CHAPTER - II

INDIAN LEGAL SYSTEM AND

THE ADMINISTRATION OF CRIMINAL JUSTICE

1. Introduction:

The present Indian legal system is a product of the past. India has a long history of civilization. There are numerous experiments made by our forefathers to establish the peace and maintain the order in a society. From Indus valley civilization till the arrival of the British the legal system was based on principles of Hindu Dharma Shastra, in earlier period then in a later period (after the domination by Muslims) with Muslim Law. In British Period both the systems (Muslim law and Hindu law) were replaced by modern legal system with the arrival of the British in India. The criminal justice system were initiated by Lord Hastings and strengthened by Governor Generals in a later period.

In this chapter, researcher wishes to project a broad skeleton of Indian legal system and the administration of criminal justice. It is necessary to reflect on present structure of the Indian legal system.

2. Historical Background of the Indian legal system

A. Ancient History of the Hindu period

The criminal laws in ancient days were based on Dharma. Dharma regulates the life of the people. Even King could not infringe the rules of moral and Dharma. The violation of Dharma means Adharma. The conduct of Adharma was treated as sin, prohibited act, immoral or unethical behaviour. However, these rudimentary rules and retributive practices with regard to the
punishment were in force. The King used to enforce the law for the welfare of his people, if he is benevolent and merciful, before delivering justice he used to hear both the parties. In his absence, justice was delivered through his appointed judges. Village Panchayat decided the simple cases and petty matters of local importance. In ancient Hindu Period, there was no system of lawyer, as it exists today.

B. Islamic Period:

Since 712 AD Muslims came from Arab Countries to India taking over Indian Kingdoms. At the same time, Arabs also conquered the Persian, Afghan, and Turk. With the expansion of empire, Muslim ruler (by force), also spread Islam in the occupied regime. Under Islamic law Koran was the fountainhead of Mohammedan Criminal Jurisprudence. The King or Sultan was the enforcer of law and head of the State. Original and appellate authorities called Diwane-Mazlim. Military Officers who took part in investigation usually conduct prosecution. After hearing both the parties, King in consultation with Chief Qazi and legal luminaries used to declare final judgment. Technical procedures were not followed. Depositions were recorded by Qazi in question and answer forms. More weight was given to believers. Two men of non-believers were equal to one believer. The accused was given opportunity to plead his case with the help of documents and also the right of cross-examination.

In Mughal Period Mohatasib had to conduct the case in District Court and of serious offences or in Appellate Courts, for King. This Mohatasib’s functions are similar with the present day Public Prosecutor. Professional legal experts known as “Vakils” in Criminal Courts represented litigants. The system of representation in a Court of law was quite in use in Islamic period.

---

5 V. D. Kulshreshtha, Landmarks in Indian Legal and Constitutional History 7 (Eastern Book Company, Lucknow, 7th Ed., 1997)
6 V. D. Kulshreshtha, Landmarks in Indian Legal and Constitutional History 26 (Eastern Book Company, Lucknow, 7th Ed., 1997)
7 Ibid. at p.24
whereas in Hindu period, it was not a part of Court Proceeding. Trial by ordeal was prohibited to determine guilt of the person.\footnote{\cite{ibid}, p.25}

In Maratha Regime particularly at the time of Shivaji the justice was delivered in open Courts in Majlis or Dharmasabha. King was treated as the final repository of law and justice. Nyayadhish and Pandittrao were under the king. Justice was based on fair play, social custom, tradition and belief of the people. Prosecutors were working in higher Courts.\footnote{See B. A. Masodkar, National Jurisprudence pp 47-48, (Shrinam Trust, Amravati)} It is to be noted that in this period of Maratha regime, there was no written Penal Code.

\section*{C. Modern Period:}

From the Muslim and Hindu ruler, the power has been transferred to British East India Company, a trading company from Britain. This time there was no regular and systematic administration of criminal justice in India in the modern sense. British declared in 1680, English language as the only recognized language of Court. In Court, procedures were conducted in summary way according to justice, equity and good conscience. Laws were framed by the company and accordingly permitted the Company Court to impose fine, penalties, and punishment of imprisonment, even to death. The law proclaimed by the Company Government must be in accordance with English law and policy declared in different Charters.

At the beginning of English period, all trials required jury of 12 Englishmen. The judges and prosecutors\footnote{A. B. Keith, Constitutional History of India 41, (Macmillan & Co., Bombay, 1st Ed.1936)} were selected from professional lawyers. The principles of English laws in this period were greatly influenced by prevailing Indian laws and legal institutions.\footnote{R. M. Sharma, Constitutional History Of India 14, (Macmillan & Co., Bombay, 2nd Ed. 1954)} The President and Councils in India were given power of making laws subject to the director's approval. This became landmark in legal history having far reaching consequences. In 1858, the powers were transferred to Queen. 1861 onwards, a modern legal
system came into existence in which the King or Queen became the fountainehead of justice in India and not the company.

There were prosecutors in higher Courts (Wherever English laws were applicable) and in Lower Court police used to conduct the prosecution. Prosecutor had to justify and argue in favor of the Government. Thereafter British ruler started the process of codification of Indian laws and established bridge between Indian and English legal system.

Warren Hasting and Lord Cornwallis made systematic efforts to organize and reorganize the administration of criminal justice in India, which was full of inadequacy and defects. The reforms, which were carried out by both of them, were marked by certain black spots. In Nandkumar case he was declared guilty and passed sentence of death under British parliament Act 1729, which was not applicable to India. In Nandkumar case Government appointed prosecutors for State. Plea of Jurisdiction was rejected unanimously. The role of prosecutor was minimum and doubtful. As a part of conspiracy between Warren Hastings and Chief Justice Imphy the decision for conviction was already taken before the trial held. The nexus between the prosecutors and Government were exposed to the reality. The importance of the prosecution function can be realized from the Nandkumar case. One can also realize from this example that the prosecutor if manipulated, then there can be a miscarriage of justice.

Under the influence of Benthamite philosophy of utilitarianism, reforms were carried on in procedure and substantive law. Under section 53 of the Charter Act 1833, the First Law Commission was appointed in 1835 with T. B. Macaulay as a Chairman. The commission was assigned to the work of codification of penal laws. In 1847 Governor General instructed the commission to prepare a scheme of pleading and procedure with the form of indictment. Other two members of the commission prepared it: Cameron and Elliott and they submitted report on 1st of February 1848. The Second Law

---

11 M. P. Jain, Outlines of Indian Legal History 35, (Wadhawa, Nagpur, 3rd Ed., 1993)
13 M. P. Jain, Outlines of Indian Legal History 476 (Wadhawa, Nagpur, 5th Ed., 1993)
Commission under the chairmanship of Sir John Romilly M. R. undertook the work of examining the recommendations of First Law Commission. On the basis of their recommendations, the amalgamation of Sadar Adalat and Supreme Court at each presidency taken place at a single Code for the State as High Court were established. A single Code as Criminal Procedure Codes in 1861 came into existence for the first time.

**Purpose of Criminal Procedure:**

The basic object of criminal law is to protect society against criminals and law-breakers. In order to achieve this purpose, the law provides the prescribed punishments to actual offenders for their crime and also provides a threat to potential or prospective lawbreakers. The Criminal Procedure Code, which deals with the procedural aspect of criminal law, prescribes the modality of operation of substantive law.

A person committing an offence is not automatically punished; nor would the offender be, not even interested in confessing his guilt and receiving the sentence. It is for this reason that the procedural Code designed to look after the process of the administration and enforcement of the substantive criminal law.

The present Code of Criminal Procedure, 1973, which has came into force from April 1, 1974. It provides the machinery for the detection of crime, apprehension of suspected criminals, collection of evidence, determination of the guilt or innocence of the suspected person, and the imposition of suitable punishment on the guilty person. The Code also controls and regulates the working of the machinery set up for the investigation and trial of offences. On the one hand it has to give adequately wide powers to make the investigative and adjudicatory processes strong, effective and efficient, and on the other hand, it has to take precautions against errors of judgment and human failures and to provide safeguards against probable abuse of powers by the police or judicial officers. As the Law of India has observed that this often involves "a nice balancing of conflicting considerations, a delicate weighing of opposing
claims clamoring for recognition, and the extremely difficult task of deciding which of them should predominate.\(^{16}\)

**Importance of criminal procedure:**

The criminal Procedure Code which is a catalogue of procedural rules of fairness. The importance of criminal procedure lies in making the distinction between rule of law and rule by whim and caprice of administration.\(^{17}\) The law of criminal procedure is also complementary to substantive criminal law; its failure would seriously affect the substantive criminal law, which in turn would considerably affect the protection that it gives to society. Therefore it is generally said that too much expenses, delay and uncertainty in applying the law of criminal procedure would render even the best penal laws futile and oppressive. While formulating the Code of Criminal Procedure, 1973 the following considerations were therefore kept in view:\(^{15}\)

First- an accused person should get a fair trial in accordance with the accepted principles of natural justice;

Second- every effort should be made to avoid delay in investigation and trial, which is harmful not only to the individuals involved but also to society.

**Constitution of Criminal Courts in India:**

The following functionaries are working under Criminal Procedure Code and entrusted with power and discharging duties, are as under:

(1) The Police,

(2) The Prosecutors,

(3) Defence Counsels.

\(^{16}\) 37th Report, p. 1

\(^{17}\) Iqbal Ismail Sodawala v. State of Maharashtra 1974 SCC (Crl) 764, 770; (1975) 3 SCC 140; 1974 Cri LJ 1291

(4) Magistrates, and Judges of Higher Courts, and


Amongst these, the role of the Prosecutor is most pivotal and functionally most important as an accessory to the Court. The other important functional unit is the Judges and Magistrates. In order to have expediency, the areas of Courts and Magistrates are divided into suitable territorial units for the purposes of judicial administration. The Prosecutors and his staff are attached to the Courts.

The basic territorial divisions of a State are the Districts and the Sessions divisions. According to Section 7 every State shall be a Sessions division or shall consist of Sessions divisions; and every Sessions division shall, for the purposes of this Code, be a district or consist of districts. Further, after consultation with the High Court, the State Government can divide any district into sub-divisions, and can also alter the limits or the number of such session's divisions, districts, or the sub-divisions of any district.

The Code has also considered the special needs of big cities like Bombay, Calcutta and Madras and has recognized such cities as separate territorial units and designated them as metropolitan areas.

Classes of Criminal Courts, —The Supreme Court of India and a High Court for each State have been created by the Constitution, and their jurisdictions and powers — including those in respect of criminal matters — are well defined in the Constitution itself. In addition, the Criminal Procedure Code makes provision of appeal to the Supreme Court under certain circumstances, and also enables the Supreme Court to transfer the cases, in the interests of justice, cases and appeals from one High Court to another High Court or from one criminal Court subordinate to one High Court to another criminal Court subordinate to another High Court. (Section 406) Apart from the Supreme Court and High Courts, the following classes of criminal Courts have been described by Section 6 which is as follows:
There shall be, in every State the following classes of Criminal Courts, namely—

(i) Courts of Session;

(ii) Judicial Magistrate's of the First class and, in any metropolitan area, Metropolitan Magistrates;

(iii) Judicial Magistrates of the second class; and

(iv) Executive Magistrates.

Section 6 mentions the Courts of Executive Magistrates as a separate category distinct from the Courts of Judicial Magistrates. This marks the adoption of the policy of the separation of the Judiciary from the Executive. Formerly, most of the Magistrates used to perform both judicial and executive duties. They were appointed, supervised, and otherwise controlled by higher executive authorities and ultimately by the State Government. Our Constitution has directed that the State shall take steps to separate the Judiciary from the Executive in the public services of the State. Accordingly some States tried to implement the direction in their own ways. However, the implementation of the Constitutional direction was neither full nor uniform. The purpose of separation between Judiciary and Executive is to ensure the independent functioning of the Judiciary. It is implicit in the separation that no Judge or Judicial Magistrate would be in any way connected with the prosecution nor would be in direct administrative subordination to anyone connected with the prosecution. In a criminal trial, as the State is the prosecuting party, it is of special significance and importance that the judiciary is freed of all suspicion of executive influence or control, direct or indirect. The separation incidentally ensures that officers will devote their time entirely to judicial duties and this fact would lead to efficiency in the administration of justice. For proper separation of the Judiciary from the Executive, the Code has contemplated, as mentioned earlier, two categories of Magistrates —

Judicial Magistrates, and the Executive Magistrates. The former are under the control of the High Court, while the latter are under the control of the State Government. Broadly speaking, functions which are essentially judicial in nature are the concern of the Judicial Magistrates, while functions which are "police" or administrative in nature are the concern of the Executive Magistrates.

Court of Session — For every Session's division the State shall establish a Court of Session, which shall be presided over by a judge to be appointed by the High Court [Section 9(1)(2)]. The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session [Section 9(3)]. The Court of Session shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify [Section 9(6)].

Courts of Judicial Magistrates:

a) Courts of Judicial Magistrates of first class or second class: In every district (not being a metropolitan area), there shall be established as many Courts of Judicial Magistrates of the first class and of the second class, and at such places, as the State Government may, after consultation with the High Court, by notification specify [Section 11(1)]. The State Government may also, after consultation with the High Court, establish, for any local area, one or more special Courts of Judicial Magistrates of the first class or of the second class to try any particular case or particular class of cases, and where any such Special Court is established, no other Court of Magistrate in the local area shall have jurisdiction to try any such case or class of cases for the trial of which such special Court of Judicial Magistrate has been established. [Proviso to Section 11(1)] The power to determine the number of Courts of Judicial Magistrates of both class and their location is left to the State Government since it will have to take into account various administrative and financial considerations. The State Government, however, is required to exercise this power in consultation with the High Court in order that
Magistrates' Courts are established in adequate number in all districts and at suitable places.\(^2^1\)

**b) Court of Chief Judicial Magistrate:** In every district (not being a metropolitan area), the High Court shall appoint a Judicial Magistrate of the first class to be the Chief Judicial Magistrate [Section 12(1)]. He is head of the Magistracy in the district.\(^2^2\) His main function would be to guide, supervise, and control other Judicial Magistrates in the district. He would also try criminal cases punishable up to 7 years and cases of Government defalcation in which amount is more than Rs.2000/-.  

**c) Court of Additional Chief Judicial Magistrate:** The High Court may appoint any Judicial Magistrate of the first class to be an Additional Chief Judicial Magistrate, and such Magistrate shall have all or any of the powers of a Chief Judicial Magistrate as the High Court may direct [Section 12(2)].

**d) Sub-Divisional Judicial Magistrate:** The High Court may designate any Judicial Magistrate of the first class in any sub-division as the Sub-Divisional Judicial Magistrate subject to the general control of the Chief Judicial Magistrate, such Sub-Divisional Magistrate shall also have and exercise such powers of supervision and control over the work of the Judicial Magistrates (other than Additional Chief Judicial Magistrates) in the sub-division as the High Court may specify. [Section 12(3)]

**Local jurisdiction of Judicial Magistrates:**

Subject to the control of the High Court, the Chief Judicial Magistrate may, from time to time, define the local limits of the areas within which the

\(^2^1\) 41st Law Commission Report, p. 22, Para 2.24  
Judicial Magistrates may exercise all or any of the powers, which they might be invested under the Code. But if the jurisdiction and powers of a Judicial Magistrate are not so defined, they shall extend throughout the district. [Section 14]

Subordination of Judicial Magistrates:

Every Chief Judicial Magistrate shall be subordinate to the Sessions Judge; and every other Judicial Magistrate shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Judicial Magistrate [Section 15(1)]. The Sub-Divisional Judicial Magistrate also, subject to the general control of the Chief Judicial Magistrate, shall have and exercise such powers of supervision and control over the work of the Judicial Magistrates (other than Additional Chief Judicial Magistrate) in his sub-division as the High Court may specify. [Section 12(3)]

Courts of Metropolitan Magistrates:

As in a district, every metropolitan area will have almost a parallel set-up of Judicial Magistrates. In every metropolitan area the State Government may, after consultation with the High Court, establish Courts of Metropolitan Magistrates at such places and in such number as it may specify [Section 16(1)]. The presiding officers of such Courts shall be appointed by the High Court, and the jurisdiction and powers of every such Magistrate shall extend throughout the metropolitan area (Section 16(2)&(3)). Likewise, in every Metropolitan area, the High Court shall appoint a Metropolitan Magistrate as Chief Metropolitan Magistrate. It may similarly appoint an Additional Chief Metropolitan Magistrate and such Magistrate shall have all or any of the powers of a Chief Metropolitan Magistrate as the High Court may direct. [Section 17]
It may be noted that though the Code makes a specific special provision in relation to a district (other than a metropolitan area) for the establishment of special Courts of the Judicial Magistrates to try any particular case or class of cases, it does not likewise provide for the establishment of special Courts of Metropolitan Magistrates.

Subordination of Metropolitan Magistrates:

The Chief Metropolitan Magistrate and every Additional Chief Metropolitan Magistrate shall be subordinate to the Sessions Judge; and every other Metropolitan Magistrate shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Metropolitan Magistrate. [Section 19(1)] For the purposes of the Code, the High Court may define the extent of subordination, if any of the Additional Chief Metropolitan Magistrates to the Chief Metropolitan Magistrate. [Section 19(2)]

Sentences, which the Courts may pass:

(a) A High Court may pass any sentence authorized by law [Section 28(1)].

(b) A Sessions Judge or an Additional Sessions Judge may pass any sentence authorized by law; but any sentence of death passed by any such judge shall be subject to confirmation by the High Court [Section 28(2)].

(c) An Assistant Sessions Judge may pass any sentence authorized by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years [Section 28(3)].

(d) A Chief Judicial Magistrate or a Chief Metropolitan Magistrate may pass any sentence authorized by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years [Section 29(1) read with Section 29(4)].
(e) A Judicial Magistrate of the first class or a Metropolitan Magistrate may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding five thousand rupees, or of both [Section 29(2) read with Section 29(4)].

(f) A Judicial Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year or of fine not exceeding one thousand rupees or both [Section 29(3) read with Section 29(4)].

Table I

Hierarchy of Criminal Courts:

```
The Supreme Court of India
  ↓
High Courts
  ↓
Session Courts
  ↓
  ↓
Assistant Sessions  Chief Metropolitan  Chief Judicial
  ↓  ↓  ↓
    ↓
Judicial Magistrates of First Class  Special Judicial Magistrate of First Class  Judicial Magistrate of second class  Special Judicial Magistrate of second Class
```
The Police:

Besides the judiciary there are another functionaries under the Code is the police, the prosecutors, the defence counsels, and the prison authorities as well as the correctional services personnel. The ordinary criminal Courts originate from the provisions of the Criminal Procedure Code. In the case of the police force it is somewhat different. The Code presupposes the existence of the police and police officers, and it only arms them with certain powers and directs them to discharge certain duties.

Function and organization of the police:

The police forces are organized and they have to perform their function in accordance with the Police Act, 1861. Police is an instrument for the prevention and detection of crime. Every State Government has to establish its own police force, which is formally enrolled. The overall administration of the police in the entire State is vested in the Inspector-General of Police. The administration of police in every district vests in the District Superintendent of Police under the general control and direction of the District Magistrate who is usually the Collector of the district.

Powers and Functions:

The term "Police-Station" means any post or place declared generally or specially by the State Government, to be a police station, and includes any local area specified by the State Government in this behalf. The Criminal Procedure Code confers specific powers, e.g. power to make arrest, search, etc. on the members of the police force who are enrolled as police officers. Wider powers have been given to police officers, who are in charge of police stations, such station-house officers are also required to discharge onerous duties in relation to detection, investigation and prevention of offences. This

---


24 Ibid. S. 4.
provision shows the importance of the duties of the station-house officer and the concern of the Code for their prompt discharge; Police officers above the rank of a station-house officer are invested with the powers of the station-house officer but over larger local limits.

Police Officers superior in rank to an officer in charge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may he exercised by such officer within the limits of his station.

Public Prosecutors:

Public Prosecutor is another functionary, which is the most important from the point of dispensing justice created under the Code. The Public Prosecutor represents the State before the Court and seeks for proper punishment to the offender. A crime is a wrong not only against the individual victim but also against the society at large. It is because of this consideration that the State, representing the people in their collective capacity, participates in a criminal trial as party against the person accused of crime more particularly if the crime is a cognizable offence. The Public Prosecutor is the counsel for the State in such trials. His duties mainly consist in conducting prosecutions on behalf of the State. The Public Prosecutor also appears as State Counsel in criminal appeals, revisions and such other matters in the Session Courts and the High Courts. The Public Prosecutor should not however appear on behalf of accused25. The Public Prosecutor or the Assistant Public Prosecutor has authority to appear and plead before any Court in any case without vakalatnama entrusted to him. (Section 301) With the consent of the Court he can withdraw from the prosecution against any person (Section 321). He can give advice to the police or other Government Departments with regard to the prosecution of any person if his advice is so sought.

---

According to the pattern set by the Criminal Procedure Code, while Public Prosecutors (including Additional Public Prosecutors and Special Public Prosecutors) are to conduct prosecutions and other criminal proceedings in the Session Courts and the High Courts. Assistant Public Prosecutors are appointed for conducting prosecutions in the Magistrates’ Courts. According to the prevailing practice, in respect of cases initiated on police reports, the prosecution is conducted by the Assistant Public Prosecutor and in cases initiated on a private complaint, the prosecution is either conducted by the complainant himself or by his duly authorized counsel. In such cases also the State can appoint prosecutors if the cause has in public interest.

In this connection the following points may be noted:

Appointment in the High Court as a Prosecutor

(a) A person shall be eligible to be appointed in High Court as Public Prosecutor if he has been in practice as an advocate for not less than seven years [Section 24(7)]; however it has been clarified by [Section 24(9)] that the period during which a person has been in practice as a pleader, or has rendered (whether before or after the commencement of the Code) service as any prosecuting officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate;

(b) The appointing authority can make the appointment only after consultation with the High Court [Section 24(1)];

(c) The Central Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for conducting in a High Court any prosecution, appeal or other proceeding on behalf of the Central Government [Section 24(1)];

---

36 Mukul Dalal v. Union of India (1988) SCC (Cri) 566; (1988) 3 SCC 144
(d) Similarly, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for conducting in a High Court any prosecution, appeal, etc., on behalf of the State Government [Section 24(1)]; The State Government may appoint a Director of Public Prosecutions; but he shall be functioning under the Advocate-General of the State.

(e) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, an advocate who has been in practice for not less than ten years as a Special Public Prosecutor [Section 24(8)].

Public Prosecutors and Additional Public Prosecutors for the districts:

(a) A person shall be eligible to be appointed as a Public Prosecutor or Additional Public Prosecutors if he has been in practice as an advocate for not less than seven years [Section 24(7)]; the explanation regarding the period given in Para 3.6 (a) above is applicable here also.

(b) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons who are, in his opinion, fit to be appointed as the Public Prosecutor or Additional Public Prosecutors [S. 24(4)]; and no person shall be appointed as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears on such panel [Section 24(5)].

However, where in a State there exists a regular cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such cadre. But if, in the opinion of the State Government, no suitable person is available in such cadre for such appointment then the Government may appoint a Public Prosecutor or an Additional Public Prosecutor from the panel of names prepared by the District Magistrate as mentioned above [Section 24(6)].
(c) Consistent with the above rules, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district [Section 24(3)]; further it is possible that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be for another district.

(d) The Central Government or the State Government may appoint for the purposes of any case or class of cases, an advocate who has been in practice for not less than ten years as a Special Public Prosecutor [Section 24(8)].

Nothing in Sections 24(8) and 24(9) restricts the power of the State Government to appoint Special Public Prosecutors in public interest. It can also refuse to appoint a Special Public Prosecutor in a particular case for sufficient reasons\(^{27}\). It may appoint a special Public Prosecutor in a case and insist that the victim or his dependents pay him\(^{28}\).

**Assistant Public Prosecutors:**

Section 25 makes provisions prescribing eligibility qualifications for being appointed as Assistant Public Prosecutor as well as provisions for the appointment of such prosecutors for conducting prosecutions in the Magistrates' Courts.

The section read as follows:

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

\(^{27}\) Abdul Khadir Musaliar v. State of Kerala 1993 Cri LJ 1249 (Ker HC)
\(^{28}\) Phool Singh v. State of Rajasthan 1993 Cri LJ 3273 (Raj HC)
(1-A) The Central Government may appoint one or more Assistant Public Prosecutors for the purpose of conducting any case or class of cases in the Courts of Magistrates.

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

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

Provided that a police officer shall not be appointed—

(a) If he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted, or

(b) If he is below the rank of Inspector.

Although it is not expressly provided in the section that the Assistant Public Prosecutors should be legally qualified, it is hoped that the present trend of appointing, as far as possible, qualified legal practitioners as Assistant Public Prosecutors will be maintained in all States and that the provisions made in sub-section (3) above will be resorted to less and less in future years\(^{26}\). However, the provisions contained in Sections 24 and 25 do not give an adequate idea as to the actual organization of the prosecuting agency in the district or as to the hierarchy or the administrative control envisaged therein. Generally speaking the prosecution work in the Magistrates’ Courts is under the directions of the Police Department, while the prosecution of trial in Session Courts is under the general control of the District Magistrate\(^{30}\). It would be worthwhile to refer to the views expressed by the Law Commission in its 14\(^{th}\) Report on the Reform of Judicial Administration. The Report observed: “It has been suggested, and we see great usefulness in the suggestion, that the prosecuting agency should be separated from and made independent of its administrative counterpart, that

\(^{26}\) 41\(^{th}\) Law Commission Report p.312

\(^{30}\) Ibid. Vol. II, at p. 766

29
is the Police Department, and that it should not only be responsible for the conduct of the prosecution in the Court but it should also have the liberty of scrutinizing the evidence particularly in serious and important cases, before the case is actually filed in Court. Such a measure would ensure that properly qualified authority carefully examines the evidence in support of a case before a case is instituted so as to justify the expenditure of public time and money on it. It would also ensure that the investigation is conducted on proper lines that all the evidence needed for the establishment of the guilt of the accused has been obtained. The actual conduct of the prosecution by such an independent agency will result in a fairer and more impartial approach by the prosecutor of the case\(^{31}\).

The provisions of the new Code of 1973 have not gone far enough to adopt fully the suggestions made by the Law Commission. It was expected that administrative steps would be taken in due course of time to make the suggested reforms a reality. It has been observed by the Bombay High Court that the appointment of Special Public Prosecutor and Additional Public Prosecutor would not be violative of Art. 14 of the Indian Constitution\(^{32}\).

The State Government still follows the spoils system in appointing District Counsels/Public Prosecutors. This practice has been disapproved by the Supreme Court in a decision delivered in Shrilatha Vidyarthi's case, in which the Court ruled that having regard to the provisions in Sections 21, 24, 25, 321 etc., of the Code, the functions of public prosecutors invest them with the attributes of holders of public office and hence their appointment cannot be terminated arbitrarily\(^{33}\). The Supreme Court has disapproved the retention of Assistant Public Prosecutors as part of the Police establishment in Maharashtra. The State has been directed to have a separate cadre of Assistant Public Prosecutors independent of the Police Department\(^{34}\). Accordingly, the changes have been made in the State of Maharashtra by

---

\(^{31}\) Ibid. at p. 770.

\(^{32}\) Vijay Vaita v. State of Maharashtra (1986), Cr.L.J. 2093(Bomb).


\(^{34}\) S.B. Shahane v. State of Maharashtra 1995 Suppl. (3) SCC 37
creating an independent cadre as Director of Prosecution under whom the prosecutors will work.

The Defence Counsel:

According to Section 303, any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code, may as a matter of right, should be defended by a pleader of his choice. Unlike the other functionaries under the Code, such as the police and the prosecutors, the advocates and pleaders engaged in the task of defending the accused persons are not in the regular employment of the State and in most of the cases they receive remuneration for their services from the accused persons. The adversary system of criminal trial presupposes that the State using its investigative resources and employing a competent prosecutor would prosecute the accused, which, in turn, will employ equally competent defense counsel to challenge the evidence of the prosecution. Therefore, both the Constitution of India and the Code confer on the accused person a right to consult and to be defended by a legal practitioner of his choice. The right to counsel would however be of no use if the accused due to his poverty or indigent conditions has no means to engage a counsel for his defense. The indigent accused obviously stands the risk of denial of a fair trial when he does not have equal access to the legal services available to the opposite side. To an appreciable extent the Code has attempted to find a solution to this problem. Section 304 provides that where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State; and the section further empowers the State Government to extend the application of the above provision in relation to any class of trials before other Courts in the State. At present there are several schemes under which an indigent accused could get legal aid. The legal aid schemes of the State Governments, Bar Associations, Legal Aid and Advice Board, Supreme Court Senior

35 Report of the Expert Committee on Legal Aid, p. 70
Advocates' Free Legal Aid Society, etc., are in point. The Legal Services Authorities Act, 1967 also provides for legal aid to the needy.\footnote{Article 22(1) of the Constitution and S. 303 of the Code.}

Prison authorities and Correctional Services Personnel:

As in the case of the police, the Code presupposes the existence of Prisons and Prison authorities. The Code empowers Magistrates and Judges under certain circumstances to order detention of under trial prisoners in jail during the pendency of the proceedings. The Code also empowers the Courts to impose sentences of imprisonment on convicted persons and to send them to the prison authorities for the proper execution of such sentences. If at the conclusion of the trial, the accused is found guilty, the Court shall pass a sentence on the offender unless it decides to deal with the offender under the Probation laws.\footnote{See S. 235(2), 248(2), 255(2)} Section 361 further directs the Court that as far as possible the Court should deal with the offender under Section 360 (regarding release of the offender on probation of good conduct or after admonition) or the provisions of the Probation of Offenders Act, 1958. Or in case of youthful offenders, under the benevolent laws applicable to such offenders for their treatment, training or rehabilitation.

Therefore, it would become necessary to provide for the machinery and personnel for the execution of sentences and also for the rehabilitation and treatment of the offenders. The Criminal Procedure Code however does not make specific provisions for the creation, working and control of such machinery. These matters have been left to other special Acts, such as the Prisons Act, 1894, the Prisoners Act, 1900, the Borstal School Acts, the Probation of Offenders Act 1958, etc.,

In conclusion chapter No.2 how in India since Hindu Period, the legal system of administration of criminal justice system were functioning and there after in Islamic period, Mughal period and Maratha period.

\footnote{Article 22(1) of the Constitution and S. 303 of the Code.}
\footnote{See S. 235(2), 248(2), 255(2)}
Thereafter Britishers came to India. They also started to rule the nation and their system is in existence. However their system of justice prevail up till now is known as a modern period. Since Warren Hasting and Cornwallis the branch of delivering justice was developed through law. Benthamite reform were carried out for fair justice. First Criminal Procedure Code came into existence in 1861. It mentioned procedural aspects in trial and investigation were dealt in the Code, prescribed the procedure modality of operation of substantive law. Thereafter Criminal Procedure Code was changed in 1872, 1882 and 1698, and lastly in 1973. In the Code of 1973 provide machinery for detection of crime and procedure is also laid down in it, speedy remedy for trial and police investigation. However the functionaries are working under the Provisions Criminal Procedure Code and classes of Criminal Courts and which cases are tried in particular Courts has been mentioned and their jurisdiction. The prosecutor has an important link to conduct the trial on behalf of the State. Therefore work of the Prosecutor among functionaries are of immense value, has been shown in it.