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Subject: **Law**

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Paper : **Criminal Justice Administration**

Module : **Functionaries of Criminal Justice Administration  
including Hierarchy of Courts**





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## DESCRIPTION OF MODULE

Items	Description of Module
Subject Name	Law
Paper Name	Criminal Justice Administration
Module Name/Title	Functionaries of Criminal Justice Administration including hierarchy of courts
Module Id	LAW/CJA/III
Objectives	Learning Outcome: <ul style="list-style-type: none"><li>• To acquaint the reader about the organisational and procedural aspects of criminal justice administration</li><li>• To create awareness about the diverse functionaries</li><li>• To appreciate the functions assigned to diverse functionaries</li><li>• To understand what may constitute abuse of process at the time of actual work by the functionaries</li></ul>
Prerequisites	General understanding of the provisions of Constitution of India, Code of Criminal Procedure, Probation of Offenders Act, Juvenile Justice (Care and Protection of Children) Act, Police Act
Key words	Functionaries of criminal justice administration, hierarchy of criminal courts, crime investigation, public prosecutor, correctional justice, juvenile justice, legal aid



## 1. Introduction:

The identification of functionaries of criminal justice administration requires us first to flag the activities that form part of the larger canvas of such an administration. Criminalisation of conduct involves the coming into play the functions performed by diverse functionaries that define, investigate and prosecute crime; conduct trial and sentence convicted person; and administer post conviction imprisonment. The multiple functionaries come to play their assigned roles in various stages including investigation, prosecution, trial and post conviction. The Code of Criminal Procedure 1973 in Chapter II gives a detailed elaboration and rules relating to formal functionaries in the pre-trial and trial process.

## 2. Concept of crime:

Every social order is confronted by the task of designating certain forms of harmful behaviour as crimes. There are two theories explaining the concept of crimes. The first, described as the consensus theory, treats that 'crime is a harmful human conduct that sovereign desires to prevent by punishment inflicted after following criminal procedure.' The assumption of consensus theory is that the society, by and large, agrees with the sovereign's conceptualization of crimes. The second, described as conflict theory, treats crime as an instrument in the hands of the dominant sections. Therefore, crime relates to behaviour that the dominant sections decide to prohibit in their own interest. While consensus theory may explain traditional forms of crime appropriately, conflict theory explains crimes committed by the marginalised section in a better way. Whether under consensus or conflict theory, the State in modern societies assumes a pivotal role in conceptualisation of crime. In the nineteenth century the dominant rationalization was morality that preferred to distinguish between *mala in se* (malicious from inception) and *mala prohibitum* (malicious because of prohibition) crimes. *Mala in se* crimes were those that involved an inherently wrongful or malicious act such as kidnapping a girl from the custody of parents. However, in complex and modern societies, Russell's definition, propounded in his treatise *Russell On Crime*, appears to reflect a more balanced view of crime, described thus: 'Criminal offences are basically the creation of the criminal policy, adopted from time to time by those sections of the community who are powerful or



astute enough to safeguard their own society and comfort by causing the sovereign power in the state to repress conduct which they feel may endanger their position.’<sup>1</sup> In India, the Indian Penal Code, the basic criminal code, along with many other modern statutory measures, constitute the total framework for criminalisation of diverse kinds of behaviours. The fact that the State, with all its might, takes over the prosecution requires that the standards to be achieved are different for criminal trials, proving the case beyond all reasonable doubts.<sup>2</sup>

### 3. Competence of Diverse Criminal Justice Functionaries:

The Code of Criminal Procedure 1973 assigns different functions to diverse functionaries including Police, Prosecutor, Magistrates, Courts, Defence Counsels and refers to Witnesses, Correctional administrators and Prison administration.



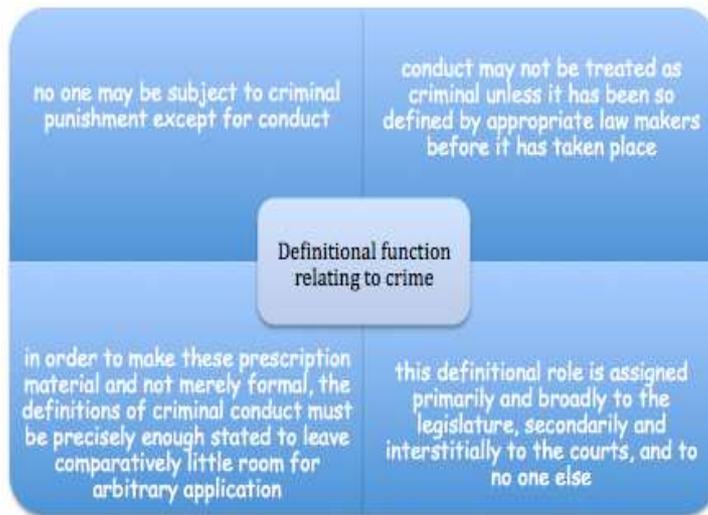
Professor Herbert L. Packer has made the following four approximations about the definitional function relating to crime:(a) No one may be subject to criminal punishment except for conduct; (b) conduct may not be treated as criminal unless it has been so defined by appropriate law makers before it has taken place; (c) this

<sup>1</sup> Pande, Prof. B. B., *Is Criminal Justice System a Worthwhile Cause?* 11 Journal of the National Human Rights Commission 11 (2012); See Turner, J.C. Cecil (Ed.), *Russel on Crime*, 12<sup>th</sup> Edn. Stevens & Sons, London; Nigam, R.C, *Law of Crimes in India* 25-37 (1965);

<sup>2</sup> *Babu Singh v. State of Punjab* [1964] 1 Cri L J 566; *Kali Ram v. State of HP* (1973) 2 SCC 808; *Shivaji Sahabrao Bobade v. State of Maharashtra* (1973) 2 SCC 793



definitional role is assigned primarily and broadly to the legislature, secondarily and interstitially to the courts, and to no one else;(d) in order to make these prescription material and not merely formal, the definitions of criminal conduct must be precisely enough stated to leave comparatively little room for arbitrary application.<sup>3</sup>



Packer insists that each of the functionaries is expected to perform this function as per allocated competence, neither more nor less. Therefore the functions of defining crime, defining conditions of exemptions and awarding sentence after conviction is

primarily to be performed by the legislature and secondarily by the courts, but in no case the Police or Prosecutors can play this definitional role. The Code of Criminal Procedure provides elaborate rules for the allocation of different functions for fair and just criminal justice administration. William J Stuntz describes criminal procedure as a regulatory system, which unlike the non-constitutional law of civil procedure does the following prominent things:

- (a) it skews every errors in defendants favour, as by requiring proof of guilt beyond a reasonable doubt;
- (b) constitutional criminal procedure limits the judges flexibility;
- (c) the law extensively regulates the conduct of various actors ranging from Police and Prosecutors to Defence Attorneys and court personnel.<sup>4</sup>

#### **4. Police as a specialized Crime Investigating Agency:**

Every conventional criminal incident has to pass through the investigation stage, which generally gets initiated the moment information about crime is reported to the

<sup>3</sup> The Limits of the Criminal Sanctions, Stanford University Press, 1973, p. 73

<sup>4</sup> "The Uneasy Relationship Between Criminal Procedure and Criminal Justice", 107 Yale LJ 1, p.12 (1997-98)



Police(FIR in case of cognizable offences).Police can undertake investigation on receiving information about crime from the victim or public or can act *suomotu* on the basis of information received through its own resources.<sup>5</sup>The Code deals in detail with the investigative powers of the police. The police can initiate an investigation on its own only if the allegation appears to be that of a cognizable offence.<sup>6</sup> Their powers under the Code extend to proceeding to the scene of crime, gathering information from the witnesses, effecting arrest,<sup>7</sup> conducting search, collecting evidence, seizing incriminating material, recording of statements, getting confession or statement recorded by Magistrate, file police report/charge sheet and other powers incidental to conducting a proper investigation as prescribed in the Code.<sup>8</sup>



The role of the police does not necessarily end with the filing of the final report as they continue to play a crucial role in trial leading to the judgment. Since investigation of crime is exclusively an executive function, to be performed by appropriate Police officer, even the judiciary is not supposed to direct the Police about

<sup>5</sup> *Ramesh Kumari v. NCT of Delhi* (2006) 2 SCC 677; *Rajendra Singh v. State of UP* AIR 2007 SC 2786; *Lalita Kumari v. Government of UP* AIR 2014 SC 187

<sup>6</sup> S. 156, CrPC

<sup>7</sup> See *Joginder Kumar v. State of UP* AIR 1994 SC 1349; *DK Basu v. State of WB* AIR 1997 SC 610; *Bhavesht Jayanti Lakhani v. State of Maharashtra* (2009) 9 SCC 551

<sup>8</sup> Chs V, XII, CrPC



the ways of conducting investigation or a particular outcome of investigation.<sup>9</sup> While the police investigate into an alleged crime, a Magistrate is always kept in the picture but he is not authorised to interfere with actual investigation or to direct the police as to how an investigation is to be conducted.<sup>10</sup>

Police have primarily two roles – maintenance of law and order and investigating alleged crimes. Under the constitutional scheme, the police come under the State subject as a part of maintenance of law and order.<sup>11</sup> The law also envisages the constitution of special police force whose jurisdiction may go beyond a State.<sup>12</sup> They are a force under the control of the executive wing of the government, the District Magistrate, usually the Collector of a district. Under the Code of Criminal Procedure very wide powers are given to the officer in charge of a police station (station house officer) and imposes onerous duties on him like detection, investigation and prevention of offences. A police officer, whatever be his rank, exercises the powers of the station house officer under the Code of Criminal Procedure.<sup>13</sup>

The Police functionaries that play a key role in the investigation of crime are known to the general public in the form of local State Police (deriving legal authority from the Indian Police Act, 1861 and several State Police Acts), the Central Bureau of Investigation (deriving legal authority from the Delhi Special Police Establishment Act, 1946), the National Investigation Agency (deriving legal authority from the National Investigation Agency Act, 2008) and the Special Armed Forces (based on respective Armed Forces legislations). In addition to the Police Acts and other special legislation, the source of Police investigatory power lies in sections 154 to 173 of the CrPC. Chapter XII gives an elaborate scheme of how the investigatory powers of the police are to be exercised with respect to collecting evidence, effecting arrest, when to arrest, examining witnesses, filing of 'closure' report or chargesheet etc. However, of late, the functioning of Police has increasingly come under media and public

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<sup>9</sup> *MC Abraham v. State of Maharashtra* (2003) 2 SCC 649; *Divine Retreat Centre v. State of Kerala* (2008) 3 SCC 542; *Kedar Narayan Parida v. State of Orissa* (2009) 9 SCC 538

<sup>10</sup> Law Commission of India, 41<sup>st</sup> Report, 1969, Vol. 1, p.167

<sup>11</sup> Item 2, List II; Criminal law and procedure are Items 1 and 2 in List III, VII Schedule to the Constitution

<sup>12</sup> The Police Act 1888

<sup>13</sup> S. 36, CrPC



criticism, a reason for considerable pressure seeking Police reforms. A line of thinking has found the recognition of the Supreme Court in the *Prakash Singh v. Union of India* which lays down that Police investigatory function ought to be performed by a distinct set of people, who need not be given law and order and security duties.<sup>14</sup>

### **5. Prosecutorial Functions and District Prosecution System:**

Logically the prosecution stage begins only after investigation is over. But due to considerable overlap between the two stages and close linkage between Police and Prosecutors the prosecution stage has remained by and large, less clearly demarcated. Public prosecutors at the lower court level are supposed to play the dual function of helping the Police to collect the best evidence and organising best proof, and also help in performing the public justice function to ensure fair, impartial and quality justice. In this way prosecutor performs a quasi judicial/judicial function too.

The Criminal Procedure Code 1973 for the first time provided statutory measures for constituting separate and distinct prosecution cadre by enacting section 24 and 25 that envisages detailed rules for appointment and qualification of Public Prosecutors and Assistant Public Prosecutors. The provisions try to ensure that prosecutors ought to be appointed out of a pool of qualified Advocates of seven years and ten years standing, a regular cadre of prosecutors is to be developed and that as far as possible no Police officer shall be eligible to be appointed as an assistant public prosecutor. The separate and distinct prosecution policy has received additional boost because of addition of Section 25A that empowers the State Government to set up a Directorate of Prosecution consisting of a Director of Prosecution and Deputy Directors of Prosecution.<sup>15</sup> To be eligible to be a Director the person should have more than ten years practice as an Advocate and shall be appointed with the concurrence of the Chief Justice of the High Court. But the Director of Prosecution shall function under the administrative control of the Head of the Home Department of the State. Further Section 25A envisages that Director of Prosecution, Deputy Directors of Prosecution,

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<sup>14</sup> (2006) 8 SCC 1

<sup>15</sup> The Code of Criminal Procedure (Amendment) Act 2005



Public Prosecutors and Assistant Public Prosecutors would constitute a hierarchy for the purposes of functional command.

Though the law envisages a fair degree of independence and autonomy for Public Prosecutors, in actual practice prosecutors play a very marginal role in the administration of criminal justice. The Police file its report under section 173(2) directly to the Magistrate and, on the basis of the charge-sheeted facts and materials, the court goes ahead to frame charges, if satisfied. Prosecutor is neither officially kept in the loop by the Police, nor mandatorily consulted by the Court. But the normative scheme envisages that the Police ought to know on what documents should be adduced or which witnesses would be examined by the prosecution.<sup>16</sup> Similarly, section 226 envisages that the Prosecutor ought to be appraised of the charges against the accused and the evidence on the basis of which the guilt is sought to be proved. Section 321 gives exclusive powers to the prosecutor to move for withdrawal from prosecution. All these provisions clearly indicate that under our criminal procedure the legislative intent is to assign positive role to the prosecution, which rarely gets reflected in practice. Thus, to transform the reality there is a need to amend the law by obligating the Police to file a Police report through the prosecution or at least give a copy of police report to prosecution. The prosecution should be empowered to direct the Police to collect evidence or witnesses. Much more than the law the attitudes and pro-executive fixation of the prosecutors must also undergo a change.<sup>17</sup>

The Code envisages the appointment of Public Prosecutors, Additional Public Prosecutors, Assistant Public Prosecutors and Special Public Prosecutors.<sup>18</sup> They are the counsels for the State representing the society in a criminal trial. They are not to appear on behalf of the accused.<sup>19</sup> The duty of the Prosecutor in a criminal trial is not merely to secure conviction at all costs but to place before the court whatever evidence is possessed by the prosecutor, whether it be in favour of or against the accused, and leave it to the court to decide the question whether the offence is proved

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<sup>16</sup> S.173 (5) (a) & (b) CrPC

<sup>17</sup> *R Sarala v. T Velu* AIR 2000 SC 1731

<sup>18</sup> Ss. 24 and 25, CrPC

<sup>19</sup> *Sunil Kumar Pal v. Phota Sheikh* AIR 1984 SC1591



as charged.<sup>20</sup> This is so, as the object of criminal trial is find out the truth and to determine the guilt or innocence of the accused. He may advice the State on the matter of prosecution of a person or appeal where his opinion is sought. Public Prosecutors generally appear in cases instituted on police reports. In cases initiated on private complaints, the party himself or his counsel may conduct the prosecution. Even in such cases, if any public interest is involved, the State may appoint a Prosecutor.<sup>21</sup> The Central as well as State governments may appoint Public Prosecutors, depending upon the offences that are to be prosecuted. They may be appointed to a court, for a case or for class of cases.<sup>22</sup> Generally, the prosecution work in the Magistrate's Court is under the directions of the police department and the prosecution of trial in the Sessions Court is under the general control of the District Magistrate. Recent amendments to the Code envisage the setting up of Directorate of Prosecution consisting of Directors and Deputy Directors of Prosecution functioning under the Home Department. All prosecutorial work is to be done under the Directorate. This is to encourage active coordination between the police and the prosecution.

If a party appoints a pleader to conduct prosecution, he can act only under the directions of the Public Prosecutor and may be permitted by the court to submit written arguments at the closure of evidence.<sup>23</sup> Persons other than prosecutors are prohibited from conducting prosecution. However, a Magistrate may allow any person to conduct prosecution, except police officers below the rank of Inspector or those who have participated in the investigation.<sup>24</sup>

The Public Prosecutor, as mentioned earlier, can withdraw a prosecution with the permission of the court. Though the Code does not impose any grounds, it has been held that the Public Prosecutor, as the court's Minister of Justice, has a duty to protect the administration of criminal justice against possible misuse or abuse by the executive. It is stated that not even the government can compel the Public Prosecutor

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<sup>20</sup> *Ghirrao v. Emperor* (1933) 34 CriLJ 1009

<sup>21</sup> *Mukul Dalal v. UoI* (1988) 3 SCC 144

<sup>22</sup> S. 24(8), CrPC

<sup>23</sup> S. 301(2), CrPC

<sup>24</sup> S. 302 (1), CrPC



to withdraw from prosecution.<sup>25</sup> Though it is an executive function, it has also been described that the functions of the Public Prosecutor are to be categorized as part of the judicative process and not as an extension of the executive.<sup>26</sup>

## **6. Crime Adjudication Function and Courts as Criminal Justice Functionaries:**

### **6.1. Constitutional scheme of criminal courts and their jurisdiction**

#### **6.1.1. Supreme Court:**

The Supreme Court has been created under Article 124 of the Constitution.

The right to move the Supreme Court by appropriate proceedings for the enforcement of the Fundamental Rights conferred by Part III is guaranteed by Article 32, itself under Part III. The Supreme Court has power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. The right guaranteed by the Article is not to be suspended except as otherwise provided for by the Constitution.

Article 129 provides that the Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself. An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court if the High Court certifies under Article 134A that the case involves a substantial question of law as to the interpretation of the Constitution.<sup>27</sup> An appeal would lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court if the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or certifies under Article 134A that the case is a fit one for appeal to the Supreme Court.<sup>28</sup> Parliament may by law confer on the Supreme Court any further powers to entertain and hear

<sup>25</sup> *Rajender Kumar Jain v. State* (1980) 3 SCC 435

<sup>26</sup> *Subhash Chander v. State (Chandigarh Admn.)* (1980) 2 SCC 155

<sup>27</sup> Art 132 (1)

<sup>28</sup> Art 134 (1)

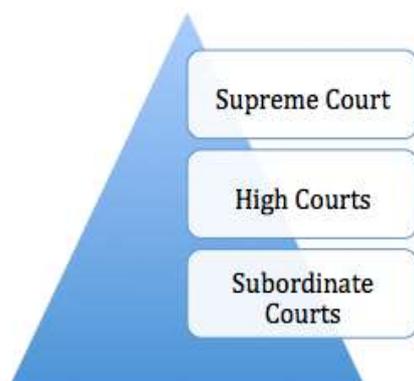


appeals from any judgment, final order or sentence in a criminal proceeding of a High Court subject to such conditions and limitations as may be specified in such law.<sup>29</sup>

Article 134A states that every High Court, passing or making a judgment, decree, final order, or sentence, referred to in clause (1) of article 132 or clause (1) of article 133, or clause (1) of article 134, (a) may, if it deems fit so to do, on its own motion; and (b) shall, if an oral application is made, by or on behalf of the party aggrieved, immediately after the passing or making of such judgment, decree, final order or sentence, determine, as soon as may be, the question whether a certificate of the nature referred to may be given in respect of that case.

Article 136, which starts with a non-obstante clause, confers a discretion on the Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India (except made by any court or tribunal constituted by or under any law relating to the Armed Forces). It can review its own judgment.<sup>30</sup> Where cases involving the same or substantially the same questions of law are pending before the Supreme Court and one or more High Courts or before two or more High Courts and the Supreme Court is satisfied that such questions are substantial questions of general importance, the Supreme Court may withdraw the case or cases pending before the High Court or the High Courts and dispose of all the cases itself.<sup>31</sup> It may, after determining the said questions of law, return any case so withdrawn together with a copy of its judgment on such questions to the High Court from which the case has been withdrawn, and the High Court shall on receipt thereof, proceed to dispose of the case in conformity with such judgment. The Supreme Court may, for the ends of justice, transfer any case, appeal or other proceedings pending before any High Court to any other High Court.

Article 141 prescribes that the law declared by the Supreme Court shall be binding on all courts within the territory of India, the law of





the land. Article 142 enables the Supreme Court to pass any such order as is necessary for doing complete justice in any cause or matter pending before it, and order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe. Advisory jurisdiction of the Supreme Court is provided for in Article 143 so that, where it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Supreme Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

#### **6.1.2. High Courts:**

Article 214 envisages that there shall be a High Court for each State, which shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.<sup>32</sup> Under Article, 226 every High Court has the power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose. This power conferred on a High Court is not in derogation of the power conferred on the Supreme Court by clause (2) of Article 32. The scope of Article 226 is repeatedly reiterated to be wider than the jurisdiction envisaged under Article 32 for the Supreme Court.

By virtue of Article 227, High Courts have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. It may call for returns from such courts; make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

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<sup>32</sup> Article 215, Constitution of India.



If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of the Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may either dispose of the case itself, or determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment.<sup>33</sup>

### **6.1.3. Subordinate courts:**

Article 233 requires that appointments of persons to be District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. Appointments of persons other than District Judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.<sup>34</sup> The control over district courts and courts subordinate thereto are vested in the High Court.<sup>35</sup>

### **6.2. Courts as dealt with by the Code of Criminal Procedure:**

Among the functionaries in criminal justice administration, the role of Magistrates and the trial courts are the most important. For the purpose of the Code, the basic territorial divisions within a State are the Districts and the Sessions Division, and Metropolitan area in big cities declared to be so.

In a purely adversarial system the prosecutor representing the State and the accused are contestants and the truth is expected to emerge from the controverted facts through effective constant challenges. In this situation, the judge is to work as an umpire between the contestants.<sup>36</sup> An adversarial system ensures a proper reconciliation between the public and private interests. However, in the peculiar

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<sup>33</sup> Article 228, Constitution of India.

<sup>34</sup> Article 234, Constitution of India.

<sup>35</sup> Article 235, Constitution of India.

<sup>36</sup> Government of India, Ministry of Law, Justice and Company Affairs, *Processual Justice to the People: Report of the Expert Committee on Legal Aid* (1974), p.70



Indian context, the judge is not to remain passive as an umpire, but play a more positive and active role for protecting the public as well as individual interests of the accused persons.<sup>37</sup> The active role of the judge is reflected in the fact that, under the Code, the charge against the accused is to be framed not by the prosecution but by the court after considering the circumstances of the case,<sup>38</sup> the prosecutor cannot withdraw the case without the consent of the court,<sup>39</sup> certain offences cannot be compounded without the permission of the court,<sup>40</sup> the court has been empowered to examine any person as a witness though such person has not been called by any party as a witness,<sup>41</sup> the court can examine the accused at any time to get an explanation from him<sup>42</sup> and the court has the discretion to accept the plea of guilty,<sup>43</sup> among other powers. After the government makes the first appointment of a judge or Magistrate, they thereafter work under the control and supervision of the High Court. The courts are to be independent and impartial for a fair administration of criminal justice. Separation of judiciary from the executive,<sup>44</sup> the requirement of open courts,<sup>45</sup> the requirement that the judge or magistrate should not be personally interested in the case<sup>46</sup> and the provisions for transfer of cases,<sup>47</sup> secure independence and impartiality. For the effective functioning of the criminal courts, it is important that the judges and Magistrates should be persons with ability and wisdom, duly qualified as to have good knowledge of law and must be persons of character, integrity and honesty.

The most important component of criminal justice administration relating to a crime is trial. The Code prescribes four types of trials. They are – trial before a Court of Sessions, trial of warrant cases, trial of summons cases and summary trials. The first two modes are prescribed for the warrant cases and the last two for the summons cases. The reasoning is that for serious offences trial must be elaborate ensuring a higher degree of justice and fairness. A Court of Sessions cannot directly take

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<sup>37</sup> *Ram Chander v. State of Haryana* (1981) 3 SCC 191

<sup>38</sup> Ss. 228 and 240, CrPC

<sup>39</sup> S. 321, CrPC

<sup>40</sup> S. 320, CrPC

<sup>41</sup> S. 311, CrPC

<sup>42</sup> S. 313, CrPC

<sup>43</sup> Ss. 229, 241, 252 etc., CrPC

<sup>44</sup> Article 50, Constitution of India; 14<sup>th</sup> and 37<sup>th</sup> Reports of the Law Commission of India.

<sup>45</sup> S. 327, CrPC

<sup>46</sup> S. 479, CrPC

<sup>47</sup> S. 407, CrPC



cognizance of any offence, unless specifically permitted to do so under certain circumstances.<sup>48</sup> A competent Magistrate may take cognizance of such an offence and commit the case to the Court of Sessions for trial, if necessary.<sup>49</sup> Any party to the criminal proceedings can take a plea that a court has no jurisdiction to try the case. The power to take cognizance of an offence may not be confused with the power to inquire into or try a case. A Court may have power to try a case but not to take cognizance of the offence; whereas the Magistrate may have power to take cognizance of an offence but not to inquire into or try the case.<sup>50</sup>

The territorial demarcation referred to above specifies one category of jurisdiction, also called local jurisdiction. The other has reference to the competence of the court to try particular kinds of offences. Provisions of the Code and the Schedule thereto determine the powers of a court to try specific offences either under the Penal Code or under any other law (Refer Table). No Executive Magistrate has any power to try an accused person on the charge of any offence.



Even though the High Court has, under the Code, power to try any offence, in practice, the High Court does not conduct any trial.<sup>51</sup> A High Court may, after considering the importance and widespread ramification of a case, decide to try the case itself at the instance of the government or on its own initiative, in which case, it follows the procedure prescribed for Sessions trial.<sup>52</sup>

Among the superior criminal courts, the Supreme Court and the High Courts are created by the Constitution. Their jurisdiction and powers on criminal matters are also laid down in the Constitution.

<sup>48</sup> S. 193, CrPC

<sup>49</sup> S. 209, CrPC

<sup>50</sup> S. 190, CrPC; *Chauthmal v. State of Rajasthan* 1982 CriLJ 1403

<sup>51</sup> S. 26, CrPC

<sup>52</sup> S. 474, CrPC



The Code of Criminal Procedure makes provision of appeal to the Supreme Court under certain circumstances.<sup>53</sup> It also empowers the Supreme Court to transfer cases and appeals from one court to another.<sup>54</sup> The High Courts have been given superintendence over the courts of Judicial Magistrates subordinate to it to ensure an expeditious and proper disposal of cases.<sup>55</sup> The High Courts also exercises appellate and revisional powers.<sup>56</sup> The Code invests the High Court with inherent powers to make such orders as is necessary to give effect to any order, or to prevent the abuse of the process of any court or otherwise to secure the ends of justice.<sup>57</sup>

Apart from the High Court, each State has courts including Courts of Session, Judicial Magistrates of the First Class, Metropolitan Magistrates in a Metropolitan area, Judicial Magistrates of the Second Class and Executive Magistrates.<sup>58</sup> There can also be Courts constituted under any law other than the Code like under the Juvenile Justice Act, Panchayati Raj Act or special courts. The Executive Magistrates are under the control of the government.

### 6.2.1. Court of Session:

The State Government establishes a Court of Session for every sessions division to be presided over by a Judge, to be appointed by the High Court.<sup>59</sup> The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session.<sup>60</sup> All their orders and judgments are that of the Court of Sessions.<sup>61</sup> The Court of Sessions shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify.<sup>62</sup> All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction.<sup>63</sup> The Sessions Judge distributes the business among such

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<sup>53</sup> Ss. 374 and 379, CrPC

<sup>54</sup> S. 406, CrPC

<sup>55</sup> Article 227, Constitution of India and S.483, CrPC

<sup>56</sup> Chs XXIX and XXX, CrPC

<sup>57</sup> S. 482, CrPC

<sup>58</sup> S. 6, CrPC

<sup>59</sup> S. 9(1) and (2), CrPC

<sup>60</sup> S. 9(3), CrPC

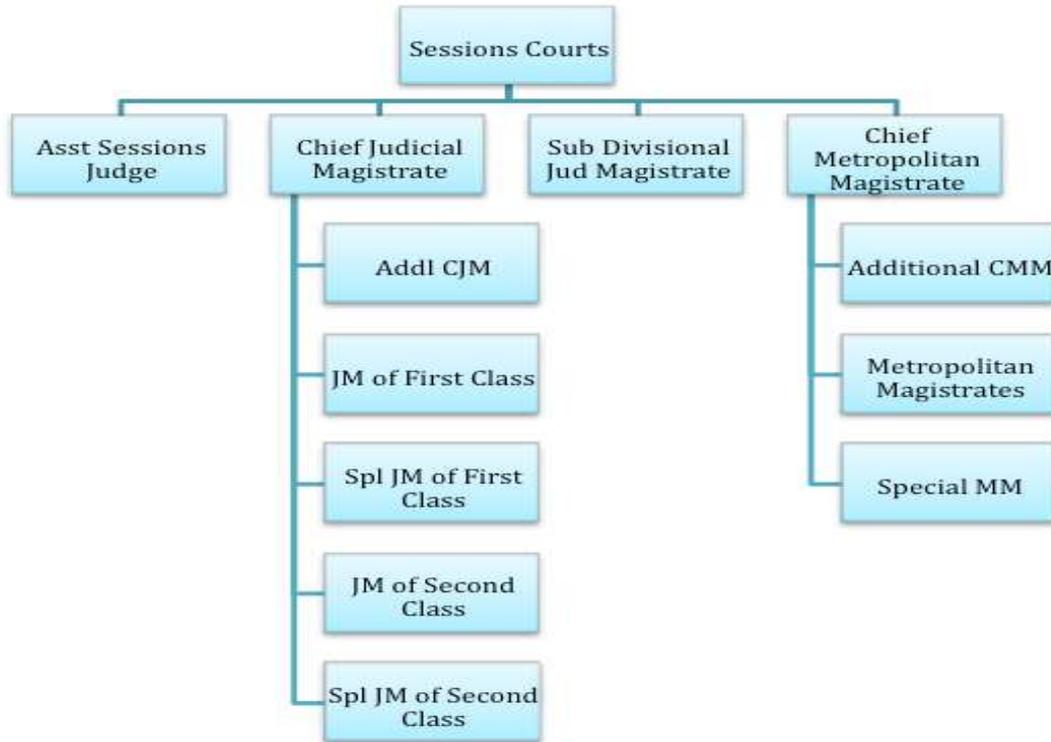
<sup>61</sup> *Gokaraju Rangaraju v. State of AP* (1981) 3 SCC 132

<sup>62</sup> S. 9(6); *Kehar Singh v. State (Delhi Admn.)* (1988) 3 SCC 609

<sup>63</sup> S. 10(1), CrPC



Assistant Sessions Judges.<sup>64</sup>



### 6.2.2. Courts of Judicial Magistrates:

In every district, the State Government may, after consultation with the High Court, establish as many Courts of Judicial Magistrates of the First Class and of the Second Class at such places, as, by notification, specify.<sup>65</sup> One or more Special Courts of Judicial Magistrate of the First Class or of the Second Class may also be established to try any particular case or particular class of cases for any local area.<sup>66</sup> The presiding officers of such Courts are appointed by the High Courts.<sup>67</sup> The High Court may, whenever it appears to it to be expedient or necessary, confer the powers of a Judicial Magistrate of the First Class or of the Second Class on any member of the Judicial Service of the State, functioning as a Judge in a Civil Court.<sup>68</sup>

<sup>64</sup> S. 10(2), CrPC

<sup>65</sup> S. 11(1), CrPC

<sup>66</sup> Proviso to S. 11(1), CrPC

<sup>67</sup> S. 11(2), CrPC

<sup>68</sup> S. 11(3), CrPC



### 6.2.3. Chief Judicial Magistrate and Additional Chief Judicial Magistrate:

In every district, the High Court appoints a Judicial Magistrate of the First Class to be the Chief Judicial Magistrate.<sup>69</sup> The High Court may also appoint any Judicial Magistrate of the First Class to be an Additional Chief Judicial Magistrate.<sup>70</sup> 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, every Sub-divisional Judicial Magistrate shall also have and exercise, such powers of supervision and control over the work of the Judicial Magistrates (other than Additional Chief Judicial Magistrates) in the Sub-Division as the High Court may specify in this behalf.<sup>71</sup> On the request of the Central or State Government, the High Court may confer upon any person who holds or has held any post under the Government all or any of the powers conferred or conferrable by or under the Code on a Judicial Magistrate of the First Class or of the Second Class, in respect to particular cases or to particular classes of cases, in any local area.<sup>72</sup> Such Magistrates are called as Special Judicial Magistrates. They are appointed for terms specified by the High Court, not exceeding one year at a time.

Subject to the control of the High Court, the Chief Judicial Magistrate may define the local limits of the areas within which the Magistrates may exercise all or any of the powers with which they may be invested under this Code.<sup>73</sup> The Court of a Special Judicial Magistrate may hold its sitting at any place within the local area for which it is established. The jurisdiction and powers of every such Magistrate extends throughout the district. Every Chief Judicial Magistrate is subordinate to the Sessions Judge, and every other Judicial Magistrate is, subject to the general control of the Sessions Judge, subordinate to the Chief Judicial Magistrate.<sup>74</sup> The Chief Judicial Magistrate may distribute business among the Judicial Magistrates subordinate to him.<sup>75</sup>

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<sup>69</sup> S. 12(1), CrPC

<sup>70</sup> S. 12(2), CrPC

<sup>71</sup> S. 12(3), CrPC

<sup>72</sup> Ss. 13 and 18, CrPC

<sup>73</sup> S. 14, CrPC

<sup>74</sup> S. 15(1), CrPC

<sup>75</sup> S. 15(2), CrPC



#### **6.2.4. Metropolitan areas:**

The State Government may, by notification, declare any area in the State comprising a city or town whose population exceeds one million as a metropolitan area for the purposes of the Code.<sup>76</sup> In every metropolitan area, there shall be established as many Courts of Metropolitan Magistrates, and at such places, as the State Government may, after consultation with the High Court, by notification, specify.<sup>77</sup> The presiding officers of such Courts are appointed by the High Court.<sup>78</sup> The jurisdiction and powers of every Metropolitan Magistrate extends throughout the metropolitan area.

#### **6.2.5. Chief Metropolitan Magistrate and Additional Chief Metropolitan Magistrate:**

The High Court, in relation to every metropolitan area within its local jurisdiction, appoints a Metropolitan Magistrate to be the Chief Metropolitan Magistrate for such metropolitan area. The High Court may also appoint any Metropolitan Magistrate to be an Additional Chief Metropolitan Magistrate.<sup>79</sup> On request of the Central or State Government, the High Court may appoint Special Metropolitan Magistrates.<sup>80</sup> They have the powers of a Judicial Magistrate of the First Class. The Chief Metropolitan Magistrate and every Additional Chief Metropolitan Magistrate are 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.<sup>81</sup> The Chief Metropolitan Magistrate distributes business among the Metropolitan Magistrates and Additional Chief Metropolitan Magistrate.<sup>82</sup>

Under the Indian criminal justice administration courts play a pivotal role. Though they are not supposed to interfere with the executive in the exercise of investigatory power, they do enjoy power to order investigation in a non-cognizable case,<sup>83</sup> order

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<sup>76</sup> S. 8, CrPC

<sup>77</sup> S. 16(1), CrPC

<sup>78</sup> S. 16(2) and (3), CrPC

<sup>79</sup> S. 17, CrPC

<sup>80</sup> Ss. 13 and 18, CrPC

<sup>81</sup> S. 19(1), CrPC

<sup>82</sup> S. 19(3), CrPC

<sup>83</sup> S. 155 (b), CrPC



investigation of cognizable offence case, record confession or statement<sup>84</sup> and order further investigation after the final report is furnished.<sup>85</sup> In addition to the above, Magistrate grants permission to the Police to conduct Test Identification Parade, for Narco analysis and DNA Tests, receive complaints and take cognizance of the case, conduct committal, remand and bail proceedings, frame charges, discharge the accused if evidence is insufficient and finally conduct trial of the accused by hearing witnesses from the both sides.

### **6.3 Sentences that Court may pass:**

A High Court may pass any sentence authorised by law.<sup>86</sup> A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law, but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court.<sup>87</sup> An Assistant Sessions Judge may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years.<sup>88</sup> The Court of a Chief Judicial Magistrate and a Chief Metropolitan Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.<sup>89</sup> The Court of a Magistrate of the first class and 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 both.<sup>90</sup> The Court of a 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 of both.<sup>91</sup>

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<sup>84</sup> S. 164, CrPC

<sup>85</sup> S. 173 (8), CrPC

<sup>86</sup> S. 28(1), CrPC

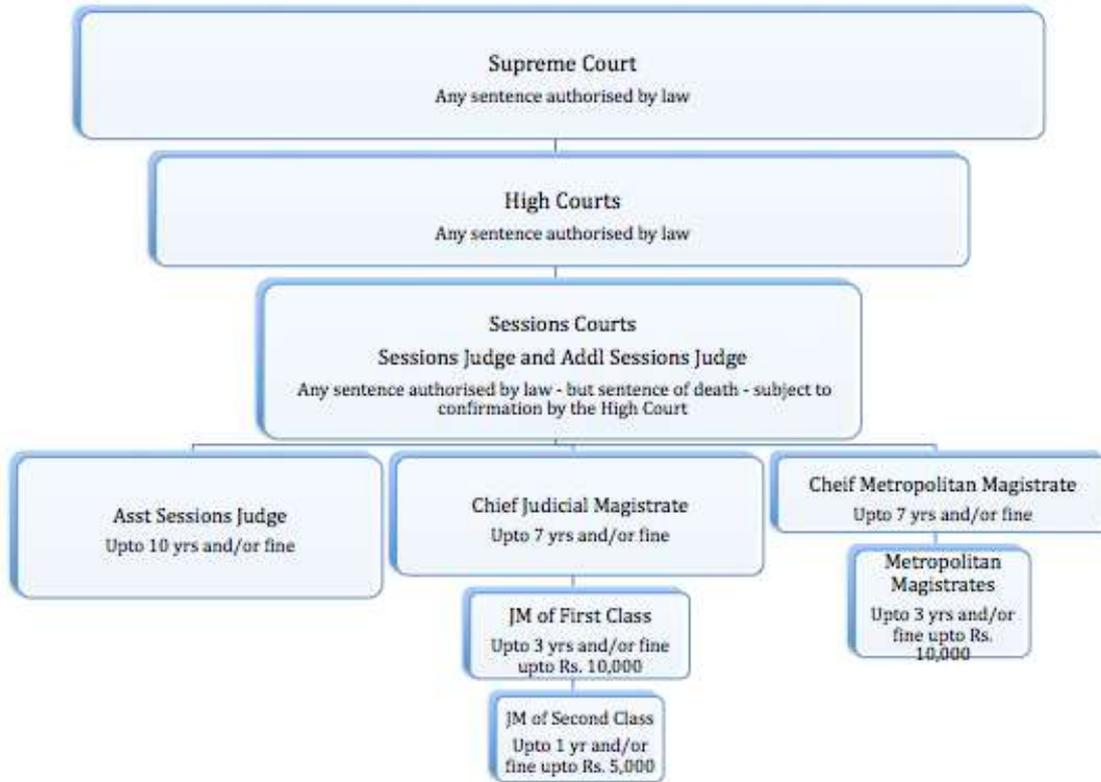
<sup>87</sup> S. 28(2), CrPC

<sup>88</sup> S. 28(3), CrPC

<sup>89</sup> S. 29(1) read with S. 29(4), CrPC

<sup>90</sup> S. 29(2) read with S. 29(4), CrPC

<sup>91</sup> S. 29(3) read with S. 29(4), CrPC



## 7. Functionaries relating to correctional justice:

The role of the judiciary ends with the finding of guilt or innocence of the person charged at the end of trial. If the accused is found guilty, the judiciary shall award an appropriate sentence and let the executive enforce the same. The prisons and matters related to imprisonment are covered by separate legislation like the Central and State Prisons Acts and the Prisoners Acts. In the case of correctional structure without 'imprisonment', they may be dealt with under the Probation of Offenders Act, 1958.<sup>92</sup> The Probation of Offenders Act envisages the appointment of Probation Officers in an area to supervise the persons placed under him instead of being sent to jail. The Probation Officer's report may also be sought for before a Magistrate or judge decides the appropriate sentence for an offender after his conviction as a part of pre sentence hearing.<sup>93</sup> They play an important role in juvenile justice administration. In some States, the Probation Officers have also been notified as Protection Officers under the Protection of Women from Domestic Violence Act 2005.

<sup>92</sup> Probation provisions are also included in S. 360, CrPC.

<sup>93</sup> S. 14, Probation of Offenders Act 1958



The Code invests powers with the executive wing of the State to execute, suspend, remit or commute a sentence imposed by the Judicial Magistrate or the judge. The execution of a sentence depends upon the type and nature of the sentence awarded. The sentence awarded by court may become unjust for various reasons. It may seem, in future, to be inappropriately harsh or less suitable to a convict who has an early reformation. It is to cover such situations that the appropriate government has been given the powers to suspend, remit or commute the sentences.<sup>94</sup> It is not necessary under the Code that the opinion of the sentencing judge be obtained before the exercise of such powers by the government. It helps in correcting the errors in judgment or sentencing, if any, and in accelerating and strengthening the resocialisation process of the offender. But it must be realised that the orders of suspension or remission does not interfere with the order of conviction passed by the court but it only affects the execution of the sentence.<sup>95</sup> The exercise of this power is subject to judicial review.<sup>96</sup>

These powers should not be misunderstood with the prerogative powers conferred on the President and the Governors by the Constitution to grant pardon, reprieves, respites or remission of punishments.<sup>97</sup> The exercise of these powers is not subject to any conditions.<sup>98</sup>

## **8. Functionaries under the juvenile justice system:**

The Juvenile Justice (Care and Protection of Children) Act of 2000 lays down the scheme of juvenile justice. The presumption of innocence has a different connotation when it relates to juveniles. The juveniles found to be in conflict with law are in need of rehabilitation and restoration rather than retribution. The juvenile must not be subjected to corporal punishment or confinement. The Supreme Court in *Bachpan Bachao Andolan v. Union of India* has reiterated importance of measures to protect the

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<sup>94</sup> Ch XXXII E, CrPC

<sup>95</sup> *Sarat Chandra Rabha v. Khagendranath* AIR 1961 SC 334

<sup>96</sup> *Laxman Naskar v. State of WB* (2000) 7 SCC 626 laid down guidelines

<sup>97</sup> Law Commission of India 41<sup>st</sup> Report; *Maru Ram v. UoI* (1981) 1 SCC 107; *Narayan Dutt v. State of Punjab* (2011) 4 SCC 353

<sup>98</sup> *State of Haryana v. Balwan* (1999) 7 SCC 555; *Krishnan Nair v. State of Kerala* 1984 CriLJ 87 (Ker)



interest of juveniles with relevant recommendations.<sup>99</sup> Uses of words or language that are accusatory are to be avoided.<sup>100</sup> Disclosure of identity of a juvenile is a non-cognizable offence with a fine of Rs. 25000.<sup>101</sup> Institutionalisation is to be the last resort. Non-custodial measures are mentioned in the Act.<sup>102</sup> Even for heinous crimes detention prescribed cannot go beyond 3 years. Any disqualification or stigma attached to conviction is struck down.<sup>103</sup> Except for serious offences, the police must not register an FIR, but must make a general diary entry leading to a Social Investigation/Background Report by the Probation Officer to be placed before the Juvenile Justice Board. Apprehension, if at all, should be in the interest of juvenile for his/her protection. Bail is a right of a juvenile, which can be denied only in exceptional circumstances provided under section 12. The Juvenile Justice Act requires establishment of Observation Homes, Special Homes and Places of Safety under the Women and Child Development Department of the State government. Juvenile Justice Boards are to be constituted in every district.<sup>104</sup> The members are to be trained in child psychology and child welfare. Every police station must have a Special Juvenile Police Unit. Child Welfare Officers are to be designated to all police stations. The Supreme Court has had to step in repeatedly because of lapse in implementation of Juvenile Justice Act.<sup>105</sup> The Supreme Court, in *Sampurna Behrua v. Union of India* has issued directions on the matter of juvenile justice administration, a case still under its consideration for continued supervision.<sup>106</sup>

### **9. Private defence counsels and Legal Aid:**

The Constitution as well as the Code envisages that a person accused of an offence before a court or against whom proceedings are initiated under the Code has a right to be defended by a pleader of his choice.<sup>107</sup> This right also extends to getting a

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<sup>99</sup> (2011) 5 SCC 1

<sup>100</sup> Rule 3, JJ Rules 2007

<sup>101</sup> S. 27 of the JJ Act

<sup>102</sup> S. 15 of the JJ Act

<sup>103</sup> S. 19 of the JJ Act

<sup>104</sup> S. 4 of the JJ Act

<sup>105</sup> *Childline India Foundation v. Allan John Water* (2011) 6 SCC 261

<sup>106</sup> (2011) 15 SCC 232; NALSA has accordingly issued Guidelines for Legal Services in Juvenile Justice Institutions.

<sup>107</sup> Article 22 (1), Constitution of India and Ss. 303 and 304, CrPC



reasonable opportunity, if in custody, to communicate with his legal adviser.<sup>108</sup> This right begins from the time of arrest.<sup>109</sup> The communication between the accused and his lawyer is privileged and confidential.<sup>110</sup> Such defence counsels are also officers of the court and are a must for a fair trial in an adversarial system.<sup>111</sup> The indigent accused stands at a risk of denial of fair trial when he does not have an equal access to the legal services available to the prosecution. It is the constitutional duty of the State to provide free legal aid in order to ensure that equal opportunities for securing justice are not denied to anyone by reason of economic and other disabilities.<sup>112</sup> Therefore, for the indigent there are several schemes in place for seeking free legal aid.<sup>113</sup> Right to legal aid is guaranteed under Articles 22(1) and 39A of the Constitution and sections 303 and 304 of the Code of Criminal Procedure 1973. To implement such a cherished right to equal access to justice legal aid functionaries may be drawn from amongst the pool of advocates rendering private practice or Student Legal Aid Clinics or the legal aid NGOs.

## 10. Miscellaneous:

### 10.1. Executive Magistrates

In every district and in every metropolitan area the State Government appoints as many persons as it thinks fit to be Executive Magistrates and appoints one of them to be the District Magistrate, usually the District Collector.<sup>114</sup> Any Executive Magistrate may be appointed to be an Additional District Magistrate, and such Magistrate shall have such of the powers of a District Magistrate as directed by the State Government.<sup>115</sup> An Executive Magistrate may be placed in charge of a sub-division

<sup>108</sup> *Llewelyn Evans, re*, (1926) 27 CriLJ 1169

<sup>109</sup> *Khatri (2) v. State of Bihar* (1981) 1 SCC 627

<sup>110</sup> S. 126 Evidence Act 1872

<sup>111</sup> Government of India, Ministry of Law, Justice and Company Affairs, *Processual Justice to the People: Report of the Expert Committee on Legal Aid* (1974), p.70; See also Government of India, Ministry of Law, Justice and Company Affairs, *Report on National Juridicare: Equal Justice - Social Justice* (1977).

<sup>112</sup> Art 39A inserted by the Constitution (Amendment) Act 1976 and interpreted to be part of right to life under Art 21 in *Hussainara Khatoon (4) v. State of Bihar* (1980) 1 SCC 98.

<sup>113</sup> The Legal Services Authorities Act 1987, the legal aid schemes of the State governments, Bar Associations, Legal Aid and Advice Board, Supreme Court Senior Advocates' Free Legal Aid Society and the like.

<sup>114</sup> S. 20(1), CrPC

<sup>115</sup> S. 20(2), CrPC



and he shall be called the Sub-divisional Magistrate.<sup>116</sup> The State Government may confer a Commissioner of Police with all or any of the powers of an Executive Magistrate in relation to a metropolitan area.<sup>117</sup> The State Government may also appoint Executive Magistrates to be known as Special Executive Magistrates for particular areas or for the performance of particular functions.<sup>118</sup> The District Magistrate defines the local limits of the areas within which the Executive Magistrates may exercise all or any of the powers with which they may be invested under the Code.<sup>119</sup> All Executive Magistrates, other than the Additional District Magistrate, are subordinate to the District Magistrate, and every Executive Magistrate (other than the Sub-divisional Magistrate) exercising powers in a sub-division are subordinate to the Sub-divisional Magistrate, subject, however, to the general control of the District Magistrate. The District Magistrate distributes business among the Executive Magistrates subordinate to him and to an Additional District Magistrate.<sup>120</sup>

## 10.2. Preventive powers:

The system is normally said to be set into motion when there is information on commission of a crime. In general, anybody can set the criminal law in motion by giving such information. There are, in certain circumstances, certain preconditions or limitations for taking cognizance under the CrPC.<sup>121</sup> The executive wing of the government, who has their ears to the ground, are equipped to sense a potential law and order problem in a given locality by identifiable persons and are required to use the criminal procedure to prevent the commission of crimes. These are termed as preventive powers under the Code and are conferred on the police and Executive Magistrates.<sup>122</sup> The police have the power to arrest a person to prevent the commission of a cognizable offence.<sup>123</sup> The Executive Magistrates have judicial discretionary powers to initiate proceedings and take security from persons, who cause a reasonable apprehension of conduct likely to lead to a breach of peace or

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<sup>116</sup> S. 20(4), CrPC

<sup>117</sup> S. 20(5), CrPC

<sup>118</sup> S. 21, CrPC

<sup>119</sup> S. 22, CrPC

<sup>120</sup> S. 23, CrPC

<sup>121</sup> Ss. 195 to 199 CrPC

<sup>122</sup> Chs XI and VIII, CrPC

<sup>123</sup> S. 151, CrPC



disturbance of public tranquility. Security proceedings by Executive Magistrate include security for keeping the peace and for good behaviour.<sup>124</sup> The exercise of these preventive powers imposing restriction on the liberty of a person should be understood as 'preventive' and not 'punitive'. The duration of such restrictions are small and there are checks and balances in place to ensure its sparse use. It is generally the revenue authorities that are conferred with these powers by the government. The only preventive power exercisable by a Judicial Magistrate is while convicting an offender of certain offences who can be asked to furnish security.<sup>125</sup> Powers to order removal of public nuisances, where fraught with potential danger to peace and tranquility, are conferred on the Magistrate.<sup>126</sup> Quick action to deal with urgent cases of nuisance or apprehended danger disturbing public tranquility is also envisaged.<sup>127</sup> The Executive Magistrate and police are empowered to order dispersal of unlawful assemblies and such other assemblies that are likely to cause breach of peace.<sup>128</sup> They have also been empowered to use force for this purpose. Prevention of injury to public property has also been included in the Code. Certain precautionary steps are envisaged in respect of disputes as regards immovable property not necessarily affecting the public at large.<sup>129</sup>

## 11. Summary:

Different functionaries of criminal justice administration play diverse roles assigned to them. From the point of initiation of criminal proceedings to the post conviction handling of convicts, the participants are required to perform their respective roles so as to achieve the results in a fair and just criminal justice administration. The system takes a separate note of juvenile offenders for special treatment. There are checks and balances in place, which enables the functionaries in the hierarchy to ensure that the violation of cherished rights are avoided and the objectives of justice are met. This is a must for a democratic State with its roots entrenched in Rule of Law.

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<sup>124</sup> Ss. 107 - 110, CrPC

<sup>125</sup> S. 106, CrPC

<sup>126</sup> Ch XB, CrPC

<sup>127</sup> Ch XC, CrPC

<sup>128</sup> Ch XA, CrPC

<sup>129</sup> Ch XD, CrPC



### **Did You Know?**

1. A magistrate can ask any person to investigate into an offence as per the Code of criminal procedure.
2. The court is not bound to accept the draft charges pointed out in the final report.
3. Investigation can be continued even after submission of the final report by the police.
4. Some trappings of inquisitorial system are sought to be introduced into our system, the directorate of prosecution is an example of this.
5. Legal aid is the duty of the State.

### **Points to Ponder**

1. Should the police be bifurcated to cater to investigatory and law and order functions?
2. Would it be advisable to introduce more features of an inquisitorial system to render criminal justice?
3. Is the legal aid effective in India?

