CHAPTER-III

INVESTIGATION AND CRIMINAL JUSTICE SYSTEM

We have discussed the components of criminal justice system i.e. what it includes, how it works then we have to study the basic institutions like police, courts and correctional authorities. What is to be done in one area has a direct effect upon the another and they interact, at many points in the criminal justice process. Courts receive their clientage from the police, the correction sector receive offender from the court, and the cycle may be repeated if he released offender repeats the offence and is again arrested by the police.

3.1 The Police

Police is the first agency for the administration of criminal justice and is considered to be the first line of defence against crime.\(^1\) They are the entry point of the criminal justice system for the first offender and re-entry for the failures of other sub-system,\(^2\) namely recidivists. They occupy a strategic position in respect of social defence, probably only next to the family and other personal groups in importance.

They are important because they keep our complex society together. They keep the citizens working and prospering within the framework of civilized law and acceptable social conduct.\(^3\)

No society can exist of function without the support of an organized police force. Nevertheless, almost in every part of the word, police has failed to check completely the onwards march of crime and delinquency. It is also the most hated institution of any and every type of government. The only difference is that in democracy people are vociferous and loud in their

\(^1\) Pal, N.C. : Crime, Cause and Cure (1963) 47.
complaints against the police and in autocracy or dictatorship popular voice in suppressed.

In India, police is an object of not only dislike but hatred, in England, in the words of Halcomb, “No body loves a policeman”, in U.S.S.” Cops are pigs for many”. Moreover in many countries, police is corrupt, high-headed, inefficient and under the influence of politicians.

The police is primarily concerned with the maintenance of law and order and security of persons and property of individuals. It therefore plays a vital role in criminal justice system. Of late, police duties have increased enormously and are becoming more and more diversified.

The modern police must protect the public against physical danger, rescue lives, regulate traffic and preserve law and order in the streets and public places. It also has a definite duty with regard to the prevention of juvenile delinquency and atrocities against women and children. The police should also be taught about the difference between the torture and interrogation.

Any discussion on ‘Police’ will be incomplete without a word about the origin and evolution of this institution. Originally the word ‘Police’ was used in a wider sense to connote the management of internal economy and the enforcement of governmental regulations in a particular country. With the passage of time, the term police began to be used in a much narrow sense to connote an agency of the state to maintain law and order and enforce the regulations of the code of Criminal Procedure. The word, “Police” is derived from the Greek Word “Politeia” on its Latin equivalent ‘Politia’. In the present context, the term police connote a body of civil servants whose primary duties are preservation of order, prevention and definition of crime and enforcement

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4 Verma, P : Pathology in Crime and Delinquency (1972) 480.
of laws. As pointed out by Ernest Fround, police functions generally relate to promoting public welfare by restraining and regulating the use of property and liberty of persons.

3.2 Police Force in U.K.

The beginning of civil protection against crime and disorder in England came with the promulgation of the Edict West Minister in 1285 by King Edward I. A regular system of constabulary was however established in England by the Act of the British Parliament passed in 1787 for the maintenance of peace and tranquility in Ireland. As the civilization progressed the complexities of life multiplied due to the impact of industrialization and urbanization. Therefore, Sir Robert Peel, the Home Secretary of England, pleaded for a change in the existing system of constabulary. This led to the passing of metropolitan Police Act, 1829, which provided for a separate police force for the metropolitan city of London. Similar police force was introduced throughout the U.K. in subsequent years. The constable were popularly known as ‘Peelers’ after the name of Sir, Robert Peel who pioneered this scheme. Later on they came to be known as ‘Bobbies’. In U.K. it can be said that the police enjoys public support and respect and there are very few occasions of lethal use of force by the policemen. They are well trained and equipped with latest Gadgets and weapons to table the problem of crime and criminals efficiently.

3.3 Police Force in America

Before U.S. came under the influence of the Britain, the Civilians performed the function of night watchman by rotation with a view to protecting the society from crimes and criminals. A regular police force was set up in America by the Dougan Charter of 1886. The modern police in U.S.A. is vested with the authority of using legitimate and justified force
against the citizens. It is generally believed that American police cannot allow a challenge to go unmet as they consider ‘Backing down’ as cowardly. The major police problem in U.S.A. is distrust and suspicion of police which separate cops from the community.

3.4 Police Force in India

Police force has been in existence in India in one form or another from the very ancient times. There are references to the existence of police system in epics, namely, Mahabharata and Ramayana. Manu, the great ancient law given also emphasized the need of police force for maintenance of law and order. The Gupta dynasty in ancient India was particularly known far its excellent law and order situation through a well organized police for main ting law and order in the society. The British government, in Indian retained the system of policing prevailing in each province with modifications. The Indian police act 1861, and aftermath of the war of independence of 1857, was enacted to recognized the police and to make it more effective instrument for the prevention and detection of crime as laid down in the preamble of the Act.

The hierarchy of police officials working in police force includes the Inspector-General of Police, Superintendent of Police, Head Constable and Recruit Constable etc. For the sale of administrative convenience, there many be one or more additional Superintendent of Police and Deputy Superintendent of Police.

3.5 Legal Function of Police

The major function which the police is lawfully required to perform are as follows:

(i) **Patrolling and Surveillance** :- Patrolling is the visible function for the purpose of general watch and ward. In insurgency prone area, armed police, which go about in a roving commission, generally in
an unplanned manner. Surveillance is yet another important function of the police which is based on anti-crime work. Presently this work depends entirely on dossiers and watch charts kept in at the police station. Each police station generally has a list of criminal and anti-social elements. Which require special watch now every police station is connected through internet and all the criminal record of the criminals are available through internet.

(ii) **Preventive Function** :- The foremost task assigned to the police is to make arrest of law-breakers and suspected criminal and take them into custody in order to prevent crime. The preventive power of the police is contained in the Code criminal procedure.\(^5\) The legal limits of arrest and detention of suspects are clearly defined in the Cr. P.C.\(^6\) Wherever the police feels that the investigation cannot be completed within period of 24 hours fixed by Sec. 57 of Cr. P.C. and there are seasonable grounds for believing that accusation is well founded the police officer making the investigation may seek an order of remand from the nearest judicial magistrate (Section 167 Cr. P.C). The police may arrest without a warrant.\(^7\)

(iii) **Conditional Release of Accused on Bond etc** :- The police also has the power to release the accused on a bond with or without sureties in case there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate.\(^8\)

In a bailable offence the police officer can set the person at liberty after taking bail, even in non-bailable offence a police officer has power to grant

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7 Sec. 41 Cr. P.C. 1973.
bail in all such cases except those punishable with death in imprisonment for life.\(^9\) The police can’t go deep into the question as whether he has actually done or not *Bhajan Lal v. State*.

(iv) **Investigation by Police** :- The purpose of investigation is to collect evidence and apprehend the culprit. Sec. 154 to 176 of Cr. P.C. 1973 deals with investigation by the police.

This invariable happens at the stage of Submission of charge-sheet under Sec 173 of Cr. P.C. In order to eradicate this evil, the law commission in its 14 the Report (1958) has suggested that investigating staff should be separated from the law and order staff to enable the investigation officer to devote undivided attention to investigation work.

(v) **Interrogation of Offenders and Suspects** :- Another important function that develops on police is to frisk and interrogate the criminals or suspects.

(vi) **Search and Seizure** :- The police also conducts search and seizure whether with or without warrant.\(^{10}\)

(vii) **Maintain Inquest Register** :- The police is to record information in the Inquest Register in case a person dies under unnatural or suspicious circumstances.\(^{11}\)

(viii) **To assist the Prosecutions** :- Beside doing its other functions, they must also actively assists the prosecutor to conduct prosecution of cases in law courts.

(ix) **Identification** :- In addition to the usual function of protecting life and liberty of person and apprehending criminals, the police also

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10 Sec 94 to 104 of Cr. P.C. 1973.
has to deal with special activities such as identification and laboratory technical research.

(x) **Control of Juvenile Delinquency** :- Since childcare is a developmental function of the welfare state, the police has an important role to play in controlling juvenile delinquency

(xi) **General welfare functions** : - As a part of welfare measures, the police is entrusted with yet one important function of helping public in tracing out the missing person.

Despite a radical change in the role and functions of police during the last five decades of Indian independence. It is rather unfortunate that it still reflects in its edifice the British colonial philosophy and this historical background has always deprived the police from getting a high status as its counterparts possess in the Western countries, where police is friend without a sympathetic police officer, no other agency can ensure criminals justice to law abiding citizens against the law breakers.

3.6 The Criminal Courts

3.6.1 Role of Judiciary :- The role of judiciary in general is aptly brought out in these words :

“……. in a country which declares its independence on the proposition that all men are created equal and in which all judicial personal are sworn to support and defined a constitution guaranteeing equal protection of Laws, it is no more than reasonable to accept a court system of both law and justice : A system which will establish procedure to protect the innocent, discover and initiate appreciate action against the guilty and afford ‘due process’ to all litigants……”

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The criminal court is the core of the criminal justice system, it has the duty to supervise the work of the police, prosecution and defence counsel, to preserve the due process of law through out the arrest-to-release procedure in the criminal justice and to translate into living law the sanctions which may be imposed upon offenders after fair trial.

In fact the criminal court has a dual role. It is both participant in the criminal justice process and the supervisor of its practices. As a participant, the court and its officers determine guilt or innocence and impose sanction. In many jurisdictions the court also serves a correctional agency by administrating the probation system.\textsuperscript{13} The organization of the judiciary equally affects sentencing. The law itself lays down maximum penalties, both in relation to offences and in relation to the powers of the particular courts. There are the limits within which the court must work and they may at times fetter the court and prevent it dealing with an offender as it wishes.\textsuperscript{14}

Justice specially in criminal matters in the essential components of the fundamental right of life and liberty enshrined in Art 21 of the Constitution of India. The procedure of Lok Adalat inherently embodies the concept of speedy trial and it can be seen as one of the most efficacious legal instrument of upholding speedy justice. Widening the criminal jurisdiction of Lok Adalats would therefore be a significant step in the direction of fulfillment of the constitutional mandate contained in Art. 21.

3.7 Functions of Criminal Law Courts

A analysis of the working of the modern criminal law courts would reveal that these court perform four fold function, namely:

\textsuperscript{13} Felkness, G.T. : Constitutional Law for Criminal Justice (1978) 390.
\textsuperscript{14} Mc Clean, J.D. and wood, J.C. : Criminal Justice System and the Treatment of Offenders (1967)9.
i) Redressal of the complainant who is wronged by the criminal act of the offender.

ii) Punishment of offender.

iii) Fair and impartial trial of the accused with a view to ensure justice in his case. The major task of criminal courts is to make sure that innocent persons are not unnecessarily punished while those guilty of some offence do not go unpunished. In order to achieve this purpose, the courts are inclined to point out the deficiencies and lacunas in prosecution and defence version and both of them gradually try to remove those shortcomings.

iv) Maintenance of law and order in society by eliminating offender through punishment.

As we have discussed the plays a very important role in the overall mechanism of Criminal Justice System. Much depends on the way and how investigation is conducted. The overall result of the trial i.e. acquittal or conviction of the accused depend upon the way in which investigation is conducted. According to Sec 2(h) of the criminal procedure code 1973 “investigation” includes all the proceedings under the code i.e. Cr. P.C. for the collection of evidence conducted by a police officer or by any person other than a magistrate) who is authorized by a magistrate. Investigation does not mean to collect evidence against the accused to secure his conviction, rather it means to collect evidence in a neutral manner, regarding the crime, to place it before the court and the court will decide after applying its judicial mind whether the evidence as collected will prove a person guilty or not.

If investigation is not conducted in a proper way it may lead to the conviction of an innocent person or acquittal of a guilty person. From the above we can gather that investigation is a vital step in criminal justice system, as it is because of investigation of crime that the whole process start and the
conclusion if the criminal trial one way or the other also depends upon the investigation. Chapter XII of the Cr. P.C. which is titled as “information to Police and their power of investigation” deals with investigation it consists of sec. 154 to 176 of the criminal procedure code.

The Supreme Court has viewed the investigation of an offence as generally consisting of :

i) Proceeding to the spot.

ii) Ascertainment of the facts and circumstance of the case.

iii) Discovery and arrest of the suspected offender.

iv) Collection of evidence relating to the commission of the offence which may consist of :

   a) The Examination of various person (including the accused) and reduction of their statement into writing, if the officer thinks fit.

   b) The search of places or seizure of think considered necessary for the investigation or to be produce at the trial and

v) Formation of the opinion as to whether on the materials collected there is a case to place the accused before a magistrate for trial, and if so, taking necessary steps for the same by filing of charge sheet under sec 173.

As we have seen above according to Supreme Court investigation includes discovery and arrest of the suspected offender and article 21 of the Constitution provides that nobody will be deprived of his life and personal liberty except according to the procedure established by law. The procedure is provided by sec. 154-176 criminal procedure code and other provisions of Cr. P.C. like section 41, 42, 44, 45, 46, 47, 48, 49, 50, 57 etc. chapter of Cr. P.C.
3.8 Interrogation by Police and Confessions

The statements made to the police are not admitted for the purposes of admissible pieces of evidence as can be traced from reading Section 162\(^{15}\) of Cr. P.C. with Section 25 of the Indian Evidence Act. Statements to police not to be signed: Use of statements in evidence.

A plain reading of sections 61 and 16 of the Cr. P.C. reveals that the police investigation of the offence in the case of a person arrested without warrant should be completed in the first instance within 24 hours under section 61 or if not then within 15 days under section 167. Any police officer making an investigation may examine orally any person supposed to be acquainted with the facts and circumstances of the case, the finding can thereafter be adduced in writing but these statements aren’t to be signed by the maker of such statements under Section 162 (2). Section 161 (2) provides what civilities should be followed by police officer when making oral examination. A person during oral examination shall be bound to answer all questions relating to the

\(^{15}\) Section 162 : Statements to police not to be signed : Use of statements in evidence. (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination. (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), of to affect the provisions of section 27 of that Act.

Explanation – An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.
case put to him by the concerned police officer, other than questions the answers to which would have a tendency to expose him/her to a criminal charge or to a penalty or forfeiture. Any statement made to a police officer cannot be used for any purpose of any inquiry or trial in respect of any offence under investigation. This statement may be used to contradict such witness. [Section 162 of the Cr. P.C.]

The Evidence Act provides some safeguards as to the time when a person is interrogated by police. While interrogating a suspect the questioning must not be coercive or too intimidating. The police should not extract admission or confession by third degree method. [Section 25 of the Evidence Act]. Statement made to police officer by the accused is not admissible in evidence except that part of the statement which leads to discovery of incriminating material. The caution as to the admissibility of confession made to a police officer is intended to protect the accused person against third degree method by the police. The evidencing law is very clear in that a confession made to a police officer is not admissible, but it can be used in evidence of the thing recovered as a result of the confession made to a police officer by the accused. Thus if a weapon used in a number of cases is recovered by the police as a result of confession made by an accused person, the recovery is a relevant piece of evidence. Thus it would nor be wrong to say that the provisions of the Evidence Act clearly malign the police and do not keep trust on them. If we read together the provisions of the Constitution and the Evidence Act, the message is very clear. There is no mandate under the scheme of the Constitution and Evidence Act that a person can be threatened, tortured or any way manipulated for the purpose of extracting any

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16 Supra Footnote 1.
17 Ibid.
19 As being violative of the provisions of the Part III rights under Article 20(3), Article 21 and Article 14 of the Constitution of India.
kind of statement which has incriminating impact on the arrested or accused person.

But the sad and the bad part of the story is that in spite of the provisions of the Constitution and Evidence Act, Police is applying third degree method, which renders the authentication of a true and genuine confession by the accused, the witnesses under skepticism and the entire criminal proceedings under judicial spectacles. The practicality of Indian Prisons and Police custodial torture has become so endemic that every year many people died of or severely injured of police torture. Because of various reasons third degree method is in practice. In the first place hardened criminals have some training to survive though treatment so, police cannot extract information from them without the aid of third degree method. This means that a large percentage of confessional statements that are made are made involuntary out of the extreme pressure that is imposed behind the bars or while in police custody. Besides this confessions of the witnesses also keep changing by the influence and the indirect pressure that the criminals or accused in the high profile cases can exercise by virtue of their high social status.

Secondly, police arrests some persons and threatens to torture or torture them because of eliciting money and many innocent people on basis of forced Confessions are arrested by police and punished by the courts. This type of allegation has been frequently leveled against police. Thirdly, commoners have some typical ethos as to how criminals should be treated by the police.

A large section of police heavily consider that police cannot be effective if they do not take resort to though treatment against hardened criminals.

Fourthly, criminal justice system of the India sub-continent is based on the Anglo-Saxon accusatorial system under which the focus of the judiciary is
not on truth, but on evidence and this makes the ‘Confessionary Statements’ to be admitted as evidence as extremely important in Criminal Adjudication.

3.9 Role of the Supreme Court of India

In the context of wide custodial violence for purposes of making the accused commit his guilt in India has developed constitutional tort. In *Nilabati Behra v. State of Orissa*, the court ordered that the government of Orissa to give Rs. 1,50,000 as compensation to deceased’s mother. In this case one Suman Behra (22) died when he was under the custody of police in the District of Sundergarh in Orissa. After the death Nilabati Behra, mother of Suman Behra, sent a letter addressing the Supreme Court of India.

*That, if police applied any mode of pressure which is subtle or crude, mental or physical, direct or indirect, that is not a matter to be considered, but if it is sufficiently substantial in obtaining information from the accused, it becomes a case of custodial torture. Supreme Court clearly declared that custodial torture is violative of right against self-incrimination and an arrested person cannot be bound to answer self-incriminatory questions.*

*In Niranjan Singh v. Prabhakar Rajaram*, the Supreme Court emphatically observed that, “the police instead of being protector of law, have become engineer of terror and panic putting people into fear.” The Supreme Court again expressed its concern in *Kishore Singh v. State of Rajasthan*, and observed that, “Nothing is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts deeper wound on our constitutional culture than a state official running berserk regardless of human rights.”

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21 AIR 1980 SC 785.
22 AIR 1981 SC 625.
Further the court held that The Public Prosecutor is appointed by the State or Central Government and the prosecution machinery is to be completely separated from the investigation agency (the police). In 1995, the Supreme Court ordered in that the prosecuting agency be autonomous, having a regular cadre of prosecuting officers. Also on earlier occasions the Court has categorically laid down that the Public Prosecutor is not a part of the investigating agency, but is an independent statutory authority and that the duty of a public Prosecutor is to represent not the police, but the State.

Investigation of criminal cases and interrogation of accused and witnesses by police are inevitable and important part of criminal justice system. Without this mechanism police cannot detect criminal cases and cannot bring wrongdoers before a court of law. They must have the authority to investigate and interrogate, but at the same time constitutional requirements should be fulfilled. Legal, constitutional and state dispensation should be arranged in a way not to let any innocent person to be harassed or tortured by law enforcing staffs, for the purposes of tracking confession out of them.

### 3.10 The Objectionable Practices in Investigations are

i) Delay in recording the first information report.

ii) Interpolations and alteration in the F.I.R. and other documents.

iii) Avoiding registration of cognizable offences.

iv) Conservations of cognizable offences into non-cognizable offences.

v) Padding of evidence.

vi) Irregularities in the preparation of search and seizure lists.

vii) Deliberate arrest of innocent and illegal detention of suspects.

viii) Fabrication of evidence.

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ix) Use of third degree methods for obtaining confessional and other statements.

x) Use of touts and the agents.

xi) Harassment of witnesses.

xii) Bribe and other corrupt practices.

xiii) Institution of false cases.

Many of the above practices can be attributed to the fact that the efficiency of the police officers is judged by the number of cases booked and convicted.

3.11 Bare Provisions Relating to Investigation under the Code of Criminal Procedure 1973

According to Sec. 154 of Cr. P.C. every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station shall be reduced into writing and read over to him i.e. the informant. Technically the information relating to the commission of a cognizable offence, which is given to police officer is called first information report i.e. the FIR. Any person can give information to the police relating to the commission of a cognizable offence. The principal object of the FIR from the point of view of the informant is to set the criminal law in motion.\(^ {24}\) It must not be vague but definite enough to enable the police to start investigation. Where an anonymous telephonic message did not disclose the name of the accused neither it discloses the commission of a cognizable offence, it was held that such a telephonic message could not to held as FIR.\(^ {25}\) The evidentiary validity of FIR is far greater them any other statement recorded by police during the course of investigation. Sec. 157 further requires the investigating officer to send the FIR at once to the Magistrate taking cognizance on police report.


\(^{25}\) Randhir Singh v. State 1980 Cri LJ 1397 (Delhi High Court).
So the FIR means the information, by whomsoever given, to the officer in charge of a police station in relation to the commission of cognizable offence and which is first in point of time and on the strength of which the investigation into the offence is commenced. It is not substantive evidence i.e. it is not the evidence of the facts Evidentiary Value of F.I.R.

Though FIR is not substantive evidence, it can be used to corroborate the informant under S 157 of the Indian Evidence Act 1872 or to contradict him under S. 145 of Act, if the informant is called as a witness at the time of trial. If it is made by the victim it can be used under 32(1) of Indian Evidence Act 1872 as dying declaration. If is made by accused then it can be used under Sec. 8 as conduct influenced by facts in issue or under S. 21 as an admission by the accused.

A police officer cannot investigate a non-cognizable offence without the orders of magistrate having power to try such case or commit the case for trial.\(^{26}\)

According to Sec. 156 Cr. P.C. any officer is change of a police station may, without the order of a magistrate investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provision of chapter XIII of Cr. P.C. According to this section a police officer can also investigate a cognizable offence committed outside the jurisdiction of a police station to which he is in charge. If police officer does not investigate the case and aggrieved person reaches the magistrate with complaint then the magistrate before taking cognizance can order the police to investigate the case under Sec. 156 (3).

\(^{26}\) Sec. 155(2).
According to Sec. 157, if from the information received i.e. FIR or otherwise i.e. upon his own knowledge, an officer in charge of police station has reason to suspect the commission of an offence i.e. cognizable offence which he is empowered under sec. 156 to investigate he shall forthwith send a report to the magistrate empowered to take cognizance on the police report and shall proceed to the spot to ascertain the facts and circumstances of the case and if necessary to arrest the offender.

The report to the magistrate is sent to inform him of the commission of the cognizable offence and is generally sent through some senior officer.

According to Sec. 160 a police officer can call any person supposed to be acquainted with the facts and circumstance of a case for the purpose of investigation at the police station except a person under 16 years of age and a women. In Nandai Satpathy v. P.L. Dani 1978 SCC the Supreme Court held that the person supposed to be acquainted with facts and circumstances the case includes accused also. Sec. 161 provides that a person who is called for investigation is bound to truly answer all questions except the questions the answer to which have a tendency to expose him to a criminal charge. Article 20(3) of the Indian Constitution also provides that a person accused for an offence cannot be compelled to be a witness against himself. So Supreme Court in Nandani Satpathy case held that Sec. 161(2) of Cr.P.C. is a parliamentary gloss on Article 20(3) of the Indian Constitution. These statements can be reduced into writing by the police officer making the investigation. Sec. 162 provides that the person who makes statement under Sec. 161 i.e. during the course of investigation is not to sign it. It further tells us about the use to which these statements can be put to i.e. their evidentiary value. These statements can be used only for the purpose of contradicting the person under sec. 145 of the Evidence Act if the person is called as a
prosecution witness at the enquiry or trial related with the offence during the course of which such statement was made.

But these statements can be used as evidence under Sec 32(1) of the Evidence Act as dying declaration or used under section 27 of the Evidence Act. Further explanation to section 162 provides that an omission to state a fact or circumstances in the statement referred to in the section may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to contradiction in the particular context shall be a question of fact. Section 163 states that no police officer or other person in authority shall offer to make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in section 24 of the Indian Evidence Act 1872, which makes such statement totally inadmissible in evidence.

3.12 Section 164 Cr. P.C. : Recording of Confession and Statements

An analysis of the section will bring out the following points:

i) A confession or a statement can be recorded only by a metropolitan magistrate or a judicial magistrate. The basic principle to entrust the serious business of recording confession upon the judicial officer is that they must exercise their judicial knowledge and wisdom to find cut whether it is voluntary confession or not.

ii) Confession or statements can be recorded under sec 164 either in the course of an investigation or at any time afterward before the commencement of enquiry or trial, it can still be used in evidence, but section 164 would not relate to such a confession and the same would be recorded by the trial court or the court making the inquiry.

iii) Before recording any such confession, the Magistrate is required to explain to the person making the confession that (i) he is not bound
to make it and (ii) if he does so it may be used as evidence against him. These provisions contained in section 164(2), if administered in the proper spirit, are most salutary. They should not degenerate into idle formalities. Magistrate should see to it that the warning is brought home to the mind of the person making the confession. It is also very necessary that the magistrate should disclose his identify to such person so as to assure him that he is no longer in the hands of the police.

iv) Subsection (2) of section 164 further enjoins the magistrate not to record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntary. The following directions are normally followed by magistrate in order to ensure that a confession is made voluntarily:

(a) After giving warnings to the person making a confession under sub section (2) the magistrate should give him adequate time to think and reflect. Normally such person, if coming from police custody to sent to jail custody at least for a day before his confession is recorded. The object of giving such time for reflection to the accused is to ensure that he is completely free from police influence.

(b) Every inquiry must be made from the accused as to the custody from which he was produced and as to the custody to which he was to be consigned and the treatment he had been receiving in such custody in order to ensure that there is no scope of any sort of extraneous influences proceedings from a source interested in the prosecution still lurking in the accuser’s mind.
(c) If accused is handcuffed, the magistrate should order to remove the handcuff, and the police and other person who are likely to have any influence over the accused should be ordered to sit out in order to create free atmosphere.

(d) The accused should be assured in plain terms of protection from any sort of apprehended torture or pressure from such extraneous agents as the police or the like in case he declines to make a statement. As a further safeguard to ensure that the confession is voluntary subsection (3) prohibits a remand to police custody of the accused if he expresses his unwillingness to make the confession when produced before the magistrate.

(e) The accused should particularly be asked the reason why he is going to make a statement which would surely go against his self-interest in course of trial and he should further be told in order to remove any lurking suspicion in his mind that even if he contrives subsequently to retract the confession, it will be evidence against him still.27 The magistrate’s failure to ask why the accused wanted to confess was however held to be a non-compliance of form curable under section 463.28

(f) It would be necessary in every case to put the question prescribed by the High Court Circular, but the question should not be allowed to become a matter of mere mechanical enquiry and no element of casualness should be allowed to creep in. The whole object of putting question to an accused who offers to confess is to obtain an assurance of the fact that the confession

28 Kehar Singh v. State (Delhi Admn.) 1988 SCC (Cri) 711.
is not caused by any inducement, threat or promise, having reference to the change against the accused, as mentioned in section 24 of the Evidence Act.\(^{29}\)

(g) A confession must be perfectly voluntary otherwise the court should reject it. The term voluntary means one who does anything of his own free will. A magistrate recording confession must make inquisitorial enquiry and make adequate exercise to ascertain the impelling reason of the prisoner to confess his guilt.

(h) It is imperative for the magistrate to explain to the accused his constitutional rights under Art. 22(1) of the Constitution as well as the provisions of section 303 of the Cr. P.C. about his right to consult a lawyer before recording the confession.\(^{30}\)

(i) It is the constitutional right of every prisoner who is unable to engage a lawyer or secure a legal service on account of poverty, indigence or incommunicado situation to have free legal service. In default of compliance with the obligation by the magistrate, the confession is vitiated as contravening Art. 21 of the Constitution.

v) Subsection (4) requires that a confession shall be recorded in the manner provided by section 281 Cr. P.C. for the recording of the examination of an accused person. Accordingly the whole of the confessional, including every question put to the accused and every answer given by him shall be recorded in full. There is no provision in section 281 for administering oath to an accused. Therefore no


\(^{30}\) *State of Assam v. Rabindra Nath Guha* 1982 Cri LJ 216.
oath can be administered to the accused who is making a confessional statement before a magistrate, and if oath is in fact administered it will be contrary to the provision of section 281 and as such the confessional statement would lose its evidentiary value.\(^{31}\)

vi) Whatever be the procedure for the recording of the confession, the confession shall be signed by the person making it, and after the confession is recorded, the magistrate is required to make a memorandum at the foot of the record as mentioned in subsection (4) of section 164 Cr. P.C.

vii) If an accused desires to make a statement other than a confession, it can be recorded by a magistrate under sub-section (5) of section 164 Cr. P.C.

viii) The Magistrate recording a confession or statement under section 164 is required to send the record directly to the Magistrate by whom the case is to be inquired into and tried. Such record is admissible in evidence even though the magistrate making the record is not called as witness to formally prove it at the trial of the accused person.

The confession so recorded is a substantive evidence i.e. evidence of the facts which it states.

3.13 Non-Compliance with Provisions of Section 164 or Section 281 Cr. P.C.

If any court before which a confession or other statement of an accused person recorded, or purporting to be recorded under section 164 or section 281 is tendered, or has been received in evidence finds that any of the provisions of

either of such sections have not been complied with by the magistrate recording the statement, it may notwithstanding anything contained in section 91 of the Indian Evidence Act 1872, take evidence in regard to such non-compliance, and may, if satisfied that such non-compliance has not injured the accused in his defence on merits and that he duly made the statements recorded, admit such statement.\textsuperscript{32}

Section 463 Cr. P.C. only permits oral evidence to prove that the procedure laid down in section 164 had actually been followed, where the record, which ought to show that, does not do so.\textsuperscript{33}

Section 164 Cr. P.C. does not override section 29 of the Evidence Art. In view of the specific provisions of section 29, mere absence of warning under section 164 would not make the confession inadmissible, provided the court is satisfied that the accused knew that he was not bound to make the confession and that if he did so it would be used as evidence against him.\textsuperscript{34}

It can hardly be doubted that a magistrate would not be obliged to record any confession made to him if, for example, it were that of a self-accusing mad man, or for any other reason the magistrate thought it to be incredible or useless for the purpose of justice.\textsuperscript{35}

Section 165 Cr. P.C. authorities a police officer making an investigation to search a place if he thinks fit i.e. if he has sufficient ground to believe that anything necessary for the purpose of investigation may be found in that place which is to be searched.

An officer in charge of police station or a police officer not being below the rank of sub-inspector making an investigation may require an

\textsuperscript{32} Section 463 Cr. P.C.
\textsuperscript{35} Nazir Ahmed v. King Emperor, AIR 1936 PC 253.
officer in charge of another police station, whether in the same district or a different district to cause a search to be made, within the limits of his own station.36

3.14 Police Officer to Maintain Diary of Investigation Proceedings

According to section 172(1) Cr. P.C. every investigating police officer is required to enter day by day his proceedings about the investigation in a diary. Such a diary shall set forth the time at which the information reached the investigating officer, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation sec 172(1) Cr. P.C.

The diary is popularly called “Case diary” or “special diary”. Any criminal court can send for police officer diary of a case under inquiry or trial in such court, and may use such diary, not as evidence in the case, but to aid it in such inquiry or trial. It may however be noted that diary might be useful for getting the means for elucidating points which need clearing up or for discovery of relevant evidence, it can never be used as substantive evidence of any fact stated in it. Sec. 172(3) imposes a restrictions on the use of case diary by the accused person. It says “Neither the accused nor his agent shall be entitled to call for such diaries nor shall he or they be entitled to see them merely because they are referred to by he court, but if they are used by the police officer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer, the provisions of section 161 or section 145 as the case may be of the Indian Evidence Act 1872 shall apply.”

3.15 Procedure when Investigation Cannot be Completed in Twenty-Four Hours

When investigation cannot be completed within 24 hours fixed by Section 57 Cr. P.C., then the police officer can seek the remand from the

36 Sec. 166 (1) of Cr. P.C.
judicial magistrate, which if the judicial Magistrate does not have jurisdiction can be only of 15 days, which can be police remand or judicial remand. Remand after the 15 days can be given by only judicial magistrate who has jurisdiction. It can continue until the conclusion of trial.

If investigation is not completed within a period of 90 days if the offence is punishable with death or life imprisonment or imprisonment for a term of not less than 10 years and 60 days where investigation relates to any other offence, then the accused has a right to bail if he offers to furnish bail bond. The period of 90 or 60 days is to be counted from the date when the accused was first brought before the magistrate. An executive magistrate can also grant remand for maximum 7 days. In cases tried by magistrate as summon case, if the investigation is not completed within 6 months then the magistrate shall make an order stopping the further investigation into the offence unless the officer making the investigation satisfies the magistrate that for special reason and in the interest of justice the continuation of the investigation beyond the period of six months is necessary. For sufficient reasons the Session Judge can vacate the order of magistrate stopping the investigation. This all is provided by section 167 of Cr.P.C.

After completion of investigation the police officer submits a report under section 173 Cr. P.C. which can be positive or negative. Positive report is called challan. Magistrate has judicial discretions whether to accept or not to accept the report. Before taking cognizance he can order investigation under section 156(3) Cr. P.C. After report is submitted, the police officer, if any new fact or evidence is discovered, can make further investigation and submit it to the magistrate.

An officer in charge of police station and other police officer specially empowered in this behalf are required by section 174 Cr.P.C. to make
investigation into cases of suicides and other unnatural or suspicious deaths and to report to the District Magistrate or Sub-divisional Magistrate.

Section 176 provides inquiry by Magistrate into cause of death in police custody and into other cases of unnatural or suspicious death.

### 3.16 Plea Bargaining

The provisions under this chapter apply to an accused against whom:

a) a report has been forwarded by the officer in charge of the police station under Section 173 alleging therein that an offence appears to have been committed by him other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years has been provided under the law for the time being in force; or

b) a Magistrate has taken cognizance of an offence on complaint other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years has been provided under the law for the time being in force, and after examining complaint and witnesses under Section 200, issued the process under Section 204.

This chapter however does not apply to offender accused of offences that affect socio-economic condition of the country, or women or children below the age of fourteen years.

The offences that affect the socio-economic conditions of the country referred to in sub-section shall be determined and notified by the Government of India.

### 3.17 Petition for Plea Bargaining

Section 265-B enables a person accused of the applicable offences to file petition praying for plea-bargaining in the court in which the offences are pending for trial.
The petition should contain description of the case including the offence(s). It shall be accompanied by an affidavit sworn by the petitioner stating that he has understood the nature and extent of the punishment prescribed for the offence, he has not been coerced into making the prayer and that he had not previously been convicted of the same offence(s).

After the receipt of the petition, the Court shall issue notice to the prosecutor/complainant as the case may be, and to the accused to appear in the court for further action on the date fixed.

On appearance of the accused on the date fixed, the court shall examine him/her in camera to ascertain whether he was coerced into making the petition. If the Court is satisfied that he has on his own violation made the plea it shall give time to the prosecutors/complainant and the accused to work out a mutually satisfactory agreement which may include compensation the victim and thereafter fix the date for further hearing.

If on the other hand, the Court is satisfied that the petition was coerced or that he was previously convicted of the same offence, the Court may take action to try him in accordance with the provisions of the Code.

S. 265-C spells out the following guidelines in working out a mutually agreeable disposition:-

(a) in a case instituted on a police report, the Court shall issue notice to the public Prosecutor, the Investigating Officer, the accuse and the victim to participate in the process of working out a disposition; and it shall be the duty of the Court to see that all parties participate in the process voluntarily. It is permissible for the accused to participate with his pleader in the process;

(b) in a case instituted otherwise than on a police report, the Court shall issue notice to the victim and the accused to participate in the working out of a disposition.
Again, it is duty of the Court to see that parties participate in the process of hammering out the agreement voluntarily. The accused or the victim could participate with his pleader in the process.

On completion of the process a report shall be prepared and signed by the Presiding Officer and others who participated in the discussions. If no agreement is reached the Court may fill in the usual procedure to process the case through trial [Section 265-D]

When the agreement is reached and the disposition signed the Court shall dispose of the case in the following manner, namely :-

a) the Court shall award the compensation to the victim in accordance with the disposition under Section 265-D and hear the parties on the quantum of sentence, releasing of the offender on probation or after admonition under Section 360 Cr. P.C. or under the probation of offenders Act, 1958 or any other law for the time being in force;

b) after hearing the parties as aforesaid, if the Court is of the view that Section 360 of the probation of offenders Act, 1958 or any other law are attached, it may release the accused on probation;

c) after hearing the parties under clause (b), if the Court finds that minimum punishment has been prescribed for the offence committed, it may sentence him to half of such minimum punishment;

d) in case the Court finds that the accused is not covered under either of the above categories, it may sentence him to one-fourth of the prescribed punishment or extendable, as the case may be, for such offences [Section 265E].

The Court shall deliver its judgment as described above in open court, and this judgment shall be final and except by way of special leave petitions under
Article 136 and under writ jurisdiction under Articles 226 and 227 of the Constitution, there shall be no appeal.

Section 428 providing for set off is applicable to the sentence awarded under this chapter.

It is a matter of importance to note that a statement given by an accused under this chapter shall not be used for any purpose other than for the purposes under this chapter.

This chapter is declared rightly to be not applicable to juveniles.

It is interesting to see that plea bargaining was suggested to be incorporated by the Indian Law Commission. The 142nd Law Commission seemed to have captured the imagination of the protagonist of plea bargaining in India. The Commission in fact advised to incorporate a separate Chapter which would provide for a competent authority, Who would be a metropolitan magistrate appointed as plea judge of offences involving imprisonment below 7 years. Under this scheme, the plea judge would not have tried any offence as a regular judge so as to ensure that matters are itself disposed of fairly. Two retired judges of the High Court appointed in consultation with the Chief Justice and his tow senior most colleagues would constitute the competent authority for offences involving imprisonment for 7 years and above. As is evident, what is now incorporated is a totally different scheme under which is no plea bargaining is cases involving offences that carry more that 7 years’ imprisonment has said that the concept of plea bargaining could not be introduced in India. This is against public policy and concept of fair trial. Because court is to make changes in India, court cannot dilute it.

In 1994 an amendment bill was introduced in Rajya Sabha which was about well organized concept of plea-bargaining according to Indian ethos which will reduce burden on courts, prosecution etc. According to it:
Chapter 12-A should be introduced to Cr.P.C. Name should confessional treatment for voluntary confessional plea. The plea should be voluntary without bargaining. This plea shall be made before a competent authority. This plea shall not be available for offences punishable with more than 7 years. Not available to economic offences also. Shall not be available to offence against women and children and shall not be available to habitual offenders.

In 2003 another bill was introduced in the Rajya Sabha for making amendments in IPC, Cr.P.C. and Evidence Act with reference to plea bargaining. It was written in statements and objects of bill, “To reduce the delay in the disposal of criminal trials and appeals as also to alleviate the sufferings of under-trial prisoner.” It is proposed to introduce the concept of plea bargaining as recommended by law commission of India in its 154th report on the code of criminal procedure. The committee on criminal justice system reforms under the Chairmanship of Dr. (Justice) V.S. Malimath, formerly Chief Justice of Kerala High Court, has also endorsed the commission’s recommendations. It means pre-trial negotiations between defendant and prosecution during which the accused agrees to plead guilty in exchange for certain concession by the prosecutor. The benefit of plea-bargaining would, however not be available to habitual offenders. Now a new chapter has been inserted into Cr. P.C. regarding Plea Bargaining i.e. chapter XXX-A starting with section 265-A Cr. P.C.

3.18 Critical Analysis of the Recommendations of Malimath Committee Report

In November 2000 the Government of India set up the committee on reform of the Criminal Justice System, purportedly to fairly assess and propose changes to the way criminal trials are conducted in India. A summary of its
158 recommendations shows that despite its smart of expression of noble sentiments, the committee has in fact been intended as a means for the government to attack the very foundations of criminal justice in India, and give enormous powers to the police.

There were proposals to demolish the fundamental principles of criminal justice in India to have come from the government itself, they would have been met with great resistance. The reforms committee, then, is a neat and carefully crafted vehicle to drive through the govt.’s agenda with the subtle language of ostensibly independent experts. If its recommendations are implemented, it will be unnecessary for India to introduce new anti-terrorism laws on emergency legislation: their cumulative effect will far exceed the power of such regulations. A combined reading of these provisions and the assessment of these provisions will create a picture the glimpses of which are as follows:

To begin with, the committee has suggested that the Indian Criminal Justice System be guided by a “quest for truth”. The committee may feel like this a reasonable proposition, and perhaps even an original one, but the “quest for truth” is nothing new to India. Every humbug politicians trying to look pious begins with the popular refrain Satyam Shivam Sundaram. Notwithstanding, the inequalities and untruths that continue to consume India have few parallels in world history. This is because this “quest for truth” has been de-linked from the search for justice and thus this ‘truth’ permits cruel rampant inequality. Now the old ideal is being recalled to undo the system of criminal justice. The “quest for truth” also recalls the motto of the Chinese Judicial System “Finding Truth From Facts”. Whereas the committee is pretending to introduce practices from continental European legal system it is
in fact barrowing the motto and practices of an authoritarian system that only now is developing new and less primitive judicial methods.

To achieve this “truth”, the reforms committee has in fact launched an assault on the Constitution of India, without making mention of it. Article 20(3) of the Constitution ensures that an accused not be compelled to act as a witness for the prosecution. The committee is effectively proposing that this Article of constitution should be discarded, as it recommends the accused present a statement of defence at the beginning of the trial. This is not unlike what is done in China, although there the right of the accused to remain silent is not recognized at all. This clever proposal aims to reduce criminal trial to civil trial standards. In India, where the poor lack access to competent lawyers it will mean a growth in criminal convictions without adequate defence. The number of innocent persons languishing in jail due to ignorance and lack of resources will increase immeasurably.

The committee has also proposed a change to the burden of proof, from “proof beyond reasonable doubt” to a “clear and convincing” standard of proof. The committee has justified its decision on the grounds that “beyond reasonable doubt is too high a standard for prosecutors to meet. In fact, this is a proposal to undo the presumption of innocence itself. Lower standard of proof and the presumption of innocence cannot co-exist. This was observed by Basil Fernando, Executive Director of the Asian human Rights Commission, in his response to the questionnaire distributed by the committee in 2002 “To effect such a change goes against the vary fundamentals or criminal trial, which deal with the life and liberty of individuals. It would trivialize criminal justice. A direct outcome would be the further degeneration of the police investigators and prosecutors. It would open the road for miscarriage of
justice”…….37 Once again this is nothing other than a devious attack on one of the pillars of criminal justice.

Another of the committee’s remarkable suggestion is for an officer at the rank of Director General of Police to be appointed as Director of Prosecution. This appointments would virtually end the separation of the criminal investigation and prosecution functions, as both would be in the hands of the police. Civilian control of the system by way of an independence public prosecutor would be lost. Such a mode is typical not of more developed systems but rather more primitive ones.

On the other hand, reforms committee has refrained from making recommendations in a number of important areas, including the use of torture by the police. India has not ratified the UN convention against torture and nor has it made torture an offence, unlike several other Asian Countries, despite strong recommendations of National Human Rights Commission. Meanwhile, the police continue to be responsible for endemic torture and extra judicial killings. Although the committee has acknowledged this situation, it has failed to make a specific corresponding recommendation. Under these circumstances its proposal that confession be made admissible by amending section 25 of the Evidence Act is a dangerous incitement of further torture. That such a statement would have to be made to an officer not below the rank of Superintendent of Police, or recorded on tape, is no safeguard without legal provisions to prohibit statements taken through torture being sued in trials.

The committee is also silent about the extreme corruption prevalent among the police. It has ignored suggestions that an independent commission to monitor corruption be established. Again, this means that is

37 Published in article 2, vol. 1. no. 2, April 2002, online at http://www.article2org/mainfile.php/0/02/26
recommendations to strengthens the position of police investigation through a National Security Commission and State Security Commission is dangerous. Together with a proposed Apex Criminal Intelligence Bureau, such agencies could become a surveillance system threatening all independent organizations.

Moreover, in the hands of a state inimical to the interest of some specific groups in society, they could prove lethal. The Gujarat Massacre is not long passed, and the threat of such state managed violence yet hangs over millions in India. What is needed is not more freedom for the policing agencies to encourage and commit further atrocities, but rather independent bodies to monitor and control the police.

In conclusion, if these recommendations are implemented, the consequence will be that:

1. The judiciary and lawyers will be subordinated to the police. Judges hold an important place in society due to the high standards they must uphold. Once they become mere arbiters of civil-style cases, they will also be viewed as nothing more than that. Judges and the lawyers presenting case will lose respect to the short-term benefit of the executive.

2. By applying civil law standard to criminal trials, the value of life and liberty will be reduced to same position as that of property. In India, whereas society has been built upon graded inequalities, the removal of the little recognition of human equality given by the law can only have very sad consequences. The vast number of Indians, and particularly more discriminated groups-such as women, tribal groups, low castes and Dalits will lose the small gains they have made since independence.

3. Powerful groups will use the police as a tool without fear of challenge. Given the already naked use of power by some political groups associated with the ruling party, it is frightening to think of what could happen next.
4. Ultimately, this type of criminal justice will in turn affect the basic democratic system enshrined in the constitution. The electoral system will be weakened, as opposition groups will face new and unprecedented police powers. Again, those who represent minority interests will experience the gravest problems.

So there must be full and open public debate on the committee’s findings. To be silent now is to accept the possibility of silence for a long time to come.