of Criminal Procedure, 1973 (Cr.P.C) –

Power of preventive detention is given to police under section 151 and 107 of the criminal procedure code. Preventive arrests evidently means arrests made under sections 107 to 110 and 151 Cr.P.C and under local Police enactments containing similar provisions. While the break-up between arrests made under section 151 and sections 107 to 110 is not given, we have to recognize that there is a qualitative difference between them.

Preventive Action of the Police:

1. Police to prevent cognizable offences.-

Every police officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent, the commission of any cognizable offence.

2. Information of design to commit cognizable offences.-

Every police officer receiving information of a design to commit any cognizable offence shall communicate such information to the police officer to whom he is subordinate, and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence.

3. Arrest to prevent the commission of cognizable offences.-

(1) A police officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

(2) No person arrested under sub-section (1) shall be detained in custody for a period exceeding twenty-four hours from the time of his arrest unless his further detention is required or authorized under any other provisions of this Code or of any other law for the time being in force.

4. Prevention of injury to public property.-

A police officer may of his own authority interpose to prevent any injury attempted to be committed in his view to any public property, movable or immovable, or the removal of injury of any public landmark or buoy or other mark used for navigation.

5. Inspection of weights and measures.-

(1) Any officer in charge of a police station may, without a warrant, enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false.

(2) If he finds in such place any weights, measures or instruments for weighing which are false, he may seize the same, and shall forthwith give information of such seizure to a Magistrate having jurisdiction.

Criticism

Preventive detention is facing a number of critics since is incorporated in the constitution. Preventive detention being misused is always criticized by the society.

The first criticism is that there is no need of preventive detention for the purpose of maintaining internal security .Entry 3 of List III of the Constitution of India, which allows Parliament and state legislatures to pass preventive detention laws in times of peace for “the maintenance of public order or maintenance of supply and services essential to the community,”. Assuming that preventive detention could be justified in the interest of national security as identified in Entry 9 of List I of the Constitution, there is still no compelling reason to allow this extraordinary measure in the circumstances identified in Entry 3 of List III.

Secondly under Article 22(2) every arrested person must be produced before a magistrate within 24 hours after arrest. However, Article 22(3)(b) excepts preventive detention detainees from Clause (2) and, as a consequence, it should be repealed in the interest of human rights. At present, detainees held

under preventive detention laws may be kept in detention without any form of review for up to three months, an unconscionably long period in custody especially given the real threat of torture. At the very least, the Government should finally bring Section 3 of the Forty-fourth Amendment Act, 1978 into effect, thereby reducing the permitted period of detention to two months. Though still a violation of international human rights law, this step would at least reduce the incidents of torture significantly.

Thirdly The Advisory Board review procedure prescribed by the Constitution involves executive review of executive decision-making. The absence of judicial involvement violates detainees' right to appear before an "independent and impartial tribunal", in direct contravention of international human rights law including the ICCPR (Article 14(1)) and the Universal Declaration of Human Rights (Article 10).

Fourthly individuals held under preventive detention must be given the right to legal counsel and other basic procedural rights provided by Articles 21, 22(1) and 22(2) of the Constitution. Article 22(1) of the Constitution, for example, guarantees the right to legal counsel, but Article 22(3)(b) strips this right from persons arrested or detained under preventive detention laws. Relying on these provisions, the Supreme Court stated, in *AK Roy v. Union of India*, that detainees do not have the right to legal representation or cross-examination in Advisory Board hearings.

Article 4 of the International Covenant on Civil and Political Rights (ICCPR) -- which India has ratified -- admittedly permits derogation from guaranteeing certain personal liberties during a state of emergency. The Government, however, has not invoked this privilege, nor could it, as the current situation in India does not satisfy with standards set forth in Article 4.

Particular procedural protections are urgently needed (i) to reduce detainees' vulnerability to torture and discriminatory treatment; (ii) to prevent officials' misusing preventive detention to punish dissent from Government or from

majority practices; and (iii) to prevent overzealous government prosecutors from subverting the criminal process.

Article 9(2) of the ICCPR states: “*Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*” The PSA does not involve the laying of charges at all; however it requires that the authorities inform the arrested person of the grounds for arrest within 5 days (maximum 10 days) but clause 3(2) of the Act permits the authorities to withhold any facts for reason of ‘public interest’. Lawyers in the state report that this provision has been very broadly interpreted and that it is indeed common practice not to inform detainees of the grounds of their detention at all.

Article 9(4) of the ICCPR states: “*Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*” The right to *habeas corpus* is constitutionally secured in India; however, in practice, approaching the High Court in the state to ascertain the lawfulness of a detention order under the PSA is a long process which rarely leads to satisfactory results. The state frequently does not cooperate with court orders for court appearances or requests for documentary evidence and does not necessarily honour courts’ decisions.

The ICCPR further lays down in Article 9(5): *Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation.*

There is no such provision in Indian law.

4.2.2. Special enactments

The First Preventive Detention Act was passed by Parliament in 1950. The validity of the Act was soon challenged before the Supreme Court in *Gopalan vs. the State of Madras*. The case was heard by six Judges of the Court and each of the Judges wrote a separate opinion.

Each has examined in general the scope of fundamental rights under the Constitution besides analysing in detail the content of personal liberty. By a 4: 2 majority, the Court upheld the Act except section 14 of the Act which was unanimously declared invalid. The invalidity of this section, however, did not affect the rest of the Act as it could be severed from the remaining provisions.

For a period of two decades from 1950 to 1970 a Parliamentary enactment on preventive detention had continued to exist in the country. The Preventive Detention Act of 1950 was amended seven times, each time for a period of three years, thus extending it up to 31st December 1969.

It was not further extended; hence since then there has been no preventive detention law for the country as a whole. Some of the States, however, passed laws on preventive detention in 1970. In 1971 Parliament passed a modified version of the old Preventive Detention Act under the title Maintenance of Internal Security Act (MISA) which continued to exist until 1978 when it was abolished.

In 1980 however, a modified version of MISA was passed under the title of National Security Act which was upheld as I constitutional by the Supreme Court in 1981.

A similar Act passed by Parliament subsequently in the wake of terrorist activities in Punjab is known as Terrorist and Disruptive Activities (Prevention) Act (TADA) and has been in operation enabling the Executive to take into custody and preventive detention of persons suspected of terrorist activities.

Vigilance is still required to protect the country's hard-won freedom and national unity from forces of subversion and violent revolution. Until and unless every party or group accepts constitutional means to achieve its objectives and practices them, special provisions such as the preventive detention law and TADA may still be needed in India.

The Prevention of Terrorism Act, 2002 (POTA) was an anti-terrorism legislation enacted by the Parliament of India in 2002. The act replaced the

Prevention of Terrorism Ordinance (POTO) of 2001 and the Terrorist and Disruptive Activities (Prevention) Act (TADA) (1985–95), and was supported by the governing National Democratic Alliance. The act was repealed in 2004 by the United Progressive Alliance coalition.

The act defined what a "terrorist act" and a "terrorist" is, and granted special powers to the investigating authorities described under the act. To ensure certain powers were not misused and human rights violations would not take place, specific safeguards were built into the act. Under the new law, a suspect could be detained for up to 180 days without the filing of charge sheet in court. It also allowed law enforcement agencies to withhold the identities of witnesses, and to treat a confession made to the police as an admission of guilt. Under regular Indian law, a person can deny such confessions in court, but not under POTA.

The Unlawful Activities (Prevention) Act 1967.

Unlawful Activities (Prevention) Act is aimed at effective prevention of unlawful activities associations in India. The Constitution (Sixteenth Amendment) Act, 1963 was enacted to impose, by law, reasonable restrictions in the interests of the sovereignty and integrity of India. In order to implement the provisions of 1963 Act, the Unlawful Activities (Prevention) Act 1967 was enacted to impose, by law, reasonable restrictions in the interests of sovereignty and integrity of India, on the:

- Freedom of Speech and Expression;
- Right to Assemble peaceably and without arms; and
- Right to Form Associations or Unions.

The Unlawful Activities (Prevention) Act 1967 was amended by the Unlawful Activities (Prevention) Amendment Act 2004, in order to incorporate the provisions of POTA, which was repealed by the Parliament in the wake of nation-wide protests against its draconian provisions. The Unlawful Activities (Prevention) Amendment Act, 2008 enacted after POTA was withdrawn by the

Parliament. However, in the last Amendment Act, 2004, most of provisions of POTA were incorporated, thus making it equally draconian. In 2008, after Mumbai attacks, it was further strengthened.

The National Security Act, 1980

Section 2(b) "detention order" means an order made under section 3

3. (1) The Central Government or the State Government may –

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, or the security of India, or

(b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India, It is necessary so to do, make an order directing that such person be detained.

(2) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of Public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

Explanation.- For the purposes of this sub-section, "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" does not include "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" as defined in the Explanation to sub-section (1) of section 3 of the Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980, and accordingly, no order of detention shall be made under this Act on any ground on which an order of detention may be made under that Act.

(3) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct, that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (2), exercise the powers conferred by the said sub-section:

Provided that the period specified in an order made by the State Government under this sub-section shall not, in the first instance, exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time.

(4) When any order is made under this section by an officer mentioned in sub-section (3), he shall forthwith report the fact to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as, in his opinion, have a bearing on the matter, and no such order shall remain in force for more than twelve days after the making thereof unless, in the meantime, it has been approved by the State Government:

Provided that where under section 8 the grounds of detention are communicated by the officer making the order after five days but not later than ten days from the date of detention, this sub-section shall apply subject to the modification that, for the words "twelve days", the words "fifteen days" shall be substituted.

(5) When any order is made or approved by the State Government under this section, the State Government shall, within seven days, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as, in the opinion of the State Government, have a bearing on the necessity for the order.

The Bombay Police Act, 1951

When the executive officers charged with responsibility of maintaining law and order / Public order in their jurisdictions have reasons to believe that activities/ movements of a person are detrimental / prejudicial to maintaining public tranquility and smooth flow of life, such authorities (C.P./D.M.) may authorize and order such a person to be detained under the various preventive detention laws.

The commissioner of Police and the District Magistrate in areas under their respective charges may issue order in writing u/s 37 (3) of Bombay Police Act, 1951 for prohibiting any assembly or procession whenever and for so long as it consider such prohibition necessary for preservation of the public order. Such written order can also be issued for prohibiting the carrying of arms, swords, spears, guns, knives, sticks or lathis, or any other article, which is capable of being used for causing physical violence.

Other State Legislations:

1. The Jammu and Kashmir Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988
2. The Karnataka Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum-Grabbers Act, 1985
3. The Maharashtra Prevention of Communal, Anti-Social and Other Dangerous Activities Act, 1980
4. The Maharashtra Prevention of Dangerous Activities of Slum Lords, Bootleggers and Drug Offenders Act, 1981
5. Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders (Forest

- Offenders), Goondas, Immoral Traffic Offenders and Slum-Grabbers Act, 1982
6. The Chhattisgarh Special Public Security Act 2005
 7. The Madhya Pradesh Special Public Security Act 1999
 8. Kerala, the state of Kerala enacted the Kerala Anti- Social Activities (Prevention) Act 2007,
 9. Tamil Nadu ,The Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, and Slum-Grabbers Act 1982 .
 10. The Maharashtra Control of Organized Crime Act, 1999

4.3 Questions for Self learning:

1. What is the constitutional validity of preventive detention?
2. Discuss in detail the provisions in Cr. P. C. with respect to preventive detention?
3. Discuss other special legislation with respect to preventive detention?
4. Do you agree that the concept of preventive detention is necessary evil?

4.4. Let us sum up

Preventive detention has both some advantages and disadvantages as every others law. But, the use of this power should be very limited or it may be a weapon of oppression very easily. India is one of the few countries in the world whose Constitution allows for preventive detention during peacetime without safeguards that elsewhere are understood to be basic requirements for protecting fundamental human rights. For example, the European Court of Human Rights has long held that preventive detention, as contemplated in the Indian Constitution, is illegal under the European Convention on Human Rights regardless of the safeguards embodied in the law.

Preventive detention is devised to afford protection to society. Any preventive measures, even if they involve some restraint or hardship upon individuals, do

not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the state.

Preventive detention, a method solely reserved by the government to detain an individual, withholding his/her freedom, without the prior awareness of the courts about the matter, is always seen as an indicator of autocracy, the degree of which depends on the extent to which an individual's rights are repressed without the participation of the judiciary. Thus on the basis of this, a proper liberal democracy would have minimal preventive detention measures available for the government. The Indian government for instance has through legislation passed several acts on central as well as the state level giving the powers of preventive detention in special cases, besides the sections provided in the Cr.P.C.

Following things need to be considered while amending the preventive detention law.

The detainees should be promptly informed of all the reasons for their arrest and detention to enable them to effectively present their case when seeking legal redress. The relatives of detainees are promptly notified of detention and all transfers of detainees. There should be regular access of detainees to lawyers, family members and medical care be made mandatory under the law; ensure its implementation. No one is subjected to torture and cruel, inhuman or degrading treatment or punishment while in detention.

4.5. Glossary

Preventive detention: According to the Webster's World Law Dictionary, "preventive detention is a confinement of an accused person pending trial, under terms of a statute authorizing denial of bail to defendants charged with having committed certain offenses and/or are considered to be a danger to themselves or to the public at large."

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- 3 *Ramesh v. State of Gujarat*, A.I.R. 1989 S.C. 1881.
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- 7 *Sunil Fulchand Shah v. Union of India*, A.I.R. 1989 S.C. 1529.
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UNIT 5

Introductory

5.0. Objectives.

5.1. Introduction

5.2 Topic Explanation

5.1. Definition of Penology

5.3 Questions for Self learning

5.4. Let us sum up

5.5. Glossary

5.6. References

Unit 5 Introductory

5.0. Objectives.

After studying this unit the student will be able to

1. understand the concept of penology
2. acquaint with the various definitions of penology

5.1. Introduction

The word Penology is derived from the Latin word *poena*, i.e. "punishment" and the Greek suffix *-logy*, "study of". It is a section of criminology that deals with the philosophy and practice of various societies in their attempts to repress criminal activities, and satisfy public opinion via an appropriate treatment regime for persons convicted of criminal offences.

Penology is concerned with the effectiveness of those social processes devised and adopted for the prevention of crime, via the repression or inhibition of criminal intent via the fear of punishment.

5.2 Topic Explanation

5.1. Concept of Penology

We first need to consider what is meant by punishment. Punishment can be distinguished from other forms of pain or suffering such as a painful treatment for a medical condition where the harm is not an expression of moral condemnation, and not a response to our misdeeds. Punishment rests on moral reasons, the expression of moral condemnation, in response to rule infringements. Indeed, Feinberg (1994) refers to censure or condemnation as the defining feature of punishment. What distinguishes punishment, says Feinberg, is its expressive function: ‘punishment is a conventional device for the expression of attitudes of resentment and indignation. Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties’ (Feinberg 1994: 73). A penalty in football is not comparable to imprisonment in terms of public reprobation. Punishment is ‘a symbolic way of getting back at the criminal, of expressing a kind of vindictive resentment’ (ibid: 76). Condemnation or denunciation, he says, conjoins resentment and reprobation.

5.2 Definition of Penology :-

Penology concerns with the various aspect(s) of punishment and Penal policies. The various mechanisms of punishing the offenders are also studied under penology.

Penology is an extended branch of law enforcement. The main justification the penal mechanism lies the overriding function of the state to Maintain law and order, to sustain law enforcement mechanism and maintain them in terms of condition. Thereby those who defile the majesty of law and are impervious to the demands of collective social conscience can be removed and kept out the circulation and exposed to such minimum legal and physical restrictions for a period of time as may be necessary to ensure that they may see the error of their ways and not repeat their anti-social or deviant acts.

Dean J. Champion

According to Encarta Reference Library 2005 - "Penology is the study of prisons and punishment management. It studies the theory, scientific study of and practice of how criminals are punished, how prisons are managed, and how rehabilitation is handled".

Prisons are also called penitentiaries. The word penitentiary was coined in the late 18th century because certain groups believed that through solitary religious study of the Bible, prisoners would become penitent (remorseful) and reform their behaviour. The study of theories and practices of punishment is called Penology.

M S Sabnis :-

According to him, Penology is sometimes described as a science of punishment, although one may find therein more of humanism than of science. Penology is at best, a body of systematised knowledge of management of penal measures and penal institutions so designed that a minority among people who dae violates the established norms of individual and social conduct and behaviour codified as law by a given society at a given time and place are kept out of circulation for the certain period of the time in order to enable the rest of society, which is predominantly law abiding, to constitute its socially useful activity without let or hindrance.

Cladwell :- According to Cladwell

Punishment is an art which involves the balancing of retribution, deterrence and reformation in terms not only of the court but also of the values in which it takes place and in the balancing of these purposes of punishments, first one and then the other receives emphasis as the accompanying conditions change.

Penology is Branch of criminology dealing with prison management and the treatment of offenders. Penological studies have sought to clarify the ethical bases of punishment, along with the motives and purposes of society in inflicting it; throughout history and between nations in penal laws and procedures and the social consequences of the policies in force at a given time.

Dr. Ayman Elzeiny :-

The “Penology” word is derived from “punishment or penalty” word.

The energetic movement of human rights contributed to the adoption of the reforms penology as a science. Now as the struggle against criminality uses not only penalties but also security measures and pure social methods, the denomination of penology became anachronistic.

Penology as a science could be divided into prevention science and treatment science. The prevention science operates before the commission of the crime, while the treatment science takes place after the occurrence of the crime to amend the criminal and avoid his recidivism. And also suggests the ideal methods of prevention and treatment, therefore it traces that ideal criminal policy.

In conclusion we mean by penology now a days a substitute which we call “science of struggle against criminality” that means the ideal methods of prevention and treatment as regards criminality”.

So we shall explain at first the prevention and after that the treatment whether its method is legislative, Judicial or executive.

A key feature of punishment is that it rests on a moral foundation, expressing a moral judgement. It is reflective and based on reasons. A further distinguishing feature of punishment is that it stems from an authoritative source, usually the state. Suffering consequent upon misdeeds is not punishment unless those who inflict it have authority over the offender. If we imagine that a murderer chased

by the police crashes his car and dies before he can be tried, he has not suffered punishment but escaped it. Even if we conceive of misfortune befalling a person who commits a bad deed, as 'God's punishment', we are still conceiving of punishment as derived from authority.

The term Penology was coined in 1834, by Francis Lieber, a German American to denote a system of administering punishment to the convicted offenders. But Cesare Beccaria's Essay on crimes and punishments, published in 1764, and marks the beginning of what came to be known, a few years later, as a classical school of Penology. Beccaria's views on crime and punishment shocked to its very foundations the arbitrary, inhuman, oppressive, traditional penal system, setting in motion radical Penological concepts and doctrines which provided a framework of more humanistic, more enlightened and rational Penal system.

As an organized branch of knowledge, Penology is only two and half centuries old. The lineaments of penology are clearly discernible in the pioneer work of prison reform by John Howard (1726-1789), Elizabeth Fry (1780-1845), and Mary Carpenter in England, Sir William Crofton in Ireland and Dr. Enoch C. Wines (1806-1879) and Benjamin Sanborn (1831-1917) in the United States. The principles of Penology were, however, first enunciated in the US in the Declaration of Principles, 1870 adopted by the National (American) Prison Association (renamed in 1941 as the Annual Congress of Correction).

Conventional penologists generally distinguish between six general philosophical approaches that underpin their policies and inform sentencing practice:

- (1) incapacitation/social defence,
- (2) punishment/ retribution/just deserts,
- (3) deterrence,

- (4) rehabilitation/treatment,
- (5) prevention, and
- (6) restitution/reparation.

The focus on punishment and penal institutions, such as the prison, and their possible justifications is the remit of what is called 'penology'.

Understanding penal policy

The question of why some acts are criminalised and not others, and why society deals harshly with some wrong-doing but lightly with others, is much debated in criminology. But when we consider this in relation to penal policy, a fundamental issue is why punishment is seen as an appropriate response to a specific event or mode of behaviour. This entails asking three questions:

- First: what particular response is made and why?
- Second: if the response is penal, which particular penal option is selected?
- Third: what is the particular level of penal response?

These three dimensions of penal policy, what to punish, how to punish, and how much to punish, will shape policy outcomes and while this book will focus principally on the last two, the first is still important as it sets the scene for the latter two elements.

In looking at the first question, we might ask why the response is punitive, rather than taking some other form, such as social assistance or a medical response. The offender might be seen as a wicked person, who should be punished, or as a sick person requiring treatment, or as an inadequate individual whose criminality is the result of social deprivation and who needs social welfare policies to address that problem, as well as appropriate crime-prevention strategies.

Justice embodies notions of fairness to all members of the community, including victims and offenders, and striking a balance between their competing interests is the cornerstone of current criminal justice policy. But it also assumes a consensus on what constitutes justice, and achieving justice in terms of improving conviction rates, for example, may create injustice for particular individuals or groups. What is construed as fair treatment means different things in different theories of social justice, but its construction also depends on how punishment is rationalised in the different theories of punishment which moral philosophers, penologists, and criminologists have developed, notably the classical theories of retributivism and utilitarianism. By retributivism is meant the approach which links punishment according to the desert or culpability of the individual and which matches the severity of the punishment to the seriousness of the crime and the culpability of the offender. By utilitarianism is meant the approach which sees individuals as motivated by the pursuit of pleasure and avoidance of pain and uses this to devise social and penal policies to promote the greatest happiness of the greatest number. Punishment, on this approach, is used to prevent offending and reoffending through deterrence, incapacitation, and rehabilitation.

Consequently, determining what constitutes the justice of a particular punishment requires a decision on the theory of punishment to be deployed: just punishment from a retributivist standpoint might seem unjust from a utilitarian perspective and vice versa. As we shall see later, preventive detention may be justifiable if the interests of the wider society are given priority over individual rights but this raises problems for retributivism.

Human rights

Human rights have implications for both the theory and practice of punishment in justifying specific punishments, in assessing the justice of punishments, and

in improving standards in penal institutions. Human rights instruments are, then, a key mechanism for achieving just punishment and rights are themselves an important element of many theories of punishment. For example, natural rights are a significant dimension of retributivist theory, which recognises the right of the offender to be treated with respect as an autonomous human being. Rights have therefore provided a way of criticising the penal system in the UK which has been strongly influenced by utilitarianism, an approach which has been criticised for its failure to acknowledge the rights of the offender and for sacrificing the individual's rights for the wider public interest. Rights also have implications for issues such as the interviewing and detention of suspects before trial, the treatment of remand prisoners and the granting of bail, the defendant's right to a fair trial, the right to be presumed innocent, the treatment of witnesses, preventive detention, the right to be released when one's sentence is served, and the right not to be subject to unfair or discriminatory treatment. These principles may act as a control on judicial discretion and inhibit disparities in sentencing. Rights also extend to victims of crime and help shape policy on their role in the criminal process, on their entitlement to redress. These issues will be considered for penal reformers, rights are seen as a way of achieving reform, although not all radical reformers share a commitment to a rights approach. Some Marxist theorists of law, who believe the rule of law may mask social injustice, are suspicious of rights because they are essentially individualist rather than collectivist, abstracting the individual from the historical and social context, and because they fail to deliver substantive justice (Easton 2008a).

Rights have implications across the criminal justice system and at all stages of the criminal justice process, but we will be particularly concerned with the impact of rights jurisprudence on the experience of custody. Due process and substantive rights have implications for the treatment of prisoners. For example, they can achieve fairer treatment in the context of disciplinary procedures and

decision making over issues such as segregation and transfers, but also in terms of substantive rights to food, exercise, and time unlocked.

The Criminal Justice Act 2003 of UK states ‘five purposes of sentencing’: crime reduction, public protection, offender rehabilitation, punishment and reparation. The unified theory provides the coherent, rights-based framework we require. Multiple sentencing purposes are justified for the protection of rights. Different purposes conflict when they lack a common overarching aim. Crimes are public wrongs that violate and threaten rights. Punishment should be understood as a response to crime that aims to protect and maintain rights. The five purposes of sentencing represent different ways to achieve rights protection. The unified theory provides us with the coherent framework that can justify their inclusion and illuminate their implementation in practice.

The unified theory of punishment offers new ideas for criminal justice reforms that better secure the protection of rights for all.

Why a ‘unified’ theory of punishment?

- * A coherent framework to manage potential conflict between different sentencing purposes
- * Rejects a one-size-fits all approach and recognises importance of context
- * Ensures ‘outcome flexibility’ so punishment can better meet the needs and expectations of stakeholders

- * Punitive restoration model clarifies how restorative justice can be transformed and utilized more widely contributing to less crime, and higher public confidence at less cost³¹

5.3 Questions for Self learning

³¹ Thom Brooks, *Punishment* (Routledge, 2012). Law School Research Briefing no. 3 Durham Law School Briefing Document, Durham University. www.durham.ac.uk/law

1. Discuss the concept of penology.
2. Define penology. How is it important in society?
3. Can penology pass the touch stone test of human rights? Explain with help of illustrations.

5.4. Let us sum up

The study of penology therefore deals with the treatment of prisoners and the subsequent rehabilitation of convicted criminals. It also encompasses aspects of probation (rehabilitation of offenders in the community) as well as penitentiary science relating to the secure detention and retraining of offenders committed to secure institutions. Penology concerns many topics and theories, including those concerning prisons (prison reform, prisoner abuse, prisoners' rights, and recidivism), as well as theories of the purposes of punishment (such as deterrence, rehabilitation, retribution, and utilitarianism). Contemporary penology concerns mainly with criminal rehabilitation and prison management. The word seldom applies to theories and practices of punishment in less formal environments such as parenting, school and workplace correctional measures.

5.5. Glossary

Penology: The Oxford English Dictionary defines penology as "the study of the punishment of crime and prison management", and in this sense it is equivalent with corrections.

5.6. References

1. Thom Brooks, *Punishment* (Routledge, 2012). Law School Research Briefing no. 3 Durham Law School Briefing Document, Durham University. www.durham.ac.uk/law

UNIT 6

Theories of Punishment

6.0. Objectives.

6.1. Introduction

6.2 Topic Explanation

6.2.1. Retribution

6.2.2. Utilitarian prevention: Deterrence

6.2.3. Utilitarian: Intimidation

6.2.4. Behavioural prevention: Incapacitation

6.2.5. Behavioural prevention: Rehabilitation – Expiation

6.2.6. Classical Hindu and Islamic approaches to punishment

6.3 Questions for Self learning

6.4. Let us sum up

6.5. Glossary

6.6. References

Hate the sin and not the sinner

Mahatma Gandhi

6.0.Objectives.

1. To be able to understand various theories of punishment and its importance in society.
2. To be able to understand Classical Hindu and Islamic approaches to punishment.
3. To be able to understand the importance of punishment in the society

6.1. Introduction:

Punishing the offenders is a primary function of all civil 'police' States as it is under the obligation of maintaining peace and order in the society. It is in

this perspective that the problem of crime, criminal and punishment is engaging the attention of criminologist and penologists all around the world. Salmond defined crime as an “act deemed by law to be harmful for society as a whole although its immediate victim may be an individual”. Those who commit such acts, if convicted, are punished by the State. It is therefore, evident that the object of criminal justice is to protect the society against criminals by punishing them under the existing penal law. Thus punishment can be used as a method of reducing the incidence of criminal behaviour either by deterring the potential offenders or by incapacitating and preventing them from repeating the offence or by reforming them into law-abiding citizens. During the last two hundred years, the practice of punishment and public opinion concerning it has been profoundly modified due to the rapidly changing social values and sentiments of the people.

The crucial problem today is whether a criminal is to be regarded by society as a nuisance to be abated or an enemy to be crushed or a patient to be treated or a refractory child to be disciplined? Theories of punishment, therefore, contain generally policies regarding handling of crime and criminals. There are four generally accepted theories of punishment, namely, deterrent, retributive, preventive and reformative. It must, however, be noted that these theories are not mutually exclusive and each of them plays an important role in dealing with potential offenders.

Concept of Punishment:

Before dealing with the theories of punishment, it would be significant to clarify the concept of punishment. Punishment is a consequence to certain act which is ‘disapproved’ by authority and therefore inflicted is an evil, it is an unpleasant thing. But it has to be inflicted upon the ‘criminal’, or upon someone who is ‘supposed to be answerable’ for him and for his wrong doings.

Justification for Punishment:

There are some legitimate reasons for justification of punishment as follows

1. Punishment dissuades a person from future wrong doing,
2. Confining the prisoner physically incapacitates him from committing a crime,
3. Fines or payment of compensation to the victims of crime or his/her relatives or families gives them a relief.
4. Reform of the offender ensures his rehabilitation as a law abiding citizen to make him socially acceptable.

6.2 Topic Explanation

6.2.1. Retribution:

Punishment articulates and satisfies the righteous anger which a healthy minded community regards transgression, and therefore it is sometimes an end in itself. The retributive theory treated punishment as an end in itself. It was essentially based on retributive justice which suggests that evil should be returned for evil without any regard to consequences. The supporters of this view did not treat punishment as an instrument for securing public welfare. The theory therefore, underlined the idea of vengeance or revenge. Thus the pain to be inflicted on the offender by way of punishment was to outweigh the pleasure derived by him from the crime. In other words, retributive theory suggested that punishment is an expression of society's disapprobation for offender's criminal act.

Emanuel Kant was one of the supporter of this theory of retribution (as cited by Paranjape) observed: "Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or civil society, instead, it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the

purposes of someone else.’³²

According to Kant, punishment is an end in itself therefore; retribution is a natural justification because society thinks that an ‘evil’ that is a bad person should as anticipated be punished and ‘good’ ought to be rewarded. The theory of retribution has its origin in the crude ‘animal instinct’ of individual or group to strike back when hurt.

Retributive theory is closely associated with the notion of compensation which means splotch out the guilt by inducing suffering as an appropriate punishment. It is this consideration which underlies the mathematical equation of crime, namely, guilt plus punishment is equal to innocence writes Paranjape. The modern view, however, does not favour this contention because it is neither wise nor desirable. On the contrary, it is generally condemned as vindictive and cruel approach towards the offender as well as his family.

Most penologists do not accept the contention that offenders should be punished with a view to making them “pay their dues”. The reason cited that and agreed to is that no sooner an offender completes his term of sentence, he thinks that “his guilt is washed off” and he is “free” to indulge in criminality again.

6.2.2. Utilitarian prevention: Deterrence:

In olden days punishments were, normally, deterrent in nature. This kind of punishment presumes imposing of severe penalties on offenders with a view to deterring them from committing crime. The founder of this theory, Jeremy Bentham, based his theory of deterrent punishment on the principle of hedonism which said that ‘a man would be deterred from committing a crime if the punishment applied was swift, certain and severe’. This theory considers punishment as an evil, but is necessary to maintain order in the society.

The deterrent theory also seeks to create some sort of fear in the mind of

³² V. N. Paranjape, Criminology & Penology with Victimology, (2011) p243

others by providing 'sufficient' penalty and 'perfect' punishment to offenders which keeps them 'away' from criminality. Thus the rigour of penal discipline acts as a sufficient 'warning' to offenders as also others. Therefore, deterrence is undoubtedly one of the efficient policies which almost every penal system accepts despite the fact that it consistently fails in its practical application. Deterrence, as a measure of punishment particularly fails in case of unsentimental, hardened criminals because the severity of punishment hardly has any effect on them. It also fails to deter ordinary criminals because many crimes are committed on the 'spur of the moment' without any prior intention or design. The ineffectiveness of deterrent punishment is comprehended from the fact that quite a large number of hardened criminals return to prison soon after their release. Thus the core object of deterrent punishment is indisputably defeated. This view finds support from the fact that when capital punishment was being publicly awarded by hanging the person to death in public places, many persons committed crimes of pick-pocketing, theft, assault or even murder in those men-packed gatherings despite the ghastly scene³³.

6.2.3. Utilitarian: Intimidation: (pressure/ threat/ Creating fear)

The aim is not to 'punish' the crime but to 'prevent' it, therefore threat will render any such action unnecessary. If trespass still takes place, he undertakes prosecution. Thus, the instrument or deterrence which is devised originally consisted in the general threat and not in particular convictions. The real object of the penal law therefore, is to make the threat generally known rather than putting it occasionally into execution. This indeed makes the preventive theory realistic and gives it humane touch. It is effective for discouraging anti-social conduct and a better alternative to deterrence or retribution, which now stand rejected as methods of dealing with crime and criminals. Preventive punishment is philosophy based on the proposition "not

³³ V. N. Paranjape, *Criminology & Penology with Victimology*, (2011) p243

to take revenge of crime but to prevent it”. It assumes that need for punishment of crime arises simply out of social requirements. In punishing a criminal, the community protects itself against anti-social acts which cause danger to social order, in general person or property of its members. In England, utilitarian’s like Bentham, Stuart Mill and Austin supported preventive theory because of its humanising influence on criminal law. They asserted that it is the certainty of law and not its severity, which has a real effect on offenders.

6.2.4. Behavioural prevention: Incapacitation:

Due to the preventive outlook regarding ‘crime’ views regarding criminals’ changed tremendously, thus the development of prison institution gained momentum. The preventive theory seeks to prevent the repetition of crime by “incapacitating” the offenders. It suggests that prisonisation is the best mode of crime prevention as it seeks to ‘eliminate’ offenders from society thus disabling them from repeating crime. The supporters of preventive philosophy recognise ‘imprisonment’ as the best mode of punishment because it serves as an effective deterrent and a useful preventive measure. It presupposes some kind of physical restraint on offenders. According to the supporters of this theory, murderers are hanged not merely to deter others from meeting similar end, but to ‘eliminate such dreadful offenders’ from society.

6.2.5. Behavioural prevention: Rehabilitation – Expiation:

As against ‘deterrent’, ‘retributive’ and ‘preventive’ forms of punishments, a new approach to punishment the “reformatory approach” seeks to bring about a change in the attitude of offender so as to rehabilitate him as a law abiding member of society. Reformatory theory condemns all kinds of physical punishments. The major emphasis of the reformist movement is rehabilitation of inmates in peno-correctional institutions so that they are ‘transformed’ into

law-abiding citizens. The reformists are campaigners of 'human treatment' of inmates inside the prison institutions. They also suggest that prisoners should be properly 'trained' rather reformed, thus transformed to adjust themselves to free life in society after their release from the prison.

The reformative view of penology suggests that punishment is only justifiable if it 'looks to the future' and not to the past. It should not be regarded as settling an old account but rather as opening a new one. Thus the supporters of this view justify prisonisation not solely for the purpose of isolating criminals and eliminating them from society but to bring about a change in their mental outlook through effective measures of reformation during the term of their sentence. The modern law provides for special consideration such as 'parole' and 'probation' which are suggested as the best measures to reclaim offenders to society as reformed persons.

The reformative methods have proved useful in cases of juvenile delinquents, women and the first offenders. However, the recidivists and hardened criminals do not respond favourably to the reformist ideology.

It is therefore necessary in certain cases especially for abnormals and degenerates who have diminished responsibility punishment should not be regarded as an end in itself. However it must be only as a means, as ultimately the end being the social security and rehabilitation of the offender in society.

Yet another argument which often surfs against reformative treatment is that there is no punishment involved in it in terms, as punishment is some sort of pain and therefore, it cannot be regarded as punishment in true sense of the term. But it must be pointed out that though reformative treatment involves benevolent justice, yet the detention of the offender in prison or any other reformative institution for his reformation or readjustment is in itself a punishment because of the mental pain which he suffers from the deprivation of his liberty during the period he is so institutionalised.

6.2.6. Classical Hindu and Islamic approaches to punishment:

Dr. P. K. Sen, a well known authority on Indian penology has given a comparative account of the old and new penal systems. He observed that penology embodies the fundamental principles upon which the State formulates its scheme of punishment. He further pointed out that punishment always lacks exactness because it is concerned with human conduct which is constantly varying according to the circumstances. He therefore, suggested that “punishment must be devised on case to case basis so that it could be free from rigidity and capable of modification with changing social conditions”. *Dr. Sen* emphatically stressed that penal science is not altogether new to Indian criminal jurisprudence. A well defined penal system did exist in ancient India even in the time of *Manu* or *Kautilya*. In ancient penal system, the ruler was expected to be well versed in *Rajdharm* (duty of king) which included the idea of *Karma* (duty) and *Dand* (punishment).

The ancient Indian criminal justice administrators were convinced that punishment serves as a check on repetition of crime and prevents law-breaking. They believed that all theories of punishment whether based on vengeance, retribution, deterrence, expiation or reformation are directed towards a common goal, that is, the protection of society from crime and criminals. Thus, punishment was regarded as a measure of *social defence* and a means to an end. The modern trend, however, is to replace retributive and deterrent methods by reformatory and corrective measures, the object being rehabilitation of the offender. Commenting on this aspect of penal justice, *Dr. P.K. Sen* asserted that the concept of punishment has now radically changed inasmuch as it is no longer regarded as a reaction of the aggrieved party against the wrong-doer but has become an instrument of *social defence* for the protection of society against crime³⁴.

³⁴ Cited from V. N. Paranjape, *Criminology & Penology with Victimology*, (2011) pp252-53

During the medieval period the Muslim rulers introduced their own penal laws in India. The system being retributive in nature and irrational and discriminatory in its application, failed to meet the ends of justice. The Muslim law arranged punishments for various offences into four main categories, viz. (1) Kisa, (6) Diya, (3) Hadd and (4) Tazeer. These punishments carried with them a bias and contempt for Hindus. However, with the decline of Moghul rule, the British captured political power in India. The irrationalities of Muslim criminal law provided an opportunity for British law administrators to substitute their own system of laws with necessary modifications so as to suit the needs of India.

While introducing the principles of English criminal law and methods of punishment in the Indian criminal justice system, they exercised great caution to ensure that the changes did not offend the sentiments of the indigenous people. The new system introduced by the British rulers was far more rational, impartial and reasonable than their predecessors and was therefore, readily accepted by the people of India. As already stated, the supremacy of Brahmins no doubt revived once again but it was essentially a part of British diplomacy to divide and rule Indian community. However, it came to an end in the closing years of British Company's rule in India³⁵.

6.3 Questions for Self learning

1. What are the various theories of punishment?
2. How is Retribution punishment different from Deterrence Punishment?
3. Discuss the classical Hindu and Islamic approaches to punishment.

6.4. Let us sum up

Crime is inevitable in the society. In views of Emile Durkheim, “there is no society that is not confronted with the problems of criminality..... everywhere and always there have been men who have behaved in such a way as to draw

³⁵ Cited from V. N. Paranjape, Criminology & Penology with Victimology, pp258

upon themselves penal repressions....”³⁶. As crime is a universal phenomenon it is obviously primary concern of every society.

In this chapter we studied various theories of punishment i.e. Retribution, Utilitarian prevention: Deterrence, Utilitarian: Intimidation, Behavioural prevention: Incapacitation, Behavioural prevention: Rehabilitation – Expiation and also Classical Hindu and Islamic approaches to punishment. The major questions which are attracting the attention of modern penologists are whether the traditional forms of punishment should remain the exclusive or primary weapons in limiting criminal behaviour or should be supplemented and even replaced by a much more flexible or diversified combination of measures of treatment of a reformatory, curative and protective nature. After studying views of various legal philosophers we come to conclusion that none of the punishment alone can serve the purpose, therefore it is clear that none of them is competent enough, but a combination of one or more can serve the purpose of maintaining peace in the society and control the crime rate.

6.5. Glossary:

- 1. Punishment:** when certain act is ‘disapproved’ by authority and the same is done the consequence to which an ‘evil act’ is inflicted upon the person doing the disapproved act.
- 2. Theories of Punishment:** various theories propounded and different time (era) to justify the imposition of such punishment.

6.6. References

1. Ahmad Siddique, (1993), *Criminology: Problems and Perspectives*, Eastern Book Co. Lucknow
2. V. N. Paranjape, (1999) *Criminology & Penology*, Central Law Publication, Allahabad.
3. V. N. Paranjape, (2011), *Criminology & Penology with Victimology*, Central Law Publication, Allahabad.

³⁶ Ahmad Siddique, , *Criminology: Problems and Perspectives*, p1

UNIT 7:

The Problematic of Capital Punishment

7.0 Objectives

7.1. Introduction

7.2 Topic Explanation

7.2.1. Constitutionality of Capital Punishment

7.2.2. Judicial attitudes towards Capital Punishment in India –

An inquiry through the statute law and case law.

7.2.3. Law Reform Proposals

7.3 Questions for Self learning

7.4. Let us sum up

7.5. Glossary

7.6. References

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7.0 Objectives:

- (1) To study the constitutionality of death penalty
- (2) To know the relevancy of death penalty.
- (3) To examine the reasoning of rarest of rare in case of death penalty provided in rape.
- (4) To enquire about the views of different jurist and social organisation regarding death penalty

7.1. Introduction

In a social context the death penalty is the most pertinent debate. Death penalty forms an vital part of the criminal justice system in the Indian State. With the increasing strength of the human rights movement, the very existence of death penalty is questioned as morally wrong. Some of the thinkers are of opinion that is a weird argument as keeping one person alive at the cost of the lives of numerous members or potential victims in the society is unimaginable and in

fact, that is immoral³⁷. There is an argument that the existence of death penalty is important for the peace and tranquillity of the society at large.

India maintains capital punishment i.e death sentence for a number of grave offences. The Supreme Court in *Mithu vs State of Punjab*³⁸ struck down Section 303 of the Indian Penal Code, which provided for mandatory death punishment for offenders serving life sentence. Imposition of the capital punishment is not always followed by execution (even when it is upheld on appeal), because of the possibility of commutation to life imprisonment. The number of people executed in India since independence in 1947 is a matter of dispute; official government statistics claim that only 52 people had been executed since independence. However, the 1967 Law Commission of India report shows that 1,422 executions took place in 16 Indian states from 1953 to 1963, and has suggested that the total number of executions since independence may be as high as 3,000 to 4,300. In December 2007, India voted against a United Nations General Assembly resolution calling for a moratorium on the death penalty. In November 2012, India again upheld its stand on capital punishment by voting against the UN General Assembly draft resolution seeking to ban death penalty.

7.2 Topic Explanation

7.2.1. Constitutionality of Capital Punishment

Under Article 21 of the Constitution of India, no person can be deprived of his life except according to procedure established by law.

The Supreme Court of India ruled in 1983 that the death penalty should be imposed only in "the rarest of rare cases." While stating that honour killings fall within the "rarest of the rare" category, Supreme Court has recommended the

³⁷ Apurva Prabhakar, *Why Must Death Penalty Continue To Exist? International Journal of Humanities and Social Science Invention* ISSN (Online): 2319 – 7722, ISSN (Print): 2319 – 7714 www.ijhssi.org Volume 2 Issue 5 □ May. 2013 □ PP.32-36 www.ijhssi.org

death penalty be extended to those found guilty of committing "honour killings", which deserve to be a capital crime. The Supreme Court also recommended death sentences to be imposed on police officials who commit police brutality in the form of encounter killings.

The principle which, at present, is generally applied in awarding punishment is that the sentence is imposed for the protection of the public; it should not exceed the maximum merited by the gravity of the current offence. In some cases, the court appears to have departed from this principle in order to protect public from a dangerous offender. However, the element of retribution seems to have been the central theme of punishment as noted by Lord Asquith observed ‘...a third theory and it is the one which seems to me to come nearest to truth is that there must be an element of retribution or expiation in punishment; but that so long as that element is there and enough of it is there, there is everything to be said for giving punishment the shape that is mostly likely to deter and reform.’”

After going through various judicial pronouncements upholding the constitutionality of death sentence, and the evolution of ‘rarest of rare ’ theory in the landmark *Bachansingh* case debate has arisen that death penalty is cruel punishment and it is proposed to examine the justification for retention of death penalty as a form of punishment .

The need to revisit the contention that death penalty is a cruel punishment is inspired by two recent developments in the international sphere. The first is the judgment in 1995 of the South African Constitutional Court, declaring death penalty to be a cruel and inhuman punishment and therefore unconstitutional .

The second is the signing by 120 countries of statute creating the International Criminal Court, which has rejected the death penalty as a punishment for genocide, crimes against humanity and war crimes.

The Supreme Court of India held capital punishment constitutionally valid in *Jagmohan Singh v. State of UP*³⁹. Still the movement for abolition of capital punishment was getting strong day by day and by way of caution the Supreme Court engrafted a rule to S. 302 that capital punishment would be awarded only in rarest of rare cases⁴⁰. In consonance with this rule the Parliament enacted a new sub section to S. 354 CrPC which lays down: *When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case for sentence of death, the special reasons for such sentence.*

The Supreme Court's ruling that death sentence ought to be imposed only in the 'rarest of rare cases' was expanded in *Machhi Singh v. State of Punjab*⁴¹.

The following propositions were culled out by the Supreme Court:

1. The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;
2. Before opting for the death penalty, the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the crime;
3. Life imprisonment is the rule and death sentence is an exception. In other words, death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstance of the crime, and provided, the option to impose sentence of

³⁹ AIR 1973 SC 947

⁴⁰ Bachan Singh v. State of Punjab, AIR 1980 SC 898.

⁴¹ AIR 1983 SC 957.

imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances;

4. A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstances has to be accorded full weight, age and just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

In *Sushi Murmu v. State of Jharkhand*⁴² the accused for his own prosperity sacrificed a child of 9 years. The child was killed in a grotesque and revolting manner. The court upholding the sentence of death, enumerated the following circumstances where death sentence may be imposed:

A. When murder is committed in brutal, grotesque, diabolical revolting and dastardly manner so as to arouse intense and extreme indignation of the community;

B. When murder is committed for a motive which evinces total depravity and meanness e.g. murder by hired assassins for money or reward or cold blooded murder for gain or where the murderer is in dominating position or in a position of trust or where the murder is committed in betrayal of motherland;

C. When murder of SC/ST, minority community etc., is committed not personal reason but in circumstances that arouse social wrath ; bride burning or dowry death or when murder is committed in order to remarry for the sake of extracting more dowry or to marry other woman on account of infatuation;

D. When multiple murder is committed ; and

E. When the victim of murder is innocent, child or helpless woman or old or infirm person and the murderer is in dominating position or a public figure generally loved and respected by the community .

⁴² 2004 CriLJ 658 (SC)

There is a clear and discernible necessity of caution to set the maximum punishment in an offence. And also by implication there must be intensive and exhaustive inquiry into accused related parameters before employing the maximum sentence by a court of law. Therefore discretion to the judiciary in this respect (to declare the maximum punishment) is of utmost critical and seminal value. Reasons must be detailed setting clearly why any punishment other than the maximum punishment will not sentencing which has been statutorily recognized under section 354.

In an appeal filed by Vikram Singh and another person, facing the death sentence, the constitutional validity of Section 364A of the Indian Penal Code has been questioned.

7.1.2. Judicial attitudes towards Capital Punishment in India - An inquiry through the statute law and case law.

Indian Penal Code, 1860

During the British regime in India, death was prescribed as one of the punishments in the Indian Penal Code, 1860 (IPC), and the same was retained after independence.

Section under IPC	Nature of crime
120B	Punishment of criminal conspiracy
121	Waging, or attempting to wage war, or abetting waging of war, against the Government of India
132	Abetment of mutiny
194	If an innocent person be convicted and executed in consequence of such false

	evidence to procure conviction of capital offence
302, 303	Murder
305	Abetment of suicide of child or insane person
364A	Kidnapping for ransom
396	Dacoity with murder If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished

In addition to the Indian Penal Code, a series of legislation enacted by the Parliament of India have provisions for the death penalty.

Under the Commission of Sati (Prevention) Act, 1987 Part. II, Section 4(1), if any person commits sati, whoever abets the commission of such sati, either directly or indirectly, shall be punishable with death.

The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 was enacted to prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes. Under Section 3(2) (i) of the Act, bearing false witness in a capital case against a member of a scheduled caste or tribe, resulting in that person's conviction and execution, carries the death penalty.

In 1989, the Narcotic Drugs and Psychotropic Substances (NDPS) Act was passed which applied a mandatory death penalty for a second offence of "large scale narcotics trafficking". On 16 June 2011, the Bombay High Court ruled that Section 31A of the NDPS Act, which imposed the mandatory sentence, violated Article 21 (Right to Life) of the Constitution and that a second conviction need not be a death penalty, giving the judge(s) discretion to decide about awarding capital punishment.

In recent years, the death penalty has been imposed under new anti-terrorism legislation for people convicted of terrorist activities. On 3 February 2013, in response to public outcry over a brutal gang rape in Delhi, the Indian Government passed an ordinance which applied the death penalty in cases of rape that leads to death or leaves the victim in a "persistent vegetative state". The death penalty can also be tendered to repeat rape offenders under the Criminal Law (Amendment) Act, 2013.

More than 118 countries have abolished the death penalty either in law or practice. Whatever may be merits or demerit of it, existing law requires that for imposing death sentence, special reasons have to be recorded. The apex court in *Bachan Singh v.State of Punjab*⁴³ favoured the retention of death penalty in India and to award it in rarest of rare cases. Some recent cases of the Supreme Court have developed a new trend of awarding appropriate punishment. Where the murder has been committed by a large number of persons or by more than one person in a heinous or brutal manner, the death sentence may be awarded, otherwise the alternative punishment of Life Imprisonment be preferred. This view finds its support in the cases of *Swamy Shradhananda v.State of Karnataka*⁴⁴, *Ramsingh v. Sonia*⁴⁵, *Renuka Bai v. State of Maharashtra*⁴⁶, *B.P. Sinha v. State of Assam*⁴⁷, *Amarjit Singh v.State of Punjab*⁴⁸ etc.

Though many guidelines have been given for awarding punishment, still there is difficulty that which punishment will be appropriate in heinous crimes. NO universal rule or policy is there death sentence. It was said in B.P. Sinha case that death penalty can be imposed even on circumstantial evidence. So there is a

⁴³ AIR 1980 SC 898

⁴⁴ AIR 2007 SC 2531.

⁴⁵ 2007 (3) SCALE 106.

⁴⁶ (2006) 7 SCC 442

⁴⁷ 2007 (2) SCALE 42

⁴⁸ AIR 2007 SC 132.

need to study for evolving the proper pattern for sentencing in India, so that appropriate sentence is awarded in heinous crimes.

7.2.3 Law Reform Proposals

S.367 (5) of the Criminal Procedure Code (1898) prior to its amendment in 1955, required a court sentencing a person convicted of an offence punishable with death to a punishment other than death to state the reasons why it was not awarding death sentence. The amendment deleted this provision but there was no indication in either the Cr.P.C. or the Indian Penal Code 1860 (IPC) as to which cases called for life imprisonment and which the alternative –death penalty. The Law Commission of India in 1967 undertook a study of death penalty and submitted its Report to the government .It justified its conclusion for retention of the death penalty thus:

Having regard ...to the conditions in India, to the variety of social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment.

7.3 Questions for Self learning

a. Write in short

1. What is capital punishment?
2. Law Reform Proposals

b. Write in brief

1. How is Constitutionality of Capital Punishment proved?
2. Discuss with help of case laws the Judicial attitudes towards Capital Punishment in India.

3. Discuss the recommendations of the law commission with respect to Capital punishment.

c. Please study some important cases

1. Alope Nath Dutta & Ors. V. State of West Bengal, 2006 (13) SCALE 467.
2. Amarjit Singh v. State v. State of Punjab, AIR 2007 SC 132.
3. Bachan Singh v. State of Punjab, AIR 1980 SC 898.
4. B.P.Sinha v. State of Assam, (2007) 2 SCALE 42.
5. Jagmohan Singh v. State of UP, AIR 1973 SC 947.
6. Kashmir Singh v. State of Himachal Pradesh 1990 Sup (1) SCC 133.
7. Machhi Singh v. State of Punjab, AIR 1980 3 SC 957.
8. Raju v. State of Haryana, AIR 2001 50.
9. Ram Singh v. Sonia, (2007) 3 SCALE 106.
10. Renuka Bai v. State of Maharashtra, (2006) 7 SCC 442.
11. Sambhal Singh v. State of UP, 2004 Cri LJ 1533 (ALL).
12. Sardar Khan v. State of Karnataka, 2004 CriLJ 910 (SC).
13. Shushil Murmu v. State of Jharkhand, 2004 CriLJ 658 (SC) .
14. Simon v. State of Karnataka, (2004) 2 SCC 694.
15. Swamy Shraddananda v. State of Karnataka, AIR 2007 SC 2531

7.4. Let us sum up

One of the objects of punishment is to restrain a crime. This purpose is achieved by capital punishment just as much as any other form of punishment. The issue of death penalty has been one of the most debatable topics in the criminal justice system. It is a basic psychological principle that death is the greatest fear for most of the normal persons. Most humans have a natural fear of death. When the people are aware that for certain offences the anticipated punishment is death, this definitely act as a deterrent by preventing people from committing such heinous crimes. Man is deterred from committing crimes mainly owing to the existence of laws that penalize the committing of such acts. There are very few people who believe it is immoral to commit wrongful acts. If laws preventing wrongful acts do not exist, then the human society would be identical to uncultured society that flourishes on the principle of survival of the fittest.

7.5. Glossary

1. Capital Punishment: death sentences

Death penalty is the sentence, which legally terminates the natural life of a person. This means that a person's life can be terminated legally by taking recourse to law. This connotes that a person's life is cut short from the natural span of that person's life.

2. Constitutionality ; valid by constitution of the country.

7.6. References :

Batuklal, *The Code of Criminal Procedure*, Central law Agency, 2nd edition 2008

2. Ratanlal and Dhirajlal, *The Code of Criminal Procedure*, Wadhwa &Co., 16th ed. Reprint 2003.

3. N.D. Basu, *The Code of Criminal Procedure*, Ashoka Law House, 9th ed. 2001.

4. M.P. Jain, *Indian Constitutional Law*, Wadhwa and Co. Nagpur, 2004

5. H.M. Sirvai *Constitutional law*

6. Dr. S.A.T. Subzwari *Criminal Major Act*. 3rd Edition (Reprint 2009)

7. *The Code of Criminal Procedure*, 1973

8. Apurva Prabhakar, *Why Must Death Penalty Continue To Exist?* *International Journal of Humanities and Social Science Invention ISSN (Online): 2319 – 7722, ISSN (Print): 2319 – 7714 www.ijhssi.org Volume 2 Issue 5 □ May. 2013 □ PP.32-36 www.*

9. Ahmad Siddique, (1993), *Criminology: Problems and Perspectives*, Eastern Book Co. Lucknow

10. V. N. Paranjape, (1999) *Criminology & Penology*, Central Law Publication, Allahabad.

UNIT 8:

Imprisonment

8.0 Objectives

8.1. Introduction

8.2. Topic Explanation

8.2.1. The state of India's jails today

8.2.2. The disciplinary regime of Indian prisons

8.2.3. Classification of prisoners

8.2.4. Rights of prisoner and duties of custodial staff.

8.2.5. Deviance by custodial staff

8.2.6. Open prisons

8.2. 7. Judicial surveillance - basis - development reforms

8.3. Questions for Self learning

8.4. Let us sum up

8.5. Glossary

8.6. References

8.0 Objectives

1. To study the state / condition of India's jails today
2. To understand disciplinary regime of Indian prisons
3. To study the Classification of prisoners
4. To understand Rights of prisoner and duties of custodial staff.
5. To study the Deviance by custodial staff
6. To study the provisions of Open prisons
7. Judicial surveillance - basis - development reforms

8.1. Introduction

As a result of international movements for humanisation of prisons the judiciary in the common law countries started taking active interest in prisoner's

treatment. It has been established that prisons are no more institutions designed to achieve only the retributive and deterrent aspects of punishment. They are now treated as places where the inmates are lodged not as forgotten members of the society but as human beings having some rights. India also the judiciary has come forward to protect the rights of the prisoners. It can be seen that initially here also the courts were reluctant to adopt the liberal attitude towards prisoner's claims of various demands concomitant to the fundamental rights concepts. But later the attitude changed and the courts started recognising the human rights concepts in favour of prisoners in letter and spirit. Through various decisions the judiciary have recognised the right to counsel, right to speedy trial, right to physical protection, right to expression, right to meet family members, and right against cruel and unusual or oppressive jail practices.

8.2 Topic Explanation

8.2.1. The state of India's jails today

Prison system in ancient period evolved merely accidentally. It was not carefully planned. The great prison in Rome was built by Pope Innocent X in 1655. There were generalised institutions for the care of criminals. The Seventeenth and Eighteenth centuries saw the rise of "Prisons", "Jails", "Houses of correction"⁴⁹. There is deterrence. Most of the prisons are heavily overcrowded. Convicts and under-trials are lodged in the most of the prison buildings in the States are ill-equipped, ill furnished and without proper ventilation or sanitation and with insufficient water supply arrangements.

8.2.2. The disciplinary regime of Indian prisons

The most comprehensive study of the prison administration in all its aspects was done by the Indian Jails Committee in 1919-20 which examined the conditions

⁴⁹ John Lewis Gillin, *Criminology and Penology* (1977), p.372.

of prisons not only in India but also in England, Scotland, U.S.A., Japan, Philippines and Hong Kong.

In the meantime, the Government of India sought assistance of the United Nations for the deputation of an expert to study the prison administration in India. Accordingly, Dr. W. C. Reckless visited India in 1951 and made several valuable suggestions such as revising boards for the selection of prisoners for premature release and the introduction of legal substitute for short sentences. In 1956, the Government of India set up the All India Jail Manual Committee which prepared the Model Prison Rules in 1959 mainly for the guidance of the State Governments. But except the state of Maharashtra, no other state has completely revised the jail manuals on the basis of the said Model Rules.

The Ismail Committee in which submitted its report in 1977 mainly dealt with allegations of ill-treatment and beating. Along with that it has made some suggestions for prison reforms, rights of the prisoners and other ancillary matters: The Committee has recommended that scientific classification of prisoners and diversification of institutions are essential for treatment programmes in prisons. Dealing with delay and indifference to prison reforms, Justice Ismail said that so long as prisoners have not been cast out of society and they continue to be members of the society, though segregated temporarily, but are expected to rejoin the mainstream of the society after their release, it is the duty of the State to spend for their rehabilitation, reformation and re-entry into the mainstream of the society.

The Government of India, concerned at the large number of under trial prisoners in Indian jails, has brought to the notice of the Law Commission⁵⁰ the need for undertaking suitable judicial reforms and changes in the law, in order to deal with the problem posed thereby. The Commission has recommended speedy investigation of the Case. It highlighted the need to liberalise provisions for release on bond. It also suggested separate places of detention for under trial prisoners.

The Tamil Nadu Prison Reforms Commissions has suggested that all persons deprived of their liberty shall still be entitled to be treated with humanity and with respect for the inherent dignity and rights of human person.⁵¹ Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. Short term prisoners should also be given useful work, so that they may not remain idle and given wages. The Committee made some progressive suggestions with regard to women prisoners. The co-operation of public spirited, dedicated social workers and voluntary organisations should be enlisted for rehabilitation of female prisoners released from prisons.

Justice A. N. Mulla Committee of Jail Reforms has suggested setting up of National Prison Commission as a continuing body to oversee modernisation of prison in India⁵². It has suggested that the existing diarchy of prison administration at Union and State level should be removed. The Committee specially recommended a total ban on the heinous practice of clubbing together juvenile offenders with the hardened criminals in prisons. According to its

⁵⁰ Law Commission of India, 78th Report (1979), p.16. It was constituted by G.O.MS No.397 Home Department dt. 17th February 1978. The Committee consisted of R.L.Narasimhan Chairman and S.M.Diaz and Dr.A.Venkoba Rao as Members

⁵¹ Report of Tamil Nadu Prison Reforms Commission (1979), p.10.

⁵² Justice Mulla Committee was appointed by the Union Ministry and the Committee submitted its Report on Jail Reforms to Home Ministry on 31st March 1983.

suggestion the classification of prisoner's central location in the prison was made. Socio-legal and emotional support to women inmates should be extended through a socio-legal counselling cell and by means of legal aid camps held in prison.

More recently the Estimate Committee of the 9th Kerala Legislature made some valuable suggestions with regard to the rights of prisoners in the State of Kerala⁵³. According to the committee taking into consideration the new reformatory objective of imprisonment sufficient opportunities must be provided for interview of the prisoners. Prison labour can be made more profitable and useful if provisions are made for distributing work according to the ability and taste of the prisoner. The Committee made an important recommendation to the government suggesting enhancement of punishment for those prisoners who violate conditions of parole⁵⁴.

8.2.3. Classification of prisoners

One of the objectives of prison administration is to wean the offender away from wrong doing in future and make him return to society safe and useful. To achieve this end the classification of prisoners on scientific lines is of utmost importance. Without such classification, the individualized treatment through which prisons now seek to attain their basic objectives is impossible. Classification will enable the prison administration to provide different types of treatment to different categories of prisoners according to their individual capacities and needs for reform and rehabilitation. Experience of even the early prison reforms reveals that worst psychological troubles are bound to arise if prisoners are huddled together irrespective of their crime peculiarities.

⁵³ P.M.Aboobecker was the Chairman of the Committee. Ishaq Kurikkal, E.E.Ismail, A.Kanaran, K.Krishnankutty K.Mohammadali, K.K.Ramachandran Master, Therambil Ramakrishnan, T.Sivadasa Menon, V.M.Sudheeran and C.F.Thomas were members of the Committee. The Committee submitted its report on 28th January, 1993. Also See 9th Kerala Legislature Estimate Committee Report. (1991-93)

⁵⁴ 9th Kerala Legislature Estimate Committee Report (1991-93)

Any attempt to eliminate or regulate criminal propensities cannot succeed without the requisite knowledge of the history of a crime i.e., the family background, mode of living, education, culture and various other aspects of the life of the criminal. These objective aspects serve as the basis for different types of treatment in the matter of food, lodging, work-assignments, recreation, intellectual and reformatory courses etc. for different categories of prisoners.

There are various objectives for the classification of prisoners. It enables the prison authorities to study the offender as an individual and to organise an overall, balanced, integrated and individualized training and treatment programme. It ensures maximum utilization of resources and treatment facilities available in the institution as well as the community. The advantages of classification have also to be looked into. It provides more adequate custodial supervision and control. Proper classification provides for better discipline and increased productivity. More effective organisation of all training and treatment is another advantage. The classification in prison should be based on certain principles, viz., age, sex, physical and mental condition, educational and vocational training needs and potentialities for reformation and rehabilitation. Besides, factors like nature of crimes, motives, provocations, previous history of the offender, his 'social processing', his 'sophistication in crime' should be taken into account to determine his gradation in custody and appropriate treatment. A broad classification as such was done on the basis of the nature and number of offences by the court itself. In practice the classification has become a mere routine and a mechanical exercise.

Some modern criminologists are of the opinion that nature of crimes need not be taken into consideration while classifying prisoners on the plea that the nature of a person's offence is not a measure of his potentiality for

rehabilitation. As Barnes and Teeters⁵⁵ put it "The function of classification is to differentiate the various inmates in terms of their potentialities for rehabilitation regardless of the offence on the sentence". It cannot be denied that the nature of a person's offence is not a measure of his potentiality for rehabilitation. Even so, in order to avoid the evil effects of an overoptimistic assessment of the criminal and also of uncontrolled mixing and consequent contamination, the nature of crime should reasonably be taken into account for the purpose of classification of offenders in prison. If a prisoner convicted for an organised crime is kept with the first offenders, the possibility of contamination and worsening of community life would remain very great. While classifying prisoners the nature of crimes should, therefore, receive due attention.

The existing Jail Codes of various States and Union Territories provide for segregation of prisoners more or less on the basis of their age, sex, criminal antecedents, nature and terms of imprisonment, physical and mental conditions etc. These minimum statutory requirements, though insufficient for the purpose of scientific classification, are more in breach than in observance. This aspect is lucidly highlighted by the latest All India Committee on Jail Reforms (1980-83) in the following words: Under-trial prisoners, prisoners sentenced to short medium and long terms of imprisonment, prisoners sentenced to simple imprisonment, habitual offenders, lifers, hardened and dangerous prisoners, children, young offenders, women offenders, civil prisoners, prisoners sentenced by court martial, criminal and noncriminal lunatics, detenus under the National Security Act, persons detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, smugglers etc. were all

⁵⁵ Harry Elmer Barnes and Negle K. Teeters, *New Horizons in Criminology* (1966), p 467

kept in the same institutions and the arrangements for their segregation even in different wards were not effective".⁵⁶

The Committee further observed that factors like overcrowding and periodic large turnover of prisoners override all principles and requirements of segregation and that in reality segregation has become a provision only on

Different criteria are adopted for the classification of prisoners in India. It is made on the basis of sex, age and the nature of the sentence awarded to prisoners⁵⁷. Prisoners are classified mainly as 'A' class, 'B' class and ordinary prisoners, female prisoners, youthful prisoners, lunatics, civil prisoners, under-trial prisoners and prisoners sentenced to death. If a prisoner is having a contagious disease he should not be put along with other prisoners. The female prisoners are classified and separated, not only the unconvicted from convicted but also adolescent from older prisoners, habitual from non-habitual and prostitutes from respectable women. There are various safeguards provided for female prisoners. They are not permitted to leave the enclosure set apart for females, except for release, transfer or attendance at court or under the order of the Superintendent.

Prisoners Act 1900 also stipulates such a classification of female prisoners. If a male prisoner is below twenty one years he has to be treated differently from other prisoners. Also civil and criminal prisoners and convicted and under-trial

⁵⁶ Report of All India Committee on Jail Reforms (1980-83) Vol-I P. 108.

⁵⁷ Prisoners Act 1900, 8.29 reads:— "The requisitions of this Act with respect to the separation of prisoners are as follows:— (1) in a prison containing female as well as male prisoners, the female shall be imprisoned in separate buildings, or separate parts of the same building, in such manner as to prevent their seeing, or conversing or holding any intercourse with the male prisoners: (2) In a prison where male prisoners under the age of twenty one are confined means shall be provided for separating them altogether from the other prisoners and for separating those of them who have arrived at the age of puberty from those who have not: (3) Unconvicted criminal prisoners shall be kept apart from the convicted criminal prisoners: and (4) Civil prisoners shall be kept from criminal prisoners.

prisoners are also treated differently. Among the convicted prisoners, if circumstances warrant, further classification can be made, convicted criminal prisoners may be confined either in association or individually in cells or partly in one way and partly in the other. Thus Section 28 of the Prisoners Act empower the jail Superintendent to segregate the convicted prisoners keeping them in separate cells and restrict their movements for the purpose of maintaining discipline within the prisons.

The constitutional validity of Section 28 of the Prisoners Act which empowers such classification was questioned in *K.Valambal v. State of Tamil Nadu*⁵⁸ It is a landmark decision with regard to classification of prisoners. Justice Gokula krishnan and Justice Venugopal of the Madras High Court found that the classification of prisoners is not against Article 14 of the Constitution. In *Valambal* the petitioners were found indulging in activities in jail like indoctrinating the other co-prisoners by preaching the policy of violence and annihilation of moneyed class and planning to escape from the jail. The court held that the petitioners formed a class by themselves⁵⁹. Their separate classification in the matters of security measures was not arbitrary. So the action of the prison authorities did not violate article 14 of the Constitution. 'Disciplinary segregation taken by' the jail superintendent cannot be characterised as solitary confinement as contemplated under Section 73 of the Penal Code, nor it can be characterised as cellular confinement or separate confinement which are intended as punishment for prison offences under Sections 46(8) and 46(10) of the Prisons Act.

⁵⁸ 1981 Cr.L.J. 1506.

⁵⁹ 1981 Cr.L.J. 1506.

There are certain classes of prisoners who need special attention inside the prisons. Insane prisoners, women prisoners and young prisoners are such categories.

8.2.4. Rights of prisoner and duties of custodial staff.

In India also the status of a prisoner and the rights granted to him are almost the same as that of England and USA. His movements are restricted and some disabilities are imposed upon the prisoner. Various restrictions are imposed upon the exercise of the fundamental rights also. Conviction of certain offences also results in the loss of civil rights. But unlike in England a convict is unable to sue for torts in India. No permanent voting disqualification exists in India. It is only for the period of imprisonment.

History of prisoners and prison administration goes back even prior to the enactment of the Prison Act and Prison Manuals. Concerns for the betterment of conditions of prisoners have been attempted in India from earlier times in various legislations. Legislations that deal with the prisoners in India are Prisons Act 1894, Prisoners' Act 1900, Transfer of Prisons Act 1950 and Prisoners (Attendance in Courts) Act 1955. Apart from the specific legislations, Articles 14, 19 and 21 of the Constitution of India are also relevant with regard to prisoner's rights.

Correctional treatment, with the new orientation of making offenders non-offenders was irrelevant. Irons on prisoners, security in prisons, award of punishment etc. framed legislative priority. Naturally, the absence of the Indian Constitution gave the central legislature absolute power of disposal of prisoners. It can be seen that the British government gave scant regard to the human rights principles to prisoners. This was in tune with their philosophy of prison administration as a tool for oppression of their opponents. But when the

permanent law, which created rights came to govern lesser legislations the court, true to its oath to uphold constitution, had to reinterpret the provisions of Prisons Act so as to obliterate the absolutism of British Indian Prison. It was this process which produced revolutionary changes in the area of prisoner rights through various case laws. Women and children in 'protective custody', mentally ill persons unable to find a place in mental hospitals, undertrials who had spent years in prison without trial having commenced against them these and many more of distinctive qualities have claimed the attention of the Indian Supreme Court.

8.2.5. Deviance by custodial staff

The inadequacy of prison administration and ill-treatment of prisoners has invited criticism not only from academics but from official bodies as well. An overview of the existing studies and reports relating to prisoner rights shows that there is preponderance of publications; but they relate to certain specific aspects like prison administration, prison atrocities etc.

In the Indian Constitution the human rights principles are given a prominent place. Later developments in prisoners rights truly reflect the constitutional goals and ideals. The Supreme Court has dealt with prisoner rights in an elaborate manner in Sunil Batra(I) v. Delhi administration upon a writ petition under Article 32 of the Constitution. Here it was laid down that a court sentence does not deprive the prisoner of his fundamental rights. The Constitution Bench in Sunil Batra cases laid down important principles regarding the status of prisoners. The constitution bench brushed aside the "hands off" prison doctrine, upheld the fundamental rights of prisoners, though circumscribed severally by the reality of lawful custody. The fundamental rights did not forsake prisoners, and that the penological purpose of sentence was reformatory' even though deterrent too. Further it was explained that the courts has a continuing responsibility to ensure that the constitutional purpose of the deprivation is not

defeated by the prison administration. At present the court need not adopt a "hands off" attitude in regard to the problem of prison administration in India.

8.2.6. Open prisons

An open prisons are fundamentally one in which there are no locks, and no surrounding security. The prisoner is trusted to remain inside the prison or in its immediate neighbourhood, for in many open prisons much time is spent working outside the area in which there are prison buildings. The absence of locks and buildings changes the whole atmosphere of the prison. The prisoner is less conscious of being detained, the staff members are less pre-occupied with security in these institutions. So it develops individual responsibility on prisoners.

Every prisoner is not suitable for the treatment in the open prisons. Anyone who is regarded as an escape risk is unsuited to open prisons. Another category of prisoners not eligible to open prisons are those who through inherent inadequacy or institutionalisation would find open conditions intolerable. Violent and sexual offenders are also treated as persons not suitable for open prisons. The population of an open prison must be carefully selected.

In an open prison anxieties about violence and security are few. Here prisoners stay for lengthy terms so that they can be known as individuals producing a wholly different relationship from that of a closed prison where there is an unselected and constantly changing population. In practice, most open prisons are in rural settings often they are in isolated places. This means that they are pleasant and healthier than the prisoners in closed prisons.

Prisoners are selected from other 'closed prisons' in the State by a selection committee. Only such prisoners who are sentenced for life imprisonment who

can adequately respond to a programme based on trust and responsibility are usually selected for confinement in the open prison⁶⁰. No prisoner can claim a transfer to an open prison as a matter of right. The selection committee, at the time of selection, has to give due regard to mental and physical health of the prisoners: behaviour and conduct in prison and sense of responsibility displayed, progress in work, vocational training, education in closed prison, group adjustability, character and self—discipline, extent of institutional impact and his fitness for being trusted for confinement in an open prison.

8.2.7. Judicial surveillance - basis - development reforms

The fundamental rights guaranteed under the Constitution are not absolute and many restrictions have been imposed on their enjoyment. Right to freedom of person is one of the most important rights among the fundamental rights. When a person is convicted or put in prison his status is different from that of an ordinary person. A prisoner cannot claim all the fundamental rights that are available to an ordinary person. The Supreme Court of India and various High Courts in India have discussed in various decisions. Before discussing these decisions it is necessary to see various constitutional provisions with regard to prisoner's rights.

Statutory Provisions

There is no guarantee of prisoner's right as such in the Constitution of India. However, certain rights which have been enumerated in Part III of the Constitution are available to the prisoners also because a prisoner remains a "person" inside the prison. The right to personal liberty has now been given very wide interpretation by the Supreme Court. This right is available not only to free people but even to those behind bars. The right to speedy trial, free legal

⁶⁰ The Committee consists of Inspector General of Prisons, Deputy Inspector General of Prisons, Superintendent of the Prison from which the prisoners are to be selected and the Superintendent of the open prison.

aids, right against torture, right against inhuman, and degrading treatment accompany a person into the prison also. One of the important provisions of the Constitution of India which is generally applied by the courts is article 14 in which the principle of equality is embodied. The rule that "like should be treated alike" and the concept of reasonable classification as contained in article 14 has been a very useful guide for the courts to determine the category of prisoners and their basis of classification in different categories. Article 19 of the Constitution guarantees six freedoms to the citizens of India. Among these certain freedoms like 'freedom of movement', 'freedom to reside and to settle' and freedom of profession, occupation, trade or business" cannot be enjoyed by the prisoners because of the very nature of these freedoms and due to the condition of incarceration.

But other freedoms like "freedom of speech and expression", "freedom to become member of an association" etc. can be enjoyed by the prisoner even behind the bars and his imprisonment or sentence has nothing to do with these freedoms. But these will be subjected to the limitations of prison laws.

Article 21 of the Constitution has been a major centre of litigation so far as the prisoners' rights are concerned. It embodies the principle of liberty. This provision has been used by the Supreme Court of India to protect certain important rights of prisoners. After *Maneka Gandhi case*⁶¹, this article has been used against arbitrary actions of the executive especially the prison authorities. After that decision it has been established that there must be fair and reasonable procedure for the deprivation of the life and personal liberty of the individuals. The history of judicial involvement in prison administration shows that whenever the prison officials have subjected the inmates to brutal treatment the courts have intervened to protect their rights. The issue of prison conditions and

⁶¹ *Maneka Gandhi v. Union of India* AIR 1978 SC 597

environment has emerged as one of the predominant themes of correctional philosophy raising questions concerning inmate's rights and fate of prison life. Originally the treatment of prisoner's inside the prisons were cruel and barbarous. 'When a person was convicted, it was thought that he lost all his rights. The prison community was treated as a closed system and there was no access to outsiders in the affairs of the prisoners.

The authorities under the guise of discipline were able to inflict any injury upon the inmates. The scope of judicial review against the acts of prison authorities was very restricted. The courts were reluctant to interfere in the affairs of the prisoners: it was completely left to the discretion of the executive. But gradually a change was visible.

Right to Fair Procedure: When we trace the origin of the prisoner's right in India, the embryo we can find in the celebrated decision of *A. K. Gopalan v. State of Madras*. One of the main contentions raised by the petitioner was that the phrase "procedure established by law" as contained in article 21 of the Constitution includes a 'fair and reasonable' procedure and not a mere semblance of procedure prescribed by the State for the deprivation of life or personal liberty of individuals.

The majority view in *Gopalan*⁶² was that when a person is totally deprived of his personal liberty under a procedure established by law, the fundamental rights including the right to freedom of movement are not available. It was held that .."There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint, for that would lead to anarchy and disorder....In some cases, restrictions have to be placed upon free exercise of individual rights to safeguard the interests of the society: on the other hand, social control which exists for public good has got to be restrained, lest it should be misused to the detriment of individual rights and liberties''.

⁶² *A. K. Gopalan v. Union of India*

Another important decision was in Pandurang's case⁶³ the court held that conditions of detention cannot be extended to deprivation of other fundamental rights consistent with the fact of detention. The respondent was detained by the government in the district prison of Bombay in order to prevent him from acting in a manner prejudicial to the defence of India, public safety and maintenance of public order. While he was inside the jail he wrote with the permission of the government a book in Marathi under the title "Anucha Antarangaat". The book was purely of scientific interest and it did not cause any prejudice to the defence of India, public safety or public order. The detenu applied to the government and the Superintendent for the permission to send the manuscript out of the jail for publication: but both were rejected. On approaching the High Court, it held that there were no rules prohibiting a detenu from sending a book outside the jail with a view to get it published. The High Court held that the civil rights and liberties of a citizen were in no way curbed by the order of detention and that it was always open to the detenu to carry on his activities within the conditions governing his detention.

It further held that there were no rules prohibiting a detenu from sending a book outside the jail with a view to get it published. Supreme Court also affirmed the decision of the High Court and held that the said conditions regulating the restrictions on the personal liberty of a detenu are not privileges conferred on him, but are the conditions subject to which his liberty can be restricted.

In *D. B. M. Patnaik v. State of Andhra Pradesh*⁶⁴, the Supreme Court categorically asserted that convicts are not by the mere reason of their detention, denuded of all the fundamental rights they possess. In *Patnaik* the petitioners were undergoing their sentences in the central jail, Visakapatnam. They were also at the same time prisoners under trial in what is known as the

⁶³ A.I.R. 1966 S.C. 424.

⁶⁴ A.I.R. 1974 SC 2093

Parvathipuram Naxalite c conspiracy case⁶⁵. The petition was filed for the removal of the armed police guards posted around the jail and for dismantling live wires electrical mechanism fixed on the top of the jail-wall. The Supreme Court held that the right of personal liberty and some of other fundamental freedoms are not to be totally denied to a convict during the period of incarceration. Here there was no deprivation of any of their fundamental rights by the posting of the police guards immediately outside the jail. The policemen who live on the vacant jail land are not shown to have any access to the jail which is enclosed by high walls. But the court laid down some important aspects regarding prisoners rights. Chandrachud J. held that "The security of one's person against an arbitrary encroachment by the police is basic to a free society and prisoners cannot be thrown at the mercy of policemen as if it were a part of an unwritten law of crimes. Such intrusions are against the very essence of a scheme of ordered liberty".

Questions for Self learning

1. What is the condition of India's jails today? Do you have suggestions for its improvement?
2. Discuss various disciplinary regimes applicable in Indian prisons.
3. How is the Classification of prisoners made?
4. What are the Rights of prisoner? What is duty of custodial staff against the prisoner?
5. Is there any deviance by custodial staff? What relief is provided by the Supreme Court?
6. What is the benefit of provisions of Open prisons? Is this system successful?

⁶⁵ ibid

8.4. Let us sum up

Prison is not only a place of confinement and deterrence. It is also an abode of rehabilitation and refinement. The modern trend is to eradicate the causes of crime rather than the criminals by educative, corrective and reformative methods. There must be a procedure in the sentencing court itself for receiving complaints from convicted persons if their rights are infringed in jail. The present system of sentencing a person and forgetting him forever should change. Effective improvements in prison justice administration are possible if the judiciary has a say in the treatment of offenders in jail. Courts must be clued with the power to go beyond individual cases and issue affirmative directions of a wider nature.

The High Courts and the Supreme Court of India have been gradually exercising jurisdiction in pretentious prison justice, including improving the quality of food and amenities, payment of wages and appropriate standards of medical care. Access to courts must be made easier to the aggrieved prisoners. A radical change is to be effected in the outlook of prison administration - in policy as well as in its functioning. The principle of reform and rehabilitation should get acceptance both in letter and practice.

8.5. Glossary

Open Prison: An open prison is essentially one in which there are no locks, and no surrounding security. The prisoner is trusted to remain inside the prison or in its immediate neighbourhood, for in many open prisons much time is spent working outside the area in which there are prison buildings. The absence of locks and buildings changes the whole atmosphere of the prison

Prison reform: There is deterrence, but without naked terror, there is prevention, there is reform, but by way of expiation rather than by cure: there is

education, both in knowledge of the laws themselves and in the need to recognise the rights of others and there is public denunciation too.

8.6. References

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Note:-The Paper will be taught with reference, wherever necessary, to the procedures in India, England, US France, Russia and China