CHAPTER ONE

Criminal Justice System: Its Evolution and Needed Reforms
Introduction

‘Justice forms the cornerstone of each nation’s law’

Alexis de Tocquevelli

‘ Long years ago we made a tryst with destiny, and now the time comes when we shall redeem our pledge, not wholly or in full measure, but very substantially. At the stroke of the midnight hour, when the world sleeps, India will awake to life and freedom. A moment comes, which comes but rarely in history, when we step out from the old to the new, when an age ends, and when the soul of a nation, long suppressed, finds utterance. It is fitting that at this solemn moment we take the pledge of dedication to the service of India and her people and to the still larger cause of humanity....... We end today a period of ill fortunes and India discovers herself again. The achievement we celebrate today is but a step, an opening of opportunity, to the greater triumphs and achievements that await us. Are we brave enough and wise enough to grasp this opportunity and accept the challenge of the future? Freedom and power bring responsibility. The responsibility rests upon this assembly, a sovereign body representing the sovereign people of India.......The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity.

The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us, but as long as there are tears and suffering, so long our work will not be over. And so we have to labour and to work, and work hard, to give reality to our dreams.......The future beckons to us. Whither do we go and what shall be our endeavour? To bring freedom and opportunity to the common
man, to the peasants and workers of India; to fight and end poverty and ignorance and disease; to build up a prosperous, democratic and progressive nation, and to create social, economic and political institutions which will ensure justice and fullness of life to every man and woman. We have hard work ahead. There is no resting for any one of us till we redeem our pledge in full, till we make all the people of India what destiny intended them to be……”

Looking back over all these years, it can be simultaneously contemplated and debated that whether we have progressed on the path as envisioned by our constitution makers. The objective of welfare state which includes security of its citizens as its primary goal would remain oblivious unless the country lays its foundational principles on a strong Criminal Justice System. This however has great interdependence with the soul of our Constitution. The former comprises of police, bar, prison and judiciary and plays a crucial role in achieving the latter which defines the ideals and duties of the state. These constituents depend upon the principles and procedure enshrined in the constitution for their functioning in the given societal framework.

The success of the Criminal Justice System ensures that an atmosphere of hatred, enmity, insecurity and fear in the society may be prevented and enjoyment of people’s right in accordance with the aims and objective of the Constitution must be assured. The failure of Criminal Justice System, on the other hand can lead to a

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1 Spoken by Jawahar Lal Nehru when he addressed constituent Assembly on the eve of independence on 14th August 1947
complete disillusionment of the civilian rights resulting into a complete mockery of the Constitution.

With the preamble of the Constitution conferring social, political and economic justice to all its citizens, an effective Criminal Justice System constitutes the bedrock of the law & order and justice delivery system within the country leading to a better, dignified and equitable life for the people. A weak Criminal Justice System in fact promotes criminality and promotes several other anti-social activities in the society. This certainly leads to the erosion of the people’s faith in the justice delivery mechanism within the country. Also the process of identifying and prosecuting the criminals involves people’s active participation. People can help the police in foiling the design of any untoward happening and their help in investigation and seizure operation is of immense value. The success of Community Policing in Indian context in recent times is a stark manifestation of this participation. The support in the form of eye witnesses in crime prosecution helps in boosting the morale of the investigators. Subsequent detention and rehabilitation of the criminals along with their assimilation into the society also requires people’s participation of an entirely new dimension. A former Chief Justice of India noted about deteriorating Criminal Justice System in India as follows:

“"The criminal justice delivery system appears to be on the verge of collapse due to diverse reasons. Some of the responsibility will have to be shared by the Executive branch of the State. Not much has been done for improvement of the investigative & prosecution machinery. Significant suggestions for separation of Investigative wing from Law & Order duties and changes in rules of evidence still
lie unattended. The public outrage over the failure of the criminal justice system in some recent high profile cases must shake us all up into the realisation that something needs to be urgently done to revamp the whole process, though steering clear of knee jerk reactions, remembering that law is a serious business.\(^2\)

Thus the effective realisation of the constitutional values, objectives and ideals is entirely contingent upon the Criminal Justice System of a country while the efficacy of the Criminal Justice System in turn is dependent on the citizenry of the country. The State and the people of the country thereby play a pivotal role in ensuring that the chaotic level of criminalised society may not get established.

In addition to these major roles and duties, other important functions of Criminal Justice System include prevention and control of crime, establishment of public order and peace, protection of the rights of victims as well as persons in conflict with the law, the suppression of criminal conduct by apprehending offenders for whom prevention is ineffective, to review the legality and relevance of our preventive and suppressive measures, the judicial determination of guilt or innocence of those apprehended, the just disposition of those who have been legally found guilty and the correction by socially approved means of behaviour of those who violate the criminal law thus generally protecting life and property against crime and criminality.\(^3\)

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\(^2\) Speech at the inauguration of the Joint Conferences of Chief Justices and Chief Ministers held on 11\(^{th}\) March 2006 by Hon’ble Justice Y.K. Sabharwal, Chief Justice of India

**Concept of Crime**

To have a clear picture of the Criminal Justice System, it is most expedient that a conceptual framework of ‘Crime’ is envisaged. This could be understood with the notion of modern civilized societies that are based on certain acceptable group standards which everyone as a part of the social fabric has to adhere. The word ‘crime’ is derived from the word ‘crimen’ which means ‘charge’ or ‘offence’. Crime is a social fact and has social relevance. The concept of crime involves the idea of a public wrong in comparison to private wrong with the consequent intervention between the criminal and injured party by a neutral agency representing the community as whole. Crime thus is the intentional commission of an act usually deemed socially harmful or dangerous, anti social, immoral, sinful and specifically defined, prohibited, and punishable under criminal law.

In Indian context, crime is understood to be an act that is punishable by law as being defined by the statute in force. The Indian Penal Code does not define crime per se, but includes the comprehensive definition of an ‘offence’ which is punishable under certain circumstances under the penal code. The act of crime is thus seen in Indian context as a deviance by an individual or a group of individuals disrupting the peace and security of the existing society. The society therefore takes steps for its prevention and control by prescribing specific punishments for each such crime.

The concept of crime has also been a dynamic evolving abstraction. It changes with the socio economic status of the society. It has always been defined according to the public values and societal opinion about illegitimate and illegal
behavior. It also has distinct spatio-temporal characteristics. Criminal behaviour is thus defined by the laws of particular jurisdictions and there are sometimes vast differences between and even within countries regarding what types of behaviour are prohibited and what types of behaviour are allowed. Conduct that is lawful in one country or jurisdiction may be criminal in another, and activity that amounts to a trivial infraction in one jurisdiction may constitute a serious crime elsewhere. Changing times and social attitudes may lead to dynamic changes in criminal law, so that behaviour that was once criminal may become lawful with the passage of time.

For example, abortion, once prohibited except in the most unusual circumstances, is now lawful in many countries, as is homosexuality in private between consenting adults in most Western countries, though it remains a serious offense in some parts of the world including India. Once defined as criminal acts, suicide and attempted suicide have been removed from the scope of criminal law in many jurisdictions across the world. Nonetheless, the general trend has been toward increasing the scope of criminal law rather than decreasing it, and it has been more common to find that statutes create new criminal offenses every day rather than abolishing existing ones. New technologies have given rise to new opportunities for their abuse, which has led to the creation of new legal restrictions. Just as the invention of the motor vehicle led to the development of a whole body of criminal laws designed to regulate its use, so the widening use of computers and especially the Internet has created the need to legislate against a variety of new abuses and frauds—or old frauds committed in new ways.
Thus the criminal behavior is an integral part of the societal existence that could only be understood by studying the interrelationships between the personality of the offender, the social set-up in which he lives and the previous experience growing out of interactions between the individual and his/her environmental situation.

**Need for Criminal Justice System**

Like in every democratic civilized society, our Criminal Justice System is expected to provide the maximum sense of security to the people at large by dealing with crimes and criminals effectively, quickly and legally. The aim should be to reduce the level of criminality in society by ensuring maximum detection of reported crimes, conviction of the accused persons without delay, awarding appropriate punishments to the convicted along with just and equitable rehabilitation to the victim for meeting the ends of justice.

Tracing the history of justice, the concept was developed in ancient Greece along with the concept of democracy during fifth century B.C. It had its origin in the ideas of vengeance of primitive and ancient man and has also a mention in the Old Testament. The concept was to protect the weak from the strong by using a wrong as licence to counter react in return. Justice involves the infusion of morality into law. Plato held that justice was a rational principle at the root of moral distinctions that
converge in each individual to make a rational society. A rational society was one in which the principle of justice had power as well as manifest authority. ⁴

Justice forms the basis of the progress which each society intends to achieve. Whether the ancient feudal system, the Church, the State, the Monarchy, Democracy or an economic system, the point to be noted in organizing criminal justice is that citizens want security at any cost. They do not want a criminal justice regime in which the state overprotects some and leaves the rest to their fate under a system which consistently fails to fulfil its basic obligations. People want the state to provide security with least interference with liberty, not discriminating citizens on the basis of religion, caste, gender or status. They do not care whether the security apparatus is controlled by the local government, state government or the central government or all of them together.

The Criminal Justices System exists because society has deemed it appropriate to enforce the standards of human conduct so necessary to protecting individuals and the community. It seeks to fulfil the goal of protection through enforcement by reducing the risk of crime and apprehending, prosecuting, convicting and sentencing those individuals who violate the rules and laws as promulgated by society. The offender finds that the criminal justice system shall punish him for his violation by removing him from the society and simultaneously will try to dissuade him from repeating a criminal act through rehabilitation. ⁵

⁵ Chamelin C. Neil, “Introduction to Criminal Justice”, 1975, p. 5
**Fundamental Components of Criminal Justice System**

The sole objective of Criminal Justice System is the protection of the right to personal liberty against invasion by others, protection of the weak against the strong, law abiding against lawless and the peaceful against the violent. As the custodian of peace and security within a society, the State prescribes the rules of conduct against lawlessness, disorderly behaviour, violent acts and fraudulent deeds; sanctions for their violation, machinery to enforce sanctions and a proper procedure for that machinery.

Criminal Justice means the criminal law, the criminal procedure, the institutions of enforcement of the criminal law and the personnel involved in administering the system. Rule of law, democracy, development and human rights are dependent on the degree of success that the governments are able to achieve on the criminal justice front. Even national security is now-a-days increasingly getting linked to the maintenance of internal security. Crime control and criminal justice management are the products of a fair, efficient and effective criminal justice system as above defined. Insofar as Criminal Justice System is itself the product of multiple sub-systems such as the police, the prosecution, the judiciary, the prisons and a number of co-existing social control mechanisms outside the formal state system (education, family, media etc.), it is important that each of these sub-systems also accomplishes a desirable degree of efficiency and effectiveness in supporting the mission of freedom from crime.

Further, the well recognised fundamental ingredients of Criminal jurisprudence within Criminal Justice System are ‘*Presumption of innocence and*
Burden of proof on the Prosecution’, ‘Right to silence of the accused’ and the ‘Right to fair trial’. Protecting the ‘Rights of the accused’ but at the same time ensuring expedient ‘Justice to the Victim’ forms the core of the Criminal Justice System. Simplifying judicial procedures and practices; bringing about synergy among the judiciary, the prosecution and police; making the system simpler, faster, cheaper and people-friendly by making use of technology; improving the investigation and trial procedures on professional lines and making the functionaries efficient, ethical and accountable to people are some of the prerequisites for a sound Criminal Justice System.

**Presumption of Innocence and Burden of Proof on Prosecution**

The system of criminal justice dispensation in India is a characteristic and overhang of the common law system that has been inherited from the Britishers. Under this system, the accused is presumed to be innocent and the burden is on the prosecution to prove beyond reasonable doubt that the accused is guilty. The concept of burden of proof is based on principle of fairness, good-sense and practical utility and accepted in the English Common Law which has been adopted by India. Section 101 of the Indian Evidence Act, 1872 incorporates this principle. This principle was also enshrined by the Hon’ble Supreme Court in *Dahyabhai Chhaganbhai Thakkar v. State of Gujarat*6. It is also a universally recognised right and Article 14(2) of the International Covenant on Civil and Political Rights, 1966 provides that-

“Everyone charged with a criminal offence shall have the right to be presumed innocent until he is proved guilty according to law”.

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6 *AIR 1964 SC 1563*
Presumptions are legal instruments whereby courts are empowered to pronounce in a case when there is either no evidence or insufficient evidence. Presumptions may be either of fact or of law. It may be either conclusive or rebuttable. It should also be taken care of that “proof beyond reasonable doubt” is not an absolute principle of universal application and deviations can be made by the legislature through statutes. These statutes provide that court under certain circumstances may presume certain facts, place the burden on the accused of rebutting such presumption. If the accused fails to rebut the presumption before the court, it can be reasonably assumed by the court that the accused is guilty and it can proceed to give its verdict on the basis of that presumption. Sometimes it can be the demand of the situation for the court to prescribe a standard of proof lower than “proof beyond reasonable doubt” and make the accused liable for his acts. Till the time the accused has the opportunity to adduce evidence to nullify the adverse effect, such deviation will not offend Article 14 or Article 21 of the Constitution.

The accused also enjoys the right to silence and cannot be compelled to testify against him in the relevant situation. In the adversarial system as prevalent in India, truth is supposed to emerge from the respective versions of case presented by the prosecution and the defence respectively before a neutral judge who acts like an umpire to see whether the prosecution has been able to prove the guilt of the accused beyond reasonable doubt and thus gives the benefit of doubt to the accused.

The parties to the case i.e. the prosecution and the accused determine the scope of dispute and decide autonomously and in a selective manner on the evidence that they decide to present before the court. The case is presented by each side to
corroborate the facts of the event conforming to its own case theory favouring its own client. The trial is oral, continuous and confrontational. The parties bring out facts favourable to their case through Examination-in-chief and use cross examination of witnesses to undermine the opposing case and to discover information the other side has not brought out. The judge in order to maintain his position of neutrality never takes any initiative to discover truth but assesses both sides of the story objectively and impartially within the precincts of the law of the land. He does not correct the aberrations in the investigation or in the matter of production of evidence before court. As the adversarial system does not impose a positive duty on the judge to discover truth, he plays a passive role. The system is heavily loaded in favour of the accused and is sometimes insensitive to the victims’ plight and rights.

**Right to Silence of the Accused**

Article 14 of the International Convention on Civil and Political Rights recognises the right of the accused to resist compulsion for testifying against one own self. It is also a fundamental right conferred by Art 20 (3) of the Constitution. It says that “No person accused of any offence shall be compelled to be a witness against himself”. This is often described as ‘right to silence’. It has been evident from the past that there were instances under every type of regime where the accused in custody was tortured for forcing him to confess or disclose information, when there is none to come to his rescue. This could result into travesty of justice and perpetration of force, cruelty and abuses. This is why such prohibitions were included in our constitution by the way Article 20(3). In *Poolpandi etc. v. Superintendent, Central Excise and ors.*, *AIR 1992 SC 1795*, the Supreme Court too
has opined that though such prohibitions are necessary for protecting the ‘Rights of the Accused’, it does not prohibit admission or confession which is made without any inducement, threat or promise. It also does not bar the accused from voluntarily offering himself to be examined as a witness. Any confession made under compulsion is rendered inadmissible evidence by virtue of Section 24 of the Indian Evidence Act.

Although the accused is a good source of information about the commission of the offence, it is not fully tapped in India due to the fear of infringing the accused right to silence granted by Article 20(3). As such, Article 20(3) does not prohibit the accused being questioned during investigation or trial. Right granted by Article 20(3) is in reality immunity to the accused from compulsion to speak against himself. When questioned during investigation, the accused may deny or make a confession and can get it recorded by the Magistrate under section 164 of the Cr.PC. When the accused is asked during trial whether he pleads guilty to the charge he may confess and plead guilty. Any voluntary statement by the accused leading to discovery of any incriminating fact is admissible under Section 27 of the Indian Evidence Act. Sections 306 and 307 of the Cr.PC empower the court to tender pardon to the approver who was an abettor in the commission of the offence but later agrees to full and complete disclosure of all the facts including his own involvement in the commission of the crime.

Even when the accused is not speaking, the court can draw appropriate inferences from his silence. Article 20(3) does not, in terms, speak of any immunity from drawing of appropriate inference when the accused refuses to answer. This is
because if the court can draw an adverse inference against the accused from his silence there would be less incentive for the police to resort to compulsion or trickery to obtain a confession or else it would tend to encourage such behaviour. It may also not be right to say that adverse inference should always be drawn from the silence of the accused. Adverse inference should be drawn only where an answer is reasonably expected from the accused and not mechanically in every case. That adverse inference would be drawn by a trained judicial mind is sufficient to guarantee that it would be exercised reasonably and on relevant considerations.

**Right to Fair Trial**

One of the most important roles of any government is to maintain law and order and hold people to account for crimes they have committed. Thus justice should not only be done but must also seen to be done. This carries a grave responsibility because convicting someone of a criminal offence and potentially taking away his/her personal liberty is one of the most serious steps that any government can take against an individual. It can only be justified after the person has been given a Fair Trial.

The Right to a Fair Trial means that people can be sure that processes will be fair and certain. It prevents governments from abusing their powers. A Fair Trial is the best means of separating the guilty from the innocent and protecting against injustice. Without this right, the rule of law and public faith in the justice system collapses. The Right to a Fair Trial is one of the cornerstones of a just society. Various rights associated with a fair trial are explicitly proclaimed internationally in numerous declarations of supranational bodies and had been adopted by various
constitutions and conventions. Article 10 of the Universal Declaration of Human Rights which forms the foundation for fair trial states that-

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

Similarly the right to a fair trial is protected under Articles 14 of the International Covenant on Civil and Political Rights which is binding in international law on those states that are party to it. Article 14(1) of the covenant states that-

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.”
Similarly Article 14 (3) (d) of the International Covenant on Civil and Political Rights entitles the person facing the criminal charge either to defend himself in person or through the assistance of a counsel of his choice and if he does not have legal assistance, to be informed of his right and provide him the legal assistance without payment in case he does not have sufficient means to pay for it.

In the same breadth, the Sixth Amendment to the United States Constitution and the Article 6 of the European Convention of Human Rights also provide for the Right to fair trial to the accused. It is one of the most extensive human rights and all international human rights instruments enshrine it in more than one article. States may limit the right to a fair trial or withdraw from the fair trial rights only under circumstances specified in the human rights instruments. Thus the Right to a Fair Trial is recognised internationally as a fundamental human right and countries are required to respect it. Different countries have developed different ways of doing this but regardless of how a particular legal system operates, the principles below are core to all fair justice systems during any civil or criminal proceedings:

a) the right to be heard by a competent, independent and impartial tribunal or court

b) the right to a public hearing

c) the right to be heard within a reasonable time

d) the right to counsel

e) the right to interpretation

In India, the state is expected to insist on good behaviour from citizens only when its own behaviour is blameworthy, unjust and illegal. Hon’ble Supreme Court
in the leading case of *Kishore Singh Ravinder Dev v. State of Rajasthan* has stated that the various laws in India whether constitutional, evidentiary or procedural have made elaborate provisions for safeguarding the rights of accused with the view to protect his (accused) dignity as a human being and giving him benefits of a just, fair and impartial trial.

There are various facets to the right to a fair trial in India. The Hon’ble Supreme Court in the case of *Zahira Habibullah Sheikh & Anr v. State of Gujarat* has held that-

“The principle of fair trial now informs and energizes many areas of the law. *It is reflected in numerous rules and practices.... fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated.*”

The concept of fair trial stands on the tripod of interests of the accused, the victim and the community where the latter is represented acts through the State and prosecuting agencies. The concept of a fair trial has been gradually expanded by the courts to include various aspects of criminal procedure. For instance the Hon’ble Supreme Court has in the past transferred several cases from one state to another when it has been reasonably anticipated that the accused will not be provided a fair trial or the court process may be interfered with by some extraneous considerations to uphold this principle.

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7 1981 SCR (1) 995
8 Appeal (Crl.) 446-449 of 2004(SC)
The Right to Free Legal Aid in India flows from Article 22 (1) of the Constitution and forms part of Article 21 of the Constitution through liberal interpretation. It further got fortified by the introduction of the Directive Principles of State Policy embodied in Article 39 A of the Constitution by the 42nd Amendment Act of 1976 and enactment of Section 304(1) of the Code of Criminal Procedure. It is required by the court in all criminal cases in India, where the accused is unable to engage counsel, to appoint a counsel for him at the expenses of the State. It is the duty of the Court to ensure that the accused is denied no necessary incident of a fair trial. This is in line with International Covenants and Human Rights Declarations to which India is a signatory. The object and purpose of providing competent legal aid to the undefended and unrepresented accused persons is to see that the accused gets free, fair, just and reasonable trial of charge in a criminal or civil case.

In *Maneka Gandhi v. Union of India*\(^9\), it has been held by a Constitution Bench of Supreme Court that the procedure for depriving a person of his life or liberty should be fair, reasonable and just. To quote the court-

"We are of the opinion that it is not fair or just that a criminal case should be decided against an accused in the absence of a counsel. It is only a lawyer who is conversant with law who can properly defend an accused in a criminal case. Hence, in our opinion, if a criminal case (whether a trial or appeal/revision) is decided against an accused in the absence of a counsel, there will be violation of the Article 21 of the Indian Constitution"

Similarly the Hon’ble Supreme Court in *Sukh Das v. UT of Arunachal Pradesh*\(^9\) has held that a conviction of the accused in a trial in which he was not

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\(^9\) 1978 SCR (2) 621
provided legal aid would be set aside as being violative of Article 21 of the Constitution. But, where the accused pleads guilty without the assistance of a counsel under the legal aid scheme and was convicted by the Magistrate it was held that the trial and conviction was not vitiated because the Magistrate was fully satisfied that the plea was voluntary, true and genuine.

In *Ram Awadh v. State of U.P.*, the Allahabad High Court held the following in this context:

“The requirement of providing counsel to an accused at the State expense is not an empty formality which may be not by merely appointing a counsel whatever his calibre may be. When the law enjoins appointing a counsel to defend an accused, it means an effective counsel, a counsel in real sense who can safeguard the interest of the accused in best possible manner which is permissible under law. An accused facing charge of murder may be sentenced to death or imprisonment for life and consequently his case should be handled by a competent person and not by a novice or one who has no professional expertise. A duty is cast upon the Judges before whom such indigent accused are facing trial for serious offence and who are not able to engage a counsel, to appoint competent persons for their defence. It is needless to emphasise that a Judge is not a prosecutor and his duty is to discern the truth so that he is able to arrive at a correct conclusion. A defence lawyer plays an important role in bringing out the truth before the Court by cross-examining the witnesses and placing relevant materials or evidence. The absence of proper cross-examination may at times result in miscarriage of justice and the Court has to guard against such an eventuality”

10 1986 SCR (1) 590
11 1999 CriLJ 4083
Rights of the Accused

The suspect/accused is the most probable person to know the truth about the commissioning of the crime. But except in the case where there has been a voluntary confession, it is very unlikely that he would incriminate himself. Also in a democracy, like India he is entitled to some rights guaranteed by the Constitution. In many of the statutes and the Constitution, there are many implicit and explicit rights for the accused. Some of the important ones are listed below:

a) Accused has a right neither to be convicted for the commissioning of an act which was not an offence at the time of its commission nor to be subjected to a penalty greater than the one prescribed at the time of commissioning of the Act. [Art 20 (1)].

b) Accused has a right against double jeopardy. [Art 20 (2)].

c) Accused has a right not to be compelled to be a witness against himself. [Art 20 (3)].

d) No accused shall be deprived of his life or personal liberty except in accordance with procedure established by law which is just, fair and reasonable. [Art 21].

e) Accused has a right to fair and speedy trial. [Art 21].

f) Accused has a right to assistance of a Counsel. [Art 22 (1)]. He is entitled to free legal aid and enjoys the right to remain silent. A woman or a child below 16 years of age cannot be taken to a police station for interrogation. This should apply equally to those who have serious physical or mental problems.

g) Right to be produced before the Magistrate within 24 hours of arrest excluding the time for travel [Art 22 (2)]. When the arrested person is produced before the Magistrate, he has a duty to enquire with the accused as to when he was arrested.
and the treatment meted out to him including subjecting him to third degree methods and about the injuries if any on his body.

h) Right not to be detained in custody beyond 24 hours after arrest excluding the time for travel without the order of the Magistrate. [Art 22 (2)].

i) An arrested person being held in custody is entitled, if he desires, to have one friend, relative or other person, who is known to him or likely to take an interest in his welfare, told as far as practicable that he has been arrested and where he is being detained. The police officer shall inform the arrested person of this right when he is brought to the police station. The entry shall be required to be made in the general diary as to who was informed of the arrest.

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

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

l) The arrested person 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 Services of the concerned State or Union Territory.

m) Handcuffs or other fetters shall not be forced on prisoners convicted or under-trial while lodged in a Jail anywhere in the country or while transporting or in transit from one Jail to another or from Jail to Court or back.

n) In all the cases where a person arrested by Police, is produced before the Magistrate and has been remanded- judicial or non-judicial- by the Magistrate,
the person concerned shall not be handcuffed unless special orders in that respect is obtained from the Magistrate at the time of the granting of the remand.

o) When the Police arrests a person in execution of a warrant of arrest obtained from a Magistrate, the person arrested shall not be handcuffed unless the police has also obtained orders from the Magistrate for the handcuffing of the person to be so arrested.

p) A person accused of a bailable offence is entitled to bail as a matter of right. Similarly, persons accused of non-bailable offence may be granted bail at the discretion of Court on application except in very grave circumstances.

**Justice to Victim**

The Criminal Justice System undoubtedly demands active participation of the State in apprehending all criminals involved in the crime, establishing just process of proving his guilt and ultimately adopting a rehabilitative approach in the punishment given to the accused, if proven guilty thereby establishing peace and order within the society and provides a sense of security to its citizens. However it is often seen that even if the State performs its duty with utmost responsibility with respect to accused, the other side of the crime constituting of the victim is completely neglected. These victims many a times tend to play an instrumental role in establishing a just societal order. This instrumental value often neglects the legal rights and protection that these victims deserve in a constitutional setup like India. This sometimes results into disinterestedness among the victim in the proceeding of the trial and causes consequent distortions in the Criminal Justice System. Thus unless justice to the victim is put as one of the focal points of criminal proceedings,
the system is unlikely to restore the balance as a fair procedure in the pursuit of truth.

In its entirety, two types of rights are recognized with respect to victims of crime. They are: (i) the victim’s right to participate in criminal proceedings (right to be impleaded, right to know, right to be heard and right to assist the court in the pursuit of truth) and (ii) the victim’s right to seek and receive compensation from the criminal court itself for injuries suffered as well as appropriate interim reliefs in the course of proceedings. It is very interesting to find that the most of the European system and western countries assigns great importance to these rights in establishing a sound Criminal Justice administration. In India, however, these rights are not clearly recognised and codified.

Four fold strategy focussing on-

(i) Access to justice and fair treatment- right of the victim to prefer an appeal against any adverse order passed by the trial court; right to be informed of victim’s rights; the right of representation by lawyer if the victim is an indigent person whereby the Legal Services Authority should provide a lawyer at State’s expense; right to protection of privacy and safety;

(ii) Restitution - including return of property or payment for the harm or loss suffered;

(iii) Compensation - to take care of the monetary and other losses suffered by the victim by the State;

(iv) Assistance- the right to participate as the dominant stakeholder in criminal proceedings, right to register an F.I.R without facing harassment by the
police; to take account of post-crime care to the victim by providing counselling, psychiatric and rehabilitative services; prevent intimidation and harassment of victims by offenders or their counsel when the former appears as prosecution witness; enacting a victim protection law; and giving a role to the victim in the negotiation leading to settlement of criminal cases either through courts, Lok Adalats or Plea-bargaining can help in ensuring justice to the victim and thereby reposing faith in the justice administration of the system.

**Statement of the Problem for Study**

Many developments like advancement in the field of scientific and technological innovation, socio-economic transformation, rapid population burst, exponential scientific evolution and rapidly connecting world through modern communication and transport facilities have definitely changed the texture of the modern day crimes. Particularly in a country like India where considerable chunk of population is still uneducated particularly legally, has heterogeneous social setting, strained police-public relations, lengthy and complicated procedural wrangles and rampant poverty and unemployment, it is not uncommon for the eye witnesses to often turns hostile, for one reason or the other, thus weakening the prosecution case and giving the benefit of doubt to the criminals. This has posed a serious challenge to the effective Criminal Justice delivery system in the country.

Application of scientific techniques in the inquiry of crime which has developed into a full fledged field of “Forensic Science” provides proper consistency and
coherence to criminal investigation and prosecution. It prevents resorting to the “third-degree methods” for interrogation of the suspects by the law enforcement agencies to bring out the truth. Further Forensic Science is an essential tool in examining the scene of occurrence and the crime exhibition in Laboratory and contributes a significant part in the deposition of the expert evidence in the courts of law within our Criminal Justice System. Therefore, Forensic Science establishes the distinctiveness of the offender through individual clues like fingerprint, footprints, semen, blood drops or hairs etc. The courts too now-a-days are heavily depending upon the evidence obtained through scientific methods to find out the truth. However the legal system in our country has to deal with the evolving field of forensic science more effectively which it has not adequately responded. Countries like India that follows the adversarial system of legal jurisprudence where the crime and its link to the criminal has to be proven ‘‘beyond reasonable doubt’’, these non-invasive scientific techniques can prove to be a boon. Though these scientific techniques may not be enough evidence to convict a person, yet it can be looked upon as a tool or aid towards guiding the police and prosecution in the right direction to collect evidence.

Hence a detailed analysis regarding the nature and scope of these new emerging techniques of forensic science with special reference to Narco-analysis, Polygraph, Brain Mapping, DNA profiling, Electronic surveillance and Computer forensics along with their admissibility and legal status shall be undertaken by the humble researcher.
Hypothesis

After formulation and identification of the problem, the codification of laws for Narco-analysis, Polygraph, Brain Mapping, DNA profiling, Electronic surveillance and Computer forensics can be contrasted across the world vis-a-vis India. Despite advancement in science and technology and its applicability in criminal investigation and prosecution, India is yet to formulate a policy for the same. These scientific evidences provide almost cent percent result in comprehensive investigation of the crime and linking it to the accused. These advanced techniques tend to get into the bottom of the intricate criminal case and help into more accurate and flawless administration of justice. Even though, there is lot of resentment among a group of intellectuals regarding the applicability of these advanced techniques, they can play a vital role in developing a strong Criminal Justice System. A full blown policy and comprehensive legal framework by the Parliament would go a long way strengthening the prevalent Criminal Justice System in India. In light of the above, the present research work is developed by the researcher on the following hypothetical formulations:

i. Whether Forensic science has really proved to be a boon in the criminal investigation and prosecution?

ii. Whether Polygraph Test, DNA Profiling, Narco-Analysis, Brain Mapping and Electronic Surveillance and Computer Forensics could be considered as constitutionally valid under Indian scheme of things?

iii. Whether the conviction of the accused person could be sustained on the basis of these scientific techniques of Forensic Science?
iv. Whether Forensic science has been really helpful in protecting the human rights in this contemporary society?

These hypotheses will be proved by the researcher by a designated methodology.

**Research Methodology**

An academic work like this study needs some specific methodology for its completion. Considering the notion that any research can be considered as a vigilant inquiry or analysis of the principles for unearthing of the new facts or a new interpretation of already existing phenomena, the present work will be undertaken by the researcher with a sense of intellectual inquisitiveness in an organized and systematic manner by employing the methodology of *Doctrinal and Analytical research*. Although the thesis is conventional but has been approached in an explanatory and analytical fashion making it more acceptable and convincing. Precisely, the study is based upon the vast number of related text books of eminent authors, journal, Reports, Judicial pronouncements on relevant issues, articles from law journals, websites and other relevant materials which have been collected from various reputed libraries by the researcher. Apart from this the researcher has also visited a number of legal websites during the course of the study. Throughout the research work, a uniform mode of citation has been followed. The matters collected and the case laws suffered have been critically examined to write the thesis. Proper care has also been taken to arrange and present the thesis in a systematic & logical
manner. Valuable views and suggestions from my supervisor and teachers have been also taken and given proper attention while giving a finishing touch to the present work.

_Area and Scope of the Study_

The research problem in this thesis has been identified through review of literature and relevant case laws. The researcher has made a detailed survey of cases on DNA profiling, Brain mapping, Narco-analysis, Polygraph Test, Electronic surveillance and Computer forensics decided by Supreme Court and various High Courts of India as well as of courts of developed countries such as U.S.A. and U.K. The researcher has studied numerous articles and books on the subject and has referred to the reports of Law Commissions, Governmental Committees, Human Rights Commissions and other organization. While adopting a Doctrinal and Analytical methodology, a descriptive study of the assigned problem has been carried out by the researcher. In this study an attempt has been made to highlight the problems relating to the application of DNA profiling, Narco-analysis, Polygraph Test and Brain Mapping along with the issues relating to rights guaranteed under constitutional law and general laws in India. Efforts have also been taken to highlight the merits and demerits of existing scattered criminal legislations and laws relating thereto in the present thesis. Further an attempt has been made by researcher to examine that how the executive and legislature could work the best within the constitutional framework to protect the society from the malice of crime as well as strengthen the prevalent Criminal Justice System in the country with victim at the centre of preposition.
Rationale of the Study

The rationale of the present study is an attempt to uncover the need of advanced and latest scientific methods of investigation and prosecution in modern day Criminal Justice System. With criminals and crimes getting more sophisticated, these detective techniques are very helpful in exhuming the truth behind any crime including white collar crimes and can help the law enforcement agencies as well as the courts to increase the efficacy of the investigation and improving the conviction rate of the criminals respectively. It is nonetheless an irony that there are many to defend the rights of the accused while none to defend the public cause and interest. A sound framework of scientific techniques in criminal investigation and prosecution may certainly fill the void. This approach must be also reconciled with the judicial pronouncement of the Hon’ble Apex court in *Selvi v. State of Karnataka* where the admissibility of these scientific techniques was challenged. The court ironically took a stand that ignores to take into account the interest of victims and justice to him/her thereof. Following a restrictive interpretations of various legal and constitutional provisions, the court has raised a question on the dependability of these techniques on ethical and legal grounds. In the light of the above propositions and legal developments, this study aims to highlight the need to use the scientific techniques of investigation as against the use of third degree methods. It must be understood that in modern times dispensation of justice through legal system has become much dependent on the medical science but how far this medical knowledge is admissible is still a controversial issue which has been addressed by the researcher. In this perspective, an attempt would be made by the researcher to give some suggestions so that such types of evidences should become a part of administration of justice across the country.
**Aims and Objectives of the Study**

In the present study, the role & significance of forensic science with special reference to DNA Profiling, Narco-analysis test, Brain Mapping, Polygraph test, Electronic surveillance and Computer forensics in India would be deeply analyzed at length. Their significance in improving the investigation, prosecution and adjudication of the crime thereby reinventing the Criminal Justice System in India is particularly focused at. The study is guided by the following objectives and purposes:

a) To understand as to how the Forensic Science including DNA profiling, Narco-analysis, Brain Mapping, Polygraph test, Electronic Surveillance and Computer Forensics are proving to be an effective tool in the process of crime investigation and prosecution.

b) To enumerate and analyze the evolution of the application of scientific techniques in crime investigation and prosecution.

c) To understand the way in which the forensic scientists work intimately with the police and investigation officers, members of the legal profession before whom they eventually appear as an independent expert witness in the process of solving the mystery of the crime and final dispensation of justice.

d) To understand the modus operandi of various scientific techniques with special focus on DNA Profiling, Narco-analysis test, Brain Mapping, Polygraph test, Electronic surveillance and Computer forensics and analyze their advantages as well as their pitfalls.
e) To present a comprehensive overview of the admissibility of these scientific techniques under various Indian laws including the Constitution of India.

f) To highlight the various jurisprudential norms vis-a-vis the applicability of scientific techniques in criminal investigation, prosecution and adjudication.

g) To give an account of legal status of the scientific techniques in Indian scenario with special focus on DNA Profiling, Narco-analysis test, Brain Mapping, Polygraph test, Electronic surveillance and Computer forensics.

h) To enumerate the various recommendations and viewpoints of various committees, commissions regarding the applicability of the scientific techniques in criminal investigation and prosecution with special focus on the various resolutions passed by the Government of India in this regard.

i) To analyze the various obstacles in the integration of these scientific techniques in the Criminal Justice System and suggest ways and means to remove these hurdles in cogent manner and within the broad ambit of the Constitutional scheme of India.

**Framework of the Study**

There cannot be denying from the fact that there exist widespread ignorance and misconceptions about the basic concepts, meaning, nature, and application of new scientific techniques like DNA Profiling, Narco-analysis test, Brain Mapping, Polygraph test, Electronic surveillance and Computer forensics in India. Many people are not aware that science plays a significant role in the detection of crime and apprehension of criminals. The result of such confusion is often botched up
investigation, feeble prosecution and low rate of conviction making crime and criminals as accepted reality of the societal existence.

It must be kept in perspective that barbaric and torturous methods of detecting crime have also no place in a civilized society. If the Indian Penal Code is looked from different perspective, it can be realized that the categorization of different crimes is based on its heinous nature, gravity, intensity and mode of criminal act done which is nothing but medical concept and scientific study of an act of crime. With advancement of Science and Technology, crime and criminals have taken a leap jump in their sophistication. It is thus only relevant and sagacious that the law enforcement agencies and justice delivery institutions gear up their ways of functioning in order to achieve the goal of crime free society. Thus the whole attempt in this study would be to give a complete and clean picture of the concept and application of new scientific tests such as DNA Profiling, Narco-analysis test, Brain Mapping, Polygraph test, Electronic surveillance and Computer forensics in the criminal justice system of the country. An endeavour is made in the study to delineate in detail the DNA Profiling, Narco-analysis test, Brain Mapping, Polygraph test, Electronic surveillance and Computer forensics and their admissibility in Indian legal and Constitutional framework.

In this pursuit and to attain correct and appropriate approach following framework strategy has been adopted:
The First Chapter deals with literature about the evolution of the Criminal Justice System through different ages and also touches upon the aspect of aberrations that has crept into it making it asynchronous with the modern times. The journey through this text would not only give an insight to the reader about rules of administering justice under different rules, dynasties and imperial powers but also create a yearning for change in the skeleton of Criminal Justice System suited to modern times. The literature presents a comprehensive picture of the various challenges and problems faced by the Criminal Justice System in India and suggest an agenda for reform in the present context would briefly discuss the statement of the problem, objective & rationale of the study, and hypothesis adopted and the research methodology of the present study.

The Second Chapter makes a humble attempt to trace the evolution of application of the scientific techniques in criminal investigation and prosecution across the world with a special reference to such evolution in India. The literature touches upon the need of having modern scientific techniques integrated with criminal investigation and prosecution and glances the reader through the ‘’Rainbow Principles’’ of the scientific aid to the Criminal Justice System. The text also presents a critical appraisal of the applicability of the scientific techniques in this modern crime infested society.

The Third Chapter presents a detailed and comprehensive analysis of various scientific techniques employed in crime investigation, prosecution and adjudication across the world with a special reference to DNA Profiling, Narco-analysis test,
Brain Mapping, Polygraph test, Electronic surveillance and Computer forensics. This literature helps the reader to understand the intricacies of these techniques and internalize the applicability of these techniques thereby bringing in more acceptability to these novel features of modern day forensic jurisprudence.

**The Fourth Chapter** discusses at length the admissibility of these scientific techniques like DNA Profiling, Narco-analysis test, Brain Mapping, Polygraph test, Electronic surveillance and Computer forensics in Indian legal scheme. Special reference to the Constitution of India, the Indian Evidence Act, Code of Criminal Procedure and the Code of Civil Procedure has been given while sufficing the text with relevant judicial pronouncements. The last part of the literature presents the legal status of these scientific techniques thereby ensuring that the reader becomes well versed with the status of the applicability of these scientific techniques in criminal investigation, prosecution and adjudication.

**The Fifth Chapter** enumerates the various recommendations of several committees and commissions of independent India in regard to the applicability of scientific techniques in criminal investigation, prosecution and adjudication. Special reference is given to various steps taken by the Government of India towards making certain statutory exercise to update the Indian Criminal Justice System in consonance with the international standards.
The Last Chapter elaborately ventures into the arena of conclusion which would recapitulate briefly the nodal points of the study followed by certain tentative humble suggestions by the researcher on her part for achieving the objective of the study that has been undertaken.

Evolution of Criminal Justice System in India

“If men were angels no government would be necessary.”

James Madison

India had always been bestowed with a unique Criminal Justice System in its past. The prevailing socio-economic conditions, aspirations of people and the political setup of the country have always influenced the evolution of the Criminal Justice System in India. Accordingly, the institutions, rules, and methods of administering justice have always changed and got suited to the changing circumstances under different rules, dynasties, and imperial powers.

In the early societies, due to the absence of any state and its elaborate machinery, the punishment to the accused by the victim himself was the most acceptable way of governance. The Rig Vedic text in ancient India brings out a testimony to the above fact. However, with the gradual evolution of the group existence, emergence of the state, and formulation of consensual ideals along with appropriate actions on its violation began to get developed. In course of time more elaborate regulations for the way of life and the way of its administering began to
emerge. This code of conduct which came to gradually evolve began to be known as \textit{Dharma} or the Law. The whole hierarchy of the administration along with the King to the commonest man was expected to regulate his life on these \textit{Dharmaniyam}.

In the very early phase of the Indian civilization, the \textit{Dharma} and \textit{Dharmaniyam} were emphasized to a great deal in every individual’s life. A selfless society existed which ensured utmost respect for the right of the others. Every act was expected to be in the conformance with the \textit{Dharma} and people observed obedience to the dictates of this code of conduct as an integral part of their life. The \textit{Rig-Veda} and \textit{Atharva-Veda}, the biggest contributions in intellectual dimensions of the early Indian civilization, mention certain crimes and punishments prevalent in that society. The King maintained a body of secret advisors and emissaries and personally patrolled the streets in the nights, in disguise, to study and receive first hand information for restoring peace and tranquility.\footnote{S. Mahartaj Begum, “\textit{District Police Administration}”, 1996, p. 23-24}

However the situation did not last long and the belief in the observance of the principles of \textit{Dharma} gradually dissipated. A situation arose where a group of people began to emerge which exploited the society by their sheer manipulation of the content in \textit{Dharamshastra}. Tyranny of the strong over the weak led to the emergence of the institution of the King and control of the society by an establishment called State. The King which formed the head of the state organized a system of rules and regulations, rights and duties and decided upon the punishment in case of violation of the same. This constituted the Criminal Justice System of the
period concerned. The evidences of such system can be traced to the Vedas which, through their elaborate principles of ruling the masses, laid the foundation of Criminal Justice System in India. Later with evolution of more organized life in the post-Vedic period, greater detailed code of conduct and rules of governance began to emerge which not only were concerned with an individual but would also be regulating the attitude and deeds of the King. The work on statecraft, *Arthashastra* is a great manifestation of such rules and codes which are still revered in modern polity.

The Mughal rule later also had well organized Criminal Justice System for maintaining the law and order within the empire. This medieval dynasty, though different from the Vedic age was essentially a police and despotic state. Every member of the officialdom was recruited in the army having a rank designated by his ‘Mansab’. The police official called the ‘Fauzdar’ was in charge of the entire police force with a member of subordinate officials called ‘Daroga’ or ‘Kotwal’ working under him. The policeman called the ‘Sipahi’ was the official of lowest rank in the police constabulary of the Mughals. The detective branch of the police was called ‘Khuphia’ who assisted the police in criminal investigations. The chief police administrator of the province was called ‘Subedar’.

The entire criminal administration of justice was based on the principles of Mohammedan criminal law and the punishments were inflicted upon criminals in accordance with the provisions of Quran. Crime under the Islamic law was considered to be an offence against God or the ruler or a private citizen and as such
it was a private affair between the offender and his God, King or the injured person. Most of the crimes therefore could be compounded including that of murder with express approval of the victim or his/her family. Crime was not considered as a social offence. Even the Emperor did not have a general power of pardon. The emperor, the representative of God on the earth was considered as the ‘Fountain of Justice’. He exercised general superintendence over all the courts created by him within his territory. He was the final adjudicator and arbitrator of the disputes and was assisted by an official called ‘Qazi’ who was appointed by the King himself and enjoyed his office during the pleasure of the Emperor. He was invested with both the civil and criminal power.  

The modern police force in India however came into being during the British rule in the last quarter of the 19th century and got built up slowly. However it was not that Britishers developed this elaborate machinery of police force out of vacuum. They too inherited many indigenous police features and structures from the Mughal system which were their immediate predecessors. But they reorganized it and developed it on a more or less uniform pattern throughout India. They tried different experiments in different provinces to have a police system suited for their purpose.  

The police organization in pre independence India was governed primarily by the Police Act of 1861 which still continues in the statute books without any substantial change. After independence, the constitution adopted a federal scheme in which Police was entrusted to the state along with public order, administration of justice, prison reformation and borstal institutions. The legislature of the state has

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the exclusive power to make laws regarding the law and order within the state	hough the Union government is indirectly involved in the Police administration of
the country and interferes generally in any situation of exigency.

The main function of administration of criminal justice in the country is
performed by the criminal law courts comprising of Magistracy and the Court of
Session. The High Court and the Supreme Court have only appellate jurisdiction in
criminal cases. These courts generally engage themselves in dispensing abstract and
equitable justice in terms of principles set forth in an absolute and accepted law. It,
therefore, follows that the court must impart justice within the limits of the law so as
to maintain uniformity and impartiality in the determination of guilt and punishment
of the accused.15

However for purposes of analysis in the chapter hereafter, it is important to
delineate the Criminal Justice System in India by independent elements like the
institutional laws (substantive and procedural) and the institutional structures (the
police, the prosecution, the courts, and the prisons and correctional services) set up
to enforce and administer the laws in each sector. In context of the evolution of the
Criminal Justice System in India to its present form, all these elements can be clearly
carved out for evolving a better analysis of the respective system at different times.
For convenience, the same may be coherently divided into three epochs- Ancient,
Medieval and the Modern period. Modern may be further divided into pre-
independence period and post-independence period. A detailed analysis of the
Criminal Justice System in these periods is being presented below.

Criminal Justice System in Ancient India

In examining the administration of justice in ancient India it is necessary to keep constantly in perspective the social structure of that era within which it operated. The social system is a by-product of the various social forces which appears in different forms and affects the social existence of the inhabitants. Socio-legal culture therefore is a mirror of the people’s overall development. The fact that ancient Indian social structure was spiritually oriented is evident from the laws & codes of ancient India. Rich philosophical contributions guiding the social behaviour and conduct are the proof that the ancient Indian mind was constantly engaged in the understanding of the problem for achieving a superior life. Therefore we need to study the judicial concept in ancient Indian jurisprudence in its social and spiritual context.\textsuperscript{16}

This period in the history of India is known for its dominance of Hindu law due to pre-eminence of Hindu rulers and emperors. The King known as ‘\textit{Gopa Janasya}’ or the protector of the people was the pivot of Criminal Justice System. During the Pre Aryan period, the rules of conduct were strictly observed by all including the King who generally was the head of the inhabiting tribe. Men and women were not manipulative and they adhered to truth and virtues. They never departed from established and prevalent customs and traditions. That era was of complete happiness for all because even if anyone erred at all, he ratified his errors through prayers and sacrifices. In fact they were guided by an organized social order and they even did not find it necessary to have a King or his laws.

\textsuperscript{16} S.D. Sharma, “\textit{Administration of Justice in Ancient India}”, Harman Publishing House, 2001, p. ix
With the coming of the Aryans, anarchy became the chief characteristic of the social existence. To prevent a complete chaos, the rules and codes of conduct were promulgated. The concept of sin and crime came into existence. A social contract was established between the people and the King and thereby the authority of King came into prominence. Emergence of State, though not in modern sense, came into being and there began a clear distinction between the ‘Ruler’ and the ‘Ruled’. Many spiritual texts recording the intellectual excellence of the times came into existence of which ‘Rig Veda’ is the oldest. The Rig Vedic concept of ‘Reet’ began to shape the Indian civilization and culture. All the members of the society including the King were governed by the ‘Dharma’ and guided by ‘Dharmaniyam’. The King always strived to work towards the welfare and security of its people.

The ‘Dharamshastra’ in ancient India forms the earliest text in which details of law and codes in some modern sense are provided. In the ‘Dharamshastra’, all the offences were either punishable with fine or imprisonment or both. The punishments varied according to whether an offence was against the King or the ruling authority, or against a person to whom the offender owed duty or allegiances or amounted to only misdemeanors.\textsuperscript{17} The conception of crime and justice was very intricately interlinked with the structure of the prevailing society and thus the Criminal Justice System was a blend of religion and law existing at that time.

\textsuperscript{17} U.C. Sarkar, “\textit{Epoch in Hindu Legal History}”, Vishveshvaranand Vedic Research Institute, 1958, p. 55
However the most profound treatise that has influenced the legal course in ancient India and laid the foundation of a science of statecraft is Kautilya’s *Arthashastra*. According to *Arthashastra*, it is the duty of the King to ensure the welfare, prosperity and well being of its subjects (‘Palana’). It dealt with the rights and duties of the King from the standpoint of actual administration involving the creation and regulation of different departments of the government including the most important organ of the state, viz the Judiciary.

Also each state was divided into provinces and further into divisions and districts. Every province was headed by a Governor while the district or division by the district official. These officials were responsible for the Law & Order, welfare and developmental activities. Kautilya’s ‘Arthashastra’ made the division of districts into towns administered by ‘Nagarkas’ performing the desired functions. Other than cities and towns, numerous villages formed the base of the administration pyramid. Each village consisted of village headman and a village panchayat. The office of village headman which generally was hereditary represented the King’s administration at the lowest level. However the most conspicuous feature of the village administration during the ancient period was the existence of ‘Sabhas’ and ‘Samitis’. These two popular assemblies formed the crux of village administration in the ancient era.

Kautilya’s ‘Arthashastra’ deals with offences such as robbery, defamation, assault, gambling, betting and other miscellaneous offences relating to crime. There is also mention of comprehensive and elaborate system of punishments which were
to be given to criminals based on the degree of their crime. These punishments were also contingent upon the social status of the accused. The administration of justice, according to *Arthashastra*, implied the determination of what is just and equitable and to see that it is implemented with utmost impunity. Administration of justice was considered as the most sacred duty of the King and he was considered to be the fountain head of justice and the highest judge in criminal and civil matters.\(^{18}\)

Kauṭilya also specifies a very sound theory that each complaint must be adjudicated by involving proper consideration of the evidence available. Even fines were to be imposed for causing damage to plants and trees. The amount of fines used to get doubled when an injury or mischief was done to any tree on the boundary, in places of pilgrimage or the forest of the King. Gambling and betting could be indulged in, according to Kauṭilya only under the supervision of the Superintendent in-charge of gambling. But he was careful enough to sanction gambling under state supervision with the main objective of detecting thieves, spies and stolen property.\(^{19}\)

Administration of justice was one of the main functions of the state during the Mauryan time. Although the beginning of a regular judicial administration could be traced back to the pre-Mauryan period, justice delivery had reached to a comparatively higher stage of development during Mauryan rule. In fact the Mauryan Judicial system bridged the gap between the two epochs of judicial administration in India- *Dharmashastra* during Vedic times on one hand while the

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\(^{18}\) Krishna Mohan Agrawal, *"Kauṭilya on Crime and Punishment"*, Shree Almora Book Depot., 1990 p. 56

\(^{19}\) *Supra* 17 at p. 94
Manusmriti during post Vedic on the other. Several penal provisions including the death penalty formed the part and parcel of the judicial administration in Chandragupta Maurya’s reign. Punishment prescribed to be given was often very brutal which shows the anxiety of the legal authority to suppress the crimes. Indeed many of Ashoka’s rock edicts depicts that the continuation of the death penalty with little respite was continued even among the later Mauryans. Separate rural and urban judicial system was one of the most prominent features of the Mauryan judicial administration. The state police and jail administration of pre Mauryan times was also carried forward by the Mauryan kings. The judicial system was meticulously and scientifically planned. Kautilya in ‘Arthashastra’ has even laid down rules and regulations about the procedure of holding court, acquiring evidence, examination of witnesses, appointment of judges, their conduct and punishment, etc.20 The views of Kautilya in all these matters are very scientific and relevant till date.

Another important source of legal information in ancient India, particularly in post Vedic period, comes from religious text of Smritis. Of these Smritis, Manusmriti forms a comprehensive treatise on the conduct and way of life within the realm of Hindu religion. According to Manusmriti, law has its existence in the God itself and state is created by God itself. The King has to follow the principles laid down in these texts and is himself bound by it. If the King engages in deed against the tenets of law, he was brandished as ‘Adharmik’. Similarly the Puranas are full of instances where the Kings were dethroned and beheaded in such a situation. Believing in the Divine Theory of Ruler, the King was given the authority or power to govern its subjects as a divine representative of the God. This theory was used to justify the end that people must accept the King as an individual on a

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divine mission and in return accept his sense of judgment. On the other side, King was expected to do justice by following law mentioned in the scriptures in letter and spirit. The punishment prescribed in these scriptures was according to the social status one enjoys in the society and the lowest stratum was subjected to severest form of punishment. *Manusmriti* describes certain section of the society incompetent as far as witnesses and judges are concerned. Manu has also referred to oaths and ordeals which were taken while deposing as the witness to any crime. Manu not only describes injury of any form to any human being as a offence but also includes hurting trees, plants, animal and even inanimate goods as acts of crime.

Later the coming of Indo Greeks, Kushans in Indian scenario made dramatic changes in the military or judicial administration. Appointments of ‘*Dandanayak*’ and ‘*Mahadandnayak*’ during Kushana rule is worth mentioning. The coming of the Gupta brought many new innovations in the local administration. The establishment of Municipal boards as popular decentralized body of governance was one of the commendable initiative which still contains relevance for the contemporary Indian Criminal Justice System. After the Gupta’s reign, Harshavardhana laid the foundation of sound and efficient administration. The accounts of Chinese traveller Hieun Tsang about Harsha’s popularity, righteousness and neutrality is a brief testimony of the above mentioned fact. In the south too, the imperial Pandya, Pandava, Chola and Chera were marked by the usual characteristics of harsh and intolerant judicial administration.
A brief account of the salient features of the Criminal Justice System that evolved and prevailed during ancient India are described below.

**Institutional Laws - The Concept of Dharma**

The Indian legal system has always been embedded in the concept of Dharma. The very first mention of the principle can be traced back to the Vedas which later was propounded in Smritis, Puranas and Dharamshastra. Dharma constituted the central theme of Indian social fabric and was concerned with the overall development of an individual. Everyone was required to carry out his/her conduct according to deeds of the Dharma as prescribed by the scriptures. Also, it provided the King with the authority to impose sanction in punishing a defiant for protecting the rights and liberties of any individual and preserving the sanctity of social fabric of ancient India.

Dharamshastra in fact included the entire gamut of human activity governed by the concept of Dharma. This necessarily included the civil and criminal procedures assimilating the broad horizon of law. The Dharamsutra, as a part of Dharamshastra, presents an original compilation of the legal principles and the customs prevalent in the society which constituted the laws of the time.\(^\text{21}\)

The Smritis, which are the next important work, deals with the constitution as well as gradation of the courts, appointment of judges and the procedural law thereby disclosing a well developed system of administration and justice delivery.

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The *Manusmiriti* for instance consists of eighteen subdivision of law covering various aspect of civil and criminal law. In fact *Manusmiriti* is considered to be the most authoritative work influencing the Criminal Justice System in India post 2nd century AD.

*Puranas*, next in line, are also an important source of law in the ancient India. Each of the *Puranas* is dedicated to the praise of a special deity and is supreme in its teaching as far as that particular deity is concerned. All of the 18 *Puranas* supposedly did not have any influence on each other while they were created. As a result these ancient texts serve as a distinct source of legal knowledge scattered across the country in different times and at different places.

Kautilya’s *Arthashastra* provides a detailed account of Criminal Justice System prevalent during the Mauryan Empire. Considered as the earliest science of politics or statecraft, it focuses on the role of the state in maintaining the social order along with preventing and punishing the criminal activities. *Arthashastra* provides an enriching account of law of procedures; the law of evidence in civil and criminal cases; procedure of criminal investigation along with the quantum and method of punishments in various types of offences. Prison, lockups and welfare of the prisoners was also the subject matter of study in Arthashastra. Elaborate duties and conduct of Kings, Judges makes Arthashastra a commendable treatise that has a lot of relevance even in this contemporary era.
However the *Dharamsutra* never recognized the legislative power of the King. Under the Hindu jurisprudence, the enforceability of the law was made by the sovereign while the supreme authority was still that of the Dharma, that is, the code of conduct enshrined in these ancient texts. This however changed in later times with the gradual passage of time where the authority of the King became unquestionable as far as law making or law enforcement is concerned.

In addition to these literary works of the Hindu law, several customs and usages also got evolved as law for administering justice. In fact with the passage of time, more and more reliance on these customs over the Vedic texts was observed in practice in the Criminal Justice System of ancient era. In regard to the residuary matter, the power was bestowed to the King as he was considered as the descendant of the God on Earth. The King was to decide upon these matters on the basis of his conscience but within the broader limit of *Dharma* and based on experience, regulation and the usage.

**Institutional Structures and Criminal Procedures**

**The King and his Court**

The administration of the Justice, according to the *Smritis*, was the prime responsibility of the King. He was entrusted with the duty to enforce the principles of the *Dharma* in an impartial way ensuring the protection of the rights and liberties of the individual and punish the person working in the contraventions of the dictates of the *Dharma*. The King’s court was the highest court of appeal and enjoyed enormous power in exercise of the sovereign function of adjudication. In disposal of
his duties, he was assisted by group of ministers, judges and consultants as deemed appropriate by the King. Next to the King’s court was the court of the Chief Judge which would render justice by the interpretations of the deeds propounded in the Dharamshastra. At local level, the state officials were entrusted with the responsibility of administering justice.

**Judicial System in the Villages**

The judicial system in the villages were so organized that every villager in ancient India had access to the institutions concerning the Criminal Justice System. The constitution of Sabha and Samitis in ancient India were primarily entrusted upon with the responsibility for administering justice. Later the village council, very similar to present day panchayat, comprising of four to five people became responsible for the justice delivery at village level but the criminal and civil cases handled were of simple nature. Several village committees later were also constituted which looked after the matters ranging from imposing fine to the offender to punishing the criminal for the offence. Other cases were tried in the central court or the courts in the town with the final appeal lying with the sovereign King.

**Police**

The first institution of state police emerged during the pre Mauryan period. Kautilya’s Arthashastra while recording the police establishment divided it into two wings: Regular police and the Secret police. The regular police comprised of three
tier of official namely Pradesta (Rural) or the Nagarka (Urban) at the top; rural and urban Sthanika in the middle and the rural and urban Gopas at the bottom. The secret police on the other hand comprised of two categories namely Peripatetic and Stationary. The Manusmriti suggests that the King must possess an army of soldiers and spies in administering justice in his state. Thus it appears that an institution like modern day police existed during the ancient era for ensuring equitable and impartial Criminal Justice System.

**Jails**

The Jails too, like the police establishments, trace back to pre Mauryan times. The Jails, according to Arthashastra, were generally constructed in the capital city and were fully guarded. The men and women prisoners were completely separated and were employed in useful work. A sympathetic view towards the prisoners who have been punished for any misdeed was also taken into consideration during the ancient period. The Dharmamahamatras were charged with the management of the Prison and Prisoners and was entrusted with the responsibility to release the deserved ones. Arthashastra has dealt with Jail administration in profuse detail.

**Investigating and Intelligence agencies**

Violation of Dharma was considered as a crime and the King was entrusted upon the responsibility to punish the person acting in the contravention of the law. Any person can act as an informant (known as Stobhaka) for the King and after taking the cognizance of the crime, it would be the duty of the King to see that the
commissioning of the crime is adequately addressed through adjudication and the criminal is sufficiently punished. There were also investigating official (known as Suchaka) appointed by the King to detect the commissioning of the crime. The Manusmiriti defines the responsibility of the King in detection and punishment of the crime and prescribes certain guidelines for him to follow in this regard.

**Punishment**

The punishment policy prevalent in the ancient period was one of the elaborately dealt subjects and the quantum and magnitude of the punishment for different types of the crimes are enumerated in number of ancient scriptures. The Manusmiriti defines punishment as the core principle for containing criminal activities and dealt with four methods of punishment: admonition, censure, fine and corporal punishment. With the punishment philosophy intricately interlinked with the Varna system, the Manusmiriti prescribed more severe punishment for Sudra while mild treatment for the Brahmans. The nature and types of punishment according to Manusmiriti were cruel, wild and barbarous. Many other Smritis differed in the matter of punishment with the Manusmiriti however certain commonalities existed.

Kautilya’s Arthashastra, in contradiction with the Manusmiriti, prescribed more severe punishment to the Brahmins as they had to share greater responsibility in societal upliftment. Moreover since they were the acquirer of knowledge, they were expected to tread the path of justice in the first place and pave the way for others to follow. So the quantum of punishment was out of the expectation from the societal class of Brahmans. The Dandaniti, that is, the punishment policy as
prescribed by Kautilya was more regulated by the motives and nature of the offence, time and place, age, social status, sex, conduct and monetary position of the offender. The Court also had the power to provide for interim compensation to the victim other than prescribing punishment for the crime.

**Examination of Witness and Perjury**

The examination of witnesses was not usually delayed in ancient India. The witnesses were legally bound to appear before the court. Failure to do the same amounted to heavy penalty and sometimes to punishment. Perjury, that is, false testimony before the court was considered a serious offence. Severe punishment in case of false evidence was prescribed by the court and the wealth acquired by such mala fide acts was confiscated by the King.

**People’s participation in Crime Prevention**

In ancient India, the failure in disposing off the duties towards society was taken very seriously. Failure in helping a man in need was considered a serious crime. For instance, any owner of a house who did not provided assistance to any person during fire outbreak was liable to fine. Double punishment was prescribed to the person who ran away from the spot where the crime has taken place and where he could be of any help in preventing the commissioning of the crime.
Right to Self Defense

The right to self defense was well acknowledged in ancient India. The person had the right to assassinate the offender in self defense. Also, the life of women and weaker sections that are not in a position to defend themselves should be defended by attacking the assailant even in a life threatening manner. Even the killing of the Brahman was not considered as a crime if acted with a self defensive intent.

Offenses by Public Servant

The offenses by public officials like Police superintendent, municipal caretakers etc. were taken on a serious note in ancient India and were punished severely. Even the judges who had passed unjust order or had taken bribe or had tried to abuse their authority were taken very seriously and sternly punished.

Thus from the foregoing discussion, it is clear that the modern Criminal Justice System find its roots into the ancient system of managing crime and administering justice. Many of the ancient text including the Arthashastra are a brief testimony of that.
**Criminal Justice System in Medieval India**

With the downfall of the Hindu kingdom in India and the advent of the Muslim rule, the Criminal Justice System in the country experienced a makeover under the Perso-Arabic and Turkish influence. The Islamic jurisprudence that developed in the Middle East was imported by various dynastic rulers into India but was modified suitably to make it coherent with the Indian society and ethos.\(^{22}\) The initial period of medieval time was characterized by the dynastic wars and revolutions which resulted into very volatile political institutions. No republics were formed and no free town was established. The atmosphere of mutual distrust and enmity prevented any sort of administration to consolidate. As a result, no homogeneous Criminal Justice System could be evolved for considerable period of time. The quick succession rule of Slave dynasty, the Khilji, the Tughlaq, the Syed, the Lodhi prevented any uniformity in the administration even though some of the contributions did have impact on the later administration of medieval times.

For the first time in the history of Criminal Justice System of medieval India, the chief judge was appointed by Qutub-ud-din-aibak. Later Balban also introduced the system of espionage for collecting information about the criminals. The spy system was made even more comprehensive during Alauddin Khilji tenure. Crime was strictly dealt with and general peace and security prevailed within the empire. Later due to increase in rebel and robbery activities during Muhammad bin Tughlaq reign, the peace and security of the society increasingly became threatened but it was very ruthlessly curbed by the Sultan by punishing the culprits with no mercy. However his successor Firuz Shah Tughlaq was more tolerant and banned torture in

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\(^{22}\) See, S.K. Puri, *"Indian Legal and Constitutional History"*, Allahabad Law Agency, Allahabad, p. 18
giving punishments such as amputations, tearing out of eyes, sawing people alive, crushing people's bones as punishment, pouring molten lead into throats, putting people on fire, driving nails into hands and feet etc. which were practiced more commonly in Delhi Sultanate by his predecessors. Later Sikander Lodhi initiated many reforms in the Criminal Justice System and infused more discipline into the affairs of the Sultanate. Further the reforms carried out in justice delivery by Sher Shah Suri were exemplary by any standards and were far ahead of their times. He was of the opinion that stability of the government depended on the justice delivery and that it would be his greatest concern to prevent the violation of it either by oppressing the weak or permitting the strong to infringe the laws with impunity. During his reign, the head of the Village Council was recognized and ordered to prosecute and punish the criminals. They were ordered to prevent theft and robberies. In case of robberies, they were made to pay for the loss sustained by the victim. The village autonomy was kept intact by all virtues and victims of criminal acts were adequately compensated. Police regulation was drawn up for the first time in India.

However, the prominent watershed in the evolution of Criminal Justice System in the medieval era came with the coming of the Mughals. The civil administration was headed by the King or the Emperor known as Sultan. He was assisted by his Minister (Wazir). The kingdom was divided into provinces (Subah) which was further divided into districts (Sarkar). Each district constituted of group of villages called Parganas. The major progress in the development of Criminal Justice System during the Mughal period was attributed to Akbar. He introduced many reform in administration of the justice across the kingdom. He created common citizenship and a uniform system of justice for everyone. Besides, he
prohibited slavery, abolished death penalty for criticizing Islam and prohibited the forcible practice of Sati. Later Jahangir abolished the cruel and barbarous treatment in dispensing justice and decentralized the power of the courts. Shah Jahan established the system of appeal. Aurangzeb made to prepare a digest of Muslim criminal law which came to be known as Fatwa-i-Alamgiri.

Throughout the medieval period the entire Criminal Justice System was based on the principles of Mohammedan criminal law and punishments were inflicted upon criminals in accordance with the provisions of that law only.\(^\text{23}\) Interestingly, some crime under Islamic law was considered to be an offence against the God or the ruler or the state while most were considered a private affair between the offender and the injured person. The latter crimes were not considered as a social offence and hence most of the crimes in this category were compounded but with the express permission of the victim or his/her close relative. Even the Emperor was not empowered to grant pardon in such category of crimes.

It was interesting that even murder was not considered to be a crime against the God or the state. It was a wrong done to a party and as such it could be compounded by payment of blood compensation called *Khun Baha*.\(^\text{24}\) The Emperor was considered as the representative of God and was revered as the ‘Fountain of Justice’. He exercised general superintendence over all courts created by him within his territory. *Qazi* was the most important functionary of the Criminal Justice System and was invested with both civil and criminal power. The King was assisted

\(^{23}\) Supra 13 at p. 29
\(^{24}\) B. S. Jain, ”Administration of Justice in Seventeenth Century India”, Metropolitan Book Company, Delhi, 1970 p. 57
by the Chief Sadar (Sadr us Sadr) regarding ecclesiastical affairs and Chief Qazi (Qazi ul Quzat) in all the other civil and criminal matters. The Chief Qazi was assisted by other Qazi at provincial, district and town level. The village court was presided by the village headman (Chaudhary) and had power to inflict punishment for small offences. The decision of the panchayat was final and binding.

The criminal cases were decided by the Emperor, the Provincial Qazi, the Governor, the Fauzdar (Fauzdari Adalat) and Kotwal. Petty criminal cases relating to theft or rioting in the Pargana (Town) were assigned to the local Kotwal. In course of time, a whole time Qazi was appointed to try criminal cases within the Pargana. The Faujdar also possessed some criminal jurisdiction. The courts of the Governor (Nizam e Suba) and Provincial Qazi (Qazi e Suba) had also original jurisdiction in addition to hearing appeals against the decision of Faujdar and local Kotwal.25

The Muslim polity was based on the concept of the legal sovereignty of the Shara or Islamic law. Muslims considered Shara as divine, eternal and immutable. The Shara was based on the principles enunciated by the Quran which has three basic elements viz, Hadis, Ijma and Qiyas. The Quran is the most important source of law. The political philosophy is based on the premise that the Holy Prophet, Muhammad alone was the omnipotent being and could be attributed to the Sovereign. The Khalifa or Caliph was regarded as a God’s Servant responsible for observance of his law as a trustee for the Supreme Being. It was made obligatory on

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all Muslims to owe allegiance to the Caliph who was their ruler. In India, the Sultan of Delhi too claimed to be the representatives of the Caliph.

Evidences against criminals/offenders during the Muslim era were of the various types viz, statements of witnesses, oaths and written documents. Where a witness had come to give evidence, the Qazi should not direct him in any way but quietly record his evidence. A person who was blind, insane or dumb was considered as incompetent to give evidence. Slaves were also considered incompetent witnesses. When the person stood in near relationship to each other, they were considered as incompetent witnesses such as son in favour of father and grandfather, wife for husband, master for slave, but a brother was treated a competent witness against brother and uncle a competent witness against the nephew. The evidence of non believer was not admissible against the Muslims.26

Some the salient features of the Criminal Justice System that evolved and prevailed during medieval India are described below in brief:

**Institutional Laws - Concept and Sources of Law**

All the Sultans and Muslim rulers followed the Islamic law or Shara during the medieval India. Muslim criminal law as prevalent in India then was supposed to have been defined in the Quran as revealed to the Prophet Muhammad and his traditional sayings (hadis) which evolved later. The Islamic society did not place its faith in a graded or sanctified inequality of caste system unlike the Hindu society existing at that particular time. However, this concept of equality was applicable

26 Supra 22 at p. 22
only to the Muslims. Under the Muslim law, non-Muslims did not enjoy all the rights and privileges which the Muslims did. They were not treated as equal to Muslims in law and were called *Zimmis*. Their evidence was inadmissible in the courts against the Muslims. They had to pay an additional tax called *Jizya* to the state while in regard to other taxes they had to pay at a rate double that of what a Muslim paid.

A special feature of the Muslim law was that the Muslim criminal jurisprudence treated most of the criminal law as a branch of private law rather than of public law. The principle governing the law was more in the nature of providing relief to the person injured in civil matters rather than to impose penalty for the offence committed. It was for the private persons to move the State machinery against such offences and the State would not suo-moto take cognizance of the same.

Muslim Jurisprudence can be divided into four well defined branches or school viz. *Hanafi* School, the *Maliki* School, the *Shafi* School, and the *Hanbali* School. The main source of Muslim law (*Shara*) in each of these schools is *Quran* and *Sunnah or Hadis*, which means the practices and traditions of the Prophet who, is considered to be the best interpreter of *Quran*. On all matters on which *Quran* was silent, *Sunnah or hadis* was regarded as paramount authority. In addition to these the other two sources which developed inevitably for meeting the needs of expanding Muslim society were: *Ijma*—consensus of opinion of the learned in *Quran*; and *Qiyas*—analogical reasoning having due regard to the teachings of *Mohammad*. Further many rules and regulation that were issued by the Muslim rulers from time to time came to be known as *Urfi*. This body of law was mostly concerned with
matter like trade, property, taxation and the like. A judge was allowed considerable
discretion in the interpretation and application of this law.

**Institutional Structures and Criminal Procedures**

**The King**

The administration of justice and its strict enforcement was one of the
primary functions of the King who also headed the judicial organization of the state.
This function was one of the foremost responsibilities of the King according to
Quran. The ruler, according to Islamic Jurisprudence, constituted the highest court
of appeal. To maintain and enforce the criminal code was one of the important
functions of the King. Being the head of the state, he was also the supreme authority
to administer justice in his kingdom.

**The Institutional structure of various Courts**

The courts of different nature were established to deal with justice delivery
during the Muslim rule to deal with differing nature of cases. The Court of Diwan-e-
mulzim was the highest court of criminal appeal during the Sultanate period. A
separate court of Diwan-e-siyasat was constituted to deal with the cases of criminal
prosecutions of rebels against the state and those charged with high treason. The
police and the judiciary of the state were placed under the Chief Sadr and Chief Qazi
respectively. At each Subah, Adalat Qazi-e-subah was empowered to try both civil
and criminal cases of any description and to hear appeals from the district courts.
Similarly, there were courts at Sarkar and Pargana level. Appeals were filed before
the district court from the judgements of the Pargana Qazis, Kotwals and village
 Petty criminal cases were filed before the Kotwal who was the principal executive officer in the town.

During the reign of Sher Shah Suri, the justice delivery system was further strengthened and the Shiqahdars who had up till now powers corresponding to those of Kotwals were given magisterial powers within the Parganas to try civil and criminal cases. The institutional development got a renewed vigour during the Mughal rule when a separate department of justice (mahukma e adalat) was created to regulate the administration of the justice within the state. Justice was administered by means of a hierarchy of courts rising from the Village Council (Panchayat) to the Pargana, Sarkar and Subah and finally to the Chief Sadr-cum-Qazi and the Emperor himself. The Emperor’s Court had jurisdiction to hear original and appellate criminal cases. In criminal cases the Mohtasib-e-Mumalik or the Chief Mohtasib assisted the Emperor. The public was allowed to make representations and appeals to the Emperor’s Court in the cause of justice. The second important court of the empire was the court of the Chief Justice (Qazi-ul-qazat). This had original, civil and criminal jurisdiction and also heard appeals from the lower courts. It also supervised the working of the provincial courts. In order to hear an appeal, the Emperor presided generally over a Bench consisting of the Chief Qazi and Chief Justice. At each provincial headquarters, the Provincial Chief Appellate Court, presided over by the Qazi-e-subah, besides hearing appeals had also the original civil and criminal jurisdiction. In each district, chief civil and criminal court of the district was presided over by the Qazi-e-sarkar, who was the principal judicial officer of the district. Qazi-e-pargana presided over the Adalat-e-Pargana that had to deal with all
civil and criminal cases arising within the jurisdiction of the Pargana, including the villages.

Even during the Muslim rule the institution of panchayat was kept intact as it existed during ancient India. It continued to be the smallest administrative unit of the government. Each pargana consisted of a group of villages. For each village there was a village Panchayat, a body of five leading men, elected by the villagers. The head of Panchayat was known as Sarpanch. The Panchayat had the authority to decide both civil and criminal cases of purely local character during the Muslim period based on the customary law existing in that particular community. Although the decisions of the Panchayat were not strictly according to the Mohammedan law, yet there was no interference in the working of Panchayat. As a general convention, the decision of Panchayat was binding upon the parties and no appeal was allowed from its decision.

**Police**

Policing responsibilities of the cities and towns was entrusted to Kotwals and that of the countryside to Faujdars. The Mughals had established the kotwali system in the cities and the chowkidari system in the villages. The Court of Fauzdar tried petty criminal cases concerning security and suspected criminals. Kotwals were also authorized to decide petty criminal cases.

**Jails**

Imprisonment as punishment was not expressly provided under the Islamic criminal law so the need for prisons as penal instruments was hardly felt during
Mughal times. However jails were needed to detain prisoners waiting the trial or for accommodating prisoners spending their days in confinement due to their inability to pay for compensation. The latter was in accordance with the provision of Diya in Mohammedan law. The duties of looking after the jails and the inmates were entrusted to the Kotwal. However it was left to the discretion of the Qazi to impose tazir, which was in offences not categorized under hadd, qisa and diya, enabling him to award imprisonment.

**Crimes and Criminal Procedure**

Unlike the Hindu law, all the crimes under Islamic law were not considered threat against the State and thereby the offences were classified under three heads, namely (i) crimes against God (ii) crimes against the State and (iii) crimes against private individuals.

Only the crimes against the God and the State were treated as offences against public morality and threat to the existence of the state. Other crimes were rather treated as private offences against the victim. No suo-moto cognizance was undertaken by the state in the latter and private person was entrusted with the responsibility to move the state machinery against such offences and plead the state for justice delivery. In criminal cases, a complaint was presented before the court either personally or through a representative. A public prosecutor known as Mohtasib was appointed for each alleged criminal to place the other side before the court. The burden of prove was always on the prosecution and an accusation in itself was no proof of the guilt of the accused. The court was empowered to call the
accused at once and to begin hearing of the cases. The criminal process required a valid accusation made in the presence of the defendant who had the right to confront his accusers by interrogating him, cross-examining him or by asking him to take the oath of Holy Scriptures. The criminal trial did not always involved a process that placed the state against the accused but always aimed to involve the victim-accuser directly into the process. Ordinarily, the judgement was pronounced in the open court. However in exceptional cases, where there are apprehensions of accused influencing the trial or the trial being against the interest of the state, the judgement was not pronounced in the open court.

Evidences were classified into three categories: (a) *tawatur*, i.e. full corroboration; (b) *ehad*, i.e. testimony of a single individual; and (c) *iqrar*, i.e. admission including confession. The law of evidence prescribed for proving the offence was highly technical. Some of the rules of evidence followed under Muslim criminal law were as follows:\(^{27}\)

(i) No capital sentence could be inflicted on a Muslim based on the evidence of a non-Muslim.

(ii) In other cases, evidence of one Muslim was considered as equivalent to two non-Muslims.

(iii) Evidence of two women was considered equivalent to that of one man.

(iv) Evidence should be direct, viz. that of eye witnesses only and not circumstantial and further specified number of witnesses were required to secure conviction. For instance, for proving offence of rape not only eye witnesses were required but also these witnesses must be four in number.

(v) Evidence of women was inadmissible to prove a charge of murder and in all cases of *hadd* or *kisa*.

**Punishments**

The punishments for various offences were classified into four broad categories, viz (a) *kisa*, i.e. retaliation which meant in principle, life for life and limb for limb; (b) *diya* meant blood money being awarded to the victim or his heirs; (c) *hadd* inflicted on persons who committed offences against God; (d) *tazeer*, i.e. punishment for the cases not falling under *hadd* and *kisa* which included the punishment of exile, imprisonment or humiliation of any other kind.

The type and quantum of penalty to be imposed was decided as per the discretion of the Judge. Judges used to take into account a variety of circumstances in awarding punishment. Generally punishments prescribed under the Muslim law were very cruel. For instance, mutilation of the body was one of the types of punishment which resulted in great suffering, pain and gradual death. Another special feature of the punishments under Islamic law was that of *diya* i.e. blood money. It was awarded to the victim or the heirs of the victim in a fixed scale. This applied to cases of certain offences including those falling under *kisa*. Another peculiar feature of the Muslim criminal law was that the death sentence was required to be executed by the heirs of the deceased.

**Institution of Lawyers**

Legal profession began to evolve as a promising career during the Muslim period and litigants were many times represented before the courts by professional
legal experts known as *Vakils*. Two Muslim Indian Codes, namely, *Fiqh-e-Firoz Shahi* and *Fatwa-e-Alamgiri*, clearly stated the duties and conduct of a *Vakil*. Ibn Batuta, who was a Judge during the reign of Mohmmad Tughlaq, mentions about *Vakils* in his seminal book. Sometimes these *Vakils* were appointed by the State to provide free legal aid to the poor litigants. A *Vakil* also had a right of audience in the court. It was also expected that the *Vakil* should maintain high standard of legal behaviour and conduct.

**Appointment of Judges**

Emperor was the appointing authority of the Chief Justice and other judges of higher rank within the state. Similarly, *Qazi-e-subah* and *Qazi-e-sarkar* were appointed from amongst the lawyers practising in the courts by the Emperor itself but with due consultation with the Chief *Qazi*. Lapses on the part of government officers were not forgiven and were thoroughly investigated, if necessary, through commissions of inquiry. Corrupt judicial officers were punished with impunity and dismissed. Every possible effort was made to keep up the high standard of conduct within the judiciary and among the judges.

Thus from the foregoing literature, it is very much evident that the Criminal Justice System during the Muslim rule in India marked a significant departure from that of Hindu period but undoubtedly had a profound influence on the Criminal Justice System of contemporary times.
**Criminal Justice System in Modern India**

**Pre Independence Era**

Administration of Criminal Justice established over a period of thousands of years was inherited by the East India Company, a trading corporation based in England and to which a charter was granted by Queen Elizabeth I of England to trade into and from the East Indies, in the countries and parts of Asia and Africa for a period of fifteen years. The company was accorded with a legislative authority enabling it to regulate its own business and maintain discipline amongst its servants. Later the company got successful in securing a Royal farman from Emperor Jahangir that conferred *inter alia* the rights on the Company to establish a factory at Surat; to live according to their religion and law without any interference from the state; to settle disputes among Englishmen and to have the disputes between Englishmen and local persons settled through local authorities.

In 1623 a charter was issued by James I in order to strengthen the hands of the company, for enforcing its laws and punishing the person subject to jury trial in case of capital punishment.\(^28\) So in view of the Charter of the King of England read with the *farman* of the Mughal Emperor, the legal position at Surat Factory was as follows:

a) There was no common legal system which would apply to all persons in Surat including the Englishmen.

b) Civil justice was according to personal laws of the Hindus and the Muslims.

c) Criminal law followed was that of Muslim criminal law.

\(^{28}\) *Supra* 22 at p. 32
d) Englishmen were to be governed by English law.

As the activities of the Company widened, the King of England issued a new Charter of 1661 that had an important bearing on the judicial system in India. The Charter not only entrusted judicial power to the Governor and its council of the factory authorizing the Company to try cases, both civil and criminal, relating to all persons whether servants of the Company or not but also allowed the justice to be administered according to the laws of England. Thus by this Charter the laws of England for the first time became applicable within any of the territory of India and through these powers, the Company started developing into a localised government in India with Mughal emperor at the helm.

The Charter of 1668 further assisted the Company to consolidate the transition from a trading body into a territorial power when the island of Bombay was transferred to the East India Company for an annual rent of ten pounds. The Charter of 1668 also authorized the Company to make laws, orders, ordinances and bylaws for the good governance of the island of Bombay. The Charter further empowered the Company to establish courts of similar nature and power to those established in England for the proper administration of justice. Later the Charter of 1683 provided that the seat of these courts should be established at such places as the Company deems fit on the consideration of equity, good conscience, laws and customs of merchants. The Company was also authorized to declare war and to make peace subject to overall control of the Crown of England.
The Charter of 1726 established, for the first time, three Mayor’s Courts in three Presidency towns on uniform basis. Thus this Charter was rightly known as the ‘Judicial Charter’. Need for more organised, systematic and coordinated legislative and judicial system was felt by the officials of the Company particularly with the growing prosperity of English settlements in India.\textsuperscript{29} Thus the Charter contained important provisions which inaugurated the British system of the courts and administration of justice in India. The Charter also provided for the establishment of a Corporation in each Presidency town.\textsuperscript{30}

The Charter of 1753, which was a modified and improved version of the Charter of 1726, placed the Mayor’s court under the Governor and his Council. Now Mayor’s court could try civil suits only between European and European or natives (relating to Englishmen and other foreigners) and European. These courts continued to grant probates of will and the letters of administration and were given matrimonial and admiralty jurisdiction.\textsuperscript{31}

Later the court of requests that could try petty cases of value not exceeding five pagodas was also established. Further, under the Charter of 1753, the hierarchy of courts began to function which were the court of requests, the Mayor’s court and the court of the President and his Council. The court of President and his counsel could also hear criminal appeal from the Mayor’s Court and held its session quarterly to decide criminal cases. Lastly the King in council in England was

\textsuperscript{29} Supra 17 at p. 308
\textsuperscript{30} J.K. Mittal, “\textit{India Legal History}”, Allahabad Law Agency, 1980, p. 14
\textsuperscript{31} Harihar Prasad Dubey, “\textit{The Judicial System of India}”, N. M. Tripathi Pvt. Ltd., Bombay, 1968, p. 58
empowered to hear appeals from the court of Governor and council in all civil cases involving a sum of 1000 pagodas or more.\(^\text{32}\)

With the passage of time the Company continued to secure more and more powers and privileges from the British Crown. Being encouraged by this constant support of the British Government, the Company went on expanding its spheres not only in the business field but also in the political arena till the landmark revolt of 1857 which led to the transfer of the administration of the country under the direct control of the British Crown. The Proclamation of Queen Victoria of England on November 1, 1858 outlined the principles on which the Crown would govern India. The Criminal Justice System under Britishers got revamped by modifying the existing laws, passing new laws and introducing new principles which continued till the independence of the country in 1947. The Criminal Justice System, as it exist today, had mostly evolved during the British period.

The various facets of the British Criminal Justice System which laid the foundation of future and modern institutional setup in India are discussed below:

**Institutional Law and its status**

With the advent of the Muslim rulers in India, the Muslim criminal law began to replace the Hindu law, which was prevalent till then, as the law of the State. Although the Hindu law was still applicable and enforceable in Village

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\(^{32}\) N.V. Paranjape, “*Indian Legal and Constitutional History*”, Central Law Agency, 2010, p. 6
Panchayat, Islamic law was applied and enforced by the courts maintained by the State. The coming of the British saw no change in the administration of criminal justice immediately as they were more concerned with their economic and commercial interest rather than political interest. The then prevalent Muslim criminal law and justice system were allowed to continue by the British not only for the Muslims but also for the non-Muslims as the general law except in circumstances where brutality of Islamic jurisprudence was not accepted by the Britishers. The situation which made the application of the Muslim criminal law inevitable was very cogently described by Illbert in the following words:

“The object of the East India Company was to make as little alteration as possible in the existing state of things. Accordingly, the country courts were required, in the administration of criminal justice, to be guided by Mohammedan law. But it soon appeared that there were portions of the Mohammedan law, which no civilized government could administer. It was impossible to enforce the law of retaliation for murder, of stoning for sexual immorality or of mutilation for theft, or to recognize the incapacity of unbelievers to give evidence in cases affecting Mohammedans.”

Various administrators and Governor General brought several reforms in the evolution of Criminal Justice System in the country for which a brief account is presented below:

**Reforms in Criminal Law by Warren Hastings**

Warren Hastings, the Governor of Bengal from 1772 and Governor-General from 1774 to 1785, could identify the shortcomings and inequities of the existing

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33 Supra 22 at p. 37
structure of criminal law and the system of Criminal Justice prevalent in India. So he formulated a judicial plan of 1772 for better administration of the revenue collection and law for Bengal, Bihar and Orissa. As per this plan, the whole of Diwani area was divided into several districts. In each district a Provincial Court of Diwani called the Mofussil Diwani Adalat presided over by the Collector was established that dealt with all the civil cases, including real and personnel property, inheritance, caste, marriage, debts, disputes accounts, contracts, partnerships and demand on rent.\footnote{Monica David, “India legal and Constitutional History”, Vimala Publications, 1968 p. 15}

The system of Criminal Justice was also revamped. A court for the judicature of criminal cases called as Fauzdar Adalat was established in each district. A Qazi and a Mufti, with the assistance of two Maulvis appointed to expound the Mohammedan criminal law, sat to hold the trial in such courts. The appeal of these courts was placed in Sadar Nizamat Adalat presided by a Daroga who was appointed by the Nizam and assisted by Chief Qazi, a Chief Mufti and three Maulvi. This Sadar Nizamat Adalat was under the overall supervision of Governor and his Council. The Fauzdar Adalat was not empowered to award capital punishment but was entitled to transmit the evidence regarding the Capital punishment case to Sadar Nizamat Adalat for final decision. Also fines over hundred rupees were confirmed by the Sadar Nizamat Adalat.\footnote{H. V. Sreenivasa Murthy, “History of India”, Eastern Book Company, 1993, p. 145-146}

Later the judicial plan of 1774 brought Indian officer called the Diwan or Amil in place of the Collector in each district who was empowered to collect the land revenue and to act as a judge of the Mofussil Diwani Adalat.\footnote{Monica David, “India legal and Constitutional History”, Vimala Publications, 1968 p. 15} The Regulating Act of 1773 also made the provision of establishing the Supreme Court at Calcutta. The
Supreme Court had full powers and authority to exercise all civil, criminal, administrative and ecclesiastical jurisdictions and had full power and authority to hear and determine all complaints against any of His Majesty’s subjects for any crime. It was recognised as a court of record. It had jurisdiction over servants of the company also. All offences of which the Supreme Court could take cognizance were to be tried by the jury of British subjects residing at Calcutta.36

Reforms in Criminal Law by Cornwallis

When Cornwallis succeeded Warren Hasting, he introduced many changes in criminal Justice System based on the principle of equity and justice like reformed criminal law, setting up of a gradation of civil courts and bringing out the new Code of regulations. Cornwallis introduced reforms in three phases—in 1787, 1790 and 1793 respectively.

Through the Judicial Plan of 1787, the District collector was entrusted with both revenue and judicial functions who was to be an Englishman. This was in stark contrast with the system brought about by Warren Hastings where Collector was only given the powers in the realm of revenue collection. The Collector was also provided with magisterial powers in his district which empowered him to arrest, try and punish the criminals for petty offences. Mofussil Fauzdar Fadalats were authorized to try and punish both the Indians and all Europeans who were not British subjects.

36 Supra 22 at p. 57
Through the Scheme of 1790, Cornwallis brought about vast changes in the Criminal Justice System across the country. The following were the most important reforms introduced under the scheme:\(^{37}\)

a) The *Nawab* was deprived of his position as the highest criminal court. This power was assumed by the Governor-General-in-Council with the designation of *Sadar Nizamat Adalat*. In case of capital offence it was the *Sadar Nizamat Adalat* that has to pass the final sentence.

b) Four Courts of Circuit were established at each divisional headquarters replacing the *Fauzdar Adalats*. These courts were presided by covenant servants of the company assisted by Qazi’s and Mufti.

c) The Collector of each district was designated as Magistrate to preside over the lowest criminal courts in the hierarchy.

d) The Magistrates had to take an oath before the Supreme Court to qualify them to function as Justices of Peace and thereby acquired the authority to arrest Englishman accused of any offence.

e) Europeans other than the British were to be treated in the same manner as Indians in criminal matters.

f) Cruel punishments were abolished and in offences like that of murder, the punishment in the form of blood money whereby the choice was given to the next of kin of the murdered person to remit the death penalty was done away with; and the courts were required to proceed against the accused even if the heirs refused to prosecute. Evidence of non-Muslims was admitted as valid.

g) Salaries and allowances of the judges and the native officers were increased in order to check corruption.

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Subsequently, Police reforms were also carried out in the year 1791. The post of Superintendent of Police was established in Calcutta with functions of maintaining order and arresting criminals. In the year 1792, provisions were made for payment of small daily allowance to all prosecutors and witnesses who were in need of such assistance, as it would help in enabling the parties to seek justice in greater number. Further in 1793, the Zamindars were divested of their police powers and were replaced by Darogas who were directly responsible to the Company.

Within the Scheme of 1793, Cornwallis prepared and implemented necessary rules and regulations (came to be known as Cornwallis Code) which inter alia covered the following aspects:38

a) The Collectors were divested of judicial powers.

b) By Regulation IX of 1793, the magisterial functions of collectors were transferred to the Mofussil Diwani Adalats.

c) Court of Circuit established in 1790 was merged with the Court of Appeal. Each such court was to consist of three English Judges. The court was to break into two divisions, one consisting of a single senior-most Judge and other consisting of two other Judges while functioning as the Circuit Court. After completion of the circuit all the three judges were to sit together as the court of Appeal to hear appeals against the decisions of the Mofussil Diwani Adalats.

38 Supra 37 at p. 33-34
d) Collectors and all the executive officers were made answerable to the *Diwani Adalats* for their official acts. This established judicial supremacy over executive action.

e) Regulation VII of 1793 was made in order to fulfil the requirement of a well organized legal profession. This *inter alia* made the following provisions:

   (i) Pleadners who were found guilty of misconduct including misbehaviour in private life were liable to be suspended by the court;

   (ii) The *Vakils* were required to charge moderate fees as laid down in the regulations and they were liable for dismissal if they accepted anything beyond the scheduled fee from their clients. To give effect to this provision, fees of lawyers were required to be collected by the court;

   (iii) *Vakils* who were found to be wilfully adopting dilatory tactics for their own advantage were liable for damages and also dismissal;

   (iv) *Vakils* were liable for prosecution by their clients, if they resorted to fraudulent method or other types of malpractices; and

   (v) Provision was made to appoint a few government lawyers to argue cases required to be conducted at public expenses.

**Reforms in Criminal Law by other Governor General’s till William Bentinck**

Many Englishmen added to the reform movement of the Criminal Justice System until the arrival of Lord William Bentinck at the scene. Lord Wellesely, for example, appointed Head Native Commissioners, also known as *Sadar Ameens* for expediting the disposal of pending judicial work in *zilas*. In each district, a civil
servant of the Company was appointed as Magistrate separate from another civil servant who was appointed as Collector. Similarly Lord Hastings gave the powers to the Magistrate for referring to Native Law Officers and Sadar Ameens the cases of petty offences for trial; the jurisdiction of Magistrates and Joint Magistrates was enlarged; efforts were also made to deal with the unnecessary delay in the administration of justice and to dispose of arrears of work. Lord Hastings also took special interest in reorganizing the police force to make it efficient to deal with criminals and to maintain law and order in the country.

Later Lord Amherst authorized the Magistrate and the Superintendent of Police to pardon such person who was required to get important information for the main accused or the main crime. It assisted the police in investigating the crimes and punishing the persons who were really responsible for committing the crimes.

Reforms of Criminal Law by William Bentinck

Lord William Bentinck as Governor-General contributed to a great extent in improving the machinery of the administration of justice and introduced several reforms of great importance. He reorganized the entire system of civil and criminal courts and lead to the abolishment of the Courts of Circuit and appointed Commissioners of Revenue and Circuit in their place to control the working of the magistracy, police, Collectors and other revenue officers. Later due to overburdening of the Commissioners with all the three functions viz., revenue, police and judicial, Sessions Judges with power to try criminal cases were appointed so that additional burden could be relieved. This was the origin of the district and sessions court as
existing till date. In 1829 Bentinck took a very progressive step in reforming the social conditions of women in India by abolishing the prevailing inhuman practice of sati. The abhorrent practice was made an offence punishable like culpable homicide and its abetment was also made a punishable offence.

Lord William Bentinck also brought economy in Indian administration by appointing Indians in Civil and Criminal court of the country in place of highly paid Englishmen. In 1832 the Commissioners of Circuit and Sessions Judges were authorized to take the assistance of respectable natives in criminal trials either by referring some matters to them as Panchayat for investigation or by calling them to the Court as jury.

Reforms in Criminal law by various Law Commissions

The Law Commissions were a body consisting of eminent English jurists and later some Indian legal jurist, which gave India a structure of codes, rules and regulations dealing with important parts of substantive and procedural law relevant to both civil and criminal realm. These Commissions became powerful instruments during British rule for injecting enshrined principles of English common law into the expanding structure of Indian jurisprudence and helped it in acquiring the structure with which we today are aware of. These Commissions thus truly helped in laying the foundation of the present Criminal Justice system in India.

The first Law Commission was appointed in 1835 under the chairmanship of Lord Macaulay as per the provisions of the Charter Act of 1833. The Commission
was mandated to inquire into the jurisdiction, powers and rules of existing legal structure in India and review all existing judicial procedure along with suggesting improvement in the nature and operation of all laws in force within the British territories. The most significant contribution of the First Law Commission was the preparation of draft Indian Penal Code for purposes of codification of penal laws in India.

The Second Law Commission was appointed in 1853 and *inter alia* recommended the need of a body of substantive law which may be applicable to whole of India; such a uniform law should be prepared taking into account the English law as the foundation where exception could be carved out in favour of certain classes; and law should apply to one and all except those who are saved by the provisions.

Subsequently, the Third Law Commission and the Fourth Law Commission which were appointed in 1861 and 1879 respectively recommended the codification of laws in different spheres in India which later led to passing of a large number of foundational acts including the Indian Evidence Act, 1872, Indian Contract Act 1872. The practice of appointing Law Commissions to study the prevailing law and procedures is still followed in India.

**Codification of Laws**

The Indian Penal Code, a law based on common law principles was enacted into law in 1860 by Indian legislature. This Code wholly superseded the
Mohammedan criminal law and now forms the foundation of substantive law in the country. A general Code of Criminal Procedure followed in 1861 which laid the procedural aspect of the Indian legal system as far as the criminal justice was concerned. Similarly the British codified the principles regarding the evidences during the course of the trial and enacted the Indian Evidence Act in 1872. Thus the Britishers ushered in the principle of equity, justice and homogeneity in the Criminal Justice System of the country which acted as the foundation over which the future generations of Indians built upon a sound system of criminal administration suiting to their changing needs.

**Organization of the Police**

A strong Police administration forms the foundation of foolproof Criminal Justice System. It was Lord Cornwallis who initiated the reform of the police system across the country. For it, he appointed a Superintendent of Police for Calcutta in 1791 and thereafter, extended his reform efforts down to the *mofussil*. Cornwallis undertook bold initiative to pull police powers out of the hands of the *Zamindars* of Bengal, Bihar and Orissa, and ordered, in 1793, the District Judge to open a police station for every four hundred square miles under a regular police station officer who later came to be known as *Daroga*. For the charge of the police system in the town, the earlier prevalent practise was followed and it was placed under the charge of a *Kotwal*.

The period between 1801 and 1860 became a period when many experiments for reforming the police system were conducted by different English administrators.
Each province made attempts to organize the Police system in a way that was most suitable to its need thus the system in totality lacked any sense of homogeneity. For instance, in 1816, Sir Thomas Munro took the Superintendence of Police in Madras out of the hands of the Judge and placed it in the hands of the Collector, who already had the indigenous village police under his control.

Similarly in 1843 Sir Charles Napier undertook the task of introducing a police system in the newly conquered territory of Sind on the lines of the Royal Irish Constabulary. According to the plan, while the police force was to continue under the authority of the Collector, it was to be supervised by an officer solely appointed for its control and direction at the district level. Therefore Charles Napier created a separate police structure directed by its own cadre of officers. Direction throughout the area of Sind was under the control of the Inspector General of Police and while in each district it was with the Superintendent of Police. The latter was accountable to the former as well as the District Collector at district level. Thus a dual control existed which has been inherited in the today’s administration.\(^{39}\)

In 1848, Sir George Clarke, the Governor of Bombay, appointed full-time European Superintendents of Police in many districts. In 1853, the police in Bombay was remodelled on Napier’s lines. This phase of experimentation ended with the revolt of 1857. An urgency of police reorganisation was felt and a sense of homogeneity was demanded from various quarters to deal with situations similar to 1857 that could arise in future. Accordingly, a commission was appointed in 1860 to study exhaustively the police needs of the government. Its main recommendations

\(^{39}\) Jois. M. Rama., “Legal and Constitutional History of India”, Vol. 1, p. 112-113
were embodied in the Indian Police Act of 1861. The aims of the Act as enshrined in the Act itself were to re-organize the police and to make it a more efficient instrument for the prevention and detection of crime. This Act is still in force in India without any significant change.

**Jail Reforms**

Due to inheritance of the Criminal Justice System of the Muslim period, the Britishers administered the jails, as part of the whole system, without any substantial change. Further since the Company paid least attention towards the fund allocation to jails, the condition of the jails became deplorable with every passing year. Many of the detention practices of the times were indicator of poor prison management in the country. For instance, in some jails, there was no separation between male and female prisoners. Also there was no manual of rules or regulations for the guidance and direction needed for effective management by the jail staff. Till 1860, the management of District Jails was the responsibility of the District Magistrate and his preoccupation in administration left little attention to jail and jail staff management.

The first initiation of Jail reforms was undertaken in 1860 within the presidency of Bombay by framing a simple Code of Rules which was followed by ‘Gaols Rules’ framed in 1866. Similarly in Bengal, the Jail Code was compiled in 1864 which defined the duties, responsibilities and powers of the various officers in the jail administration. Later various committees were appointed to bring about a reform in the Jail administration across the country. A few recommendations of
these committees were carried into effect from time to time but the reforms never reached to a satisfactory level.

Finally, the Prisoners Act of 1894 was enacted which provided that convicted prisoners may be confined either in association or individually in cells. It fixed nine hours’ labour a day for convicts sentenced to labour. The enactment was followed by the Reformatory Schools Act of 1897 which aimed at holistic prison reform across the country. Later the British appointed Indian Jails Committee in 1919 which recommended bringing about changes in the rules governing the jail system of the country.

**Various Court Institutions inside and outside the Country**

After the transfer of power directly under the Crown in 1858 and subsequent codification of laws, the next logical step was to amalgamate the two set of courts existing till then, i.e. the Supreme Courts (the King’s Courts) and Sadar Adalats (the Company’s Courts). This object was achieved by passing the Indian High Court Act of 1861 by the British Parliament.

The act of 1861 empowered the crown to establish High court of Judicature in Presidency towns abolishing the Supreme Court at Calcutta and Sadar Diwani Adalat along with Sadar Nizamat Adalats. The jurisdictions and powers of the High court thus established were to be fixed by the letter patent as mandated by the act itself.\(^{40}\) Accordingly, the High Courts at Bombay, Madras and Calcutta were

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\(^{40}\) H. V. Sreenivasa Murthy, “*History of India*”, Eastern Book Company, New Delhi 2003, p.65
established in the year 1862. Each High Court was empowered to have supervision over all subordinate courts subject to its appellate jurisdiction as well as acting as a Court of Reference and Revision from the decision given by the other subordinate criminal courts. Later the crown also established High court in other part of the country.

With this the number of courts at the appellate level decreased; the quality of work in the lower courts improved; efficiency of the Judges improved; procedures were simplified and the appellate procedure also became uniform. The Letters Patent also empowered the respective High Courts to admit, enrol and remove Advocates, *Vakils* and Attorneys-at-Law. It was also empowered to take disciplinary action against them. The qualification necessary for Advocates, Pleaders and Attorneys were to be laid down by the High Court. The decision of High Court was final in appeals for criminal cases and no further appeal lay to any other court. However, in civil cases appeals from the decision of the High Court were laid before the Privy Council.

The Privy Council which was a committee under the King of England to hear appeals from colonies was the highest Court of Appeal from India. Appeals against the decisions of the High Courts and Federal Courts were laid before the Privy Council. Initially, there was no appeal to the Privy Council without its special leave and it reserved the right to decline the admission of the appeal. But from 1943 onwards appeals could be made under a certificate granted by any of the Presidency High Courts. There was no provision to appeal to the Privy Council in criminal proceedings as a matter of right. Further the Privy Council laid fundamental
principles of law in a lucid manner for the future guidance of Indian courts. The law declared by the Privy Council in the pre-Constitution period is still binding on the High Court except in those cases where the Supreme Court of India took a different view. The principles of integrity, impartiality, independence and the rule of law, which were laid down by the Privy Council in various judgements are still followed by the Supreme Court of India in its pronouncements. It shows the amount of respect which the Indian judiciary still has for the Privy Council judgements.

However the Government of India Act, 1935 changed the entire structure of the Indian Government from “unitary” to “federal” type. It also laid the foundation for a federal framework in India at the union level. This act necessitated the establishment of a Federal Court to decide upon the disputes of the constituting units. Although a Federal Court was established, the system of appeals from High Courts to the Privy Council remained undisturbed and unaffected. It had original jurisdiction in matters involving the interpretation of the Act of 1935 or the federal laws or the determination of the rights and duties arising thereof between the parties. The disputes must involve any question of law or fact or existence of any legal right. It could also give special leave to appeal. Thus the Federal Court was placed between the High Courts and the Privy Council but only for the limited set of cases involving substantial question of constitutional law and some aspects of criminal jurisprudence.

The Federal Court of India more and less adhered to the same set of legal principles as were followed by the Privy Council in the exercise of its appellate

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jurisdiction in criminal matters. The Government of India Act of 1935 clearly provided for the supremacy of Federal Court along with the Privy Council when it stated that the law declared by these courts will be binding on all the courts in British India. Thus the English doctrine of precedent was introduced in India. The Federal Court functioned successfully and effectively during the transitional period in Indian history, when there was no written Constitution. It built up great traditions of independence, impartiality and integrity which all were inherited by its successor, the Supreme Court of India.

Thus, the British introduced reforms in the then Criminal Justice System wherever they felt it necessary to suit the needs of modern and progressive legal system based on English common law. They also adopted new legal principles by modifying the existing laws wherever required and made new laws where they felt it was missing. The institutions of police, magistracy, judiciary and jails that developed during the British period still have their imprints on the modern institutions, their structure and functioning. However, the British rulers too, just like the previous cases did not make the concept of equality an inherent feature of the restructured Criminal Justice System in pre independent India. There existed a wide engulf between Indians and other non-European on the one hand and the Britishers on the other where the latter not only enjoyed special privileges as far as legal provisions were concerned but enjoyed an upper hand over the former in the implementation of the law. It was only in the freedom struggle that the right to equality was fully recognised and subsequently incorporated in the Constitution of the country in order to make the citizens realise their long cherished dream.
Post Independence Era

The present Criminal Justice System of India is a melting pot of the continuous effort on the part of rulers who ruled this country during ancient and medieval. This provided the present system with different shades of their times controlling the affairs of the country and thereby contributed to the development of the Criminal Justice System. However, even in the past, most of them treated the Criminal Justice System more as an instrument to subjugate the masses, trample their rights and establish a non egalitarian societal order. The British rulers too were not devoid of this infirmity. Although they made well-thought-out efforts for establishing a sound, coherent, uniform and well defined Criminal Justice System in India, they too looked at the Criminal Justice System more as an instrument to uphold the colonial rule in India and less for the administration of fair criminal justice to the people.

With Independence an era of new Criminal Justice System ushered in the country which aimed at creating social harmony and maintaining public order by enforcing the laws and curbing their violation. The Criminal Justice System through its network of the police, bar, judiciary and correctional services created a framework for enforcement of the rights of the people and establishment of cohesion and harmony in the society. The various components of present Criminal Justice System in India are briefly discussed below.

Institutional law- The Criminal Law under Indian setting

Most of the criminal law in India has its legacy traced to colonial era and were adopted under article 372 of the Indian Constitution. The Indian Penal Code,
1860; the Police Act, 1861; the Code of Criminal Procedure of 1861; the Indian Evidence Act, 1872; and Indian High Courts Act, 1861 are the major landmarks in the history of criminal law of India. In addition to these major criminal laws there are numerous Central and State criminal Acts and amendments to these landmark legislations in force in India.

All laws in India, which may be civil, criminal or otherwise, are made by Parliament or the State Legislatures in accordance with the provisions of the Constitution of India. The Constitution itself deals with many matters which have a direct bearing on the criminal justice administration in the country such as protection in respect of conviction for offences (Article 20), protection of life and personal liberty (Article 21), protection against arrest and detention (Article 22), appeal to Supreme Court in criminal matters (Article 134), and powers of President and Governor to pardon, suspend, remit sentences (articles 72 and 161). Moreover the Constitution under article 17 and 23 declares certain offences punishable in accordance to the provision of the law in force within the country.

The Indian Penal Code which forms the core of Indian Criminal Justice System is the major substantive law and deals with various offences and the punishments thereof. It is divided into 23 Chapters containing 511 sections out of which 386 sections have punitive provisions for various offences while the rest contain definitions, exceptions and explanations. Offences are divided into various categories such as offences against the State, offences against the public tranquillity, offences against public justice, offences against the human body, offences against property, etc. Classification of offences into cognizable or non-cognizable; bailable
or non-bailable and triable by session’s court or a Magistrate of first class or second class is done in accordance with the provisions in the First Schedule of the Cr.PC 1973. Section 320, Cr.PC. enumerates the compoundable offences under the I.P.C.\textsuperscript{42} Although the Indian Penal Code has largely remained a British legacy, it has been recently amended in 2013 to make it more gender conscious and gender sensitive whereby more clarity and depth in crime against women along with more stringent punishments have been brought about.

The Code of Criminal Procedure, 1973, is the main law of criminal procedure in India which replaced its British legacy in form of Criminal Procedure Code 1898. It is divided into 37 Chapters consisting of 484 sections. Two Schedules—the first, classifying the offences under the I.P.C. and the second, containing forms—have also been appended to it. The Code of Criminal Procedure also deals with the constitution of courts, powers of courts, various processes to compel appearance of persons and production of things, powers of police, maintenance of order, arrest, bail, trials, appeals, etc. The criminal procedure is a subject of concurrent jurisdiction enabling Parliament as well as the State Legislatures to amend it. Parliament has brought many amendments in it during the last 40 years to meet the requirements of changing circumstances. It has been amended most recently in 2013 whereby more gender conscious provisions respecting women’s privacy and dignity have been brought about. Many states too have amended the Code of Criminal Procedure, 1973 according to their requirements.\textsuperscript{43}

The Indian Evidence Act, another landmark legislation, lays norms for admissibility of evidence, and introduces a more correct and uniform rule of practice in matter of evidence in any criminal prosecution. The Act prescribes rules for admissibility of the evidence on the issues as to which the courts have to record findings. The main principles, which underlie the law of evidence, are—(1) Evidence must be confined to the matter in issue; (2) Hearsay evidence must not be admitted; and (3) best evidence must be given in all cases. The Indian Evidence Act, 1872 contains 167 sections grouped into 11 Chapters. The Supreme Court had held in 1961 that for the interpretation of the sections of the Act the court could take aid of the relevant English common law principles. But subsequently, in 1971, the apex Court repudiated its earlier stand and held that the law of evidence is a complete Code in itself and as such does not permit importing of any other principle of English Law relating to evidence in criminal cases.  

Institutional Structures of Modern Indian Criminal Justice System

The Police

Police has always formed the core of the Criminal Justice System of any country. In theory, the safety and liberty of the people depend upon the laws of the Parliament and the State legislature as well as the Constitution, but in practice the decisions of the Parliament, Legislature and the Courts is to be enforced by a dedicated, disciplined, smart, modern, responsible and tech savvy police force. Thus

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the functioning of police may be termed as the action part of the ‘Rule of law’. As a law enforcement agency, the police in all societies, developing or developed, has to preserve and protect the very basic framework of human survival and social existence.

The Police Act, 1861, imposes a uniform police system and establishes the police on a provincial basis. The Act regulates the organization, recruitment and discipline of the police force in India. The Police Act of 1861, which prescribes the framework of police, is the nucleus structure around which the various central and state laws have grown to organize policing at various levels. In addition to the Police Acts, the police derive powers from the Cr.PC, I.P.C. and numerous other central and state criminal laws. Chapters IV to VII, and X to XII of the Cr. P.C. contain detailed provisions relating to the powers of the police including the power to arrest, search, investigate, disperse unlawful assembly and take preventive action.

**The Bar**

The Bar, the prosecution and the defence included, plays a vital role in the administration of criminal justice by assisting the judiciary in reaching to the truth in criminal cases. In addition to its normal functions of assisting the judiciary in dispensing justice, the Bar plays another crucial role by offering its members for appointment as Judges. Emphasizing the role of the lawyers, the Supreme Court in the case of *Bar Council of Maharashtra v. M.V. Dabholkar*[^45] observed:

[^45]: A.I.R. 1976 SC 242
“The central function of the legal profession is to promote the administration of justice. If the practice of law is thus a public utility of great implications and a monopoly is statutorily granted by the nation, it obligates the lawyer to observe scrupulously those norms which make him worthy of the confidence of the community in him as a vehicle of justice—social justice.”

The Advocates Act, 1961 which governs the legal profession in India has the following important feature: (i) Establishment of All India Bar Council and a common roll of advocates where an advocate on the common roll has the right to practise in any part of the country and in any court including the Supreme Court; (ii) Integration of the Bar into a single class of legal practitioners as advocates; (iii) Prescription of a uniform qualification for the admission of persons to the profession; (iv) Division of advocates into senior advocates and other advocates based on merit; (v) Creation of autonomous Bar Councils, one for the whole of India and one for each State where the Council for India being constituted by representatives elected by State councils; and (vi) Punishment of advocates for misconduct.46

**The Judiciary**

The judiciary has the vital task of interpreting the constitutional provisions and reviewing the decisions of the government thereby establishing the ‘Rule of Law’ across the country. Justice has to be administered through the courts and such administration would relate to social, economic and political aspects of governance as stipulated in the Constitution of India. The judiciary, therefore, becomes the most

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important wing of the constitutional system for fulfilling the mandate of the Constitution. This is the reason that our Constitution framers have accorded utmost importance to judiciary and incorporated detailed provisions relating to higher as well as subordinate judiciary in the Constitution itself. The Constitution has provided for a single integrated system of courts to administer justice both at central and state level with Supreme Court at the top and subordinate service at the lower level in the ladder of judicial framework.

The Supreme Court acts as the primary federal court for determination of disputes between the constituent units of the federation. It is also the highest interpreter of the Constitution and thus plays the role of its guardian and saviour. It is also the highest appellate court in the country both on civil as well criminal side. Any law, rule, bylaw or order, promulgated or passed by the legislature or administrative authorities which contravenes the provisions of the Constitution can be declared null and void by the Supreme Court. The Constitution contains express provisions in this regard which forms the rock bottom of Indian polity. Also under Article 32 of the Constitution, Supreme Court acts as the protector of the Fundamental Rights of the people. Similarly the High court at the state level and the subordinate courts at district level perform the critical task of dispensing justice across the country.

The Correctional Services

The main objective of the Criminal Justice System in any civilized society is not merely to punish the offender but to bring behavioural and attitudinal changes in
the accused for the greater interest of the society. This makes it imperative for the correctional agencies to decriminalize and reform the offenders to make them fit for society and not to dehumanize them by giving harsh and inhuman treatment. Any failure on the part of correctional agencies to bring about behavioural change in the offender would certainly make the whole process a futile exercise and the main purpose of the criminal justice administration will be defeated. The role of the correctional services, therefore, becomes very crucial. The correctional system of India mainly consists of prisons, probation and parole.

The Prisons, Reformatories and other institutions of like nature are under the control of state government while the legal base for prisons is provided under section 4 of the Prisons Act which requires the State Governments to provide accommodation for prisoners in prisons within their territories which as per section 3, means any jail or place used permanently or temporarily for the detention of prisoners. Further, under section 417 of the Code of Criminal Procedure, 1973, the State Government may direct as in at what place a person is liable to be imprisoned or committed to custody.  

The Parliament for bringing uniformity in the administration of prisons across the country passed Prisons Act of 1894 and the Prisoners Act of 1900 which still govern the management of prisons in the country. The Prison manuals of the State Governments are based on these central Acts. Prison establishments in different States/Union Territories comprise several tiers of prisons or jails. The most common and standard jail institutions in India are Central Jail, District Jails and Sub-Jails.

The other types of jail establishments are Women Jails, Children or Borstal Institutions, Open Jails and Special Jails. At the State level, prison administration functions under the Home Department. The Prison Superintendents are assisted by Jailors, Sub-Jailors, Wardens, and other jail staff.

*Probation* means suspension of the sentence by the court in select cases, especially for young offenders, where the offenders are not sent to prison but are released on probation after agreeing to abide by certain conditions. Probation has been described by the Economic and Social Council of the United Nations as one of the most important aspects of the development of rational and social policy for criminal justice administration.48

After realising the need and importance for probation, the Indian Parliament passed the comprehensive law on probation in the form of the Probation of Offenders Act, 1958. Section 3 of the Act provides that when any person is found guilty of having committed an offence among theft, dishonest misappropriation of property, cheating or any offence punishable with imprisonment for not more than two years, or with both, under the Indian Penal Code or any other law, and if no previous conviction is proved against him, the court may release him after due admonition. Section 4 of the Act empowers the court to release any person found guilty of having committed an offence not punishable with death or imprisonment for life on probation of good conduct. The person being released on probation has to enter into a bond to appear and receive sentence when called upon during such period, not exceeding three years, and in the meantime to keep the peace and be on

good behaviour. The Supreme Court, in *Rattan Lal v. State of Punjab*\(^49\), has observed that the Probation of Offenders Act, 1958 is a milestone in the progress of the modern liberal trend of reform in the field of criminal jurisprudence. It is the result of the recognition of the doctrine that the object of criminal law is more to reform the individual offender than to punish him.

Parole is an administrative mechanism under which a convict is released after serving a part of the sentence awarded to him where the release is not the result of any court decision. It may be due to some contingency or emergency with the accused that demands immediate release of the offender. However if an offender released on parole is found to have improved and has abstained from further criminal conduct, he gets remission of the rest of the sentence and for at least a part of the sentence.\(^50\) Parole involves the study of the personality of the offender and his circumstance which made him to act in a way he actually did. In India, every State Government has its own rules on parole. However, in order to bring out uniformity, a set of Model Parole Rules have been framed by the Central Advisory Board on Correctional Services.

In the development of the scheme of parole in India, the Supreme Court’s decision in the case of *Md. Giasuddin v. State of Andhra Pradesh*\(^51\) is a bulwark. In this case the Apex Court inter alia directed the Government to release the appellant on parole. The Court observed:

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\(^{49}\) 1964 SCR (7) 676  
\(^{50}\) Supra 48 at p 231-39  
\(^{51}\) 1978 SCR (1) 153
“We have given thought to another humanizing strategy, viz., a guarded parole release every three months for at least a week, punctuating the total prison term. We direct the State Government to extend this parole facility to the appellant, Jails Rules permitting, and the appellant submitting to conditions of discipline and initiation into an uplifting exercise during the parole interval. ...The State will not hesitate, we expect, to respect the personality in each convict in the spirit of the Preamble to the Constitution and will not permit the colonial hangover of putting people behind the bars and then forget about them.”

Thus, in post-independence period efforts have been made to bring about qualitative improvement in the working of correctional services.

**Challenges and Problems faced by the Criminal Justice System in India**

Indian Criminal Justice System today is in shambles and could eventually collapse one day if we do not take corrective steps beforehand. The unsatisfactory state of Criminal Justice in India has nothing to do with the adversarial system. In fact, the Criminal Justice System in India is plagued with many problems and is in need of serious reform. Fair and effective administration of justice is the cornerstone of a free society and this essentially builds up public confidence in the institutions of government. Revamping the Criminal Justice System is a holistic exercise and requires wide ranging measures with multi stakeholder consultation.

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One of the problems which serves as a great obstacle for the development of just Criminal Justice System in India is the problem of discrimination. Discrimination has many facets some of which are gender, religion, caste and ethnicity, socio-economic and political condition. All these lay down the foundation for endemic and systematic torture. Torture involves as well as encourages the process of dehumanization and is made easier, if the victim is from an oppressed class. It is not very uncommon to see and hear about the oppressed classes being stopped from reaching the courts where their grievances could be addressed.

Another malafide of our existing Criminal Justice System is that our Criminal Justice System treats the victim very badly. He/She runs from pillar to post for years to prove his/her case and often ends in despair. He/She has also no role to play in the investigation. Faulty and slipshod investigations are another challenge for Criminal Justice System. The investigations conducted are often time consuming, frustrating and very often counterproductive. The investigators often try to construct an incident which deliberately aims to misguide the counsel and the judge. This is a very common and normal practice in the Indian Judicial System, which often leads to wrong judgements, thus frustrating the victims. The investigative machinery regarding crimes is terribly under developed, both in terms of attitude as well as facilities.

Time consuming legal process is also acting like a termite that is eating up the Criminal Justice System, slowly and slowly. Over six million cases are pending in India’s High Courts and more than 60,000 in the Apex court. About 30 million cases are still pending in subordinate courts all across the India. More than a quarter
million under trials are languishing in jails across the country and out these some 3600 have been in jail for more than 5 years even as their guilt yet to be ascertained. Many non violent offenders are sent to jail while the most violent are set free. The National Crime Report Bureau Prison’s Statistics 2015 claim that jails in various parts of the country are plagued with the problem of overcrowding with a total prison population of 4,19,623 against the total authorized capacity of 3,66,781. Many people with a mental illness, or drug or alcohol addiction or those who are violent offenders are still in our prison system, when they actually belong to mental hospital or rehabilitation centres. 

Lack of resources—financial and human, has also been a very serious problem of Indian Criminal Justice System. Our Criminal Justice System suffers from serious under funding and even under staffing. There is an urgent need for training of all judicial personnel and court administrators. Corruption exists in the roots of our Criminal Justice System and is hollowing out the value system in the society. This contributes to more discrimination and to miscarriage of justice paving the way for more frustration for the victim.

Torture as an instrument for making the ends meet is also one of most serious threats of a just Criminal Justice System. It is endemic to India and several authorities including the judiciary have acknowledged it in the past too. Poor training imparted to police officials for investigation also lead to this disease. Torture is used systematically in our Criminal Justice System as an investigative method. In fact a vicious circle has been created of deficient interrogation, falsified investigation results and ultimately distrust of Criminal Justice System. Indians have

made a perception in their minds that torture has to be accepted under extreme circumstances for hardened criminals and terrorists. Due to the overload within the Criminal Justice System, public tolerance towards violence has increased. The word—investigation in Indian Criminal Justice System merely means—beatings and torture in the police custody. It has nothing to do with humanity. Although National Human Rights Commission and Supreme Court as well as several High Courts of India have given many recommendations to prevent torture, but still it has not lead to any productive answer against torture.

The number of judges in India per million populations is about 12-13 judges while for U.S.A. it is 107, U.K. is 51, for Canada 75 and Australia it is 41.54 This *inadequacy in Judge to population ratio* in India is further making justice an oblivion entity. The foundation of the Criminal Justice System is the investigation by the police. The success/failure of the case depends entirely on the work of the Investigating Officer. But unfortunately the *lack of trust on the Police* itself shakes the foundation of the Criminal Justice System in India. Section 161 of Criminal Procedure Code (Cr.PC.) says that it is only the accused that can make use of his statement *U/s 161 Criminal Procedure Code (Cr.PC.).* So far as the prosecution is concerned the statement can be used only to contradict the maker. Any confession *U/s 25 Indian Evidence Act* is not admissible. *Lack of proper training* to Investigating Officers (I.Os) in interrogation techniques and sophisticated investigation skills further dents the Criminal Justice System across the country. This is a major cause for the failure of Criminal Justice System. Also there is *lack of*

54 Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs; Report (Vol. I)
co-ordination between the investigation and the prosecution. This makes things worse.

**Agenda for Reform**

**Approaches in Criminal Justice System Reform**

The universal tendency of the government to control and eliminate all types of anti social activities through criminal sanctions without examining the use of alternative means of social control and without considering the repercussions of such retributions on the larger interest of the society could be counterproductive. Use of police to enforce welfare oriented laws also gives rise to opportunities for corruption and harassment of innocent persons. It is in this light that Supreme Court has called government to undertake judicial impact studies before initiating any legislation and has desired to make provision for implementation costs on a meaningful and scientific basis. Such a step could embark on discussion within the precinct of the legislatures to look for alternatives to punishment for effective social control with beneficial returns.

Thus reform in Criminal Justice System is the need of the hour but the various approaches should not only be synchronous with the times but also should meet the rising aspirations of the people. A brief account of such approaches that may be relevant to the present times is being produced which may be either implemented one after the other or some at the same time. However the aim should
be to strengthen the Criminal Justice System with win-win situation for all the stakeholders.

To start with, there is no denial from the fact that the present era is the era of humanising legal paradigm where the legality of the conduct has to be seen through a behavioural lens. The growth of Human right organisations, both at national and international level, rise of social media and rapid transmission of broader and progressive liberal outlook has also strengthened such paradigm. Thus comes with it the increasing demand to *decriminalize* some of the existing offences. Various movements and organised activism of some sections of the society to decriminalize offences such as suicide, beggary, homosexuality, some of the offences against marriage, etc have not only emerged at the national but also at international level. However keeping in mind the dual purpose of adopting the principle of decriminalization and use of non-criminal strategies to control the conduct of persons, it is for the lawmakers to decide which of the existing offences should be so changed and when. The advice of expert bodies like the Law Commission of India in this regard must also be weighed in. Furthermore a mandatory provision of ‘sun-set’ clause in each legislation under which the life of a law is limited to a fixed period unless extended by the legislature should be incorporated.

Another related idea is that of *diversion* or treatment of a set of criminal conduct through instruments outside the formal Criminal Justice System. For example, violations of customs, excise and income tax laws, children in conflict with the law etc. are primarily dealt with institutions and procedures set up under such special laws. This not only prevents the judicial system from clogging but also
ensures effective and quick justice delivery. Thus it should be the policy of the
government to identify more such laws and divert their enforcement from the
ordinary criminal proceeding to specialized forums endowed with quasi-judicial
authority.

Furthermore it is being observed that criminal cases of less serious nature tend
to clog the system for want of evidence which hardly serves any purpose for an
effective criminal justice. Thus it is only proper to set a time limit or limitation
period for the conduct of trial proceedings in such cases, after which the case should
be deemed to have been abated, if not settled or withdrawn. The parties aggrieved
may pursue for civil remedies for the injuries suffered and the case should be
allowed to be pursued only as private complaints in the Criminal Justice System
which must be amicably settled with active intervention of the court. Such settlement
for minor offences which are unable to proceed and which do not have any serious
impact on society or public interest may be allowed. However it must be left to the
sagacity of the legislature about the type of cases and the circumstances in which
such a result should follow with the state having the right to revive it if and when it
deems necessary in future for public interest.

A shift from retribution based Criminal Justice System with focus on
prosecuting the accused to Victim Oriented Criminal Justice System is the need of
the hour. The recent Criminal Amendment 2013 passed by the Parliament and the
appeal by United Nations to all member states for recognising the special rights of
victim to participate in criminal proceedings and to claim compensation irrespective
of the outcome of the criminal case is the clear manifestation of the same. The
Committee on Criminal Justice Reforms (2003) also favours empowering the victims of serious offences with the right to implead themselves as a party, right to be represented by counsel, right to produce independent evidence and cross-examine witnesses with the leave of the court, right to be heard in the matter of bail, right to continue with the case if the prosecution sought withdrawal, and the right to advance arguments and to prefer an appeal against an adverse order. The state should also ensure rehabilitation of hapless victims of crime and violence in a more cogent and friendly environment. Need for a nation-wide victim compensation scheme and compensation fund has also been realised quite a long time ago but has not been implemented till date in its entirety. More focus particularly should also be accorded to compensate the victims of rape, communal violence, terrorism and other heinous crimes.

In light of the above, there have been numerous attempts by the government like enactment of special legislations namely, The SC/ST (Prevention of Atrocities) Act, The Civil Rights Protection Act, The Domestic Violence Act, Immoral Traffic (Prevention) Act etc. under which victims have been given special rights and privileges which signifies the legislatures’ concern for victims of crime. However a national level policy is still in oblivion. A National Policy thus should aim at a phased programme of victim compensation under which victims of violent crimes, property offences may be compensated. The principles for determining the quantum of compensation to the victim can be drawn from the law of torts with suitable modifications applicable in Indian setting. Arrangements to get the compensation appropriated from the offender themselves and remitted to the Victim Compensation Fund can also be explored. The fine amounts after the trial may also be directed to
this Compensation Fund. There is also scope for imposing a security cess on large industrial houses and high security establishments in order to mobilize resources for augmenting this Victim Compensation Fund.

Reorganisation and realignment of criminal procedure through reclassification of crime can also be tried for more efficient crime management and reinvigorating the Criminal Justice System. One approach to such realignment could be based on the demands of due process guarantee and efficient use of available resources. As proposed by the Committee on Criminal Justice Reforms (2003), there could possibly be a four-fold classification of all offences now covered by the Indian Penal Code, special and local laws as Social Welfare Offences Code (SWOC), Correctional Offences Code (COC), Penal Code (PC) and Economic Offences Code (EOC). In the above four-fold scheme of re-organizing criminal law, the rules of procedure, the nature of trial and evidence, the types of disposal and punishment etc should form an inherent part. This would provide a fair degree of flexibility which the system can afford under the Indian constitutional scheme.

The object of Social Welfare Offences Code (SWOC) is more of reparation and restitution rather than punishment and retribution. Arrest and detention would be unnecessary in such cases (except where violence is involved) and compensation and community service rather than incarceration will be prescribed to better meet the ends of justice. A special agency other than the regular police should be deployed in the enforcement of these laws. The method of settlement can be more conciliatory, cost efficient and human rights centric with active and dynamic participation of the civil society rather than adversarial. Minor marriage offences, prohibition offences,
minor environment offences, campus indiscipline etc. are possible instances that can be brought under this Code. The dispute regarding these matters may be managed locally, expeditiously with engagement of decentralized judicial institutions like Gram Nyayalayas, Lok Adalats and local bodies.

On the other hand the *Correctional Offences Code (COC)* encompasses more serious offences than the social welfare offences which may require some police intervention. This may include offences punishable up to three years of imprisonment and/or fine. They are usually not accompanied by violence against the person and are, in most cases, liable to fine, probation and related correctional action. Arrest and detention may also be ordinarily allowed with a warrant in such cases but all of them may be open to settlement through Lok Adalats, Plea Bargaining and other alternative methods thereby avoiding trials.

While dealing with offences under SWOC and COC, there may be slight deviance in the evidentiary procedures through rebuttable presumptions, shifting of burden and less rigorous standards of proof. They can be treated as summons cases with provision for summary trials as provided under Cr PC. The trials to these offences are more of the nature of civil justice and can be dealt with largely compensatory remedies and, in extreme cases with imprisonment.

As far as the *Penal Code (PC)* is concerned, this would comprise of grave offences punishable with imprisonment beyond three years and with death. These are the offences which are the real threat to the peaceful societal existence and must deploy maximum energy, time and resources of the state. Naturally, they deserve
prompt intervention by the state under expert supervision keeping in mind the need for efficiency, effectiveness and fairness. Greater accountability on the part of state in dealing with these offences have to be ensured with minimum scope for human rights violations as these cases create public alarm and insecurity. On the other hand the Economic Offences Code (EOC) may include offences that may pose threat to the economic security and health of the country. They might require multi-disciplinary, inter-state and transnational investigation and demand necessary evidentiary modifications to bring the guilty to book.

With the advent of modern day crimes like terrorism, trafficking etc that have tendency to transcend borders not even of states but also of countries and becoming more technology oriented, it is the need of the hour that they may be tackled jointly by all concerned. Gone are the days when the threats of national security were in domain of Union government only. The challenges offered by these crimes are too complex to be handled by the existing capacity of the law enforcement apparatus of most Indian States. The need of the hour demands sub-national and supra-national cooperation and deployment of a multi-professional agency with a global network and outreach. Also the response time and possibility of apprehending the accused for these crimes hold the key for extent of damage. Thus some sort of joint mechanism – centrally activated and monitored while controlled by the constituent implementing the required action– seems to be an absolute necessity. The constitutional division of powers cannot come in the way when the nation’s security is in peril.

Thus modern crime control mechanism should carve out specific jurisdictions of crimes affecting national security to be designated as federal offences with respect
to which a Central agency should be independently able to undertake investigation as well as measures of prevention and control with the support and co-operation of the State machinery concerned. The defence of the country in the context of the shifting trends in warfare strategies in the modern time, in which proxy war, using terrorism and organized crime as tools of warfare, are increasingly substituting the conventional wars, can no more be viewed from the point of view of external aggression only and the role of federal agency has to be catapulted to a higher level in order to manage it. It is on this reasoning that the National Criminal Justice Policy should conceive legislative provisions on federal crime and the need for a federal agency to enforce it.

Lastly a serious rethinking on the philosophy, justification and impact of sentencing in criminal justice administration has to be done given their inadequate deterrence in modern times. Continuous rise in crimes like rapes, murders, theft etc even after the presence of enough penal provision make us to explore and introduce innovative way of punishments and devising their norms and procedures. Community services, vigorous implementation of probation, parole etc would unquestionably go a long way in strengthening the Criminal Justice System. More importantly, the idea should be to increase the number of choices in punishment and make the other functionaries of the system (like probation service and correctional administration) to have a voice in the sentencing process and administration.

Also Technology Orientation to Criminal Justice System would set new rules for the enforcement of ‘Rule of Law’ in the coming future. No future policy for reinvigorating Criminal Justice System can have any meaning without adoption of
science and technology into its strategies and structures designed for its enforcement. Therefore a reform of Criminal Justice System through a clear cut policy interventions based on scientific analysis and institutions developed on scientific lines is the need of the hour for preventing enormous delays and costs and occasional miscarriage of justice.

**Articles of Reform**

It is most evident from the forgoing chapter that with the change in the character and enormity of the crimes along with shift in the philosophy of criminal justice administration, reforms are the demand of the times. Also efforts should be made to make empirical and practicable changes to improve the efficacy of the criminal justice administration rather than recommending radical changes and idealistic theories. A contribution in that direction is being made to suggest some of these changes that would play a phenomenal role in paradigm shift in Criminal Justice System of the country which are as follows:

- **Simplify Criminal Laws**
- **Adopt Inquisitorial System for Trial of Heinous Offences**
- **Punish Perjury**
- **Introduce Plea Bargaining**
- **Substitute Fine for Imprisonment in Petty Offences**
- **Compensate Victims commensurately**
- **Declare Discrimination an Offence**
- **Amend the Police Act of 1861**
- **Increase Strength of Police**
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j) Give Special Emphasis on Police Training
k) Improve Image of Police
l) Insulate Police from Undue Interference
m) Maintain Coordination Between Police and Prosecution
n) Organize Training for Prosecutors and Legal Advisors
o) Enforce Professional Conduct of Advocates
p) Improve Standard of Legal Education
q) Fill in the Vacancies of Judges
r) Increase Judges Strength
s) Establish Indian Judicial Service
t) Organize Training for Subordinate Judiciary
u) Discourage Adjournments in Criminal Cases
v) Prevent Over-crowding of Jails
w) Organize Specialized Training for Jail Staff
x) Bring Criminal Justice System under Assured Budgetary Support
y) Involve People in Administration of Criminal Justice