



LAW COMMISSION

Thirty-seventh Report

on

The Code of Criminal Procedure, 1889

(SECTIONS 1 to 176)

DECEMBER, 1967

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5, Jor Bagh, New Delhi-3
Dated 19th February, 1968

J. L. KAPUR,

My dear Minister,

I have great pleasure in forwarding herewith the 37th Report of the Law Commission on the Code of Criminal Procedure, 1898, sections 1 to 176.

1. The circumstances in which the subject was taken up for consideration are stated in the first few paragraphs of the Report. After the subject was taken up, a study of the Code was undertaken.

2. A Press communique was also issued inviting suggestions on the existing Code. The suggestions received from the public, as well as various suggestions received through the Ministry of Home Affairs, were voluminous.

3. Certain preliminary points were discussed and decided at the 29th meeting of the Commission.

4. Some points of detail were considered at the 39th meeting of the third Commission. As a consequence of that discussion, preparation of a draft Report and Bill was then undertaken under the directions of a member of the third Commission. The work at that stage proceeded upto section 176.

5. Further study of the subject was continued, and has been going on throughout.

After consideration of the Code of Civil Procedure, Capital Punishment and other urgent matters was finished, the Code of Criminal Procedure (upto section 176) was, in the fourth Commission, discussed at several meetings held in 1967, namely, the 86th meeting held on 15th to 20th May, 1967, the 87th meeting held on 8th to 11th August, 1967, the 88th meeting held on 21st to 26th August, 1967, and the 89th meeting held from 25th September to 30th September and 4th and 5th October, 1967.

6. In the light of the decisions taken at the various meetings mentioned above, and on a consideration of the

(ii)

suggestions received from time to time, and also incorporating the studies made in the meantime, a fresh draft Report (up to section 176) was prepared. The fresh draft Report was approved, with modifications, at the 90th meeting of the Commission held from 18th to 25th November 1967.

7. The fresh draft Report was revised in the light of the decisions taken at the meeting held in November, 1967.

8. The draft Report *was not* circulated to State Governments, High Courts etc. for comments, as the Report was to be urgently submitted.

9. In response to the suggestion made to us in this behalf, we are submitting this Report dealing with sections 1 to 176 of the Code, to be followed by recommendations relating to other sections.

10. Reports on some important topics under the Code have been separately submitted. These are enumerated in paragraph 10 of this Report.

11. I would like to say that in the preparation of this Report a great deal of labour and time had to be expended by our Secretary Mr. P. M. Bakshi. The suggestions made by various High Courts, lawyers, Executive Officers and others interested in law were received at different times. They had to be collected under various sections of the Code, and edited with comments. The case law which ran into a good few thousands of pages, and which had to be studied and condensed into the pages of the report, was a time and energy absorbing job. Then, historical and comparative study of the materials had to be and was made, and extensive and intensive research done, and the material was put and projected into the Draft Report.

Mr. Bakshi has been of the greatest assistance to us. I would commend his work and thank him for his co-operation, assistance and hard and intelligent work.

Yours sincerely,

(J. L. KAPUR)

Hon'ble Mr. P. Govinda Menon,
Minister of Law,
NEW DELHI.

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THIRTY-SEVENTH REPORT ON THE CODE OF
CRIMINAL PROCEDURE, 1898.

(SECTION 1—176)

1. Revision of the Code of Criminal Procedure, 1898, has been undertaken by the Law Commission in the following circumstances.

Genesis of
the report

After the Law Commission submitted its report on the Reform of Judicial Administration,¹ Government asked the Law Commission to undertake examination of the Code, not merely from the point of view of implementing the recommendations made in the Report referred to, but also with the object of attempting a general revision. Work on the subject was started immediately, and has been continuously going on since then. The process of revision took time because of the vastness and importance of the subject-matter, the prolific case-law that had accumulated on the Code, the several important matters of constitutional importance that had to be considered, the voluminous suggestions received on the subject, the detailed study that was needed for examining the effect on the Code of the separation of the Judiciary from the Executive, and the pre-occupation of the Commission with certain other subjects which were urgent.

2. In the revision of the Code, as proposed here, we have proceeded generally on the lines usually followed in the Commission's other Reports on the revision of statutes. Attention, however, should be drawn to some important aspects. First, a law of Criminal Procedure affects a larger number of persons than most other laws; secondly, criminal law is an instrument for the protection of society, and criminal procedure is its chief means. Criminal Courts are the main agencies for its administration. The ordinary citizen is, or is likely to be brought, directly or indirectly, into contact with the criminal law, more often than with most other laws. He may appear as a witness, a juryman, or, often, as an accused or a complainant. If he is the accused, he may be faced with the possibility of loss of personal liberty (and sometimes life) and in most cases, even if he is acquitted, a harm to his reputation. Beginning with arrest and ending with appeal to the highest appellate court, the stages of a criminal proceeding touch the individual in vital matters. A decision as to the policy to be adopted in the procedural law, therefore, often involves a nice balancing of conflicting considerations, a delicate weighing of opposing claims clamouring for recognition, and the extremely difficult task of deciding which of them should pre-dominate.

Objectives
of revision

The very nature of the subject-matter is, thus such, that human values are involved to a greater degree than in

1. 14th Report of the Law Commission (Reform of Judicial Administration).

other laws. On any responsible body of persons, this work would impose considerable mental and moral strain. We hope that our recommendations as to the changes to be made or not to be made in the existing law have done justice to the subject, though we do not expect that all of them will find universal or general acceptance.

3. Some of the problems which we had dealt with are of a recurring nature; such as, the law of arrest; the questioning of the accused; the use in evidence of statements recorded during investigation by the police; and so on. The consideration of speed and the demands of justice had to be harmonised, in dealing with these and similar problems. Often, the solution was not easy, as each of the alternatives had weighty arguments in support. What appears in this Report as our conclusion on some of the important matters was not arrived at without some hesitation.

Importance of the code 4. The importance of a Code of Criminal Procedure is based on two considerations :—

First, expense, delay or uncertainty in applying the best laws for the prevention and punishment of offences would render those laws useless or oppressive; secondly, the law relating to Criminal Procedure is more constantly used and affects a greater number of persons than any other law.¹

Object of the code 5. Very briefly stated, the object of Criminal Procedure is the ascertainment of the guilt or innocence of the accused. Therefore, the matters dealt with in a Code of Criminal Procedure would mainly pertain to the various stages incidental to the process of ascertainment of the guilt. From the legal point of view, the law of Criminal Procedure is the law dealing with the process of applying the instrument of Criminal law—punishment—to the facts of a particular case.

6. The object of the Code of Criminal Procedure is, (to state it in a different form), to provide a machinery for the punishment of offences against the substantive law.^{2,3} Thus, a Code of Criminal Procedure would mainly deal with the judicial process in so far as it pertains to the institution, conduct and disposal of criminal prosecutions.

7. If the law of Criminal Procedure had only to deal with the chronological stages of a criminal trial, it would have been very simple and short. That is not so, however, because human values are involved.

8. Because a criminal trial involves human issues, the right to a fair trial figures prominently. The requirements of a fair trial, speaking broadly, relate to the character of

1. Stokes, Anglo-Indian Codes, Vol. 2, page 1.

2. Ganesh Narain, (1889) I.L.R. 13 Bom. 590, 598.

3 Q. E. v. Abdul Rehman, (1891), I.L.R. 16 Bom. 580, 584.

the court, the venue, the mode of conducting the trial (particularly trial in public), rights of the accused in relation to defence, and other rights.¹

9. Moreover, before the actual trial, there are stages of some importance, namely,—

- (i) investigation, which is the gathering of facts ;
- (ii) the magisterial inquiry in important cases—which is the unfolding and testing of the prosecution case ;² and
- (iii) the charge which is the final instrument giving a precise shape to the accusation. The law has to deal with them also.

These matters increase the field and volume of the inquiry to be embarked upon, when revising a Code of Criminal Procedure.

10. On some of the important sections of the Code, the Law Commission has already submitted reports separately. These Reports deal with some matters which required detailed and separate examination or urgent consideration.^{3,4,5}

Besides these, the Commission also had to study the procedural provisions in various special laws, in connection with its report on Socio-economic offences.⁶

11. The materials studied by the Commission for the revision of the Code may be briefly classified as— Materials studied

- (a) case-law ;
- (b) local amendments ;
- (c) law in other common-law countries, wherever practicable and relevant, and the literature thereon ;
- (d) effect of the constitutional provisions, particularly those dealing with fundamental rights ;
- (e) Report of the Commission on the Reform of Judicial Administration (14th Report).

1. Cf. David Harris, "The right to a fair trial in criminal proceedings as a human right", (April 1967), 16 I.C.L.Q. 352.

2. See Devlin, *The Criminal Prosecution in England* (E.L.B. Edn. 1966), Page 111.

3. 25th Report, (Report on Evidence of Officers about forged stamps, currency notes etc. (Section 509A, Code of Criminal Procedure, as proposed)

4. 32nd Report (Section 9, Code of Criminal Procedure, 1898).

5. Report on section 44 of the Code—Proposal to insert provision for disclosure of offences relating to bribery etc. (The Report is under submission).

6. 29th Report (Report on the proposal to include certain Social and Economic Offences in the Indian Penal Code).

- (f) Suggestions received from time to time by the Commission being—
- (i) suggestions forwarded by the Government of India or State Governments or High Courts ;
 - (ii) opinions or suggestions which were received by the Joint Committee which examined the Amendment Bill of 1954¹ ;
 - (iii) other suggestions relating to sections of the existing Code made directly to the Law Commission ;
- (g) academic literature.

12. We have found that in many cases it was necessary to examine in detail not only the Codes of 1861, 1872, 1882 (predecessors of the present Code), and the Code of 1898 as it stood before the amendments of 1923 and 1955, but also the debates and discussions relating to those Codes in the Legislature, and the suggestions and opinions which were considered by the various Committees which were entrusted with examining the Bills which ultimately led to the Codes of 1861, 1872 and 1882 and the present Code, and the Amendment Acts of 1923 and 1955. It may not, perhaps, be out of place to mention here, that the Amendment Act of 1923, which made important amendments in numerous sections of the Code, was the result of a long period of discussion and consideration, extending over a period of 12 years.

Lines on which Code revised in the past

13. Some idea of the lines on which the Code should be revised may be obtained from the lines on which its revision has been done in the past. The Code of 1861, was the first general Code² of Criminal Procedure applicable to the whole of British India (excepting the Presidency Towns and the High Courts), while the first revision was done in 1872. The revision attempted in 1872 appears mainly to have been directed at a re-arrangement of the sections in more convenient and useful form, together with changes of substance in a few sections. Case-law on the previous Code had not, at that time, accumulated to such a great extent as to require detailed examination from the point of view.

14. The primary object of the Code of 1882 was to re-cast the Code of 1872, and also to consolidate with it the substance of the High Courts Act and the Presidency Magistrates Act, and to incorporate in it the numerous reported

1. Several suggestions forwarded to the Joint Committee were not embodied in the Amending Bill of 1954. The Joint Committee stated, that some of these raised important issues and opportunities for eliciting general opinion thereon had not yet been given. The Joint Committee recommended that these should be taken up for consideration after circulating them for public opinion, and, if necessary, Government might bring before the House another suitable Amending Bill (Report of the Joint Committee dated 3rd September, 1954, para. 55).

2. For detailed historical discussion, see paragraphs 17 *et seq.*, *infra.*

decisions on its wording, and thus give to India "a single and complete Code of Criminal Procedure, and carry out, so far, the policy of providing a simple and uniform system of law for that country."¹

The language of the Code of 1872 was departed from in 1882 only so far as was necessary for the main purpose.

The secondary object of the Code of 1882 was to consolidate portions of certain special enactments (7 in number) dealing with the execution of process, the police, justices of the peace, inquiries into crimes committed abroad by British subjects etc. Thus, the process was in the nature of consolidation of statutes plus amendment.

The Code of 1898 was mainly a revising measure, intended to—

- (a) incorporate changes made by several Acts which amended the law of criminal procedure ;
- (b) deal with matters brought to the notice of the Government of India, in regard to necessary amendments of the law ; and
- (c) to remove defects and difficulties in administering the law and contradictory interpretations, as shown by the Law Reports.²

15. The Amending Act of 1923 had its genesis in the Bill of 1914. In the Statement of Objects and Reasons,³ the object of the amendment was thus stated. "Since the existing Code was passed, a number of suggestions for the amendment of particular points have, from time to time, reached the Government of India, and the Police Commission has also made various recommendations. The present Bill is the outcome of the examination of this accumulation of proposals, and is one of the series of revisions which experience of the actual working of the Code has necessitated from time to time."

The Amendment Bill of 1955 was mainly intended to ensure speedy disposal of cases, and to make certain other amendments on certain matters of importance.

16. Thus, the process began with consolidation in 1882. After consolidation, the main revision of the Code has been in the direction of re-arrangement, incorporation of case-law and changes on certain matters of policy. After the Amendment of 1923, a lot of case-law has accumulated. It may also be stated, without meaning any disrespect to those

1. Stokes, Anglo-Indian Codes, Vol. 2, page 4.

2. See Statement of Objects and Reasons to the Bill of 1897.

3. Statement of Objects and Reasons to Bill No. 3 of 1914, Gazette of India, 1914, Part V, page 119.

who framed the Amending Act of 1923, that on certain sections, fresh controversies have arisen by reason of some of the amendments introduced in 1923.¹ The task of revision now is a stupendous one, involving, as it does, a study of—

- (i) hundred years of case-law ;
- (ii) the geneology of many sections of importance ; and
- (iii) local amendments, particularly of the field of separation.

Historical
survey

17. A historical survey of the Code itself is not out of place before we deal with the major changes. History of the Code seems to represent four stages—

- (a) The period of formation ;
- (b) The period of consolidation ;
- (c) The period of revision ; and
- (d) The period of refinement.

Position
before 1861

18. An idea of the diversity in the structure of criminal courts and their procedure, in 1855, can be had from the fact that in their First Report² the Commissioners on the Reforms of the Judicial Establishment had to prepare as many as 8 parts, outlining the Constitution and procedure of the various Courts as follows :—

“Appendix B

1. Outline of the Constitution and Procedure of Her Majesty's Supreme Courts of Judicature at Calcutta, Madras, and Bombay.
2. Outline of the Constitution and Powers of the Justices of the Peace and Magistrates of the Presidency Towns of India.
3. Outline of the Constitution and Procedure of the East India Company's Courts of Civil Judicature in the Presidency of Bengal.
4. Outline of the Constitution and Procedure of the East Indian Company's Courts of Criminal Judicature in the Presidency of Bengal.
5. Outline of the Constitution and Procedure of the East India Company's Courts of Civil Judicature in the Presidency of Madras.
6. Outline of the Constitution and Procedure of the East India Company's Courts of Criminal Judicature in the Presidency of Madras.

1. The controversy regarding definition of “complaint” is one such example.

2. See First Report of the Commissioners on the Reform of Judicial Establishment in India, (1855), page 208 (Appendix B).

7. Outline of the Constitution and Procedure of the East India Company's Courts of Civil Judicature in the Presidency of Bombay.
8. Outline of the Constitution and Procedure of the East India Company's Courts of Criminal Judicature in the Presidency of Bombay."
19. The Code of 1861 was the result of long labours spread over a number of years. We quoted from Stokes'—

"So long ago as the 20th March, 1847, the President in Council instructed the Indian Law Commissioners to prepare a scheme of pleading and procedure with forms of indictment adapted to the provisions of the Penal Code, and such a scheme, together with several forms, was prepared by Messers Cameron and Elliott, and submitted with a report dated 1 Feb. 1848.² Their draft was examined and considered by a new set of Commissioners appointed in 1854 under 16 and 17 Vict. c. 95, section 28, and comprising Sir John Romilly M. R., Sir John Jervis C. K., Sir Edward Ryan, and Messrs Cameron, Ellis, Lowe (now Lord Sherborne), and Millett. These Commissioners produced a draft Code which was presented to Parliament in 1856, and was in the following year introduced into the Legislative Council by Mr. (now Sir Barnes) Peacock. It ultimately was passed by the Legislative Council as Act XXV of 1861. This Code came into force on 1 Jan. 1862: it applied in the first instance only to the territories subject to what were called the general regulations, but was gradually extended to the rest of British India except the Presidency-towns. It was amended by Acts 33 of 1861, 15 of 1862, 8 of 1866, and (very largely) by Act 8 of 1869."

20. In 1872, the principal Code and its amending Acts were repealed and replaced by Act 10 of 1872. The Code was drawn partly by Mr. (later Sir Fitzjames) Stephen (who framed the sections corresponding with sections 221-240 of the present Code)^{3 4} and partly by Mr. H. S. Cunningham,⁵ but chiefly by Captain Newbery, Personal Assistant to the Inspector General of the Punjab Police.⁶

21. The history of the Code of 1861 and other Acts upto 1872 was thus traced by Sir James Fitzjames Stephen (then Mr. Stephen) while presenting the Supplementary Report of the Select Committee on the 1872 Bill.

1. Stokes, Anglo-Indian Codes, Vol. 2, pages 1-2.

2. There was a previous report dated 4 Nov. 1843 regarding the qualifications, summoning, and challenging assessors and jurors. This I have not seen.

3. Stephen, History of the Criminal Law, iii. 337n.

4. Mr. Stephen also drew Chapters II-VII, XXIII (chief) and XXXVI.

5. Mr. Cunningham drew section 90, most of Chap. XIX, and Chap. XXXIV.

6. See Stokes, Anglo-Indian Codes, Vol. 2, pages 1-2.

7. Speech of Mr. Stephen, Proceedings of the Governor General in Council dated 16th April, 1872.

"I may perhaps be allowed to give, in a very few words, the history of the Code. It has been built up by slow degrees by the labours of successive generations of legislators ever since legislation first began in this country. The very earliest Regulations of 1793 provide for the establishment of a system for the administration of criminal justice. This system was repeatedly altered, varied and re-adjusted, so as to meet the varying wants of the country and to supply the requirements which were shown by experience to exist. The mass of legislation which thus accumulated was very large, and when the Penal Code was passed in 1860, it was considered a matter of pressing importance to prepare a Code of Criminal Procedure as quick as possible, in order to act as a companion to it. Act XXV of 1861 was the result. It threw together all the existing law on the subject to which it related, and so consolidated an immense mass of Regulations and Acts. I will not say how many, but I think they were counted by the hundred. Act 25 of 1861 was drawn by men thoroughly well acquainted with the system with which they were concerned; but I am inclined to doubt whether they did not know it rather too well, for they certainly threw the various provisions together with very little regard to arrangement, and without any general plan. Various Acts for the amendment of the Code became necessary after it had been passed. These were consolidated by Act XVIII of 1869. The result was rather to increase than to diminish the confusion which had previously existed. Act VIII of 1869 was not regarded as a final measure, and a correspondence on several points connected with it, and with the further reform of the system of criminal procedure took place between the Government of India and the Indian Law Commissioners, who gave their opinion on various matters submitted to them in one of their very latest reports. This report was the cause of the present Bill. I must now say what appears to be necessary upon its provisions."

22. Mr. Stephen then proceeded to make some observations as to the changes introduced. "I wish, in the first place, to state distinctly my own position with regard to the Bill. Of course, I am fully responsible for it; but at the same time I must observe that I have not been so presumptuous or foolish as to attempt to introduce modifications of my own devising into the working of a system gradually constructed by the minute care and vast practical experience of many successive generations of Indian administrators and statesmen. I have carefully avoided that fault. I have regarded myself, rather as the draftsman and secretary of the Committee, by whom all the important working details of the Bill have been settled, than as its author; and to them, rather than to me, is due any merit which may attach to the practical improvements which I hope this Bill will be found to have introduced in the administration of criminal justice, and in the general maintenance of the public security. I am the more anxious to say this, because,

when I last addressed the Council on this subject, I made various criticism from the point of view of an English lawyer on the administration of justice in this country."

23. Continuing his speech, Mr. Stephen then stated, "I do not wish to retract or to modify what I then said. I shall feel that the system of criminal justice in this country is open to serious objection, and would admit, in course of time, of considerable improvement. I think I could suggest means by which those improvements might be brought about quickly and gradually; but the task of the critic differs essentially in my opinion from that of the legislator. The task of the critic is to form and express his opinion as pointedly as possible, in order that they may form the subject of public discussion and gradually produce whatever effect may properly belong to them. The task of the legislator, in reference to an existing system like that of Indian Criminal Procedure, is much more like that of the editor of a law-book. It is his duty to re-arrange, to explain what experience has proved to be obscure, to supply defects, and to make such alterations as harmonize with, and carry out, the leading idea of the system with which he is concerned. The notion that any one could, if he would, or that he ought to wish, if by any accident he had the power, to make a new set of laws for his fellow-creatures out of his own head, and without reference to existing materials, is, to my mind, altogether wild and absurd. This I believe to be true everywhere, but it is emphatically and peculiarly true of India. It is simply impossible to make extensive changes in the administration of this country suddenly. The reason is obvious, though I think people in England are apt not unnaturally to overlook it. It is, that the number of officers is so small, their duties so unremitting, and the nature of the engagements between them and the Government which employs them so stringent, that the whole administration would be thrown into confusion by any change which greatly altered the duties, or involved any serious modification in the position, of the officers concerned."

24. The Code of 1872 did not extend to the Courts established by Royal Charter in Calcutta, Madras and Bombay. The position, as stated by Stokes,¹ was as follows:—

Separate
Acts for
High Courts
and Presi-
dency towns

"For these Courts, as well as for the High Court at Allahabad and the Chief Court at Lahore, provision was made by Act 10 of 1875 (to regulate the procedure of the High Courts in the exercise of their original criminal jurisdiction), which reduced the number of jurors to nine and the number of pre-emptory challenges to eight, dispensed with the necessity of a unanimous verdict, codified the law relating to *habeas corpus*, provided a simple substitute for the writ of *certiorari*,

1. Stokes, Anglo-Indian Codes, Vol. 2, pages 2-3.

and repealed and re-enacted in an improved form the seven Acts¹ by which the Legislature had from time to time amended the criminal procedure of the Supreme Courts, or their successors the High Courts. This Act² was drawn by the writer and carried by Mr. (now Lord) Hobhouse. The Code of 1872 was also inapplicable to the Magistrates' Courts at Calcutta, Madras, and Bombay. For these, provision was made by Act 4 of 1877 (to regulate the procedure and increase the jurisdiction of the Courts of Magistrates in the Presidency Towns). This Act, which increased the jurisdiction of the Presidency Magistrates, assimilated their procedure to that of the provincial Magistrates, and made many other improvements, was drawn by the writer and carried by Mr. (now Sir Theodore) Hope.”

1882 Code

25. The position before 1882 has been thus stated:—³

“It thus appears that, before the present Code of Criminal Procedure was passed, no less than three such Codes were in operation in British India: Act 10 of 1872, amended by Act 11 of 1874, which was in force throughout the Mufassil; the High Courts Act, 10 of 1875, which was in force in the Presidency-towns, Allahabad and Lahore; and the Presidency Magistrates (Act 4 of 1877), which, also, was in force in the Presidency-towns.”

“Many of the provisions of these Codes merely repeated one another; many of their rules, though dealing with the same subjects, unnecessarily varied in language; and the result was that the bulk of the Indian Statute-book was far greater than it needed to be, and that the Courts when construing one Code were often deprived of the guidance of prior decisions on another.”

26. The object of the 1882 Code has been thus described by Stocks:—⁴

“The primary object of the present Code, which was framed by the writer at the suggestion of the Secretary of State in his despatch (Legislative), No. 44, dated 26th October, 1876, was to recast the Code of 1872, combining with it the substance of the High Courts' Act and the Presidency Magistrates' Act, and incorporating in it the numerous reported decisions on its

1. Acts 31 of 1838, 22 of 1839, 4 of 1862 (except sections 26-35, 47-53), and Act 13 of 1865, a useful measure, carried by Sir H. Maine, with (*inter alia*) abolished grand juries. Certain other provisions relating to the criminal procedure of the Supreme Courts were contained in 9 Geo. 4 c. 74, which was repealed by Act 10 of 1875, with the exception of section 1, 7, 8, 9, 25, 26 and 56. It also repealed certain enactments (in Acts 24 of 1866 and 13 of 1869) relating to the High Court for the N.W. Provinces.

2. Except sections 97 and 98 (Act 10 of 1882), section 305, which were drawn by Mr. Hobhouse.

3. Stokes, Anglo-Indian Codes, Vol. 2, pages 3-4.

working, and thus at last give to India a single and complete Code of Criminal Procedure, and carry out, so far, the policy of providing a simple and uniform system of law for that country. The language and arrangement of Act 10 of 1872 were, for obvious reasons, departed from only so far as was necessary for the main purpose of the Code. But it was obviously impossible to reproduce the inartificial wording of many of the sections, and an arrangement according to which, for example, the provisions for the prosecution of crimes came before the provisions for their prevention, and the change (*i.e.* the written accusation of an offence) was dealt with after trials, appeal and execution.”

27. The Code of 1898 was a revision proposed for these reasons.¹ 1898 Code

“It has been usual to consolidate and amend the law relating to Criminal Procedure at the end of successive decades. Thus, the first Code of Criminal Procedure Act, 25 of 1861, was succeeded by Act 10 of 1872 and the latter was followed by Act 10 of 1882.

“Since 1882 there have been passed sixteen Acts² all relating to Criminal Procedure and many of them expressly amending the Code of 1882.

“In addition to this, several matters have been brought to the notice of the Government of India in regard to necessary amendments of the law, which have been deferred until the periodical amendment of the Code shall have been undertaken. The Law Reports also have shown many defects and difficulties in administering the law and occasionally contradictory interpretations by the High Courts in giving it effect.

“On these considerations the Government of India have determined again to consolidate and amend the law relating to Criminal Procedure. Such alterations as have been made in the present law are printed in italics, and the material amendments it is proposed to introduce are referred to in the notes on clauses given below. Where changes have been made in the numbering of existing sections, their former numbers have been given on the margin.”

28. The 1898 Code has been amended by numerous Acts of the Legislature. Of these, the most important were two Acts of 1923, the Criminal Law Amendment Act (12 of 1923) and the Code of Criminal Procedure Amendment Act, 1923

1. Statement of Objects and Reasons to the Code of Criminal Procedure Bill, 1897.

2. Act 3 of 1884; Act 10 of 1886, Act 5 of 1887; Act 15 of 1887; Act 1 of 1889; Act 5 of 1889; Act 13 of 1889; Act 3 of 1891; Act 4 of 1891; Act 10 of 1891; Act 12 of 1891; Act 3 of 1894; Act 10 of 1894; Act 4 of 1895; Act 5 of 1895; Act 5 of 1896 and Act 12 of 1896.

(18 of 1923). The genesis of Act 18 of 1923 dates as far back as 1914. In 1914, a Bill (No. 3 of 1914) was introduced in the Imperial Legislative Council, and was thereafter referred to the Local Governments and Administrations. Their opinions raised numerous queries. Meanwhile, in 1916 the Government referred this Bill and the opinions received thereon to a Select Committee (known as the Lowndes Committee). The Bill (as revised by this Committee) was again introduced in the Imperial Legislative Council in 1917. Some further suggestions for the amendment of the Code were received by the Government in the meanwhile. After the termination of the war, a new Bill was prepared in 1921, which was substantially the same as the one introduced in 1917. This Bill (No. 3 of 1921) was introduced in the Council of State on the 21st February, 1921, and was referred to a Joint Committee.

29. The Joint Committee submitted its report after a year (in September, 1922); and the Bill as revised by this Committee, with certain alterations made during the discussions in the Council of State in September, 1922 and in the Legislative Assembly in January and February, 1923, ultimately passed into law, and was enacted as Act 18 of 1923.

The other major amendment was in 1955, which is too recent to require detailed discussion at this place.

Special laws not dealt with in this Report

30. We would like to make it clear, that though various special laws contain provisions relevant to criminal procedure, this Report does not purport to deal with revision of those provisions.

Major problems

31. We shall now set out some of the major problems to which we had to devote considerable attention. We shall here merely enumerate them. These issues are—

- (a) separation of the judiciary and the Executive ;
- (b) abolition of the jury trial ;
- (c) simplification of the various categories of trials ;
- (d) Magistrates in Presidency Towns ;
- (e) abolition or retention of the ordinary original criminal jurisdiction of High Courts ;
- (f) the law of arrest ;
- (g) the law of search and seizure ;
- (h) the duty to give information about offences.

Problem of separation

32. The problem of separation has assumed both theoretical and practical importance in India during the last 20 years or so. The Constitution directs¹ that the State shall

1. Article 50 of the Constitution.

take steps to separate the Judiciary from the Executive in the public services of the State. As introduced originally,¹ article 39A of the Constitution sought to provide that the State shall take steps to secure that within a period of three years from the commencement of this Constitution, there is separation of the Judiciary from the Executive in the public services of the State. But later,² the time limit of three years was deleted, in view of the fact that it might not be possible to bring about the desired result within three years in the States which were not former Indian provinces. The Prime Minister also explained, that while Government was entirely in favour of separation, a time limit may produce enormous confusion in some parts of the country where it was very difficult to bring about separation.

33. In the field of criminal law, separation of the judiciary from the Executive broadly means the administration of the criminal justice by members of the judiciary who are independent of executive control. This general principle involves two consequences; first, that a Judge or a Magistrate who tries a case must not be in any manner connected with the prosecution or interested in the prosecution, and second, that he must not be in direct administrative subordination to anyone connected with the prosecution.³

34. So far as the first aspect is concerned, the principle is already recognised, to some extent, by section 556. The Explanation to that section, however, in so far as it provides that a Judge or a Magistrate shall not be deemed to be a party or personally interested, to or in any case by reason only that he is concerned in a *public capacity*, modifies the provision to some extent. Cases where the Magistrate has himself *directed* the prosecution,^{4,5} and cases where the Magistrate had taken a *direct* part in the investigation,⁶ apart, section 556 does not bar a Magistrate from trying a case merely because he has the slightest official dealing in the case. In fact, the Explanation seems to be intended to meet the consequences arising from the unavoidable incidents of the executive and the magisterial duties being united in one and the same person⁷.

35. Read with the illustration, the Explanation to section 556 seems to emphasise two aspects, namely, if a person has directed the prosecution of a person for an

1. Constituent Assembly Debates, 24th November, 1948, page 582.

2. Constituent Assembly Debates, 25th November, 1948, page 585.

3. Cf. the speech of Mr. Justice Meredith, quoted in (1949) 2 *Indian Law Review* 302.

4. See illustration to section 556.

5. See also *In re Het Lall Roy*, (1874) 22 *Sutherland Weekly Reports*, Criminal, 75, 76.

6. *Sudhama v. Q.E.*, (1895) I.L.R. 23 Cal. 328, 334.

7. Cf. *Emp. v. Basant Ram*, (1883) *All Weekly Notes* 181.

offence, he is disqualified² and so also he is disqualified if he otherwise takes an active part, for example, by dispersing an unlawful assembly and arresting its members.³ But, if his participation is merely formal,⁴ he is not disqualified.

Thus section 556 is subject to certain limitations, some of which may be usefully elaborated.

36. In particular, courts seem to have made a distinction between "directing" a prosecution on the one hand, and merely "authorising" a prosecution on the other hand.^{5 6}

Thus, a Magistrate in charge of the opium and excise administration of a district is not "personally interested" in the observation of the provisions of the Opium Act, merely because it is his duty to see the law relating to sale of opium enforced and maintained in his district; he is, therefore, not precluded from exercising jurisdiction in respect of offences against the said Act, because the words "personally interested" must refer to "some particular and immediately personal interest in the case and its results."⁷ A District Magistrate is not precluded under this section from trying an offence under the Police Act, merely because he is the head of the police.⁸ The fact that the District Magistrate controls the police does not, of itself, disqualify him from trying or inquiring into cases investigated by the police of his district.⁹

37. But, where the Magistrate as president of the octroi sub-committee directed the prosecution of an accused for evading the payment of octroi, the Magistrate was debarred from trying the case, even though the accused had consented to be so tried.¹⁰ A Magistrate is not disqualified from trying a case based on a private complaint which has not been filed under his direction and sanction, merely and solely on the ground that the validity of certain orders passed by him in his capacity as an Executive or Revenue Officer is directly put in issue and is likely to be challenged before him, and that the innocence or guilt of the accused considerably depends on the effect of such orders.¹¹

1. *Kharak v. Tarack*, (1883) I.L.R. 10 Cal. 1030.

2. *Girish Chundra Ghose v. Q.E.*, (1893) I.L.R. 20 Cal. 857, 865 (*Trevelyan & Rampini JJ.*).

3. See further, *Q.E. v. Chenchi Reddi*, I.L.R. 24 Mad. 238.

4. *Cf. Dasrath Rai*, (1909), I.L.R. 36 Cal. 869, 872.

5. See *Rameshwar Bhartia*, A.I.R. 1952 S.C. 405.

6. See also *Lorinda v. the Crown*, (1919) I.L.R. 1 Lah. 35, 38.

7. *In re Ganeshi*, (1893) I.L.R. 15 All. 192, 194 (F.B.).

8. *Q.E. v. Narain Singh*, (1900) I.L.R. 22 All. 340, 342.

9. *Maung Lat*, 1 Cr. L.J. 477.

10. *Emp. v. Bisheshar*, I.L.R. 32 All. 635.

11. *Mohandas*, 27 Cr. L.J. 1333, 1334; see also *Md. Abdul Khan Ahmed*. A.I.R. 1946 Cal. 303.

38. The observations of the Judges in the under-mentioned case¹ stress the evils of a combination of functions.

Separation would eliminate many of the controversies under section 556, by removing the functions of initiating or sanctioning prosecutions from the province of those who try the case.

39. The second aspect is the more important one, namely, a person administering criminal justice must not be subordinate to the Executive.

40. Some of the important aspects of the principle of separation were spelt out in the amendment moved by Mr. A. C. Dutt on the resolution of Babu Kishori Mohan Chaudhari on 4th April, 1922 in the Bengal Legislative Council. The Resolution was as follows :—

“This Council recommends to the Government that early steps be taken for the total separation of the judicial from the executive functions in the administration of the Presidency.”

Mr. A. C. Dutt moved an amendment that the following words be added at the end—

“That the said separation be affected in consonance with the following principles :—

(1) Officers appointed to perform executive duties in no case to perform judicial duties and *vice versa*.

(2) Officers appointed to perform judicial duties to be in no way subordinate to executive officers.

(3) The entire control and management of criminal judicial service, including the powers of promotions, transfers and punishment of judicial officers, be vested in the High Court.”

The amendment was lost, but the original resolution was put to vote and passed.²

41. The usual way³ of classifying the functions of Magistrates under the Code of Criminal Procedure and various other statutes is to divide them into three broad categories, namely—

Classifica-
tion of
functions of
Magistrates

“(a) Functions which are “police” in their nature, as for instance, the handling of unlawful *assemblies* ;

1. *Lopuri Domini v. the Assam Rly. and Trading Co.*, (1883) I.L.R. 10 Cal. 915.

2. See Government of Maharashtra, Report of the committee on the Separation of Judiciary from the Executive, (1947), page 9, para. 28.

3. See Government of Madras, Public (Separation) Department, G.O. Ms. No. 2304 dated the 24th September, 1952.

(b) functions of an administrative character, as for instance, the issue of *licences* for firearms, etc. etc ; and

(c) functions which are essentially judicial, as for instance, the trial of *criminal cases*."

The essential feature of the scheme for separation (it is stated)¹ would be, that "purely judicial functions coming under category (c) above are transferred from the Collector and magistrates subordinate to him, to a new set of officers who will be under the control not of the Collector but of the High Court. Functions under (a) and (b) above will continue to be discharged by the Collector and the Revenue Officers subordinate to him."

Functions of
Magistrates
elaborate
discussion

42. In order to obtain a more concrete picture, however, it is, necessary to deal with the functions of Magistrates more elaborately. An idea of the variety of their functions can be obtained from the numerous statutory powers and duties of the District Magistrate (and other Magistrates). In most of these cases, he acts as an "officer" or "authority", and not as a "court". These functions could be broadly grouped as :—

(a) functions of the District Magistrate as head of the police, or otherwise in connection with the police force, (e.g. an order passed) under section 44 of the Bombay Police Act.²

(b) order by the District Magistrate prohibiting certain petition writers from carrying on their business within the precincts of the district court,³

(c) order by a Magistrate under section 17, Police Act, 1861, appointing special constables⁴, or order sanctioning prosecution under section 4 of that Act⁵;

(d) order by an Additional District Magistrate as *persona designata*, e.g. an order in exercise of special powers conferred by an enactment, to carry out its provisions and untrammelled by any inquiry.⁶

(e) other Executive orders, e.g.—

(i) order by District Magistrate for registration of a Sarai under section 3, Sarais Act (22 of 1857).⁷ "The District Magistrate as the chief officer charged with the executive administration of a district in criminal matters can under no stretch of

1. See Government of Madras, Public (Separation) Department, G.O. Ms. No. 2304 dated the 24th September, 1952.

2. *In re Pandurang*, (1910) 11 Cr. L.J. 705; 8 I.C. 747; 12 Bob. L.R. 1029.

3. *Sukdeo Prasad*, (1902), A.W.N. 175.

4. *Parmeshar v. Emp.*, A.I.R. 1917 Oudh 170.

5. *Chotey Lal v. Chhedil Lal*, A.I.R. 1923 All. 149 (Mears C.J. and Piggott J.).

6. *Hazari v. Emp.*, A.I.R. 1939 All. 124, 127, and cases cited therein.

7. *Ghulam Sadid-uddin v. Emp.*, A.I.R. 1941 Lah. 71, 72 (Din. Mohamad J.).

language be treated as a court. His functions as an executive officer are poles asunder from his functions as a judicial officer."

(ii) order of requisitioning.¹

(iii) order under section 45(3) of the Code of Criminal Procedure, appointing a person as head-man of a village.^{2,3}

(f) licensing, for example—

(i) order by the District Magistrate under the rules for licensing and controlling places of public entertainment framed under section 39A, Bombay District Police Act, 1890⁴

(ii) similar functions of the District Magistrate, e.g. under the Police Act ;

(g) powers concerning law and order, e.g.—

(i) tendering pardon,⁵

(ii) orders for deposit of security by a newspaper,⁶ or orders of forfeiture of security,^{7,8,9}

43. It is in this background that the concept of separation has to be understood. In its essence, separation means separation of judicial and executive functions in such manner that the judicial functions are exercised by the judiciary *which is not controlled by the executive*. This would ensure that influence of the executive does not pollute the administration of criminal justice.

44. Since the broad question of separation is no longer a controversial issue, it is unnecessary to deal in detail with its history. An excellent historical discussion is contained in the Report of the Bombay Committee,¹⁰ Developments that have taken place since the submission of the Report of that Committee (apart from the adoption of the Constitution) are mainly in the nature of Reports of Committees or Commissions appointed in several States on the subject, and legislation or executive orders passed or proposed as a

1. *Ujamshi v. Emp.*, A.I.R. 1946 Bom. 533, 535(F.B.).

2. *Salet Singh*, A.I.R. 1948 All. 114.

3. *Damma*, (1907) I.A.R. 29 All. 563, 564 (P.C. Banerji J.).

4. *Manghanmal v. Emp.*, A.I.R. 1939 Sind. 340, 341.

5. Section 337(1), main paragraph.

6. *Agasied Jalauddin v. K.E.* (1913) 17 C.W.N. 1245.

7. See section 3(1) (proviso, Indian Press Act, 1910 (1 of 1910) considered in *Annie Besant v. Government of Madras*, (1916) I.L.R. 39 Mad. 1085, 1106, 1112.

8. *Gulzar v. Emp.* A.I.R. 1918 Lah. 219.

9. See also *Mahomed Ali*, (1913) I.L.R. 41 Cal. 466, 484, 485 (F.B.). (Jenkins C.J.).

10. Government of Bombay, Report of the Committee on the Separation of the Judiciary from the Executive, 1947 (1964 Reprint), pages 3-13.

result of such Reports or otherwise. It is not necessary to encumber this part of the Report with a discussion of those developments. Case-law on the subject is also developing.¹

Questions raised by separation in relation to the Code

45. For the purpose of considering the question of separation *vis-a-vis* revision of the Code of Criminal Procedure, one has necessarily to consider certain questions, namely,

(i) should separation be effected by legislation or by executive orders ;

(ii) if it is to be effected by legislation, should it be done by a Central legislation, or should it be left to the States ;

(iii) what should be the authority to exercise control over Magistrates exercising judicial functions ;

(iv) what powers under the Code should be given to the Magistrates exercising judicial functions and what should be left to others, and what powers, if any, should be allotted to both.

Legislation necessary for separation

46. On the first question,² we think that legislation must be resorted to for achieving separation. We are aware that separation has been effected in some States by executive orders. But this method suffers from certain drawbacks. The legislature would have no opportunity of discussing the scheme. The executive orders can have no legal force, so that if an "Executive" Magistrate decides, say, to exercise judicial powers, complications may arise³. As an experimentation, separation by executive orders has certain merits, no doubt. But once the stage of experimentation has passed, separation must take legislative shape.

The trend of recent developments in some States has also been in that line, as evidenced by the Punjab Act,⁴ and by the Bill which was introduced for the Union Territory of Delhi,⁵ and by the Bill recently introduced in West Bengal.⁶

Separation whether to be by Central Law

47. The second question⁷ is more difficult one. The Law Commission had, in an earlier Report, expressed⁸ its view in these words :—

"We are of the view that this is a matter on which legislation by Parliament is necessary. Such legisla-

1. Cf. paragraph 46, *supra*.

2. Paragraph 45(i), *supra*.

3. See the decisions in—

(i) A.I.R. 1959 Ker. 46.

(ii) *State v. G. Subbегowela*, (1962) 2 Cr. L.J. 711 (Mysore).

4. The Punjab Separation etc. Act, (1964) (Punjab Act 25 of 1964).

5. The Delhi and Himachal Pradesh Separation Bill, 1966 (Lok Sabha Bill of 1966). The Bill lapsed on the dissolution of the Lok Sabha.

6. The West Bengal Separation etc. Bill (August 1967).

7. Paragraph 45 (ii), *supra*.

8. 14th Report (Reform of Judicial Administration), Vol. 2, pages 859-860, para 22.

tion will have the advantage of bringing into operation throughout the country a uniform system of separation and force the pace of its introduction in States which have delayed and fallen behind."

48. In deciding the question whether separation should be introduced by Central Law or by States, we were faced with various considerations.

Three important aspects were considered in favour of State Legislation. First, separation involves changes in the magisterial set up and in the number of courts, and necessitates several administrative arrangements. Secondly, separation entails the amendments of Central Acts (besides the Code of Criminal Procedure, 1898), and some State Acts, and it would not be possible to carry out those amendments by Parliamentary legislation, particularly because some of those Central Acts and most of the State Acts fall within the State List. Thirdly, a decision was taken at the Law Minister's Conference¹ in 1960 that whatever measures are suitable to local conditions be adopted, and Parliamentary legislation is not needed.

49. We gave our anxious consideration to these aspects.² It appeared to us, that though the actual implementation of separation may involve many administrative arrangements, yet it would be desirable to have a uniform pattern of magistracy and control over them, for all the areas to which the Code applies. Amendment of other Central Acts and State Acts will, of course, have to be undertaken by the States.³ Further, in the States where separation has been already introduced but on lines different from those which we are recommending, the process described will have to be undergone again. The demands of uniformity are, in our opinion, paramount to these difficulties, and it should be possible, by fixing a sufficiently late date for commencement of the Bill which may be introduced on the subject, to give the States sufficient time to plan the administrative arrangements as well as the legislative amendments referred to above.

50. As regards the third question—that is, the *authority* that will exercise control over the Magistracy—there are several patterns,⁴ from which we have to choose.

1. Proceedings of the Law Ministers' Conference, held at Srinagar on 28th June 1960.

2. Paragraphs 47-48, *supra*.

3. Paragraph 48, *supra*.

4. See discussion relating to section 17(1).

Allocation
of functions
between
Judicial and
Executive
Magistrates

51. As regards the fourth question—powers of each category of Magistrates and the pattern of the Magistracy—the Law Commission had, in an earlier Report,¹ recommended adoption of the Bombay pattern (subject to certain modifications). After that Report was submitted, the Punjab Act has been passed.² While the Punjab Act follows certain provisions of the Bombay Act, it differs from the Bombay Act in certain other respects, both as regards the nomenclature of and control over the magistracy, and as regards the allocation of functions between Executive and Judicial Magistrates.

Patterns of
separation

52. Thus, at present there are three main patterns of separation (introduced by statute, or otherwise), namely,—

- (1) The Bombay pattern ;
- (2) The Madras pattern ;
- (3) The Punjab pattern.

(The Bombay and Madras patterns have been described in the earlier Report.³ The broad features of the Punjab pattern will be indicated wherever necessary).

Allocation
of powers
in each
pattern

53. The allocation of powers between the Executive Magistrates and Judicial Magistrates is a matter which has been tackled in different ways in different States. To give one example, the powers of ordering the furnishing of security under sections 108 to 110 of the Code have been assigned in Bombay and Punjab to Executive Magistrates. In Madras,⁴ they have been assigned *primarily* to Judicial Magistrates, but Executive Magistrates have been given a concurrent power, only to provide for all contingencies.⁵

To take another example, powers under section 164 of the Code are assigned, in Bombay, to both classes of Magistrates, and, in Punjab, to Executive Magistrates only, while in Madras they are assigned to Judicial Magistrates only.

54. These divergencies are understandable; it is not always easy to classify a function as judicial or executive, even theoretically. Moreover, even where a classification is in theory possible, practical considerations (such as the need for urgent action in emergency), might make it advisable to give concurrent jurisdiction to both classes of Magistrates.

1. 14th Report, Vol. 2, pages 859-869, para. 22.

2. The Punjab Separation etc. Act., 1964 (Punjab Act 25 of 1964).

3. 14th Report, Vol. 2, pages 851-852, paras. 6 and 7, and Annexure at pages 861-863, showing allocation of functions.

4. Cf. the views expressed in 14th Report, Vol. 2, page 859, para 22.

5. See Government of Madras, G.O. Ms. No. 2304 dated 24th September, 1952, paragraph 19(3) and Schedule, Item 18.

55. The broad considerations which weighed with the framers of the Bombay Act seem to be, that powers other than those of trial of offences should be left to Executive Magistrates, even where the recording and sifting of evidence and a decision thereon are required.¹ The Punjab Act also seems to proceed on the same pattern² as is illustrated by the amendments made in the Punjab in sections 107 to 110, 127 to 132, 133, 143, 144, 145, 147, 155, 190 etc. It is true that both in Bombay and in the Punjab, certain powers are kept with both categories of Magistrates, such as powers under sections 94, 95, and 96(2). But the principal reason for adopting this course seems to be, that most of these powers are in the nature of "ancillary" powers, which may be needed by *any Magistrate*, whatever be the function he is performing.^{3,4} That is because Magistrates who are "Executive" Magistrates, nevertheless, continue to be "Courts"⁵ for several purposes. The distinction between such concurrent powers under the Bombay and Punjab Acts (on the one hand), and the concurrent jurisdiction under the Madras pattern (on the other hand), is this:—in Bombay and Punjab, the concurrent powers would not be exercised in *the same case*, so that there is no conflict of jurisdiction.⁵ The Madras pattern is somewhat different.

Allocation
under
Bombay and
Punjab
schemes

56. The Madras scheme has been designed as to operate within the frame work of the Code without statutory amendment, and without much change in the nomenclature of Magistrates. The broad principle⁷ on which the Madras scheme is based, is that matters which involve the *recording and sifting* of evidence are strictly within the purview of Judicial Magistrates. But concurrent jurisdiction is provided in for some cases. Thus, powers under Chapter 9, (sections 127 to 132A) and Chapter 11 (section 144) are kept with both Judicial and Executive Magistrates but judicial Magistrates shall exercise them only in emergency and only until an Executive Magistrate is available. Conversely, powers under sections 108 to 110 are assigned to Judicial Magistrates, but Executive Magistrates are given concurrent jurisdiction to provide for all contingencies. Again, in cases under section 145, the initiation of proceedings will be before an Executive Magistrate, but, if it is necessary to hold an inquiry, proceedings will be transferred to Judicial Magistrates.⁸⁻⁹

Allocation
under
Madras
scheme

1. Section 164 as amended in Bombay is an exception to this.

2. Section 88 (6c) as amended in the Punjab is an exception to this.

3. Sections 98 and 100 are possible exceptions to this.

4. Sections 60 and 61 are also left undisturbed for the same reason.

5. Sections 6, 6A and 17B, Bombay and Punjab.

6. Section 10 as retained in Bombay and Punjab and section 98 as retained in Bombay and as amended in Punjab are exceptions to this.

7. Government of Madras G.O. Ms. No. 2304 dated 24th September 1952, paragraphs 3 and 17, and Notes thereto, para. 2(1).

8-9. Government of Madras, G.O. Ms. No. 2304 dated 24th September, 1952 para 20 as amended by G.O. Ms. No. 2993 dated 30 August 1961.

57. Another special aspect of the Madras scheme is that, with reference to section 155, in non-cognizable cases, both Executive and Judicial Magistrates can order an investigation, and the final Report is sent to the Magistrate—(Executive or Judicial); who ordered the investigation.¹ The “charge-sheet”, however, can be sent only to the Judicial Magistrate, who alone can take cognizance² on the report of the police officer (or on complaint). Lastly, Executive (as well as Judicial) Magistrates can take *cognizance* under section 190(1)(c),³ though the former are not competent to hold trial of offences.

Essence of
separation
present in
each
pattern

58. Notwithstanding these points of difference, it must be stated, that the *essence of separation* is present in all the patterns. The primary object with which a Magistrate is constituted, is the trial of offences⁴ (under section 28). That power has been assigned in all the patterns to independent Magistrates.

It is unnecessary at this stage to discuss the position in detail as to how far separation has been implemented by statute in each State or Union Territory.⁵

West Bengal
Scheme

59. While this report was under preparation, a Bill was introduced in the West Bengal Legislative Assembly for carrying out separation.⁶ The broad principle on which separation is proposed in that Bill⁷ seems to be this; that only those powers which relate to inquiry into or trial of offences should be assigned to the Judicial Magistrates, and other powers be left to the Executive Magistrates.

60. The West Bengal Bill also gives a list of concurrent powers.⁸ Some of these powers are incidental to the main powers respectively allocated to each category of Magistrates. But some—such as those under sections⁵ 164 and 167—are “concurrent” in the real sense.

1. Government of Madras, G.O. Ms. No. 2304 dated 24th September 1952, para. 21(2) and Schedule, Item 24.

2. Government of Madras G.O. Ms. No. 2304 dated 24th September, 1952, paragraph 21(1), and Schedule, Item 24.

3. Government of Madras, G.O. Ms. No. 2304 dated 24th September, Schedule Item 29.

4. Cf. *Emp. v. Noor Mohmed*, A.I.R. 1928 Sind 1, 4.

5. Separation has been introduced in Mysore by the Code of Criminal Procedure (Mysore Amendment) Act, 1965 (Mysore Act 13 of 1965).

6. The West Bengal Separation of Judicial and Executive Function Bill, 1967 (Calcutta Gazette Extraordinary, dated August 23, 1967).

7. See the Statement of Objects and Reasons, to the West Bengal Bill, para 3.

8. The First Schedule, as proposed to be inserted by the West Bengal Bill shows at a glance the powers of each category of Magistrate.

61. The scheme of allocation of functions proposed in West Bengal has been thus described :—¹

“The Judicial Magistrates will primarily deal with cognisance, investigation, inquiry into and trial of any offence under the Indian Penal Code or under any other local or special law, while the Executive Magistrates will be mainly concerned with prevention of offences and other executive and administrative functions.”

62. Another interesting legislative device adopted in the West Bengal is, that while certain sections of the Code have been specifically amended by prefixing the word “Judicial” or by proposing similar verbal amendments, at the same time the First Schedule (as proposed to be added to the Code by the Bill) contains a list of sections, powers whereunder are given to each category of Magistrates or to both categories.

The third feature is the provision² for Sub-divisional Magistrates, both Executive and Judicial.

63. Another major change to be considered is the abolition of jury trial. This question has been considered by the Law Commission in an earlier Report,³ wherein a recommendation has been made for abolition of the system. The principal reasons for recommending abolition were—

(a) The verdicts of the jury were often influenced by extraneous considerations. They did not satisfy the test of fairness, and did not ensure justice in its true sense.

(b) It was difficult to get jurors who could objectively evaluate the evidence for arriving at a fair and unbiased verdict.

(c) Many persons got themselves chosen as jurors only for the sake of remuneration and illegal gratification.

(d) An accused convicted on a trial by jury had only a limited right of appeal.

(e) Trial by jury took longer time than trial by a Judge. Being untrained persons, jury-men were naturally slow in appreciating the evidence and in following arguments.

(f) Practical experience of the system was not favourable.

It is unnecessary to discuss this matter further at this stage. The changes to be made can be considered when the relevant sections⁴ are considered.

1. Statement of Objects and Reasons to the West Bengal Bill, para 3.

2. Sections 13 and 13A, as amended or inserted by the West Bengal Bill.

3. 14th Report, Vol. 2, page 873.

4. Sections 267 *et seq*, which are outside the scope of this Report.

64. At first sight, the modes of trial as provided in the Code may appear to be numerous. Proceedings by way of, or preliminary to, the trial of offences could be enumerated as follows :—

A. Magistrates' Courts—

Preliminary inquiries—

(1) Committal proceedings instituted on a police report (Chapter 18).

(2) Committal proceedings instituted otherwise than on a police report (Chapter 18).

B. Magistrates' Court—Trials in the Mofussil

(1) Trial of summons cases (Chapter 20).

(2) Trial of warrant cases instituted on a police report (Chapter 21).

(3) Trial of warrant cases instituted otherwise than on police report (Chapter 21).

(4) Summary trial, with some variations in appealable and non-appealable cases (Chapter 22).

[Note:—Magistrates empowered under section 30 have higher powers, but there is no special procedure prescribed for them. They follow the same procedure as would be followed by ordinary Magistrates of the first class in the trial, except that by virtue of their higher powers, they can themselves dispose of many cases which otherwise would require to be committed.]

C. Magistrates' Courts—Presidency Towns

Trials in the Courts of Presidency Magistrates, with variations in appealable and non-appealable cases. (Chapter 25).

D. Courts of Session

(1) Trial in the Court of Session by jury (Chapter 23).

(2) Trial in the court of Session by the Judge alone (Chapter 23).

E. High Courts

(1) Trials before the High Court with the aid of jury (Chapter 23), and

(2) Trials before the High Court of cases transferred to it, which may be tried without jury (Chapter 23).

65. The multiplicity of modes of trial is, however, more apparent than real.¹ Commitment proceedings for an offence and trials of that offence are really two different

1. See also 14th Report, Vol. 2, page 719, para 16.

stages of the same case. Most High Courts do not exercise ordinary original criminal jurisdiction. And the distinction between cases instituted on police report and cases instituted otherwise is a recent innovation, introduced by the Amendment Act of 1955. In practice the kinds of trials usually met with in the Mofussil are trial of warrant cases instituted on police report, trials before courts of Session, and trial of summons cases. The difference in procedure (in these three cases) is attributable mainly to the gravity or nature of the offence to be tried.

66. The question of Magistrates in Presidency towns requires some discussion. It is sometimes argued, that the institution of Presidency Magistrates should be abolished. In earlier Report of the Law Commission,¹ the view had been expressed, however, that the institution of Presidency Magistrates had been a useful one.

67. The question of abolishing the distinction between Presidency Magistrates and other Magistrates was raised by non-official members before the Joint Committee² which considered the 1922 Bill. The Committee did not think it proper to alter the provisions. It, however, expressed a hope, that at a later date a special Committee might undertake a full inquiry into the status, powers and procedure of Presidency Magistrates.³

68. It should also be noted, that all the Judges of the Calcutta High Court and the majority of the Judges of the High Court of Madras had expressed their view when the Bill which led to the Act of 1923 was on the anvil, (and this was noted by the Joint Committee of 1922 also) that the system should be maintained,⁴ though some of them did say that recruitment should be improved.

69. It may be noted, that the Constitution⁵ makes special provisions regarding appointment of the Chief Presidency Magistrates and Additional Chief Presidency Magistrates. As regards other Presidency Magistrates, it is only a question of time before the power ultimately pass to the High Courts.⁶ Only persons of special merit would be appointed as Presidency Magistrates. For these reasons, *we do not recommend* abolition of this special category of Magistrates.

1. 14th Report, Vol. 2, page 801, para. 11.

2. Report of the Joint Committee dated 26th June, 1922, under clause 94 (section 364).

3. No such Committee seems to have been appointed.

4. Legislative Department, Assembly & Council-A, Proceedings, October, 1923, No. 1-54, Opinions dated 5-3-1918 and 14-12-1917, Paper No. IV, Opinion No. 13 (Clause 89), and Paper No. IV, Opinion No. 16.

5. Article 233(1) read with Article 236(a), Constitution of India.

6. Cf. section 18(5) of the Code as amended in Bombay, and also article 237 of the Constitution of India.

(Certain changes regarding recording of evidence etc. by Presidency Magistrates were recommended, in an earlier Report.¹ But these are matters of detail).²

70. In fact, there may be certain advantages in having a special class of Magistrates even in places other than Presidency towns—a matter to which we shall advert later.³

71. Another matter of importance is the ordinary original criminal jurisdiction of High Courts. The subject was discussed in an earlier Report of the Commission,⁴ and, for the reasons set out in that Report⁵ at another place, it was suggested that the ordinary original criminal jurisdiction of the Calcutta High Court be abolished. (The High Courts of Bombay and Madras no longer exercise this jurisdiction). The matter requires careful consideration, and will be dealt with under the appropriate section.⁶

Section-wise
discussion

72. We shall now proceed to an examination of the Act section by section.

Section 1

73. Under section 1 of the Code, the main question to be considered is the territorial application of the Code in relation to excepted persons. We do not recommend any changes in this respect although we examined the matter in some detail.⁷

Sections 2
and 3

74. Section 2 is already repealed.

Section 3 has two sub-sections, containing rules for the construction of certain expressions which are used in old enactments and which refer to Magistrates or Judges under the phraseology used in the pre-1898 Codes.

Since the nomenclature of Magistrates is proposed to be altered,⁸ it will be desirable to add a similar provision for the construction of expressions used in the *existing enactments*, where those expressions refer to Magistrates by their *existing nomenclature*.⁹

Section 4(1)
"Complaint"

75. In view of the conflicting decisions and uncertainty prevailing¹⁰ in respect of certain matters relating to the definition of "complaint" and the connected provisions in sections 173, 190(1) (b), 207-A, 251-A, it is desirable to *clarify*

1. 14th Report, Vol. 2, pages 827-828.

2. See section 362.

3. See paragraphs 101-103, *infra*.

4. 14th Report, Vol. 2, page 714, para. 2.

5. 14th Report, Vol. 2, page 1201, para. 7, last sub-para.

6. See discussion regarding section 28.

7. For detailed discussion, see Appendix 2.

8. See section 6, as proposed and section 6A, as proposed.

9. See section 3, as proposed.

10. For detailed discussion, see Appendix 3.

the position as far as possible. (Some parts of the controversy are due to a misreading of the sections, and cannot be cured by amendment). The solution which *we recommend* is—

(i) to clarify in section 4 (in the definition of “complaint”) that reports made by the police on an authorised investigation of non-cognizable cases are complaints, thus solving the points¹ relating to the definition of “complaint” and section 200, and the points relating to section 190 in respect of non-cognizable offences ;

(ii) to keep sections 251-A and 207-A as they are, as the observations in *Pravin Chandra’s* case² must be read along with the facts of that case ; and

(iii) to *amend* section 190(1) (b) (if necessary) to cover specifically reports under other sections of the Code or under other laws.³

76. With reference to definition, the following suggestion⁴ has been made by the Bar Council, Madras :—

Section 4(1)
and defini-
tion of
Court

“The Indian Penal Code defines ‘Court of Justice’ and the Evidence Act defines ‘Court’. The word Court occurs in section 195(1) (b) and (c). The question as to how far a tribunal created under various statutes is a court within the meaning of section 195 crops up quite often. In 1956 S.C.J. 155, the Supreme Court has given a judicial meaning of Court as a body which gives a definitive judgment. An offence of perjury or forgery of a document produced before a *Tribunal in relation to a proceeding* before it cannot be proceeded against by the Tribunal, but can be done only by the individual constituting the Tribunal.

“This anomalous position may be rectified by defining the word ‘Court’ in conformity with the definition in the Evidence Act.”

77. We examined the case-law on the subject. The decisions of the Supreme Court on the point are noted below :—^{5 6 7}

Certain decisions of High Court also review the case-law.^{8 9}

1. For the various points, see Appendix 3.

2. *Pravin Chandra v. State*, A.I.R. 1965 S.C. 1185.

3. To be considered under section 190(1)(b).

4. F. No. F. 3(2)/55-L.C. Pt. III, S. No. 52.

5. *Brajnandan*, (1955) 2 S.C.R. 1955; A.I.R. 1956 S.C. 68.

6. *Jagan Nath*, (1963) S.C.R. 416.

7. *Virinder v. State of Punjab*, (1955) 2 S.C.R. 1013; A.I.R. 1956 S.C. 153.

8. *Haricharan*, 44 C.W.N. 536.

9. *Emp. v. Hayat Fateh Din*, A.I.R. 1948 Lah. 184, 189, para. 18.

Recently, the cases as to the expression 'Court' have been reviewed by the Supreme Court in the context of the Contempt of Courts Act.¹

We think, that the definition in the Evidence Act may not be appropriate for the Code of Criminal Procedure. Case-law shows the elasticity of the expression 'Court'. A neat and precise definition may not be possible. No change is, therefore, recommended.

Section 4(1)
(i) "High Court"

78. In section 4(1)(i) the definition of "High Court" expressly mentions the Calcutta High Court in relation to the Union Territory of Andaman and Nicobar islands. There are now, apart from those islands, many Union territories to which the jurisdiction of the High Courts of neighbouring states has been extended.² It does not appear to be correct to mention only one Union territory, without mentioning the others. The portion referring to the Andamans should be omitted.³

The definition also includes such an "officer" as the State Government may appoint in this behalf, in areas in respect of which under law the highest court of criminal appeal has not been established. This part of the definition was added in 1882 to empower the Governor-General in Council to appoint such officers in outlying territories where no such court had been established by law.⁴ It does not appear necessary to disturb it.

Section 4(1)
(k), "Inquiry"

79. In section 4(1)(k) the definition of "inquiry" is slightly ambiguous. It is the word "inquiry" which should be linked with the words "conducted under this Code". The inter-position of the words "other than a trial" creates an ambiguity; these words require to be segregated, from the word "conducted", by a suitable amendment.⁵

Section 4(1)
(l), "Investigation"

80. Section 4(1)(2) defines "investigation". It appears unnecessary to add the word "Judicial" before the word "Magistrate", in this definition.

Section 4(1)
(m), "Judicial proceeding"

81. Section 4(1) (m) defines a "judicial proceeding". The importance of this definition decreased after the deletion of the word "judicial" in section 476(1). (In the Code of 1872, section 297, it was used in relation to revision also.)

82. The expression "judicial proceeding" has again been used in section 479-A(1). No change is necessary in this definition.

1. *Jugal Kishore v. Sitamarhi Central Coop. Bank*, A.I.R. 1967 S.C. 1494 (October issue).

2. Cf. 32nd Report of the Law Commission, paragraph 35, for details.

3. See section 4(1), definition of "High Court", as proposed.

4. Stokes, *Anglo-Indian Codes*, (1888), Vol. 2, page 5.

5. See section 4(1) definition of "inquiry", as proposed.

83. Section 4(1) (p) defines an "officer in charge of a police station". It has been suggested by the Inspector-General of Police of a State,¹ that a proviso should be added to the effect that a Sub-Inspector on duty in the interior (i.e. while he is away on tour from the police station) is an officer in charge. It appears to us, that such a change is not practicable, as it would mean duplication of "Officer in charge of police station". The scheme of the Code is, that there is only one officer in charge of the police station. As the scheme stands, when the officer in charge is out, some person must be in charge of the police station. He has to maintain a record of the First Information Report² and other records. Declaring some other officer as "officer in charge" might create complications.

We may also note, that the question of police strength was discussed in an earlier Report.³ But no legislative amendment is necessary.

84. Section 4(1) (q) defines a "place" as including a house, building, tent and vessel.⁴ It does not include a vehicle. It has been held by the Supreme Court,⁵ that a motor vehicle is not a "place" within the meaning of sections 102 and 103 of the Code, so that the formalities laid down by those sections need not be observed when a motor vehicle is to be searched.

The decision has revealed a lacuna in the definition of "place", because, as a motor vehicle is not a place, the power of search under various other sections which authorise searches of a "place"⁶, would not authorise searches of motor vehicles. We, therefore, think that it is desirable to include vehicles in the definition of "place".⁷

85. With reference to section 4(1) (r) which defines "pleader", a suggestion to prohibit unlicensed persons from "pleading"⁸ was considered by us. This does not require a change in the law. It is a question of enforcing the law as to Advocates and the law prohibiting touts.⁹

86. The definition of "pleader" can, however, be simplified;¹⁰ it is unnecessary to enumerate the various classes of practitioners.

1. F. 27/3/55-Judl. II, (Home Ministry), Appendix I, Item No. 1.

2. Section 154.

3. 14th Report, Vol. 2, Page 737, Paragraph 14.

4. As to "vessel", see section 48, Indian Penal Code.

5. *Bhagwanbhai v. State*, (1963) 3 S.C.R. 386, 392.

6. For example, sections 98(1) and 165(1).

7. See section 4(1)(q), as proposed.

8. F. 27/3/55-Judl. II (Home Ministry File) Appendix 1, Item No. 2.

9. As to how far the definition of "pleader" in the Code applies to section 126 Evidence Act, see note in (1898) 2 C.W. N. (Journal) 245, 246, discussing history of section 126 also.

10. See section 4(1)(r), as proposed.

Section 4(1)
(w),
"warrant
case"

87. Section 4(1) (w) defines a "warrant case" as a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding one year. Cases relating to other offences are summons cases. In an earlier Report,¹ a recommendation was made for the substitution of "three years" for "one year" in this definition, that is to say, as a general rule, all offences which do not carry punishment of imprisonment for more than three years should (according to that recommendation) be triable under the summons case procedure.

88. The reasons for which this recommendation was made (as stated in that Report) can be thus summarised—

(i) The procedure of summons cases leads to expeditious disposal of cases.

(ii) The creation of numerous statutory offences during recent times which are, for the most part technical in nature and involve nothing more than a violation of or a non-compliance with a rule or regulation, calls for a speedier determination of those cases.

(iii) Even under the Indian Penal Code there are several offences of the same kind, but differing in degree, which at present have different modes of trial.

(iv) The distinction between summons cases and warrant cases is arbitrary. An example of this arbitrary distinction is the position regarding offences under sections 168 and 169, Indian Penal Code. Another example is furnished by section 342 on the one hand, and sections 343 and 344, Indian Penal Code, on the other. The essential ingredients of wrongful confinement are the same in all these cases; only the duration varies. Yet, the offence under section 342 is a summons case, while the offences under sections 343 and 344 are warrant cases.

(v) There is no prejudice to the accused by the expansion of the category of summons cases as recommended.

89. We have, however, reached a different conclusion. In the first place, expansion of category of summons cases, as recommended in the earlier Report, would bring in numerous offences, of which some are really serious,—for example, offences under sections 136, 153A, 295A, 419, 465 etc., Indian Penal Code—and we are not convinced that there will be no prejudice to the accused in such cases. Secondly, the objection that the division is at present arbitrary would survive even if the limit is raised to three years, because the dividing line will still be dependent on an arbitrary period (period of maximum imprisonment). Thirdly, some of the offences—such as those under sections

1. 14th Report, Vol. 2, Pages 723-724, paragraphs 30 to 32.

153A, 295A and 465, Indian Penal Code—involve nice questions of intention or interpretation of facts, and the warrant case procedure, whereunder a precise charge is to be formulated, is, in our view, preferable for such offences. We are not, therefore, carrying out the recommendations made in the earlier Report.

90. With reference to “warrant cases” following suggestion¹ has been made by a High Court—

Section 4(1)(w) Definition “warrant case” Suggestion of High Court

“The definitions of summons cases and warrant cases should be re-classified, bearing in mind the gravity of the offences in terms of punishment, and the extent to which the *mens rea* or moral turpitude is involved. (See the recommendations of the Law Commission).”

This point has already been considered.²

91. In section 4(2), the portion referring to definitions in the Indian Penal Code is not in line with recent usage. But, as the whole Code is not being re-cast and only an amending Bill is being proposed, we would not disturb it.

Section 4(2)

92. Section 6 is proposed to be *shortened*,³ so as to deal with Magistrates separately.

Section 6

93. It has been suggested,⁴ that Third Class Magistrates should be abolished. We are unable to accept it. The institution may be necessary for purposes of training.

Section 6 and Third Class Magistrates

94. At this stage, the question of the pattern of the Magistracy falls to be considered.⁵

Section 6A (New) and the pattern of Magistracy

95 In an earlier Report⁶ the Bombay pattern of separation was recommended to be adopted in general. But, so far as the specific topic of structure of the Magistracy is concerned, we have to take into account several matters. We discuss below the position with reference to the Mofussil and Presidency towns.

96. In Bombay, (section 6A), the Judicial Magistrates of the three classes, as in the Code, are retained without a change of nomenclature. Judicial Magistrates appointed under section 14 are designated in Bombay as Special Judicial Magistrates. The District Magistrate is no longer a Judicial Magistrate, in Bombay.

Judicial Magistrates in the Mofussil

1. F. 3(2)/55-L.C. Pt. III, S. No. 31.

2. See discussion relating to section 4(1)(w) “Warrant cases”.

3. See sections 6 and 6A (as proposed).

4. F. 3(2)/55-L.C. Part I, S. No. 49, and F. 27/3/55 Judl. II (Home Ministry File), Appendix 1, Item No. 3.

5. See section 6A, as proposed.

6. Cf. 14th Report, Vol. 2, Pages 859-860, Para. 22.

In the Punjab scheme (section 6A), the Chief Judicial Magistrate (who takes the place of the District Magistrate in this respect) is added. Magistrates of the first class and second class are retained, but the word "Judicial" is prefixed to them. There are no Magistrates of the third class in the Punjab scheme. Special Judicial Magistrates are mentioned in Punjab, as in Bombay.

In the Madras scheme, the District Magistrate is retained as a Judicial Magistrate. The Sub-divisional Magistrate is also retained as a Judicial Magistrate of the first class. Besides, there are the three classes of Magistrates in the Judicial category. Where necessary, "Additional, First class Magistrates" can be appointed under the Madras scheme.

Executive
Magistrates
in the
Mofussil

97. In Bombay (section 6A), the District Magistrate, the Sub-divisional Magistrate and the Taluka Magistrate are the Executive Magistrates. But there are no "classes" amongst them. There are no Executive Magistrates of the first and second classes. The Bombay scheme also provides for "Special Executive Magistrates".

In the Punjab scheme (section 6A), the District Magistrate and the Sub-divisional Magistrate are retained as Executive Magistrates of the first class and second class respectively. But, besides them, there can be appointed other Executive Magistrates of the first or second class. Two "classes" of Executive Magistrate are, thus, contemplated in the Punjab. There are no "Special Executive Magistrates" in the Punjab.

In the Madras scheme, the Collector, the revenue officers and many of the Tashildars are also designated as Executive Magistrates of the appropriate class. (The Collector retains some of the powers of the District Magistrate, but is called the Additional District Magistrate). Thus, under the Madras scheme, the present nomenclature of the Code has been retained, and the dichotomy of Executive and Judicial Magistrates has been introduced without altering that nomenclature.¹ (It is unnecessary to discuss, at this place, the provisions regarding *subordination* of Magistrates in each scheme).

Magistrates
in Presi-
dency
towns

98. In the Presidency towns, there are no District Magistrates, even now. Moreover, the Collector was never a Magistrate in the Presidency towns. Therefore, separation does not present the same problems in the Presidency towns as elsewhere.

In Bombay (section 6A), Presidency Magistrates have been retained under "Judicial Magistrates", without, however, prefixing the word "Judicial", and such Presidency Magistrates as are "specially empowered by the State Government" fall under the category "Executive Magistrates".

1. Control over and subordination of Magistrates is a topic falling under section 17.

The Madras scheme contains no special provisions for Presidency towns (as regards separation).

99. Having considered the various patterns, we have come to the conclusion that a combination of the Bombay and Punjab Scheme is the best for being adopted as a model. The "District Magistrate", in practice, does not perform judicial functions himself at present, and therefore, it would not be necessary to retain him as a *Judicial Magistrate*. His place as a controlling officer should be taken by the Chief Judicial Magistrate, as in the Punjab.¹

Scheme recommended regarding Mufassil

As far as possible, it is better to keep separate nomenclature for the two categories of Magistrates, in the Mufassil, as has been done in Bombay and Punjab.

Regarding Executive Magistrates, the Bombay scheme abolishes classes. But, here again, a division into two classes may be worth preserving (as in the Punjab), particularly when there are executive officers of varying status in the same district. Bombay has provided for Special Executive Magistrates, and we think that this may be adopted as a provision useful for emergencies, when it is necessary to appoint Executive Magistrates for a particular class of cases or for areas which are not co-extensive with the limits of a district,—an arrangement which is outside section 12 and is not covered by section 14 as amended in the Punjab.

100. In the Presidency towns, the Bombay scheme furnishes a good example of a scheme which has worked well, and may be adopted. No doubt, that scheme uses the same expression, "Presidency Magistrate" for both the categories (with the addition of the words "specially empowered by the State Government" to describe Executive Magistrates), and this might be open to objection. But, in practice, it has not led to any confusion.

Scheme recommended regarding Presidency towns

101. Besides the Presidency towns, there are other cities which have assumed special importance now, in view of their population, commercial importance etc. It is our view, that the institution of Presidency Magistrates has proved to be a useful one, and that the system can be extended to other cities which may be comparable to Presidency towns. To achieve that object, it is desirable that provisions of the Code of Criminal Procedure applicable to Presidency towns be extended to such cities, after consideration of their importance, population, degree of urbanisation, level of the bar, feasibility of attracting good judicial talent etc. We may, in this connection, state here, that in respect of the city of Ahmedabad, by a Gujarat Act,² the system of Magistracy has been equated to that

Other cities of special importance

1. As to control over Magistrates, see discussion regarding section 17.

2. The Ahmedabad City Courts Act, 1961 (Gujarat Act 19 of 1961), sections 13 to 16-

in force in the Presidency towns, and the city of Ahmedabad has (for the purposes of the Code of Criminal Procedure) attained the status of a Presidency town¹ by virtue of the amendment made in the Code by that Act.

102. There is, however, one very important aspect which has to be taken care of, before any city is brought within the above scheme.

In the Presidency towns, there is no District Magistrate. There is a Commissioner of Police appointed under the Police Act in force in the particular presidency town, and he has certain special powers. There are also certain special powers conferred on the Chief Presidency Magistrate by the *Police Acts* in force in the Presidency towns. The *Police Acts*, thus, contain provisions supplementing (and, sometimes modifying) the Code. The hiatus that would be caused in Presidency towns by the absence of a District Magistrate (and other relevant provisions) is, thus, met by suitable provisions in the local legislation. An example of such local legislation is furnished by the provisions in the Bombay Police Act.² Thus, suitable legislative and other action has to precede or accompany the application of provisions applicable to Presidency towns to a particular area. It is for this reason, that we ourselves are not proposing the amendment in each section of the Code in this respect.³

103. Certain powers will, even after the scheme of separation, continue to vest in *both* categories of Magistrates. It is, therefore, expedient to have a provision⁴ that will ensure that the word "Magistrate", used without qualifying words, includes both.

This finishes our consideration of section 6.

Section 7

104. We now come to section 7. The power under section 7(2), to alter the limits etc. of sessions divisions, should be exercised in consultation with the High Court. We recommend that section 7(2), be amended⁵ accordingly.

Section 7(4) and Presidency Magistrates

105. We discussed at length a suggestion⁶ to abolish the institution of Presidency Magistrates. Though one State Government has no strong views in the matter, another State Government has stated that the abolition of Presidency Magistrates would increase appeals to the High Court.⁷ We are not in favour of recommending the aboli-

1. For a detailed discussion of the differences between Presidency towns and other Places, see Appendix 5.

2. The Bombay Police Act, 1951 (Bombay Act 22 of 1951), section 96, and also sections 2(5), 2(6), 7(a), 36, 37(1), 38(1), 39, 55 and 95.

3. At one stage of our consideration of the subject such amendments had been thought of, but later, they were abandoned.

4. Cf. section 6A(2), as proposed.

5. See section 7, as proposed.

6. F. 27/3/55-Judl. II (Home Ministry) Appendix I, Item No. 4.

7. The views of State Governments on certain suggestions were obtained by the Ministry of Home Affairs, which had forwarded to us the suggestions as well as the views.

tion of Presidency Magistrates. In fact, we regard the institution as a useful one,¹ and are inclined to recommend the extension of the institution to other big cities.²

106. No changes are needed in section 8.

Section 8

107. Section 9 deals with the Court of Session, appointment of Sessions Judges etc. We have already submitted a report³ on this section, recommending the changes that appeared to be necessary in view of the constitutional provisions as to "control", as interpreted by the Supreme Court.⁴ The section may be amended⁵ accordingly.

Section 9
and earlier
Report

108. With respect to section 9(3), some points regarding Assistant Sessions Judges are discussed below.⁶

Section 9 (3)

109. With reference to section 9(4), it has been suggested⁷ that the Sessions Judge appointed as the Additional Sessions Judge of another Sessions Division should sit at the headquarters of the Sessions Division of which he is the Additional Sessions Judge. This would mean abolition of the discretion which the Sessions Judge has at present regarding venue. No such change is, in our view, required.

Section 9(4)

110. Section 10 deals with the District Magistrate and Additional District Magistrate. Following changes are needed in this section—

Section 10

(i) An *Executive Magistrate* of the first class should be appointed as a District Magistrate.⁸ Compare the Punjab amendment, section 10(1).

(ii) Further, an *Executive Magistrate* of the first class should be appointed as an Additional District Magistrate. Compare the Punjab amendment, section 10(2).

(iii) Provision for appointment of a *Chief Judicial Magistrate*⁹ should be made. Compare section 10(1A), Punjab.

Necessary changes¹⁰ are recommended.

1. Paragraphs 66 to 70, *supra*.

2. Paragraph 70, *supra*.

3. 32nd Report of the Law Commission (Appointment, Transfer etc. of Sessions Judges).

4. See *State of Assam v. Runga Muhammad*, A.I.R. 1967 S.C. 903.

5. See section 9, as proposed.

6. See discussion regarding section 30, *infra*.

7. F. 27(5)/54-Judl. II (Home Ministry), Appendix II, Item 3.

8. See discussion under section 6A.

9. See also discussion relating to section 6A and section 12.

10. See section 10, as proposed.

Section 10
and Mobile
Courts

111. The following suggestion¹ has been made by a State Government:—

“A provision should be made for the creation of *Mobile Courts* in large cities, with a view to punishing persons committing breach of traffic regulations and offences pertaining to the Motor Vehicles Act and Municipal Laws” (The suggestion states that such courts are in existence in big cities like Calcutta and Madras).

We may note, that the matter was referred to in an earlier Report² also. In our view, however, an amendment of *the Code* is not appropriate for the purpose. It may be left to the particular laws.

We may, incidentally, note that, the matter seems to pertain to section 352 also. Further, questions of right to counsel under section 340 are also involved.³

Section 11

112. No changes are needed in section 11.

Section 12

113. Section 12 deals with the “appointment” of “sub-ordinate Magistrates”, and needs the following changes:—

(a) In view of separation, it becomes necessary to deal *separately* with Judicial and Executive Magistrates;

(b) Executive Magistrates will continue to be appointed by the State Government, and their area will be defined by the State Government, or by the District Magistrate, subject to the control of the State Government;

(c) Judicial Magistrates should be “appointed” by the *High Court*. If separation is to be introduced effectively, the conferment of Magisterial powers—which is the matter to which section 12 mainly pertains—must belong to the High Court. Compare section 12 as amended in the Punjab.

(d) The definition of the local area of Judicial Magistrates should be made by the High Court, or subject to its control, by the Chief Judicial Magistrate, as in the Punjab. The Bombay amendment gives this power to the Sessions Judge, but, as our scheme⁴ contemplates the appointment of a Chief Judicial Magistrate, he should have this power.

(e) Both under the Punjab and under the Bombay amendments, section 12 contains a provision to the effect that the power of “appointment” of (Judicial) Magistrates shall, on the issue of a public notification

1. F. 3(2)/55-L.C. Pt. III, S. No. 49.

2. Cf. 14th Report, Vol. 2, Page 787, Paras. 27-28.

3. Cf. *Rem Dayal v. Corporation of Calcutta*, A.I.R. 1953 Cal. 76, 78.

4. See discussion relating to sections 10 and 17.

under article 237 of the Constitution, be exercised subject to the terms of the said notification. The "appointment" to which article 237 relates is recruitment and we do not think it necessary to insert such a provision in section 12, which can be taken as confined to the *conferment of Magisterial powers* on persons appointed to the appropriate cadre in conformity with the constitutional provisions that may be applicable.^{1,2}

(f) A provision regarding the *transitional* period may be made (Compare the Punjab Amendment).

Necessary changes are *recommended*.³

114. With reference to section 12, the following suggestion⁴ has been made by a High Court Judge:—

"Section 12 may be amended to provide that the power of appointing Magistrates may be conferred *upon the High Court* instead of State Government."

Section 12 and suggestion regarding appointment

This has already been covered, in substance.⁵

115. Section 13 relates to Sub-divisional Magistrates. It will be necessary to *add* the word⁶ "*Executive*" here. Compare section 13, as amended in the Punjab.

Section 13

The Bombay scheme is different. Under section 13 (as amended in Bombay), there are no "classes" of Executive Magistrates, and the Sub-divisional Magistrate appointed under section 13 is a *sui generis*. Further, section 13 (as amended in Bombay), speaks of "Taluka Magistrates" also,— a provision which may not be needed in the whole of India.

116. We have accepted the suggestion of a State Government⁷ to provide for the appointment of an Additional Sub-divisional Magistrate.

Section 13 (2A) (To be added)

Necessary provision be *added*.

We may note, that a similar suggestion has been made in the Report of the U.P. Committee for Investigation into corruption in subordinate courts.⁸ As it has been held⁹ that the present section does not contemplate an *Additional* Sub-divisional Magistrate, an amendment would be required.¹⁰

1. See also the 32nd Report (Section 9 of the Code—Appointment etc. of Sessions Judges).

2. See also discussion relating to section 9.

3. See section 12, as proposed.

4. F. 3(2)/55-L.C. Pt. III, S. No. 49(a).

5. See paragraph 113, *supra*.

6. See section 13, as proposed.

7. F. 3(2)/55-L.C. Part II, S. No. 33.

8. F. 3(2)/55-L.C. Part VII, S. No. 449 (Suggestion of the U.P. Committee for Investigation of Causes of Corruption in subordinate Courts in Uttar Pradesh) (1963), Report, Pages 37-38 (Bill at Page 223).

9. See *Lakshmi v. State*, A.I.R. 1962 All. 165, Para. 5.

10. Compare section 10(2).

Section 14 117. Section 14 deals with Special Magistrates. In view of separation, special Magistrates can be of two categories— (i) Special Judicial Magistrates, and (ii) Special Executive Magistrates. The latter are dealt with separately.¹ Section 14 can deal with Special Judicial Magistrates.

So far as *Judicial* Magistrates are concerned, the conferment of powers under section 14 should be by the High Court.² And, if the High Court takes this action, then the provisions contained in section 14(3) and section 14(4) becomes unnecessary, and can be omitted.

Necessary changes are *recommended*.³

Section 14A (New) 118. A new section should be *inserted*⁴ to deal with special Executive Magistrates.⁵

Section 15 119. Section 15 deals with the constitution of Benches of Magistrates. The following points may be noted:—

(i) The word “Judicial” has to be added before the word “Magistrate”:

(ii) For the “State Government”, the High Court should be substituted, as it is the latter that should deal with the matter, in view of separation. Compare the Bombay and Punjab amendments.

Necessary amendment is *recommended*.⁶

Section 16 120. In section 16, the following changes are necessary:—

(i) In place of the State Government, the High Court with the approval of the State Government should *be given* the power to make rules, in view of separation.⁷

(ii) The word “Judicial” may be *added* before the word “Magistrate”. Compare the Punjab amendment.

Necessary changes are *recommended*.⁸

Section 17(1) 121. Section 17(1) is an important provision from the point of view of separation. It provides, that the Magistrates appointed under sections 12, 13 and 14 and the Benches constituted under section 15 shall be “subordinate” to the District Magistrate, and the latter may give orders as to the distribution of business amongst them. This “subordination” is both judicial and executive.⁹

1. See section 14A (proposed), regarding special Executive Magistrates.

2. See discussion regarding section 12.

3. See section 14, as proposed.

4. See section 14A, as proposed.

5. See discussion relating to section 6A and section 14.

6. See section 15, as proposed.

7. Cf. existing section 554.

8. See section 16, as proposed.

9. Cf. *Gur Dayal*, (1879) I.L.R. 2 All. 205, 207 (F.B.).

So far as Judicial Magistrates are concerned, it is obvious that they cannot (after separation) be made subordinate to the District Magistrate, unless the District Magistrate himself is a Judicial Magistrate. It becomes necessary to consider the principal patterns of separation, in this context.

According to the Madras pattern the District Magistrate, who is a *Judicial Magistrate* is the Principal Magisterial officer in the district and, as such, has general administrative superintendence and control over the other Judicial Magistrates in his district. He himself is subordinate to the High Court.

According to the Bombay pattern, control over Judicial Magistrates is exercised by the Sessions Judge. The District Magistrate (in the Bombay scheme) is not a Judicial Magistrate, but an Executive Magistrate.

The Punjab scheme contemplates the appointment of a Chief Judicial Magistrate, to whom all Judicial Magistrates are subordinate. The Chief Judicial Magistrate himself is subordinate to the Sessions Judge. In the Punjab, the District Magistrate is an Executive Magistrate.

122. In our opinion, if administrative control over Judicial Magistrates is to be effectively exercised, it can best be done by the creation of a post of Chief Judicial Magistrate as in the Punjab. In an earlier Report,¹ the Law Commission had recommended adoption of the Madras pattern. The Punjab pattern, in this respect, follows the Madras pattern, though in Punjab the nomenclature is different and the change has been effected by statute. We recommend that section 17(1) be amended accordingly.² Chief Judicial Magistrate proposal regarding

123. Section 17(2) deals with the subordination of Magistrates to the Sub-divisional Magistrates and has to be omitted, as the Sub-divisional Magistrate in our scheme is an Executive Magistrate.³ In place of the existing sub-section, a provision dealing with the subordination of the Chief Judicial Magistrate to the Sessions Judge may be inserted.⁴ Compare section 17(2) as amended in Punjab. Section 17 (2)

124. Section 17(3) needs no change.

Section 17
(3)

125. In section 17(4), instead of "District Magistrate", we have to substitute "Chief Judicial Magistrate", in view of separation. Compare the Punjab amendment. Section 17 (4)

1. 14th Report, Vol. 2, page 858, para. 21, and page 860, Item (5).

2. See section 17(1), as proposed.

3. See section 13 as proposed.

4. See Section 17(2), as proposed.

Section 17
(4) suggestion regarding

126. With reference to section 17(4), it has been suggested¹ that the limitation expressed by the words "unavoidably absent or incapable of acting should be removed. After some discussion, we have decided to retain these words, which have caused no serious difficulty.

Section 17
(5)

127. Section 17(5) is a negative provision, which provides that the District Magistrate, and the Magistrates and the Benches appointed under section 12 to 15, shall not be subordinate to the Session Judge, except as expressly provided.² This provision has to be omitted, in view of separation. (Compare the Bombay and Punjab Amendments).

One effect of the deletion of section 17 (5) would be, that the provision that the *District Magistrate* is not subordinate to the Sessions Judge, also disappears. Since the District Magistrate, in our scheme,³ is not a Judicial Magistrate, this provision is not needed. The District Magistrate will, of course, continue to be an "inferior criminal Court", in relation to the Court of Session and the High Court.⁴

Section 17A
(New)

128. A new provision regarding subordination of Executive Magistrates may be inserted, on the lines of section 17A as inserted in the Bombay and Punjab Amendments.⁵

Section 13B
(New)

129. In view of separation, it is desirable to insert a provision as to the courts which shall be inferior to the High Court and the Court of Sessions. Such a provision has been inserted by section 17B under the Punjab and Bombay Amendments. In fact, the Explanation to section 435(1) already provides that all Magistrates, whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purpose of section 435(1) and section 437. The provision which we recommend embodies the following propositions:⁶—

(a) Courts of Magistrates in Presidency towns will be inferior to the High Court, but not to the Court of Session;

(b) Courts of Magistrates elsewhere will be inferior to the High Court as well as to the Court of Session;⁷

(c) Courts of Session shall be inferior to the High Court.

1. F. 27/3/55-Judl. II(Home Ministry File), Appendix 1, Item No. 5.

2. An excellent discussion of the question how far Magistrates are subordinate to the Sessions Judge is found in the Judgement of Spankie J. in *Gur Dayal*, (1879) I.L.R. 2 All. 205, 210, 211.

3. See section 10, as proposed.

4. See section 17B, as proposed.

5. See section 17A, as proposed.

6. See section 17B (proposed).

7. See also para. 127, *supra*.

130. Section 18, which deals with Magistrates in Presidency towns, requires *amendment* in so far as it deals with appointment to a particular court. Both in relation to the Chief Presidency Magistrates and in relation to Presidency Magistrates, appointment to the particular court should be made by the High Court. In view of the provisions of articles 233 to 235 and 236(a) of the Constitution as interpreted by the Supreme Court,¹ the appointment to the particular court of the Chief Presidency Magistrate, being a part of "control" under article 235, can only be made by the High Court. Section 18

If that is the position regarding Chief Presidency Magistrates, it should not be different for other Presidency Magistrates, even though the constitutional provisions do not apply to them until a notification under article 237 is issued.

131. Section 18(5), as amended in Bombay, contains a provision that when a notification under article 237 of the Constitution is issued, the appointment of Presidency Magistrates shall be made according to the terms of the notification. The "appointment" to which article 237 relates is recruitment, and we do not think it necessary to insert such a provision in section 18, whereunder the emphasis is on the *conferment of magisterial powers* in relation to a particular locality.^{2,3} Section 18
(5)

The designation "Presidency Magistrate" may be retained, in respect of Presidency towns.

132. With reference to section 18, the following suggestion⁴ has been made by a High Court:- Section 18
(1), and
Police
Officers

"A proviso should be added to sub-section (1) of section 1 to the effect that no police officer of any rank shall be appointed as Presidency Magistrate. The anomalous position of the Commissioner functioning as a Magistrate and performing *judicial* duties like remanding has been adversely commented upon in judicial decisions. It is not in consonance with the scheme of the separation of judiciary from the Executive. Hence a proviso is recommended".

We considered this suggestion in detail.⁵ The matter, it appears to us, falls within the State List as provisions conferring Magisterial powers on Commissioners of Police are usually contained in enactments relating to the police. The States can take action to delete the provision in the Police Act concerned. Thus, for example, section 13, Bombay Police Act, 1951 was deleted by Bombay Act 21 of 1954.

1. See 32nd Report of the Law Commission (Section 9 of the Code—Appointment etc. of Sessions Judges).

2. Cf. discussion relating to section 12.

3. See also paragraph 130, *supra*.

4. F. 3(2)/55-L.C. Pt. III, S. No. 52.

5. Compare section 5, Police Act, 1861 (5 of 1861).

Section 19 133. No changes are needed in section 19.

Section 20 134. No changes are needed in section 20.

Section 21 (1),—part relating to powers of Chief Presidency Magistrates 135. In section 21 (1), in the part relating to the powers of the Chief Presidency Magistrates, we are *recommending* certain verbal changes.

Section 21 (1),—part relating to rules 136. In section 21(1), in the part relating to rules, verbal changes, in order to bring the provision in section 21 in line with section 16, are *recommended*.

Rules under section 21(1) must be made with the sanction of the *High Court* (instead of the sanction of the State Government, as at present).

Necessary change is *recommended*.

Section 21 (2),—subordination of Presidency Magistrates 137. Section 21(2) leaves it to the State Government to define the extent of subordination of Presidency Magistrates to the Chief Presidency Magistrates. Our views in this respect are as follows:-

(a) In so far as the subordination of the Additional Chief Presidency Magistrate to the Chief Presidency Magistrates is concerned, we think that the power to define their subordination should be *given* to the *High Court*, and not to the State Government.¹

(b) So far as Presidency Magistrates *generally* are concerned (including their Benches), they should be subordinate to the Chief Presidency Magistrate. For the sake of uniformity, a provision to that effect should be *substituted*.

Necessary changes are *recommended*.²

Section 22 138. Section 22 deals with the appointment of Justices of the Peace. Following changes are *recommended* in section 22:-

(i) The appointment of Justice of the Peace should be made in consultation with the High Court;

(ii) They should be citizens of India.³

With reference to section 22, a suggestion to define the powers and duties of Justices of the Peace has been received.⁴ We have dealt with the matter separately.⁵

1. Cf. discussion relating to section 18.

2. Cf. section 21, as proposed.

3. See section 22, as proposed.

4. F. 3(2)-55-L.C., Notes, pages 30-34.

5. See discussion regarding powers of Justices of Peace (New section 22A etc.).

139. After section 22, we *recommend* the insertion of a new section, to deal with the powers of the Justices of the Peace, which are not defined under the present law. The provision which we propose¹ has been framed after studying section 22A of the West Bengal Amendment and section 539D of the Bombay Amendment.

Section 22A
(New)

140. Another section may be *inserted*² regarding the power of the Justice of the Peace to record a dying declaration. Section 22B as inserted by the West Bengal Amendment lays down a number of "duties" to be performed by the Justice of the Peace, but we think that it would not be desirable in an All India Code, to impose all these *duties* on a Justice of the Peace, and it will suffice to give them the *power* to record a dying declaration. We also think, that the function should be described as a "power", and not as a "duty".

Section 22B
(New)

The expression "dying declaration" is really a loose word for a statement which, on death, becomes relevant under section 32(1) of the Indian Evidence Act. Hence the description of the statement to be recorded should conform, as far as possible, to the language of section 32 of the Indian Evidence Act, 1872.

141. Sections 23 and 24 are already omitted.

Sections 23-
24

142. Section 25 may be retained, (though it has been omitted in West Bengal) as "duties" are not being imposed on Justices of the Peace in our Scheme.³ But we *recommend*⁴ that Judges of the Supreme Court may be included in the section.

Section 25

143. Sections 26 and 27 are already omitted.

Sections 26-
27

144. In connection with section 28, the question of retention of ordinary original criminal jurisdiction of the High Court (wherever it exists) was considered at great length by us. The matter was discussed in an earlier Report,⁵ the view expressed there being that the ordinary original jurisdiction of the Calcutta High Court in respect of murder should be abolished. We have, however, come to a different conclusion. In our opinion, it is better to have justice from a court of superior jurisdiction than from a court of inferior jurisdiction, and where justice from a superior court is available under the existing law (as in Calcutta), strong reasons should be needed to disturb the law.

Section 28
and original
criminal
Jurisdiction
of High
Court

1. See section 22A, as proposed.

2. See section 22B, as proposed.

3. See discussion relating to sections 22A and 22B (proposed).

4. See section 25, as proposed.

5. See 14th Report, Vol. 2, page 1201. para. 7, and page 714, para. 2.

145. We may point out, that it is the judgments of the High Courts on the original side that have enriched not only our Civil law, but also our criminal law. To illustrate this, it will suffice to refer to only one judgment¹ dealing with section 302, Indian Penal Code. No better or more lucid exposition of the distinction between culpable homicide and murder can be found than in this judgment. We are aware, that the recommendation in the earlier Report was made after recording evidence. Nevertheless, we think that there are cogent reasons for not disturbing the existing position. That will be too big a price to pay for uniformity.

146. Regarding the original Criminal jurisdiction of High Courts, we would like to refer to the remarks which Mr. Justice Mathew made in England while addressing the Lord Mayor, in connection with a suggestion that the criminal business of the country should be handed over to the Court of Quarter Sessions:²

“I think you will agree with me that the respect and the confidence which attaches to the administration of the criminal law is largely due to the fact that the judges attend the assizes. It is an old constitutional principle and rule that when the liberty of the humblest subject of the Queen is imperilled, his trial should be presided over by one of the high officials of the law. The traditions of the Bench and their obligations are well understood by the country; and it is expected that the accused man should have one protector in Court, and that is the Judge. It is expected that every precaution that experience can suggest should be taken to prevent the greatest of all tragedies—the conviction of an innocent man.”

Section 29 147. Section 29 has been amended in Madras.³ In substance, the Madras amendment assimilates the procedure in the High Court to that in the Court of Session. The matter really pertains to Chapter 23 (section 266 *et seq.*)⁴

Section 30 148. Under section 30, the following points require to be considered—

(a) In view of separation, mention of the District Magistrate may be *omitted*, and the Chief Judicial Magistrate may be *added*. Compare the Punjab Amendment.

(b) In earlier Report,⁵ a recommendation was made for amending section 30, so that all first class Magistrates with five years' experience may be given the power to impose sentences of imprisonment upto 4 years, after separation of the Judiciary.

1. *Reg. v. Govinda*, (1876), I.L.R. 1 Bom. 342, 344-346.

2. See (1897) 2 C.W.N. (Journal) 33.

3. Madras Act 34 of 1955.

4. To be considered under section 266. (Madras Amendment to section 29).

5. 14th Report, Vol. 2, page 721, para. 23.

On this change being made, the list of offences triable concurrently by the Court of Session and the Court of such Magistrates would have been enlarged, and the need for a provision for specially empowering specified first-class Magistrates under section 30 would (it was contemplated) have disappeared.

149. We have given our anxious consideration to this matter. But we are compelled to differ with the recommendation of the 14th Report on this point. The recommendation was based on the assumption that *any Magistrate of five years' standing* would be fit to impose the heavier sentence. We are not sure if the general standard of Magistrates justifies this assumption. Instead, the existing provision in section 30, which provides for a selection of the more capable amongst the senior Magistrates, seems to be preferable. We, therefore, think that section 30 should be allowed to continue at least for the present.

150. With reference to section 30, it has been suggested¹ that enhanced powers under section 30 of the Code of Criminal Procedure should be conferred on Magistrates with the concurrence of and not merely in consultation with the High Court. Section 30 and conferment of powers

The changes which we are recommending in the sections relating to appointment of, and conferment of powers on Magistrates, achieve the object in view.²

151. Regarding the respective utility of Assistant Sessions Judges appointed under section 9 and Magistrates appointed under section 30, conflicting views have been expressed in the various suggestions received by us. Section 30 and utility of Magistrates appointed there-under

Thus, the suggestion³ of two High Court Judges is that section 30 should be deleted, and Assistant Sessions Judges should be appointed. There should (according to them) be a separate cadre for Assistant Sessions Judges, as the entrustment of work of Assistant Sessions Judges to Civil and Sessions Judges only leads to delay.

The suggestion⁴ of the Administration of a Union Territory is, that until separation it is not desirable to enlarge the powers of Magistrates to dispose of cases at present tried by Assistant Sessions Judges.

The view of a Public Prosecutor is,⁵ that there is little difference between a Magistrate empowered under section 30 and an Assistant Sessions Judge, that Assistant Sessions Judges do not usually pass sentences for more than two

1. F. 3(2)/55-L.C. Part VII, S. No. 449 (Suggestion of the U.P. Committee for Investigation of Causes of Corruption in Subordinate Courts in Uttar Pradesh (1963), Report page 39, (Bill at page 224).

2. See section 12, 36 and 37 as proposed.

3. F. 3(2)/55-L.C. Pt. II, S. No. 33(b).

4. F. 3(2)/55-L.C. Pt. II, S. No. 34.

5. F. 3(2)/55-L.C. Pt. II, S. No. 34(b).

years, and that the cases now committed to Assistant Sessions Judges can be adequately dealt with by a Magistrate with enhanced powers.

No change need, we think, be made in the statutory provisions. The Code leaves the matter elastic, because it is open to the State Government to provide for the required number of posts of Assistant Sessions Judges, or to resort to section 30.

Section 30
and sugges-
tion of a
High Court
Judge

152. The following suggestion¹ has been made by a High Court Judge:-

"There are hardly any Magistrates exercising powers under section 30. Section 30 may, therefore, be suitably *amended* to confer on experienced first class Magistrates power to punish offences with imprisonment which may extend to 3 years and to bring within their jurisdiction offences punishable with rigorous imprisonment of 5 years."

We think, that it is better to keep the matter elastic, by retaining section 30.

Section 30
and serious
offences
triable by
First Class
Magistrates

153. Regarding section 30, it has been stated² that there is an anomaly regarding powers of a "S.30 Magistrate" to try offences under section 326, 382, 392, Indian Penal Code, as these offences are punishable with imprisonment for more than 7 years. We do not think that such an anomaly exists. A Magistrate invested with powers under section 30 does not, in our opinion, thereby lose his powers as a *First Class Magistrate to try* the offences that are otherwise triable by a first Class Magistrate. The anomaly is more apparent than real. Whether, in such cases, his enhanced powers of *sentencing* under section 34 are also attracted, is another matter. Our view is, that in such cases, his powers as to sentencing are only those conferred by section 32. In such cases, if the Magistrate thinks that a punishment higher than imprisonment for two years is needed, he has to commit the accused to the Court of Session. *It is that position* which is, in our view, anomalous. To remove that anomaly, it is better to *substitute* the words "ten years" for "seven years", in section 30, so that the provisions of section 34 will be attracted. The 7 year's limit in section 34 should not, however, be increased.

Section 30
and sugges-
tion for
restoring
pre-1955
provision

154. The following suggestion³ has been made by a District Judge.

"Section 30 be amended so as to restore it to the position it had before the amendment made by Act XXVI of 1955. Several cases which are committed to the Court of Sessions are *petty*, and can as well be tried by experienced Magistrates."

1. F. 3(2)/55-L.C. Pt. III, S. No. 49(a).

2. F. 3(2)/55-L.C. Part I, S. No. 83.

3. F. 3(2)/55-L.C. Pt. III, S. No. 49(b).

A suggestion made by another District Judge¹ may also be noted.

“Section 30 has to be *suitably* amended by empowering the experienced magistrates to try all offences not punishable with death as was under the old provision. The amendment made by Act XXVI of 1955 has tended to increase the work considerably in Sessions Court.”

We are not, however, inclined to accept the suggestion *in toto*, though we are recommending certain other modifications.²

155. No change is necessary in section 31. Section 31

156. In section 32(1), opening line, the word “Judicial” need not be added before the word “Magistrate”. Section 32

157. The following suggestion³ has been made by a High Court. Section 32
(1)(a)

“The Judges of the High Court feel, that as a result of the separation of the judiciary from the executive, and with the experience gained by the Magistracy, first-class Magistrates with 5 years experience may be given the power to impose a sentence of imprisonment upto 4 years. See the Law Commission’s recommendations, in this respect.⁴

This question has been already considered.⁵

158. With reference to section 32, it has been suggested by the U.P. Committee that Magistrates who have exercised first class Magisterial powers for more than five years may be invested with power to impose sentence of imprisonment up to four years. Section 32
and sugges-
tion of U. P.
Committee

We have already considered a similar suggestion made in the earlier Report of the Law Commission.^{6, 7}

159. We have considered suggestions^{8, 9, 10} to increase the powers of a first class Magistrate to punishment of imprisonment up to 3 years, but we are not inclined to accept them. It is true, that in many recent special laws, the maximum punishment of imprisonment laid down is three years, Section 32
and impris-
onment
upto 3 years

1. F. No. F. 3(2)/55-L.C. Pt. III, S. No. 49(e).

2. See section 30 (as proposed).

3. F. No. F. 3(2)/55-L.C. Part III, S. No. 32.

4. The reference seems to be to the 14th Report, Vol. 2, page 721, para. 23.

5. See discussion relating to Section 30.

6. F. 3(2)/55-L.C. Part VII, S. No. 449, suggestion of the U. P. Committee for Investigation of Causes of Corruption in Subordinate Courts in Uttar Pradesh (1963, Report pages 39-40).

7. See discussion relating to section 30.

8. F. 3(2)/55-L.C. Part I, S. No. 36 and 49.

9. F. 3(2)/55-L.C. Part II, S. No. 33 (Suggestion of a State Government).

10. F. 27/3/55-Judl. II (Home Ministry’s file), Appendix I, Item No. 6.

and, in such cases, as the position now stands, a First class Magistrate (if he thinks that a sentence of two years is not enough), was to commit the case to Sessions. But we do not see anything seriously unsatisfactory in that position.

Section 33 160. In section 33, the following points have been considered—

(a) Before the word “Magistrate”, the word “Judicial” need not be added.

(b) It is unnecessary to increase the limit of imprisonment in default from one fourth to one half. The increase in the Magistrate’s powers regarding the maximum amount of fine was due to rise in prices, and was not the result of any decision to increase the powers of Magistrates as such.

Section 33 and suggestion to make the section self-contained

161. With reference to section 33, the following suggestion¹ has been made by a High Court Judge.

“Section 33 relating to imprisonment on default of fine, may be amended so as to make it self-contained, by including the provisions in sections 64 to 68, Indian Penal Code”. We studied the statutory provisions referred to. With great respect, we are unable to accept the suggestion.

The attempt to combine section 33 of the Code of Criminal Procedure with sections 64 to 68 of the Indian Penal Code is, it seems to us, likely to make section 33 cumbersome. Moreover, the topics dealt with in the two sets of provisions, though connected, are different.

The Code of Criminal Procedure focusses attention on the powers of particular classes of Courts, while the Indian Penal Code deals generally with the liability of the offender to the punishment of imprisonment in default.

Provision for consideration after section 33, Life imprisonment

162. With reference to life imprisonment, certain State Governments brought it to the notice of the Government of India,² that owing to the repeal of section 58 of the Indian Penal Code by the Code of Criminal Procedure (Amendment) Act, 1955, there is a lacuna as to how the persons sentenced to imprisonment for life should be treated while in jail. Attention has also been drawn to the following observations³ in criminal appeal No. 120 of 1956 (Kerala High Court).

“Section 302 as amended by the schedule to the Code of Criminal procedure (Amendment) Act, 1955 (Central Act 26 of 1955) only states that alternative punishment for murder shall be ‘imprisonment for life’ and not rigorous

1. F. 3(2)/55-L.C. Pt. III, S. No. 49(a).

2. F. No. F. 3(2)/55-L.C. Pt. VII, S. No. 272.

3. The decision is reported in A.I.R. 1957 Kerala 102, 103.

imprisonment for life or simple imprisonment for life..... The court passing sentences have however to keep in view the provisions of section 60 of the Penal Code and choose one or the other from in view of all circumstances. Recently we had another instance where the Sessions Judge had failed to specify whether imprisonment for life awarded by him was rigorous or simple. In that case the Inspector-General of Prison has sought our direction as to what description of imprisonment the prisoner should be "made to undergo. Here *we clarify* the position by stating that the imprisonment for life in this case shall be simple imprisonment and not rigorous".

Now, it has been suggested, that considering the nature of offences for which imprisonment for life is awarded, it is desirable that the imprisonment for life should be rigorous, and should only be amenable to such concessions in special case of illness, old age, etc., as the Prisoners Act and the Prison Rules may permit. We have examined the suggestion. We think that the matter pertains to the Indian Penal Code,¹ and can be more conveniently considered under that Code.²

163. It is unnecessary to add the word "Judicial" before the word "Magistrate" in section 34, having regard to the context. Section 34

164. Section 35, *inter alia*, contains a provision as to sentences of imprisonment, to the effect that such sentences (when passed on conviction for several offences at the same trial) shall run consecutively, unless the Court directs that they shall run concurrently. Section 35

Now, a High Court Judge³ has suggested the insertion of a provision to the effect that the *normal rule should be* that the punishment of imprisonment is cumulative and not consecutive. We have given anxious thought to this suggestion. The matter, we are afraid, cannot be made so rigid. History of the section and the case law on the subject were gone into by us. We are of the view that, on principle, the matter should be elastic, and that is the true import of the existing provision. If the court does not *direct* that the sentence shall run concurrently, then it is to be regarded as consecutive, under the existing provision. But, the main question—*i.e.* in what cases the Court can give a direction is left—and rightly so—to the discretion of the Court.

165. In section 35(1), the words "unless the court directs that such punishment run concurrently" were added at the Select Committee stage in 1898, for these reasons.⁴ Section 35

1. See also *Urlikia v. State* A.I.R. 1964 Orissa 149 in this connection.

2. To be considered under the Indian Penal Code. . . .

3. F. No. 3(2)/55-L.C. Part II, S. No. 33(a).

4. Report of the Select Committee, dated 16th February, 1898.

"15. Clause 35.—On the recommendation of the High Court, North-Western Provinces, we have empowered Courts in India, as in England, to pass concurrent, as well as consecutive, sentences of transportation and imprisonment. The effect of this change will probably be to mitigate sentences and at the same time also to discourage frivolous appeals....."

166. The High Court of North-Western Provinces made the following suggestion when the Bill of 1897 was under consideration :¹

"28. Section 35. Under this section concurrent sentences cannot be passed. This Court is strongly of opinion that a court should have the power, when a person is convicted at one trial of two or more distinct offences in respect of each of which a sentence of imprisonment or transportation is passed, to order that the sentences shall be concurrent or consecutive, as to the court may seem right. This could be effected by the addition to sub-section (1) of section 35 of the words "unless the court directs that such punishment shall run concurrently". The power to pass concurrent sentences is frequently used by the courts in England, and it is a useful power. Section 240 provides a cumbersome and dilatory procedure in the case of two charges."

167. As the Code stood before 1882, concurrent sentences could not be passed.²

In the Code as it stood before 1898, the power to pass concurrent sentences was absent, and the Allahabad High Court, in a very early case,³ regretted this omission. Hence, in the 1898 Code, this provision was inserted.

168. The point now to be considered has been elaborated by Desai J. thus—

"Then the learned Magistrate has passed concurrent sentences without giving any reason and apparently without even applying his mind to the question. I find that *Magistrates invariably make the several sentences concurrent without exercising any discretion in the matter. It is laid down in section 35 of the Code that one "sentence of imprisonment will commence after the expiration of the other sentence of imprisonment, unless the Court directs that such sentences shall run concurrently. Obviously the normal rule is that the sentences should be consecutive, and they may be made to run concurrently only if there is some reason. Whether the sentences should run consecutively or concurrently is*

1. Letter dated 13th December, 1897 of the High Court of North-Western Provinces to the Secretary to Government, North-Western Provinces and Oudh, Part II, para. 28 (Legislative proceedings, April, 1898, Nos. 24-128, in the National Archives, relating to the Code of Criminal Procedure, 1898).

2. *Emp. v. Vazir Jan.* I.L.R. 10 All. 58.

3. *Ishri*, (1897) I.L.R. 20 All. 1 (F.B.).

4. *Khuda Bux v. The State*, A.I.R. 1951 All. 637, 649.

left to the discretion of the Court, but the court must exercise its discretion judicially. It must not exercise it arbitrarily, and must *not on every occasion blindly* order the sentences to run concurrently as if there were no alternative; *but this is done by nearly every Magistrate*. I scarcely remember even one instance in which a Magistrate ordered two sentences to run consecutively. In the present case there was no justification for ordering the sentences, which themselves were inadequate, to run concurrently; the applicants should have been punished cumulatively for the "different offences committed by them. I would have very much liked to make the sentences consecutive, but I am not sure if I can do so without a notice of enhancement having been given to the applicants. I am inclined to the view that making the sentence run consecutively instead of concurrently *does not amount to enhancement*. But this question was not argued at the Bar, and as I am not quite certain that it does not amount to enhancement. I would refrain from making the alteration."

Sentences are usually ordered to run concurrently when the two offences are akin or intimately connected with each other.¹ Sentences passed in separate trials cannot, of course, be ordered to run concurrently.²

169. It has been suggested by the U.P. Committee,³ Section 35 that sentences should normally run consecutively, and they should be made to run concurrently only for good reasons to be recorded by the Court. and suggestion of U.P. Committee

We have already expressed our view while considering a similar suggestion made by a High Court Judge.⁴

170. In sections 36 to 38, which deal with the conferment of Magisterial powers, the following changes are necessary: - Sections 36 to 38

(a) Mention of the Chief Judicial Magistrate should be added, after 'District Magistrate'.

(b) Further, in view of separation, the conferment of powers should be *by the High Court*, which should be substituted in place of the State Government.

(c) For abundant caution, and for covering conferment of powers under other laws, it would be desirable to adopt section 38A, Punjab Amendment which has followed section 38A, Bombay Amendment, with suitable modifications.

1. *N. N. Burjoriji v. Emp.*, A.I.R. 1935 Rangoon 456, 458.

2. *King Emp. v. Nag sein*, A.I.R. 1923 Rangoon 198.

3. F. 3(2)/55-L.C. Part VII, S. No. 449, Suggestion of the U.P. Committee for Investigation of the Causes of Corruption in Subordinate Courts in Uttar Pradesh (1963), Report page 40, Bill at page 224.

4. See discussion relating to section 35.

- Section 39 171. In section 39(1), mention of the High Court may also be added.¹ Compare the Punjab amendment.
- Section 40 172. In section 40, after the words "State Government" occurring for the second time, the words "or the High Court as the case may be" should be added, in view of separation. Compare the Punjab amendment.
- Section 41 173. In section 41(1), the High Court has to be added. Compare the Punjab amendment.
In section 41(2), the mention of the Chief Judicial Magistrate subject to the control of the High Court should be added. Compare the Punjab amendment.
- Section 42 174. No change is needed in section 42.
- Section 43 175. No change is needed in section 43.
- Section 44 176. Section 44 imposes an obligation to report certain offences. Following points require to be noted in connection with this section :-

(i) Regarding a proposal to insert a provision requiring reporting of offences relating to bribery, we have submitted a separate Report.²

(ii) The scope of the corresponding offence in England—misprison of felony—has been narrowed down by a recent Act.^{3,4}

(iii) Section 44 does not apply to the *offender*. The Madras decision⁵ apparently expressing a view to the contrary, can, in our view, be taken as confined to section 203, Indian Penal Code, though it refers to section 44, Code of Criminal Procedure, and section 202, Indian Penal Code.

(iv) It is unnecessary to accept the suggestion⁶ for extending section 44 so as to impose an obligation to report "loss of public property".

(v) Whether sections 431 to 433 and 437 to 439, Indian Penal Code should be added (in section 44) was considered by us. An objection was raised before us that sections 435-436, Indian Penal Code are mentioned in section 44 because they relate to mischief *by fire* where *urgent* action is required, while the other sections (now considered for inclusion) *do not possess* that feature.

1. Cf. sections 36 to 38 (as proposed).
2. See the Report on section 44 of the Code of Criminal Procedure, 1898 (33rd Report).
3. The Criminal Law Act, 1967.
4. See the 33rd Report and Appendix 1 thereto.
5. *In re China Gangappa*, A.I.R. 1930 Mad. 870.
6. Suggestion made in the resolution of Shri Dwivedi, removed in the Lok Sabha in 1961; the point was referred for Law Commission's consideration. See F. 3(2)/55 Part IV, S.L. No. 69.

We have, however, decided to add the above mentioned sections (sections 431 to 434 and 437 to 439, Indian Penal Code), primarily with object of encouraging detection of offences of mischief in respect of embankments etc.

177. It has been suggested¹ that the burden of proof under section 44 should be removed. We are not inclined to accept the suggestion. Ordinarily, only the accused will be aware of the existence of an excuse, and therefore the present provision is justifiable. Section 44
and burden
of proof

178. With reference to section 44, the following suggestion has been made by a Public Prosecutor² in Andhra Pradesh. Section 44
(1) and f
offences
under the
Railway Act

“In section 44(1), after the figures “400”, the words “or any section of the Indian Railways Act”, should be inserted.

The (proposed) amendment is intended to include persons who have knowledge of sabotage of railway tracks and other offences.

Sabotage of the railway tracks and other offences under the Indian Railways Act are on the increase.”

We think, however, that this is a matter which can be more conveniently dealt with in the enactments relating to Railways.³

179. It has been suggested,⁴ that the words “non-bailable” in section 45(1) should be removed. We cannot accept this. That would unduly widen the scope of the section. Section 45

180. Under section 45, a number of other points were considered by us.

(i) In section 45(a), the words “or is a member of such village Panchayat” should be added, in view of the amendment already made in section 45(1), main part, in 1955.

(ii) The question whether the delegation of powers contemplated by section 45(1) (f)—particularly the words “prevention of crime”—confers (on the District Magistrate) too wide a power, was raised before us. Our view is, that the delegation is valid. No change is needed on this point.

181. No change is needed in existing sections 46 to 50. Section 46
to 50

182. Section 51 is an important section, and has been considered by us at length. We may first note a small Section 51

1. F. 27(5) 54-Judl. (Home Ministry file), Appendix III, Item (5).

2. F. No. F. 3(2)/55-L.C. Part III, S. No. 50(v).

3. Cf. Law Commission's Report on section 44 of the Code of Criminal Procedure 1898—Proposal to insert provision requiring reporting of bribery (33rd Report) and Appendices 2-3, thereto.

4. F. 3(2)/55-L.C. Part I, S. No. 72.

point, namely, whether it is necessary to *replace* the exception by a provision that the wearing apparel shall not be removed unless a substitute is provided. We think that no such change is needed.

Section 51 and medical examination of the accused 183. The question whether a provision authorising *medical examination* of the accused at the stage of investigation was needed, was considered by us in detail. The provisions in the Identification of Prisoners Act, 1920 and the Prisoners Act, were examined, and the scope of article 20(3) of the Constitution also discussed.

Our conclusions on the subject are as follows¹:—

(i) The existing law does not authorise medical or physical examination of the accused in aid of investigation (except to the limited extent provided for in the Identification of Prisoners Act or other special law).

The provision in the Prisoners Act is intended for a different purpose, namely, check-up of a prisoner for contagious diseases etc.

(ii) It is desirable to amend the Code of Criminal Procedure by inserting a provision on the subject,²

(iii) The second part of section 259, Queensland Criminal Code, which appeared to be a useful precedent, should be incorporated in our Code, with suitable adaptation,

(iv) The provision proposed to be added would not violate article 20(3) of the Constitution.

(v) It is unnecessary to provide for matters not provided for in the Queensland section.

Section 51 and articles of daily use 184. With reference to section 51, it has been suggested³ that articles of daily personal use and books etc. should be added in the Exception to section 51. We think, however, that it is unnecessary so to widen the section.

Section 52 185. No change is needed in existing section 52.

Section 52A (New) 186. As to section 52A (New), the matter has been discussed already.⁴

Section 53 187. No change is needed in section 53.

Section 54 188. Section 54 is a very important section, dealing as it does with the law of arrest. The most important part of the section is that which gives power of arrest in respect of *cognizable offences*. Whether an offence is cognizable or not depends on the relevant entry in the Second Schedule.

1. For detailed discussion, see Appendix 6.

2. See section 52A (as proposed).

3. F. 27(5)/54-Judl. (Home Ministry File), Appendix II, Item (4).

4. See discussion relating to section 51 and medical examination.

Here we shall note only the points whereon a change in the section itself is required or has been urged in the suggestions.

189. Section 54, clause Ninthly, needs to be *amended* by adding the words "whether such requisition is in writing or not", as there is a controversy on the point.¹

190. We are not inclined to accept the suggestion² to limit the various clauses of section 54, or to provide for investigation of the (grounds of) arrest by a *judicial officer*. Section 54 suggestion to limit powers

191. With reference to section 54, the suggestion of a State Government³ to give to the arrested *person full particulars of the offence for which the arrest is made*,^{4,5,6} has appealed to us. But we do not think that a writing is necessary. A suitable provision on the subject *is recommended*.⁷ Section 54 and communication of grounds

There is a somewhat similar provision in section 80, which is confined to arrest under warrant.⁸

192. The law of arrest without warrant was considered at length in England in a judgment of the House of Lords. The propositions relevant for the present purpose may be quoted from that judgment :—⁹

"(1) If a policeman arrests without warrant on reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reasons to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized.¹⁰ (2) If the citizen is not so informed, but is nevertheless seized, the constable, apart from certain exceptions, is liable for false imprisonment."

193. With reference to section 54, a question regarding a police officer's power to effect an arrest beyond his jurisdiction, has been raised by the Inspector General of Police, Orissa in his suggestion on the Code.¹¹ Section 54 and arrest beyond jurisdiction

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1. See (i) *State v. Ramchandra*, A.I.R. 1955 All. 438, 440.
(ii) *Roshan Lal*, A.I.R. 1950 M.B. 83.
 2. F. 27(5) 54-Judl. (Home Ministry File), Appendix II, Item 5.
 3. F. 3(2)/55-L.C. Part II, S. No. 33.
 4. Cf. article 22(1), of the Constitution.
 5. See also *Madhu Limaye v. State*, A.I.R. 1959 Punj. 506.
 6. As to English Law, see (i) Archbold, *Criminal Pleading etc.* (1966) paragraph 2809.
(ii) *Cwristie v. Lycainsky*, (1947).
 7. A.C. 573; (1947) 1 All E.R. 567 (H.L.).
 8. As to section 46, see *Q.E. v. Basanta Lal*, 4 C.W. N. 311 and comment thereon in 8 C.W.N. (Journal) 298.
 - 9 and 10. *Christle v. Leachinsky*, (1947) A.C. 573, 586, 587; (1947) 1 All. E.R. 567, 572, 573 (H.L.).
 11. F. 27(3)/55-Judl. II (Home Ministry File), Appendix I, Item 9.

The assumption that a police officer can, under the present law, effect an arrest beyond his jurisdiction *in another State*, (which is made in the suggestion), may not be correct. A police officer's powers are ordinarily limited to the general police district, under the Police Act.¹ Apart from special provisions (such as section 58 of the Code of Criminal Procedure), he cannot exercise powers beyond the general police district. This is the position, and no amendment thereof is necessary. We do not think that it is necessary (as has been suggested by the Inspector General of Police, Orissa) to insert a provision as follows:

"A Police Officer authorised to arrest under this section may effect the arrest at places beyond the jurisdiction of the Police Station to which he is attached, but should generally do so with the knowledge of the local police."

Section 54
and recording
reasons
for arrest

194. It has been suggested,² that the reasons for arrest by a police officer, should be recorded. This would not be practicable, in our opinion, and the suggestion cannot, therefore, be accepted.

Section 55

195. Under section 55, the following points have been considered:-

(i) It is unnecessary to replace the words "in the like manner" by the words "without an order from a Magistrate and without a warrant". That, no doubt, is the meaning,³ but it is unnecessary to disturb the language.

(ii) In clause (c), it is unnecessary to add the words "within the limits of such station" which appear in section 55(a) and in section 55(b). The omission of these words in clause (c) may not necessarily be inadvertent.

(iii) For the words "fear for injury", the words "fear of injury" may be *substituted*.

In section 55, certain *other changes* are desirable, in view of the changes proposed in section 109(a).⁴

Section 55
(1) (b)

196. It has been suggested^{5, 6} that section 55(1) (b) should be deleted. We are unable to accept the suggestion. Properly construed, section 55(1) (b) is not meant to deal with a mere case of poverty. It is a power vested in high police officers for purposes of arresting and sending up persons suspected of living by unlawful means.

1. See section 22, Police Act, 1861.

2. F. 3(2)/55-L.C. II, S. No. 20.

3. *Nepal I.L.R.* 35 All. 407.

4. See discussion relating to section 109(a).

5. F. 27(5)/54-Judl. (Home Ministry File), Appendix II, Item 5.

6. F. 27(5)/54-Judl. (Home Ministry File), Appendix III, Item 6.

197. There is an apparent conflict of decisions on the Section 56 relationship between sections 54 and 56.

The correct position appears to be this. Where a police officer acts on a requisition sent to him under section 56, his powers are naturally confined by section 56. But, where the police officer is in *independent possession* of information, and purports to act under section 54, his action is legal¹

The matter was explained at great length by the Madras High Court also.²

The amendment which we are *recommending*³ only restates the law laid down in the judicial decisions as properly understood, and is intended to obviate unnecessary controversy.

198. In section 57, the following points have been considered:- Section 57

(i) In sub-section (2), the words "having jurisdiction" may be *added* after the word "Magistrate". Compare the Bombay amendment.

(ii) In section 57(2) and in section 57(3), the word "Judicial" need not be added, as in Presidency towns the Magistrates performing judicial functions are not proposed to be described as "Judicial" Magistrates.

199. No change is needed in existing section 58. Section 58

200. Regarding section 59, a number of points have arisen:- Section 59

(i) The question whether it is necessary to replace the words "in his view" by "in his sight or presence" was considered.⁴ Observations of Page J. in one case,⁵ that the section is not happily worded, have been noted; and the other decisions relative to these words in the section have been considered by us. We think, that no change is necessary to disturb the language.

(ii) The question whether the words "cause him to be arrested" should be added in section 59 has also been considered: In view of the case-law⁶ which shows an obscurity on the subject, we think that it is desirable to *add these words*.

1. See *Sulaiman v. State of Kerala*, A.I.R. 1964 Kerala 185 (Reviews case law).

2. *Gurcharan Kaur v. Province of Madras*, A.I.R. 1942 Mad. 539, 546.

3. See section 56 (as proposed).

4. Cf. *Nazir v. Rex*, A.I.R. 1951 All. 3 (F.B.).

5. *Gouri Prasad v. Chartered Bank*, I.L.R. 52 Cal. 615; A.I.R. 1925 Cal. 884, 885 (Page J.)

6. See—

(i) *Nazir v. Rex*, A.I.R. 1951 All. 3, 7 para. 15(F.B.).

(ii) *Fakiro v. Emp.*, A.I.R. 1947 Sind 107, 109, para 7.

(iii) *Graham v. Henry Gidney*, A.I.R. 1933 Cal. 708, 714 (Ameer Ali J.).

Section 59A (New) 201. A new section is proposed regarding giving to the arrested person full particulars of the offence.¹

Section 59B (New) 202. The following suggestion² has been made by a High Court.

“Arrests of respectable Agriculturists and men in other walks of life are made in connection with prohibition offences etc. It has been found that the people have been practically condemned to remain in police custody without getting themselves *released on bail* promptly. Also, this is done very often to degrade these persons in the eyes of the public and for other unlawful reasons which need no specification but can readily be guessed. The abuse can be prevented *only if it is made obligatory* on the part of the police officer to *give reasonable time for arrangements* to be made for bail *before the arrested person* is removed etc. Much of the discontentment against the lower ranks of police will be removed if this provision is enacted.” Accordingly, the High Court has suggested the insertion of the following sections:-

“54A(1): *Where a police officer effects an arrest without a warrant of any person accused of a bailable offence, it shall be obligatory on the part of the officer to inform the person arrested that the offence with which he or she is charged is bailable and that the accused may arrange for sureties to offer bail on his or her behalf.*

(2) *The police-officer shall wait for a reasonable time for such arrangement to be made, before removing the concerned person to the station.*”

The State Government concerned found the reasons convincing, and supported the amendment.

We discussed the suggestion at length. In our view, only the first part of the suggestion may be accepted. A provision requiring the police to *wait* may create complications. We also think, that the proposed provision should be placed after section 59.

Necessary amendment is *recommended*.³

Section 60 203. As to section 60, the “Magistrate” referred to in the section will be—

(a) *the Judicial Magistrate*, in the case of arrest for an offence;

(b) *Executive Magistrate*, in other cases. It is not, therefore, necessary to qualify the expression “Magistrate”.

1. See discussion under section 54, *supra*.
 2. F. No. 3(2)/55-L.C. Pt. III, S. No. 252.
 3. See section 59B (Proposed).

204. In section 61, the following points have been considered :- Section 61

(i) The opening part of the section should be *changed* so as to begin—"No person who has been arrested without warrant shall be detained." This change appears to be desirable, in order to bring the section into conformity with article 22(1) of the Constitution.

(ii) It is unnecessary to add the word "Judicial" before the word "Magistrate" in the middle part of section 61. Whoever is the Magistrate competent under section 167 will be the "Magistrate" referred to in this section.

205. Section 62 requires the police to send certain reports. The section need not be extended to Presidency towns. In these places, the matter would be taken care of by the local Act relating to police.¹ Section 62
whether
changes
necessary
for presi-
dency towns

206. In other places (i.e. outside Presidency towns), the reports under section 62 should be sent to the District Magistrate etc. The object of the report is to keep the District Magistrate etc. informed of the situation regarding grave offences. It is, therefore, unnecessary to substitute "Chief Judicial Magistrate". (We find, that no such changes have been made in Bombay and Punjab). Section 62
Competent
Magistrate
outside
Presidency
towns

A suggestion to keep the power under section 62 with Judicial Magistrates,² has been considered by us, but we are unable to accept it.

207. In section 63, after the word "Magistrate", the words "having jurisdiction" should be *added*, as in the Bombay and Punjab amendments. Section 63

208. No changes are needed in sections 64 to 67. Section 64
to 67

209. Regarding section 65, certain changes have been suggested by two Judges of a High Court^{3,3} which, in effect, would empower a Magistrate to issue a warrant without taking cognizance of the offence. This, we are afraid, would conflict with section 204(1). Taking cognizance of an offence must precede the issue of a warrant. There may be provisions to the contrary which usually appear in special laws.⁴ But, in the absence of such special provisions, the scheme of the Code seems to contemplate cognizance as a step *prior* to the issue of a warrant by a Magistrate. Section 65
and issue of
warrant

We are aware, that there is a decision to the contrary,⁵ but we regret that we are, with great respect, unable to

1. Cf. section 96, Bombay Police Act, 1951.

2. F. 3(2)/55-L.C. Part I, S. No. 49.

3. F. 3(2)/55-L.C. Part II, S. No. 33(b).

4. Cf. *R. R. Chari v. State of U. P.* (1951) S.C.R. 312, A.I.R. 1951 S. C. 207.

5. *L. Ram Narain Singh v. A. Sen* A.I.R. 1958 All. 758, 760.

agree with the view that a Magistrate can issue a warrant (for the arrest of the person who could be arrested without warrant under sections 54 and 55) *without taking cognizance*.

Sections 66-67

210. Sections 66-67 need no change.

Section 68 and service by post and service by party

211. The suggestion of a State Government (which has endorsed the suggestion of the High Court for State) is to permit service by a party, *with leave* of the Court.¹ According to the suggestion, a proviso should be inserted in section 68(2) as follows :—

“Provided that a summons under this section may, by leave of the Court, be served by the party or his agent applying for the same on the witness by personal service. If such service is not effected and the Court is satisfied that reasonable diligence has been used by the party or his agent to effect such service, then the summons shall be served in the usual manner.”

We regret, that we are not able to accept the suggestion, as we are not certain if a provision suggested, may not be abused.

212. Another State Government² has suggested that a provision authorising the service of summons by *registered post* be inserted. The suggestion is as follows :—

“In addition to the existing provision in section 68, Cr. P. C. a sub-clause be added providing that the summons may, in addition, be also sent though registered post and acknowledgement of the same deemed as sufficient service.”

213. There is also a suggestion by the Delhi Administration³ for authorising service of summons by post, in order to curtail unnecessary delay.

As the law stands now, service by post is not valid.⁴ We considered these suggestions at length.

214. We are recommending a suitable provision, for *witnesses only*.⁵ We do not think that postal service should be adopted, as a general rule, for summoning the accused.

Section 62 and Corporation

215. A State Government⁶ has raised the question about the procedure to be followed where, after service on a Corporation, its representative does not appear. The matter seems to pertain to the Chapter on General provisions in Inquiries and Trials.⁷

1. F. 3(2)/55-L.C. Part I, S. No. 80.

2. F. 3(2)/55-L.C. Part II, S. No. 33.

3. F. 3(2)/55-L.C. Part VII, S. No. 386.

4. Cf. A.I.R. 1950 E.P. 20.

5. See section 74A (proposed).

6. F. 27(3)/55-Judl. II (Home Ministry File) Appendix I, Item No. 14.

7. To be considered after section 340.

216. In section 68, regarding Benches, a provision may be *added* on the lines of section 75. Section 68 and Benches
217. No change is needed in section 69. Section 69
218. In section 70—
 (a) provisions regarding service on the servant in Presidency towns should be *omitted*. There is no such provision in the Code of Civil Procedure,¹ and, in our opinion, having regard to changed social conditions, this provision should not continue.
 (b) Consequently, it will be desirable to *add* a provision that a servant is not “a member of the family” within the meaning of this section.² Section 70
219. Section 71 may be *amended* on the lines of the corresponding provision in the Code of Civil Procedure.³ Section 71
220. No change is required in section 72. Section 72
221. With reference to section 73, the suggestion of a State Government⁴ to require the complainant to deposit reasonable expenses of the accused residing in another district, has not found favour with us. Section 73
222. No change is required in section 74. Section 74
223. A new section—section 74—is proposed, for the service of summons by post.⁵ Section 74A (New) service of summons by post
224. No change is needed in sections 75 to 77. Sections 75 to 77
225. In section 77(1), the following amendments are necessary :— Section 78
 (i) Instead of “Magistrate of the first class”, *we have to substitute* “Judicial Magistrate of the first class”. (Compare the Punjab amendment).
 (ii) “Chief Judicial Magistrate” may be added, Compare the Punjab Amendment.
 (iii) Instead of the words “district or sub-division”, the words “area of jurisdiction” may be *substituted*, in view of the above changes.
226. No change is needed in existing sections 79 and 80. Sections 79 and 80

1. Cf. Order 5, Rule 15, Code of Civil procedure, 1908.
 2. Cf. Order 5, Rule 15, Explanation, Code of Civil Procedure, 1908.
 3. Cf. Order 5, Rule 19, Code of Civil Procedure, 1908.
 4. F. No. 3(2)/55-L.C. Part II, S. No. 33.
 5. See discussion under section 68, *supra*.

Section 81 227. With reference to section 81, the provisions of article 22 of the Constitution have been considered. As section 81 is confined to arrest *under warrant*, it is unnecessary to disturb the language of the section.

Sections 82
to 86 228. No change is needed in sections 82 to 86.

Section 87 229. With reference to section 87, the question whether section 87 applies to attachment for contempt has been examined. The Supreme Court judgment¹ holding that section 87 does not apply to such attachment has been considered by us. It was felt, that as the matter relates to the law of contempt of court, it could be dealt with better in the rules to be made by the High Courts.

It is unnecessary to add that reasons should be recorded before action is taken under section 87. A mandatory provision, however, to that effect may render a proclamation issued without recording the reason void.² This would be particularly so, as courts construe sections 87-88 strictly.³

Section 87
(2) 230. With reference to section 87(2), the following suggestion⁴ has been made by the Chief Presidency Magistrate, Madras.

“Section 87(2) prescribes the procedure for the publication of the proclamation to serve on an accused person. The suitability of making a provision for the publication in a daily (that a particular person is wanted in a particular case in a particular court) either as an additional or an alternative mode of securing the accused, could be usefully considered.”

We think that publication in the daily newspapers, in addition to existing modes under section 87(2), as an optional mode where the court thinks fit, should be added.

(Question of expense of publication can be dealt with by a suitable provision in the rules).

Section 88
(2) 231. In section 88(2), after the words “District Magistrate”, the words “Chief Judicial Magistrate” should be added. Compare the Punjab Amendment.

Section 88
(6) 232. In section 88(6), reference to the 1908 Code of Civil Procedure *may be substituted*.

Section 88
(6B) 233. In section 88(6B), after the words “District Magistrate”, the words “Chief Judicial Magistrate” *should be added*. Cf. the Punjab Amendment.

1. *Mrs. Peterson v. Forbes*, (1963) Suppl. 1 S.C.R. 40; A.I.R. 1963 S.C. 692.

2. Cf. the case-law as to section 90.

3. Cf. *Pal Singh v. State*, A.I.R. 1955 Punj. 18.

4. F. 3(2)/55-L.C. Part III, S. No. 52.

234. In section 88(6C), proviso, after the words "Dis- Section 88
 trict Magistrate", the words "Chief Judicial Magistrate", (6C)
 should be added, though the Punjab amendment does not
 make this change. It is unnecessary to provide—as has
 been done in the Punjab amendment to section 88(6C),—
 that a claim or objection made before a District Magistrate
 or other Executive Magistrate should be referred to the
 Chief Judicial Magistrate (who may then refer it to a
 Judicial Magistrate subordinate to him). There is no harm
 if claims or objections made before an Executive Magistrate
 (in respect of property attached under his orders) are
 investigated by him, as the rights of aggrieved parties are
 sufficiently protected by the right of suit which is pre-
 served by the section.¹

235. A suggestion² to exempt subsistence allowance from Section 81
 attachment under section 88 has not been found acceptable
 by us.

236. Under section 89, the following suggestion³ has Section 89
 been made by a High Court Judge :

"It should be provided that if the absconding person
 does not appear within 2 years or so, the attached pro-
 perty may be sold and the proceeds credited to the
 State Government."

In our view, existing section 88(7) gives this power
 by implication.

We are not, therefore, recommending any amendment
 in this respect.

237. As to section 90, there is a conflict of decisions on Section 90
 the question whether the provision for recording of reasons
 is directory or mandatory.^{4 5 6} It would not, however be
 convenient to resolve the conflict by an amendment of sec-
 tion 90, as the matter really relates to application of the
 provisions saving irregularities. We may, however, state
 here, that the object of this requirement is to draw atten-
 tion to the consideration that a warrant ought not to be
 issued where a summons can serve the purpose, and that
 care should be exercised by the court to satisfy itself that
 upon the materials before it, it was necessary to issue a
 warrant.⁷

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1. See Section 88(6D).
 2. F. 3(2)/55-L.C. Part II, S. No. 48.
 3. F. No. 3(2)/55-L.C. Part III, S. No. 49(a).
 4. I.L.R. 38 Madras 1088.
 5. Sahebulla, I.L.R. 51 Cal. 1 (F.B.).
 6. Indra, A.I.R. 1955 Punjab 81.
 7. Cf. Sahebulla, I.L.R. 51 Cal. 1 (F.B.).

Section 91 238. With reference to section 91, it has been suggested¹ that the section may be amended so as to give power to a court to require execution of a bond in such terms as could make it obligatory for the person to either appear in the court which took the bond or in any other court to which the case may be *transferred*. We have studied the law on the subject. The point is also of interest² in connection with section 514(1), and Fifth Schedule, Form No. 42 (Generally as to section 91, the under-mentioned case³ may be seen).³

We see no objection to the suggested amendment being made, and we recommend accordingly.

Section 94
and the
accused 239. It has been held by the Supreme Court,⁴ that section 94 does not apply to the accused. Where it is intended to require an accused person to produce a document etc., a summons cannot, therefore, be issued under section 94; nor can a warrant for search be issued under the first two paragraphs of section 96. But section 96, last paragraph, can be used. We considered the question whether any change in the language of section 94 is needed to codify the proposition that it does not apply to the accused. We came to the conclusion that it was not necessary.⁵

Section 94
(1) and right
of the
defence to
summon
documents 240. With reference to section 94(1), a suggestion has been made by the Markapur Bar Association, Andhra Pradesh,⁶ to amend the section so as to provide for summoning documents in the possession of the prosecution at the instance of the accused *even before he has entered into defence* (being documents useful for cross-examination). The suggestion refers to a decision in *Yusuf Sahib v. Havgivender*,⁷ holding that this right is restricted to a stage after the *accused has entered on defence*. The suggestion says, "If this view is correct, proceedings are unnecessarily prolonged even in cases where there could have been a *discharge*." Hence, before the words "such Court may issue a summons", the words "*at any stage of the proceedings*" should be inserted.

241. We have examined the entire case-law in this respect.

1. F. 3(2)/55-L.C. Part VII, S. No. 449, Suggestion of the U.P. Committee for Investigation of Causes of Corruption in Subordinate Courts in Uttar Pradesh (1963), Report, pages 40-41, Bill at page 225.

2. To be noted under section 514(1).

3. *Vasu Deo*, A.I.R. 1958 All. 578.

4. *State of Gujarat v. Shyam Lal*, A.I.R. 1965 S.C. 1257, 1259, paragraphs 29 to 32.

5. For a detailed discussion, see Appendix 7.

6. F. 3(2)/55-L.C. Pt. III, S. No. 50(O).

7. *Yusuf Sahib v. Hayogi Vendor*, (1955), 1 Andhra Pradesh W.R. 409 (Subha Rao C. J.).

As has been pointed out, "the words of section 94 are very large, and, it seems, advisedly so."¹

The section is wide enough to empower the court to exercise this power at the instance of the accused even before he enters on his defence.^{2,3,4} This is clear from the word "whenever" used in the section.

No change is now necessary.

242. The position regarding applicability of the Bankers' Books etc. Act⁵ to a summons issued under section 94 of the Code was examined by us in some detail. Our views are as follows :—

Section 94
(3) and
Bankers'
Books.

(a) as regards inquiries or trials, there is uncertainty as to whether the Bankers' Books Evidence Act overrides the general provisions of section 94. This uncertainty should be *removed*.

(b) as regards investigations, the Bankers' Books etc. Act does not, at present, apply at all. There is no reason why it should not extend to investigations.

243. We, therefore, *recommend* that—

(i) Section 94(3) be amended so as to provide that nothing in the section shall affect the Bankers' Books etc. Act.

(ii) In the Bankers' Books etc. Act, a new section—section 6A should be inserted to extend that Act to *investigations*.⁶

244. With reference to section 96, it has been suggested⁷ that powers be given to the Superintendent or Commissioner of Police to require *delivery* of postal articles, and that power be given to the Deputy Superintendent of Police to order *detention*, of such articles. We are not able to accept the suggestion. The District Magistrate, being the head of the administration, should have this power, but it is not desirable to give the power to police officers.

Section 95.

245. In section 95, it will be necessary to add "the Chief Judicial Magistrate."

246. Under section 96, the question of its applicability to the accused has been already discussed.⁸

Section 96.

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1. *Nizam of Hyderabad v. A. M. Jacob*, (1892), I.L.R. 19 Cal. 52, 64 (Ameer Ali J.).
 2. *In re Dr. Raghotham*, A.I.R. 1963 A.P. 362, 363, para. 4 (D.B.).
 3. *Hari Charan v. State*, A.I.R. 1955 Pun. 17, 18, para. 4.
 4. *Armugam v. State*, A.I.R. 1961.
 5. The Bankers' Books Evidence Act, 1891 (18 of 1891).
 6. To be carried out under the Bankers' Books etc. Evidence Act, 1891.
 7. F. 27(3)/55-Judl. II (Home Ministry File), Appendix I, Item No. 15.
 8. See discussion under section 94, *supra*.

In section 96(2), it is necessary to *add the Chief Judicial Magistrate.*

Section 96 (1) and officers to whom search-warrant should be directed. 247. The following suggestion¹ has been made by the Administration of a Union Territory.

“Section 96(1) may be amended to specify the status or the rank of the officers to whom search-warrant is to be directed, and that officer should not be below the rank of Inspector of police.”

We have considered the suggestion.

From the Fifth Schedule, Form No. 8 (Form prescribed for search-warrant under section 96), it would appear, that the warrant under section 96 can be given to any “police officer or other person or persons.” Section 98(1), and Fifth Schedule, Form No. 9 may be contrasted, under which the search warrant can be issued *only* to a police officer above the rank of constable.

We, however, think that no such *rigid* provision is called for, in relation to warrants under section 96.

Section 97. 248. No change is needed in section 97.

Section 98. 249. In section 98, the following points have been considered :

(i) After “District Magistrate”, “Chief Judicial Magistrate” be *added*.

(ii) Amendment of section 523 is *necessary*,² to provide for the action to be taken on articles seized under section 98.

(iii) The question whether, in section 98 (1) (d) and (e), it is necessary to add, after the word “Magistrate”, the words “issuing the warrant”, was considered, with reference to the form in the Fifth Schedule (Form of “Warrant of search of suspected place of deposit”). That is the intention of the section. But there may be cases where it may be necessary to take the property to a Magistrate other than the Magistrate issuing the warrant, where the circumstances so require. In such cases, it would be possible to adapt the warrant. The section need not be made rigid in this respect.

Section 98 (2). 250. In section 98 (2) (a), reference to the new Customs Act, 1962, may be *substituted*.

Section 98 (2) and Judicial Magistrate. 251. The power under section 98 should be given to both Judicial and Executive Magistrates, because section 98 does not necessarily contemplate a pending judicial proceeding.^{3 4}

1. F. No. 3(2)/55-L.C. Part III, S. No. 21.

2. To be considered under section 523.

3. See S. K. Srivastava v. Gajanand, A.I.R. 1956 Cal. 609, 612.

4. See also Mohammed Serajuddin, A.I.R. 1962 S.C. 759, 762, para. 12.

252. No change is needed in existing section 99. Section 99.

253. Certain points relating to section 99A have been considered. The conclusions arrived at by us are as follows :— Section 99A.

(i) It is unnecessary to require that an order of forfeiture should be issued only on the certificate of the Advocate General, or other principal law officer.¹ The existing safeguard—review by the High Court—is enough.

(ii) Section 99A refers to certain sections of the Indian Penal Code. In this respect, the constitutional validity of section 99A will depend on the validity of those sections.

254. We recommend that section 292, Indian Penal Code (obscene matter) should be *added* in section 99A. This commendation is independent of the suggestion^{2,3} made by the Ministry of Home Affairs, asking us to consider the question of making certain amendments to section 292, Indian Penal Code, and other connected amendments in the Code of Criminal Procedure. Section 99A
and obscene
matter.

In the course of our discussions on the subject, it was urged that section 292, Indian Penal Code ((obscene matter) does not stand on the same footing as seditious or other matters mentioned in section 99A. Seditious or other matters (it was stated) might require urgent action from the point of view of maintenance of law and order, while obscene matter would not ordinarily affect law and order. Further, it was stated, it is not fair to throw on the author the burden to move the High Court, as would be the position if section 99A is applied to obscene matter.

The view taken by us, however, is that, in order to check the growing evil of obscenity, it is necessary to *amend* section 99A, to add obscene matter.

But, it is not, in our view, necessary to mention specifically indecent or obscene matter contained in *reports of judicial proceedings* (as has been done in the Bombay Amendment).

255. It is not necessary to omit the descriptive portion in section 99A, even though it amounts to a repetition of the description of the offending matter as given in section 124A etc. of the Indian Penal Code. Section 99A.
Descriptive
portion.

256. No change is required in section 99B. Section 99B.

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1. Contrast The Young persons (Harmful Publications) Act, 1956.
 2. F. 3(9)/56-L.C. Pt. I, S. No. 31 (suggestion of the Ministry of Home Affairs).
 3. F. 3(2)/55-L.C. Part IV, S. No. 97.

Sections. 99C to 99F. 257. Section 99C requires decision by a Bench of three Judges of the High Court. In relation to Courts of Judicial Commissioners composed of less than three members, this requirement cannot be fulfilled. But, as difficulty has not arisen in practice, and, as the problem may not occur often in practice, no change is required for the present.

It has been suggested by two High Court Judges,¹ that the hearing under section 99C should be allowed by two Judges. We regret that we are unable to accept the suggestion, as the proceedings under section 99-C are important enough to justify the present provision, which requires that the application should be heard by a Bench of three Judges.

258. No change is needed in sections 99-D to 99-F.

Section 99G. 259. Under section 99-G, we have considered the question whether an amendment is needed with reference to the words "otherwise than in accordance with section 99-B". These words may or may not have the effect of barring an application under article 226 of the Constitution, in a fit case. It is, however, unnecessary to disturb the language to provide for that.

Section 100. 260. In section 100, the following points have been considered :—

(i) No changes have been made by the Punjab or Bombay Amendments to confine the power under section 100 either to Judicial or to Executive Magistrates. Having regard to the fact that concurrent jurisdiction may be convenient for emergent action, no change is required in this respect.

(ii) It is unnecessary to replace, in section 100, the word "confined" by the words "believed to be so confined", though that is the meaning.²

Section 100. Notice and procedure for inquiry. 261. An important point which was brought to our notice in the course of our discussions in connection with section 100 was, that the section does not provide for the issue of a notice to the opposite party, and injustice, it was stated, resulted from this position. The facts in a Calcutta case illustrate the possible hardship.³

In that case, an application under section 491 of the Code was made by one Jogendra Nath Shaw Chowdhury on the allegation that he had been duly married to the infant girl, but that the girl's father had lodged a false complaint before the Presidency Magistrate of the Northern Division that the girl was being wrongfully detained by the Appli-

1. F. No. 3(2)/55-L.C. Part II, S. No. 33(b).

2. *Kallan Beg v. Emp.*, A.I.R. 1936 All. 306, 308.

3. In the matter of section 491, *Criminal Procedure Code and in the matter of Shoibalini Dassee*, (1898), 2 C.W.N. 333 (Notes of cases) (Jenkins J.).

cant and obtained a search-warrant from the said Magistrate under section 100 and that, subsequently, the said Magistrate had made over possession of the girl to her said father. He also alleged, that the father's application to the Magistrate was without notice to him, and that he got no opportunity of showing cause against the orders made as above stated. The search-warrant had been issued on the 30th August, 1898, the order for possession also having been made on the same day.

262. The observations which Jerkins J. made while granting a rule on behalf of the alleged husband are interesting.

"JERKINS J. : How is it that the Magistrate came to make that order without notice to the Applicant? He undoubtedly had a right to appear and show cause and in fact it seems strange that an order of this kind under section 100, Cr. P. C., should have been made without notice, or even a search-warrant issued without such notice."

(Ultimately, the rule was discharged, as the High Court was not satisfied on the affidavits that there had been a marriage. This was, however, without prejudice to any suit which the applicant might bring).

263. Our attention was also drawn to other cases which show how Magistrates sometimes¹ misuse sections 100 and 552, or which stress the need for a proper inquiry.^{2 3}

We are not, however, inclined to recommend an amendment of the section.

264. It has also been suggested,⁴ that an elaborate procedure for the inquiry under section 100, be provided for.

Some of the points made in the suggestion are :—

(a) to require that a statement on oath of the informant, and of at least one witness, should be put in before issuing a search-warrant ;

(b) to provide for temporary custody pending hearing ;

(c) to fix a date and hold an inquiry in the presence of the opponent.

We are not, however, inclined to recommend any such elaborate procedure.

1. *Lalmani Devi v. State*, A.I.R. 1958 Pat. 689, 691, para. 5.

2. *Lilabai*, A. I. R. 1958 M.B. 24, 25, para. 8.

3. See, however, *Chepa Mohton*, A.I.R. 1928 Pat. 550 (Warrant could be issued on a mere petition).

4. F. No. 3(2)/55-L.C. Part I, S. No. 70.

Sections 101 and 102. 265. No change is needed in existing sections 101 and 102.

Section 103*. 266. The recommendation in the 14th Report¹ to delete the words "(inhabitants) of the locality" in section 103 was considered. We think that it is not safe to make such a change. Practical difficulties notwithstanding the principle on which this requirement rests is a salutary one. Its deletion will mean that in practically every case witnesses from *any locality* will be brought to be present as a search.

Section 103. Various other suggestions. 267. Various other suggestions² relating to section 103 were considered by us.

Thus, a Deputy Inspector General of Police³ has stated, that respectable inhabitants do not like to associate themselves with searches against their neighbours. This requirement of the law should (according to his suggestion), therefore, be dispensed with, when a raiding party is headed by a Police Officer of the *rank* of Inspector of Police or above. We are not in a position to accept the suggestion.

The condition of "respectability" ought not to be dispensed with, even where the search is carried out by any Inspector or higher officer etc. Section 103 is intended to safeguard the rights of a house-holder, and also to ensure that the search conducted by the police should be honest and genuine.⁴ Its object is to ensure that it may not be possible to bolster up a false case⁵⁻⁶.

268. The legislature has made this provision to ensure fair dealing and a feeling of confidence and security amongst the people, and in order to give effect to this object, it is necessary that the witnesses to search should be absolutely unprejudiced and uninterested in the result. "It is only when Panch witnesses are independent that the liberty of the subject can be safeguarded, as far as searches are concerned."⁸

269. It has been suggested by a State Government,⁹ that in section 103(1) after the words "*in which the place to be searched is situated*" the words "*or if no inhabitant of*

1. 14th Report, Vol. 2, pages 755-756.

2. F. No. 3(2)/55-L.C. Part II, S. No. 33 and 34(d).

3. F. No. 3(2)/55-L.C. Part II, S. No. 34(d).

4. *Nirmal Singh v. Emp.*, A.I.R. 1919 All. 41, 42.

5. *Lachmi Narain v. Emp.*, A.I.R. 1919 Pat. 452, 453.

6. *Emp. v. Balai Ghosh*, A.I.R. 1930 Cal. 141, 143.

7. *In re Rajabather*, A.I.R. 1959 Mad. 450, 452, 6, 7, where Ramaswami J. has summarised the law and reviewed the case-law.

8. *S. K. Fernandez v. The State*, A.I.R. 1951 Bom. 468, 469, para. 3 (Chagla C. J. and Gajendragadkar J.).

9. F. 3(2)/55-L.C. Part II, S. No. 33.

the locality can be procured, any other two or more witnesses" should be added.¹

We cannot accept the suggestion. The proposed relaxation, if enacted, is likely to be resorted to in all cases, thus robbing the section of its utility.

270. A High Court Judge has suggested² the insertion of a provision that a finding or sentence shall not be altered on account of non-compliance with section 103. We regret that we are unable to accept this suggestion. It is the law (speaking broadly),³ that such non-compliance by itself does not justify the reversal of a conviction or sentence. But a pointed provision to that effect would be unwise.

271. In this connection, we would like to state below, in brief, some of the main points that emerge from the case-law.

(a) Where the witnesses are not respectable inhabitants of the locality, that circumstance would not invalidate the trial, but would only affect the weight of the evidence in support of the search and recovery ;⁴⁻⁵

(b) At the same time, the necessity of due compliance with the provisions regarding searches should be emphasized. See the object of the section as explained in the under-mentioned case⁶ holding that the object is to ensure fair dealing and a feeling of confidence and security amongst the public, in regard to a somewhat necessary invasion of a private right.

The provisions of the section designed are for greater certainty and security,⁷⁻⁸ and its object is presumably to obtain as reliable evidence as possible of the search and to exclude the possibility of any malpractice of any kind.

(c) There may be cases where the accused would be prejudiced by non-compliance. In one case,⁹ the High Court had to make these observations—

"It appears to me that it is high time that steps should be taken to stop this wanton disregard of statutory provisions by the police of these provinces".¹⁰

1. Compare 14th Report, Vol. 2, pages 755-756, para. 48.

2. F. 3(2)/55-L.C. Part II, S. No. 33(a).

3. See paragraph 240, *infra*.

4. *Sunder Singh v. The State*, A.I.R. 1956 S.C. 411, 415.

5. *Radhakishen v. State of U.P.* (1963) Supp. 1 S.C.R. 408; A.I.R. 1963 S.C. 822.

6. *In re Govindan*, A.I.R. 1959 Mad. 544, 547.

7. *Emp. v. Ma Thein*, A.I.R. 1936 Rang. 15, 17.

8. *Emp. v. Balai Ghose*, A.I.R. 1930 Cal. 141, 143.

9. *Bishnath Rai v. Rex*, A.I.R. 1950 All. 147, 148, para. 3 (S. No. Seth J.).

10. See also *Dr. Jai Nand v. Rex*, A.I.R. 1949 All. 291, 299.

(d) It is not, therefore, advisable to put a provision in a pointed form, saving such irregularities. Since the trial is not vitiated *even now*,¹ no provision is needed.

Section 103 and search of the person. 272. A suggestion³ to extend section 103 to search of the person was considered by us. But we could not accept it. Search of the person had usually to be made immediately on arrest, and ordinarily there would be no time to call witnesses.

Section 103 and list of respectable persons. 273. The following suggestion³ has been made by a Bar Council.

“The Bar Council.....feels that for every village a list of respectable persons, known as Justices of the Peace or some other suitable and dignified name, may be prepared. Such an honorary office may attract respectable men. The power to search may be vested in the Justice of the Peace and the right of drafting the panchnama should be invested in him.”

The comment of the State Government concerned on this suggestion is, that creating a sort of “cadre of search witnesses” etc. will create more problems than it will solve. The State Government was not in favour of this proposal, as it would lead to abuses and bring the entire system into disrepute.

We agree with the State Government’s comment. No change is required.

Section 103 and suggestion of U.P. Committee. 274. We may note the suggestion⁴ that search witnesses should be respectable persons but not necessarily the inhabitants of the locality in which the place to be searched is situated.

We have already stated,⁵ that we are not in favour of any amendment of section 103 to that effect.

Section 103 (3). 275. A suggestion⁶ to allow the search list under section 103(3) to be given afterwards, was considered, but rejected by us. The present provision is intended to safeguard the right of the occupant, and is a salutary one.

Section 104. 276. No change is required in section 104.

Section 105. 277. No change is required in section 105.

1. *Kochan Vilay*, I.L.R. 1960 Ker. 916, A.I.R. 1961 Ker. 8 (F.B.)

2. F. 3(2)/55-L.C. Part I, S. No. 28.

3. F. No. 3(2)/55-L.C. Pt. III, S. No. 52.

4. F. 3(2)/55-L.C. Part VII, S. No. 449, Suggestion of the U.P. Committee for Investigation of causes of Corruption in Subordinate Courts in Uttar Pradesh (1963), Report page 41, Bill, page 225 middle.

5. See discussion regarding section 103.

6. F. 3(2)/55-L.C. Part I, S. No. 17.

278. No change is required in section 105-A.

Section 105
A.

279. In section 106, the following points have been considered in relation to separation.

Section 106.

(a) Mention of the following Magistrates *may be added*—Chief Judicial Magistrates.

(b) Before the word “Magistrate”, the word “Judicial” need not be added, as in Presidency towns, the prefix “Judicial” is not used.

280. Case-law¹ as to the applicability of section 106 to cases of conviction under section 149, Indian Penal Code has been considered by us, and the history of the 1923 Amendment (as a consequence of which a controversy has arisen) also gone into. An amendment is proposed to settle the law on this point.

Section 106
and the
offences
covered.

As section 106 stands at present, security cannot be required on conviction for abetment of criminal intimidation. An amendment is proposed to set *this right*.

281. The words “or other offence involving a breach of the same” in section 106 have given rise to conflicting interpretations.² The views expressed in the decisions on the subject can be broadly grouped as follows :—³

Section 106
and the
words
“offence
involving
breach
of the
peace”.

(a) The word “involve” connotes the inclusion, not only of a necessary, but also of a probable feature, circumstance, antecedent condition or consequence.⁴ If the offence is such an offence that it is, as a matter of experience, often followed by breaches of the peace, and if the evidence shows that the accused would have accomplished their object by breach of the peace, it is enough. Thus, an offence such as the removal of a landmark under section 434, Indian Penal Code is often followed by serious riots, and, therefore, where the evidence shows that the accused were prepared to commit the act of removal by breach of peace (and was prevented from doing so only because the other side ran away), the offence falls within the words “involving a breach of the peace.”⁵

1. Contrast—

Ramjan v. Jawaluddin, A.I.R. 1944 All. 272.
with

In re Mekrai, A.I.R. 1939 Mad. 787.

2. The various views are criticised in *The King v. Maung Kyi Nyo*, A.I.R. 1940 Rang. 50.

3. The earlier cases are collected in Note “Criminal Cases of 1903” (1904) 8 C.W.N. Warrants, at pages 141, 143, 153 and in the Editorial note 8 C.W.N. (Journal, 210).

4 & 5. *Emp. v. Manik Rai*, (1911) I.L.R. 33 All. 771, 772 (Knox J.).

Same is the position regarding criminal trespass,¹ where there is an intention to commit a breach of the peace.

(b) Not only are offences in which breach of the peace is an essential ingredient included, but also offences in which an evident intention to commit a breach of the peace is expressly found.^{2 3}

(c) Breach of the peace must be an ingredient of the offence.^{3 4 5 6}

Thus, acts of immorality in seducing married women may provoke or lead to a breach of the peace, but they do not "involve" a breach of peace.⁷

In an earlier Madras case,⁸ White C. J. had raised query as to whether, where a breach of the peace had been in fact committed, an order could be passed though the offence did not "involve a breach of peace".

(Compare the language of section 522—an offence attended by criminal force).

For a slightly wider view, the under-mentioned case⁹ may be seen. In that case, the High Court observed¹⁰ that the words "breach of the peace" are the anti-thesis of the other set of words "keeping the peace". The words "keeping the peace" connote preservation of the public peace, and are the direct opposite of the words "breaking the peace". Therefore, the court has to examine whether the offence brought home to the individual necessarily includes or implies breach of the peace or constitutes or amounts to a breach of the peace. If it does, the section applies. Then followed an elaboration of the section, in these words.

"Is it intended by the section that each of the offences described in the Indian Penal Code should fall under the category of either "offences involving a breach of the peace" or offences of the opposite description. I do not think either is desirable or possible. The facts constituting an offence must be looked at for determining whether the offence comes within the section or not. The present case is in point and strikingly illustrates what I mean. Wrongful confinement *per se* is not an offence involving a breach of the peace. If,

1. Dharam Raj, (1920) I.L.R. 2 All. 345.

2. *Abdul Gaful v. Mad. Mirza*, I.L.R. 59 Cal. 659; A.I.R. 1931 Cal. 645 (D.B.) (Reviews cases).

3. *Asoka v. Emp.*, A.I.R. 1930 Cal. 802.

4. *Anukul Saha*, A.I.R. 1939 Cal. 484 (D.B.).

5. *Abdulla v. Crown*, I.L.R. 2 Lah. 279; A.I.R. 1921 Lah. 98.

6. *Mithiah Chetty*, (1905) I.L.R. 29 Mad. 190 (Section 143, Indian Penal Code).

7. *Arun Samanta*, (1903) I.L.R. 30 Cal. 366, 368 (Prinsep and Mitra JJ) (Case under section 110).

8. *Kannokaran v. Emp.*, (1902) I.L.R. 26 Mad. 469.

9. *In re Kuppa Reddiar*, (1924) I.L.R. 47 Mad. 846; A.I.R. 1924 Mad. 808.

10. *Kuppa Reddiar, In re*, A.I.R. 1924 Mad. 808; 809 (Venkatasubha Rao J.).

for example, a person happens to be in a room in his own house and another by locking the room on the outside, confines the person within the room and makes egress impossible, all the elements necessary for constituting the offence of wrongful confinement are present. But this involves no breach of the peace but on the contrary if, as has happened in the present case, the offenders in a coconut garden using violence seize another and tie his hand, I am clearly of the opinion that the offence as proved does involve a breach of the peace."

(e) The expression "offences involving a breach of the peace" covers two classes of cases—The first class is where a breach of the peace in fact has occurred. The other case is where the *definition* of the offence involves a breach of the peace, as in one of the two classes of cases under section 504, Indian Penal Code.¹

282. An amendment of section 106 is proposed to settle the law on the point, so as to *replace* the words "involving a breach of peace" by a different phraseology.

283. The question whether the Sessions Judge should also be added in section 106(3)—which refers to the High Court exercising the "powers of revision", can be considered after the question of revisional powers of the Sessions Judge is considered.² Section 106 (3) and Sessions Judges.

284. It has been suggested,³ that the power under section 106 should be given to Second Class Magistrates (particularly for riot cases). We are unable to agree. The maximum period of security under section 106 is 3 years, and, for that reason, it is better that the power is confined to Magistrates of the highest class. Section 106 and Magistrates empowered.

285. With reference to sections 106 and 110, it has been suggested⁴ that the maximum period for binding down persons to be of good behaviour under sections 106 and 110 should be reduced *from three to two years*. Sections 106 and 110 maximum period.

The reason given in support of this suggestion is, that the period of three years was "too long and often caused harassment to citizens who may have had the misfortune of having incurred the displeasure of the police". If a person does not change his ways within two years, there are (it is stated), other methods of dealing with him.

1. *Emp. v. Yacoob Sayed*, (1918) I.L.R. 43 Bom. 554; A.I.R. 1919 Bom. 150 (Heaton J.).

2. Amendment of section 106(3) to be considered when section 435 is considered.

3. F. 27(3)/55-Judl. II (Ministry of Home Affairs File) Appendix I, Item No. 18.

4. F. 3(2)/55-L.C. Part VII, S. No. 449, Suggestion of the U.P. Committee for Investigation of Causes of Corruption in Subordinate Courts in U.P. (1963), Report page 42, Bill at pages 225-226.

We have considered the suggestion carefully. But we may point out, that security for the period of three years can be demanded only after confirmation by the Sessions Judge, who has to go into the case on the merits.¹ This safeguard being there, we do not regard the suggested change as necessary.

Sections 107 to 110. Retention of (general question). 286. Sections 107 to 110 deal with preventive action. They are vitally connected with the preservation of the public peace and the maintenance of law and order. This is the first duty of every State. The duty cannot be effectively carried out without some provisions designed to give sufficient powers. Some safeguards are needed no doubt, and the law provides for them. However, omission of these sections appears to be out of question.

Section 107. 287. The power under section 107 should be given to Executive Magistrates, being concerned with the maintenance of law and order.² The power may be assigned to—

(i) Presidency Magistrates specially empowered by the State Government in this behalf (Cf. the Bombay amendment) ;

(ii) District Magistrates and Sub-divisional Magistrates (see the existing section) ;

(iii) *Executive* Magistrates of the first class (Cf. the Punjab amendment).

Section 107 (1) and suggestion of a High Court Judge. 288. With reference to section 107(1), the following suggestion³ has been made by a High Court Judge.

“Sections 107-110 relate to security for keeping peace. The words “is informed” occurring in section 107(1) lead to the presumption that the information may be lodged by private persons. It may be made clear by necessary amendment, that these sections should be confined to cases where information is lodged by the police (and not by private persons) that a breach of peace is apprehended.”

289. We examined the existing law on the subject.

As the law stands at present, the Magistrate can draw up proceedings—

(a) on a police report,⁴

(b) on a report of a subordinate Magistrate,⁵

(c) information given by a private individual.⁴

1. Sections 123(2) and 123(3).

2. As to subsequent proceedings, see discussion relating to section 117.

3. F. 3(2)/55-L.C. Part III, S. No. 49(q).

4. *Laxmi Narain v. Emp.*, A.I.R. 1932 All. 670.

5. *R. v. Jarappa*, (1871) 8 B.H.C.R. Cr. 162, 163.

(d) on private petition ;¹

(e) information gathered from a previous trial.²

It may be noted, that under section 106, even the orders of the High Court in revision are sufficient.³

290. *The sine qua non* for the institution of a proceeding under section 107 is, that the *Magistrate* shall be of opinion that there is sufficient ground for proceeding.⁴

We are, with great respect, unable to recommend an amendment on the lines suggested. There may be cases where the *Magistrate* may have to act on information from sources other than the police.

291. It has been suggested,⁵ that section 108 should be omitted. We are not in favour of deletion of the section.

Section 108.
Retention of
Jurisdiction
under.

We would, however, like to draw attention to the fact that the jurisdiction under section 108 is preventive, and not punitive. The test is, whether there is (i) dissemination of seditious matter; and (ii) fear of repetition.⁶ "To take proceedings under section 108, there ought to be evidence that, if not prevented, the person accused would continue to act in the way in which he had done."⁷ We may quote⁸ the observations of Rankin J. :

"The most important thing in the end is the question under section 108, Cr. P. C., whether it is necessary to order the person summoned to enter into a bond.

It may sometimes happen that the contention on the part of the editor in such circumstances is so extravagant that the *Magistrate* may be justified in thinking that unless effective steps are taken, the editor intends, notwithstanding the decision of the Court, to go on as before. Merely because a person has insisted upon putting his case before the Court and taking its decision, to infer that it is necessary after the decision has been given to bind him down in or to prevent him from doing the same thing again is, I think, unwarranted.

1. *Sanjivi v. Koneri*, A.I.R. 1926 Mad. 521, 524.

2. *K. E. v. Gobardhan*, A.I.R. 1922 Oudh 273.

3. *Emp. v. Muhammad* (1881) I.L.R. 3 All. 545, 548, 553.

4. *Deoballam v. Gorakhanath*, 48 Cr. L.J. 703, 704 (Patna) (Agarwala J.).

5. F. 27(5)/54-Judl. (Home Ministry File), Appendix II, Item No. 10 (suggestion of a Member of Parliament).

6. *Emp. v. Vaman*, 11 Bom. L.R. 743.

7. *Chiranjil Lal, v. K. E.* I.L.R. 50 All. 854; A.I.R. 1928 All. 344, 345 (Dalal J.).

8. *Chakravarty, v. K. E.* I.L.R. 54 Cal. 59; A.I.R. 1926 Cal. 1133, 1137 (Rankin J.).

The following observations show the scope and object of section 108 :—¹

“The provisions of Chapter VIII of the Code are no doubt preventive in their scope and object; and are obviously aimed at persons who are a danger to the public by reason of the commission by them of certain offences. The test under section 108 is whether the person proceeded against has been disseminating seditious matter and whether there is any fear of a repetition of the offence. In each case that is a question of fact which must be determined with reference to the antecedents of the person and other surrounding circumstances.”

292. The circumstances in which section 108 was inserted in the 1896 Code are interesting. Alongwith the Bill of 1898, amending the Indian Penal Code, for the purpose of dealing with the law of sedition, Government decided to insert section 109. The reasons were thus explained :—²

“For the present, at any rate, we have no further amendments to suggest in the substantive law, and I now wish to refer to two amendments which the Government propose to move in the Select Committee on the Code of Criminal Procedure Bill. Section 109 of that Code provides that in certain cases people who misbehave themselves may be bound over and required to find sureties to be of good behaviour for a term not exceeding twelve months. We propose to apply a similar procedure to the case of people who either orally or in writing disseminate, or attempt to disseminate, obscene, seditious or defamatory matter. A man who disseminates, that is to say, who sows broadcasts or scatters abroad, such matter is obviously a dangerous public nuisance. It is immaterial whether he chooses, as his means of dissemination, an oral address, or a book or a pamphlet, or a newspaper. We are bound to check such obnoxious conduct. But as a rule the persons who are guilty of it are small and insignificant individuals. They may do enormous mischief among uneducated, foolish and ignorant people, but in themselves they are deserving of very little notice. It is absurd to deal with them by an elaborate State prosecution. We think that in most cases no prosecution at all will be required. It will be sufficient to give them an effective warning to discontinue their evil practices, and we think that the machinery we have devised will operate as an effective warning. The general power of revision possessed by the High Courts will secure that that machinery will not be used in any way

1. *Emp. v. Vaman*, (1909) 11 Bom. L.R. 743, 744 (Chandavarkar, Ag. C.J. and Heaton J.).

2. Proceedings of the Governor-General-in-Council, Dec. 12, 1897; speech of Mr. Chalmers Law Member.

oppressively; and we further propose that this new power should only be exercised by Presidency or District Magistrates, or specially empowered Magistrates of the first class."

293. The necessary clause was approved in substance by the Select Committee.¹ The Committee stated, that it had confined jurisdiction to certain Magistrates, and provided that the bond may be with or without surety, and removed reference to obscene matter and made certain other changes. It had also provided that the order shall be subject to revision.

The amendment, however, evoked serious protests.²

294. In the proceedings of the Select Committee on the 1898 Code,³ one of the members, Shri Bishambar Nath, stated, that insertion of the new clause would virtually mean the revival of that "retrogressive and noxious legislation in the Vernacular Press Act." Answering the criticism, Sir John Woodburn explained the real object of section 108 thus :—

"In the interests of good government it is always better that crime should be prevented than that it should be allowed to come to a head, however, exemplary and effective the subsequent punishment may be. The lamentable riots, which were yesterday reported from Bombay, furnish fresh proof of the suddenness and fierceness with which passions may be roused in this country in an ignorant mob and of the imperative necessity of arming the executive with all the powers of prevention which possible forewarning may render it expedient to use.

"I am myself perfectly willing that even this preventive jurisdiction shall be exercised only under the express authority and sanction of Government. This will give assurance that it will be exercised with moderation and prudence; but that provision should exist for the use of preventive measures, when occasion requires, is the opinion of every responsible Government in India and of every High Court without exception. The only dissentients in the High Courts were Justices Ghose and Banerjee, Judges of a soberness and soundness of judgment which must always carry weight and even they accepted the measure now before Council with the proviso which will be agreed to

1. Report of the Select Committee on 1898 Code, 16-2-1898, Legislative Proceedings, April, 1898, No. 24 to 128, Appendix A-50 (National Archives).

2. See the various articles and notes in (1898) 2 Calcutta Weekly Notes (Journal section), pages 51, 73, 75, 85, 87, 88 (representation of the Calcutta Bar) and 95 (Report of the Select Committee on the amendment to the I.P.C.) and page 111.

3. Proceedings of the Governor General in Council, 11th March, 1898, Legislative Proceedings, April, 1898, No. 24-128, Appendix A-60 (National Archives).

today. I can add nothing to this unanimous opinion of all that is responsible for the peace and order of India."

295. One of the amendments moved by Sir Griffith Evans was accepted in the Council. He moved this amendment :—

"No proceedings shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under or printed or published in conformity with the rules laid down in the Press and Registration of Books Act, 1867, except by the order or under the authority of the Governor-General in Council or the Local Government or some officer empowered by the Governor-General in Council in this behalf."

He thus explained the amendment "The last words of the amendment are taken from section 196. The effect, roughly speaking, is to require the same sanction of Government when proceedings are instituted under section 108 against the Press as is required in all cases of a prosecution under section 124A. The result will be that Magistrates will be able to take proceedings without Government sanction in all other cases, but will require Government sanction before taking proceedings in respect of a newspaper article. It may be asked why this distinction should be made between oral and written sedition. One reason is that oral incitements to a mob of ignorant people are apt to lead to immediate disturbances and may require immediate action without waiting for sanction. Another is that many seditious preachers are migratory and must be caught at once if they are to be stopped, whereas newspaper editors and publishers have a fixed address and a fixed occupation and can be found at any time. But the main reason is a different one. A portion of the Vernacular Press has been allowed to drift into a very lamentable condition for many years, and the curb which it is proposed to put upon them by this section will have to be applied with great discretion and judgment. I mean no disrespect to the Magistrates in India when I say that I do not think this power can be safely entrusted to them. Able and conscientious as they are, the comparatively isolated lives that they lead in the several districts are not favourable to the wide outlook and sense of proportion which are necessary to deal effectively with this evil. Many of them are also too young. It is, I think, essential that this power should be exercised by persons of the ripest judgment, living in a serener atmosphere, away from local feeling and excitement. In fact, I do not think that any one but the Government ought to use this power with any prospect of the good results which are intended."

296. Power under section 108 should be assigned to Executive Magistrates, the power being of a preventive nature. It may be given to — Section 108 changes required.

- (a) Chief Presidency Magistrates (See existing section);
- (b) District Magistrates, (see existing section);
- (c) Presidency Magistrates specially empowered by the State Government in this behalf (see the Bombay Amendment);
- (d) Executive Magistrates of the first class (see the Punjab amendment).

Mention of section 295A, Indian Penal Code, should be added in section 108, as the offence under that section is similar to the offences already mentioned in section 108.

297. A suggestion¹ to extend section 109 to cases of intention to commit a crime was considered, but rejected by us. Section 109 suggestion regarding intention to commit crime.

A suggestion² to omit section 109 totally was also considered, but we are unable to accept it.³

298. The power under section 109 should be given to Executive Magistrates, the power being of a preventive nature. These will be— Section 109 power under.

- (i) Presidency Magistrates specially empowered by the State Government in this behalf (see the Bombay amendment);
- (ii) District Magistrates (see the existing section);
- (iii) Executive Magistrates of the first class (see the Punjab amendment);

299. Under section 109(a), there is a conflict of decisions as to the interpretation of the words "to conceal his presence within the local limits of the Magistrate's jurisdiction. We considered the controversy at some length.⁴ We recommend, that the wider interpretation be adopted, that is to say, it is not necessary that the person against whom action is to be taken should have come from outside the Magistrate's jurisdiction. To achieve this object, section 109(a) should be amended so as to read— Section 109 (a) and the words "to conceal his presence".

(a) that any person within the local limits of such Magistrate's jurisdiction is....."

It will also be desirable to amend section 55, as it is couched in similar phraseology.⁵

1. F. 27(3)/55-Judl. II (Home Ministry File) Appendix I, Item No. 20.

2. F. 27(5)/54-Judl. (Home Ministry File), Appendix II, Item No. 11.

3. See also discussion relating to sections 107-110, *supra*.

4. For detailed discussion, see Appendix 8.

5. To be carried out under section 55.

Section 109
(b) Constitutional
of.

300. With reference to section 109(b), the following suggestion has been made by the Minister for Justice of a State Government.¹

“For a correct understanding of the changes which have taken place in consequence of the promulgation of the Constitution of India, it is necessary to look to the background—the context of bureaucratic rule. It cannot be denied that the position of a citizen in law before independence has drastically changed in the wake of freedom on the promulgation of the Constitution of India. Consequently, there has been a corresponding change in the rights of citizenship. The relevant question is what were the rights of a citizen of India before the Constitution of India came into force and how these rights stand now after its promulgation..... The old rights of citizenship created under foreign rule were of such a character and extent the exercise of which would not in any way interfere with the strengthening of the position of British rule in India and the foreign Government was too vigilant to protect its interests. Thus, the interests of the people were sacrificed for the benefit and welfare of British administration in this country. It will be appreciated that the old conception is now entirely changed. Whatever rights of citizenship are provided under the Constitution they have been created for building up and consolidation of the freedom of the country in the first instance and secondly for providing opportunities of free natural development to citizens of this country with an intense irresistible urge to vivify and resuscitate the dead—stagnant life of its people. To examine the position in law of section 109(b), Cr. P. C. we should look at it from the angle of vision of the new conception of citizenship as adopted and enshrined in the Constitution. Under section 109(b), Cr. P.C. the question of public peace is also involved. Public peace under the old British regime was undoubtedly a public peace of a graveyard, but an attainment of freedom this conception of public peace has undergone a drastic change. Now the conception of public peace is pregnant with its significance of the public peace of free citizens which will lead to the strengthening and consolidation of freedom in the country and to the awakening of a growing dynamic life of its citizens. From the above, it is crystal clear that under the new set-up of democratic Government we have to examine it in the light of the provisions of the rights of citizenship contained in the Constitution of India and that of public peace in its new context of the free sovereign state. If for interpretation of the provision of the Constitution we base our examination on the same old outdate conceptions of the rights of citizenship and public peace, which we can honestly say are left behind as most disgraceful, insulting and

1. F. 3(2)/55-L.C. Part VII, S. No. 152.

degrading remnants of the slavery of British rule in India, we will only misguide our endeavour and chase the wild goose in so far as the correct understanding of the above subject is concerned. Naturally as follows :—

(1) Whether the conceptions of the rights of citizenship and that of public peace have undergone a change in consequence of the promulgation of the Constitution of India? If so, how the above conceptions as they stand now after attainment of freedom, are materially different from the old ones? In case a material change is found, how does section 109(b), Criminal Procedure Code affect the provisions of Constitution of India?

(2) Whether the responsibilities of the Free Sovereign State of India for moral and material progress and peace and prosperity of the citizens of this country are the same as that of old regime of Britishers in this country, or this responsibility has further fully developed into a complete responsibility of a Sovereign State? If so, is an action under section 109(b), Criminal Procedure Code justified and maintainable?

(3) Whether any classification of the people of this country based on the ground of their *fortunes* is countenanced by the provision under the Constitution of India.

(4) Whether in view of the great changes mentioned above section 109(b), Criminal Procedure Code stands repugnant to the provision of article 14 of the Constitution?

(5) Whether section 109(b), Criminal Procedure Code is void by reasons of its inconsistency as provided under article 13 of the Constitution? So far as the provision of section 109(b), Cr. P. C. is concerned, it apprehends breach of public peace from a class of people *who have no ostensible means of subsistence—have nots. This is obviously creating a class by itself to be dealt with differently by the law of the land from the class of the people who are the haves. Is such a position tenable according to the Constitution of India?*"

We considered the suggestion. Our view is this—Section 109(b), cannot be employed against a person merely because he is a pauper or he is unemployed. It is requisite that the demanding of security must be necessary to ensure good behaviour. There must, ordinarily, be a suspicion that dishonest means are resorted to.¹ That being the *position*, we do not think that the section needs alteration because of the constitutional provisions.

1. See *Victor*, I.L.R. 53 Cal. 345.

Section 110 (e) and 110 (f). 301. We have been unable to accept a suggestion¹ to omit section 110, clauses (e) and (f).

Section 110 and illicit distillation. 302. The suggestion of a State Government² to add, in section 110, persons who habitually *commit illicit* distillation etc. was considered by us at some length; but we are not in a position to accept it. These are offences by virtue of local laws, and it would not be correct to put them in a provision applicable to the whole of India.

Section 110 Magistrates to be empowered. 303. Power under section 110 may be given to Executive Magistrates, as it is vitally concerned with the maintenance of law and order. These will be—

- (a) Presidency Magistrates specially empowered (See the Bombay Amendment);
- (b) District Magistrates (See existing section 110);
- (c) Sub-divisional Magistrates (See existing section 110); and
- (d) *Executive* Magistrates of the first class (See the Punjab amendment).

Section 110 and other points. 304. We have considered a suggestion³ to put various restrictions on the power under section 110 and to provide for compensation for false information leading to proceedings under section 110 etc. In our opinion, these changes would not be practicable.

Sections 111 to 116. 305. Section 111 is already omitted, no changes are needed in sections 112 to 116.

Sections 112 and 117(1) Remand. 306. With reference to sections 112 and 117(1), it has been suggested,⁴ that the courts should have power to remand to custody persons arrested under section 55 of Code for being proceeded against under Chapter VIII of the Code of Criminal Procedure.

We would, however, point out, that section 55 is *meant* for *urgent* cases. A remand should not be necessary in such arrests. Arrest under section 55 should be followed *promptly* by proceedings for obtaining orders under section 109, if the case so justifies.

As to remand in cases⁵ under section 107(3), section 107(4) may be seen. As to remand pending inquiry under Chapter 8, section 117(3), and also the undermentioned cases,^{6,7} may be seen.

1. F. No. 27(5)/54-Judl. (Home Ministry File); Appendix II, Item 12.

2. F. No. 3(2)/55-L.C. S. No. 25.

3. F. 27(5)/54-Judl. (Home Ministry File), Appendix IV, Items 2, 3, 4.

4. F. 3(2)/55-L.C. Part VII, S. No. 449, Suggestion of the U.P. Committee for Investigation of Causes of Corruption in Subordinate Courts in Uttar Pradesh, (1963), Report, pages 42-43 Bill at page 226.

5. See *Shravan Kumar* A.I.R. 1957 All. 189, 192 (V. Bhargava and Sahi JJ.) (Case under section 107).

6. I.L.R. (1960) 2 All. 792.

7. *C. Kabui v. Union Territory of Manipur*, A.I.R. 1963 Manipur 12, 14, para. 9.

We do not think, that any change is necessary.

307. The detailed inquiry under sections 117 to 119 should be left to *Executive Magistrates*,¹ who would have power under Section 117 issued the initial order.²

In an earlier Report,¹ a recommendation was made for leaving the actual inquiry under sections 117 *et seq.* to *Judicial Magistrates*. Under the Madras pattern jurisdiction under section 107 is exclusively with the Executive Magistrate. But, in regard to proceedings under sections 108 to 110, where the proceedings are initiated (as almost invariably they are) on information from the police the information can be laid directly before the Judicial Magistrate, and if a private person seeks to initiate proceedings,⁴ he can be referred to the Judicial Magistrate. Thus, it is the Judicial Magistrate who conducts the proceedings, under the Madras pattern. No question of emergency (it is stated)⁵ can arise under sections 108 to 110; but, to provide for all contingencies, concurrent jurisdiction is given to both classes of Magistrates

308. We have considered the Madras pattern⁶ and also the recommendation in the 14th Report for leaving the actual proceedings to Judicial Magistrates (confining the powers of Executive Magistrates to such immediate action as is necessary). In our opinion, such a procedure would not be convenient for adoption for the whole of India, particularly when separation is to be introduced by law. The sections are preventive, and, though recording and sifting of evidence are required, yet the proceedings are vitally concerned with the maintenance of law and order.

309. Sections 118 to 122 need no change.

Sections 118
to 122.

310. The suggestion of a High Court Judge,⁷ with reference to section 122, is as follows :—

In practice, many Magistrates refuse to accept any surety offered without first getting it *verified*. This is not strictly in accordance with the provisions of section 122. The principle that whatever surety is offered must be accepted by the Magistrate though he can, after an inquiry, reject him, is unsound, and the section needs to be suitably amended.

1. This, however, involves no verbal amendment in section 117.

2. See discussion regarding sections 107 to 110.

3. 14th Report, Vol. 2, page 859, para. 22.

4. Government of Madras, Order No. G.O. Ms. 2304, dated 24th September, 1952, paragraph 19(3), and Schedule, entry 18.

5. Government of Madras, Order No. G.O.Ms. 2304, dated 24th September, 1952; paragraph 19(3), and Schedule, entry 18.

6. The West Bengal Bill also assigns these powers to Executive Magistrate. See the first Schedule to the Code, as proposed to be inserted by the West Bengal Separation etc. Bill, 1967.

7. F. 3(2)/55-L.C. Part II, S. No. 33(a).

(i) The Magistrate should be empowered to refuse to accept a surety if he has reason to believe that he is not fit to be accepted;

(ii) In such a case, he should be required to hold an inquiry into the fitness and then decide whether to accept him or not;

(iii) It may be advisable to prescribe a limit within which the Magistrate should complete the inquiry;

(iv) If he cannot complete the inquiry within the time prescribed, he can be compelled to accept the surety, with liberty to reject him later on his being found to be unfit after the completion of inquiry. This would be an adequate safeguard against bogus sureties.

311. Of the four points made in the suggestion,¹ the first two are, in substance, covered by section 122(1), main paragraph, and the proviso. The Magistrate, no doubt, can exercise the discretion to refuse to accept a surety only after a satisfactory enquiry.² Reasons must be recorded for rejecting a surety.³ Rejection of a surety cannot be perfunctory. It has been recognised for long, that the "ground on which a Magistrate has power to refuse to accept any surety must be a valid and reasonable ground."⁴

312. The third and fourth points contemplate a time limit, for completing the inquiry. But it is doubtful if it would be workable. To insert a rigid rule, that if the inquiry is not finished within the prescribed time-limit, the *surety must be accepted*, may not be advisable. It may even induce some Magistrate to hold a very perfunctory inquiry in order to comply with the time-limit, thereby substituting another evil in place of any evil in the form of delay that may be existing. It is true, that it is desirable that the order *rejecting etc.* the surety should be passed within a reasonable time.⁵ This would enable the accused to furnish fresh sureties.

The matter, however, seems to require administrative action rather than legal amendment.

Having regard to the fact that attempts are sometimes made to sue Magistrates for detaining a person in alleged violation of the procedure provided by the section,⁷ it appears to be desirable to *avoid* a categorical provision.

1. Paragraph 310, *supra*.

2. *In re Abdul Khan*, (1906), 10 C.W.N. 1027, 1028 (Ormond and Gupta JJ).

3. *Akbar Ali v. Emp.*, (1914) I.L.R. 42 Cal. 706.

4. *Rayan*, (1916) I.L.R. 43 Cal. 1024, 1026, 1027 (Mookerjee and Sheepshanks JJ). (Reviews case-law).

5. *Narain Soobodhee*, (1874) 22 W.R. Cr. 37.

6. *Maung Tun v. K. E.*, A.I.R. 1925 Rang. 353.

7. *Cf. Lakshmi Narain Singal*, A.I.R. 1962 All. 137.

313. No changes appear to be necessary regarding the Magistrates empowered under section 123(2). Section 123 (2) and Magistrates empowered.

314. It has been suggested that sub-sections (2), (3), (3A) and (3B) of section 123 of the Code may be deleted. The suggestion has been made by the U.P. Committee for Investigation into corruption in subordinate Courts.¹ Section 123 and suggestion to delete confirmation by Sessions Judge.

The Committee's reasoning was, that the hands of the Sessions Judges were too full.

315. We have considered the suggestion carefully. But we venture to think, that the suggested change is too radical, and the reason given does not, *with great respect, justify it.*

Section 123(2) contemplates that the Sessions Judge must form his *independent opinion*² as to the propriety of the order, the period and amount. He has to deal with the case on merits.³ This provision has been there, at least since 1882. In fact, the Code of 1898 substituted "Sessions Judge" for "Court of Session". The order passed by the Sessions Judges become the *order in the case*.⁴ These points show the importance attached by the legislature to confirmation by the Sessions Judge. We would not be prepared to alter, these salutary provisions, without strong and compelling reasons.

316. With reference to sections 124 and 125, certain points arise in view of separation. These are considered below. Sections 124 and 125 and separation.

317. In section 124, the following points require consideration. Section 124.

(a) Wherever the District Magistrate occurs, the Chief Judicial Magistrate has been added in Punjab. This is to be adopted, as section 124 is to continue to apply to orders under section 106—see under (b) below. But, the respective powers of the District Magistrate and the Chief Magistrate should be defined.

(b) The cases of security under section 106 will also continue to be governed by section 124, as at present. The jurisdiction, however, will be that of the Chief Judicial Magistrate, so far as action under section 124 in respect of an order under section 106 is concerned.

(c) In section 124(2), the words in brackets "unless the order has been made by some court superior to his own" need not be omitted. The omission of these words will be

1. F. 3(2)/55-L.C. Part VII, S. No. 449, Suggestion of the U.P. Committee for Investigation of Causes of Corruption in Subordinate Courts in Uttar Pradesh (1963), Report, page 43, middle, Draft at page 227.

2. *Mangal Singh v. Crown*, A.I.R. 1928 Lah. 189, 191 (Tek Chand J.) (Reviews cases).

3. *Emp. v. Amir Bala*, (1911) I.L.R. 35 Bom. 271, 274.

4. *Emp. v. Amir Bala*, (1911) I.L.R. 35 Bom. 271, 274.

misconstrued. They have this effect, that only orders of the District Magistrate himself or of his subordinate Magistrate can be interfered with.

History of Section 124. 318. As to section 124(1), the reason why certain words were omitted in 1923 can be gathered from the Statement of Objects and Reasons to the Bill which led to the Amendment Act of 1923.¹

"This amendment is mainly intended to enable persons committed to prison under Chapter VII of the Code to be sent to Industrial Homes and Settlement of the Salvation Army, or to other similar Homes or Settlements, where it may be possible to reform them and make them accustomed to regular work of a kind which may be useful to them after the expiry of their period of detention. It is proposed to give a District Magistrate or a Chief Presidency Magistrate absolute power to release with or without conditions a person imprisoned for failure to give security, *without the intervention of the Court of Session or High Court.*"

Power to release persons imprisoned for failing to give security. 319. Before the 1923 Amendment, section 124 read as follows :—

"124. (1) Whenever the District Magistrate or a Chief Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this Chapter, whether by the order of such Magistrate or that of his predecessor in office, or of some subordinate Magistrate, may be released without hazard to the community or to any other person, he may order such person to be discharged.

(2) Whenever any person has been imprisoned for failing to give security under this Chapter, the Chief Presidency or District Magistrate may (unless the order has been made by some Court, superior to his own) make an order reducing the amount of the security or the number of sureties or the time for which security has been required.

(3) Whenever the District Magistrate or a Chief Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this Chapter as ordered by the Court of Session or High Court may be released without hazard to the community, such Magistrate shall make an immediate report of the case for the orders of the Court of Session or High Court, as the case may be, and such Court may, if it thinks fit, order such person to be discharged."

1. Statement of Objects and Reasons to the 1921 Bill, under clause 23.

320. In section 125, the following points have been considered :—

(a) The Chief Judicial Magistrate may be *added*; and the respective powers of the District Magistrate and the Chief Judicial Magistrate may be *defined*.¹

(b) For the words “under this Chapter”, it is not necessary to substitute the words “under section 118”.¹

(c) The words “not superior to his court” need not be omitted.¹

321. Section 126 may be *amended* so as to confine the power of discharge to the court by which security was ordered. Compare the Bombay and Punjab amendments. Section 126.

322. In section 126A, after the word “Magistrate”, the words “or court” should be inserted.² Section 126 A.

323. Sections 127 to 132A deal with the dispersal of lawful assemblies. These powers have been kept only with *Executive Magistrate*, in the Punjab. In Bombay, the sections have not been amended, which means that both classes of Magistrates can exercise the powers. In Madras, the scheme is as follows. Primarily and normally, these functions devolve on Executive Magistrates. But, when for some reason or other, the Executive Magistrate is not available on the spot, the officer for the time being in charge of a police station, or any higher police officer, may seek the assistance of the Judicial Magistrates. The Judicial Magistrate should act as though he were the Executive Magistrate, pending the arrival of the latter. “The moment the Executive Magistrate comes on the scene and is able to take charge of the situation the Judicial Magistrate will efface himself. But, before withdrawing from the picture, the Judicial Magistrate will, if so requested by the Executive Magistrate having territorial jurisdiction, modify or cancel whatever directions he may have issued, so that the Executive Magistrate will be able to act unhampered by orders not of his own making.”³ Sections 127 to 132A.

324. While we recognise the utility of a scheme (as in Madras) giving concurrent powers to deal with emergencies, we felt, that, to avoid confusion and also in view of the fact that separation is now to be introduced by legislation, it would be better to confine the power to only one set of Magistrates, namely *Executive Magistrates*. Any practical

1. Cf. discussion regarding section 124.

2. This is consequential on the changes proposed to section 126.

3. Government of Madras, G.O.Ms. No. 2304, dated the 24th September, 1952, para. 18.

difficulty could be solved by appointing more Executive Magistrates.

Section 127
and sugges-
tion of
Madras Bar
Council.

325. The following suggestion¹ has been made by the Madras Bar Council :—

“Chapter IX—Unlawful Assemblies—may be omitted. Appropriate legislation for the dispersal of an unlawful assembly by police and military authorities should be made. Courts and Magistrates should not be invested with any powers to disperse unlawful assemblies, as such power is purely executive in character. It is necessary that Magistrates should not be made to feel that they are part of the executive. If this Chapter is to be retained, the Magistrates may be divested of the power given to them under this Chapter by appropriate deletion and amendments.”

We think, however, that this power must be retained, for dealing with emergencies. We do not see any need to disturb the structure of the Code, by putting these provisions in separate legislation.

Section 127
(1) and
suggestion
of High
Court Judge.

326. With reference to section 127(1), the following suggestion² has been made by a High Court Judge :—

“The power to command any unlawful assembly to disperse is rather wide. The real object would be served only by retaining the power to disperse an unlawful assembly of five or more persons likely to cause breach of peace. The words “any unlawful assembly” may be omitted.”

327. We are, with great respect, unable to accept the suggestion,³ for the reasons given below. Primarily, the power is to disperse an “unlawful assembly”. The power to disperse other assemblies likely to cause a disturbance of the peace etc.⁴ is only an extension of the first power. The extension is considered necessary, because such assemblies are *potentially* unlawful assemblies.

Section 127(1) of the Code runs thus—

“127. (1) Any Magistrate or officer in charge of a police station may command any unlawful assembly or any assembly of five or more persons likely to cause a disturbance of the public place, to disperse.....”

The omission of the words “unlawful assembly” (as suggested)³ would give a wrong colour to the section.

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1. F. No. F. 3(2)/55-L.C. Part III, S. No. 52 (Page 281, correspondence).
 2. F. 3(2)/55-L.C. Part III, S. No. 49(a). (Page 188, correspondence).
 3. Paragraph 326, *supra*.
 4. See also section 151, Indian Penal Code.

328. If section 127 is altered so as to confine it to an *unlawful* assembly of five or more persons likely to cause breach of the peace, it will be much narrower than the existing section but, then it will become vague, because "breach of the peace" is a test difficult to apply.

It may be added, that armed forces can be employed only *when public security so requires*.¹

The section (section 127) now covers—

- (i) unlawful assemblies—
section 141, Indian Penal Code;
- (ii) other assemblies which are potentially unlawful—section 151, Indian Penal Code.

It cannot be confined to only one category—i.e. (i) above.

329. Generally, as to the Crown's right, undermentioned case may be seen.²

330. Under section 133, the following points have been Section 133. considered :—

(i) Powers under section 133 *may be assigned* to Executive Magistrates, the section being designed to afford a rough and ready procedure for removing public nuisances. Further, primarily the section is intended to be used in urgent cases,^{3 4 5 6} though of course, long user cannot legalise a public nuisance.⁷

(ii) Under section 133(1), opening paragraph, the Executive Magistrates empowered *will be*—

- (a) Presidency Magistrates specially empowered; (Compare the Bombay Amendment);
- (b) District Magistrates and Sub-divisional Magistrates (as in the existing section);
- (c) Executive Magistrates of the first class see the Punjab Amendment).

(iii) In section 133(1), concluding paragraph, for the words "Magistrate of the first or second class", it is necessary to *substitute* the words "Executive Magistrate of the first or second class" (compare the Punjab amendment). (It is unnecessary to add some other Presidency Magistrate specially empowered etc., in the concluding paragraph).

1. See sections 129 and 131, Code of Criminal Procedure, 1898.
 2. *Chanappa v. Emp.*, I.L.R. 55 Bom. 263; A.I.R. 1931 Bom. 57 (F.B.).
 3. *Mir Imam Abdul Aziz v. Emp.* (1897) 4 P.R. Cr.
 4. *Basanti Devi v. Rex.*, A.I.R. 1949 All. 650.
 5. *Rameshwar Prasad v. State* A.I.R. 1958 Pat. 270.
 6. *Kedar Nath v. Satish Chandra* A.I.R. 1940 Oudh 75, 77.
 7. *State v. Manji Raghu*, (1964) 2 Cr. L.J. 94.

(iv) In section 133(1), concluding paragraph, in place of the words "move to have the order set aside or modified" the words "show cause why the order should not be made absolute" should be substituted. The existing language is not in harmony with the language of section 135(b) and sections 136, 137 etc.

Sections 133-134 and U.P. Committee's suggestion. 331. With reference to section 133, the U.P. Committee¹ has suggested that, to remove changes of misunderstanding, sections 133 and 134 of the Code may be amended suitably.

We are already recommending certain verbal changes.²

Section 133 (1) and Magistrates empowered. 332. With reference to section 133(1), it is the suggestion of a High Court Judge³ that powers under the section be limited to the District Magistrate and to Sub-divisional Magistrates *specially selected*. We have given our anxious consideration to this suggestion. But, since the Legislature has, in 1923, *deliberately* expanded the category of Magistrates who could act under section 133, we hesitate to make a recommendation for reverting to the old position.

[The reason given in the Bill of 1914 which ultimately led to the Amendment Act of 1923 was that instead of Magistrates specially empowered, all First class Magistrates were empowered to act under the section *whenever necessary*.⁴]

[Section 133(1), as enacted in 1898, was confined to the District Magistrate, Sub-divisional Magistrate, and First Class Magistrates specially empowered. In 1923, it was extended to *all* First Class Magistrates. Second Class Magistrates (unless they are also Sub-divisional Magistrates) are not mentioned.]

Section 133 and Jury. 333. A suggestion to abolish jury in proceedings under section 133 has been made by a State Government.⁵ But we are unable to agree with it. Orders under section 133 are of a far-reaching nature. Jury is a good safeguard for such orders, as affording an indication of what is considered reasonable and proper.⁶

Section 133 and summons procedure. 334. A suggestion to insert a provision that the summons procedure be followed in cases under section 133 *et seq* was considered. No such change is necessary.⁷

1. F. 3(2)/55-L.C. Part VII, S. No. 449, Suggestion of the U.P. Committee for Investigation of Causes of Corruption in Subordinate Courts in U.P. (1963), Report, pages 43-44 (Draft at pages 227 to 230).

2. See section 133, as proposed.

3. F. 3(2)/55-L.C. Part II, S. No. 33(a).

4. See Gazette of India, Part V, 28th March 1914, Statement of Objects and Reasons to the Amendment Bill, under clause 19.

5. F. 3(2)/55-L.C. Sl. No. 28.

6. See also para 341, *Infra*.

7. See section 137(1), which already provides that *evidence* shall be taken as in a summons case.

335. No change is needed in section 134.

Section 134.

336. As regards section 135, certain points have been considered¹ under section 139A. Section 135.

337. The following suggestion has been made by the U.P. Committee,² with reference to section 135 and 136. Sections 135-136 and U.P. Committee's suggestion.

Trial by jury having been abolished, sections 135 and 136 of the Code (which still retain the provision for appointment of jury) should also be amended suitably.

We have already expressed our views in the matter.³

338. No change is needed in section 136.

Section 136.

339. Section 137, may be amended as follows:—

Section 137.

(i) for the word "he" in section 137(1), the words "such person" should be substituted. A section should not, ordinarily, use a pronoun referring to a noun used in a previous section;

(ii) in section 137(2), the Magistrate should have power to *modify* the order.⁴

340. The suggestion of the U.P. Committee for investigation into Corruption etc.⁵ to the effect that in proceedings under section 133 *et seq.* the court should have a power to direct a local inquiry or to summon and examine an expert, has been found acceptable to us. A section to that effect may be inserted.⁶ Section 137-A (New).

341. The following suggestion⁷ has been made by a High Court Judge:— Section 138 and 139, and suggestion of a High Court Judge.

"The procedure regarding appointment of a jury in public nuisance cases is cumbrous. The matter should be left for determination by the Magistrate. An appeal may be provided."

We would, however, emphasise, that the function of the jury is to decide whether the measures directed by

1. See discussion under section 139A.

2. F. 3(2)/55-L.C. Part VII, S. No. 449, Suggestion of the U.P. Committee for Investigation of Causes of Corruption in Subordinate Courts in U.P. (1963), Report, pages 43-44 (Draft at pages 227 to 230).

3. See discussion regarding section 133 and jury (Paragraph 333, *supra*).

4. As to existing law, see—

(i) *Sadanand*, A.I.R. 1958 All. 174.

(ii) *Juje D Silva*, A.I.R. 1943 Mad. 335.

(iii) *Secretary, Rate Payer's Committee* A.I.R. 1952 Cal. 127.

5. F. 3(2)/55-L.C. Part VII, S. No. 449, Report of the Committee, (1963), page 44, and draft at page 230.

6. See section 157A (as proposed).

7. F. 3(2)/55-L.C. Part III, S. No. 49(a).

the Magistrate are reasonable and proper.¹ As the powers given are of an exceptional nature,^{2,3} we think that the jury may be retained. These provisions are intended to operate as a check on the exercise of the "summary and arbitrary dealing with right of property."^{4,5}

Sections 138-139 and U.P. Committee's suggestion—
U.P. Committee's suggestion—
342. The following suggestion has been made by the U.P. Committee⁶ for the Investigation of causes of Corruption—

The reasons given by the U.P. Committee are as follows:—

"The provision relating to the appointment of a jury appears to be unnecessary. Experience over years has shown that very rarely did a party ask for the appointment of a jury; further, whenever a party did ask for the appointment of a jury the request was not made in order to have a proper decision of the cause but was made mainly for the purpose of delaying the proceedings.

Provision for appointment of a jury should be deleted from these sections.

"Trial by juries having been abolished in the State, it appears that the retention of a jury under this Chapter was not justified. The Committee, therefore, recommends the deletion of that provision which entitled a party to ask for the appointment of a jury.

"Sections 138 and 139 of the Code may be *deleted*."

We are unable to accept the suggestion, as we think that the system of jury ought to be retained for these proceedings.⁷

Section 139A.

343. With reference to section 139A, difficulty is caused because the language of section 135(b) is not clear enough to indicate that the provisions of section 139A are saved. It is, therefore, desirable to *amend section 135(b)*, so as to make it clear,⁸ that the provisions of section 139A are not affected by section 135(b).

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1. See section 139(1).
 2. *Gokal Chand v. Crown*, (1919) I.L.R. 1 Lah. 163, 168.
 3. *Basanti Devi v. Laxmi Chand*, A.I.R. 1949 All. 650, 651.
 4. *Reg. v. Dajsukh Ram*, (1864-68) 2 B.H.C.R. Cr. 384, 386, 407, 412 (Sausse C.J.).
 5. See also para. 333, *supra*.
 6. F. 3(2)/55-L.C. Part VII, S. No. 440, Suggestion of the U.P. Committee for Investigation of Causes of Corruption in Subordinate Courts in U.P. (1963), Report, pages 43-44, (Draft at pages 227 to 230).
 7. See para 333, *supra*.
 8. To be carried out under section 135(b).

344. With reference to section 139A, the U.P. Committee¹ has suggested that a new section containing the same provision as is contained in section 139A should be added as section 136A, and the existing section 139A should be deleted.

Section 139A
and U.P.
Committee's
suggestion.

The reason given is that section 139A is not at its appropriate place, and should come after section 136.

The changes which we are recommending² will remove the misunderstanding caused at present.

345. No changes are needed in sections 140 to 142.

Sections 140
to 142.

The question was raised in the course of discussion before us whether, the jurisdiction of Civil courts to set aside the order under section 133 *et seq* was ousted by reason of the provisions of section 133(2) and section 140(3), and (if so), whether the position was satisfactory. It appears, that such jurisdiction is not taken away, at least so far as the *final* order is concerned.³

As has been observed, the procedure of the Magistrate is more or less summary, and "his decision goes so far as to fix upon the party who must go to the civil court to get a civil dispute decided".⁴

Nor does claim for the appointment of a jury estop a person from asserting his rights.⁵ No change is necessary on this point. What section 140 means is, that if a Magistrate causes the act ordered to be performed, *that order* cannot be questioned in the Civil court, and no suit can be maintained to prevent the Magistrate from carrying it into effect.⁶

346. In section 143, the following points require to be noted:—

(i) Presidency Magistrates especially empowered should be *added* in section 143. Cf. the Bombay Amendment. (There is also a suggestion of a State Government to that effect).⁷

(ii) Before "other Magistrate", the word "Executive" be added. Cf. the Bombay Amendment.

1. F. 3(2)/55-L.C. Part VII, S. No. 449, Suggestion of the U.P. Committee for Investigation of Causes of Corruption in Subordinate Courts in U.P. (1963), Report, pages 43-44 (Draft at pages 227-230).

2. See paragraph 343, *supra*.

3. Secretary of State v. Jethabhai, (1892), I.L.R. 17, Bom. 293, 299, agreeing with Chuni Lal, I.L.R. 15 Cal. 460, 467, 470 (F.B.).

4. Dulichand v. Emp., I.L.R. 51 All. 1025 A.I.R. 1929 All. 833 (Dalal J.).

5. Mutty Ram v. Mohi Lal, (1880) I.L.R. 6 Cal. 291, 301 (Field J.).

6. Cf. Ram Narain, A.I.R. 1940 Oudh 75, 76.

7. F. No. 3(2)/55-L.C. Part I, S. No. 18.

Section 143 and need for previous adjudication. 347. With reference to section 143, it is the suggestion of a High Court Judge¹ to clarify that an order under section 143 may be passed only in respect of a public nuisance held to be so by a competent court. That is the legal position under the case-law, as the order under section 143 can be passed only if the matter has been adjudicated by a competent court.^{2,3,4} But, in our opinion, it is unnecessary to codify that proposition.

Section 143 and penalty and procedure. 348. It has been suggested⁵ that a penalty should be prescribed for disobedience of an order under section 143. We think that the provisions of section 291, Indian Penal Code are enough.⁶

It is also stated in the same suggestion, that in section 143 there should be a provision similar to that contained in section 140(2)(3). The object of the suggested change is, perhaps, to empower Magistrate to deal *speedily with repetition of the nuisance*, that is to say *i.e. without undergoing the formalities of section 133*. We would not, however, like to go that length.

Section 144 validity of. 349. The question of the validity of section 144 generally, was considered by us with reference to the discussion in the Allahabad case of *Raj Narain*⁷ and the Supreme Court's judgment in *Babulal*.⁸ The view taken by us was, that the section as a whole is valid. In any case, it is not possible to split up the section without creating confusion.⁹

Section 144 and Members of Parliament. 350. A suggestion¹⁰ not to prosecute a Member of Parliament etc. for offences under section 188, Indian Penal Code for the violation of an order under section 144 of the Code of Criminal Procedure has been considered by us. But we are not inclined to recommend a general exception by statute, on this point.

Section 144 and news-paper. 351. A suggestion¹¹ not to pass orders under section 144 in respect of newspapers has been made, but the matter cannot be governed by a general and imperative provision.

It has also been suggested¹² that *newspapers* be exempted from orders under section 144 prohibiting the assembly of five persons. This concerns the actual orders passed, and does not need an amendment of the law.

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1. F. 3(2)/55-L.C. Part II, S. No. 33(a).
 2. *Jogendra Lal v. Sheikh*, A.I.R. 1935 (Cal. 108(2).
 3. *Ram Sahai v. Uttama Debi*, A.I.R. 1935 All. 79, 80.
 4. *Jagdish v. Dhanushdhari*, A.I.R. 1940 Pat. 305.
 5. F. 3(2)/55-L.C. Part II. Sl. No. 33(a).
 6. As to section 291, see *Q.E. v. Jokhu*, I.L.R. 8 All. 99.
 7. *Raj Narain v. District Magistrate*, A.I.R. 1956 All. 481.
 8. *Babulal Parate v. State*, A.I.R. 1961 S.C. 884.
 9. As to section 144(6), see paragraph 355, *supra*.
 10. F. 3(2)/55-L.C. S. No. 15.
 11. F. 3(2)/55-L.C. S. No. 7.
 12. F. 3(2)/55-L.C. S. No. 7.

352. It has been suggested by a High Court Judge,¹ that some parts of section 144 are unconstitutional. The point (1) has been already dealt with.²

353. In section 144(1), before the word "other Magistrate", the word "Executive" may be *added*.
 Section 144 (1) and competent Magistrates.

354. The suggestion, made in the Report of the U.P. Committee to investigate into causes of corruption in Subordinate Courts³ to add the words "or area" after the word "place" in section 144(3) was considered by us in detail. The case-law on the subject was examined, and the examination revealed that there was a conflict not only on the question whether the word "place" covered an area—a matter referred to by the U.P. Committee—, but also on the question whether the expression "frequenting" included the act of residing.⁴ We recommend that a clarification may be made *on both the points*, and that the wider views should be adopted by an amendment of section 144(3).
 Section 144 (3) and meaning of the expression "place" and "frequenting".

355. Regarding section 144(6), the case-law as to its validity was considered in detail by us.⁵ Our view is, that since the State Government's power to extend the duration of the order of the Magistrate is limited by the consideration that the extension should be "in cases of danger to human life, health or safety, or a likelihood of a riot or an affray", it is a valid provision. It is not necessary to lay down *any maximum* duration—for example 6 months, in this respect. But, in our opinion, it is necessary to give a right of *representation* to the person affected, after the duration is extended.
 Section 144 (6).

356. Various suggestions⁶ under section 144(6) are noted below : —
 Section 144 (6) Suggestion regarding

(a) Suggestions to increase the initial period to 3 or 6 months were considered, but not accepted by us.

(b) A suggestion to *empower the District Magistrate* to extend the initial period, was considered, but did not find favour with us, as such a power would turn out to be risky.

(c) A suggestion to give power to the State Government to *revoke* the order was considered; but we felt that the present position, under which only the

1. F. 3(2)/55-L.C. Part II, No. 33(a).

2. See discussion regarding validity of section 144, *supra*.

3. F. 3(2)/55-L.C. Pt. VII, S. No. 449, Report of the U.P. Committee, (1963), page 44, and draft at page 230.

4. For detailed discussion, see Appendix 9.

5. For detailed discussion, see Appendix 10.

6. F. 27(3)/55-Judl. II (Home Ministry File). Appendix I, Items 23-24, and F. 3(2)/55-L.C. Part I, S. No. 69.

District Magistrate could revoke the order, is proper. Primarily, it is the District Magistrate who is responsible for maintaining law and order in the district under his charge, and the power should vest in him.

Section 145 (1). 357. The power under section 145(1) should be assigned to the following *Executive Magistrates* :—

(a) *Presidency towns*—

Chief Presidency Magistrates (Compare the Bombay Amendment).

[It is unnecessary to empower other Presidency Magistrates.]

(b) Outside the Presidency towns etc. the power may be given to—

(i) District Magistrates (see existing section);

(ii) Sub-divisional Magistrates (see existing section);

(iii) any other Executive Magistrate of the first class (compare the Punjab amendment);

Date of receipt of the police report etc. should be mentioned in the order issued, under section 145(1).

Section 145 (1) and date. 358. Section 145(4), second proviso, creates a legal fiction by providing that if it appears to the Magistrate that any party within two months next before the date of "such order"—that is to say, the preliminary order under sub-section (1)—has been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession from such date.

This proviso was introduced in 1898 by the Select Committee¹ for the following reasons :—

"As the law stands at present, the date of the order under sub-section (1) of this clause is taken as the critical date for the purpose of determining actual possession. This appears to give an unfair advantage to a person who has forcibly dispossessed another. But difficulties arise when the test of actual possession at the time of the institution of the proceedings is departed from. We think that the proviso we have added to sub-section (4) goes as far as is possible to meet the evil in question without involving the Magistrate in an inquiry into title or right to possession, which is the function of a Civil Court."^{2,3}

1. Report of the Select Committee dated 16-2-1898, Legislative Proceedings, April 1898, No. 24 to 128, Appendix A-50 (National Archives).

2. For the law before 1898, see *Katras Jheriah Coal Co. v. Subkrishta Daw and Co.*, (1894) I.L.R. 22 Cal. 297, 303.

3. For history of section 145, see the cases cite *Athippa Gounder*, A.I.R. 1967 Mad. 445 para 5(F).

359. Now, a difficulty has arisen as to the computation of the period of two months, i.e. as regards the starting point for counting the period. The period of two months has to be counted backward. But the question is, whether the period is to be counted from the date of the actual passing of the order by the Magistrate, or whether it can be counted from the date of the receipt of the police report or other information by the Magistrates. The need for an amendment in this respect has been emphasised judicially.¹ What may be described as the "narrower interpretation" has been put in several decisions.²⁻⁴⁻⁵

On principle, however, the wider view should be preferred, because no litigant ought to suffer for the delay that takes place in court.⁶

360. We made an attempt to find out if the legislative materials threw any light as to why the *starting point was so framed as it now stands*.

The proviso was inserted in 1898 at the Committee stage.⁷ In the discussions on the 1898 Bill⁸ and in the proceedings of the Council of the Governor General of India dated 11th March, 1898, several points (including the history of the law and the provisions of Act 4 of 1840, section 2 of which corresponded to section 145), were considered. But this particular point was not adverted to at that time. There is a long speech by Sir Henry Prinsep in the discussions (after the Select Committee Report of 1898), in the proceedings of the Governor General-in-Council, objecting to the proviso. But he also does not seem to have discussed this aspect.

361. In his speech, the Law Member⁹ thus explained the object of inserting the proviso :—

"The Magistrate under this clause is not to decide questions of title but is to confirm existing actual possession. But then when we came to consider the matter in Select Committee, this objection was pointed out to us. The Magistrate will probably not be put in motion and will not hear the case until the ordinary possession

1. *Gangadhar v. Shyam Sunder*, A.I.R. 1958 Orissa 150, 157.

2. *Ganga Bux*, A.I.R. 1959 All. 141 (F.B.).

3. *Tolan v. Duben*, A.I.R. 1951 Assam 161.

4. *State v. Ram Jiwan*, A.I.R. 1962 Bom. 8.

5. *Kampati*, A.I.R. 1961 Andhra Pradesh 208.

6. Cf. the reasoning in *C. Narayana v. Kesappa*, A.I.R. 1951 Mad. 500, overruled recently in *Athiappa Gounder*, A.I.R. 1967 Mad. 445 (F.B.).

7. See paragraph 358, *supra*.

8. See, particularly, the Minute of dissent of Sir Henry Prinsep in the Select committee Report dated 16-2-1898; Legislative proceedings (April 1898), No. 24 to 128, Appendix A-50 (National Archives).

9. See the speech of Mr. Chalmers, Law Member, in Proceedings of the Governor General-in-Council, dated 11th March, 1898, Legislative Proceedings April, 1898, Nos 4 to 128, A-60 (National Archives).

has been disturbed. When a man has been evicted that is the time when he runs off to the Magistrate for protection, and if the section remains as it was originally drafted the Magistrate would be obliged to confirm him in possession. In Committee we saw the difficulties of both views and we came to the conclusion that *prima facie* the duty of the Magistrate was not to go into questions of title, but to confirm the party in possession. If, however, it turned out that any part had been wrongfully and forcibly dispossessed, it was thought that the Magistrate "ought to take cognizance of such a case, and give back the actual possession to the party who had been so ousted, but it was thought undesirable that the Magistrate should go into a long roving inquiry and we, therefore, fixed the period at which we might replace the party forcibly dispossessed in possession at two months."

The proviso was then adopted.

362. In view of the controversy¹ on the subject it is desirable to make the law clear by *substituting* the starting point as the date of the receipt of the police information etc. in section 145, sub-section (4), second proviso. In consequence, to ensure that the date is recorded, the order under sub-section (1) should *also record the date* of receipt of the information etc.

363. The anomaly caused by the present provision in section 145(4), second proviso, is illustrated by the view expressed by a High Court Judge in his suggestion:²

"Sometimes on account of a serious defect in the preliminary order the High Court may quash all the proceedings and direct the Magistrate to issue a fresh order under sub-section (1); in such a case not only the provision would be rendered useless, but also it would do injustice to a party. A party might have been put in the possession of the property by the Magistrate on passing of the final order under sub-section (6), with the result that he would be in possession on the date on which the Magistrate passes a fresh order under sub-section (1) in accordance with a remand order of a High Court, and the benefit of the proviso would be lost."

Section 145
(1)—suggestion of a
High Court
Judge.

364. With reference to section 145(1), the suggestion³ of a High Court Judge raises three points, namely:-

(i) The section should be restricted to District Magistrates and Sub-divisional Magistrates specially selected.

(ii) the affidavit procedure (inserted in 1955) should be removed;

1. See paragraph 359, *supra*.

2. Suggestion in F. 3(2)/55-L.C. Part II, S. No. 33(a).

3. F. 3(2)/55-L.C. Part II, S. No. 33(a).

(iii) the mode of calculating the time limit under section 145(4), second proviso, should be altered.

The third point is separately dealt with.¹

As regards the first point, our view is, that it is not desirable to restrict section 145 to the specified Magistrates as proposed. It may be, that the object of section 145 is sometimes defeated by a resort thereto in cases not within its intendment. From this point of view, the power should be confined to the higher Magistracy. Nevertheless, having regard to the need to preserve the public peace—which is the main justification for section 145—we would not recommend any change that would render its use in emergency more difficult than at present.

As regards the second point, without further experience of the provision regarding affidavits (introduced in 1955), we would not recommend a change.

365. Date and time of attendance should also be mentioned in the order under section 145(1). Section 145
(1) and date.

366. There appears to be a controversy^{2,3} on the question whether the omission to record grounds under section 145(1) vitiates the order. The matter, however, really pertains to section 537, and no provision on the question can be conveniently made in section 145. Section 145
(1) and
omission to
record
grounds.

367. No change is needed in section 145(2). Section 145
(2).

368. The U.P. Committee⁴ has made several suggestions with reference to section 145:— Section 145
and Suggestion
of U.P.
Committee.

(1) Evidence by putting in affidavits in proceedings under section 145 of the Code should be replaced by the oral examination of witnesses and their being cross-examined by the other.

(2) If, after an attachment has been made, the proceedings under section 145 are dropped, then, the court should be empowered to restore the attached property to the person from whose possession it was taken at the time of attachment.

(3) The period of two months contemplated by the second proviso to sub-section (4) of section 145 of the Code should be reckoned back from the date on which

1. See paragraphs 358 to 362, *supra*.

2. See case-law discussion in—

(i) *Khudi Ram v. Jitendra Nath*, A.I.R. 1952 Cal. 713, 715 to 717.

(ii) *Sri Ram v. State*, A.I.R. 1958 Punj. 47.

(iii) *Kapoor Chand*, I.L.R. 55 All. 301; A.I.R. 1933 All. 264 (F.B.).

3. Some of the earlier cases are reviewed in Note "Criminal cases of 1903", 8 C.W.N. (Journal) 139, 154.

4. F. 3(2)/55-L.C. Part VII, S. No. 449, Suggestion of the U.P. Committee for Investigation of Causes of Corruption in Subordinate Courts in Uttar Pradesh (1963), Report, pages 45 to 47, (Draft at pages 230-232).

Magistrate got the information about wrongful dis-possession and apprehension of breach of peace, (and not from the date on which the Magistrate passed the preliminary order).

(4) A Magistrate exercising jurisdiction under section 145 of the Code should have a *discretion* to take the disputed property under his management, by appointing a *Receiver*.

Our views as to these suggestions are as follows:-

Point (1)—No change is necessary, for the present, as it is rather early to restore the pre-1955 position.

Points (2), (3), (4)—These points are covered by the discussion at other places in this Report,¹ relating to section 145.

Section 145 (6) and punishment by Magistrate. 369. It has been suggested² that sub-section (6) of section 145 of the Code should be amended so as to confer a power on the Magistrate to punish a party who disobeys an order made thereunder.

We regret that we do not find this to be acceptable. The very Magistrate who issued the order should not punish the person violating it.

Section 145 (1) and suggestion to exclude private complaints. 370. The following suggestion³ has been made by a High Court Judge :—

"It should be specified in sections 145-147 that cases should be started only on the report by the *police regarding* breach of peace. Private complaints should be *excluded completely*."

We have considered this suggestion in detail. Its acceptance would mean omission of the words "other information" in section 145(1). At present, there is no limitation as to the source of information, on which the Magistrate can act under section 145. The Magistrate may even act on information gathered at a *local inspection*, if he records his grounds⁴ for acting.

We are not inclined to limit the section in the manner suggested.⁵

Of course, prudence may require care before acting on a private report.⁷ But there should be no restriction so far as law is concerned.

1. See various points discussed under section 145.

2. F. 3(2)/55-L.C. Part VII, S. No. 449, Suggestion of the U.P. Committee for Investigation of Causes of Corruption in Subordinate Courts in Uttar Pradesh (1963), Report page 48, top, and draft at page 233.

3. F. No. F. 3(2)/55-L.C. Part III, S. No. 49(a).

4. *Nityanand, v. Paresh Nath*, (1905), I.L.R. 32 Cal. 771.

5. *Moher Kunbi v. Tilak Singh*, A.I.R. 1934 Nag. 194, 195 (*Vivian Bose J.*).

6. See also discussion relating to section 107(1).)

7. See *Obhoy v. Mohammed*, I.L.R. 10 Cal. 78 and 11 C.W.N. (Journal) 223.

371. With reference to section 145(1), the following suggestion¹ has been made by a Bar Council.

“Provision should be made for service of affidavits and copies of documents on the opposite side, so that if any counter affidavits are necessary or production of further documents is essential, they may be permitted to be filed; the Magistrate will thereby have a complete picture of the case to enable him to give just decision.”

Section 145
(1) and
suggestion
for service
of affidavits.

The State Government concerned has opposed the suggestion, as in its view, in the normal course, written statements of the parties are enough, and there is no need for counter affidavits. We agree, in substance, with the State Government's view. No change is therefore necessary.

372. The resolution of a Conference of lawyers² is as follows:—

“This Conference reiterates its opinion that the party affected by any affidavit presented to the Court for consideration in a proceeding under section 145 of the Code of Criminal Procedure should have the right to subject the person swearing the affidavit to cross-examination, and in that view of the matter this Conference recommends that two provisos be added to sub-section (4) of section 145 of the Code of Criminal Procedure.

Section 145
and resolution
of
Lawyers
Conference.

“Provided that if the party adversely affected by an affidavit so desires the Court shall summon the person swearing the affidavit for cross-examination”, and

“Provided further that in case the person so summoned fails to appear for cross-examination, the affidavit sworn by him shall be excluded from consideration”.

This Conference further reiterates the opinion that orders passed under section 145, Criminal Procedure Code should be subject to appeal, and in that view of the matter sub-section (II) be added to section 145, Criminal Procedure Code worded as follows:—

“An appeal shall lie against the order passed by the Court under this section which shall be heard and disposed of in the same manner as is provided in this Act for appeals from order of conviction”.

We have considered the matter. We feel, that a right of appeal, as suggested, would unnecessarily prolong the proceedings, and may defeat the object of the law, which is to prevent an imminent breach of the peace. The inquiry into possession is incidental to the proceedings, and should not be

1. F. No. F. 3(2)/55-L.C. Part III, S. No. 52. (pages 281-282, correspondence).

2. F. 3(2)/55-L.C. Part VI, S. No. 271.

prolonged beyond reasonable limits. Nor do we think that an absolute right to cross-examine is desirable, so far as proceedings under section 145 are concerned, so long as the present scheme is maintained.

- Section 145 (3). 373. No change is needed in section 145(3).
- Section 145 (4). 374. In section 145(4), main paragraph and second proviso, the date of receipt of the police report or other information should be *substituted*.¹
- Section 145 (4) Third Proviso. 375. In section 145(4), third proviso, it should be *made clear* that the attachment can be ordered at any time after the order under section 145(1) is passed.
- Section 145 (4A) (New). 376. We have accepted the suggestion² of a High Court Judge, to make some provision for looking after the property attached under section 145 in emergencies. Necessary *amendment* is recommended.³
- Section 145 (5) and restoration. 377. A High Court Judge⁴ has suggested, that it may be provided that where the Magistrate stays further proceedings under section 145(5), he should release the property *without restoring any one to possession over it*. We are, however, inclined to take a different view. We feel, that in an appropriate case, the Magistrate should have the power to restore possession. It is desirable to *amend the section*,⁵ so as to make a specific provision to that effect.
- Section 145 (5). 378. The provision in section 145(5) that the order shall be "final", need not be disturbed.
- Section 145 (5) and release from attachment. 379. Where the proceedings are cancelled under section 145(5), the attachment should, in our view be withdrawn. An *amendment* to that effect is *recommended*.⁶
- Section 145 (5A) (New). 380. In section 145, a new sub-section (5A) is proposed, to provide for withdrawal of attachment.⁷
- Section 145 (6) and Penalty for disobedience 381. The suggestion of a High Court Judge⁸ makes the point that section 188, Indian Penal Code is attracted to an order under section 145(6). We are in agreement with the view. That is the view of most High Court also.
- The controversy on the subject is only *within* the Allahabad High Court. A view was expressed by Mehrotra J. in one case⁹ that an order under section 145(6) was not

1. Cf. discussion regarding section 145(1).

2. F. 3(2)/55-L.C. Part II, S. No. 33(a).

3. See section 145(4A) (proposed).

4. F. 3(2)/55-L.C. Part II, S. No. 33(a).

5. See section 145(5A), as proposed.

6. See under section 146(5A), *infra*.

7. See discussion under section 145(5), *supra*.

8. F.3(2)/55-L.C. Part II, S. No. 33(a).

9. *State v. Smt. Tugla*, A.I.R. 1955 All. 423, 427, 428, para 24.

one which the Magistrate "promulgated" within the meaning of section 188, Indian Penal Code. It was only a declaratory order, coupled with an order forbidding disturbance of possession and *served upon the party concerned alone*. According to him, section 188 was confined to orders promulgated to the whole *public*. The other Judge—Desai J. did not agree with this view, and pointed out,¹ that an interpretation (that it was not covered by section 188) would *emasculate* section 145(6) completely.

On a difference of opinion between the two Judges, the matter was referred to Agarwala J. who held² that, *qua* the parties to the litigation in the criminal court, the order, having been passed in their presence, must be deemed to have been duly "promulgated". He also pointed out, that under Form No. 22 in the Fifth Schedule, an order under section 145 was intended for the public at large also. (On the fact, however, he held that there was no such disobedience as was punishable under section 188).

382. An earlier decision³ of Desai J. had pointed out, that under section 188 of the Indian Penal Code, it is not necessary that annoyance must be actually caused; infringement with a tendency to cause annoyance etc. is enough.⁴

383. The Assam High Court in a case⁵ decided that interference with an *attachment* under section 145(4), third proviso, did not fall under section 188, Indian Penal Code, because the attachment did not forbid *any person to do any act*. But it also observed, that under section 145(8) the Magistrate was competent to pass such an order.

Other High Courts^{6,7} have held that an order under section 145(6) falls within section 188.

The Assam decision to the contrary⁸ is under section 145(4)—(attachment).

384. The controversy being a limited one as above, we do not consider an express provision to be necessary.

385. It has been suggested by two High Court Judges⁹ that the power of the court to restore possession to the party who is deemed to be in possession under the fiction of two months' previous possession, should be provided for.

Section 145 (6) and restoration to party previously in possession.

1. Paragraph 12 in the A.I.R.

2. Paragraph 45 in the A.I.R.

3. *Jaswant v. State*, A.I.R. 1951 All. 828, 829, para 2.

4. As to section 188, Indian Penal Code in this connection, see also *Ejaz Ahmad v. Maheshwar*, A.I.R. 1953 All. 257, 259 (Misra & Beg JJ.).

5. *Dibakar v. State*, A.I.R. 1961 Assam 94, 95, paragraph 4.

6. *Ambika Thakur v. Emperor*, A.I.R. 1939 Pat. 611, 618, right-hand.

7. *Dulal Chandra v. Sheo Kumar*, A.I.R. 1948 Cal. 474, 482, para 19 (P.B. Chakravarty C.J. and S.C. Lahiri J.).

8. *Atar Khan v. State*, A.I.R. 1960 Assam 109, 111, 7.

9. F. 3(2)/55-L.C. Part II, S. No. 33(b).

386. This raises an important point, namely, whether the Magistrate can simply "declare" who is entitled to possession, or whether he can pass an operative order *restoring* possession. The answer seems to be clear in view of the last portion of section 145(6). Case-law on the subject before the 1923 Amendment¹ is no longer good law. Presumably, every case under the second proviso to section 145(4) would attract the jurisdiction to restore possession under section 145(6). Of course, if the forcible and wrongful possession has continued for more than two months, the party dispossessed cannot get the benefit of the second proviso.²

In fact, it has been held,⁴ that the order of restoration can be made even subsequent to the order of declaration.

We think, therefore, that no change in the language of the section is required, on this point.

Section 145
(6A) (New).

387. A new provision for publication of the final order under section 145(6) in the same manner as the order under section 145(3), may be added.⁵ Incidentally, this will have the effect of emphasising that a prosecution under section 188, Indian Penal Code, can be instituted if such order is violated.⁶

Section 145
(7) and (8).

388. No changes are needed in section 145(7) or in section 145(8).

389. With reference to section 145(9), there appears to be a conflict of decisions⁷ on the question whether the first proviso to section 145(4) bars the powers of the Magistrate to summon a person who has *not put in* an affidavit.⁸ An *amendment*, to make it clear, that the first proviso to section 145(4) does not affect that power, is *recommended*.⁹

390. It is, of course, expected that the Magistrate will exercise his power to summon a witness for examination only when there was a satisfactory reason for not putting in the affidavit of the person sought to be summoned.

1. *Emp. v. Rameswar*, (1904) I.L.R. 27 All. 300, 301.

2. *Shri Ram v. The State*, A.I.R. 1958 Pun. 47, 52, para 23.

3. *Ram Naresh*, A.I.R. 1949 All. 97, 98, para 5.

4. *Khudiram v. Jitendra Nath*, A.I.R. 1952 Cal. 713, 718, 719, 725 (paragraphs 22 to 24, 27, 61 and 62).

5. See section 145(6A), as proposed.

6. As to section 188, Indian Penal Code, see these cases—

(i) *State v. Shreemai Tuglati*, A.I.R. 1955 All. 423.

(ii) *Emp. v. Zahirus Saved*, A.I.R. 1934 Nag. 114.

(iii) *Rasi Gounder v. Muthu Gounder*, (1964), I.M.L.J. 440.

7. See—

(i) *Bhagwat Singh v. State*, A.I.R. 1959 All. 763, para 3 (Desai J.).

(ii) *Challamulhu v. Rajavel*, A.I.R. 1964 Mad. 263, 265, para 7.

(iii) *Jodh Singh v. Bhagambar Dass*, A.I.R. 1961 Punj. 187, 189, 190, para 8.

8. For previous law, see *Tarapada*, (1906) I.L.R. 32 Cal. 1093.

9. As to section 540, see *Bahori v. Ghure*, A.I.R. 1960 Raj. 15.

The matter is in the Magistrate's discretion. And, in exercising that discretion he should certainly have regard to the object of proceedings under section 145,—an object which has been lucidly dealt with by Rampini and Mokerjee JJ. in *Tarapadas'* case as follows:—

“Section 145 was intended to provide a speedy remedy for the prevention of breaches of the peace arising out of disputes relating to immoveable property. The code contemplates a determination of this question without any reference to the merits of the respective claims of the disputing parties to a right to possess the subject of dispute. The question of possession, moreover, has to be determined with reference to a specified point of time, namely, the date of the initial order or, in the case of forcible dispossession, a date within two months next preceding such order. The Legislature could hardly have contemplated an elaborate and protracted investigation, the result of which might, in many instances, be to defeat the very object in view, namely, an effective prevention of a breach of the peace. The whole object might obviously be defeated, if the Court could be compelled to summon and resummon witnesses at the choice of the parties.”.

391. No change is needed in section 145, sub-section (10). Section 145 (10).

392. We think that the amendments made in 1955 in section 146 (reference to a civil court), instead of shortening the proceedings, tend to lengthen them. Further, the main object of proceedings under section 146 should be to take steps for *immediately* preventing breach of the peace. Once these steps are taken, proceedings under the Code should come to an end. Section 146.

Reference to a Civil Court, as a part of the proceedings under the Code, is an anomalous procedure. The aggrieved party can take proceedings of his own in a civil court. But a criminal court should not be required to make such a reference. The position before 1955 should be restored, so far as section 146 is concerned.

393. With reference to section 146, a High Court Judge² has also expressed dissatisfaction with the existing position. For the present, our recommendation³ to restore the pre-1955 position is enough. Section 146 and view of High Court Judge.

1. *Tarapada v. Nurul Huq* (1906) I.L.R. 32 Cal. 1093, 1099, 1100.

2. F. 3(2)/55-L.C. Part II, S. No. 33(a).

3. See discussion as to section 146.

Section 146 and suggestion of U.P. Committee, 394. It has been suggested by the U.P. Committee,¹ that section 146 of the Code of Criminal Procedure may be amended so as to restore the position as it obtained before the amendment of 1955.

We have already dealt with the matter.²

Section 146 and revision, 395. With reference to section 146, we may refer to Resolution, No. 22 passed at the Bihar Lawyer's Conference³ (12-13-14 April, 1963), which is as follows:—

“This Conference reiterates its opinion that review and revision should lie against orders passed under section 146. Criminal Procedure Code and in that view of the matter this Conference recommends that the words “nor shall any review or revision of any such finding be allowed” be deleted.”

[The words in question appear in section 146(1D)].

We are recommending reverting⁴ to section 146 as it stood before 1955. Hence, this suggestion need not be considered.

Section 147 (1), 396. Under section 147(1), the following points were considered:—

(a) The power *may be given to*—

- (i) Chief Presidency Magistrate (To be added).
- (ii) District Magistrate and S.D.M. (as in existing section).
- (iii) Executive Magistrates, first class. (Cf. the Punjab Amendment).

(b) The order *must mention* the date of receipt of police report etc., and that should be crucial date.⁵

(c) The order must also *specify* the date and time for appearance.⁶

(d) Affidavit procedure need not be inserted, under this section. Necessary *amendment* is recommended.

Section 147 (1A), 397. With reference to section 147(1A), certain points arise⁷ by reason of its wording, in relation to the power to order *interim* attachment in cases to which section 147 applies. But no change appears to be practicable without making the section extremely cumbersome.

1. F. 3(2)/55-L.C. Part VII, S. No. 449, Suggestion of the U.P. Committee for Investigation of Causes of Corruption in Subordinate Courts in Uttar Pradesh, (1963), Report, page 48, draft Bill, pages 233-234.

2. See discussion under section 146.

3. F. 3(2)/55-L.C. Part VI, S. No. 271.

4. See recommendation regarding section 146.

5. Cf. discussion relating to section 145(1).

6. Cf. discussion relating to section 147(1).

7. Cf. suggestion of a High Court Judge, F. No. 3(2)/55-L.C. Part II, Sl. No. 45.

398. The conflict of decisions¹ as to the scope of the words "prohibiting an interference with the exercise of such right" in section 147(2) has been considered by us. The history of the amendment made in 1923 (with reference to the 1914 Bill and the Lowndes Report etc.) has also been gone through. It is desirable that the position in this respect should be clarified, so as to empower the court to order *removal of an obstruction*, in a proper case.

399. Section 147(2), proviso, should now mention the date of receipt of the police report etc.²

400. No change is needed in section 147(3).

401. A new provision, allowing the conversion of proceedings under section 147 into those under section 145 and *vice versa*, is required for the following reasons.

It might happen, that a party makes an application under section 145, but it turns out in the proceedings that what is in question is not a right to possession to a land or water, but a right to its user—in which case the party should have resorted to section 147 instead of section 145. The converse situation may arise, where a party resorts to section 147 in a case where section 145 was applicable. There has been a controversy^{3, 4, 5} whether, in such situations, it is competent for the Magistrate to convert the proceedings brought under one of these sections into a proceeding under the other relevant section. It is desirable to empower the Magistrate to proceed under the provision which is found to be really applicable.

Necessary amendment is recommended.⁶

402. In section 148, the words "Chief Presidency Magistrate" be added. (Cf. the Bombay amendment).

403. It has been suggested⁷ that in section 149 "breach of peace" should be added. We do not favour it.

1. Contrast—

- (i) *Hem Chandra*, A.I.R. 1942 Cal. 244 (F.B.).
- (ii) *Shantilal*, A.I.R. 1954 Bom. 368.
- (iii) *Ram Ishwar*, A.I.R. 1965 Pat. 17.

with

- (a) *Abdul Wahab*, A.I.R. 1951 All. 238 (F.B.).
- (b) *Angappa*, A.I.R. 1959 Mad. 28.
- (c) *Chumanda*, A.I.R. 1914 Lah. 210.

2. See discussion relating to section 147(1).

3. *K. E. v. Abdullah*, A.I.R. 1949 Nag. 275, para 4 (Reviews cases).

4. *Turab Ali*, A.I.R. 1933 Lah. 145.

5. *Anath v. Wahid Ali*, A.I.R. 1925 Cal. 1022.

6. Section 147A (proposed).

7. F. 27(3)/55-Judl. II (Home Member), Appendix I, Item No. 25.

prove to be vague. Most of the offences affecting peace are even now cognizable, and therefore fall under the general power of arrest.¹

No change is needed in section 150.

Section 151 and seizure of subject of dispute. 404. Under section 151, a suggestion² has been made to allow seizure of the animate or inanimate matter which is the subject-matter of dispute, leading to a breach of peace. But the suggestion has not found favour with us. The proposed power may turn out to be very wide and sometimes embarrassing.

Section 151 and breach of peace. 405. A suggestion³ to add in section 151 a *design* to commit a breach of peace has been made, but has not found favour with us.⁴

Section 152. 406. No change is needed in section 152.

Section 153. 407. The power under section 153 may be allocated to both kinds of Magistrates. Hence no change in the language is necessary.

Section 154 and First Information Report by accused. 408. The following suggestion⁵ has been made by a High Court Judges:—

“It may be provided that a first information report made by an accused is admissible in evidence.

“There are already conflicting decisions under this section, and much valuable evidence is shut out, on account of legal difficulties in admitting such report.”

The suggestion has been made under section 162, but seems to pertain to section 154.

409. We studied the case-law on the subject. Decisions during the last few years show, that there is no conflict or uncertainty so far as *section 154 is concerned*. The uncertainty arises by reason of the difficulty of determining whether a particular statement is a “confession” and therefore excluded by section 25 of the Indian Evidence Act, 1872.

We do not, therefore, recommend any change in section 154 in this respect.

1. Section 54.

2. F. 3(2)/55-L.C. Part I, S. No. 72.

3. F. 27(3)/55-Judl. II (Home Ministry File), Appendix I, Item No. 26.

4. Cf. discussion regarding section 149.

5. F. 3(2)/55-L.C. Part III, S. No. 49(a).

410. With reference to sections 154 and 155, it has been stated¹ that a large number of complaints regarding the malpractices by police in recording the First Information Report were brought to the notice of the U.P. Police Commission, 1960-61, some of which are as under :—

Sections 154
and 155.

(i) Non-recording of the First Information Report, i.e. "concealment".

(ii) Distorting of facts with a view to lessening the gravity of offence, i.e. "minimization".

(iii) Introduction of new facts and distortion of facts, in order to create evidence against the accused or for implicating innocent persons.

(iv) Demand of money or other consideration for recording or prompt recording of report.

The Police Commission appointed by the Government of U.P. recommended, that a new *Reporting Centre under the direct supervision of the Superintendent of Police* should be set up at district headquarters, in order to decrease "concealment", or "minimisation" or other defects. The U.P. Police Commission felt, that these defects could be reduced by the exercise of more *intimate and closer supervision* by Circle Officers.

The Superintendent of Police (it is stated) should personally see that complaints concerning the First Information Report are properly enquired into, and exemplary punishment given to wrong doers. The First Information Report should contain :—

- (1) the name of the complainant;
- (2) the nature of crime;
- (3) approximate time of occurrence, and
- (4) place of occurrence.

Immediately after the First Information Report has been recorded, the Investigating Officer should interrogate the complainant with regard to the motive of crime, names of witnesses etc. and the record of this information should be entered in the Case Diary. This change would, (in the opinion of the U.P. Police Commission) ensure a more impartial and better type of investigation.

411. The Government of U.P., while forwarding these recommendations, has suggested that the amendment of sections 154 and 155 of the Code may be considered on an *All India* basis. The proposal of the State Government was brought to the notice of the Law Commission, for its consideration.

412. We have examined the proposed scheme, in the light of existing provisions. It appears to us, that it is possible to work the suggested scheme—at least the substance thereof—*without amending section 154*. The proposed

1. F. 3(2)/55-L.C. Part VII, S. No. 464, Suggestion of the Government of Uttar Pradesh.

“Reporting Centre” can be declared to be a “police -station” and the Superintendent in charge thereof could be declared the “officer in charge” thereof.

Section 155 (1). 413. In section 155(1), after the word “Magistrate”, the words “having power to try such case etc.” should be added, as in the Punjab amendment.

Section 155 (2). 414. In section 155(2), no changes regarding the Magistrates empowered are necessary.

Section 155 Explanation (New). 415. Under section 155, a question¹ has arisen occasionally as to what should be the procedure followed by a police officer when a case involves not only a non-cognizable offence but one or more of cognizable offences as well. Sub-section (2) lays down an absolute prohibition against the police officer proceeding to investigate a non-cognizable ‘case’ without the order of a Magistrate. But the definition of a ‘non-cognizable case’ in section 4(1)(a) is co-extensive with the definition of a ‘non-cognizable offence’. Hence, the problem remains, notwithstanding the definition, as to what to do where the case is a *composite* one. It is somewhat anomalous that where a police officer starts investigation into a cognizable offence without a Magistrate’s order he will have to run to the Magistrate for his order, in the course of the same investigation, if another minor offence which is not cognizable also appears to have been committed.

We, therefore, think that where the case is of this nature and involves also one cognizable offence, it should not be treated as a non-cognizable case for the purpose of sub-section (2) of section 155.

While the Code was under our consideration, the position in this respect was clarified by a judgment of the Supreme Court. The amendment which we are recommending² will codify the law now settled by the Supreme Court.³

Section 155 (2) and cognizable offences. 416. With reference to section 155, the following suggestion⁴ has been made by the Government of U.P. :—

“The Uttar Pradesh Police Commission 1960-61 in para 138 of their Report *inter alia* suggested that the State Government should have the power to declare certain types of non-cognizable offences as cognizable, when in any area the law and order situation exhibits a tendency to deteriorate. The State Government has accordingly suggested the amendment of section 155(2) of the Code of Criminal Procedure, on the following lines :—

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1. *Vadlamudi, v. State*, A.I.R. 1961 A.P. 448; *Ram v. State*, A.I.R. 1958 Punj. 172.
 2. Section 155, Explanation (as proposed).
 3. *Pravin Chandra v. State*, A.I.R. 1965 S.C. 1185.
 4. F. 3(2)/55-L.C. Part VII, S. No. 377.

“At the end of sub-section (2), the following proviso shall be added, viz.—

“Provided that the State Government may by notification in the Gazette direct in relation to any local area that any class of non-cognizable cases may during such period as may be specified in the notification be investigated without the order of a Magistrate.

As a consequential change, it was suggested that in sub-section (3) of section 155, for the words “any police officer receiving such order” the words “any police officer acting under sub-section (2)” should be substituted.

417. The relevant portion of the Report of the U.P. Police Commission (1960-1961), paragraph 138, is as follows :—

“We are of the opinion that the Station Officer is vested with too much of discretion. There are also complaints of abuse of the powers of the Station Officers with a view to earning illegal gratification. Besides, of late goondaism and rioting has been on the increase. The bullies beat up people, who do not carry out their wishes. We have reason to believe that the law and order position in some parts of the State, especially in the country-side, has reached a perilous state. It has been common experience that multiplication of minor offences reduces respect for law and order and ultimately leads to bigger disturbances. We would, therefore, recommend that whole the question of the discretion vested in the Station Officer should be carefully examined and that cases which are now not normally investigated, should be investigated. Thus, cases under sections 324, 325, 341, 344, 357, 457, cases of theft unless the value of property is less than Rs. 15/- and of cheating unless it is a dispute of Civil nature, should be investigated.

“A proposal was made by Shri Shanti Prasad, now Inspector General of Police, that Government should have the power to declare certain type of non-cognizable offences as cognizable offences, when in any case the law and order situation exhibits a tendency to deteriorate. The Magistrates are already empowered to direct the police to take cognizance of any particular non-cognizable case. We think that this power is not enough, and there should be a general power with the State Government to declare certain kinds of non-cognizable offences as cognizable offences. We recommend that this matter may be fully examined.”

418. We examined the suggestion. We felt, that it would be convenient to deal with the matter in a separate study, where the scheme of the Code as to cognisable offences can be examined.¹

1. To be taken up for separate study.
9—29 Law/68

- Section 156 419. With reference to section 156, the power to order investigation in non-cognizable cases will be with *Judicial Magistrates*.¹ But, since section 156 is to be read with section 155, no verbal change in section 156 is necessary on this point.
- Section 156 (3) and suggestion as to particular police officer 420. It has been stated by the Markapur Bar Association, Andhra Pradesh² that section 157(3) is ambiguous. The suggestion, further, says :—
 “In cases where a particular police officer investigates and refers to the case and thereupon a *complaint* is preferred to any Magistrate, such magistrate may order investigation by the same police officer; or if a different police officer higher in rank is entrusted with the investigation, he may direct *the very same police official* to reinvestigate. Such instances having arisen, it is proposed that sub-section (3) of section 156 be suitably amended, to say—
 “(3) Any Magistrate empowered under section 190 may order such investigation as above mentioned and *may also order such investigation by such other police official, higher in rank.*”
 Our view is, that since the suggestion refers to “complaints”, the proper section for the purpose is section 202(1), which is elastic enough³ to empower the Magistrate to specify a police officer of higher rank.
- Section 157 421. In section 157, it is desirable to *substitute*, for the words “police report”, the words “report in writing made by a police officer”⁴
- Section 157 and investigation in area of other police Stations 422. With reference to section 157, a suggestion has been made for inserting a provision regarding investigation by a police officer in the area of *other police stations*.⁵ We think, however, that the provisions of sections 160, 161 and 166 are adequate, and no further addition is required.
- Section 158 (2) 423. It has been suggested⁶ that a provision should be inserted in section 158(2) to the effect that “instructions” under the section include *instructions to investigate*. No such verbal change is necessary, as the language of section 158(2) is wide enough.
- Section 159 424. No change is needed in section 159.
- Section 160 and expenses 425. In section 160, a provision for the payment of *expenses of witnesses* ought, in our view, to be made.

1. See discussion regarding 155.
 2. F. 3(2)/55-L.C. Part III, S. No. 50(O). (Page 218, correspondence).
 3. To be noted under section 202.
 4. Cf. discussion regarding section 4(1)—definition of “complaint”.
 5. F. 27(3)/55-Judl. II (Home Ministry File), Appendix I, Item No. 27.
 6. F. 27(3)/55-Judl. II (Home Ministry File), Appendix I, Item No. 28.

On principle, it is difficult to understand why witnesses who are asked by the State to help the administration of justice by attendance *in a Court* should be compensated by cost,¹ while those who are obliged, under penal sanction, to attend an *investigation* before the police for the same purpose should be treated differently.

We recommend, that a suitable amendment be made in this respect.

426. It has been suggested² that the proviso regarding women should be removed from section 160. We are unable to accept the suggestion, having regard to the fact that the proviso contains a salutary provision. Section 160 and attendance of women

We would, in this connection, refer to the observations made by the Calcutta High Court³ while reversing the dismissal of a complaint against certain police officers to the effect that they had mal-treated a number of women. "We would wish to point out that it seems to us an unusual course that the police should take a number of women away from their village to the police station on the pretext that they wished to examine them. It seems to us the examination might have been as well conducted at the women's own houses as at the police station, and have at the same time prevented the possibility of any such charges as have been now preferred against the Police."

427. It has been stated,⁴ that under section 160 a police officer can require the attendance before himself of witnesses acquainted with the circumstances of the case under his investigation. The proviso to this section, however, states that no male person under the age of 15 years or woman shall be required to attend at any place other than the place in which such male person or woman resides. The investigating officers in U.P., it is stated, were expressing difficulties, particularly in *identification* proceedings. The Inspector General of Police, Uttar Pradesh, appointed a Departmental Committee to go into the whole matter. The Committee suggested to the U.P. Government amendment of section 160. The U.P. Government has, accordingly recommended, that the existing section 160 should be re-numbered as sub-section (1), and the following sub-section (2) should be inserted in section 160. Section 160 and requiring attendance for identification

"(2) Any police officer making an investigation under this Chapter may also, by order in writing, require the attendance of any person before a Magistrate conducting identification proceeding of any property or person in connection with the investigation of the case, on the date, time and place mentioned in the order."

1. Section 544.

2. F. 3(2)/55-L.C. Pt. I, S. No. 17.

3. Haladhar v. Sub-Inspector of Police, (1904) 9. C.W.N. 199, 201 (Harington & Pargiter JJ.).

4. F. 3(2)/55-L.C. Part VII, S. No. 429, Suggestion of the Government of U. P.

We have considered the suggestion.

We may state here, that the proviso to section 160 was inserted in 1955. But, even under the section as it stood before 1955, a witness could not be forced by the police to appear before a *Magistrate*.¹

The amendment of 1955 has not made any change in this respect. Nor are we inclined to amend the section as suggested.

Section 160 and applicability of s. 160 to the accused

428. With reference to section 160, it has been suggested² that in the marginal note, the word "person" be substituted for the word "witness". The suggestion really raises a large question, namely, whether sections 160 and 161 apply to the accused.

429. The question (whether sections 160 and 161 apply to the accused) is an interesting one. Before answering it, it will be desirable to point out three meanings of the word "accused", in this context. The word "accused" may mean—

- (i) a person who is suspected, but not yet arrested;
- (ii) a person who is suspected, and about whom the police have reasonable grounds to believe that he has committed the offence but who is not yet arrested; and
- (iii) a person who has been arrested.

430. It has been held by the Privy Council,³ that section 162 applies to the accused. In the course of the discussion, the Privy Council referred to "group of sections" beginning with sections 160, 161.

But the question whether sections 160 and 161 apply to the accused, was not directly *in issue* before the Privy Council.

In a Nagpur case,⁴ it was held, that section 161 applies to a person who may subsequently become the accused, and also that police officers were fully authorised to require the personal attendance of the suspects during the investigation and that absence of an order under section 160 was an irregularity, which would have justified the failure or refusal of the suspects to obey the order, but which could be waived by them.

1. *Emp. v. Neni Sheikh*, I.L.R. 29 Cal. 483.

2. 3(2)/55-L.C. Part I. S. No. 83 and F. 3(2)/55-L.C. Part II S. No. 34(d) (Suggestion of a D.I.G. Police).

3. *Narsinaswami v. Emperor*.

4. *In re Dina Natha*, A.I.R. 1940 Nag. 186, 189 (Niyogi J.).

431. There are, however, certain questions to be considered before assuming that section 160 applies to person suspected but not arrested. Can they be described as persons "acquainted with the circumstances of the case?" The discussion in a Madras case¹ shows the difficulty of the subject-matter, because, so far as accused persons are concerned, the police can secure the presence of such person in other ways.^{2 3 4} It was also pointed out by Waller J.⁵ that the language of section 161 seemed to be quite irreconcilable with the idea that it could be concerned with accused persons. Persons examined under section 161 were bound to answer all questions other than questions which would expose them to a criminal charge. "How can all this refer to an accused person? He is already the subject of a criminal charge, in respect of which the questions would be put to him." In fact, he pointed out, previously the law went so far as to require that the questions should be *truly* answered—which showed that section 161 did not apply to the accused. While the actual decision in this Madras case has (so far as section 162 is concerned) lost its value after the Privy Council decision,⁶ the other points have not been settled by the Privy Council.

432. On the other hand, however, a narrow construction of sections 160 and 161 leads to one practical difficulty, as there is no other section under which the police can examine the accused.

433. The true position seems to be this—

(a) Section 160 cannot, obviously, cover the third category, namely, the accused in custody, nor perhaps a person in the second category, as he is about to be arrested. But it can cover the first category.

(b) As regards section 161, it is, in our view, to be regarded as embracing all the three categories, (subject, of course, to the limitation regarding incriminating questions). In a Bombay case,⁷ it was held that section 161 does not apply to the accused. We regret that, with great respect we are unable to agree with the view.

In view of the above position, it is unnecessary to disturb the language of sections 160-161 on this point.

1. *Syamo Maha Patro v. Emp.*, A.I.R. 1932 Mad. 391, 393, 394, 398, 400, 402.

2. See the judgment of Reilly J. in *Syamo Maha Patro*, A.I.R. 1932 Mad. 391, 394 right-hand, and judgment of Sundaram Chetty J. at page 400.

3. See *Q.E. v. Saminada Chetti*, (1883) I.L.R. 7 Mad. 274 (P.B.).

4. See also *Emp. v. Ratan*, (1902) 4 Bom. L.R. 644 (Crown and Ashton JJ.), agreeing with *Saminada Chetti* I.L.R. 7 Mad. 274.

5. A.I.R. 1932 Mad. 391, 403.

6. *Narainaswami*, A.I.R. 1939 P.C. 47.

7. *Amrit v. State*, A.I.R. 1960 Bom. 488 (Raju J.).

434. Our view is, that the words "acquainted with the circumstances of the case" in sections 160 and 161 apply to suspected persons, though those words in section 170 do not cover the accused, because in section 170 the accused is *separately* mentioned. The view of Reilly, Sundaram Chetty and Waller JJ. in the Madras case¹ were considered by us. But, with great respect, we are not able to agree with the observations in that case that *section 160 does not apply to the accused, since it excludes incriminating statements.* No change in language in the text of the sections is necessary. Nor need the marginal notes be disturbed, as they cannot control the section.

Section 161
and obliga-
tion to speak
the truth

435. We have considered the question whether the word "truly" should be inserted in section 161. We are of the opinion that it should not be added, in view of the history of the section, and certain risks involved in it.²

436. The connected point, namely, that a *refusal* to answer questions under section 161 of the Code of Criminal Procedure is, as the law stands now not punishable in view of the narrow language of section 179. Indian Penal Code, is more important. We *recommend* that the relevant sections of the Indian Penal Code,³ should be amended to cover such refusal, as there can be no two opinions about the need for penal sanctions for *refusal to answer these questions.*

Section 161
and points
in 14th
Report

437. In an earlier Report,⁴ several suggestions were made regarding the manner of recording statements by the police and also regarding the need for recording the statement of every person whom the prosecution wishes to examine at the trial. With certain modifications, we are giving effect to them. Necessary *amendment is recommended.* The recommendations made earlier and the modifications which we are suggesting, are detailed below.

(a) The first suggestion was, that, instead of leaving it to the discretion of the police officer to record the statement into writing, it should be made obligatory upon him to record in writing the statement of every person who has been examined by him, under section 161(1).

This recommendation is based on sound logic, inasmuch as the purpose and utility of a statement before the police officer have been changed after the amendment of 1955. Prior to the amendment, the statement could be used for the limited purpose of contradiction under section 162. But now, it can (alongwith other materials) form the basis of a charge,⁵ and the accused, is as of right, entitled to a copy

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1. A.I.R. 1932 Mad. 391.
 2. For detailed discussion, see Appendix 11.
 3. To be considered when the Indian Penal Code is revised.
 4. 14th Report, Vol. 2, pages 752 to 755, paras. 45 to 47.
 5. Sections 207A(7).

of the statement made before a police officer.¹ The latter object would be rendered nugatory if the police does not record the statement at all. It is, therefore, absolutely essential in the interest of justice, that changes should be made making it obligatory for the officer to reduce into writing every statement made before him under section 161.

(b) The next recommendation was, that "the law should insist that the investigating officer should record the statement of the witnesses as far as possible in their own words". There is no doubt that the recording of the mere *substance* of a statement by a police officer may be useless or misleading.

We would, therefore, implement this recommendation.

(c) The next recommendation in the earlier Report, however, raises a highly controversial issue. It was stated, that the statement so recorded should be signed by the witness, where the witness is literate and can himself read out the recorded statements. The case of illiterate persons was left untouched, because the Commission felt helpless regarding them. But the question goes to the root of the matter. What are we going to do with the signed statement, and what strength does it add to the recorded statement ?

It is patent, that with all the changes referred to, a statement before the police officer is not yet admissible as substantive evidence, and no court could ever sustain a *conviction* based on the statement before the police as a previous deposition record before a Court of law. Nor can it be overlooked, that the statement is recorded before a police officer, in whom the law has not so far placed the same confidence as in a judicial officer.

The signature of the witness can, in these circumstances, add very little to the strength of the statement recorded by the police officer. It is true, that the statement can be used for contradicting the evidence in court of the witness, to the extent permitted by section 162. But, then, it can reasonably be envisaged that in every case where a witness is confronted with the statement before the police officer by showing him the signature to it he would invariably take the plea that his signature was given under duress or without reading what was recorded. It is not a statement made on oath. The strength given by the signature of the witness below such a statement would be very little.

It has been said, that a literate person can read the signed statement himself, and see whether it is correct, whereas an illiterate person cannot read his statement and could be duped by the police officer. But there is no assurance that the literate persons will not be threatened by him. If a witness challenges a police officer that the

1. Section 173(4).

statement which has been recorded is not correct according to his version, he cannot urge that an amendment should be made, by filing an affidavit.

Upon a reconsideration of the question, thus, we are unable to accept this recommendation of the 14th Report. Our reasons in this respect may be briefly re-stated—

(i) the calibre of persons who are in the Police has not improved, and mal-practices in police investigation still continue to exist;

(ii) the requirement that witnesses making statements before the police should sign the statements, will not serve any useful purpose;

(iii) such requirement may even deter the witnesses from making such statement.

Section 161
and confes-
sions

438. The recommendation in the 14th Report¹ regarding admitting in evidence confessions made by the accused to senior police officers concerns the Evidence Act, and involves no change in the Code of Criminal Procedure.

Section 161
and sending
of copies

439. With reference to section 161, it has been suggested that for sub-section (3), the following shall be substituted, namely:—

“(3) The police officer shall reduce into writing any statement made to him in the course of an examination under this section and he shall make a separate record of the statement, of each such person whose statement he records and shall forthwith send the copies of the statements so recorded to the Magistrate having jurisdiction to enquire into the case.”

The suggestion is contained in an Amendment Bill which was introduced in the Rajya Sabha.²

440. The amendments proposed in the Bill were considered by us in detail.³ The proposed amendment seeks to put in section 161(3) three propositions—

(a) Every statement made to the police in the course of an examination under this section shall be reduced into writing;

(b) Separate record shall be made of the statement of each such person whose statement is recorded;

(c) The police officer shall forthwith send copies of the statements so recorded to the Magistrate having jurisdiction to inquire into the case.

1. 14th Report, Vol. 2, page 749, para. 39.

2. F. 3(2)/55-L.C. Pt. VII, S. No. 407 (Shri K. V. Raghunath Reddy's Amendment Bill, 1963) (Rajya Sabha Bill 11 of 1963).

3. On an assurance being given by the Government that the matter would be referred to the Law Commission, the Bill had been withdrawn. See Rajya Sabha Debates, September, 1965, columns 207 to 211.

The first proposition would be covered by the amendment of section 161 which we have recommended.¹ The second proposition re-states the existing law, in substance.

The third proposition evoked lengthy discussion before us. The main object of the amendment proposed on this point² appears to have been to prevent tampering by the investigating officer, particularly in respect of those criminal cases where factions are arrayed on either side. Various points were raised in the course of the discussion before us on this suggestion. First, it was urged that the Magistrate to whom the copies of statements are to be sent would not have the time and machinery to preserve, arrange and index them. Secondly, a doubt was raised whether tampering was prevalent on a noticeable scale, and also, whether tampering would give any advantage to the police, as the statement cannot be used by the prosecution (except to the very limited extent provided for in section 162 as amended in 1955).

As against these points, it was noted that in cases of factions, one group may have the desire to get the statements altered to its advantage, so as to face the witnesses of the opposite group with contradictions. It was also considered, that the difficulties of preserving and indexing may not be serious, as even now "occurrence reports" are sent to the Magistrate empowered to take cognizance.³ In the course of our discussion, we were also asked to consider whether the proposed provision, (if at all it is to be inserted), should not be limited to offences affecting the human body, and offences of rioting, and the like—these being the usual cases where the aspect of "factions" was most prominent. We were not, however, inclined to limit it like that. We found the amendment to be desirable and practicable. We recommend, that the proposed amendment may be accepted. The copies of the statements should be sent through the superior police officer⁴ (if any), appointed under section 158.

441. The following suggestion⁵ has been made by the Bar Council, Madras with reference to statements recorded under section 161—

"In view of the 1955 amendments to section 162 whereunder these statements rank on par with evidence, there is likely to be a tendency for the police to delay the recording of such statements till a complete picture emerges out, or to ante-date the statements so as to avoid any criticism that they were recorded in a belated manner. Moreover, if the high status given to these statements is to be maintained, it is suggested, that

Section 161
and sending
of copies to
Magistrates—
Suggestion
of Madras
Bar Council

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1. Recommendation as to section 161.
 2. See Rajya Sabha Debates, 3rd September, 1965, Columns 172-173, speech of Shri K. V. Raghunatha Reddy, mover of the Amendment Bill.
 3. See section 157(1).
 4. Compare section 173(2).
 5. F. 3(2)/55-L.C. Pt. III, S. No. 52.

copies of such statements should be forwarded to the Magistrate having jurisdiction within 24 to 48 hours of the recording thereof. This procedure ensures the reliability to the statements as well as their fullness and accuracy”.

We have considered the suggestion carefully. We have already recommended¹ some changes as to sending of copies, and we think that those changes would be enough.

Section 161
and identifi-
cation
parades

442. With reference to section 161, the following suggestion² has been made by the Inspector General of Police, Madras:-

“At present there is no provision in the Investigation Chapter for holding *identification parades*. It is better to have some specific provisions regarding the holding of such parades during investigation.”

We think that the existing law is adequate. As the holding of identification parades is a matter of daily occurrence, we tried to study some aspects of the matter, and we record below some of the broad propositions which can be gathered from the case-law.

443. When identification parades are held before Magistrates, they record the statements under section 164. Whether section 164 applies to them was a matter left open by the Supreme Court.³

As the matter stands now,^{4,5,6} we do not regard any provision as necessary.

The relevancy of evidence about such identifications is, of course, outside the scope of the Code. “An identification parade belongs to the stage of investigation by the police. The question whether a witness has or has not identified the accused during investigation is not one which is in itself relevant after trial.⁷ It is governed by various decisions⁸ under section 9 of the Indian Evidence Act, 1872.

Section 161

444. There are rules and instructions on the subject.⁹ In theory, *the police* can also hold identification parades. But since that would attract section 162, they have to be held before Magistrate.

It is unnecessary to consider whether section 80, Evidence Act, applies to such statements.¹⁰

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1. See discussion under section 161 and sending of copies.
 2. No. F. 3(2)/55-L.C. Pt. III, S. No. 52.
 3. *State v. Shingara Singh*, A.I.R. 1964 S.C. 358, 363, para. 16.
 4. *Samiuddin v. Emp.* A.I.R. 1928 Cal. 500, 502.
 5. *Peave Lal v. State*, A.I.R. 1961 Cal. 531 (Article 20, considered).
 6. *In re Kamraj*, A.I.R. 1960 Mad. 125, 129-130 (Somasundaram and Ramaswami JJ.).
 7. *In re Sangiah*, A.I.R. 1948 Mad. 113, para. 4 (Rajmanna J.).
 8. *Asharifi*, I.L.R. (1960) 2 All. 488; A.I.R. 1961 All. 153 (Reviews case-law).
 9. See *Asharfy v. State*, A.I.R. 1961 All. 153, 159, Para. 2.
 10. *Cf. Sheo Raj*, A.I.R. 1964 All. 290.

445. As to the law in England, the discussion by Lord Denning in a recent case¹ relating to false imprisonment may be quoted :—

“When a constable has taken into custody a person reasonably suspected of felony, he can do what is reasonable to investigate the matter, and to see whether the suspicions are supported or not by further evidence. He can, for instance, take the person suspected to the place where he says he was working, for there he may find persons to confirm or refute his alibi. The constable can put him up on an identification parade to see if he is picked out by the witnesses. So long as such measures are taken reasonably, they are an important adjunct to the administration of justice. By which I mean, of course, justice not only to the man himself but also to the community at large. The measures must, however, be reasonable.”

446. The Supreme Court had, in one case,² occasion to deal with the admissibility of statements made *by persons in custody with reference to section 27 of the Evidence Act.* *In the judgment of Mr. Justice Hidayatullah,* in that case, attention has been drawn to the following recommendation of the Royal Commission on Police Powers and Procedure³ :—

Section 161
and Judges
Rules.

“(48). A rigid instruction should be issued to the police that no questioning of a prisoner or a person in custody about any crime or offence with which he is or may be charged, should be permitted. This does not exclude questions to remove elementary and obvious ambiguities in voluntary statements under No. 7 of the Judges Rules, but the prohibition should cover all persons who, although not in custody, have been charged and are out on bail while awaiting trial.”

Mr. Justice Hidayatullah also observed, that this was a matter for the *legislature to consider.*

447. It may be noted that in England the Revised Judges' Rules framed in 1964 contain elaborate provisions as to questioning by police. Rules I and III (a) and (b) of these rules are quoted below :—

“I. When a police officer is trying to discover whether, or by whom, an offence has been committed, he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. *This is so whether or not the person in question has been taken into custody* so long as he has not been charged with the offence or informed that he may be prosecuted for it.”

1. *Dallison v. Caffery*, (1965) 1 K.B. 348; (1964) 3 W.L.R. 385; (1964) 2 All. E.R. 610 (C.A.).

2. *State of U.P. v. Deoman Upadhya* (1961) 1 S.C.R. 4062, 4063; A.I.R. 1960 S.C. 1125, 1147, para. 73.

3. Royal Commission on Police powers and procedure, (1928-29), Cmd. 3297.

4. See (1964) 1 Weekly Law Reports, 152, under “Practice Note”.

“III. (a) Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms :—

“Do you wish to say anything? *You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.*”

“(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement.

“Before any such questions are put, the accused should be cautioned in these terms :—

“I wish to put some questions to you about the offence with which you have been charged (or about the offence for which you may be prosecuted). You are not obliged to answer any of these questions and answers will be taken down in writing and may be given in evidence.”

“Any questions put and answers given relating to the offence must be contemporaneously recorded in full and the record signed by that person or if he refuses by interrogating officer”.

448. We have considered the question whether any provision *in the Code* on the subject should be inserted. We also studied the Revised Judges Rules (1964), and the extensive literature thereon. We come to the conclusion that it may not be convenient to make these elaborate provisions in our Code. We also found that even in England, there is controversy as to the working and object of the Judges Rules, and also as to the precise object sought to be achieved by these Rules.¹ Further, in India, the answers of the accused to the questions put by the police are not admissible in evidence except to the limited extent provided for by section 162. Hence the absence of statutory provisions as to warning would not harm the accused at the stage of trial.

1. Literature on the subject is abundant. By way of examples, the following may be referred to—

- (a) Hoffman, “The Judges Rules”, (1964), Lawyer 23, 25.
- (b) Cowen and Carter, “Essays on Evidence” (1956), page 46.
- (c) Lord Porter, “English Practice and Proceed (1949) 2 Current Legal Problems 13, 23.
- (d) Proceeding of the Commonwealth Law Conference (1965), Topic 2, Papers by Norman Skelhorn and Professor K. O. Shätwel.

449. In section 162(1), the words "if reduced into writing" have to be omitted, as it is now proposed,¹ that the statement of every witness who is examined by the police shall be reduced to writing. Section 162 (1).

450. The question whether the prosecution should be allowed to cross-examine a *defence* witness by bringing out contradictions with his statement recorded in police investigation, has been discussed before us at length, in view of the suggestion to that effect made by a State Government.² The history and object of section 162, and the case-law on the subject, were gone into by us.³ Section 162 and Cross examination by the prosecution of defence witness.

The suggestion is, that in section 162(1), in the proviso for the portion beginning with, the words "Provided that" and ending with the words "by the prosecution", the following be substituted :—

"Provided that, when any person is examined as a witness in such inquiry or trial whose statement has been reduced in writing as aforesaid, any part of his statement, if duly proved, may be used by the accused or the prosecution."

It has been suggested⁴ that section 162 of the Code be amended so as to put on par the accused and the prosecution in the matter of contradiction or cross-examination of the witness on the basis of the statement made by him before the police. At present, the accused *can do so whereas the prosecution has to obtain the permission of the court before acting accordingly*. A copy of the Bill forwarded by the State Government (for the administrative approval of the Government of India before its introduction in the State Legislature) was sent to the Law Commission for consideration.

The following proviso to sub-section (1) of section 162 has been suggested⁴ in the Bill :—

"Provided that, when any person is examined as a witness in such enquiry or trial whose statement has been reduced in writing as aforesaid, any part of his statement, if duly proved, may be used by the accused or the prosecution."

The Statement of Objects and Reasons to the Bill is as follows :—

"In view of sub-section (1) of section 162 of the Code of Criminal Procedure, 1898, no statement made by a person to a police officer in the course of an investigation under Chapter 14 and reduced in writing

1. See section 161, as proposed to be amended.

2. F. 3(2)/55-L.C. Part VII, S. No. 459.

3. For detailed discussion, see Appendix 12.

4. F. 3(2)/55-L.C. Pt. VII, S. No. 459 (Suggestion of a State Government.).

can be used at any inquiry or trial in respect of the offence under investigation. But, under the proviso, if such person is called as witness for the prosecution the accused has been given a right to use such person's statement to contradict him, but the prosecution can use it for similar purpose only with the permission of the Court, which is generally given when the witness turns hostile. *However, if the same person is examined as a defence witness, the statement cannot be used at all. When such persons come as defence witnesses, difficulty is experienced by the prosecution, particularly in identification parade cases.*

"As there are other safeguards, it is proposed to allow the use of a police statement to contradict a witness even when he is called by the defence. The High Court, which was consulted, is in favour of such amendment."

We have considered the matter separately.¹

451. We are opposed to any such change, as it would practically take away the sub-stratum of section 162, which is based on the principle that these statements ought not to be admissible. That only the *accused* should have the right to use these statements, is a special and exceptional provision, which should not be extended.

Section 162 and suggestion to substitute "cross-examination" for "contradiction".

452. It has been suggested² in one Bill, that in section 162 of the principal Act, in the proviso to sub-section (1), after the words "may be used by the accused", the words "to cross-examine such a witness" shall be inserted.

This suggestion seeks to widen the scope from "contradiction" (which is at present mentioned) to "cross-examination" (which is wider). The main object of the amendment is to cover omissions.³

We considered the matter at length. In our view, no such change is necessary.

The discussion in Tahsildar Singh's case^{4 5} itself shows, that it is not possible to boil down the question (how far "omissions" are contradictions) to a short and neat formula. Nor do we consider it necessary to make the scope of the section wider than has been interpreted by the Supreme Court in that case.

1. See discussion relating to section 162.

2. F. 3(2)/55-L.C. Pt. VII, S. No. 407 (Shri K. V. Raghunath Reddy's Amendment Bill) (Rajya Sabha Bill 11 of 1963).

3. See Rajya Sabha Debates, 3rd September, 1965, cols. 207-211 (Speech of Shri K. V. Raghunatha Reddy).

4. *Tahsildar Singh*, (1959) Suppl. 2 S.C.R. 875; 1959 S.C. 1012.

5. See also *Dahybai*, A.I.R. 1964 S.C. 1563, 1569.

453. With reference to section 162, the following suggestion¹ has been made by the Public Prosecutor, West Godavari, Andhra Pradesh. Section 162 (1) proviso, and Court witnesses.

“In the proviso to sub-section (1) of section 162, for the words “called for the prosecution”, the words “examined in the Court” should be substituted.”

The reason given in support of the suggestion is this : A witness becomes hostile to the prosecution. If the prosecution gives up the witness and if *he is examined as a Court witness*, his statement cannot be put to him and contradicted. This amendment is intended to remove the anomaly. (The suggestion also says, that the decision of the Andhra Pradesh High Court may be seen).

We have examined the suggestion.

The Andhra Pradesh decision is noted below.² The matter was discussed in recent Bombay case,³ where also the same view was expressed, namely, that a *court witness* cannot be cross-examined under section 162(1), proviso. We do not, however see any need for extending the proviso as suggested. The suggested draft, moreover, goes much beyond the object in view, as it would cover defence witnesses also.

No change is, in our opinion, necessary.

454. With reference to the proviso to section 162(1), we have carefully considered the suggestion⁴ of a High Court Judge to clarify the question whether the expression “contradiction” includes omissions. The answer to the question, we believe, depends on facts. It appears to us that it is not possible to lay down a rule one way or the other. Section 162 (1) Proviso and omissions.

455. An ‘omission’ can be regarded as a contradiction only where the omission, by necessary implication, can be deemed to be a part of the statement. The matter is discussed at length in a Supreme Court Judgement,⁵ which, while laying down the law to that effect, made it clear that the examples which it gave were not intended to be exhaustive.

456. A High Court⁶ has suggested the addition of a second proviso to section 162(1) as follows :— Section 162 (1) and suggestions regarding presence of counsel.

“Provided further that when it is necessary for a police officer to examine an accused person during the course of investigation and he is proceeding to do so, he shall inform the accused that if the accused desires, the examination will be conducted and any record made in the presence of the advocate of the accused; he shall

1. F. 3(2)/55-L.C. Pt. III, S. No. 50(v).

2. *In re Kotti Reddy*, A.I.R. 1960 A.P. 76.

3. *State v. Bhanuprasad*, A.I.R. 1966 Bom. 378, 379, para. 8 (October issue).

4. F. 3(2)/55-L.C. Part II, S. No. 33(a).

5. *Tahsildar Singh v. State of U.P.*, A.I.R. 1959, S.C. 1012, 1026.

6. F. 3(2)/55-L.C. Pt. III, S. No. 52 (Page 301, Corresponding).

be further bound to afford a reasonable opportunity to the accused to send for his advocate and to have his presence."

The reasons given by the High Court for the proposed provision are stated below—

(1) The above provision will put an end to the abuses connected with section 27 of the Indian Evidence Act, and to the unlawful detention of the accused person in police custody. In England, such reasonable opportunity is given. "There is no reason why in India the members of the Bar should be credited with a double dose of the original sin and their presence be considered as polluting the investigation or hampering the investigation."

(2) Many of the criticisms that have become the staple food of the Bar, will disappear. The accused persons will be able to set up proper defence, which if investigated, might exculpate them. The investigation will become purer, and public cooperation will be increasing.

457. A somewhat similar suggestion¹ has been made by a Bar Council. The suggestion has been made under section 167, but really pertains to section 162. The Bar Council has suggested, that section 167 should contain a provision enabling the accused to have legal aid when he is in police custody.

Comments of the State Government concerned, (on this suggestion) are as follows :—

"In view of the specific provision in article 22(1) of the Constitution, it may not be in order to make specific provision refusing lawyers to appear on behalf of arrested persons. There is, however, no need either to specifically provide in the Code that the accused should be entitled to legal aid while in police custody, or even otherwise such legal aid cannot be shut out in view of the specific provision in article 22(1)".

458. We considered carefully the above suggestion, and the comment of the State Government thereon.

The following points were urged before us—

(a) Article 22(1) of the Constitution, no doubt, provides for the situation, in substance, but it appears desirable to put the matter emphatically in the Code. The proposed provision, if inserted, will supplement section 340 of the Code, which applies to a person accused of an offence before a criminal court;

(b) Relevant portion of Article 22(1) is as follows :—

"No person who is arrested, shall be denied the right to consult a legal practitioner of his choice and to be defended by a legal practitioner of his choice".

1. F. 3(2)/55-L.C. Pt. III, S. No. 52 (page 284, correspondence portion).

It was urged before us, that the right to consult a legal practitioner would be ineffective if consultation is not available when the most important steps in investigation are being taken. It was stated, that the very fact that the Constitution gives the person arrested a right to legal advice *before the trial* and as soon as he is arrested, implies, or at least renders it desirable, that the assistance of counsel must be available at the stage in question.

We are, however, in doubt if article 22 necessitates such a change. It is also our view, that it is against the principle of investigation to bring in counsel at this stage. We do not, therefore, recommend any change in this respect.

459. Various other suggestions^{1 2 3} to amend section 162 were considered by us, but have not been found acceptable to us. It is unwise to make these statements corroborative or contradictory evidence as has been suggested. If (as is stated) cases fail because of witnesses retracting from their statement under section 162, that is no ground for changing a very salutary provision. Section 162
Various
other
suggestions.

460. Regarding section 163(2), the case-law reveals⁴ a discrepancy between section 163(2) and section 164. It should, therefore, be *made clear* that section 163(2) is subject to the provisions of section 164(3). Section 163

461. The power to record statements as well as confession under section 164(1) should in our opinion be *given to Judicial Magistrates only*. Section 264

In Punjab,⁵ the power is vested exclusively in Judicial Magistrates. So also in Madras.⁶ In Bombay⁷ (and in the Bengal Bill),⁸ the power is concurrent.

462. In our view, the act of recording a confession under this section is a solemn act with high responsibility, and it cannot be vested in an Executive Magistrate without prejudice to the principle of separation enjoined by Article 50 of the Constitution. A confession is a weighty piece of evidence, and its utility depends very much upon the question whether adequate safeguards to ensure that the confession was voluntary and properly recorded had been taken at the time when the confession was recorded. All this may be expected only from persons who have got not only the experience but also the frame of mind of a Judge.

1. F. 27(3)/55-Judl. II (Home Ministry File), Appendix I, Item No. 31.

2. F. 27(5)/54-Judl. (Home Ministry File), Appendix II, Item No. 16.

3. F. 3(2)/55-L.C. Part I, S. Nos. 26, 34, and 18.

4. For detailed discussion, see Appendix 13.

5. Section 164, as amended by the Punjab Amendment.

6. Government of Madras, G.O.Ms. No. 2304 dated the 24th September, 1952, paragraph 21(3) and Schedule item 25.

7. Section 164, as amended by the Bombay Amendment.

8. First Schedule to the Code, as inserted by the West Bengal Separation of Judicial and Executive Functions Bill, 1967 (August, 1967).

463. It may be said, that so far as non-confessional statements are concerned, it matters not much whether it is recorded by a Judicial officer or an executive officer. But, whether a statement amounts to a confession or not is itself a legal question, which cannot always be determined before the statement is actually recorded so that it is not possible to send the person to an Executive or judicial Magistrate having regard to the nature of the statement proposed to be made. Moreover, in our opinion, it would be an impracticable proposal to divide the power under section 164 into two categories,—confessions and other statements, and to divide the function between the two classes of Magistrates.

We, therefore, recommend, that the power should be confined to *Judicial Magistrates* alone.

464. The power under section 164 may be given to—
 (i) Presidency Magistrates;
 (ii) Judicial First Class Magistrates;
 (iii) Judicial Second Class Magistrates specially empowered.

Since the power is to be confined to Judicial Magistrates, it is not necessary to retain the words "not being a police officer" in section 164(1). These words may be *omitted*.

Section 164
and exclu-
sion of
police.

465. It has been suggested,¹ that the police should be excluded while recording the statements of witnesses under section 164. In our opinion, a statutory provision on the subject is not necessary.

Section 164
(2) and
administra-
tion of oath.

466. The position regarding administration of *oath* to a witness whose statement is recorded under section 164 has been considered by us. The conflict of decisions on the subject has been discussed in detail in our Report on the Oaths Act.² The question that now arises is, what ought to be the law. On the one hand, if a witness whose statement is recorded is to be encouraged to speak the truth, an oath is desirable. On the other hand, our attention was drawn to the view expressed by Mr. L. C. Crump³ (while the Bill which led to the 1923 Amendment was *under consideration*). Mr. Crump had pointed out, that, in favour of the view that the witness who is examined under section 164 should not be liable for perjury, was the consideration that the police would (if he is to be made so liable) be able to compel a person to adhere to a statement which he may have made at their instance under compulsion, on pain of prosecution for perjury. We however think, that on principle there

1. F 27,3)/55-Judl. II (Home Ministry File), Appendix I, Item No. 30 (Comment of the Administration of a Union Territory on the suggestion of the I.G.P. of a State Additional point made in the comment).

2. 28th Report (Oaths Act), pages 29-30.

3. Mr. Crump was a District & Sessions Judge at that time. He later became a Judge of the Bombay High Court.

is something to be said for recording the statement on oath, to lend it some sanctity. *We recommend* an amendment of section 164 to *provide* that the statements of witnesses should be on oath.

467. We have received a suggestion from a High Court (received through the State Government)¹ to amend section 164 so as to empower a Magistrate to record a confession made before commencement of the investigation. The suggestion is that the words "made to him in the course of an investigation under this Chapter" and the words "or at any time afterwards" be omitted. The object is to empower a Magistrate to record a confession made *before* the investigation has started. The suggestion has been made in view of the fact that very often the accused, after committing the offence, runs straight to the Magistrate and surrenders with the blood stained weapon etc. and tells him what he has done. A cleaner kind of evidence than this cannot (it is stated) be conceived. Yet the testimony of the Magistrate is inadmissible by reason of the words occurring in the section. We felt, that such a provision would throw on the Magistrates an unnecessary burden, and would also not fit in with the scheme of Chapter 14, which is confined to steps taken *during* investigation. No change is, therefore, recommended on this point.

Section 164 and confessions made before investigation.

468. With reference to section 164(3), we should note the view expressed by a High Court Judge, in his suggestion,² which is as follows:³

Section 164 (3) suggestion of a High Court Judge.

"Section 164. The provisions in section 164 regarding the magistrate's being satisfied, before recording the confession, that it is being made voluntarily and about his certifying that the confession was made voluntarily are useless and do not serve any purpose in practice. If an accused is prepared to make a confession, there is hardly any magistrate who makes an honest effort to find out whether he is making the confession voluntarily or not. There is hardly any magistrate who might have refused to record the confession of an accused person if he was prepared to make one, on the ground that he was not satisfied that it was being made voluntarily. Ordinarily, a magistrate puts certain stereotyped questions without realising that the accused might have been tutored by the police to give particular answers to those questions and has no compunction in proceeding to record the confession, in certifying at the end of the confession that he satisfied himself "that it was made voluntarily and in deposing on oath in court that he had satisfied himself about its voluntary nature. The law should be practical, and if a certain provision cannot be enforced in practice it should not be allowed to remain on the statute book."

1. F. 3(2)/55-L.C. Pt. III, S. No. 52.

2. F. 3(2)/55-L.C. Part II, S. No. 33(a).

3. The point relates to section 164(3).

We have given our anxious consideration to this suggestion. We are, however, afraid that the defect lies neither in the law not in any inherent unenforceability of the law, but in non-compliance therewith. The situation described in the suggestion, wherever it exists, is due to the fact that the law is complied with only in its letter, and not in its spirit.

If the provision is deleted, the question will again arise whether the confession was voluntary. The provisions of section 164(3), if administered in the proper spirit, are most salutary. They should "not degenerate into idle formalities", but that can be secured by vigilant supervision. The deletion of the subsection, we venture to state, would be far more detrimental to the interests of justice than the existing position. We have, before coming to this conclusion, examined some of the important judicial decisions relevant to the subject of recording of confessions particularly i.e. the safeguards to be observed.¹

Section 164
and Identifi-
fication:

469. It has been suggested,² that a provision should be inserted to the effect that a Magistrate may, at the request of the investigation officer, hold an identification of persons or property and take finger prints etc. of the suspected person, and that the record by the Magistrate of these proceedings should be admissible in evidence.

We think, that, so far as identification is concerned, section 164 is enough.

Section 164
and retracted
confession.

470. With reference to section 164, the following suggestion³ has been made by a State Government.

"The rule of prudence requiring corroboration of retracted confessions should be given statutory recognition..."

We studied in detail the position on the subject. The following broad propositions can be gathered from the case law—

(a) The rule in question is one of prudence. If the retracted confession is voluntary, it can still be made the basis of a conviction.^{4 5}

As has been observed by the Privy Council⁶—

Retraction of a confession by an accused is a common phenomenon in India. The weight to be attached to it must depend upon whether the Court thinks that it was induced by the consideration that the confession was untrue, or by realization that it had failed to secure the benefits the hope of which inspired it."

1. For detailed discussion, see Appendix 14.

2. No. F. 3(2)/55-L.C. Part I, S. No. 72 (Suggestion of a District Prosecutor).

3. F. 3(2)/55-L.C. Pt. III, S. No. 49.

4. *Emp. v. Kutub*, I.L.R. 57 Cal. 488; A.I.R. 1930. Cal. 633, 635 (Rankin C. J. and C.C., Ghose J.).

5. *R. v. Gharya*, I.L.R. 19 Bom. 728.

6. *Bhuboni Sahu v. R.*, 76 I.A. 147; A.I.R. 1949 P.C. 257, 260, para. 9.

(b) It cannot be laid down as *an inflexible* rule of practice or prudence.¹

(c) It may also be noted, that as to the burden of proof, our law differs slightly. As was observed in a Bombay case,^{2,3} it is true that in England when a doubt arises as to the admissibility of a confession, the Court has to decide whether it has been proved affirmatively to be free and voluntary. This is the law laid down in the *Queen v. Thompson*⁴ by Mr. Justice Cave with the concurrence of Lord Coleridge, C.J., and Hawkins, Day, and Wills JJ.

In India the law on the subject is contained in section 24 of the Evidence Act.

The section must be fairly construed according to its language, and if this is done it seems to us impossible to contend that the law in India is identical with the law in England as explained in *The Queen v. Thompson*⁵ and the cases therein referred to. The question which a Court has to decide when determining on the admissibility of a confession is whether it appears to the Court to have been induced by the means mentioned in the section. "It may be that this section does not require positive proof, within the meaning of section 3, of improper inducement to justify rejection of the confession. The use of the words "appears" indicates" it may be argued, a lesser degree of probability than would be necessary if "proof" had been required. A court might perhaps in a particular case fairly hesitate to say that it was proved that the confession had been unlawfully obtained, and yet might be in a position to say that such appeared to it to have been the case. Still although we think that very probably a confession may be rejected on well-grounded conjecture, there must be something before the Court on which such conjecture can rest. It does not seem possible to say that the mere subsequent retraction of a confession which has been duly recorded and certified by a Magistrate, is enough in all cases to make it appear to have been unlawfully induced. Without assuming the functions of the Legislature, we cannot lay down any general rule to meet the varying circumstances of different cases. To require, as the criterion of admissibility, affirmative proof that a duly recorded and certified confession was free and voluntary, would not, in our opinion, be consistent with the terms of sections 21 and 24 of the Evidence Act, or with the interpretation given to these sections by Mr. Justice Nanabhai in *Reg v. Balvant*⁶ which appears to us to have been correctly decided and to be in harmony with the practice of the Courts.

1. See *Pyarelal v. The State*, A.I.R. 1963 S.C. 1094, 1096.

2. *R. v. Basavanti*, I.L.R. 25 Bom. 168, 171, 172, 173.

3. See generally articles in (1900) Bom. L.R. (Journal) 157, 217.

4. *Queen v. Thompson*, (1893) 2 Q.B. 12.

5. *Queen v. Thompson*, (1893) 2 Q.B. 12.

6. *Reg. v. Balvant*, (1874) 11 Bom. H.C.R. 137.

"It may be thought that the law as it stands does not afford adequate protection to prisoners against illegal practices whereby confessions are extorted, but it is not permissible to us to amend it. What the Legislature doubtless hoped and intended was that Magistrates would not record confessions unless they really believed that they were made voluntarily.¹ In the case of Magistrates acting under section 164 of the Criminal Procedure Code, there can be no question that they must be affirmatively satisfied of the voluntariness of the confession, and that when in doubt on this point they ought not to record or give the certificate. The consideration which this question is at present receiving will, we hope, lead to the issue of such instructions as may help Magistrates in the difficult task of deciding what confessions are "voluntary"."

In our view, there is no need for a rigid provision as suggested.

Section 164 and recording statements at the instance of the accused.

471. With reference to section 164, the following suggestion² has been made by the Bar Association, Adoni (Andhra Pradesh). (The Judicial First Class Magistrate, Adoni, agrees with this).

"Provision should be made for recording statements under section 164 for witnesses produced on behalf of the accused."

We examined the law on the subject.

The accused seems to have no right at present, in this respect. In fact, *the police also*, have no such right. But, there is nothing to prevent the Magistrate from recording the statement at the instance of the accused.³

We do not, therefore, see the need for any amendment.

Section 164 (1) and suggestion to make recording of statements by Magistrate obligatory.

472. The following suggestion has been made by a Bar Council.⁵

"(1) A *discretion* is given to the police while investigating an offence to produce witnesses before the Magistrate for the purpose of recording their statements on oath. A *statutory obligation* may be imposed on the investigating officer to produce eye-witness before the Magistrate for recording their statements.

(2) The role of the Magistrate at the investigating stage may be enlarged.

(3) The Magistrate may be empowered to take the evidence of identifying *witness on oath*, when he presides over the identification parades.

1. Cf. *Queen v. Thompson* (1893) 2 Q.B. 12.

2. F. No. F. 3(2)/55-L.C. Pt. III, S. No. 50(n).

3. *In re C. W. Casse*, A.I.R. 1948 Mad, 489, 490.

4. *Muhammad Sarfraz Khan*, 52 Cr. L. J. 1425.

5. F. No. F. 3(2)/55-L.C. Part III, S. No. 52.

(4) The right of taking advantage under section 27 of the Evidence Act (admission of statements from an accused person in police custody leading to the discovery of property) is denied to the police. The investigating officer may be *empowered to resume his custody* for the limited purpose and with the permission of the Magistrate who had remanded him to custody”.

The view of the State Government concerned on this suggestion is that Item 4 of the proposal of the Bar Council will not be necessary in view of section 167.

We agree on this point with the State Government.

The State Government also felt that the other proposals would not be practicable. We are of the same view as regards items (1) and (2). But, as regards item (3), we are already recommending a provision for recording the statement on oath.¹

473. Copies under section 165 should, we think, be given Section 65. free of cost. The section may be *amended* accordingly.

474. A State Government² has suggested the removal Section 165 from section 165(5) and section 166 of the obligation to (5). furnish copies of reasons recorded under section 165(3). We are unable to accept the suggestion, having regard to the fact that the matter is one of protection of privacy of property.

Section 165(5) was inserted in 1923, by means of an amendment in the Assembly. We may quote here the reasons advanced by Rao Bahadur T. Rangachariar, who moved the amendment.³

“As Honourable Members will see, the object of this amendment is that, as soon as a search is made, an immediate report should be made to the nearest Magistrate. That is one of the objects. The second object is that the person whose house is searched should have copies of the records made under sub-clauses (i) and (iii). Sub-clause (4), as it stands, enables the provisions of section 103 to apply, that is, the general rules relating to searches are made applicable. Under section 103 the occupier of the place where the search was made gets only a list of the articles taken, but what I want him to get is the reason for the search which has to be recorded in writing, which has to be sent to the Magistrate, and he gets a copy thereof. That is the object of this further sub-clause (5) which I move, Sir, as it stands”.

Government accepted the amendment, and no further debate seems to have taken place.

1. See section 164, as proposed.

2. F. 3(2)/55-L.C. Sl. No. 13.

3. Legislative Assembly Debates, 31st January, 1923, Vol. III, No. 27.

Section 165
and recovery
by police of
abducted
persons.

475. An Inspector General of Police has suggested¹ that power be given to the police to recover victims of abduction or kidnapping who are wrongfully confined. We are not inclined to accept the suggestion. Section 100, is, in our view, enough for the purpose. As the matter involves personal liberty, it is better to confine it to Magistrates competent to act under section 100.

Section 166.

476. Copies under section 166 should be given free of cost. The section should be *amended* accordingly.

Section 167
and period
of remand.

477. In relation to section 167, a point of great practical importance has to be considered. The remand under section 167 cannot be ordered for more than 15 days in the whole. Where the investigation is not completed within 15 days, the police (in some States) secure remand under section 344, without submitting a charge-sheet in the prescribed form.³

Now, there is a conflict of decisions on the question whether a remand can be ordered under section 344 without taking cognizance.⁵ In this connection, we went at length into the history of sections 167 and 344.

478. The view expressed on the subject in an earlier Report,⁴ and the recommendation made therein to the effect that the maximum period under section 167 should be *extended to 60 days*, were also considered at length by us. Our conclusions are as follows :—

(i) It is not proper to extend the maximum period in section 167, as the extended period is apt to become a routine, and is likely to be restored to in all cases.

(ii) Section 344 is not at all intended to be used at a stage before the Court has taken cognizance. This is clear from its placing in the Chapter on Inquiries and Trials, and from the history of section 167 and also from the words "inquiry or trial" which occur in section 344(1).

(iii) The real misunderstanding is caused by the Explanation to section 344, as its wide language obscures the object of the legislature that section 344, being a provision occurring in the Chapter dealing with inquiries and trials, is intended to be used to only after cognizance has been taken. The Explanation to section 344 should be *confined* to the post cognizance state, by way of clarification.⁵

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1. F. 3(2)/55-L.C. Part II, S. No. 32.
 2. Cf. 14th Report, Vol. 2, page 758, paragraph 53.
 3. For detailed discussion, see Appendix 15.
 4. 14th Report, Vol. 2, pages 857-860, para. 55-56.
 5. To be carried out under section 344.

479. With reference to section 167, the following suggestion¹ has been made by a High Court. Section 167
and remand
for more
than 15 days

“Section 167 may be amended to provide for detention in judicial custody for *more than 15 days at the stage of investigation*. If necessary, subject to a maximum period beyond which remand should not be granted. (This was also the recommendation of the Law Commission)²”.

We have already expressed our views in the matter.³

480. We had also to consider the question whether powers under section 167 should be given to both classes of Magistrates (as in Punjab) or to Judicial Magistrates only (as in Bombay). In our view, these powers should be given *only* to Judicial Magistrates. The power is ancillary to the trial of offences, its exercise requires an approach different from that of mere maintenance of law and order. Section 167
and Magis-
trates to be
empowered.

It may require, particularly where detention in police custody is to be ordered, a careful recording of reasons,⁴ for which Executive Magistrates may not have sufficient time. As has been pointed out,⁵ a Magistrate acting under section 167 has to weigh the evidence with respect to the offence and does not act in a purely executive capacity.

481. A suggestion⁶ of the Ministry of Defence may be noted regarding custody under section 167. Under sections 167(2) and 344, a Magistrate is empowered to remand an accused to any custody, that is to say, he can remand him to other than police custody. It is considered, that accused persons who are subject to military, naval or air force law may be permitted to be remanded to military, naval or air force custody. In fact, such custody has been ordered in some cases. In order that there may be no doubt left in the matter, the following additions should (it has been suggested) be made in the aforesaid sections after the word “custody” :— Section 167
(2) and
military
custody.

“including military, naval or air force custody where the accused belongs to any of these services.”

We have considered the suggestion.

In section 167(2), the words used are “in such custody as the Magistrate thinks fit”. These words are very side.

In fact, it has been held⁷ even under section 344, that the Magistrate can remand the accused to *whatever custody*

1. File No. F. 3(2)/55-L.C. Pt. III, S. No. 28.

2. The reference is to 14th Report, Vol. 2, pages 759-760.

3. See discussion regarding section 167.

4. See—

(i) *Amir Khan v. Emp.* (1902), 7 C.W.N. 457, 459.

(ii) *Emp. v. Kampu Kuka* (1906), 11 C.W.N. 554, 551.

5. *Sunder Singh v. Emp.* I.L.R. 12 Lah. 16; A.I.R. 1930 Lah. 945, 946 (Bhide J.).

6. F. 3(2)/55-L.C. Pt. VII, S. No. 457 (Suggestion of the Ministry of Defence).

7. *In re M. R. Venkataraman*, A.I.R. 1948 Mad. 100 (Accused remanded to Central Jail, Trichinopoly, instead of Madura Jail), by the Madura Magistrate.

he thinks fit. We are therefore of the view, that no change is necessary.

Section 167 and physical production of the accused. 482. It has been suggested¹ that an accused person should be physically produced before the Magistrate at the time when the police apply for remand, and that the grounds on which they ask for remand should also be put up before the Magistrate in the presence of the accused, so that if the accused wanted to controvert those grounds he could do so.

We examined the position on the subject.

Even now, Magistrates are requested to insist on the *physical production* of the accused. The position may, perhaps, be different for a subsequent remand.²

In our view, production of the accused every time is necessary whenever remand is desired. But no change is called for in the language.

Section 167 (4). 483. Section 167(4) will require re-drafting, in view of separation.

Section 168. 484. No change is needed in section 168.

Section 169. 485. In section 169, the words "report in writing" etc. should be *substituted* for the words "police report".³

Section 170. 486. In section 170, the following amendments are needed—

(a) The words "report of police officer" etc. should be substituted for the words "police report."⁴

(b) In s. 170(3), the "Chief Judicial Magistrate" be substituted for the words "District Magistrate."

Section 171. 487. A suggestion to delete the first part of section 171 has been received,⁵ but we do not accept it.

Section 172. 488. No change is needed in section 172.

Section 172. (1) and suggestion regarding sending case diaries to the Magistrate. 489. With reference to section 172, the following suggestion⁶ has been made by the Markapur Bar Association, (Andhra Pradesh).

"Apart from section 172, the Police standing order in force in this State (*vide* P.S.O. 557) requires that the case diary be sent to the Superintendent of Police to ensure that

1. F. 3(2)/55-L.C. Part VII, S. No. 449, Suggestion of the U.P. Committee for Investigation of Causes of Corruption in Subordinate Courts in Uttar Pradesh (1963), Report, page 48, Bill at pages 234-235.

2. Cf. *Nirajan v. Manipur Administration*, A.I.R. 1958 Manipur 33, 34.

3. Cf. discussion as to s. 4(1)—definition of "complaint".

4. Cf. discussion regarding section 4(1)—"complaint".

5. F. 27(3)/55-Judl. II (Home Ministry) Appendix I, Item No. 32.

6. F. 3(2)/55-L.C. Part III, S. No. 50(o), (Page 219, correspondence).

the case diary is not altered subsequently for any reason. It is also mandatory that the case diary is sent to the Magistrate along with the remand report. But if the accused is not arrested, the case diary recorded even up to that time is not sent to the Magistrate. The case diary recorded upto the time of remand is never complete. In the interests of justice, and to ensure a fair trial, it is not sufficient if the case diary is sent to the Superintendent of Police. It is also necessary that *the case diary is sent to the Magistrate having jurisdiction to try the case, day to day*, and such a course will be very much in the interest of justice."

It has therefore been suggested, that after sub-section (1), sub-section (1A) may be inserted as follows:—

"(1A) *The proceedings so entered in the case diary shall day to day be communicated to the court having jurisdiction to try the case.*"

490. We are unable to accept the suggestion. As regards statements under section 161, we have considered the matter¹ separately. But statements in a police diary stand on a special footing. We do not see any need for the provision in question.

491. The following suggestion² has been made by a District Munsif *Cum* Judicial First Class Magistrate, in Andhra Pradesh.

a Section 172
(2) and
suggestion
regarding
sending
diaries in
Capital
cases.

"Experience would have shown, specially in case involving a sentence of life imprisonment or death, that the diary of police proceedings during the investigation is not made available for sufficiently long time. Innumerable judicial decisions have pointed out that the case diaries in those cases were neither prepared on the date they are purported to have been prepared, or, if prepared, they were not in such condition as they appear to be. *The section may be amended to provide the case diaries, at least in cases of serious nature involving capital punishment should be submitted to the nearest magistrate forthwith within 24 hours of making such diary. The amendment is essential at least in regard to capital offences.*"

We do not think, that such a change should be made, even for capital offences.

492. The following suggestion³ has been made by a High Court.

"Experience shows that the accused is often handicapped in his defence by the restrictions now placed under section 172. An amendment is suggested to enable him to have a *complete picture of the case against him, as revealed by the investigation.* This will help the accused to put up a *proper defence.*"

a Section 172
and discretion
to be
given to
Court to
allow
inspection.

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1. See discussion regarding section 161.
 2. F. 3(2)/55-L.C. Part III, S. No. 50(q).
 3. F. 3(2)/55-L.C. Pt. III, S. No. 52.

The amendment proposed by the High Court is the addition of a new sub-section, as sub-section (3), to section 172, as follows:—

“(3) Notwithstanding what is contained in the above sub-section, the accused or his counsel may apply to the Court for inspection or scrutiny of any relevant portion or portions of the case diaries, in order to aid him in his defence, and the court may, in its discretion, grant such scrutiny of any portion or portions of the case diary if it is satisfied that it will be in the interests of the accused to do so, and will not be prejudicial to the public interest”.

The State Government concerned has however, expressed the view that section 172 has not caused any special difficulty. In its view the amendment suggested by the High Court may lead to complications and the question may be raised whether refusal by the Judge or Magistrate to permit inspection *was justified or not*. The State Government, therefore, does not support the suggestion of the High Court.

493. It was urged before us, that the objection of the State Government is not convincing, and that even if no special difficulty has been caused, the suggested change has other merits.

It was stated that the merit of the suggestion is, that it will inspire confidence in police investigation, without at the same time impairing the public interest. No right is proposed to be conferred which would do damage to the *general secrecy* of police records. A discretion it was emphasised is to be *conferred on the Court*.

494. As to the existing law, the undermentioned cases may be seen.^{1 2 3 4} The diary is to be used by the court alone.⁵ It cannot be used for contradicting defence witnesses.⁶ For the previous law, the undermentioned case⁷ may be consulted.

As has been observed by Field J.,⁸ “the grounds upon which the opposite party is permitted to inspect a writing and to refresh the memory of a witness are threefold: (i) to secure the full benefit of the witness’s recollection as to the whole of the facts; (ii) to check the use of improper documents; and (iii) to compare his oral testimony with his written statement. The opposite party may look at the

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1. *In re Molagan*, A.I.R. 1953 Mad. 179, 182, para. 17.
 2. *Habeeh Mohamed v. State*, A.I.R. 1954 S. C. 60, para 13.
 3. *Emp. v. Jhubbu Mahton*, (1882) I.L.R. 8 Cal. 739, 744, 745 (Field J.) (discussed the reasons why opposite party is allowed inspection where a witness refreshes his memory).
 4. *Kali Charan*, (1881) I.L.R. 8 Cal. 154, 157 (Prinsep and Wilson JJ.).
 5. *Emp. v. Dharam Vir*, A.I.R. 1933 Lah. 498, 500 (Dalip Singh & Monreo JJ.).
 6. *Dal Singh*, I.L.R. 44 Cal. 876, 888, A.I.R. 1917 P.C. 75.
 7. *Q.E. v. Mannu*, (1897) I.L.R. 19 All. 390 (F.B.).
 8. *Emp. v. Jhubboo Mahton*, (1882) I.L.R. 8 Cal. 739, 744, 745.

writing to see what kind of writing it is in order to check the use of improper documents; but I doubt whether he is entitled, except for this particular purpose, to question the witness as to other and independent matters contained in the same series of writings.”

495. It was also urged before us, that on the one hand, every material in the diary is not of a secret nature.¹ On the other hand, a *wholesale inspection* of the diary may be against public policy.² The suggestion (it was stated) strikes a mean between these two extremes.

496. Perhaps the reason why the proposed change is suggested, is similar to that stated in the observations in a Madras case:³

“It is of comparatively little use for defending Counsel being permitted by the Sessions Judge to look into the case diary at the belated stage of the trial only when the learned Judge himself on a perusal of it finds something of great use to the accused. It is necessary for responsible defence from the start that in cases such as the present, *defending counsel should know what the accused told Police in the first instance.* We have not come across any more appropriate concrete case than the present in which this course should have been “*abinitia*” adopted”.

497. We have carefully considered the various aspects of the case as put forth above. We regret, however, that we are unable to accept the suggestion. We have an apprehension that it might hamper free disclosure in investigation.

498. In section 173(1), for the words “police report”, the words “report of a police Officer in writing” may be substituted.⁴ Section 173 (1) (a).

499. Section 173(1)(a) is the provision under which the “charge-sheet” or the “chalan” or final report is sent by the police to the Magistrate empowered to take cognizance. The question has arisen whether, after the submission of the report, the police can submit a “supplementary” chalan. Ordinarily, chalans should not be submitted after completion of the investigation piecemeal.⁵ Therefore, an incomplete chalan is not contemplated.⁶ Section 173 (1) (a) and investigation after chalan.

500. But, if the police officer, after he submits the chalan, gets further information, he can still investigate and submit a further chalan.^{7,8} As has been pointed out,⁹

1. See *Fatnaya Lal v. Emp.* A.I.R. 1942 Lah. 89, 91.

2. *Emp. v. Dharam Vira*, A.I.R. 1933 Lah. 498.

3. *In re Molagan*, A.I.R. 1953 Mad. 179, 182 paragraph 17.

4. Cf. discussion relating to section 4(1)—definition of “complaint”.

5. *Ranjit Singh v. State*, A.I.R. 1952 Himachal Pradesh 81, 87, bottom, para. 15.

6. *Kirpa v. State*, A.I.R. 1952 H.P. 68, 71, para. 6.

7. A.I.R. 1952 (Orissa) 350.

8. *Mangal Singh v. Ret.* A.I.R. 1949 All. 599, 601, 602, para. 7 (Desai J.).

9. *In re Palaniswami*, A.I.R. 1946 Mad. 502, 503.

there is no "finality" to the investigation or to laying a charge-sheet.

The apparently contrary view taken in a Rajasthan¹ case may be distinguished, as, in that case, after the investigation was over, the police resumed investigation *without sufficient reason*.

501. It should be noted, that the "police report" has to state—

- (i) the names of the parties;
- (ii) the nature of the information;
- (iii) the names of the persons who appear to be acquainted with the circumstances of the case.^{2 3}

502. In view of the fact that the matter is of practical importance, it appears to be desirable to make suitable amendment to make the matter explicit. It may be useful to embody these propositions, namely:—

(1) *If after forwarding the report to the Magistrate, the police-officer obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence, in the form prescribed.*⁴

(2) *Copies of the documents not in the custody of the said officer at the time of the filing of the charge-sheet, and obtained after such filing or after commencement of the inquiry or trial, shall be furnished to the accused as and when they are obtained and before marking them as exhibits in the court.*⁴

We may add, that a suggestion⁵ to insert a proviso to section 173(1), for requiring the police officer to forward to the Magistrate a further Report when he obtains further evidence, was made by a Conference of Special Police Establishment, and State Anti-Corruption Officers also.

Section 173
(1) and
suggestion
for barring
re-investi-
gations

503. The following suggestion⁶ has been made by the Bar Council, Madras.

"Provision should be made preventing the police from re-opening an investigation which has terminated on the submission of a report to the Magistrate, under section 173."

1. *Hanuman v. Raj*, A.I.R. 1951 Rajasthan 131, 133.

2. *Mehrab v. Crown*, A.I.R. 1924 Sind 71 (F.B.).

3. *In re Shivalingappa*, A.I.R. 1930 Bom. 372.

4. Cf. the suggestion of Mr. Justice P. N. Ramaswami (Madras), in the Madras Police Gazette, dated 10th May 1958, referred to by the Public Prosecutor, Madras in his suggestion sent to the Law Commission F. 3(2)/55-L.C. Part III, S. No. 52 (page 244 of the correspondence portion).

5. F. 3(2)/55-L.C. Part III S. No. 53.

6. F. 3(2)/55-L.C. Pt. III S. No. 52 (Page 211 correspondence).

“Once a Magistrate has taken cognizance of an offence under section 190, the power of the police to file an additional or *supplemental chalan or charge-sheet should be withheld*. They may, however be permitted to file an additional list of witnesses who are not acquainted with the circumstances of the cases. They must be debarred from implicating new accused in a supplementary chalan. But, if necessary, power may be given to a Magistrate who has taken cognizance of the offence to direct *re-investigation by a superior police officer*.”

504. We do not, however, think that any such restrictive provision is called for.

Investigation is the process of collection of evidence. That process, temporarily closed for want of material, should yet be capable of being supplemented or re-stated, if the circumstances of the case so justify.

505. With reference to section 173, the suggestion of a State Government¹ is as follows:—

“**Section 173:** In complaint cases copies of all relevant documents on which the prosecution proposes to rely should be furnished to the accused by the date when the accused first appears before the court after the police report under section 173(1) (a) has been received in the Court.”

We are not, however, inclined to extend the provisions of section 173(4) to complaint cases—which would be the effect, in substance, of the suggested change.

506. With reference to section 173(4), certain points arise.

(a) The recommendations made in an earlier Report,² to transfer to the Court the obligation of the police to supply copies, was considered in detail by us. In practice, courts will, it is apprehended, find it difficult to supply the copies. The police officer can, while investigating the case and recording the statements, prepare extra copies for being furnished to the accused, and that is more convenient. No change is, therefore, needed on this point.

(b) The recommendation in the 14th Report³ about substituting (in place of “copies”) inspection in case of voluminous documents may be *carried out, with this modification* that the police officer need not give copies, if the court dispenses with them, but the accused should be allowed to inspect them in Court, in such cases.

507. With reference to section 173(4), a suggestion made by a State Government⁴ makes these points.

(i) The court (and not the police) should be required to supply copies of statements of witnesses, documents etc.

1. F. 3(2)/55-L.C. Part I. S. No. 33.

2. 14th Report Vol. 2: page 760-762, para. 57.

3. 14th Report Vol. 2 page 762, para. 58.

4. F. No. F. 3(2)/55-L.C. Pt. III, S. No. 49, (page 185, correspondence).

(ii) The court should have the discretion in regard to supply of copies in voluminous cases, and may permit the accused or his counsel to inspect them in court¹ instead of being required to supply copies.

We have already considered the question.²

Section 173
(4) and
suggestion
of a High
Court Judge.

508. The following suggestion³ relevant to section 173(4) has been made by a High Court Judge, while stating that the pre-1955 procedure should be restored.

“The supply of copies to the accused at the beginning of the trial has not helped to reduce the duration of the trial, but has led to complications. The accused try to delay proceedings to gain time to win over the witnesses and cleverly plan their statements to keep them within the police statements and yet nullify the prosecution case. This has led to increase of perjury.”

We have given deep thought to the suggestion.

In our view, it is too early to reverse the scheme introduced in 1955 and to restore the pre-1955 position.

Section 173
(4) and
suggestion
of Special
Police Estab-
lishment
Officers.

509. At the Special Police Establishment and State Anti-Corruption Officer's Conference, held in November, 1960, it was decided that the following suggestion made in the earlier Report of the Law Commission be implemented, namely⁴—

Section 173(4) should be amended suitably by vesting discretion in the court that in the case of documents considered voluminous, the supply of copies might be dispensed with, the originals themselves being made available to the accused or his counsel for perusal/examination and taking notes in the court-house.

We have already considered the matter.⁵

Section 173
(4) and
suggestion of
Public Prose-
cutor
Madras.

510. Following suggestion⁷ has been made under section 207A(4) by the Public Prosecutor, Madras.

“There should be an amendment or clarification in the Code so that the prosecutor may examine witnesses who are discovered or whose evidence is found essential and whose statements under section 162 have not been taken before the filing of the report.

The following may therefore be added as a proviso to section 207-A(4), namely:—

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1. Cf. 14th Report, Vol. 2, pages 760-762, paras 57-58.
 2. See discussion regarding section 173(4).
 3. F. No. 3(2)/55-L.C. Pt. III, S. No. 49(a). (Page 189, correspondence).
 4. F. 3(2)/55-L.C. Pt. III, S. No. 53 (Page 307, correspondence).
 5. See 14th Report, Vol. 2, page 760-62, paragraphs 57-58.
 6. See section 173 as proposed.
 7. F. No. F. 3(2)/55-L.C. Pt. III, S. No. 52.

"Provided that any witness whose name was not included in the list of witnesses at the time of the report shall be examined subject to the compliance with the provisions of section 173(4)".

This suggestion¹ though made under section 207A(4) seems to pertain to section 173(4).

We have already considered the point.^{2,3}

511. The following suggestion has been made by the Commissioner of Police, Madras,⁴ with reference to section 251-A(7). Section 173 (4) and suggestion of Commissioner of Police Madras.

Under section 251A(7), on the filing of a report under section 173, the Magistrate shall proceed to take such evidence as may be produced in support of the prosecution. It very often happens in cases of importance and complicated nature, like gang cases and criminal conspiracy, that the investigation cannot be completed within 15 days or within the period of expiry of the remand of the accused. The defence counsel press for the filing of the report under section 173 to know the nature of the offence made out against the accused. But, as important witnesses are not available, the prosecution is not able to present the full case against the accused.

Section 251A(7) may therefore (it has been suggested) be suitably amended so as to provide that, *in exceptional cases* where the police officer is unable to examine some important witnesses by reason of non-availability, he may examine them subsequent to the filing of the report under section 173 and supplement the final chargesheet, of course, *after giving copies of the relevant documents to the accused person*".

The suggestion has been made *under section 251A, but pertains to section 173.*

We have already considered the matter.^{5,6}

512. The following suggestion⁷ has been made by the Chief Presidency Magistrate, Madras. Section 173 (4) and copies left out through mistake.

"The object of furnishing the accused with copies of documents in warrant cases is to give the accused person an opportunity to know in advance what exactly are the statements and documents against him. There should be a provision in the Code to furnish, *at any*

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1. To be noted under section 207A(4).
 2. See discussion regarding section 173, and investigation after challan.
 3. A somewhat similar suggestion was made by the I.G.Ps' Conference held in 1960 See F. 3(2)/55-L.C. Part III, S. No. 53 (page 307, correspondence).
 4. F. 3(2)/55-L.C. Pt. III, S. No. 52 (Pages 249 to 250, correspondence).
 5. See discussion regarding section 173 and investigation after challan.
 6. The suggestion states that the police officer should file an affidavit.
 7. F. 3(2)/55-L.C. Part III, S. No. 52.

stage before the prosecution is over, copies of documents left out by mistake or on account of any other satisfactory reason. Suitable safeguards may be made to protect the accused from being taken by surprise. The accused cannot complain of any prejudice if a provision is made in the Code making it obligatory to give an adjournment to the accused in such cases to meet the case in the light of the documents furnished to him during the course of the trial.

“It may not be possible to furnish copies of documents in all cases. It is impossible to give a copy of negative of a photo which is filed as a document and not as a material object. In cases of breach of trust and similar offences, the prosecution may rely on several day books and ledgers merely to show the *absence* of any entry. A provision should be made in such cases enabling an accused to have an *inspection of the file* instead of getting a copy of the entire file.”

In our view, on the first point, no change is required. The existing law does not come in the way of copies being given subsequently, in cases of *bona fide* mistake or sufficient reason. Sections 173(4), 207A(1) and 251A(1) do not go to that length.

Section 173
(4) and
immediate
supply of
copies.

513. The following suggestion¹ has been made by the Markapur Bar Association, (Andhra Pradesh).

“Section 173 provides for the supply of the report *after* the same is forwarded to the court besides F.I.R. and such other documents which the prosecution proposes to rely upon. This latitude tends to cause delay in the further proceedings of the case as too many adjournments are taken for supplying the same with the result that disposal of cases is delayed, and the accused are inconvenienced.

“Section 173(1) may be amended to say—

“The officer in-charge of a police Station while forwarding a report under this section to court shall furnish or cause to be furnished to the accused...”

We have considered the suggestion, but in our view no such change is necessary.

Section 173
(4) Various
suggestions.

514. Various other suggestions² to amend section 173 were considered by us.

Amongst these are views of several Inspectors General of Police to the effect that the provision for supply of copies has thrown immense labour on the police under section 173(4), they have suggested that the provision for supply of copies be removed.

1. F. No. 3(2)/55-L.C. Part III, S. No. 50(o).

2. F. 3(2)/55-L.C. Part I, S. No. 83, and 17 and 71A, and F. 3(2)/55-L.C. S. No. 2.

But the provision for supply of copies seems to be an essential part of the scheme of the Code as embodied in sections 207A and 251A *et seq* (as inserted in 1955) and if the obligation is removed, great injustice will result to the accused.

515. In respect of cases relating to corruption it has been suggested¹ that the provisions of section 173(4) regarding supply of copies should be deleted as they cause delay. We are unable to accept the suggestion as section 173(4) is a part of the whole scheme introduced in 1955. Section 173 and cases of corruption.

516. We have considered the question whether it is necessary to insert a provision as the supply of copies in cases investigated under section 202. We think, that no change in the law is required. Section 173 (4) and s.202.

517. The following suggestion² has been made by a Bar Council, with reference to section 174. Section 174 and suggestion regarding death in police custody.

(i) Section 176 should be amended³ to eliminate police investigation and to empower *solely* the Magistrate to hold the inquiry in the case of death of any person in police custody.

(ii) *Consequential amendment* to section 174 is suggested, to give an optional power to a Magistrate to hold an inquest on receipt of information from the officer in charge regarding the death of a person under circumstances mentioned in section 174(a), (b) or (c).

The State Government concerned is in favour of this amendment.

This point is connected with section 176, and will be dealt with under that section.⁴

518. In section 174(5), the word "Executive" should be added before the words "Magistrate of the first class" and, for the words "any Magistrate" the words "any other Executive Magistrate" should be substituted. Section 174 (5).

519. In section 175(1), the word "truly" should be omitted, to bring the section in line⁵ with section 161. The person making the statement before a police officer should not be liable for perjury. It will, in consequence, be necessary to amend the connected sections of the Indian Penal Code so as to ensure⁶ that refusal to answer the questions under section 175 is made punishable.⁷ Section 175 (1).

1. F. 3(2)/55-L.C. Part VIII S. No. 549 (Special study procedure in corruption cases made by an expert and forwarded by the Ministry of Home Affairs).

2. No. F. 3(2)/55-L.C. Pt. III, Sl. No. 52 (Pages 264-265, correspondence).

3. See discussion regarding section 176.

4. See discussion regarding section 176.

5. See discussion relating to section 161.

6. Compare discussion relating to section 161.

7. To be summarised in Appendix for other Acts.

Section 175
(1) and
suggestion
regarding
copies.

520. It has been suggested¹ that in section 175, in sub-section (1), after the word "forfeiture" the words "and the police officer shall reduce into writing the statements of the witness so examined by him and shall send the copies of the statements forthwith to the Magistrate having jurisdiction to enquire into the case" should be inserted.

Having regard to the scope and nature of the proceedings under section 175, we are not inclined to recommend such change.

Section 175
A (suggested)
regarding
consequence
of failure to
send copies.

521. It has been suggested that after section 175 of the principal Act, the following section may be inserted,—

"175A. If the police officer fails to send the statements recorded under sub-section (3) of section 161, or sub-section (1) of section 175, the Court shall presume that the statements were not in existence at the time when the statements were said to have been recorded, or, even if they were in existence they were not in the same forms as might have been found later."

In our view, the matter goes to the weight of the evidence. No change is required.

Section 176
and informa-
tion to
relatives.

522. A suggestion to inform the relatives of the person whose dead body is the subject matter of the inquest² under section 176 has been found worth accepting, and we recommend a provision to that effect.³ "Relatives" in this context would mean father, mother, son, daughter, wife, or husband as far as can be ascertained. The obligation will be to inform them, as far as practicable.

Section 176
(1) and death
in police
custody.

523. The following suggestion⁴ has been made by a Bar Council.

"In case of death of any person in the custody of the police, the power of holding inquest should be vested solely with a Magistrate armed with the same powers as he has in holding an inquiry into an offence.

Sub-section (1) of section 176 may therefore be substituted as follows:—

"When any person dies while in the custody of the police, the nearest Magistrate empowered to hold inquest should hold an inquiry into the cause of death. The Magistrate holding such an inquiry shall have all

1. F. 3(2)/55-L.C. Part VII, S. No. 407, (Shri K. V. Raghunath Reddy's Amendment Bill Rajya Sabha 11 of 1963).

2. F. No. 27(5)/54-Judl. (Home Ministry File), Appendix III, Item 11.

3. See section 176 as proposed.

4. F. 3(2)/55-L.C. Pt. III, S. No. 52 page 264 of the correspondence.

the powers which he would have in holding an inquiry into an offence and shall record the evidence taken by him in a manner prescribed for taking evidence in a warrant case."

The State Government concerned is in favour of this proposal, since the idea is to eliminate police investigation or even inquest by police *in cases of death in police custody*.

(If this suggestion is accepted, then as a consequential change, section 174 would also require amendment.)¹

524. Our view on this suggestion is as follows:—

(a) Sections 174 to 176 do not contemplate investigation *by the police at all*, where the death is in police custody, even where the case falls under s. 174(1)(A) (b) (c). In our view, this is already clear from the language of section 176, and needs no change. (b) As regards excluding even *regular* investigations (under s. 154 to s. 173) in such cases, that would not be practicable.

525. The sections of the Code after section 176 are proposed to be dealt with in later Reports. Section 177
to 565.

526. In order to give a concrete picture of our recommendations, we have shown them in the form of draft amendments to the existing Code, in an Appendix. The other Appendices contain detailed discussion of several points arising under some of the sections. We have thought it proper to put them in Appendices, to avoid interruption of the main thread of discussion.

One of the Appendices summarises our recommendations in respect of other Acts.

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|---|-----------|----------|
| 1. (J. L. Kapur) | Chairman. | |
| 2. (K. G. Datar) | | } |
| 3. (S. S. Dulat) | | |
| 4. (T. K. Tope) | | |
| 5. (Rama Frasad Mookerjee) ² | | |
| | | Members. |

P. M. Bakshi,
Joint Secretary and
Legislative Counsel.

New Delhi
the 16th December, 1967.

1. See discussion regarding section 174.

2. Shri Mookerjee has signed the Report subject to the note appended.

APPENDIX 1

Recommendations as shown in the form of draft amendments to the existing Code.

(This is a tentative draft only).

Section 3

5 of 1898.

In section 3 of the Code of Criminal Procedure, 1898, (hereinafter referred to as the "principal Act"), the following sub-section shall be inserted at the end namely:—

"(3) *In every enactment passed on or after the first day of July, 1898 and before the Code of Criminal Procedure (Amendment) Act 196...comes into force:—*

(a) *references to a Magistrate of the first, second or third class shall be construed as references to a Judicial Magistrate of the first, second or third class respectively;*

(b) *references to any other Magistrate, not being references to a Presidency Magistrate shall be construed as references to the corresponding Judicial or Executive Magistrate as the nature of the case may require.*

Section 4(1)

In section 4 of the principal Act, in sub-section (1),—

(i) in clause (h), insert the following Explanation at the end, namely:—

"Explanation—A report made by a police officer in a non-cognizable case investigated without conforming to the provisions of sub-section (2) of section 155 shall be deemed to be a complaint."

(ii) for clause (i), substitute the following, namely:—

"(1) "High Court".....in relation to any.....local area, means the highest court of criminal appeal for that area (other than the Supreme Court) or, where no such court is established under any law for time being in force, such officer as the State Government may appoint in this behalf;"

(iii) for clause (k), substitute the following, namely:—

"(k) inquiry means every inquiry (other than a trial) conducted under this Code by a Magistrate or Court;

(v) for clause (q), substitute the following, namely:—

"(q) "place" includes also a house, building, tent, vehicle and vessel;"

(vi) for clause (r), substitute the following, namely:—

“(r) “pleader”, used with reference to any proceeding in any court, means a person authorised under any law for the time being in force to practise in such Court....., and includes any other person appointed with the permission of the Court to act in such proceeding.”

Section 6

For section 6 of the principal Act, substitute the following section, namely:—

“6. Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be two classes of Criminal Courts in India, namely:—

Classes of criminal courts.

Cf. Section 6 Bombay and Punjab.

I. Courts of Sessions;

II. Courts of Magistrates;

Section 6A (New)

After section 6 of the principal Act, insert the following new section, namely:—

“6A. (1) There shall be the following classes of Magistrates, namely:—

Classes of Magistrates.

I. *Judicial Magistrates*

Cf. s. 6A Bombay and Punjab.

(1) *Presidency Magistrates;*

(2) *Chief Judicial Magistrates;*

(3) *Judicial Magistrates of the first class;*

(4) *Judicial Magistrates of the second class;*

(5) *Judicial Magistrates of the third class.*

(6) *Special Judicial Magistrates.*

II. *Executive Magistrates*

(1) *District Magistrates;*

(2) *Sub-divisional Magistrates;*

(3) *Executive Magistrates of the first class;*

(4) *Executive Magistrates of the second class;*

(5) *Presidency Magistrate specially empowered by the State Government;*

(6) *Special Executive Magistrates.*

(2) *The expression “a Magistrate” or “any Magistrate”, when occurring in this Code without any qualifying words, shall be construed as including Judicial as well as Executive Magistrates.*

Cf. see also s. 3(32), General Clauses Act 1897.

Section 7

In section 7 of the principal Act, for sub-section (2), substitute the following sub-section, namely:—

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

Cf. the Punjab amendment.

Section 9

For section 9 of the principal Act, substitute the following section, namely:—

Compare
32nd Report
of the Law
Commission
Court of
Session.

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

(1A) The High Court shall appoint¹ a judge of such Court.

(2) *The High Court* may, by general or special order in the Official Gazette, direct at what place or places the Court of Session shall ordinarily hold its sitting but if, in any particular case, the Court of Session is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sitting at any other place in the sessions division, it may, with the consent of the prosecution and the accused, sit at that place for the disposal of the case or the examination of any witness or witnesses therein.

(3) The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more such courts.

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

(5) All Courts of Session existing when this Code comes into force shall be deemed to have been established under this Act.

Section 10

In section 10 of the principal Act, for sub-sections (1) and (2), substitute the following sub-sections, namely:—

District
Magistrate
and Chief
Judicial
Magistrate
Cf. s. 10(1)
Punjab.

“10. (1) In every district outside the presidency-towns the State Government shall appoint an *Executive Magistrate* of the first class, who shall be called the District Magistrate.

(A) *In every district outside the presidency-towns the High Court shall invest a Judicial Magistrate of the first class with the powers of a Chief Judicial Magistrate under this Code or any other law for the time being in force*

Cf. s. 10(2)
Punjab.

(2) The State Government may appoint any *Executive Magistrate* of the first class to be an Additional District Magistrate, and such Additional District Magistrate shall have all or any of the powers of a District Magistrate under this Code or under any other law for the time being in force, as the State Government may direct²

1. The draft proceeds on the assumption that “appointment” and “posting” and “promotion” in article 233 of the Constitution are confined to appointment to the cadre and do not cover what may be called allotment or assignment to a particular Court or area.

2. It may be necessary to make certain further amendments in section 10 (Compare section 10(2A) and section 10(3), Bombay amendment), after amendments in sections 192, 406A, 528 etc. are decided upon on the lines of the Bombay amendment to those sections.

Section 12

For section 12 of the principal Act, substitute the following section, namely:—

"12. (1) The State Government may appoint as many persons as it thinks fit, besides the District Magistrate, to be *Executive Magistrates* of the first, or second...class in any district outside the presidency-towns and the State Government, or the District Magistrate, subject to the control of the State Government, may from time to time define local areas within which such persons may exercise all or any of the powers with which they may respectively be invested under this Code.

Executive and Judicial Magistrate.
Cf. s. 12 Punjab.

(2) *The High Court may appoint any person to be a Judicial Magistrate of the first, second or third class in any district outside the presidency-towns, and the High Court or the Chief Judicial Magistrate subject to the control of the High Court may, from time to time, define the local areas within which he may exercise all or any of the powers with which he may be invested under this Code.*

(3) *The State Government, in consultation with the High Court, may for such period not exceeding six months from the commencement of the Code of Criminal Procedure (Amendment) Act, 196.....as it may think fit, appoint as many persons as may be considered necessary to be Judicial Magistrates of the first or second or third class in any district outside the presidency-towns, and the State Government, in consultation with the High Court, may define local areas within which such persons may exercise all or any of the powers with which they may respectively be invested under this Code.*

Note Reference is to the present Amendment Bill.

(4) Except as otherwise provided by such definition the jurisdiction and powers of such persons shall extend throughout such district"—

Section 13(1)

In section 13 of the principal Act, for sub-section (1), substitute the following sub-section, namely:—

"(1) The State Government may place any *Executive Magistrate* of the first or second class in charge of a sub-division and relieve him of the charge as occasion requires.

Section 13(2A) and (2B) (New)

In section 13 of the principal Act, after sub-section (2), insert the following sub-section, namely:—

(2A) *The State Government may appoint any Executive Magistrate of the first or second class to be an Additional Sub-divisional Magistrate, and such Additional Sub-divisional Magistrate shall have all or any of the powers of a Sub-divisional Magistrate under this Code or under any other law for the time being in force, as the State Government may direct;*

Section 13 (2A) and (2B).

NOTE.—Section 12(1A), Bombay and section 12(5), Punjab, relate to "appointment" in the sense of recruitment.

(2B) *For the purposes of sub-section (1) of section 192 and sub-section (2) of section 528, such Additional Sub-Divisional Magistrates shall be deemed to be subordinate to the Sub-Divisional Magistrate."*

Section 14

For section 14 of the principal Act, substitute the following section, namely:—

Special Judicial Magistrate. Cf. Section 14 Bombay and Punjab.

"14. (1) The *High Court* may confer upon any person who holds or has held any judicial post under the Union or a State or possesses such other qualifications as may.....be specified in this behalf by the *High Court*.....all or any of the powers conferred or conferrable by or under this Code on a *Judicial Magistrate*... in respect to particular cases or to a particular class or particular classes of cases, or in regard to cases generally, in any local area outside the presidency-towns.

(2) Such Magistrates shall be called *Special Judicial Magistrates*, and shall be appointed for such term as the *High Court* may by general or special order direct.

Section 14A (New)

After section 14 of the principal Act, insert the following section, namely:—

Special Executive Magistrate. Compare Section 14 (2), Bombay and existing Section 14. (1)

"14A. (1) *The State Government may also appoint Executive Magistrates for particular areas or for the performance of particular functions and confer upon them such powers conferred or conferrable by or under this Code on an Executive Magistrate of the first or second class as it deems fit.*

(2) *Such Magistrates shall be called Special Executive Magistrates, and shall be appointed for such term as the State Government may by general or special order direct:*

Cf. s. 14(4).

Provided that no powers shall be conferred under this section on any police officer below the grade of Assistant or Deputy Superintendent, and no power shall be conferred on a police officer except so far as may be necessary for preserving the peace, preventing crime and detecting apprehending and detaining offenders in order to their being brought before a Magistrate and for the performance by the officer of any other duties imposed upon him by any law for the time being in force.

(3) *The State Government may delegate, with such limitations as it thinks fit, to any officer under its control the powers conferred by sub-section (1) or (2).*

Section 15

In section 15 of the principal Act, for sub-section (1), substitute the following section, namely:—

“(1) The High Court may direct any two or more *Judicial Magistrates in any place outside the presidency-towns to sit together as a Bench, and may by order invest such Bench with any of the powers conferred or conferrable by or under this Code on a Judicial Magistrate of the first, second or third class, and direct it to exercise such powers in such cases, or such classes of cases only and within such limits, as the High court thinks fit.*”

Section 16

In section 16 of the principal Act, for the words “The State Government may, or, subject to the control of the State Government the District Magistrate may make rules consistent with this Code for the guidance of Magistrates’ Benches in any district” substitute the words “*The High Court, with the previous sanction of the State Government may, from time to time, make rules consistent with this Code for the guidance of Judicial Magistrates’ Benches in any district outside the Presidency-towns.*”

Section 17

For section 17 of the principal Act, substitute the following, namely:—

“17(1). All *Judicial Magistrates appointed under sub-section (2) and (3) of section 12 and section 14 and all Benches constituted under section 15, shall, subject to the control of the Sessions Judge be subordinate to the Chief Judicial Magistrate, and the Chief Judicial Magistrate may, from time to time, make rules or give special orders consistent with this Code as to the distribution of business among such Magistrates and Benches.*”

(2) *All Chief Judicial Magistrates shall be subordinate to the Sessions Judge.*

... ..¹

Note—Existing s. 17 (2) relating to subordination to S.D. M. omitted here.

(3) *All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose court they exercise jurisdiction, and he may, from time to time, make rules consistent with this Code as to the distribution of business among such Assistant Sessions Judges.*

1. Existing section 17(2) relating to subordination to Sub-division Magistrates is omitted here. See section 17A (proposed).

(4) The Sessions Judge may also, when he himself is unavoidably absent or incapable of acting, make provision for the disposal of any urgent application by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judges, by the *Chief Judicial Magistrate*, and such Judge or Magistrate shall have jurisdiction to deal with any such application.

Existing section 17(5) is omitted.

... ..

Section 17A (New)

After section 17 of the principal Act, insert the following new sections, namely:—

Subordination of Executive Magistrates Cf. s. 17A, Bombay and Punjab.

“17A(1). All Executive Magistrates appointed under sub-section (1) of section 12 and section 13 shall be subordinate to the District Magistrate, and every Executive Magistrate (other than a Sub-divisional Magistrate) exercising powers in a Sub-division shall also be subordinate to the Sub-divisional Magistrate, subject, however, to the general control of the District Magistrate.

(2) The District Magistrate may, from time to time, make rules or give special orders consistent with this Code as to the distribution of business among the Executive Magistrates subordinate to him and as to allocation of business to an Additional District Magistrate.

Section 17B (New)

Courts inferior to the High Court and the Court of Session s. 17B(1), Bombay and Punjab Cf. s. 435(1), Explanation Cf. s. 17B Bombay. Cf. section 17B, Punjab.

“17B. (1) Courts of Session shall be criminal courts inferior to the High Court.

(2) Courts of Presidency Magistrates shall be criminal courts inferior to the High Court.

(3) Courts of Judicial and Executive Magistrates outside the presidency-towns shall be criminal courts inferior to the Court of Session and to the High Court.”

Section 18

For section 18 of the principal Act, substitute the following section, namely:—

Appointment of Presidency Magistrates.

“18(1) The High Court shall, from time to time, appoint a sufficient number of persons (hereinafter

called Presidency Magistrates) to be Magistrates for each of the Presidency-towns, and shall appoint one of such persons to be Chief Presidency Magistrate for each town.

(2) The powers of a Presidency Magistrate under this Code shall be exercised by the Chief Presidency Magistrate, or by a salaried Presidency Magistrate or by any other Presidency Magistrate empowered by the *High Court* to sit singly, or by any Bench of Presidency Magistrates.

(3) A Presidency Magistrate may be appointed under this section for such term as the *High Court* may, by general or special order, direct.

(4) The *High Court* may appoint any person to be an Additional Chief Presidency Magistrate, and such Additional Chief Presidency Magistrate shall have all or any of the powers of a Chief Presidency Magistrate as the *High Court* may direct."

Note Section 18(5), Bombay, deals with "appointment" in the sense of recruitment. It has not been adopted.

Section 21

For section 21 of the principal Act, substitute the following section, namely:—

"21. (1) Every Chief Presidency Magistrate shall exercise within the local limits of his jurisdiction all the powers—

(a) *when are* conferred on him by this Code, Cf. s. 21(1), part.

(b) which by any law or rule in force immediately before the *first day of July, 1898*, are required to be exercised by any Senior or Chief Presidency Magistrate

(2) The Chief Presidency Magistrate, with the previous sanction of the *High Court* may, from time to time make rules consistent with the Code— Cf. Section 21(1), part.

(a) to regulate the conduct and distribution of business and the practice in the courts of Presidency Magistrates. Cf. s. 16.

... ..

(b) *for the guidance of Benches of such Magistrates respecting the following subjects, namely:—*

(i) *the classes of cases to be tried;*

(ii) *the times and places of sitting;*

(iii) *the constitution of the Benches for conducting trials; and*

(iv) the mode of settling differences of opinion which may arise between the Magistrates in session

... ..

Cf. s. 21(2),
part,

(3) The *High Court* may, for the purposes of this Code, declare what.....Additional Chief *Presidency Magistrates* are subordinate to the Chief *Presidency Magistrate* and may define the extent of their subordination.

Contrast
s. 21(2), part
and compare
s. 17(1).

(4) *Every Presidency Magistrate appointed under section 18, and all Benches constituted under section 19, shall be subordinate to the Chief Presidency Magistrate and the Chief Presidency Magistrate from time to time, make rules or give special orders consistent with this Code as to the Distribution of business among such Magistrate and benches."*

Section 22

For section 22 of the principal Act, substitute the following section, namely:—

Justice of the
Peace.

"22. Every State Government.....may, by notification in the Official Gazette, in consultation with the *High Court*, appoint such persons, being citizens of India, as it thinks fit, to be Justices of the Peace within and for the local area mentioned in such notification.

Section 22A (New)

After section 22 of the principal Act, insert the following sections, namely:—

Powers of
Justices of
the Peace.

"22A. A *Justice of the Peace* for any local area shall, for the purpose of making arrest, have within such area all the powers of a police-officer referred to in section 54 and of an officer-in-charge of a police station referred to in section 55.

(2) A *Justice of the Peace* making an arrest in exercise of any powers under sub-section (1) shall forthwith take or cause to be taken the person arrested before the officer in-charge of the nearest police-station and furnish such officer with a report as to the circumstances of the arrest.

(3) Such officer shall, thereupon, re-arrest the person.

(4) A *Justice of the Peace* for any local area shall have power, within such area, to call upon any member of the police force on duty or any volunteer to aid him—

(a) in taking or preventing the escape of any person who has participated in the commission of

any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having so participated;

(b) in the prevention of crime in general and, in particular, in the prevention of a breach of the peace or a disturbance of the public tranquility.

(5) Where a member of the police force on duty or volunteer has been called upon to render aid under sub-section (3), such call shall be deemed to have been made by an authority competent to make the call.

(6) A Justice of the Peace for any local area, not being a legal practitioner, may, in accordance with such rules as may be made by the State Government,—

(a) issue certificate as to the identity of any person residing within such area, or

(b) verify any document brought before him by any such person, or

(c) attest any such document required by or under any law for the time being in force to be attested by a Magistrate,

and until the contrary is proved, any certificate so issued shall be presumed to be correct and any document so verified shall be deemed to be duly verified and any document so attested shall be deemed to have been as fully attested as if he had been a Magistrate.

Explanation:—In this section, the expression “volunteer” means a volunteer appointed under the West Bengal National Volunteer Force Act, 1949, as in force in the State of West Bengal or a person with similar duties appointed under a similar law in force in any other State.

Section 22B

“22B(1) Subject to such rules as may be made by the State Government, every Justice of the Peace for any local area may, when so requested in writing by a police-officer making an investigation under this Code in respect of any offence committed within such local area, record any statement made by a person in respect of whom an offence affecting the human body is believed to have been committed, being a statement relating to the circumstances of the offence or of the transaction which resulted in the offence.

Recording of certain statements by Justices of Peace.

(2) The provisions of sub-section (2) of section 164 relating to the manner of recording statements shall, as far as may be, apply to the recording of a statement under sub-section (1) as if the statements were recorded by a Presidency Magistrate or a Magistrate of the first class.

Section 25

For section 25 of the principal Act, substitute the following section, namely:—

Ex. officio
Justices of
the Peace.

“25. In virtue of their respective offices,—

(a) the Judges of the *Supreme Court* and of the High Courts are Justices of the Peace within and for the whole of India;

(b) Sessions Judges, *Chief Judicial Magistrates* and District Magistrates are Justices of the Peace within and for the whole of the territories, administered by the State Government under which they are serving, and

(c) Presidency Magistrates are Justices of the Peace within and for the towns of which they are respectively Magistrates.

Section 29B

For section 29B of the Principal Act, substitute the following section, namely:—

Jurisdiction
in case of
Juveniles.

“29B. Any offence, other than one punishable with death or imprisonment for life, committed by any person who at the date when he appears or is brought before the Court is under the age of fifteen years *may* be tried—

(a) by a Chief Presidency Magistrate,

(b) by a *Chief Judicial Magistrate*, or

(c) by any other *Judicial Magistrate* specially empowered by the *High Court*,¹ to exercise the powers conferred by sub-section (1) of section 8 of the Reformatory Schools Act, 1897, or

2 of 1897

(d) in any area in which the said Act has been wholly or in part repealed by any other law providing for the custody, trial or punishment of youthful offenders, or in which the said Act does not extend and there is in force any other law providing for the custody, trial or punishment of youthful offenders, by any Magistrate empowered by or under such law to exercise all or any of the powers conferred thereby.

Section 30

For section 30 of the principal Act, substitute the following section, namely:—

Offence
punishable
with impris-
onment not
exceeding
seven years.

“30. Notwithstanding anything contained in section 28 or section 29, the *High Court* may invest any Presidency Magistrate, *Chief Judicial Magistrate* or *Judicial Magistrate* of the first class with power to try as a Magistrate all

1. The mention of “High Court” is on the assumption that section 8(1) of the Reformatory Schools Act, 1897, will also be amended.

offences not punishable with death or with imprisonment for life or with imprisonment for a term exceeding *ten* years.

(Proviso omitted.)

Section 36

For section 36 of the principal Act, substitute the following section, namely:—

“36. All District Magistrates, *Chief Judicial Magistrates*, Sub-divisional Magistrates and *Judicial and Ordinary powers of Magistrates.* *Executive Magistrates other than Special Judicial Magistrates and Special Executive Magistrates* have the powers hereinafter respectively conferred upon them and specified in the third schedule. Such powers are called their ‘ordinary powers’.”

Cf. Section 36, Punjab.

Section 37

For section 37 of the principal Act, substitute the following section, namely:—

“37. In addition to his ordinary powers,—(i) *the High Court may invest any Judicial Magistrate with any of the powers as specified in Part I of the Fourth Schedule;*”

Cf. s. 37, Punjab.

Additional powers conferable on Magistrates.

(ii) *a Chief Judicial Magistrate may invest any other Judicial Magistrate within his local jurisdiction with the powers specified in Part I of the Fourth Schedule;*

(iii) *the State Government may invest any Executive Magistrate with any of the powers as specified in Part II of the Fourth Schedule; and*

(iv) *a District Magistrate may invest any Executive Magistrate within his local jurisdiction with the powers specified in Part II of the Fourth Schedule.”*

Section 38

For section 38 of the principal Act, substitute the following section, namely:—

“38. The power conferred by clause (ii) of section 37 shall be exercised subject to the control of the High Court, and the power under clause (iv) of that section shall be exercised subject to the control of the State Government.”

Cf. s. 38, Punjab.

Control of investing power.

Section 38A (New)

After section 38 of the principal Act, insert the following section, namely:—

“38A. Whenever, under any provisions of this Code or of any law for the time being in force relating to any of the matters specified in lists II and III of the Seventh Schedule to the Constitution, any judicial powers are to be conferred on a Sessions Judge, an Additional or Assistant Sessions Judge, Chief Judicial Magistrate or any other Judicial Magistrate or any such Magistrate is to be specially empowered to exercise such powers, the orders conferring such powers shall be made by the High Court notwithstanding that such provision may not expressly so provide.

Powers on Judicial Magistrates to be conferred by the High Court.

Explanation.—For the purposes of this section, the question whether any powers are judicial shall be decided by the High Court, and such decision shall be final.”

Section 39

In section 39 of the principal Act, for sub-section (1), substitute the following sub-section, namely:—

“(1) In conferring powers under this Code the State Government or the High Court as the case may be may by order empower persons specially by name or in virtue of their office or classes of officials generally by their official titles.”

Section 40

In section 40 of the principal Act, for the words “the State Government”, occurring for the second time, substitute the words “the State Government or the High Court, as the case may be”.

Section 41

For section 41 of the principal Act, substitute the following section, namely:—

“41(1) The State Government or the High Court, as the case may be, may withdraw all or any of the powers conferred under this Code on any person by it or by any officer subordinate to it.

Withdrawal of powers.

(2) Any powers conferred by the Chief Judicial Magistrate or the District Magistrate may be withdrawn by him.”

Section 44

In section 44 of the principal Act, for the figures “435, 436” substitute the words, brackets and figures “431 to 439 (both inclusive)”.

Section 45

In section 45 of the principal Act, in sub-section (1), for clause (a) substitute the following clause namely:—

(a) the permanent or temporary residence of any notorious receiver or vendor of stolen property in any village of which he is headman, accountant, watchman, or police-officer or *in any village* in which he owns or occupies land, or is agent of any such owner or occupier, or is a member of such village panchayat, or collects revenue or rent ;

Section 52A (New)

After section 52 of the principal Act, insert the following new section, namely:—

“52A. (a) *When a person is in lawful custody upon a charge of committing any offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of the offence, it shall be lawful for a legally qualified medical practitioner, acting at the request of a police officer not below the rank of Sub-Inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person so in custody as is reasonably necessary in order to ascertain the facts which may afford such evidence and to use such force as is reasonably necessary for that purpose.*

Examination of person by medical practitioner. Compare s. 259, Criminal Code (Australia), second paragraph.

(2) *Whenever the examination of the person of a woman is to be carried out under this section, such examination shall be carried out only by, or under the supervision of, a female legally qualified medical practitioner.* Cf. s. 129A, Bombay Prohibition Act, 1949.

Section 54

In section 54 of the principal Act, in sub-section (1), in clause *Ninthly*, after the words “any person for whose arrest a requisition has been received from another police officer”, insert the words “*whether such requisition is in writing or not*”.

Section 55(1) (a)

In section 55 of the principal Act, in sub-section (1), in clause (a), for the words “any person found taking precautions to conceal his presence within the limits of such station” substitute the words “any person *within the limits of such station* found taking precautions to conceal his presence.....” Cf. amendment proposed to section 109 (a).

Section 55(1) (c)

In section 55 of the principal Act, in sub-section (1), in clause (c), for the words "fear for injury" substitute the words "fear of injury".

Section 56

In section 56 of the principal Act, insert the following sub-section at the end, namely:—

"(3) *Nothing in this section shall affect the powers of a police-officer to arrest a person under section 54.*"

Section 57

In section 57 of the principal Act, in sub-section (2), for the words "a Magistrate" substitute the words "a Magistrate *having jurisdiction*".

Section 59

In section 59 of the principal Act, for sub-section (1), substitute the following sub-section, namely:—

"(1) *Any private person may arrest or cause to be arrested any person who in his view commits a non-bailable and cognizable offence, or any proclaimed offender, and, without unnecessary delay, shall make over or cause to be made over any person so arrested to a police-officer, or in the absence of a police officer take such person or cause him to be taken in custody to the nearest police-station.*"

Sections 59A and 59B (New)

After section 59 of the principal Act, insert the following sections, namely:—

<p>Person arrested to be informed of grounds of arrest.</p>	<p>"59A. <i>Every police officer or other person arresting any person without warrant shall communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.</i>"</p>
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Section 59B

Compare sections 60, 496, 499 of the Code.

<p>Police-officer to inform person arrested of right to bail</p>	<p>"59B. <i>Where a police-officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties to offer bail on his behalf.</i>"</p>
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Section 61

In section 61 of the principal Act, for the words "No police-officer shall detain in custody a person arrested without warrant", substitute the words "No person who has been arrested without warrant shall be detained, in custody."

Section 63

In section 63 of the principal Act, for the words "a Magistrate", substitute the words "a Magistrate *having jurisdiction*". a Cf. s. 63, Bombay and Punjab.

Section 68

In section 68 of the principal Act, for sub-section (1), substitute the following sub-section, namely:—

"(1) Every summons issued by a Court under this Code shall be in writing, in duplicate, signed by the presiding officer of such Court (*or, in the case of a Bench of Magistrates, by any Member of such Bench*), or by such other officer as the High Court may, from time to time, by rule, direct, and shall bear the seal of the Court. Cf. s. 75.

Section 68(4) (New)

In section 68 of the principal Act, insert the following sub-section at the end, namely:—

"(4) *Nothing in this section shall affect the provisions of section 74A.*"

Section 70

For section 70 of the principal Act, substitute the following section, namely:—

"70. Where the person summoned cannot by the exercise of the due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family;.....the person with whom the summons is so left, shall, if so required by the serving officer, sign a receipt therefore on the back of the other duplicate. Service when person summoned cannot be found. Cf. O. 5, R. 15, Code of Civil Procedure 1908.

Explanation: A servant is not a member of the family within the meaning of this section."

Section 71

For section 71 of the principal Act, substitute the following section, namely:—

"71. If service in the manner mentioned in sections 69 and 70 cannot by the exercise of due diligence be effected, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and the Court, after making such inquiry as it thinks fit, may either declare that the summons has been duly served, or order fresh service in such manner as it considers proper. Procedure when service cannot be effected as before provided. Cf. O. 5, R. 19, Code of Civil Procedure 1908.

Section 74A (New) contd.

After section 74 of the principal Act, insert the following section namely:—

Issue of
summons for
service by
post.

“74A. (1) *In the case of witnesses the court may, in addition to and simultaneously with the issue of a summons for service in the manner provided in sections 68 to 74 (both inclusive) also direct the summons be served by registered post addressed to the witness at the place where the witness ordinarily resides or carries on business or personally works for gain.*”

Cf. Order 5,
rule 20A(2),
Code of
Civil Procedure,
1908.

(2) *When an acknowledgement purporting to be signed by the witness or an endorsement purporting to be made by postal employee that the witness refused to take delivery has been received, the Court issuing the summons may declare that there has been valid service.*”

Section 78

In section 78 of the principal Act, for sub-section (1), substitute the following sub-section, namely:—

Cf. s. 78(1),
Punjab.

“(1) A District Magistrate or a sub-divisional Magistrate or a Chief Judicial Magistrate or a Judicial Magistrate of the first class may direct a warrant to any landholder, farmer or manager of land within the area of his jurisdiction for the arrest of any escaped convict, proclaimed offender or person who has been accused of a non-bailable offence, and who has eluded pursuit.”

Section 87(2)

In section 87 of the principal Act, in sub-section (2), insert the following clause at the end, namely:—

“(d) *if the Court so directs, a copy thereof shall also be published in a daily newspaper circulating in the place in which such person ordinarily resides.*”

Section 88

In section 88 of the principal Act, in sub-section

Cf. s. 88(2),
Punjab.

(a) in sub-section (2), for the words “District Magistrate or Chief Presidency Magistrate”, substitute the words “Chief Presidency Magistrate, District Magistrate or Chief Judicial Magistrate”;

5 of 1908.

(b) in sub-section (6), for the words and figures “Chapter XXXVI of the Code of Civil Procedure”, substitute the words and figures “Code of Civil Procedure, 1908”;

1. Cf. 27th Report (Code of Civil Procedure), pages 46-47, Order 5, Rule 19A, as proposed in that Report.

(c) in sub-section (6B), for the words "District Magistrate or Chief Presidency Magistrate", substitute Cf. s. 88(6B), the words "Chief Presidency Magistrate, District Punjab. Magistrate or *Chief Judicial Magistrate*".

(d) in sub-section (6C), in the proviso, for the words "District Magistrate or Chief Presidency Magistrate", substitute the words "Chief Presidency Magistrate, District Punjab. District Magistrate or *Chief Judicial Magistrate*". ^{Contrast s. 88(6C), Punjab.}

Section 91

In section 91 of the Principal Act, after the words "for his appearance in such court", insert the words "*or in any other court to which the case may be transferred for trial.*"

Section 94

In section 94 of the principal Act, after the words and figures "the Indian Evidence Act, 1872, sections 123 and 124", insert the words and figures "*of the Banker's Books Evidence Act, 1891*". 18 of 1891.

Section 95

In section 95 of the principal Act, after the words "District Magistrate", wherever they occur, insert the words "*Chief Judicial Magistrate*". Cf. S. 95, Punjab.

Section 96

In section 96 of the principal Act, in sub-section (2), for the words "District Magistrate or Chief Presidency Magistrate," substitute the words "Chief Presidency Magistrate, District Magistrate or *Chief Judicial Magistrate*". Cf. S. 96(2), Punjab.

Section 98

In section 98 of the principal Act,—

(a) in sub-section (1), after the words "District Magistrate" wherever they occur, insert the words "*Chief Judicial Magistrate*".

(b) in sub-section (2), for the words and figures "section 19 of the Sea Customs Act, 1878" substitute the words and figures "*section 11 of the Customs Act, 1962*". 52 of 1962.

Section 99A

In section 99A of the principal Act, in sub-section (1),—

(i) after the words "different classes of the citizens of India", insert the words "*or which is obscene*";

(ii) after the word and figures "section 143A", insert the words and figures "*or section 292*".

Section 106

In section 106 of the principal Act, for sub-section (1), substitute the following sub-section, namely:—

“(1) Whenever any person accused of—

45 of 1860.

(a) any offence punishable under Chapter VIII of the Indian Penal Code, other than an offence punishable under section 143, section 153A or section 154 thereof, or

(b) assault or any other offence which has caused or is intended or likely to cause a breach of the peace, or

(c) criminal intimidation, punishable under section 506 or 507 of that Code, or

(d) abetting any offence specified in clause (a),
(b), (or) (c) of this sub-section,

Cf. s. 106(1),
Bombay and
Punjab.

is convicted of such offence before a High Court, a Court of Session or the Court of a Presidency Magistrate, a Chief Judicial Magistrate or any other Judicial Magistrate of the first class.”

And such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace, such Court may, at the time of passing sentence on such person, order him to execute a bond for a sum proportionate to his means, with or without sureties, for keeping the peace during such period, not exceeding three years, as it thinks fit to fix.

Explanation.—Where any offence specified in this sub-section—

(a) is committed by a member of an unlawful assembly in prosecution of the common object of the assembly, or

Cf. section
149, Indian
Penal Code.

(b) is committed by a member of an unlawful assembly and the offence is one which the members of the assembly knew to be likely to be committed in prosecution of the common object of the assembly, then an order under this section may be passed against every person who is a member of the assembly when the offence is committed, whether or not he has himself committed the offence.”

Section 107

In section 107 of the principal Act, for the words “Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class”, substitute the words “*Presidency Magistrate specially empowered by the State Government in this behalf.* District Magistrate, Sub-divisional Magistrate, or *Executive Magistrate of the first class.*”

Cf. s. 107(1),
Bombay.
Cf. existing
s. 107(1).
Cf. s. 107(1),
Punjab.

Section 108

In section 108 of the principal Act, for the words "Chief Presidency or District Magistrate or a Presidency Magistrate or Magistrate of the first class specially empowered by the State Government in this behalf", substitute the words "Chief Presidency Magistrate, District Magistrate, Presidency Magistrate specially empowered by the State Government in this behalf or an Executive Magistrate of the first class specially empowered by the State Government in this behalf".

Cf. existing section 108.

Cf. s. 108, Bombay.

Cf. s. 108, Punjab.

Section 109

In section 109 of the principal Act, (a) for the words "a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate, or Magistrate of the first class", substitute the words "a Presidency Magistrate specially empowered by the State Government in this behalf, or a District Magistrate or Sub-divisional Magistrate or an Executive Magistrate of the first class";

Cf. s. 109, Bombay (Presidency Magistrates).

Cf. existing s. 109 (District Magistrate and sub-divisional Magistrate).

(b) in clause (a), for the words "that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction" substitute the words "that any person within the local limits of such Magistrate's jurisdiction is taking precautions to conceal his presence..."

Cf. s. 109, Punjab (Executive Magistrates).

Section 110

In section 110 of the principal Act, for the words "a Presidency Magistrate, District Magistrate or Sub-divisional Magistrate or a Magistrate of the first class specially empowered in this behalf by the State Government," substitute the words "a Presidency Magistrate specially empowered by the State Government in this behalf, a District Magistrate or Sub-divisional Magistrate or an Executive Magistrate of the first class specially empowered in this behalf by the State Government".

Cf. s. 110, Bombay (Presidency Magistrates specially empowered).

Cf. existing s. 110 (D.N. and S.D.M.).

Cf. s. 110, Punjab amendment read with the existing section, as other first class Magistrate (only first class Magistrates specially empowered are mentioned).

Section 124

In section 124 of the principal Act—

(a) after the words "District Magistrate", wherever they occur, insert the words "or Chief Judicial Magistrate";

(b) insert the following sub-section at the end, namely:—

“(7) The Chief Judicial Magistrate shall not exercise any power under this section except in cases where the security was ordered under section 106: and the District Magistrate shall not exercise any power under this section except in other cases.”

Section 125

For section 125 of the principal Act, substitute the following section namely:—

Power to
cancel bond.

“125(1) The Chief Presidency Magistrate, the District Magistrate or the Chief Judicial Magistrate may at any time, for sufficient reasons, to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under this Chapter by order of any Court in his District not superior to his Court.

(2) The Chief Judicial Magistrate shall not exercise any power under this section except in cases where the security was ordered under section 106; and the District Magistrate shall not exercise any power under this section except in other cases”.

Section 126

For section 126 of the principal Act, substitute the following section namely:—

Discharge of
sureties.

“126(1) Any surety for the peaceable conduct or good behaviour of another person may at any time apply to the Court by which an order was made to give security to cancel any bond executed under this Chapter within the local limits of its jurisdiction.

(2) On such application being made, the Court shall issue a summons, or warrant as it may think fit, requiring the person for whom such surety is bound to appear or to be brought before it.

Section 126A

In section 126A of the principal Act, after the words “the Magistrate” insert the words “or Court”.

Sections 127 to 132

In sections 127 to 132 of the principal Act (both inclusive), for the word “Magistrate” wherever it occurs substitute the words “Executive Magistrate”.

Section 133(1)

In section 133 of the principal Act, in sub-section (1)—

(a) for the words “a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class”, substitute the words “*a Presidency Magistrate specially empowered by the State Government in this behalf* or a District Magistrate or a Sub-divisional Magistrate or an *Executive Magistrate* of the first class”; Cf. s. 133(1), Bombay.

(b) for the words “to appear before himself or some other Magistrate of the first or second class at a time and place to be fixed by the order, and move to have the order set aside or modified in the manner hereinafter provided”, substitute the words “to appear before himself or some other *Executive Magistrate* of the first or second class at a time and place to be fixed by the order, and *show cause why* the order *should not be made absolute*, in the manner hereinafter provided.” Cf. s. 136 and s. 137(3) and s. 139(1).

Section 135

In section 135 of the principal Act, in clause (b), after the words “appear in accordance with such order and” insert the words and figures “*subject to the provisions of section 139A*”.

Section 137

For section 137 of the principal Act, substitute the following section, namely:—

“137. (1) If *such person* appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons-case. Procedure where such person shows cause.

(2) If the Magistrate is satisfied that the order is reasonable and proper as *originally made*, or as *subject to such modification as the Magistrate considers necessary*, the Magistrate shall make the order absolute, *subject to such modification (if any)*. Cf. s. 137(1). Cf. s. 137(3).

(3) *In other cases, no further proceedings shall be taken in the case.* Cf. s. 137(2).

Section 137A (New)

After section 137 of the principal Act, insert the following section namely:—

“137A. (1) *The Magistrate may, for the purposes of an inquiry under this Chapter—* Compare O. 26, Rule 9, Code of Civil Procedure, 1908, and sections 148 and 539B of the Code of Criminal Procedure, 1898.

Power of Magistrate to direct a local inquiry or summon and examine an expert.

(a) *direct a local investigation to be made by such person as it thinks fit; or*

(b) *summon and examine an expert.*

Compare
section 148
(1)

(2) *Where the Magistrate directs a local investigation by any person under sub-section (1), the Magistrate may—*

(a) *furnish such person with such written instructions as may seem necessary for his guidance, and*

(b) *declare by whom the whole or any part of the necessary expenses of the local investigation shall be paid.*

(3) *The report of such person may be read as evidence in the case.*

(4) *Where the Magistrate summons and examines an expert under sub-section (1), the Magistrate may direct by whom the cost of such summoning and examination shall be paid”.*

Cf. section
148(2) of the
Code of Crimi-
nal Proce-
dure, 1898.

Contrast
Order 26,
Rule 13(2),
Code of Ci-
vil Proce-
dure, 1908.

Section 143

For section 143 of the principal Act, substitute the following section, namely:—

Power to
Prohibit re-
petition or
continuance
of public
nuisance.

Compare
section 143,
Bombay.

“143. *A Presidency Magistrate specially empowered by the State Government in this behalf or a District Magistrate or a Sub-divisional Magistrate or any other Executive Magistrate empowered by the State Government or the District Magistrate in this behalf may order any person not to repeat or continue a public nuisance, as defined in the Indian Penal Code or any special or local law”.*

Section 144(1)

In section 144 of the principal Act, in sub-section (1), for the words “a District Magistrate, a Chief Presidency Magistrate, Sub-divisional Magistrate or of any other Magistrate (not being a Magistrate of the third class) specially empowered by the State Government or the chief Presidency Magistrate or the District Magistrate” substitute the words “a Chief Presidency Magistrate, a District Magistrate, a Sub-divisional Magistrate or of any other *Executive* Magistrate specially empowered by the State Government or the Chief Presidency Magistrate or the District Magistrate”.

Section 144(3)

In section 144 of the principal Act, for sub-section (3), substitute the following sub-section, namely:—

to a particular individual or to the public generally to a particular individual or to the public generally when frequenting or visiting a particular place or *area or residing in a particular place or area.*

Section 144(7) (New)

In section 144 of the principal Act, insert the following sub-section at the end, namely:—

“(7) Where the State Government issues a direction under sub-section (6), any person aggrieved may make a representation to the State Government against such direction; and the State Government may, after giving such person a reasonable opportunity of being heard, rescind or alter the direction.”

Section 145(1)

In section 145 of the principal Act, for sub-section (1), substitute the following sub-section, namely:—

“(1) Whenever a Chief Presidency Magistrate, District Magistrate, Sub-divisional Magistrate, or any other Executive Magistrate of the first class specially empowered by the State Government in this behalf, is satisfied from a police-report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing,—

(a) stating the grounds of his being so satisfied;

(b) mentioning the date of receipt of the police-report or other information;

(c) requiring the parties concerned in such dispute to attend his court in person or by pleader, on a date and at a time to be specified in the order, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute; and

(d) further requiring them to put in such documents, or to adduce, by putting in affidavits, the evidence of such persons as they rely upon in support of such claims.”

Section 145(4)

In section 145 of the principal Act,¹ in sub-section (4),—

(a) in the main paragraph, for the words “the date of the order before mentioned” substitute the words “the date of the police-report or other information on which the order under sub-section (1) was passed”;

(b) in the second proviso, for the words “date of such order” substitute the words “date of such police-report or other information;”

(c) in the third proviso, after the words “at any time”, insert the words, brackets and figure “after the passing of the order under sub-section (1)”.

1. Where there were numerous sub-sections in a particular section, the amendments to each sub-section has been put separately, for convenience.

Section 145(4A) (New)

In section 145 of the principal Act, after sub-section (4), insert the following sub-section, namely:—

“(4A) Where the Magistrate attaches the subject of dispute under the third proviso to sub-section (4), he shall make such arrangements as he considers proper for looking after the property which is the subject of the dispute, including where necessary, an order for the appointment of a receiver, and where he makes an order for the appointment of a receiver, the provisions of sub-section (2) of section 146 shall, so far as may be, apply as they apply in relation to the appointment of a receiver under that section”.

Section 145(5A) (New)

In section 145 of the principal Act, after such section (5), insert the following sub-section, namely:—

“(5A) where the Magistrate cancels the said order under sub-section (5), he shall also make an order withdrawing the attachment, if any, ordered under the third proviso to sub-section (4), and may, in a proper case, restore to possession the party who was in possession at the time of attachment.”

Section 145(6A) (New)

In section 145 of the principal Act, after sub-section (6), insert the following sub-section, namely:—

“(6A) The order under sub-section (6) shall be served and published in the manner laid down in sub-section (1)”.

Section 145 (9)

In section 145 of the principal Act, in sub-section (9), insert the following words at the end, namely:—

“and nothing in the first proviso to sub-section (4) shall be construed as limiting the discretion of the Magistrate to issue under this sub-section a summons to a person whose affidavit has not been put in under sub-section (1)”.

Section 146

For section 146 of the principal Act, substitute the following section, namely:—

“146.(1) If the Magistrate decides that none of the parties was then in such possession, or is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach it until a competent Court

Power to
attach sub-
ject of dispu
etc.

has determined the rights of the parties thereto. or the person entitled to possession thereof :

Provided that the District Magistrate or the Magistrate who has attached the subject of dispute may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of a breach of the peace in regard to the subject of dispute.

(2) *When the Magistrate attaches the subject of dispute, he may, if he thinks fit, and if no receiver of property, the subject of dispute, has been appointed by any Civil Court, appoint a receiver thereof, who, subject to the control of the Magistrate, shall have all the powers of a receiver appointed under the Code of Civil Procedure, 1908.* 5 of 1908.

Provided that in the event of a receiver of the property, the subject of dispute, being subsequently appointed by any Civil Court, possession shall be made over to him by the receiver appointed by the Magistrate who shall thereupon be discharged."

Section 147(1)

In section 147 of the principal Act, for sub-section (1), substitute the following sub-section, namely:—

"(1) Whenever a *Chief Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or any Executive Magistrate*, of the first class is satisfied, from a police-report or other information, that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land or water as explained in sub-section (2) of section 145, whether such right be claimed as an easement or otherwise, within the local limits of his jurisdiction, he may make an order in writing—

(a) stating the grounds of his being so satisfied;

(b) mentioning the date of receipt of the police-report or other information;

(c) requiring the parties concerned in such dispute to attend his court in person or by pleader, on a date and at a time to be specified in the order, and to put in written statements of their respective claims;

and shall thereafter inquire into matter in the manner hereinafter provided.

Section 147(2)

In section 147 of the principal Act, for sub-section (2), substitute the following sub-section, namely:—

"(2) If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right, including, in a

proper case, an order for the removal of any obstruction in the exercise of any such right :

Provided that no such order shall be made where the right is exercisable at all times of the year, unless such right has been exercised within three months next before *the receipt of the police-report or other information leading to the institution of the inquiry.* or where the right is exercisable only at particular seasons or on particular occasions, unless the right has been exercised during the last of such occasion before *such receipt."*

Section 147A (New)

After section 147 of the principal Act, insert the following new section, namely:—

Convertibility of Proceedings.

"147A. Whenever proceedings are commenced under sub-section (1) of section 145 or under sub-section (1) of section 147(1), the Magistrate may, if he finds that the matter is one which should be dealt with under sub-section (1) of section 147 or under sub-section (1) of section 145, respectively, record an order to that effect; and may thereafter deal with it accordingly".

Section 148

Cf. s. 148 Bombay.

In section 148 of the principal Act, in sub-section (1), for the words "any District Magistrate or Sub-divisional Magistrate," substitute the words "any Chief Presidency Magistrate, District Magistrate or Sub-divisional Magistrate".

Section 155(1)

In section 155 of the principal Act, in sub-section (1), for the words "the Magistrate" substitute the following words, namely:—

"the Magistrate having jurisdiction to try such cases or commit the same for trial".

Section 155, Explanation (New)

In section 155 of the principal Act insert the following explanation at the end, namely:—

"Explanation.—Where a case relates to two or more offences of which at least one is cognizable, the case is a cognizable case, notwithstanding that the rest of the offences are non-cognizable".

Section 157

In section 157 of the principal Act, in sub-section (1), for the words "upon a police report", substitute the words "upon a report in writing made by a police officer".

Section 160.

Section 160 of the principal Act, shall be renumbered as sub-section (1) thereof, and after sub-section (1) as so re-numbered, the following sub-section shall be inserted, namely:-

“(2) *Subject to such rules as the State Government may make in this behalf, the Government shall pay the reasonable expenses of every person attending under sub-section (1) at any place other than his residence*”.

Section 161(3)

In section 161 of the principal Act, for sub-section (3), substitute the following sub-section, namely:—

“(3) The police-officer shall reduce into writing every statement made to him by a person examined under this section, as far as possible in the words of such person, and shall make a separate record of the statement of each such person.....”

Section 161(4) and (5) (New)

In section 161 of the principal Act, after sub-section (3), insert the following sub-sections, namely:-

“(4) *The police officer shall forthwith send copies of the statements so recorded to the Magistrate empowered to take cognizance of the offence on the report of a police-officer.* Compare section 157(1).

(5) *Where a superior officer of police has been appointed under section 158, the copies of the statements shall, in any cases in which the State Government by general or special order so directs, be submitted through that officer, and he may give such instructions to the officer submitting the copies as he thinks fit, and shall, after recording such instructions on such copies, transmit the same without delay to the Magistrate.* Compare section 173(2). Compare section 157(2).

Section 162(1)

In section 162 of the principal Act, in sub-section (1), omit the words “if reduced into writing”.

Section 163(2)

In section 163 of the principal Act, to sub-section (2), add the following proviso, namely:—

“*Provided that nothing in the sub-section shall affect the provisions of sub-section (3) of section 164*”.

Section 164(1)

In section 164 of the principal Act, in sub-section (1), for the words "Any Presidency Magistrate, any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the State Government may, if he is not a police officer" substitute the words "Any Presidency Magistrate, any *Judicial* Magistrate of first class and any *judicial* Magistrate of the second class specially empowered in this behalf by the State Government may.....".

Section 164(2)

In section 164 of the principal Act, in sub-section (2), after the words "Such statements shall be recorded" insert the words "*on Oath*".

Section 165(5)

In section 165 of the principal Act, in sub-section (5),—

(a) after the words "a copy of the same" insert the words "*free of cost*".

(b) omit the proviso.

Section 166(b)

In section 166 of the principal Act, in sub-section (5),—

(a) after the words "a copy of any record sent to the Magistrate" insert the words "*free of cost*".

(b) omit the proviso.

Section 167 (1)

In section 167 of the principal Act, in sub-section (1), for the words "nearest Magistrate" substitute the words "nearest *Judicial* Magistrate".

Section 167 (4)

In section 167 of the principal Act, for sub-section, namely:—

"(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is immediately subordinate.

Section 169

In section 169 of the principal Act, for the words "police report", substitute the words "*report in writing made by a police officer*".

Section 170(1)

In section 170 of the principal Act, in sub-section (1), for the words "police report", substitute the words "*report in writing made by a police officer*".

Section 157

In section 157 of the principal Act, in sub-section (1), for the words "upon a police report", substitute the words "*upon a report in writing made by a police officer*".

Section 170(3)

In section 170 of the principal Act, in sub-section (3), for the words "District Magistrate or Sub-divisional Magistrate" substitute the words "*Chief Judicial Magistrate*".

Section 173(1)(a)

In section 173 of the principal Act, in sub-section (1), in clause (a), for the words "a police report", substitute the words "*report in writing made by a police officer*".

Section 173(1), Proviso (New)

In section 173 of the principal Act, in sub-section (1), insert the following proviso at the end, namely:-

"Provided that if, after forwarding the said report to the Magistrate, the said officer obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed."

Section 173(4), Proviso (New)

In section 173 of the principal Act, in sub-section (4), insert the following proviso at the end, namely:—

"Provided that copies of the documents not in the custody of the said officer at the time of the filing of the report, and obtained after such filing or after commencement of the inquiry or trial, shall be furnished to the accused as and when they are obtained and before marking them as exhibits in the court".

Section 173(6) (New)

In section 173 of the principal Act, insert the following sub-section at the end, namely:-

"(6) Notwithstanding anything contained in sub-section (4), where the documents referred to in sub-section (4), are voluminous, the Magistrate to whom the report under clause (a) of the sub-section (1) is.....forwarded may at the request of the police officer direct that the accused may instead of being furnished with a copy thereof, be allowed to inspect it in court free of cost, either personally or through pleader".

Section 174(5)

In section 174 of the principal Act, in sub-section (5), for the words "or Magistrate of the first class and any Magistrate especially empowered", substitute the words "or *Executive Magistrate* of the first class and any *Executive Magistrate* especially empowered."

Section 175(1)

In section 175 of the principal Act, in sub-section (1), omit the word "truly".

Section 176 (3) (New)

In section 176 of the principal Act, insert the following sub-section at the end, namely:—

"(3) Where an inquiry is to be held under this section, the Magistrate shall, wherever practicable, inform the relatives of the deceased whose names and addresses are known, and shall allow them to remain present at the inquiry.

Explanation :-

In this sub-section, the expression "relatives" means parents, children, brothers, sisters and spouse."

APPENDIX 2

Note on section 1, Code of Criminal Procedure, 1898

Section 1(2) (which defines the territorial extent of the Code) provides for an exception in these words:-

"..... in the absence of any specific provision to the contrary, nothing herein contained.....shall apply to—

(a) the Commissioners of Police in the towns of Calcutta, Madras and Bombay, or the police in the towns of Calcutta and Bombay;

(b) heads of villages in the State of Madras, as it existed immediately before the 1st November, 1956;

(c) village police-officers in the State of Bombay as it existed immediately before the 1st November, 1956.

Provided that the State Government may, if it thinks fit, by notification in the Official Gazette, extend any of the provisions of this Code, with any necessary modifications, to such excepted persons."

The present position regarding each of the "excepted persons" may be dealt with.

(a)(i) Commissioner of Police in Calcutta—

The Commissioner of Police in Calcutta has certain powers under the Calcutta Police Act.¹ For example, he can prohibit processions or public assemblies.²

1. The Calcutta Police Act (Bengal Act 4 of 1866) and the Calcutta Suburban Police Act (Bengal Act 2 of 1866).

2. See *Leakat Hossen v. Emp.*, (1913) I.L.R. 40 Cal. 470, 472.

(a) (iii) *Commissioner of Police in Madras*

The Code does not apply to the Commissioner of Police in Madras. This is apparently because the powers of the Commissioner of Police in the city of Madras are governed by a local Act.^{1,2} Thus, section 51A(3) of the Madras Act confers on the Commissioner the powers under sections 75 to 77 of the Code.³

(a) (ii) *Commissioner of Police in Bombay—*

The position up to 1951 was, that the Code did not extend to the Commissioner of Police, Bombay nor to the police in Bombay. By the Bombay Police Act,⁴ the mention of Bombay at both the places is deleted, and the Code now applies to the whole State of Maharashtra including the town of Bombay, both as regards the Commissioner of Police and as regards police generally.

(a) (iv) *Police in the town of Calcutta—*

The police in the town of Calcutta are governed by the Calcutta City Police Act.^{5,6} The Code does not apply to the Calcutta Police.^{7,8}

(a) (v) *Police in the town of Bombay—*

See above, under "Commissioner of Police in Bombay".

(b) *Heads of villages in the State of Madras*

Under certain local regulations,^{9,10} heads of villages in Madras are empowered to try cases of a trivial nature, such as abusive language and inconsiderate assault or affrays and petty thefts, not attended with aggravating circumstances and not committed by persons of notoriously bad character. In their official capacity as village headmen in proceedings as village Magistrates, they are not governed by the Code.^{12,13} The provisions of sections 480 and 482 of the Code do not apply to village Magistrates in Madras.^{14,15}

1. The Madras City Police Act (3 of 1888).

2. See *Nilamadhob v. Emp.*, I.L.R. 5 Pat. 171; A.I.R. 1926 Pat. 279, 283.

3. Cf. *Ramanath*, A.I.R. 1953 Mad. 953, 954.

4. The Bombay Police Act, 1951 (Bombay Act 22 of 1951), section 167(3); see *Ramkishan*, A.I.R. 1955 S.C. 104, 110, para. 9.

5. The Calcutta City Police Act (4 of 1866).

6. The *Manickchand*, A.I.R. 1958 Cal. 324; *Ishaq*, A.I.R. 1958 Cal. 341.

7. A number of provisions of the Code have, however, been extended, under the proviso to section 1(2), to the Calcutta Police.

8. *Natabarjana v. State*, A.I.R. 1955 Cal. 135.

9. Madras Regulation 11 of 1816.

10. Madras Regulation 4 of 1821.

11. *Viziramutha*, 2 Weir 1.

12. See also *P. P. v. Mari Mudali*, A.I.R. 1924 Mad. 730.

13. *In re Muthukarunga*, A.I.R. 1959 Mad. 175, 178, para. 24.

14. *Q.E. v. Venkataswami*, (1891) I.L.R. 15 Mad. 131, 132.

15. *Q.E. v. Venkayya*, I.L.R. 11 Mad. 375.

(c) *Village police-officers in the State of Bombay*

Under the Bombay Village Police Act,¹ the "Police Patel" has manifold duties relating to prevention of crime (sections 6 to 9 of the Act), and these duties extend not only to assisting the police and giving information, but in certain cases, he is bound to proceed to investigate the matter, procuring all evidence relating to a crime committed in the limits of his village (section 10). He has also certain duties by way of holding an inquest in cases of sudden deaths, and apprehension of any person, who he may have reason to believe has committed serious offences (sections 11 and 12). He can call and examine witnesses, and record their statement, and search for concealed articles (section 12). The Code is not applicable to proceeding before village police officers.² The High Court could, however, under the general power of superintendence, conferred by the Letters Patent, deal with such proceedings.³

Section 1 (2) means that the procedure laid down by the Code is not to govern the actions of such village police officers.⁴

APPENDIX 3

Note on section 4—Definition of "complaint".

According to the definition of "complaint", in section 4(h), a complaint does not include a report of a police officer. Now, the Code uses different expressions relating to reports of police officers, as follows :-

- (i) 'Police report',⁵
- (ii) 'Report of a Police Officer',⁶
- (iii) 'Report in writing made by any police officer',⁷
- (iv) "report" *simpliciter*⁸

(Sometimes, the expression "information"⁹⁻¹⁰ or "intimation" is used also.)¹¹

Certain questions have arisen as to the meaning of some of these expressions, with reference to section 4(1) (h), section 190(1) (b), and sections 207A and 251A, in relation to reports made under various sections of the Code or under other enactments. The questions are interlinked with each other.

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1. The Bombay Village Police Act, 1867 (8 of 1867).
 2. *Q. E. v. Ragho*, I.L.R. 19 Bom. 612.
 3. *In re Vasudev*, A.I.R. 1919 Bom. 79.
 4. *Emp. v. Shankar Sayaji*, A.I.R. 1938 Bom. 489.
 5. Sections 133(1), 145(1), 147, 157, 170, 173, 207, 207A, 208, 251 and 251A.
 6. Sections 4(1) (h) and 114. See also sections 62, 157 and 168.
 7. Section 190(1)(b).
 8. Section 62 and section 174(1).
 9. Section 153(2); see *Bansidhar v. State*, A.I.R. 1959 Raj. 191, 193, para. 8.
 10. Section 250; see *Muhammad Hashim v. Emp.*, A.I.R. 1940 Sind 134, 135 (F.B.).
 11. Section 174(1).

(1) With reference to section 190(1)(b) which empowers the Magistrate concerned to take cognizance of an offence upon a "report in writing" of such facts of any police officer), the main question that is to be considered is, *whether, a report made by the police in a non-cognizable case investigated without obtaining the orders of a Magistrate as is required by section 155(2) does or does not fall under clause (b) of section 190(1).*

Before the amendment of 1923, the wording in section 190(1)(b) was "upon a police report of such facts". On these words, the question arose whether a communication by a police officer in respect of an offence which is non-cognizable, made of his own motion, fell under clause (b). The leading case answering the question in the negative was a Bombay one.¹

In one Patna case,² before the 1923 amendment, it was stated that the police report mentioned in section 190(1)(b) is a police report under section 173, i.e. a report in course of the investigation of a cognizable offence.

In another Patna case,³ the failure to examine a complainant on oath was regarded as fatal. In yet another Patna case,⁴ section 24 of the Police Act⁵ whereunder it shall be lawful for any police officer to lay any information "before a Magistrate and to apply for a summons, warrant against any person committing an offence" was considered. An application of the Sub-Inspector of Police to the Magistrate stating that a riot had taken place for the benefit of certain persons who claimed interest in the subject matter of the dispute, it seems, had led to the issue of a summons against those persons under section 155, I.P.C. (liability of a person for whose benefit riot is committed). The complainant was not examined on oath, and the question arose under which clause of section 190 the cognizance has been taken. It was held, that while a complaint by a private person comes under clause (a), and information by a private party comes under clause (c), a report to a magistrate by the police comes under clause (b). The only limitation laid upon the report is, that it must state facts which constitute an offence.

Now, when a police officer acts under section 24 of the Police Act and submits his information regarding the commission of the offence to the Magistrate and applies for action to be taken thereon, it becomes a "report" of that officer within section 190(1)(b), as the definition of complaint does not say that the report must be a report under Chapter 14 or report only of a cognizable offence. The decision in *Ram Lal v. Emp.*⁶ was dissented from.

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1. *K. E. v. Sada* (1902) I.L.R. 26 Bom. 150 (F.B.).
 2. *Ram Lal v. Emp.*, A.I.R. 1920 Pat. 614 (Das J.).
 3. *Mangu v. Emp.*, A.I.R. 1920 Pat. 670 (Das J.). (Case-law discussed).
 4. *Abdul Ali v. Emp.*, A.I.R. 1920 Pat. 700, 702 (Jwala Prasad J.) (Case-law reviewed) (relied on section 24, Police Act).
 5. Section 24, Police Act, 1861 (5 of 1861).
 6. *Ram Lal v. Emp.*, A.I.R. 1920 Pat. 614 (Das J.).

In a Lahore case,¹ decided before the 1923 Amendment a challan was sent up by the police in an offence for which rule 25(2) of the Defence of India Rules, 1915 required a complaint. The challan was regarded as a complaint by the High Court. (The Punjab Government had empowered all District Magistrates to order or authorise complaints for the offence in question, and accordingly, the District Magistrate had directed the Superintendent of Police to make an "inquiry", complete the case and send it up for trial, and in due course the police put up a 'challan' before the District Magistrate). It was held, that this was a "complaint", following the Bombay case.²

The history of section 190(1) (b) (upto 1898) was thus traced in a Bombay case,³ where a police constable had filed a complaint for a non-cognizable offence.

"Under Act 10 of 1872, section 140, a Magistrate might take cognizance of an alleged offence:-

(a) upon a police report under Chapter 10 (powers of the police to investigate, answering to Chapter 14 of the present Code);

(b) upon information or report by a Police officer as to non-cognizable offence: such information or report was to be regarded as a complaint;

(c) upon complaint;

(d) upon suspicion;

and under Chapter 16 the Magistrate might in a summons case dismiss the complaint as frivolous or vexatious and award compensation.

"There was no definition of "complaint", but it is clear that whether a police officer made a formal complaint or a report of a non-cognizable summons case, his report was to be regarded as a complaint which could be dismissed as frivolous or vexatious, compensation being awarded. The Code of 1882 did away with the "report of a Police officer in a non-cognizable case, except by the order of a Magistrate. Under the Code of 1882, as also under the present Code, in the case of a non-cognizable offence the informant is referred to a Magistrate. There is no section empowering a Police officer to make a report in such a case without the orders of a Magistrate. If there is no informant, and the Police officer has himself seen the alleged offence being committed, there is no obstacle to his making a complaint in the court of law, and asking for the issue of process. But there is no provision by which he can in such a case make a police report, and it has become necessary since

1. *Khushall Singh v. Emp.*, A.I.R. 1921 Lah. 345.

2. *K. E. v. Sada*, (1902) I.L.R. 26 Bom. 150 (F. B.).

3. *K. E. v. Sada*, (1902), I.L.R. 26 Bom. 150, 156, 157.

4. Offence under section 61(j), Bombay District Police Act, 1890 (4 of 1890) (obeying a call of nature in a street).

1882 to exclude from the definition of "complaint" the report of a police officer. There is an intimate connection between—

(a) "the report of a Police officer" which is by section 4(1) (h) of the Code excluded from the definition of "complaint";

(b) the report of a cognizable offence, which a police officer is to send to a Magistrate empowered to take cognizance of such offence upon a Police report (sections 157, 173); and

(c) the cognizance of any offence, which a Magistrate may take upon a police report of the same (section 190(1) (b)).

"If the alleged offence is a non-cognizable one, there is no section in the Code which empowers a police officer of his own motion to make any report to a Magistrate; and therefore there is no ground for holding that when he does file a formal complaint he is, in fact, making a report, and so what purports to be complaint is by the definition not a complaint at all."

It would be desirable to state the reasons for the 1923 Amendment. The Amendment Bill of 1914 proposed a change in section 190(1) (b), and then gave the reasons for the change as follows:¹

"24. In sub-section (1) of section 155 of the said Code, the following shall be added after the words "to the Magistrate", namely:—

"and may if he thinks fit send a report of such information to a Magistrate empowered to take cognizance of offences under section 190(1)(b), and such Magistrate may thereupon take cognizance of such offence.

Such report shall, if the Local Government so directs, be submitted through such superior officer as the Local Government by general or special order appoints in this behalf."

(Objects and reasons)

"*Clause 24*—The amendment is intended to make it clear that the words 'police report' quoted in section 190 include reports in cognizable and non-cognizable cases. There is some conflict of judicial opinion on the point."

1. See Gazette of India, March 28, 194 (Part V) pages 104 and 121.

2. The Statement of Objects and Reasons cites no cases. The cases relevant to the period would seem to be—

- (i) *K. E. v. Sada*, (1902) I.L.R. 26 Bom. 150.
- (ii) *Dilan Singh*, (1912) I.L.R. 50 Cal. 360, 364 (report of non-cognizable offence not a "complaint" within the definition).
- (iii) *Chidambaran*, (1909) I.L.R. 32 Mad. 3 (narrow view).
- (iv) *Sarferaz*, (1913) 19 I.C. 314; 14 Cr. L.J. 218 (Calcutta).
- (v) *Nga Sen Ke*, A.I.R. 1914 Upper Burma 31.
- (vi) *Ahmad Khan v. Emp.* 12 L.J. 92, overrule A.I.R. 1924 Sind 71 (Police report is confined to section 173).

Amendment
of section
155, Code of
Criminal
Procedure,
1898.

The Lowndes Committee¹ (which examined the 1914 Bill) made these observations—

“*Clause 24*—We are not prepared to accept the amendment proposed by this clause. The difficulty suggested by I.L.R. XXVI Bombay at page 157 will, we think, be met by the amendment which we propose in section 190(1) (b) (see clause 34B).”

“*Clause 34B*—See our note to clause 24. We do not think that the term “police-report” in section 190(1) (b) was intended to be a technical expression, but was used to cover any report made by a police-officer, and our amendment will make this clear.”

According to the amendment proposed by the Lowndes Committee,² section 190(1) (b) was to read:—

“(b) upon a report of such facts made by any police officer”.

The joint Committee on the 1921 Bill³ said,—

“*Clause 45*—We approve the amendment made in section 190 by this clause, but we think that courts should take cognizance under section 190(1) (b) only upon reports in writing”.

Thus, in 1923 the present wording was substituted⁴ in section 190(1) (b). But the controversy seems to survive.

One view is, that the present wording does not cover non-cognizable cases investigated without the orders of a Magistrate.^{5,6,7,8,9,10,11}

A contrary view, however, has been taken in certain cases.^{12,13}

1. See Appendix B (Notes on clauses) to Report of the Lowndes Committee, file relating to Bill which was enacted as the Code of Criminal Procedure (Amendment) Act, 1923 (16 of 1923) (National Archives, Government of India). Legislative Department, Assembly and Council-A, Proceedings, October 1923, No. 1-54.

2. See Appendix C to Report to Lowndes Committee.

3. Report of the Joint Committee on the Code of Criminal Procedure (Amendment) Bill (26th June, 1923). See the file relating to the 1921 Bill, Government of India, Legislative Department, Assembly and Council-A, Proceedings, October, 1923, No. 1-54 (National Archives).

4. For review of pre-1923 cases, see *Abdullah v. Emp.*, A.I.R. 1933 Sind 188 (D.B.).

5. *State of Kerala v. Ali Meerankully*, A.I.R. 1965 Ker. 59 (Reviews case-law).

6. A.I.R. 1961 All. 377, 378.

7. *Candri Bawee v. Emp.*, A.I.R. 1935 Bom. 131, 134 (Fawcett J.).

8. *Emp. v. Shivaswami*, I.L.R. 51 Bom. 498; A.I.R. 1927 Bom. 440, 443 (Fawcett J.).

9. *P. P. v. Ramiah*, A.I.R. 1958 Andhra Pradesh 392, 393 para. 18.

10. *Raghunath v. Emp.*, A.I.R. 1932 Bom. 610, 612, 613 (Beaumont C.J. and Broomfield J.).

11. *Abdul Hakim v. State*, A.I.R. 1961 Cal. 257, 258, para. 3, referring to a Division Bench ruling.

12. *P. P. v. Ratnavelu*, A.I.R. 1926 Mad. 865, 871 (F.B.). (Police investigating a dacoity case and found that the complaint was false—sending charge sheet against the accused under section 211, I.P.C.)

13. *Triloki Nath v. State*, A.I.R. 1962 Raj. 94, 96.

The Lahore High Court¹ followed the Bombay ruling, and in a later case,² it has clearly held that in a non-cognizable case, no police report could be made, but on a complaint signed by the Court Inspector as *ex-officio* Public Prosecutor, cognizance can be taken under section 190(b).

The Calcutta decisions are reviewed in the under-mentioned case.³ There are strong observations in one case⁴ that the use of 'police report' in section 173 does not restrict the power of the Magistrate to take cognizance of both cognizable and non-cognizable offences, under section 190(1) (b).

An invalid investigation may not vitiate the proceedings.⁵ But a Magistrate can decline to take cognizance on an invalid report.^{6,7}

Even before 1923 it was observed in a Calcutta case⁸ that report of a police officer in a non-cognizable case is a "police report" under section 190(1) (b).

The decisions giving a restricted interpretation are based on one or more of the following grounds,—

(1) that the police have no authority to investigate or report a non-cognizable offence;⁹

(2) that a wide interpretation would lead to the unacceptable position that a police officer can never make a "complaint";¹⁰ and

(3) that it is not clear¹¹ that the 1923 amendment was intended to bring in all types of police reports without exception.

It was held in a recent Supreme Court¹² case, that under section 190, where the information discloses a cognizable as well as a non-cognizable offence, the police officer is not

1. *Mehr Chiragh Din v. The Crown*, A.I.R. 1924 Lah. 258, 260, (Lumsden J.).

2. *Emp. v. Ghulam Husain*, A.I.R. 1925 Lah. 237.

3. *Manik Chand v. State*, A.I.R. 1958 Cal. 324, 334, para. 23; (1958) 62 Cal. Weekly Notes 94, 107, 108 (Observations approving the wider view).

4. *Bholanath v. Emp.*, A.I.R. 1924 Cal. 614, 616 (Greeves and Panton JJ.).

5. *H. N. Rishbud v. The State of Delhi*, (1955) S.C.R. 1150, 1163.

6. *Cf. Delhi Adm. v. Ram Singh*, A.I.R. 1962 S.C. 63.

7. *Smt. Tara v. The State*, A.I.R. 1965 All. 372.

8. *Bhairab Chandra v. Emp.*, I.L.R. 46 Cal. 810, note; A.I.R. 1919 Cal. 433, 434, 435 (Richardson and Huda JJ.).

9. *Cf. Chandavarkar J. in K.E. v. Sada*, (1901) I.L.R. 26 Bom. 150.

10. *Cf. Burn J. in Mallikharjuna v. Emp.*, 1933, M.W.N. 876 (cited in A.I.R. 1965 Ker. 59, 61, para. 5).

11. *Cf. Fawcett J. in Emp. v. Shivaswami*, I.L.R. 51 Ecm. 498; A.I.R. 1927 Bom. 440, 443.

12. *Pravin Chandra v. State of Ardhra Pradesh*, A.I.R. 1965 S.C. 1185 (Subha Rao, M. Hidayatullah and Mudholkar JJ.).

debarred from investigating any noncognizable offence which may arise out of the same facts. He can include that non-cognizable offence in the charge sheet which he presents for a cognizable offence.

It was further observed, that such a case fell under section 190(1)(b), and that once a case fell under section 190(1)(b), the procedure under section 251A was to be followed. The Calcutta decision in *Prem Chand v. State*¹ was partly overruled, i.e. to the extent described below. The Calcutta decision held, that section 20G of the Opium Act (as amended in Bengal) which provided that a report in writing by an officer of the Excise, Police or the Customs Department shall be enquired into and tried as if such report was a report in writing by a police officer under clause (b) of section 190(1), did not extend that fiction so as to regard the report as a charge sheet under section 173 or to attract section 251A. The Supreme Court raised this query—if the fiction in section 20G did not make it a report under section 173, then what other purposes could the Legislature have had in mind in saying that it was a police officer's report?

The Supreme Court decision does not, however, seem to affect the proposition that if an investigation is not authorised by law, then the police report should be treated as a complaint. If a police officer is authorised to investigate a particular non-cognizable case (as was the position on the facts which were before the Supreme Court), then his report would not fall under "complaint".

(2) The second question is, *whether the definition of "complaint" can ever be applicable in the case of report of a police officer.*² The matter is not academic, because, there are certain differences in procedure as between a case instituted on complaint on the one hand and other cases on the other hand. Thus, on a "complaint" a Magistrate has to examine the complainant,³ and he may direct an inquiry or investigation.⁴ There are no similar provisions in relation to a Magistrate taking cognizance on a report of a police officer, and, ordinarily, once the Magistrate takes cognizance, and considers that there is sufficient ground for proceeding, he has to issue process.⁵ He cannot make over the police report for inquiry and report to another Magistrate.⁶

Further, if an "information" is not a report but a complaint, then only section 250 applies.⁷

1. *Prem Chand v. State*, A.I.R. 1958 Cal. 213.

2. See the discussion in *Lakhan v. Emp.*, A.I.R. 1936 All. 788, 791, left-hand, 799, left-hand (Judgments of Sulaiman C. J. and Rachhpal Singh J.) and page 793, right hand (dissenting judgment of Bennet J.).

3. Section 200.

4. Section 202.

5. Section 204.

6. *Abdullah Mandal v. Emp.*, (1913)I.L.R. 41 Cal. 854, 856.

7. Cf. *Mohammad Hashim v. Emp.*, A.I.R. 1940 Sind 134, 135.

“Taking cognizance” means that a Magistrate must not only apply his mind to the contents of the petition, but he must have done so for proceeding in a particular case.¹ The taking of cognizance would be with the intention of taking steps in the progress of the case.²

In view of the case-law discussed above, it appears that

(a) “complaint” and report of a police officer are mutually exclusive;³ but

(b) Where the context so requires, a communication by a police officer would be a “complaint”.

(3) The third question concerns section 200. Section 200, proviso (aa), provides that when a complaint is made in writing, *inter alia*, by a public servant acting or purporting to act in the discharge of his official duties, the court need not examine the complainant on oath. The view is sometimes expressed, that a Magistrate can take cognizance of a non-cognizable offence upon the report in writing by a police officer without examining the officer on oath by virtue of section 190(1) (b) and section 200, proviso (aa).⁴ But it has been pointed out,⁵ that section 200, proviso (aa) pre-supposes that there is a “complaint”, while (after 1923) a report by a police officer of even a non-cognizable offence (according to one view) is not a complaint, and cognizance of the offence reported (according to that view) can be taken of just as on a “report” of a cognizable offence.⁶

(4) The fourth question which has been discussed in the case law is, *whether section 190(1) (b) applies to reports by the police under a provision of the Code of Criminal Procedure other than section 173*. One view is, that it includes not only the final report under section 173, but also other reports made by the police.^{7,8,9,10}

1. See *R. R. Chari v. State*, (1951) S.C.R. 312, 320; A.I.R. 1951 S.C. 207, 210, approving the observations in A.I.R. 1950 Cal. 437.

2. Cf. *Bhajokhari v. State of West Bengal*, A.I.R. 1959 S.C. 8, 12.

3. Cf. Woodroffe, *Criminal Procedure Code*, (1926) page 12, and *Abdullah Khan v. Emp.*, A.I.R. 1933 Sind 188, 189.

4. *Public Prosecutor v. Ratnavelu* I.L.R. 49 Mad. 525; A.I.R. 1926 Mad. 865.

5. *Prag Datt v. Emp.*, A.I.R. 1928 All. 765, 766, 767.

6. *Manik Chand v. The State*, 62 Cal. Weekly Notes, 94, 108 (Chakravarti C. J. and Das Gupta J.).

7. *Bansidhar*, I.L.R. (1959) 9 Raj. 86; A.I.R. 1959 Raj. 191, 193 [(Report under section 153(2)—cognizance can be taken].

8. *Rama Shankar v. State*, A.I.R. 1956 All. 525, 527, para. 7 (A Magistrate can take cognizance of an offence on a charge-sheet submitted by an investigating officer under the administrative directions of District Magistrate, after he had submitted a final report).

9. I.L.R. 1956 Cut. 267; A.I.R. 1956 Orissa 129, 135, para. 15 (P.V.B. Rao J.) (Report under section 170).

10. *In re Kunjan Nadar*, I.L.R. 1954 T.C. 1217; A.I.R. 1955 T.C. 74, 79 (Interim charge-sheet).

It was observed in a Sind¹ case (before the 1923 Amendment) that the words "police report" in section 190(1) (b) can cover reports under sections 114, 157 and 168 also. It was also pointed out,² that when a report is submitted under section 157, the Magistrate can direct an investigation (section 159), or hold an inquiry or dispose of the case.

But the Calcutta view seems to have been narrower in this respect, namely, section 190(1) (b) (before 1923) is confined to "police reports" within the meaning of section 170.³

The Allahabad High Court held before 1923 that "police report" in section 190(1) (b) is not limited to a report mentioned in section 170 and preceding sections. Thus,⁴ receiving information by post, if the Magistrate sends the case for inquiry and report to the police and takes cognizance on the report thus received, it falls under clause (b) of section 190(1).

Even under Chapter 14, a police officer makes three different kinds of reports at three different stages, under the following sections—

- (i) section 157 (a kind of preliminary report) ;
- (ii) section 168 (report to superior officer) ;
- (iii) section 173 (final report).

The under-mentioned cases⁶⁻⁷⁻⁸ may also be seen.

The observations in a Lahore case are instructive⁹ :—

"The Code of Criminal Procedure clearly contemplates the possibility of a Magistrate who has taken cognizance of an offence commencing an inquiry or trial even though the case is still under investigation in the sense that the final report under section 173 has not been put in. Under section 170 of the Code, if upon an investigation under Chapter 14 it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground to justify the

1. *Mehrab v. The Crown*, A.I.R. 1924 Sind 71, 72 (F.B.) (Per Kincaid J. C.).

2. *Mehrab v. The Crown*, A.I.R. 1924 Sind 71, 72 (Per Raymond A.J.C.).

3. See *Nagendra v. K. E. I.L.R.* 51 Cal. 402; A.I.R. 1924 Cal. 476, 479 (Mookerjee and Chatterjee J.).

4. *Sarfaraz v. Emp.* 14 Cr. L.J. 218.

5. See also *Lallu Singh*, A.I.R. 1943 Oudh 226.

6. *Ranjit Singh v. State*, A.I.R. 1952 Himachal Pradesh 81, 87, 88, para. 15 [Commencement of trial on receipt of first challan without waiting for final challan—Held, that though the challan was not a "police-report" within the meaning of section 173, it fell within the provisions of section 190(1)(b)].

7. *Bholanath v. Emp.*, A.I.R. 1924 Cal. 614, 616.

8. *Chunni Lal v. Emp.*, A.I.R. 1933 All. 399, 400 (Report by prosecuting inspector to put witness on trial as co-accused is a report in writing by a police officer within s. 190(1)(b); taking cognizance is valid, but was set aside as unfair).

9. *Lal Khan v. Emp.*, A.I.R. 1948 43, 45, para. 7 (Munir and Marlen J.).

forwarding of the accused to a Magistrate, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report, and to try the accused or commit him for trial. Under section 190, a Magistrate may take cognizance of an offence upon a report in writing of facts which constitute such offence made by any police officer. It is well settled that the report contemplated by section 190 need not be a final report under section 173 of the Code and that any report of facts which constitute an offence made by any police officer is sufficient to give the Magistrate jurisdiction to take cognizance of the offence and to commence the inquiry or trial. If, therefore, a report made by the investigating officer under section 170 complies with the conditions of section 190, sub-section (1), clause (b), namely, that it states the facts which constitute an offence, the Magistrate can take cognizance of the offence under section 190 and proceed with the enquiry or trial. Thus the position is quite possible, and every one acquainted with the procedure of police investigation knows, that an enquiry or a trial might begin on a report made by the police under section 170, even though the matter is still under investigation by the police and the final report under section 173 has not been received. In such a case, it is, in our view, quite competent to the enquiring or trying Magistrate to proceed to record the statement of the accused person under section 342, Cr. P.C. without giving any such warning as is required by section 164, Cr. P.C."

According to the contrary view¹, it is only when the final "charge sheet" under section 173 is filed that it will be clear whether an offence has been committed. Until then Magistrate does not take cognizance.

(5) The fifth question is as regards reports made under other laws.

Where a police officer, while investigating an offence under another law, still follows the procedure in Chapter 14 of the Criminal Procedure Code, there is no difficulty.² In that case, the procedure under section 252, if followed, must be set aside.³

The controversy regarding other laws may be illustrated by the conflict of decisions as to reports under the Motor Vehicles Act. In one case,³ it has been held that a report of a police officer in a non-cognizable case under

1. *In re Ponnu Kudumban*, A.I.R. 1956 Mad. 392, 395; para. 6.

2. *Cf. Pavadai Gounder*, (1967) 1 Cr. L.J. 41, 44.

3. *State v. Meenakshi*, (1961) Kerala Law Times 532.

sections 42 and 123 of the Motor Vehicles Act, 1939, is a "complaint", while in some cases¹⁻³ it was not treated as a complaint.

A question as to the Essential Commodities Act arose in a Supreme Court decision, but in that case an offence under section 420, Indian Penal Code, was also under investigation. The Supreme Court disposed of the case³ on the ground that where a cognizable offence is involved, other offences can also be investigated by the police, so that the report submitted after the investigation was held to fall under section 190(1)(b) and also under section 173.

The main reason for this conclusion was, that where the information discloses a cognizable as well as a non-cognizable offence, the police officer is not debarred from investigating any non-cognizable offence which may arise out of the same facts. He can include that non-cognizable offence in the charge-sheet which is presented for the cognizable offence.

The question has been considered under sections 207, 207A, 208, 251, 251A and 252, which make a distinction as to the procedure to be followed in cases instituted upon police report on the one hand and other cases.

Considerable practical importance attaches to this question, because the procedure under section 251A is quite different from that under section 252, and the basis of the distinction is whether the case is instituted on a "police report" or otherwise. The old procedure was retained for cases instituted otherwise than on police report, when section 251A was introduced in 1955, because, in a case instituted on a police report there are statements of witnesses recorded by the police under section 161(3) and other documentary evidence which give the accused an opportunity of knowing the case, while there are no such statements or documents in a case instituted on a private complaint.⁴

In the decisions of the High Courts where this question has come up before 1966, it has been held,^{5,6} that when a Magistrate takes cognizance under section 190(1)(b) upon a report in writing of such facts made by a police officer, it may or may not be a "proceeding instituted upon a police report" within sections 207A and 251A.

1. *State v. Abdul Rashid*, A.I.R. 1963 M.P. 71.

2. *State v. Abdul Kadir*, A.I.R. 1963 M.P. 125.

3. *Pravin Chandra v. State* A.I.R. 1965 S.C. 1185.

4 Report of the Joint Committee on the 1954 Bill, page (ix), para. 23 read with para. 20 notes relating to clauses 29 and 35).

5. *Kankanampath Nagayya*, (1962) 2 Cr. L.J. 719. (Andhra Pradesh) (Kumarayya J.).

6. *Chitraranjan Das v. State*, A.I.R. 1963 Cal. 191.

The procedure in section 251A takes into account two important matters—

- (1) that a competent Department of the Government has investigated the matter, and
- (2) that the investigation has been in accordance with the Code of Criminal Procedure.

In fact, the validity of sections 207 and 207A was upheld by the Supreme Court¹ because the distinction is based on a very relevant consideration, namely, whether or not there has been a previous inquiry by a responsible public servant.

It has been observed,² that the report of a police officer is the genus, of which “police report” understood in the technical sense is only a species.

In fact, if section 251A is sought to be given a wide interpretation to cover all reports of a police officer, the section would not really work,³ because sections 207A(3), 207A(5) and 251A contemplate that there has been an investigation under Chapter 14. Section 251A(1) would not be complied with, because there would be no first information report under section 154 nor any statement recorded under section 161 nor any report forwarded under section 173, of which a copy could be furnished to the accused, as required by section 251A(1) and section 207A(3). Moreover, sections 207A(1), 207A(3), 207A(6), and section 251A(1) and (2) expressly refer to section 173.

Though there are observations in the Supreme Court cases^{4,5} which may seem to take the view that every Report which falls under section 190(1)(b) falls also under section 251A, those observations must be read with the facts of the case, and could not have been intended to obliterate the distinction intended by the varying expressions used in sections 173 and 251A on the one hand, and section 190(1)(b) on the other.

In a Full Bench decision of the Madhya Pradesh High Court⁶ the Supreme Court decision in Pravin Chandra's case¹ was followed. The Madhya Pradesh case also related to section 20G, Opium Act, as amended in Madhya Pradesh, and the actual decision could not be otherwise, though the observations seem to suggest that whatever falls under section 190(1)(b) falls under section 251A.

1. A.I.R. 1957 S.C. 927.

2. *Chittaranjan Das v. State of West Bengal*, A.I.R. 1963 Cal. 191, 196, para. 18 (Amarsh Roy J.).

3. *Cf. Premchand v. State*, A.I.R. 1958 Cal. 213, 216 para. 11.

4. *Pravin Chandra v. State of Andhra Pradesh*, A.I.R. 1965 S.C. 1185.

5. See also *Raghubans Dubey v. State of Bihar* A.I.R. 1967 S.C. 1167, 1169, para. 9 (August).

6. *Ashiq Miyan v. State*, A.I.R. 1966 M.P. 1, 4 para. 8 (January) (F.B.).

In a Calcutta case,¹ the Supreme Court decision in Pravin Chandra² was followed and was regarded as authority for a finding that the procedure prescribed in section 251A of the Code will be attracted to the trial of cases cognizance whereof is taken under section 190(1)(b) of the Code on the report of a police officer submitted under section 11 of the Essential Commodities Act.

Proposed solution

It is desirable to clarify the position as far as possible. (Some parts of the controversy are due to a misreading of the sections, and cannot be cured by amendment). The solution would be—

(i) to include in section 4 in the definition of “complaint” reports made by the police on an unauthorised investigation of non-cognizable cases, thus solving the points relating to the definition of “complaint” and section 200, and relating to section 190 in respect of non-cognizable offences;

(ii) to keep sections 251A and 207A as they are, as the observations in *Pravin Chandra's case*² must be read along with the facts; and

(iii) to amend section 190(1)(b) (if necessary) to cover specifically reports under other sections of the Code or under other laws.³

Some important points of difference between (i) complaint cases (ii) cases instituted on police report under section 173, and (iii) cases instituted on other reports or police officers reports falling under section 190(1)(b), but outside section 173.

Complaint	Police Report	Other reports of police officers
A. 1	A. 2	A. 3
No distinction between complaints of cognizable offences and other complaints.	S. 155(2) Police may investigate into non-cognizable cases only on obtaining the order of the Magistrate. Hence a “police report” in respect of such offence can follow only on an investigation so authorised.	..

1. *Malay Banerjee v. State*, (1967) Cr. L.J. 858 para. 9 (July); A.I.R. 1967 Cal. 352.
2. *Pravin Chandra v. State*, A.I.R. 1965 S.C. 1185.
3. To be considered under section 190(1)(b).

Complaint	Police Report	Other Reports of police officers
B. 1	B. 2	B. 3
S. 196(1)(a) No prosecution for contempt of lawful authority of public servant except on the <i>complaint of the public servant.</i>	..	..
C. 1	C. 2	C. 3
S. 196A No court to take cognizance of certain classes of criminal conspiracy except upon <i>complaint</i> made by the authority of the State Government etc.	..	..
D. 1	D. 2	D. 3
S. 196 Prosecution for offences against the State etc. to lie only upon <i>complaint</i> made by order of the State Government.	..	..
E. 1	E. 2	E. 3
Sections 200 and 202 and 204	Section 204(1)	Section 204(1)
A Magistrate may examine the complainant and hold a preliminary enquiry before issuing process on a case in which cognizance has been taken by him on a <i>complaint.</i>	No Examination is necessary. Process can be issued immediately.	No examination is necessary. Process can be issued immediately.
But under section 200, Proviso (aa), examination of the complainant is not necessary in case of complaint by a public servant etc.		
F. 1	F. 2	F. 3
The complaint may be dismissed as a result of the inquiry, under section 202, if there is no sufficient ground for proceeding.	No provision for dismissal.	No provision for dismissal.

Complaint	Police Report	Other Report of police officers
<p style="text-align: center;">G. 1</p> <p style="text-align: center;">Sections 204(3) and 204(1B)</p> <p>The Magistrate may dismiss the complaint if process fee is not paid. Further, a copy of the complainant's examination need not be supplied. But, under section 204(1B), a copy of the written complaint accompanies the summons or warrant.</p>	<p style="text-align: center;">G. 2</p> <p style="text-align: center;">Section 173(4)</p> <p>Copies of the police report, and of the First Information Report and of the statements etc. made in investigation, are to be supplied before the commencement of the inquiry or trial.</p>	<p style="text-align: center;">G. 3</p> <p>No provision for supplying copy to the accused.</p>
<p style="text-align: center;">H. 1</p> <p style="text-align: center;">Sections 208-220</p> <p>The Procedure for enquiry into cases triable by the Court of Session or High Court which are instituted otherwise than on a police report, dealt with.</p>	<p style="text-align: center;">H. 2</p> <p style="text-align: center;">Section 207A</p> <p>Procedure for commitment proceedings instituted on police report, dealt with.</p>	<p style="text-align: center;">H. 3</p> <p style="text-align: center;">Section 208-220</p> <p>Procedure for commitment proceedings into cases instituted otherwise than on a police report falling under section 173, dealt with.</p>
<p style="text-align: center;">I. 1</p> <p style="text-align: center;">Section 247</p> <p>Accused to be acquitted for non-appearance of complainant, if summons issued on complaint.</p>	<p style="text-align: center;">I. 2</p> <p>No such provision.</p>	<p style="text-align: center;">I. 3</p> <p>No such provision.</p>
<p style="text-align: center;">J. 1</p> <p style="text-align: center;">S. 248</p> <p>The Magistrate may permit a complaint to be withdrawn by the complainant, and thereupon acquit the accused.</p>	<p style="text-align: center;">J. 2</p> <p style="text-align: center;">S. 249</p> <p>In any (summons) case instituted otherwise than upon complaint, the Magistrate may stop proceedings without pronouncing any judgment of acquittal or conviction, for reasons to be recorded by him.</p>	<p style="text-align: center;">J. 3</p> <p style="text-align: center;">S. 249</p> <p>In any case instituted otherwise than upon complaint (which would include the report of the police officer than one under S. 173), the Magistrate may stop the proceedings without pronouncing judgment of acquittal or conviction, for reasons to be recorded by him.</p>
<p style="text-align: center;">K. 1</p> <p style="text-align: center;">S. 250(1)</p> <p>Compensation to the accused for false, frivolous or vexatious accusation, where case is instituted upon complaint or upon 'information' given to police or Magistrate.</p>	<p style="text-align: center;">K. 2</p> <p>S. 250(1) would not apply.</p>	<p style="text-align: center;">K. 3</p> <p>Apparently, S. 250(1) would not apply.¹ The words "as defined in this Code" were omitted in 1923, only as redundant.</p>

1. Cf. *In re Syed Ibrahim*, A. I. R. 1959 Mad. 32, para. 13.

Complaint	Police Report	Other Report of police officers
L. 1	L. 2	L. 3
S. 252 to 258	S. 251-A	Ss. 252-258
Procedure for trial of warrant cases instituted otherwise than on police report.	Procedure for trial of warrant cases instituted on police report.	Procedure for trial of warrant cases instituted otherwise than on "police report".
M. 1	M. 2	M. 3
S. 259		
Discharge of the accused on the ground of absence of the complainant.	No provision.	No provision.
N. 1	N. 2	N. 3
S. 417(3)	See s. 417(1)	See section 417(1)
Appeal against acquittal in a case instituted upon complaint to lie only if the High Court grants special leave to appeal.	..	..
O. 1	O. 2	O. 3
S. 436		
Power of High Court or the Sessions Judge to order further enquiry into any "complaint" which has been dismissed under section 203 or section 204(3).	..	..
P. 1	P. 2	P. 3
S. 546-A		
The Court may, in addition to the penalty imposed upon the accused, order him to pay to the complainant any fees paid by him on the petition of complaint etc. when the same relates to a non-cognizable offence.	..	..

APPENDIX 4

Note on Section 15(2) and powers of Benches

Section 15(2) of the Code runs as follows:—

Power exercisable by bench in absence of Special direction.

15(2) Except as otherwise provided by any order under this section, every such Bench shall have the powers conferred by this Code on a Magistrate of the highest class to which any one of its members, who is present taking part in the proceedings as a member of the Bench, belongs, and as far as practicable shall, for the purpose of this Code, be deemed to be a Magistrate of such class."

The true meaning to be attached to the section is that Government, in its order under the section can specify the gradation (first, or second or third class), but if Government does not do so, then the Bench has the powers of the member of the highest class. Thus, it is open to the Government to invest a Bench composed of Magistrates of a lower class with ordinary or additional powers of a Magistrate of the higher class.¹

Section 15(2) has also another aspect, namely, the Bench has all powers (of the highest class of Magistrates to which one of its Members belongs). The emphasis, now, is not on the grade but on the nature of the powers. This removes the difficulty felt under section 50 of the Code of 1872, whereunder the High Court was unable to infer² that a Bench had jurisdiction with regard to miscellaneous matters,—such as disputes as to immovable property—from the mere fact that the Bench had been empowered to try "cases."

The words "sit together" in section 15 were explained by Beaumont C. J. as follows³:—

"Acting under section 15, the Government of Bombay, on 9th December, 1931, directed that ten Magistrates of the Satara District, two having powers of the first class and eight of the second class should sit together as a Bench, and conferred on the said Bench all the powers conferred by the said Code on a Magistrate of the first class except certain powers referred to in the notification. The view taken by the Sub-divisional Magistrate is that under that notification all ten members of the Bench must sit together, these being the words used in the notification, and that the special powers of a First Class Magistrate conferred by the notification only apply if the whole Bench is sitting together. He takes the view further that as only three members of

1. *Cf. Emp. v. Noor Mahmomed*, A.I.R. 1928 Sind. 1, 5 (F.B.).

2. *Sufferudin v. Ibrahim*, (1877) I.L.R. 3 Cal. 754.

3. *Emp. v. Bhimabhai Sitaram*, A.I.R. 1934 Bom. 176, 177, 178.

the Bench were sitting (three being a quorum) the powers of the Bench were those conferred by sub-section (2), section 15, viz., the powers of a Second Class Magistrate, no member of the Bench of three being of a higher class than that. It seems to me that the latter view of the Sub-divisional Magistrate cannot be supported, because the Bench on which powers are conferred by sub-section (3), section 15, in the absence of any special powers conferred under sub-section (1), is the same Bench as that on which special powers might have been conferred under sub-section (1), and if the learned Sub-divisional Magistrate is right in thinking that the powers under sub-section (1) can only be conferred on the whole Bench of ten Magistrates then no powers arise under sub-section (2), and a Bench consisting of less than ten Magistrates would seem to be a Bench devoid of powers. No doubt some force is lent to the view of the learned Sub-divisional Magistrates on the former point by the use of the words "sit together" in the Government Notification. These words follow the language of section 15, and as the notification is expressly made under the powers conferred by that section, we must, I think, construe the words in the notification as having the same meaning as similar words in the section.

"We have therefore to use what the words "sit together" in section 15 really mean. Now if they are to be construed literally, they mean that the whole Bench must sit in session together. Two difficulties arise on that construction. In the first place there would seem to be no force in the power given in section 16 by which the Local Government can make rules for the constitution of Benches. If a Bench in session must always consist of all the members of the Bench that power seems to be nugatory. In the second place it is plain that if the whole Bench must at all times sit together it would for practical purposes be useless as a Bench, because it is notoriously difficult to get a considerable number of Honorary Magistrates to "sit together" for any length of time. We must read sections 15 and 16 together, and reading them together it seems to me that the words "sit together", in section 15 must be construed as equivalent to "constitute",¹ so that the Local Government may direct any two or more Magistrate to constitute a Bench, and then they may invest that Bench with special powers, and they may make rules under section 16 providing how the Bench is to be constituted for the purpose of conducting trials. If that is so, the rules which have been made by Government, providing that a Bench should consist generally speaking of five members with a quorum of three, are valid. If the right construction of sections 15 and 16 of the Code is as I have indicated above, then a similar meaning must be given to the words "sit together" in the notification made by Government under section 15, and we must hold that three Magistrates, members of the

1. Emphasis supplied.

whole Bench of ten, who formed the trial Bench, had the powers of a First Class Magistrate under the notification. That being so, the learned Sub-divisional Magistrate had no jurisdiction to deal with the case."

To put the matter differently, "The two sections must be interpreted so as to give effect to both, and that can only be done, it seems, by holding that the Benches created by notification under section 16(c) out of the Bench created by section 15 have the powers given to that Bench by the order under section 15".¹

Even where one of the Magistrates is of the first class, Government can direct that the Bench shall be a Second class one. This is clear² from the word "except as otherwise provided" in section 15(2).

Where an Honorary Magistrate was a member of an "independent" Bench, he could not (unless specially authorised) exercise Magisterial powers when not sitting on the Bench.³

APPENDIX 5

Points of difference between Presidency Magistrates and other Magistrates.

(1) *Appointments : Section 18—*

The Chief Presidency Magistrate and Additional Chief Presidency Magistrate are "District Judges" within the meaning of Article 236 of the Constitution. They should be "appointed" in consultation with the High Court.

Other Magistrates (including the District Magistrate) are not "District Judges" within Article 236 of the Constitution.

(2) *Subordination : Section 21—*

(a) Presidency Magistrates are subordinate to the Chief Presidency Magistrate, to the extent defined by the State Government. Powers of transfer are exercised by the Chief Presidency Magistrate—sections 528(2), 192(1).

(b) The Acts providing for Sessions Courts in the three Presidency Towns do not subordinate the Presidency Magistrates to the Sessions Court. But, by virtue of section 528 (1C), a power of transfer is conferred on the "Sessions Judge", and this has been held to apply to cover the Sessions Judges in Presidency towns also.⁴

1. Barlee J. in *Emp. v. Bhimabai*, A.I.R. 1934 Bom. 176, 178.

2. See *Joseph v. Changanacherry Municipality*, A.I.R. 1963 Kerala 200, 201.

3. *Emp. v. Nuri Shaikh*, (1902) I.L.R. 29 Cal. 483, 486.

4. *Ahmed Moideen v. Inspector D. Division*, A.I.R. 1959 Mad. 261, 269, para. 25 to 28.

(c) Magistrates in the mofussil are subordinate to the District Magistrate. Except as provided by the Code¹ they are not "subordinate" to the Sessions Judge.²

(3) *Benches : Sections 19 and 15—*

The *Chief Presidency Magistrate* can frame rules, and, subject thereto, the *Presidency Magistrates* can sit in Benches of two or more Magistrates (section 19).

In the mofussil, the Magistrates cannot sit together unless the *State Government* directs the constitution of benches, and invests them with powers (section 15).

(4) *Offences that can be tried : section 28, Second Schedule, column 8, and section 32(a)—*

Presidency Magistrates are *sui generis* regarding the offences that can be tried and the sentences that can be imposed. There is no "gradation" amongst them.

(5) *Examination of complainant : section 200, proviso (b)*

A *Presidency Magistrate* may dispense with the administration of oath to the complainant and his witnesses. He need not reduce the substance to writing, if the complaint is a written complaint.³

Other magistrates must follow the detailed procedure given in section 200.

(6) *Committal Proceedings : sections 206 and 213—*

(a) Commitment by *Presidency Magistrates* is to the High Court under the scheme of the Code (section 206). This position has been changed by local amendments, which create a City Sessions Court in the three *Presidency towns*.

(b) A *Presidency Magistrate* need not give reasons for commitment. (This is changed in Madras).

(7) *Record of Evidence and charge : Section 362(4) and 411—*

Where no appeal lies (*i.e.* cases in which the punishment is imprisonment less than six months and fine less than Rs. 200/-) the *Presidency Magistrate* need not record the evidence nor frame a charge.⁵ [section 362(4)].

(8) *Judgment : Section 370—*

Presidency Magistrate need not write a judgment, but should keep the record on the basis of particulars mentioned in section 370. But, where the *Presidency Magistrate*

1. Section 17(5).

2. I.L.R. 2 All. 205 (F.B.); I.L.R. 26 Mad. 596.

3. I.L.R. 6 Pat. 39; A.I.R. 1927 Pat. 111.

4. Cf. Aiyar, A.I.R. 1948 Mad. 424.

5. The Law Commission, in its 14th Report, Vol. 2, page 828, has recommended an amendment requiring recording of substance of evidence and framing of charge by *Presidency Magistrates*.

awards imprisonment or fine exceeding Rs. 200, a brief statement of the reasons for the conviction should be maintained.

(9) *Appeal : Sections 411 and 406, 406A—*

(a) Appeal lies to the High Court where the sentence exceeds six months or where the fine exceeds Rs. 200/- (Section 411).

(b) An appeal lies to the High Court from an order requiring security for keeping the peace or good behaviour [section 406(a)].

(c) So also, an appeal lies to the High Court from an order refusing to accept or rejecting a surety. [section 406A(a)].

(10) *Reference : sections 432(2) and 441—*

Presidency Magistrates can refer a question of law to the High Court.¹

(11) *Revision : Sections 436 to 439 and 441*

(a) To the High Court only—The powers of the High Court under section 439 are unaffected.²

Bombay and Madras enactments establishing Courts of Sessions for the respective Presidency towns (sections 9, 10, 11) have not made changes in these provisions, but the enactment creating the City Sessions Court, Calcutta, expressly states that the City Sessions Court *will not* have powers of Appeal, reference and revision (section 6, West Bengal Act 20 of 1953).

(b) A Presidency Magistrate can submit his views to the High Court (section 441).

(12) *Transfer : Section 528—*

See "Subordination" above, and "withdrawal" below.

(13) *Attendance of Prisoners : Section 542—*

Apart from powers conferred by the Prisoners (Attendance in Courts) Act, 1955 (32 of 1955), which applies to all the territories in India (except Jammu and Kashmir), a Presidency Magistrate has special power under section 542.

(14) *Compensation for groundless arrest : Section 553—*

Applicable only to Presidency Towns.

1. See—

(i) *Girish*, A.I.R. 1929 Cal. 756 (F.B.); and

(ii) *Abdul Rahman*, (1960) 1 S.C.R. 749; A.I.R. 1960 S.C. 82.

2. Cf. *Malik Pratap Singh v. Khan Mohamed*, (1909) 36 Cal. 994, and *R. G. Ruia v. State*, A.I.R. 1958 S.C. 97, 103.

(15) *Withdrawal and transfer of cases—Sections 526(1A) and 528(1C)—*

Before 1955, there was no power in the Sessions Judge to transfer cases from one Magistrate to another. The 1955 Amendment—sections 526(1A) and 528(1C)—gives this power. It has been held to extend to Presidency Towns.¹

The power of the Chief Presidency Magistrate (section 528) is controlled by the superior power of the City Sessions Judge.² On rejection of transfer application [Section 526(1A)] by the Chief Presidency Magistrate, an application can be made to Session Court [section 528(1C)].

APPENDIX 6

Note on section 51 and Medical examination

The question of physical and medical examination of the accused at the stage of investigation can be considered under the following heads :—

(a) whether such examination is legally permissible ;

(b) if it is not legally permissible, whether a provision permitting it can be inserted without violating the constitutional privilege against self-incrimination ;³

(c) whether such a provision ought to be inserted ;
and

(d) what ought to be the form of the provision.

As to (a) above, it may be stated that any interference with the body of a person is, *prima facie*, unlawful, and must justify itself under some express rule of law. According to Winfield⁴—“Battery is intentional application of force to another person”. As observed by Salmond,⁵ “In respect of his personal dignity, therefore, a man may recover substantial damages for battery which has done him no harm whatever, as when a man’s fingerprints are taken without observing the statutory requirements.”

Halsbury states the law in England thus⁶ :—

“Without the consent of a prisoner, a judge or magistrate has no power to order an examination of his person, and if in pursuance of such an order an examination is made, the person who made the order and

1. *Ahmed Moideen v. Inspector D. Division*, A.I.R. 1959 Mad. 261, 279, paras. 25 to 28.

2. *Ahmed Moideen v. Inspector D. Division*, A.I.R. 1959 Mad. 261.

3. Article 20(3), Constitution of India.

4. Winfield Torts, (1963) page 150.

5. Salmond, Torts (1961), page 302.

6. Halsbury, 3rd Edn., Vol. 10, page 742, para. 1425; As to search, see Halsbury, 3rd Edn., Vol. 10, page 356.

the person who makes the examination are guilty of an assault; but if the prisoner consents, even under a misapprehension as to the power to make such an order, the consent is an answer to the charge of assault."¹

In England, the right of a constable to search a prisoner upon his arrest appears to be impliedly recognised by the Magistrate's Court Act, 1952.² As to the metropolis, see the Metropolitan Police Act, 1839.³ As to the extent of the right of search at common law, see the under-mentioned cases.^{4 6 5 7 8 9 10 11}

It has been specifically held,¹² that a Magistrate has no right to order an examination of the person of a prisoner. An examination by medical men, in pursuance of such an order, of the person of a female, (in custody upon the charge of concealing the birth of her illegitimate child) constitutes an assault.

Examination of the body—both of the accused and of the victim—thus seems to require consent in England.¹³

We shall now refer to sections 4 and 5 of the Identification of Prisoners Act.¹⁴

Section 4: Taking of measurements etc. of nonconvicted persons

Any person who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards shall, if so required by a police officer, allow his measurements including finger impressions and foot-print impressions to be taken in the prescribed manner.

Section 5: Powers of Magistrate to order a person to be measured or photographed

If a Magistrate is satisfied that, for the purpose, of any investigation or proceeding under the Code of Criminal Procedure, 1898, it is expedient to direct any person to allow his measurements (including finger impressions and

1. *R. v. Boulton*, (1871) 12 Cox. C.C. 87, 91 (Rest of the footnote in Halsbury is Omitted).

2. Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 and 1 Eliz. 2 c. 55), section 39.

3. Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), section 66.

4. *Wiley v. Peace*, (1951) 1 K.B. 94 D.C.; (1950) 2 All. E.R. 724.

5. *Bessell v. Wilson*, (1853) 20 L.T. O.S. 233.

6. *R. v. Bass*, (1849) 2 Car. & Kir. 822.

7. *Leigh v. Cole*, (1853) 6 Cox. C.C. 329.

8. *Dillon v. O'Brien and Davis*, (1887), 16 Cox. C.C. 245.

9. *R. v. Boulton*, (1871) 12 Cox C.C. 87, 95.

10. *R. v. Boulton*, (1871) 12 Cox C.C. 356.

11. *Latter v. Braddell*, (1881) 50 L.J. Q.B. 448 (C.A.).

12. *Agnew v. Jobson*, (1877) 13 Cox. C.C. 625.

13. See Keith Simpson, *Doctor's Guide to Court* (1962), pages 124 to 127.

14. The Identification of Prisoners Act, 1920 (33 of 1920).

foot-print impressions) or photograph to be taken, he may make an order to that effect, and in that case that person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a police officer :

Provided further, that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding."

These sections do not extend to medical examination.

That under section 51, medical examination of the accused cannot be held without his consent, appears to be fairly clear from the discussion in the undermentioned case,¹ though consent need not be necessarily recorded in writing,²

The matter has been elaborately discussed in a Bombay case.³

As to (b) above, it will suffice to refer to the decision of the Supreme Court in *Kathi Kalu*,⁴ which has the effect of confining the privilege under article 20(3) to testimony—written or oral.⁵ The Supreme Court's judgment in *Kathi Kalu* should be taken as overruling the view taken in some earlier decisions,^{6,7} invalidating provisions similar to section 5, Identification of Prisoners Act, 1920.

The position in the U.S.A. has been thus summarised.⁸

"Less certain is the protection accorded to the defendant with regard to non-testimonial physical evidence other than personal papers. Can the accused be forced to supply a sample of his blood or urine if the resultant tests are likely to further the prosecution's case? Can he be forced to give his finger prints to wear a disguise or certain clothing, to supply a pair of shoes which might match foot-prints at the scene of the crime, to stand in a lineup, to

1. *Bhondar v. Emp.*, A.I.R. 1931 Cal. 601, 602.

2. *Hanuman Sarma v. Emp.*, A.I.R. 1932 Cal. 723, 725.

3. *Deoman v. State*, A.I.R. 1959 Bom. 284, 285, 286 (*Datar & Tarkunde JJ.*).

4. *Kathi Kalu, v. State*, A.I.R. 1961 S.C. 1808.

5. Some of the relevant decisions of the High Courts are—

(a) *Pokhar Singh*, A.I.R. 1958 Punjab 294, 299, 300, 301, paras. 32 to 50.

(b) *Ram Swarup v. State*, A.I.R. 1959 All. 119, 125, 126 (*Reviews case-law*).

(c) *In re Moopan Palani*, A.I.R. 1955 Mad. 495, 497, para. 7 (*Blood-stained clothes*).

(d) *Subbava v. Bhopala*, A.I.R. 1959 Mad. 396, 401, para. 10 (*Taking of blood for test*).

6. *Brij Bhushan v. State*, A.I.R. 1957 M.B. 106.

7. *N. D. N. Pakuthy*, A.I.R. 1950 T.C. 5.

8. Emerson G. Spies "Due process and the American Criminan Trial (1964) 38 *Australian Law Journal* 223, 231.

submit to a hair cut or to having his hair dyed, or to have his stomach pumped or a fluoroscopic examination of the contents of his intestines? The literature on this aspect of self-incrimination is voluminous.¹

The short and reasonably accurate answer to the questions posed is that almost all such physical acts can be required.² Influenced by the historical development of the doctrine, its purpose, and the need to balance the conflicting interests of the individual and society, the courts have generally restricted the protection of the Fifth Amendment to situations where the defendant would be required to convey ideas, or where the physical acts would offend the decencies of civilized conduct.³

A well-known writer on American Criminal Procedure makes these points.⁴

Non-testimonial evidence, other than private papers (and perhaps personal "effects"), is outside the privilege, subject to the qualifications—

(1) It may well be that compelling an accused person to do acts which result in the conveyance of his personal ideas is in violation of the privilege against self-incrimination.

(2) Where barbaric or indecent methods are used to obtain evidence, the Fifth Amendment, as well as the Fourth and Fourteenth, may be violated.

In a recent decision the question of blood tests has been considered.⁵

A recent study has thus summarised the position in U.S.A.⁶:—

"Much energy has been expended by prosecutors in an effort to persuade the courts to limit the privilege of the accused to freedom from testimonial compulsion, thus leaving the prosecution free to compel the defendant's assistance in connection with the production of

1. Morgan, "Privilege Against Self-Incrimination", 34 Minn. L. Rev. 1 (1949); Inbau, Self-Incrimination (1950); Note, 5 N.C.L. Rev. 333 (1927); 97 U. Pa. L. Rev. 441 (1950); Ladd and Gibson, "Legal-Medical Aspects of Blood Tests to Determine Intoxication" 29 Va. L. Rev. 749 (1943); A.L.I. Model Code of Evidence, Rule 205 (1942).

2. There is still some doubt, however, as to obtaining blood or urine specimens without consent. See also *Rochin v. California*, 342 U.S. 165 (1952). In *Rochin*, the Court held that pumping accused stomach to recover narcotics violated the Fourteenth Amendment as offending the "decisions of civilized conduct."

3. See Moreland, *op. cit. supra* note 11, at pages 65-83; Griswold, the Fifth Amendment Today (1955); Sowle, *cr et al.*, "Privilege Against Self Incrimination. An International Symposium", 51 J. Crim. L., C. & P. S. 129-180 (1960).

4. Moreland, *Modern Criminal Procedure*, (1959) pages 74, 78, 80.

5. *Schmerbar v. California*, (1966, 384 U.S. 75).

6. Sowle, "The Privilege Against Self-Incrimination Principles and Trends," in Sowle (Editor), *Police Power and Individual Freedom*, (1963) 215, 219.

non-testimonial evidence. Under this dichotomy, the defendant could not, of course, be compelled to take the stand and testify (or to produce in court, under judicial order, private papers and perhaps other objects); however, the accused could be compelled to stand up in court in order to facilitate a witness's identification of him, to display a scar, to do certain appeal, to assume a certain position and, perhaps, even to provide a specimen of his handwriting or his voice. If generalisation is possible in this uncertain borderland of the privilege, it is to the effect that the prosecutors have met with a fair degree of success. The efforts of defendants to block such courtroom demonstrations (and, in the same vein, to suppress the results of demonstrations and tests conducted outside the courtroom) frequently have been unavailing.¹ However, the decisions are far from uniform. Professor McCormick, in an attempt to bring order out of apparent conflict, has suggested that some courts appear to draw a line between enforced passivity on the part of the accused and enforced activity on his part. That, they have regarded as unprivileged those things involving passive submission, while recognising as privileged those activities requiring the active co-operation of the accused.² Inasmuch as this shadowy corner of the privilege provides an ideal battleground for those who would limit the privilege and those who would expand its scope, we can safely assume that it will be productive of conflict for some time to come."

It is unnecessary to multiply further references to American and English law, as to which the under-mentioned sources may be seen.^{3 4 5 6 7 8 9 10}

A provision permitting examination seems to have a fair chance of passing scrutiny by courts under article 20(3).

1. The cases are collected in INBAU, *Self-Incrimination, What can an accused person be compelled to do* (1950). See also Maguire, *Evidence or Guilt*, section 204 (1959).

2. See McCormick, *Evidence*, section 126 (1954).

3. "Required information and privilege against Self Incrimination", (1965 April) 65 *Columbia Law Review* 681.

4. Dalbey, Hotis and Mintz, "Search of the Person", (Nov. 1966) 2 *Criminal Law Bulletin*, page 13.

5. D. A. Thomas, "Arrest & Search", (September 1966) *Criminal Law Review* 481.

6. "Self-incrimination and the States", (July 1964) 73 *Yale L.J.* 1491.

7. G. D. Nokes, "Self-incrimination by the accused in English law", (March 1966). Vol. 2, *University of British Columbia Law Review* 316.

8. "Blood Tests and the Bill of Rights,—Breithaupt revisited" (Oct. 1965) 17 *Hastings Law Journal* 139.

9. "Books and records and the privilege against self incrimination", (Fall 1966) 33 *Brooklyn Law Rev.* 70.

10. A State Statute to prevent the operation of Motor Vehicles by Persons under the Influence of Alcohol (March, 1967) 4 *Harraro Journal on Legislature* 280, 286, 287.

As to (c) above, it would appear that such a provision is needed, as examination of the body would reveal valuable evidence.

Such examination may take various shapes, e.g.—

- (i) examination of the body for ascertaining the accused's part in a sexual offence, or for finding out the injuries received by him ;
- (ii) examination for identification mark ;
- (iii) examination of internal parts, taking of fluids, (e.g. in intoxication case) and so on.

As to (d) above, the provision in the Queensland Code is useful,¹ the provision is quoted below :—

(Section 259, Criminal Code,
Queensland, Australia)

“259. Examination of person of Accused person in custody.

When a person is in lawful custody upon a charge of committing any offence, it is lawful for a police officer to search his person, and to take from him anything found upon his person and to use such force as is reasonably necessary for that purpose.

When a person is in lawful custody upon a charge of committing any offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of the offence, it is lawful for a legally qualified medical practitioner acting at the request of a police officer, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person of the person so in custody as is reasonably necessary in order to ascertain in the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.”

APPENDIX 7

Note on section 94 and the accused

It has been held by the Supreme Court,² that section 94(1), does not apply to the accused person. The decision was not based on the constitutionality of section 94 (regarding the constitutional provision relating to the privilege against self-incrimination), but on a construction³ of section 94.

1. Section 259, Criminal Code of Queensland (Australia).

2. *State of Gujarat v. Shyamlal*, A.I.R. 1965 S.C. 1257, 1259, paras. 29 to 32 (affirming, of this point, A.I.R. 1963 Gujarat 178). (Majority judgment).

3. For history of section 94, see *In re Ahmed*, I.L.R. 15 Cal. 110, 137 (Ghose J.). and also *M. P. Sharma, v. Satish*, A.I.R. 1954 S.C. 300, 306, para. 18.

The reasoning behind the Supreme Court decision was, that the Indian Legislature was aware of the principle of English law that the accused person could not be compelled to "discover" that which would tend to subject him to any punishment e.c. The Supreme Court noted, that one consequence of this holding would be, that section 96 (i.e. the first two paragraphs) would be useless (in relation to the accused). But it pointed out, that a "general" search or inspection could still be ordered, [under section 96(1), last para.] and that, so far as police officers were concerned, section 165, Code of Criminal Procedure, could be resorted to.

[As to section 94 and article 20(3), the undermentioned cases may be seen.¹]

In a recent decision of a special Bench of the Court of the Judicial Commissioner, Goa, Daman & Diu,² the various Supreme Court decisions were summarised. It was observed (obiter), that section 96 does not offend article 20(3), as neither the search nor the seizure are acts of the accused,—they are acts of another person and not the testimonial acts of the accused, that if a person not accused of an offence is compelled to give evidence, and the evidence ultimately leads to an accusation against him, that would not attract article 20(3).

Certain introductory observations may be made.

Section 96 is supplementary to sections 94 and 95. The general provisions of Chapter 7 are based on the law of England, where an Englishmen's house is his castle and cannot be easily invaded even by forces of the State.³

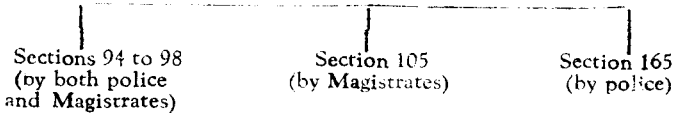
1. Decisions as to sections 94 and 96 and article 20(3)—

- (i) *State v. Prabhu Singh*, A.I.R. 1964 Pun. 325.
- (ii) *Swaranlingam v. Asstt. Inspector of Labour*, A.I.R. 1955 Mad. 716, 717, para. 2 (Somasundaram J.) (Section 94 considered).
- (iii) *In re Sornalingam*, A.I.R. 1955 Mad. 685, para. 3 (Balakrishna Aiyer J.) (sections 98 and 165 considered).
- (iv) *R. C. Gupta v. State*, A.I.R. 1959 All. 219.
- (v) *Madan Lal v. State*, A.I.R. 1958 Orissa 1.
- (vi) *Satyo Kinkar v. Nikhil Chandra*, A.I.R. 1951 Col. 101 (F.B.).
- (vii) *State v. Nagpur Electric Co.*, A.I.R. 1961 Bom. 242.
- (viii) *Babu Ram v. State*, (1961) 2 Cr. L.J. 55, 57 (All.).
- (ix) *Ranchhoddas v. Tempton*, A.I.R. 1961 Guj. 137.
- (x) *State v. Shyamlal*, A.I.R. 1963 Guj. 178.
- (xi) *Swarnalingam v. Assistant Labour Inspector*, A.I.R. 1956 Mad. 165 (D.B.) (Section 94 considered).

2. *Melicio Fernandes v. Mohan Nair*, A.I.R. 1966 Goa 23, 26 para. 5.

3. See *Emp. v. Mohammad Shah*, A.I.R. 1946 Lah. 456, 458, paragraph 6.

Any analysis of provisions relating to search¹ in the Code would be as follows :—



The *practical* question now to be considered is,—

(i) What changes are necessary in the language of section 94, to make section 94 conform to the Supreme Court's decision in *State of Gujarat v. Shyamal*².

(ii) Would a resort to the last part of section 96(1) "general search", be sufficient for practical purposes, having regard to the fact, that such searches are not very usual, and the law relating to them is also somewhat ill-defined?

(iii) Does the Supreme Court's decision necessitate any change of substance or wording in section 96?

(iv) What is the effect of the Supreme Court's decision on analogous sections—e.g. sections 51, 98, 99A(1) letter half, 165 etc.—having regard to the reasoning on which the decision is based

These points are dealt with below :

Point (i)

As to the first point, the question is whether *section 94* is to be *amended to exclude the accused by specific words*; thus codifying the interpretation placed by the Supreme Court.

Points (ii) and (iii)

So far as section 96 is concerned, the last part of sub-section (1) of that section speaks of "general search", and requires consideration. Since search warrants are a species of process exceedingly arbitrary in characters, and are resorted to only for very urgent and satisfactory reasons, the rules of law which pertain to them are of more than ordinary strictness.³

The main question that has arisen is, whether a general warrant under section 96 can be issued *during investigation*. It is not necessary that the authority issuing a warrant must be acting as a "court". But the omission of the

1. *M. P. Sharma v. Satish*, (1954) S.C.R. 1077; A.I.R. 1954 S.C. 300.
 2. *State of Gujarat v. Shyamal* A.I.R. 1965 S.C. 1257, 1259, para. 29-30.
 3. *Walvekar v. King-Emperor*, A.I.R. 1926 Cal. 966, 969, left-hand (Case under section 46, Calcutta Police Act, 1866).
 4. *Clarke v. Brojendra Kishore Roy*, (1912) I.L.R. 39 Cal. 953, 964, 965 (P.C.). For comment, see (1912) 16 C.W.N. (Journal) 221, 229.

word "investigation" from section 53(1) seems to indicate, that a Magistrate etc. cannot order search under that section for the purposes of investigation. He can order search only if the seizure will serve the purpose of an inquiry etc.¹

The true principle seems to be, that the phrase "for the purpose of" in section 96(1) is to be construed as not, in itself, implying either the pendency of the specified proceedings or the *immediate* or imminent initiation thereof: What is necessary is, that the Magistrate should be reasonably satisfied that the search is likely to be a link in the chain which, in the normal course, will lead to an "inquiry", if the expected material is found on the search, and that he should also be satisfied that there is reasonable ground for the expectation.²

The inquiry etc. must, of course, be under the Code, and not under some other Act.³

An investigation that is being made is not the same thing as an inquiry about to be made. Therefore, an order under section 96 cannot, it seems be made to further a police investigation, which may or may not result in an inquiry.⁴

A wider view has, however, been taken in a Mysore case.^{5,6}

Another point on which a difficulty might arise in practice is, what is meant by a "general search". In England, a "general warrant" (to search premises) that is, a warrant in which either the person or the property is not specified), is illegal.⁷ Such "general warrants" have figured in cases well-known in the English Constitutional law.^{8,9}

(In England, a general warrant meant a warrant issued by the Secretary of State for the arrest of such persons as were, for instance, the authors of a seditious libel. No persons were named in such a warrant, and such a warrant left it to the person entrusted with the warrant to decide who it was that should be arrested. Such warrants were held to be illegal at common law.¹⁰

1. *Hoshide v. Emperor*, A.I.R. 1940 Cal. 97, 105 (Khundkar and Sen JJ.).

2. Cf. *Jagannath Das C.J. in Kalinga Tubes Ltd. v. D. Suri*, A.I.R. 1953 Orissa 153, 155, paragraph 10.

3. *In re Mahomed Tahir*, A.I.R. 1934 Bom. 104.

4. Cf. the observations of Ashutosh Chaudhary J. in *Jagannath v. Emperor*, I.L.R. 47 Cal. 597; A.I.R. 1920 Cal. 352, 353.

5. *Kaverappa v. Sankannayya*, A.I.R. 1965 Mysore 214, paras. 32 to 42.

6. For a review of case-law, see *Melliceo Fernandez v. Mohan Nair*, A.I.R. 1966 Goa, 23, 26, para. 5 (November 1966).

7. See Hood Phillips, *Constitutional Law*, (1957), pages 509, 510; *Wilkes v. Wood*, 1763) 9 State Trials 1193; Phillips, *Leading cases* (1957), page 195.

8. See also E. C.S. Wade, "Police Search", 1934, 50 L.Q.R. 354-367.

9. *Eatick v. Carrington*, (1765) 19 State Trials 1029; Phillips, *Leading Cases*, (1957), page 196.

10. Jowitt, *Dictionary of English Law*, (1959), Vol. 1, page 862.

What section 96 refers to, however, is a warrant wherein a particular *document or thing is not specified*.

In practice, it is difficult to draw the line and to come to a clear conclusion as to whether warrants issued in a particular case are to be considered as warrants for a particular search or for a general search.¹

Another point which might arise is relating to the form of the warrant under section 96(1), last para. The form given in the Code of the Criminal Procedure² provides, that the warrant must "specify the things clearly". Forms in the Criminal Procedure Code are, however, to be used with variations wherever necessary.³ The Form will, therefore, have to be modified when a general search is contemplated.

In a Calcutta case,⁴ the warrant was in this form:—

"To (1) Assistant Commissioner of Police Detective Department.

Whereas (2) information has been received before me of the (3) commission of the offence of (4) Sea Customs Act and conspiracy to cheat Government and it has been made to appear to me that the production of (5) documents, account books and other papers for the year 1936-37, 1937-38, 1938-39 is essential to the enquiry (6) now being made into the said (7) offence. This is to authorise and require you to search for the said (8) documents etc. in the (9) firm of Merrs. Toyo Menka Maisha Ltd., 4, Clive Ghat Street, and if found to produce the same forthwith before this Court, returning this warrant with an endorsement certifying what you have done under it immediately upon its execution. Given under my hand the seal of the Court, this 4th day of April, 1939.

Sd/- (R. GUPTA),
Chief Presidency Magistrate,
Calcutta.

Calcutta, 4th April, 1939."

This was regarded as a "general warrant".

It may be noted, that so far as section 165 is concerned, that section does not authorise a *general search*. A "general" search means a search not in respect of specific documents or things which the officer considered were necessary or desirable for the purpose of the investigation in hand, but a roving enquiry for the purpose of discovering documents or things which might involve persons in criminal liability.

1. Cf. the difficulty felt by Jagannathdas C. J. in *Kalinga Tubes Ltd. v. D. Suri* A.I.R. 1953 Orissa 153, 155, paragraph 6.

2. Schedule V, form No. VIII, Code of Criminal Procedure.

3. See section 555.

4. *Hoshide v. Emp.*, A.I.R. 1940 Cal. 97, 99, 102, right-hand, 104, left-hand.

5. *Paresh Chandra v. Jogendra*, A.I.R. 1927 Cal. 93, 95 (Cuming and Page JJ.).

(iv) Sections 51, 98, 99A(1) and 165 etc. do not seem to need any change with respect to the point under consideration.

APPENDIX 3

Note on section 109(a)

Section 109(a) of the Code of Criminal Procedure runs as follows :—

“109. Whenever a Presidency Magistrate, Sub-
Security for good be- divisional Magistrate or Magistrate of
haviour from vagrants the first class receives information—
and suspected persons.

(a) that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing any offence, or

such Magistrate may, in manner, hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.”

Now, the one point on which there is a conflict of decisions is, whether the words “taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction” mean—

(a) that what is sought to be concealed is “presence within the local limits”, or whether they mean—

(b) that what is sought to be concealed is “presence” (simpliciter).

If (b) is to be codified, the sentence should read,—
“any person *within the local limits of such Magistrate's jurisdiction* is concealing his presence and.....”

If (a) is to be codified, the sentence should read, “any person is taking precautions to conceal *the fact* of his presence within.....”

Difference between (a) and (b) above may be illustrated. The facts in a Calcutta case¹ were these :—

Two men were found not very far from their home in a place outside a village, and there was evidence to show that they were bent upon committing burglary at night. One man was found in possession of a “sindh-kati” and a pair of tin-cutters, and the other of a bunch of keys; and

1. *Gagan Chandra v. Emp.*, I.L.R. 56 Cal. 949; A.I.R. 1929 Cal. 775; 34 C.W.N. 194 Rankin C. J. and Patterson J.).

there was little doubt that these people were outside the village in which they lived for the purpose of committing burglary. They were seen to be approaching a certain house, and, at the barking of a dog they lay quiet; and sometime afterwards they attempted to approach again. In these circumstances, they were arrested, and they were charged as being people who were "taking precautions to conceal their presence within the local limits of the Magistrate's jurisdiction" and that there was reason to believe that they were taking such precautions with a view to commit an offence. It appeared, that they were trying to conceal themselves from persons in the house and from anybody who might come to pass that way, and there was no doubt that they were taking such precautions with a view to committing an offence. They were bound down under section 109.

The High Court set aside the order. The scope of section 109(a) was thus explained¹—"The idea is that someone may be taking precaution to conceal himself within the local limits of the Magistrate's jurisdiction not to conceal himself as one who hides from a policeman but to conceal the fact of his infesting the Magistrate's jurisdiction, and in that class of case if there is reason to believe that this is a precaution taken with a view to commit an offence, the Magistrate can require him to give security..... Authority on this point has been cited to us in the cases of *Reshu v. Emp.*;² *Piru v. Emp.*³ and *Emp. v. Bhairone.*⁴ The exposition of the law given in the latter case is the correct exposition of the meaning of clause 1. It is quite true that clause 1, section 109, is not likely to come into operation every day. That is no reason why it should be applied to fill up any gap that there may be in the criminal law, or in a case in which it does not apply. The learned Judges of the Allahabad High Court say: "In our view it is an entire mistake to read that clause as applying to any person who takes steps to conceal himself, in the sense of concealing his presence in the way in which a criminal conceals his presence when he goes in the dark or by a deserted road, or by some other secret means to commit a crime in his own neighbourhood."

"I agree with that proposition and that in sufficient to decide this case."

With this case, we may contrast the facts in an Allahabad case.⁵ The police received information that a number of persons were hiding themselves on a dark night at about

1. *Gagan Chandra v. Emp.*, I.L.R. 56 Cal. 949; 34 C.W.N. 194; A.I.R. 1929 Cal. 775, 776 (Rankin C. J. and Patterson J.).

2. *Reshu v. Emp.*, (1918) 22 C.W.N. 1963; 41 I.C. 649.

3. *Piru v. Emp.*, A.I.R. 1925 Cal. 616.

4. *Emp. v. Bhairon*, I.L.R. 49 All. 240; A.I.R. 1927 All. 50 (F.B.).

5. *Emp. v. Phuchai*, I.L.R. 50 All. 909; A.I.R. 1929 All. 33, 34, 36 (F.B.) (majority judgment) (Boys and L.M. Banerjee JJ. contra) (Over-ruling *Emp. v. Bhairon*, I.L.R. 49 All. 240).

midnight, in a mango grove outside the abadi of a village with a view to committing some offence. When the police went to the grove, they found four persons sitting there, who, on being challenged, tried to run away. They were chased and two of them, (the accused), were captured. They had house-breaking instruments (jemmies) with them. When caught, they first gave wrong names and addresses, and then later on disclosed their real identities. They were residents of the same sub-division. They were called upon to show cause under section 109, Criminal Procedure Code. The Magistrate came to the conclusion that the case fell under section 109, sub-clause (a), and demanded security. The Sessions Judge held that that sub-section was inapplicable. The Government filed a revision from that order.

The High Court accepted the revision. The conclusion of the majority, as explained by Sulaiman Ag. C.J., was—“I think that if a man is taking precautions anywhere in order to conceal his presence, and that concealing is to be effected within the jurisdiction of a Magistrate who receives the information, such Magistrate has power to demand security even though the residence of the person informed against within the jurisdiction is well-known.”

The observation of Dawson Miller C.J. in a Patna case² (“there must be a desire to hide the fact that the accused is present within the local limits of the Magistrate’s jurisdiction”) support the Calcutta view. The judgment of Muhammad Noor J. in later Patna case³ agree with the Allahabad view.

According to the Nagpur view,⁴ concealment at a particular spot is sufficient even if residence within the local limits is well-known. This is the Oudh view also.⁵

The conflict of decisions requires to be resolved. On the existing language, the Calcutta view is plausible.⁶ But it would narrow down the practical utility of the section.

Similar amendment in section 55 would be desirable.⁷ It was stated by Knox J.⁸ “there is little doubt that section 55 was intended.....for the suppression of habitual bad characters whom an officer in charge of a police station suddenly finds within his circle or about whom he has good cause to fear that they will commit serious harm before there is time to apply to the nearest Magistrate empowered to deal with the case under section 112.”

1. *Emp. v. Phunchai*, A.L.R. 50 All. 909; A.I.R. 1929 All. 33, 36 (F.B.); followed in—*Red. v. Ram Dayal* A.I.R. 1950 All. 134, 138 para. 18 (Seth J.).

2. *Rampirich v. Emp.* I.L.R. 6 Pat. 177; A.I.R. 1926 Pat. 569, 571.

3. *Emp. v. Bishi Sahara*, A.I.R. 1935 Pat. 69, 72 (Reviews cases).

4. *Emp. v. Ganapati*, A.I.R. 1938 Nag. 465 (Gruer J.).

5. *Chhutai v. Emp.* A.I.R. 1941 Oudh 509, 510.

6. See the note in (1926-27) 31 C.W. N. 110, approving the earlier Allahabad case *Emp. v. Bhairon*.

7. To be considered under section 55.

8. *Daulat Singh*, (1891) I.L.R. 14 All. 45, 46.

APPENDIX 9

Note on section 144(3) and the expressions "place" and "frequenting".

The position as to the meaning of certain expressions in section 144(3) is, to some extent, unsatisfactory. While some of the decisions can be explained as based on the requirement of definiteness,^{1,2} yet there are two points on which there is uncertainty, as follows:—

(i) the first is, as to the exact meaning of the expression "particular place". The earlier Bombay decisions^{3,4,5} place a limited interpretation on this expression, and seem to rule out a wide area, such as a particular municipality."

In other Bombay case,⁶ it was pointed out, that the District Magistrate, when formulating his order under section 144, must show two things quite plainly, first of all, the thing which is prohibited, and secondly, the persons who are prohibited.

In a later Bombay case,⁷ the case-law was discussed, and it was emphasised that the expression "particular place" implies that the place to which the restriction applies should be sufficiently particularised. Divatia J. in that case stated:—

"It has not so much to do with the area of the place as with its description."

In a still later Bombay case,⁸ an order prohibiting certain acts in the public or private streets in a particular city was regarded as sufficiently definite.

These later Bombay cases, however, are not totally reconcilable with the earlier ones.

(ii) The second question under section 144(3) is, whether persons *residing* in an area can be said to "frequent or visit" it. The case-law on the subject was dealt in a full Bench decision of the Allahabad High Court,⁹ which very clearly held that the act of "frequenting" includes the act of residing.

1. *Golam Mohamad*, (1897) 2 C.W.N. 422.

2. *In re Qamar-ud-din*, A.I.R. 1935 Lah. 679, 680 (Currie J.).

3. *Bhagubhai v. Emp.*, A.I.R. 1914 Bom. 1914 Bom. 198(1).

4. *Bclvi v. Emp.*, A.I.R. 1931 Bom. 325, 326.

5. *Moti Lal v. Emp.*, A.I.R. 1931 Bom. 513.

6. *Emp. v. Ganesh Malvankar*, I.L.R. 55, Bom. 322; A.I.R. 1931 Bom. 135, 138 (per Beaumont C.J.).

7. *Vasant B. Khale v. Emp.*, I.L.R. 59 Bom. 27; A.I.R. 1934 Bom. 375, 378 (Reviews cases).

8. *Sorab Batliwala, v. Emp.*, A.I.R. 1935 Bom. 33, 34 (Beaumont C.J.).

9. *Emp. v. Afaq Hussain*, I.L.R. 1941 All. 186; A.I.R. 1941 All. 70, 72 (F.B.).

10. See also *Abu Husain v. Emp.*, A.I.R. 1940 Cal. 358, 361 (Edgeley J.).

Nevertheless, some doubt remains on this point, because of the (i) earlier Bombay decision on the subject,¹ (ii) the Calcutta cases²⁻³ which take a limited view, though they were not followed in later case,⁴ and (iii) a Madras case.⁵

APPENDIX 10

Note on section 144(6)

Section 144(6) of the Code of Criminal Procedure has been held to be unconstitutional by the Patna High Court, on the ground that it confers a power on the State Government to deprive a citizen of his right of movement and the right of association indefinitely, and gives no right of representation to the parties affected by the order, thus violating article 19(1) (b), (c) and (d) of the Constitution.⁶

The judgment in the Patna case emphasises several elements as supporting the invalidity of section 144(6), namely,—

- (i) indefinite period of time ;
- (ii) no right of appeal or revision to higher authority from the order of the State Government ;
- (iii) no right of antecedent hearing.

The validity of section 144, in general, has been upheld by the Supreme Court in *Babu Lal's* case.⁷ The Supreme Court's judgment is not referred to in the Patna case.

An analysis of the judgment of the Supreme Court would show, that in upholding the validity of section 144, one of the considerations which weighed with the Court was that the normal maximum duration of the order is two months from the date of its making, and the restraints imposed by the order are thus, intended to be of a temporary nature. The powers are exercisable by responsible Magistrates, and these Magistrates have to act judicially. Moreover, the restraints permissible under the provision are of a temporary nature, and can only be imposed in an emergency.

In a recent Kerala case,⁸ the vires of the sub-section was not in issue, but, referring to the Patna case, the Kerala High Court observed, "if that decision implies that an order under sub-section (6) is an independent order unaffected

1. *Bhagubhai v. Emp.*, A.I.R. 1914 Bom. 198(1) (Shah and Heaton JJ.).
2. *Ashutosh Roy* 29 C.W.N. 411; A.I.R. 1925 Cal. 625, 626 (D.B.).
3. *Abdul Majid*, 38 C.W.N. 556; A.I.R. 1934 Cal. 393, 396 (D.B.).
4. *Abu Hussain v. Emp.*, A.I.R. 1940 Cal. 358 (Edgeley J.).
5. *In re Shrirama Murthy*, A.I.R. 1931 Mad. 242.
6. *Kamala Kant*, I.L.R. 41 Pat. 871; A.I.R. 1962 Pat. 292, 295, para. 7; (1962) 2 Cr. L.J. 203 (Ramaswami C. J. and Choudhary J.) (Decided on 22nd January, 1962).
7. *Babulal Parate v. State of Maharashtra*, (1961) 2 S.C.R. 423; A.I.R. 1961 S.C. 884; (Decided on 12th January, 1961).
8. *Varied Porinchukully, v. State*, A.I.R. 1967 Ker. 157; (1967) Cr. J.L. 898, para 3. (July Part of Cr. L.J.).

by any remedy that an aggrieved party may successfully pursue, either under sub-section (4) of section 144 or under section 439 of the Code, we must express our dissent". The Kerala High Court held, that an order extended by the State Government under section 144(6) could be rescinded by the Magistrate under section 144(4). It also observed, that the High Court could revise the order even when its duration had been extended by the State Government.

A provision somewhat similar to section 144(6) contained in section 37(3), Bombay Police Act, 1951, has been held to be valid by the Bombay High Court.¹ Of the arguments advanced before the High Court, the following are of relevance :—

(1) That there was no limitation regarding the duration for which the order could continue. The High Court pointed out, that the continuation of the order depended upon the authority being satisfied that it was necessary for the preservation of public order.

(2) That the section did not afford any opportunity to the person affected to show cause. The High Court held, that the order under section 37 (prohibiting a procession) was an administrative order. Further, there was no allegation against any person, and it was difficult to understand what "representation" could be provided for. Moreover, the question whether there was an emergency or not, and whether the public order was threatened, could not be made the subject of a public debate between the Commissioner of Police and the citizens.

(3) That there was no corrective against the order. The High Court stated, that the Commissioner had to satisfy himself that conditions requiring continuance of the order were present. But he is the person on the spot, and to suggest that there should be a judicial corrective, or some other appellate authority, would stultify the object of the section.

For the present purpose, the question to be considered is this—Is the High Court competent to go into the propriety of the State Government's order? On the one hand, there is no doubt that under section 144(6), the extension of period can be indefinite.²

On the other hand, the High Court's revisional powers are wide.^{3,4,5,6,7} But, this specific question does not seem to have been decided so far.

1. *Bapwao v. State*, A.I.R. 1956 Bom. 300, 301, (para. 4), 302 (para. 7), 302 (para. 8) (Chagla C. J. and Dixit J.).

2. *Bhure Mal*, I.L.R. 45 All. 526, 527; A.I.R. 1923 All. 606, 607 (Danie's J.).

3. *Editor, Tribune v. Emp.*, I.L.R. 1942 Lah. 510; A.I.R. 1942 Lah. 171 (F.B.).

4. *In re Ardeshir*, A.I.R. 1940 Bom. 42.

5. *Rashid Allidina v. Jiwandas*, A.I.R. 1943 Cal. 35, 38.

6. *Post Commissioners v. Jogendra*, A.I.R. 1933 Cal. 348.

7. *In re Sriramamurthy*, A.I.R. 1931 Mad. 242, 245.

It may be noted that, before 1923, section 435(3) barred revision of orders under section 144. The Select Committee¹ on the 1921 Bill observed, "Clause 114.—It has been suggested from various quarters that revision should be allowed in respect of proceedings under sections 143 and 144 and Chapter XII. We do not agree that any change should be made in the law in this respect. Saiyad Raza Ali dissents from this conclusion, so far as cases under section 144 are concerned."

The question of revisional jurisdiction in respect of orders under section 144 was, however, debated (after the Select Committee's Report) in the Legislative Assembly.² The question whether only Chartered High Courts could exercise such jurisdiction—and that too under the power of "superintendence"—was discussed. Dr. H. S. Gour moved³ an amendment to delete section 435(3), his argument being that if the High Courts had the revisional power—under "superintendence"—then section 435(3) was "confusing". The amendment was adopted by 36 votes to 29. The only speech opposing it was made by Mr. H. Honkinson, who opposed it on the ground that proceedings under section 144 are "really of an executive order", and a general power of revision should not be given.

APPENDIX 11

Note on section 161(2) and the word "truly"

Section 161(2) provides, that the person examined by the Police Officer shall be bound to answer all questions relating to the case put to him by such officer (other than incriminating questions). This subsection, as it stood in 1898, contained the word "truly". In omitting the word "truly", the Select Committee of 1898 made these observations:—

"We have amended this clause by reverting to the law as it stood under the Codes of 1861 and 1872. Under those Codes a person examined by a police officer was bound to answer all material questions, but was not liable to be prosecuted for giving false evidence in respect of his answers under section 193 of the I.P.C.⁵ It seems to us unfair that a man should be liable to be convicted of giving false evidence on the strength or by the aid of a statement supposed to have been given to a police officer, but which is not given on oath, which he has not signed and which he has had no opportunity of verifying. Such statements may be hurriedly taken down as

1. Report of the Select Committee dated 26th June, 1922, under clauses 26 and 114.

2. Legislative Assembly Debates, Vol. III, No. 19, dated 18 January, 1923.

3. Legislative Assembly Debates, Vol. III, No. 32, dated 7th February, 1923.

4. Examples of Judicial opinion on the subject would be found in *Shebalak Singh v. Kamoruddin* A.I.R. 1922 Pat. 435 (F.B.); in A.I.R. 1921 Cal. 30; 31; in 1(1882) I.L.R. 8 Cal. 580, 582; and in *Govinda Cheti v. Purnal Cheti* A.I.R. 1916 Mad. 662.

5. See I.L.R. 7 Cal. 121 and 10 Cal. 405.

rough notes, as the police officer is not trained in taking evidence, and the notes are often faired out by another officer. They bear no resemblance to depositions and ought to have no weight as such attached to them. We are aware that there are inconveniences in abolishing the direct liability for giving false evidence to the police, but the balance of expediency seems to us to be in favour of the old law. The provisions of sections 202 and 203, I.P.C. appear to us to afford a sufficient safeguard against false information."¹

As to section 161 as it stood in 1872 and 1882, the under-mentioned cases^{2,3} may be seen.

There was a case⁴ of smuggling of gold from the Persian Gulf to Bombay by sea. The accused were prosecuted for offences punishable under section 120-B, Indian Penal Code read with section 167(2) of the Sea Customs Act, 1878 and section 8(1) of the Foreign Exchange Regulation Act, 1947. Some of the accused had made incriminating statements to the Customs Officer, having been summoned and interrogated by him under section 171A of the Sea Customs Act, 1878. Under section 171A(3), all persons so summoned are bound to tell the *truth* upon any subject respecting which they are examined or make statements. The point involved was, whether the said confessional statements recorded by the Customs Officer were hit by section 24 of the Indian Evidence Act, and, as such, were inadmissible in evidence. It was held, that these statements were not hit by section 24 of the Indian Evidence Act. The question whether these statements fell under section 161(2) Criminal Procedure Code or not, was not in dispute.

The following observations of Tambe J. are, however, relevant:—

“That a person should always tell truth is a moral principle, but it cannot be said to be a legal principle as such. Whenever, the Legislature requires a person to tell truth it has so enacted in various enactments. It is only when it has so enacted and a person fails to tell truth that he comes within the mischief of the provisions of the Indian Penal Code.”

When the deletion was made in 1898, the implications of the deletion on punishment for *refusal* to answer a question put by the police officer were not, it seems, considered. Since the person examined under section 161 is not bound to state the truth, a refusal to answer the questions, it has been held, is not punishable under sections

1. Report of the Select Committee dated 16-2-1898.

2. *Kassim Ali*, I.L.R. 7 Cal. 121 (F.B.) (Code of 1872).

3. *Q. E. v. Ismail*, I.L.R. 11 Bom. 659, 661 (1882 Code).

4. *Q. E. v. Sankarlinga*, (1900) I.L.R. 23 Mad. 544, 546.

5. *Laxman Padma Bhagat and others v. State*, A.I.R. 1965 Bom. 195, 208.

176, 179 and 187 of the Indian Penal Code.¹ In fact, the section (as it stands now) restores the law under section 119 of the Code of 1872, whereunder the wording was "shall be bound to answer all questions"; this provision, it was held, did not constitute an express provision of the law to "state the truth" within the meaning of section 191 of the Indian Penal Code.²

A similar view has been taken by the High Court of Rangoon,³ holding that such refusal is not punishable under section 179 Indian Penal Code.

Now, this leaves a very curious situation, because section 161(2) imposes an obligation to answer which is not enforceable by any penal sanction. At present, its only impact is to confer an absolute privilege.⁴ This lacuna should be removed. The proper place, however, for a provision on the subject would be the Indian Penal Code, and it might be desirable to make a provision in section 179, Indian Penal Code, by adding after the words "to state the truth" the words "or to answer any question."⁵

Suggestion regarding section 179, Indian Penal Code.

Proposals are made from time to time to add the word "truly" in section 161 (2). The matter was considered in connection with the Law Commission's report on Judicial Administration. The Commission did not favour the proposal.⁶

In section 175, the word "truly" has not been omitted, when section 161 was altered in 1898. The word "truly" should be omitted in section 175⁷ of the Code of Criminal Procedure.

Suggestion regarding section 175, Code of Criminal Procedure.

Another question which has arisen under section 161(2) is, whether a person giving a false answer under section 161 is guilty of an offence under section 182, Indian Penal Code. The view of most of the High Courts seems to be, that the expression "gives information" in section 182, I.P.C. cannot apply to information which is supplied not voluntarily but in answer to a question.⁸ A contrary view was taken in Patna¹⁰ and Sind cases.¹¹ There are also observations in a Bombay case¹² which throw a doubt on the subject, by taking a wide view of section 182, Indian Penal Code.

1. *Q. E. v. Sankarlinga*, (1900) I.L.R. 23 Mad. 544, 545.

2. *Empress v. Kassim Khan*, 1890 I.L.R. 7 Cal, 121 (F.B.).

3. *Mauzanagyi v. Emp.*, I.L.R. 8 Rang, 511; A.I.R. 1931 Rang 26.

4. Cf. *Sanjivi v. Koneri*, A.I.R. 1926 Mad. 521 (for section 179, Indian Penal Code).

5. To be summarised in the Appendix relating to amendment of other laws.

6. 14th Report, Vol. 2, page 752.

7. To be considered under section 175, Code of Criminal Procedure, 1898.

8. Cf. Sarkar on Code of Criminal Procedure, (1966), page 257.

9. *U. Hlaing v. R. P. Abigail*, A.I.R. 1937 Rangoon 232, 233 (Reviews case-law).

10. *Bodhau v. Emp.*, I.L.R. 7 Pat. 715; A.I.R. 1933 Pat. 555(1).

11. A.I.R. 1936 Sind 90.

12. *Q. E. v. Ramji*, (1886) I.L.R. 10 Bom. 124, 125 (earlier order of 30 June, 1885, passed without appearance of parties).

There is a conflict of authorities on the point as to whether a person giving a false reply under section 161, Criminal Procedure Code is guilty of an offence under section 182, Indian Penal Code or not as pointed out by the Joint Secretary and Legislative Counsel on page 5 of his note. The question as to how far there is need to amend section 182, Indian Penal Code in order to resolve this conflict may be considered. The majority view has been, that the expression "gives information" in section 182, cannot apply to information which is supplied *not voluntarily* but in answer to a question put by a public servant. One of the ways to resolve this conflict may be to insert the word "*voluntarily*" in between the opening word "whoever" and the second word "gives" occurring in section 182, Indian Penal Code. This will ensure that a person making a statement under section 161(2), Cr. P. C. will not be made punishable under section 182, I.P.C. [In case, it is considered desirable that such a person should be made punishable under section 182, I.P.C. for giving false information, the following words may be inserted after the word information :—

"Whether voluntarily or in reply to questions put to him by any public servant".

Answers under section 161, Code of Criminal Procedure, cannot be made the basis of a prosecution under section 211, Indian Penal Code, because such answers do not amount to a "charge".¹ As has been observed, "It would make criminal investigation very difficult if any person who gave voice to a suspicion were liable to criminal prosecution."²

There is, of course, one matter on which the anticipations of the 1898 committee have not been realised. That committee assumed that a person making false statement would be guilty under section 203, Indian Penal Code. But it has been held,^{3 4 5} that such a person does not *volunteer* the information and therefore section 203, Indian Penal Code does not apply. If this view is correct, sections 202, Indian Penal Code, (relating to *omission* to give information) would also be inapplicable to an omission to answer a question under section 161(2) of the Code of Criminal Procedure.

In addition to the amendment to section 179, Indian Penal Code which is now recommended,⁶ a clarification of the scope of sections 201 to 203, Indian Penal Code is also desirable.⁷

Suggestion regarding sections 201 to 203, Indian Penal Code.

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1. *Chinna Ramana Gowd v. Emp.*, (1908), I.L.R. 31 Mad. 506.
 2. *Kodangi v. Emp.*, A.I.R. 1932 Mad. 24 (Jackson J.).
 3. *Sarju Sonar*, (1910) 11 Cr. L.J. 438 (Allahabad).
 4. *Emp. v. Nga Po Lwin*, A.I.R. 1920 Upper Burma 20.
 5. But see *Pattammal*, A.I.R. 1940 Mad. 898, 899 (case under section 201).
 6. See recommendation regarding section 179, Indian Penal Code.
 7. To be considered under sections 201 to 203, Indian Penal Code.

The points concerning section 182 and sections 201 to 203, Indian Penal Code, should also be considered when the Indian Penal Code is revised.¹

APPENDIX 12

Note on section 162, and cross-examination by the prosecution of defence witnesses

The question whether the prosecution should be permitted to contradict (under section 162) a defence witness with the statement recorded under 161, requires an examination of several aspects² including—

- (a) history of the section;
- (b) object of the section, and
- (c) certain hardships that will be caused if such an amendment is made.

In the Code of 1872, section 119 ran as follows:—

“119. An officer in charge of a police station, or other police officer making an investigation, may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and may reduce into writing any statement made by the person so examined. Such person shall be bound to answer all questions relating to such case, put to him by such officer other than questions criminating himself.

No statement reduced into writing shall be signed by the person making it, nor shall it be treated as part of the record or *used as evidence*.”

Section 145 of the Code of 1861 read “Any statement so reduced into writing shall not be signed by the person making it, nor shall it be treated as part of the record or used as evidence.”

Section 162 of the Code of 1882 had declared that statements of persons made to the police during investigation, if reduced into writing, were not to be used as evidence.

For further history of the section, the under-mentioned sources^{3 4 5} may be seen.

1. To be summarised in recommendation for other Acts.

2. As to existing law, see—

(i) *Bahadur Singh v. Emp.*, A.I.R. 1925 Lah. 367.
 (ii) *Sarju Singh v. Mahindra*, A.I.R. 1964 Pat. 561, 564.
 (iii) *Sheo Shanker*, A.I.R. 1953 All. 652.
 (iv) *King Emperor v. Vithu*, A.I.R. 1924 Bom. 510, 511.

3. A.I.R. 1941 Journal 52.

4. *Emp. v. Najibuddin*, A.I.R. 1933 Pat. 589, 593.

5. *Bihari v. Emp.*, A.I.R. 1931 Pt. 152, 155 (Fazl Ali J.).

There was a conflict before 1898^{1,2,3} as to how far the accused was entitled to have copies of such statements. The Code of 1898 resolved this conflict.⁴

Amendment of section 162, Code of Criminal Procedure, 1898. In 1914, a change was introduced in section 162 as follows⁵:—

“27. After sub-section (1) of section 162 of the said Code, the following sub-section shall be inserted, namely:—

“(1A) *When such statement or any part thereof is used to impeach the credit of a witness under sub-section (1), such statement may also be used to corroborate the evidence of such witness.*”

The reasons for the proposed amendment of section 162 were thus given⁶:—

“Clause 27—There has been some conflict of authority as regards the bearing of section 157 of the Indian Evidence Act, 1872, on section 162 of the Code, as regards the use which may be made of a statement made by any person to a police officer in the course of an investigation. The amendment provides that when such a statement of any part of it is used to impeach the credit of the witness it may also be used to corroborate his evidence. Reference may be made to the decision in *Phanindra v. The King-Emperor*.⁷

[In *Phanindra's* case it was decided⁸ that section 162 (as it then stood) merely prohibited the use of the record of the statement, but not the proof of such statement by oral evidence for corroboration of prosecution witness.]

The Lowndes Committee which examined the amendment proposed in the 1914 Bill thus dealt with the matter⁹:—

“*Clause 27*:—The amendment of section 162 has been discussed at great length by the Committee. It has been the subject of amendment before, and of constant difficulty in the Courts. We, therefore, propose to recast the section, and we think that a note as to its previous history will be instructive.

1. *Emp. v. Mannu*, (1897) I.L.R. 19 All. 390, 408, 416 (F.B.).

2. *Bikoo Khan*, (1889), I.L.R. 16 Cal. 610, 612.

3. I.L.R. 20 Cal. 642.

4. For a summary of the decisions on this point and the suggestions made on the Bill of 1897 see note, “Law as to police papers”, 2 C.W.N. (Journal, 158).

5. Bill No. 3 of 1914, Gazette of India, 28th March 1914, Part V, page 104, clause 27.

6. Gazette of India, March 28, 1914, Part V, Statement of Objects and Reasons, page 121.

7. *Phanindra v. The King Emperor*, I.L.R. 36 Cal. 281.

8. *Phanindra v. K. E.* (1908) I.L.R. 36 Cal. 281, 285, 286 (history of section traced).

9. Report of the Lowndes Committee, 23rd December, 1916 App. B. (Notes on Clauses) under clause 27.

2. Under the original Code of 1861 (section 145), a police-officer could examine potential witnesses and reduce their statements to writing but the *writing* was not to be part of the record or used as evidence. The Code of 1872 maintained the above provisions, merely adding (section 119) that no person when examined by the police should be bound to answer incriminating questions. The only material change made by the Code of 1882 (section 162) was that, instead of the provision that the statement when so reduced to writing should not be used as evidence, it was provided that no statement made by a witness if reduced to writing should be used as evidence *against the accused*, thus making it clear that the provision in question was intended for the benefit of the accused.

“3. The new section did not lay down in terms that the accused might not use the written record of a witness’ statement for the purposes of his defence, anything that appeared therein to his advantage, and “the Calcutta High Court ruled that he was entitled to do so. The Allahabad High Court, on the other hand, held that the writings in effect formed part of the police-diary, and were therefore privileged from inspection, and this was the position which stood to be dealt with when the Amending Act of 1898 was under consideration. There was evidently a good deal to be said on both sides, as will appear from the report of the Select Committee on the Bill which is quoted *in extenso* below. The Bill as introduced proposed to adopt the Allahabad view, and put statements of witnesses when recorded by the police under section 161 on the same footing as police-diaries, and would only allow them to be used to the same extent as such diaries under section 172, *i.e.*, in effect enacting that the accused should not have access to them at all, unless the police-officer used them for the purpose of refreshing his memory, in which case the accused would be entitled to see them and cross-examine on them.

“4. The present section 162, which was embodied in the Act of 1898, was the result of a compromise in the Select Committee, whose report was in the following terms:—

“*Clause 161.*—This clause, as drafted proposed to affirm the decision of the Allahabad High Court, which was in conflict with the decision of the Calcutta High Court. The Governments of Bengal, the North-Western Provinces, Madras, Bombay and Burma “and most of the authorities consulted approve the decision of the Allahabad High Court, but the question involved (*namely*, whether the accused is entitled to inspect statements taken down by the police under section 161) is full of difficulty. In the first place, it is essential in the interests of public justice, that the sources of police information should be kept secret. If the names of informers

or directives and the nature of their information be disclosed, the detection of crime would be seriously crippled. In the second place, it is unfair to a witness that his evidence should be discredited on the strength of an alleged statement made to a policeman, which he may have had no opportunity of verifying or correcting. Such statements must necessarily be often taken down hurriedly and may be incorrectly copied out. They are not taken down as depositions, or with regard to the rules of evidence, but merely to aid the police in the course of their investigation. But, in the third place, it may be most important for the accused to show that a witness called for the inspection is telling a story substantially different from that which he told when first questioned by the police. We have endeavoured to reconcile these conflicting interests by reverting to the language of the Codes of 1861 and 1872, and adding a proviso compelling the Court, on the application of the accused, to refer to such statements, and then empowering it in its discretion to allow him to have copies of them.

"We then provide for the mode in which these statements are to be used. It is clear that a witness ought not to have his credit impeached on the strength of a statement alleged to have been made to a policeman, unless and until it is shown that he had made that statement."

"5. The result was not altogether a happy one. It will be noticed that the section deals mainly with the writing and enacts that it shall not be used as evidence, with a proviso that the Court may in its discretion direct the accused to be furnished with a copy of it presumably only in order that the accused may know that there is something in the writing which may help his defence—and goes on to say that the statement (i.e., what the witness said to the police-officer) may be used in the ordinary course to impeach the credit of the witness, obviously implying that for this purpose it must be duly proved.

"6. It seems clear that all that the amendment of 1898 intended to effect was to make it clear that the accused had no right to call for or see the record of any statements taken down by the police under section 161, unless the Court thought that in the interests of justice he should be allowed to do so. It did not purport to deal with, and has left untouched, the further question whether or not a statement made by a witness under section 161, as apart from the written record of the statement, might be used by the prosecution for the purpose of corroborating one of their witnesses under section 157 of the Evidence Act, and this is at all events one of the principal difficulties with which we have to deal now.

"7. The re-draft of the section which we propose will make it clear that the statements taken down under section 161 (and not merely the written records of such statements) are not to be used in any way or for any purposes except as allowed by the proviso. Having regard to the fact that the making of such statements is compulsory under section 161, and to the way in which, and the circumstances under which, they are usually recorded, we do not think that they are of any corroborative value where the witness merely repeats the same statement in Court, and that ought not therefore to be allowed to be used for the purpose of corroboration under section 157 of the Evidence Act. If the really material fact to the prosecution is that a statement was made to the police on a particular date or at a particular place, this fact will of course still be proveable in the ordinary course, and it will be open to the Courts or to a jury to make any proper deduction from this fact and the action which was taken on it. The amendment will also, we think, make it clear that if the accused wishes to rely on anything in the previous statements of a witness to the police, of which he has been allowed by the Court to have a copy, he will have to prove it in the ordinary way. If the witness admits this in cross-examination, it will of course be sufficient; if he denies the contradiction, and the police officer who took it down is called by the prosecution the previous statement of the witness on the point may be proved by him; if he is not called by the "prosecution, the Court would no doubt itself in most cases call him, or if the accused is calling evidence in support of his defence, it may be worth his while to call the police-officer himself. But it is clear that unless the previous contradictory statement is proved in some way in accordance with law, it ought not to depreciate the witness statement on oath. It will be observed that under our amendment, if any part of the previous statement of the witness is used for the purposes of cross-examination by the accused any other part of it may be used by the prosecution within the proper limits of re-examination. *This is, we think, the only way in which the previous statement ought to be allowed to be used by the prosecution.*"

The Select Committee on the 1923 Bill expressed this view¹:—

"Clause 33 :—We discussed the provisions of the proposed new section 162 at length and considered in detail the opinions received in connection with it. We recognise the force of some of the criticism directed against the section, but we do not think that power should be given to *contradict* by means of police diaries

1. Report of the Select Committee dated 26th June, 1922. Members of the Committee were T.B. Sapru, W.H. Vincent, M.B. Dadabhoy, S. Raza Ali, J. Chaudhury, H. Mancrieff Smith, B. C. Mitter and Zulfiqar Ali Khan.

a prosecution witness who has turned hostile, and *still less should power be given in respect of a defence witness*. We have, therefore, left the clause unaltered."

The amendments made in 1955 may be briefly dealt with.

The Bill of 1954 proposed deletion of section 162. The Joint Committee, however, observed:—¹

"16. Clause 22 (Original clause 21)— This clause provided that section 162 of the principal Act be deleted. The Committee feel that the deletion of this section will do away with the protection enjoyed at present by the accused against the prejudicial use of untruthful statement of witnesses recorded by the police officers. The effect of such an omission would be that the statements recorded by the police under sub-section (3) of section 161 may be used by the prosecution both for the purpose of corroboration as well as of contradiction. The Committee consider that the statements recorded by the police should be used for contradiction only and this right should be available both to the accused and the prosecution. As the prosecution is not entitled to cross-examine its own witnesses without the permission of the Court, it has been specifically provided that the statements recorded by the police under sub-section (3) of section 161 can be used by the prosecution for the purpose of contradiction, with the permission of the Court.

"The second proviso to sub-section (1) of section 162 has been inserted in section 173 with suitable modifications. The Committee have, therefore, omitted it from section 162.

"The restoration of section 162 with the proviso that statements can never be used for the purpose of corroboration but for the purpose of contradiction, ensures that the papers will be available both to the defence and to the prosecution. Normally, it is only the defence which is entitled to cross-examine. The prosecution can never cross-examine its witnesses without the permission of the court and the permission is never given unless the witness is held to be hostile by the Court. Therefore, if the witness turns hostile the court may permit him to be confronted with the statements that he made before the Court."

Hence the section was not deleted but amended as it now stands.

1. Report of the Joint Committee September, 1954 page (vii), para. 16.

The suggested change may go against the whole policy of section 162. In a Bombay case Beman J. made these observations:—¹

“The section plainly constitutes an exception to the ordinary rule of evidence. The proviso again endrafts an exception upon the exception. And in giving effect to the section and the proviso together it is necessary to keep carefully in sight what the Legislature really means. About this the language and the policy of the section, combined, leave, I think, no reasonable doubt. Before the last amendment, statements made by witnesses to the Police, and recorded by the Police might not be used as evidence against the accused. But there was *nothing* to prevent them being used in *favour of the accused*. They were often so valuable for that purpose, that in almost every case, the accused sought to know what they contained, with the object of using them if suitable, to his own advantage. In order to curtail to some extent that liberty, the section was amended in its present form. The effect of the amendment is to restrict the privilege of the accused. He can now only obtain access to written statements made by prosecution witnesses to the police, at the discretion of the Court. It is no longer a matter of right.

“The proviso is clearly limited to the purpose of this single concession, in derogation of the universal prohibition contained in the body of *the section, to the accused*. This is so plain on the face of the section and proviso, that I should have thought there could have been no doubt about it. The proviso deals with one case and one case only, the case of witnesses “called for the prosecution” whose statements have been taken down “in writing as aforesaid”. And the only concession it makes to the accused is to allow him, upon his request, and subject to the Court’s discretion, to have access to a “copy thereof”, namely, of the recorded statement, and thereupon to use it for one purpose and one purpose only, namely, to break down the evidence of the prosecution witness already standing against him. On the face of it the proviso does not cover the case of a witness for the defence, whose statement may have been recorded by a policeman, nor allows the prosecution to impeach the credit of such a witness by examining him upon any written statements he may have made to the police. *A fortiori* the proviso could never have been intended (and I think that its terms are plain enough to the contrary) to allow the prosecution to impeach the credit of its own witnesses for its own purposes, and against the wish of the accused, by reference to police testimony. That view presents, on the face of it, these two startling difficulties. (1) That the Legislature has in this important matter given the prosecution a marked advantage over the accused. And this is opposed to the

1. *Emp. v. Narayan Raghunath Patki*, (1907), I.L.R. 32 Bom. 110, 142, 143, 144.

first principles of our criminal jurisprudence. (2) That in effect it works out to this, that the prosecution would be empowered indirectly and under the pretence of shaking the credit of its own witnesses, to substitute in the record, as evidence against the accused person, not what those witnesses have said on oath at the trial but what they have said or may have said in circumstances altogether unknown and uncontrolled, to its own police officers. That is in fact what has happened in this case, and underlies, as I understand, the Advocate General's certified objection to Shankar's statement to Narayanrao. I think it too plain to need further argument that if *the prosecution is precluded from using these statements to impeach the credit of witnesses for the defence*, it is for much better reasons precluded from using them to impeach the credit of its own witnesses. Nor indeed is that in any case the real object, though it may be plausibly advanced as the nominal object which the prosecution has in view, when it seeks this indulgence. For *ex hypothesi*, when a Crown witness has said nothing against the accused "no question in impeaching his credit properly arises. The only person interested in shaking the credit of a witness is the person against whom he has said something. What has really happened is this. A witness, who has said things to the police, which the prosecution strongly relies on, refuses at the trial to repeat those things. The prosecution, pretending to wish to impeach his credit, then tries to bring on the record through the police officer, all that matter upon which it intended to rely, not of course to contradict the witness, out as substantive evidence. It wants in other words to substitute for what the witness has said at the trial, what it believes he ought to have said. Apart then from the use to which Exhibit N was put on this occasion I go further, I think, than any of my learned colleagues and say that it ought not to have been admitted at all, or its contents to have been allowed to be used by the prosecution for the nominal purpose of contradicting Shankar."

Observations of Knox J. in *Nasir-ud-din's case* should also be borne in mind. He observed,¹ such statements are recorded by police officers in the most haphazard manner. Officers conducting an investigation not unnaturally record what seems in their opinion material to the case at that stage and omit many matters equally material, and, it may be, of supreme importance as the case develops. Besides that, in most cases they are not experts of what is and what is not evidence. The statements are recorded often hurriedly in the midst of a crowd and confusion, subject to frequent interruption and suggestions from bystanders. Over and above all, they cannot be in any sense termed depositions, for they are not prepared in the way of a deposition, they are not read over to, nor are they

1. Q. E. v. *Nasir-ud-din*, (1894) I.L.R. 16 All. 207, 208.

signed by, the deponents. There is no guarantee that they do not contain much more or much less than what the witness has said. The law has safeguarded the use of them, and it never can have been the intention of the Legislature that, as in this case, copies of them should have been without question and as a matter of course made over to the accused or their counsel.

“It is obvious that such statements, if used at all, should only be used after proper proof of them and of the circumstances under which they were recorded, and under the direct sanction of the presiding Judge.”¹

The observations of Knox J. were cited again in a Madras case.²

The object of the section was thus explained in a Supreme Court case—³

“(16) The object of the main section as the history of its legislation shows and the decided cases indicate is to impose a *general bar* against the use of statement made before the police and the enacting clause in clear terms says that no statement made by any person to a police officer or any record thereof, or any part of such statement or record shall be used for any purpose. The words are clear and unambiguous. The proviso engrafts an exception on the general prohibition and that is, the said statement in writing may be used to contradict a witness in the manner provided by section 145 of the Evidence Act. We have already noticed from the history of the section that the *enacting clause was mainly intended to protect the interests of accused.*’ At the stage of investigation, statements of witnesses are taken in a haphazard manner. The police-officer in the course of his investigation finds himself more often in the midst of an excited crowd and babel voices raised all round. In such an atmosphere, unlike that in a Court of Law, he is expected to bear the statements of witnesses and record separately the statement of each one of them. Generally he records only a summary of the statements which appear to him to be relevant. These statements are, therefore, only a summary of what a witness says and very often perfunctory. Indeed, in view of the aforesaid facts, there is a statutory prohibition against police officers taking the signature of the person making the statement, indicating thereby that the statement is not intended to be binding on the witness or an assurance by him that it is a correct statement.

1. See also *Isab*, I.L.R. 28 Cal. 348.

2. *In re Guruva Vannan*, A.I.R. 1942 Mad. 385, 386 (Mockett and Horwill JJ.).

3. *Tahsildar, Singh v. State of U.P.*, (1959) Supp. 2 S.C.R. 875; A.I.R. 1959 S.C. 1012, 1020, 1021, para. 11, pages 1022, 1023, paras. 16, 17 (object of section) and pages 1018, 1019 (history).

4. Emphasis added.

“(17) At the same time, it being the earliest record of statement of a witness soon after the incident, any contradiction found therein would be of immense help to an accused to discredit the testimony of a witness making the statement. The section was, therefore, conceived in an attempt to find a happy ‘*via media*’, namely while it enacts an absolute bar against the statement made before a police-officer being used for any purpose whatsoever, it enables the accused to rely upon it for a “limited purpose of contradicting a witness in the manner provided by section 145 of the Evidence Act by drawing his attention to parts of the statement intended for contradiction. It cannot be used for corroboration of a prosecution or a defence witness or even a Court witness. Nor can it be used for contradicting a defence or a Court witness. Shortly stated, there is a *general bar against* its use subject to a limited *exception* in the *interest* of the accused, and the exception cannot obviously be used to cross the bar.”

Section 162 is designed to protect the accused against over zealous police officer and untruthful witnesses. It also recognises the danger of placing implicit confidence in a record made more or less imperfectly by a police officer who may not necessarily be competent to make an exactly correct record with due regard to the provisions of the law of evidence.¹

It has been pointed out by Beaumont C.J.,² that section 162 was intended to prevent user of statements made by the accused to the police, and questions designed to show, by process of elimination, that the matters subsequently mentioned by the accused were omitted from such statement, are within the mischief aimed at by the section.

The object of the section is (i) to protect accused persons from being prejudiced by a statement made to the police officer who, by reason of the fact that an investigation is known to be on foot at the time when the statement is made, may be in a position to influence the maker, and (ii) to protect the accused persons from prejudice at the hands of those who, knowing that an investigation has started already, are prepared to tell untruths.³

Section 162 renders the statements inadmissible for the obvious reason, that a suspicion about their voluntariness would attach to them.⁴

1. *Yusufali v. State*, A.I.R. 1965 Bom. 3, 5, para. 19 (Dealing with tape recorded statements) (Gokhale J.).

2. *Issuf Mahomed v. Emp.*, A.I.R. 1931 Bom. 311, 312.

3. *Emp. v. Aftab Mohd. Khan*, A.I.R. 1940 All. 291, 299 (Collister and Braund JJ.).

4. *Raja Ram v. State of Bihar*, (1964) 2 S.C.R. 752, A.I.R. 1964 S.C. 828, 834.

The section is designed to keep out evidence which, it is suggested, is not of a free and fair nature but may have been induced by some form of police duress.¹

The very object of section 161 is to amend, for the purpose of criminal trials, certain sections in the Evidence Act which state what evidence is admissible and what is inadmissible.²

The whole object of section 162, Cr. P. C. and of section 25, Evidence Act, is to deprive the court of certain materials.

The section plainly constitutes an exception to the ordinary rules of evidence,³ so that *corroboration* of a witness by his statement recorded under section 162 is not permissible.⁵

It may also be noted, that section 173(4) as amended in 1955 does not give, to the accused, right to a copy of the statement of a person *whom the prosecution does not propose to examine*. Therefore, if the prosecution is given the right to contradict a defence witness, the defence would be taken by surprise, in cases where the copy was not given.

A reference may also be made to the speech of Sir Malcolm Hailey in the debate on the 1923 Bill, where he pointed out,⁶ that the statements under sections 161, 162 Cr. P. C. are recorded mainly for the assistance of superior officers in deciding on the necessity of and for guiding prosecution. It is true, (he stated) that the law, by a somewhat exceptional provision, allows the statement to be used for challenging the credibility of certain witnesses, but the primary object of recording a statement is not that they may be used as a species of evidence. They are primarily recorded for police purposes.

It will also have to be considered, that the defence cannot use these statement *for corroboration*. Would it be fair to permit the prosecution to contradict the defence witnesses when the defence cannot use them for corroboration ?

The rule in section 162 is the result of long experience. That which has been eliminated has been considered to be of such doubtful value as, on the whole, to be more likely to disguise truth than to discover it. It is, therefore,

1. *Delbar Mandal v. Emp.*, 37 Cr. L.J. 1117, 1118; 40 C.W.N. 733 (Cal.).

2. Cf. Rankin J. in *Sajjad Mirza v. Emp.*, A.I.R. 1927 Cal. 372.

3. *Emp. v. Narayan*, (1907), I.L.R. 32 Bom. 111, 142 to 144 (F.B.) (Beaman J.).

4. On this point, see *Emp. v. Najibuddin*, A.I.R. 1933 Pat. 589.

5. *Rakha v. Crown*, A.I.R. 1925 Lah. 399, 400 (Section 157 of the Evidence Act, is controlled by s. 162).

6. Legislative Assembly Debates, Vol. III, No. 24 (26th January, 1923).

discarded for all purposes and in all circumstances. To introduce any further exception would be to destroy the whole object of the general rule.

Before the amendment of 1955, Beaman J. dealing with the question whether the proviso allowed the prosecution to impeach its own witnesses, observed,¹ that it would work out to this—"that the prosecution would be empowered indirectly and under the presence of shaking the credit of its own witnesses, to substitute in the record, as evidence against the accused person, not what those witnesses have said on oath at the trial but what they have said or may have said in circumstances altogether unknown and uncontrolled, to its own police officers."

APPENDIX 13

Note on section 163(2)

Section 163 encourages attempts at confessions, while section 164 discourages them. This discrepancy was pointed out in a Madras case.^{2,3} Section 163 says, that cautions are not necessary, but section 164 (in effect) says that they are necessary. *It is better to provide, that section 163(2) is subject to section 164(3).*

It may be noted, that before the amendment of section 164 in 1923, this inconsistency was not there, as all that a Magistrate had then to consider was, whether the confession was voluntary. But, under the section as amended in 1923, the Magistrate has to administer certain *warnings* also. If the caution (under section 164) is successful and the accused is thereby prevented from making a confession, then the question would arise—"has not the Magistrate done something illegal?"⁴

APPENDIX 14

Note on section 164(3)

When a confession is produced in evidence, there are three questions which can possibly arise,⁵ namely:—

- (i) whether it was made by the accused;
- (ii) whether it was free and voluntary;
- (iii) whether it was genuine or true.

If all these three conditions are satisfied, there would remain nothing further to be done by the prosecution to secure conviction.

1. *Emp. v. Narayan Raghunath Patki*, (1907) I.L.R. 32 Bom. 111, 143 (F.B.).

2. *In re Vella Monji*, I.L.R. 55 Mad. 711; A.I.R. 1932 Mad. 431, 432.

3. See also *Mohamed Bux v. Emp.*, A.I.R. 1934 Sind 103, 105.

4. Cf. *In re Vella Monji*, I.L.R. 55 Mad. 711; A.I.R. 1932 Mad. 431, 432.

5. *Birey Singh v. State*, A.I.R. 1953 All. 785, 789, para. 6, (Desai J.).

The main object of section 164(3) is to satisfy the court,¹ that the confession is voluntary.

Various High Courts have, from time to time, issued circulars on the subject.^{2 3 4 5}

Valuable suggestions have also been made in reported cases, as to the procedure to be followed.^{6 7 8 9 10 11}

The undermentioned cases also discuss the matter.^{12 13 14 15 16 17}

The provision in section 164(3) is not intended to be a mere formality. The importance of such a warning has been regarded as essential for a long time.¹⁸

The law as it stood in 1898 is dealt with in the under-mentioned case.¹⁹

Appendix 15

Note on sections 167 and 344

There is a controversy as to whether a Magistrate has jurisdiction to remand the accused to a judicial custody under section 344 before submission of the report by the police under section 173.

The case-law on the subject is discussed in a recent decision¹⁹ where the Madhya Pradesh decision on the subject²⁰ was followed, and it was held that while ordinarily, the investigation should be completed in 15 days, the

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1. See *In re G. Subbaramayya*, I.A.R. 1937 Mad. 321, 324, (traces history of the Madras rule).
 2. *Saravan Singh v. State of Punjab*, A.I.R. 1957 S.C. 637, 643, which approves circulars issued by the High Courts in Bombay, Madras and U.P.
 3. *Kuppathan v. King Emperor*, A.I.R. 1927 Mad. 974.
 4. *Rangappa v. State*, A.I.R. 1954 Bom. 285, 288 (Gajendragadkar and Chainani JJ.).
 5. *Ram Chandra v. State of U.P.*, A.I.R. 1957 S.C. 381, 386.
 6. Note by Dalip Singh J. in *Jahangiri Lal v. Emp.*, A.I.R. Lah. 230, 244.
 7. Discussion by B. K. Ray J. (as he then was) in *Gurubaru Praja v. The King*, A.I.R. 1949 Orissa 67, 71, 72.
 8. Discussion by B. K. Ray, C.J. in *Bala Majhi* A.I.R. 1951 Orissa 168, 173, para. 14.
 9. *Patey Singh v. Emp.*, A.I.R. All. 1931 609, 615 (Boys and Sen JJ.).
 10. *Emp. v. Nazir*, A.I.R. 1933 All. 31, 37.
 11. *Mohomed Ali v. Emp.*, I.L.R. 56 All. 302; A.I.R. 1934 All. 81, 84 (Sulaiman C.J.).
 12. *In re Shivabassappa*, A.I.R. 1959 Mys. 47, 49, para. 4.
 13. *R. v. Moti*, A.I.R. 1953 All. 792, 794, 795 para. 7 (Malik C. J.).
 14. *Paramhansa v. State*, A.I.R. 1964 Orissa 144.
 15. *In re R. Reddy*, A.I.R. 1953 Mad. 74.
 16. *In re Sainambu*, A.I.R. 1953 Mad. 564.
 17. *Emp. v. Panchkari Dutt*, I.L.R. 52 Cal. 67; A.I.R. 1925 Cal. 587 (Asutosh Mokerji J.).
 17. See *Emp. v. Jamuna Singh*, A.I.R. 1947 Pat. 305, 322-325, 328, paras. 33 to 39, 47 (discusses English law also).
 18. *Emp. v. Radhe Halwai*, 7 C.W.N. 220.
 19. *State of Kerala v. Madhavan*, A.I.R. 1964 Kerala 232.
 20. *Shrilal v. Aggarwal* A.I.R. 1960 M.P. 135.

Legislature could not have contemplated that the person must be released after 15 days if, as in the case of grave crimes, the investigation takes more than 15 days and it becomes necessary to continue the investigation. The Explanation to section 344(2) was cited in support of this view as making it clear that section 344 also relates to a stage where the offence is *still under investigation*.

It may also be noted, that the Calcutta High Court has taken conflicting views in the matter.^{1 2}

A clarification on the subject is, therefore, all the more necessary.

The Explanation to section 344(2) was not contained in the Code of 1861. It was inserted by section 194 of the 1872 Code, for the first time.

Accused not to be detained by police more than twenty-four hours without special authority.

Sections 124 and 194 of the 1872 Code (corresponding to present sections 167 and 344) were as follows:—

“124. No Police officer shall detain an accused person in custody for a longer period than, under all the circumstances of the case, is reasonable, and such period shall not, *in the absence of the special order of Magistrate*, whether having jurisdiction to inquire into or try the case or not, exceed twenty-four hours, exclusive of the time necessary for the journey from the place of arrest to the Magistrate’s Court.

If the investigation has not been completed within twenty-four hours and no such special order has been passed, and if there are grounds for believing that the accusation is well founded, the officer in charge of the police-station shall forward the accused person to the Magistrate having jurisdiction, with a statement of the offence for which he has been arrested.

A Magistrate authorising detention under this section shall record his reasons for so doing.

If such order be given by a Magistrate other than the Magistrate of the District or of a Division of a District, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is subordinate”.

Adjournment of inquiry and remand.

“194. If, from the absence of a witness or from any other reasonable cause, it becomes necessary or advisable to *defer the examination or further examination* of witnesses, the Magistrate may, be a written order, from time to time adjourn the inquiry and remand the accused person for such time as is deemed reasonable, *not exceeding fifteen days*.

1. *Bhola Nath v. Emp.*, I.L.R. 51 Cal. 402; A.I.R. 1924 Cal. 614, 616 (Grves & Paton JJ.).

2. *Superintendent and Legal Remembrancer v. Bidhindra*, A.I.R. 1949 Col. 143, para 5 (Roxburgh and Blank JJ.).

Instead of detaining the accused person in custody during the period for which he is so remanded, the Magistrate may release him, upon his entering into a recognizance, with or without a security or sureties, at the discretion of such Magistrate, conditioned for his appearance before such Magistrate at the time and place appointed for the continuance of such examination.

Explanation: After commencing the inquiry, if sufficient evidence has been obtained to raise a suspicion that the person accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable ground for a remand.

In the Code of 1882, section 167 used the words "not exceeding fifteen days", while section 344 used the words "*not exceeding fifteen days at a time*". Moreover, section 344 in that Code spoke of 'postponing' the commencement of the inquiry, and the Explanation did not open with the words "After commencing the inquiry".

When the Bill which led to the Code of 1898 was introduced, clause 167(2), first sentence, did not contain the words "in the whole". The Select Committee which considered the Bill¹ stated as follows:—

"*Clause 167*—It has been held by the High Court of Madras² that the clause does not contemplate remands for successive period of fifteen days. We think that this decision is right and have put in words to make the point clear. Any further proceedings should be taken under section 344".

The Select Committee, accordingly, added the words "in the whole" in section 167(2), first sentence. It seems, that in the debates on the 1898 Bill, (after the Report of the Select Committee), an amendment was moved to substitute for the words "in the whole" the words "at any one time". It would appear,³ that the Government of Bombay had considered the restriction indicated by the words "in the whole" undesirable—"since important cases arise in which the police require time for investigation and for the collection of evidence, while such cases would frequently be prejudiced by any such proceedings in court as are contemplated by section 344 of the Code." The amendment was, however, rejected after some discussion.

(The Law Member, Mr. Chalmers, after referring to the conflicting decisions on the subject, stated that he could not express an opinion as to which view was preferable, since that was matter for people with Indian experience.

1. Legislative Council Debates, 12th March, 1898, speech of Mr. H.E.M. James.
 2. The reference seems to be to *Q.E. v. Engadu*, (1887) I.L.R. 11 Mad. 98.
 3. Legislative Council Debates, 12 March, 1898, speech of Mr. James.

The Hon'able Mr. Nicholson said, that while remands under section 167 could be ordered by any Magistrate whether he had or had not jurisdiction, the Bill (as amended by the Select Committee) provided that such preliminary detention should not exceed fifteen days in all. At the expiry of this period, he said, the suspect must either be released or placed before the Magistrate having jurisdiction, with a report. He added—

“Such report, however, need not be the final charge sheet, and in fact, is usually an occurrence report, nor is it necessary for the Magistrate to begin enquiry thereon; on the contrary, by section 344 he is expressly empowered to postpone such commencement and to give any reasonable number of remands of fifteen days at a time if reasonable cause is shown, and the Explanation to section 344 expressly states, that if there is evidence creating a suspicion that the accused has committed an offence, and that further evidence may be procurable, if a remand be granted, that is a reasonable cause for remand. A man arrested, perhaps merely on suspicion, ought not to be detained indefinitely in custody under section 167, while the police are running round, hoping to find out something. If the police had found out something which casts *reasonable* suspicion, on the person in custody, he could be detained under section 344 for a reasonable time. If they had not found out evidence which gave ground for action under the Explanation to section 344, he should be released.”

Reading sections 61, 167, 169, 170 and 344 together, one finds that after expiry of the time allowed by sections 61 and 167, an accused must either be (1) released by the police under section 169, or (ii) forwarded for taking cognizance under section 170 to a Magistrate empowered to take cognizance upon police report. The Magistrate may either take cognizance and grant remand under section 344, or released him¹. He cannot grant remand under section 344 to enable *completion of the investigation*. Thus, the narrower view is correct

The controversy on the subject was referred to in the 14th Report² of the Law Commission, and the recommendation made in that Report was that:—

(i) Section 167 should be amended to enable a magistrate to remand an accused to custody for a period exceeding fifteen days but not exceeding sixty days if the investigation is not completed within that period;

(ii) it was wrong to utilise section 344, (for the purpose in question as that would mean, in effect, giving an “unrestricted licence to the police and the discretion of the Magistrate can be seldom effectively exercised”

1. Cf. *Bhola Nath v. Emp.*, A.I.R. 1924 Cal. 614, 615, 616, 167.

2. 14th Report, Vol. 2, pages 757 to 760, paragraphs 52 to 55, and summary, 763, item No. (17).

APPENDIX 16

*Recommendations in respect of others Acts.*1. *The Bankers' Books Evidence Act, 1891 (18 of 1891).*

This Act may be amended so as to extend some of its provisions to investigation by the police.¹

2. *Indian Penal Code, 1860 (45 of 1860)*

(a) The question whether imprisonment for life should be rigorous or simple may be considered under the Indian Penal Code.²

(b) Section 179 of the Indian Penal Code and other connected sections may be amended so as to ensure that a refusal to answer questions under section 161 of the Code of Criminal Procedure, 1898, is made punishable.³

(c) Similar amendment of the above-mentioned sections of the Indian Penal Code will be necessary in respect of a refusal to answer questions under section 175 of the Code of Criminal Procedure, 1898, if section 175 of the Code of Criminal Procedure is amended so as to omit the word "truly".⁴

1. Paragraph 216, body of the Report.

2. Paragraph 162 of the body of the Report.

3. Paragraph 352 of the body of the Report, read with Appendix 11 (containing Note on section 161).

4. Paragraph 389 of the body of the Report.

LAW COMMISSION
REPORT
ON
CODE OF CRIMINAL PROCEDURE
[Sections 1 to 178]

MINUTES OF DISSENT
BY
SHRI RAMA PRASAD MOOKERJEE
MEMBER, LAW COMMISSION

I have signed the Majority Report subject to a Minute of Dissent. I indicate in this Minute the principal grounds on which I differ from the majority.

I. Part only of the Code should not be taken up for revision.

I feel very strongly that it is not only impracticable but not proper to attempt revision of or submit an Interim Report on a portion of the Code of Criminal Procedure. The different parts are so inter-dependent and interlinked that it is not possible to deal with the earlier part without reference to the later sections and Schedules.

Within the first part falls Chapter I dealing with Definitions. It is impossible to come to any decision with regard to many of the problems included in the Definition section without reference to the subsequent sections and the manner in which these other sections are proposed to be dealt with.

So also the constitution and classes of Criminal Courts and particularly the powers of Courts as in Chapters II and III.

On a reference to the recommendations as made by the Commission on the present occasion, in respect of amendments under Chapter III, it would be noticed on a comparison with the recommendations as in the 14th Report of the Commission in Volume II and of the provisions as found under the amendments introduced in Bombay and Punjab, and those introduced by Executive Orders in Madras—how divergent the views are. Such divergences are due mainly to the conflicting approaches in respect of the later sections of the Criminal Procedure Code.

Even in the Report as now submitted casual references have been made in various places to the contents of the later sections of the Code.

II. *Principles directed or decided upon to be followed.*

If reference be made to the direction issued by the Government and announced on August 5, 1955 to the Parliament when the Law Commission was constituted, it will appear that the principles on which revisions were to be made in the existing procedural law were:—

“Firstly to review the system of judicial administration in all its aspects and suggest ways and means for improving it and making it speedy and less expensive.

* * *

Enquiry into the system of judicial administration will be comprehensive and thorough including in its scope:—

- (a) the operation and effect of laws, substantive as well as procedural, with a view to eliminating unnecessary litigation, speeding up the disposal of cases and making justice less expensive;
- (b) the organisation of courts, both civil and criminal;
- (c) recruitment of the judiciary; and
- (d) level of the Bar and of legal education.”

In the 14th Report of the Law Commission on the Reforms of Judicial Administration certain amendments among others as regards both the Civil Procedure Code and the Criminal Procedure Code were made. As pointed out in that Report for obvious reasons it could not enter into detailed examination of either of the Procedure Codes or the law of Evidence. It was then observed that the Commission would later on make recommendations in a comprehensive manner. It was further considered that before final consideration full implications of the amendments should be circulated to the State Governments for expression of opinion.

The Commission had then also considered that it would be advantageous to take up the revision of the Criminal Procedure Code and the relevant sections of the Evidence Act also simultaneously.

The normal practice in the Commission also in the past had been that either on a proposal for revision of an Act or of a particular topic referred to the Commission for opinion, the research staff under the Commission investigated the points, placed relevant materials properly arranged by the Secretary to the Commission and the Draftsman as a Draft Report. That Draft Report along with the materials on which such Draft was prepared were considered by the Commission as a whole in successive meetings. The Draft Report was then circulated amongst the Governments, High Courts and certain other bodies for expression of opinion on the Draft. Replies as received were tabulated and a final Report was drawn up on a consideration of the opinions received and further materials, as might be collected by the Commission staff and the whole-time Members.

In certain cases questionnaires were circulated for eliciting public opinion and such information was considered in detail before arriving at the final decision.

So far as procedure is concerned on the Criminal side, the Criminal Procedure Code is rightly considered to be one of the most important pieces of statutory provisions effecting the country as a whole in which not only the administration, different branches of public opinion, but ordinary citizens also are concerned. The procedure stated above was not followed in this case.

III. *Consideration of Procedure followed in other countries and Systems.*

In my view, when we have to approach the problem of reform of Criminal Procedure in India, we ought not to be bound by the frame or contents of the law as had been enunciated under the Anglo-Indian Code but also try to improve the same after examining experiments and modification in Criminal administration as had been made in other countries and systems. No doubt, difficulties that have been felt in the administration of criminal justice by the different High Courts and by the Supreme Court of India have to be considered to resolve the divergent opinions.

For persons who have been trained and brought up under the Anglo-Indian system are not always responsive to other systems of procedure and legal institutions, the Continental System is an anathema to many. But need I refer to recent American Codification as in Wisconsin and Illinois in 1955 and 1961 respectively? If reference be made to the above and to the 1964 draft of the New York Criminal Code—which is more comprehensive and systematic than its predecessor, one will notice “the influence of the Model Penal Code of the American Law Institute which is patterned after European Criminal Codes”, “Many of the basic concepts of the Soviet Criminal Law and Procedure are in the “continental” traditions”.

All the more it is desirable and necessary to know more of the Continental System and examine whether any as in that System can or should be introduced for the betterment and improvement of our System.

IV. *Separation of Executive from the Judicial.*

Another important factor which cannot, and has not to be omitted from the scope of our investigation is the effect of the Directive Principles contained in Article 50 of our Constitution about the separation of executive from the judicial. This has not been overlooked altogether—but considered in a limited way.

It should not be overlooked that attempts are being made in different States for the separation of the judicial and executive functions. In certain States, separation has been effected by introducing local amendments of the Code

of Criminal Procedure and in a large number by issuing Executive Orders without making any alteration in the Code itself.

As far as, I have been able to gather, such separation has been introduced by amendment of the Code of Criminal Procedure in Bombay which has now been enforced in the new States of Maharashtra and Gujarat, also in the Punjab which has also now after separation been effective in Chandigarh and Harayana. Recently in 1965 separation has been introduced in Mysore by an amending Act.

It had not been possible to consider in detail the provisions as introduced in the different States—as a matter of fact all the relevant literature and copies of all the Executive Orders could not be obtained.

I had in my personal capacity occasion to visit during the last few months a large number of States both in the Eastern and Western parts of India in addition to some in the North. From the discussions that I could have with Judges or Executive officers—in my private capacity—I found that discussion with the persons in direct authority threw greater light on the effect of particular provisions than a mere reading of the text of the provisions in the Amending Acts and Executive Orders could afford. The Commission could not have advantage of meeting representatives from the States—could not even obtain the written views from the different States about the provisions as proposed in the Report for a portion of the Code.

It will be noticed from Annexure 'A' how far attempts have been made in the different States for separation of Executive from the Judicial.

As noticed already in a large number of cases copies of the Executive Orders were not before us.

According to the Law Commission as expressed in the 14th Report, preference was made on many of the important topics and the policy and details as introduced in Bombay. In the present Report to be submitted by the Law Commission, on many of such points the recommendation made is based upon the Punjab view.

As stated above, for a proper appreciation and the effect of separation of executive from the judicial, mere examination of the texts of the statutes or directions issued will not be sufficient. Reference has to be made to the responsible officers who had to apply these provisions to ascertain whether such provisions were salutary and practical. For this purpose, reference is essential to the State Governments, as such, and to examine representative witnesses, or in my view, obtain from questionnaire or memoranda the effect of such provisions. The provisions as we have found, in the three States to which references were made by the

Commission on the present occasion differed in material particulars, and that by itself makes it more necessary to evaluate the effect of such rules as in the different States.

It cannot also be overlooked that some are very often influenced by notions of maintenance of peace and order; and whether one should have greater importance attached on maintenance of peace and order and rely more on police and the executive branch of the administration or emphasise the independence of the judiciary and rely more on the courts than on the Police. My view is definitely the latter one. Before the Commission arrives at a decision reference must be made as to *how* the Rules and procedure followed in different parts of India produced the desired effect and result.

As indicated already, we had not the time or opportunity even to discuss the details of the system and policy in vogue in the majority of the States, as we had not even copies of *all* the Executive Orders issued.

With a view to appreciate the implications of Article 50 of the Constitution "the States shall take steps to separate the judiciary from the executive in the public services of the State" divergent views have been expressed as noticed in the different Amending Acts and the Executive Orders issued by the majority of the State Governments.

To resolve these divergent view points, there is no other provision in the Constitution to interpret the implications of Article 50. But, it may perhaps be possible to refer to the provisions of Article 237 which is a consequential corollary to Article 50. Under Article 236 what categories of judicial officers would come under the purview of the expression "of District Judge" finds mention. There can, therefore, be no scope for any controversy that these functionaries are purely Judicial Courts. It may be noticed that under Article 236(a) under the expression "District Judge", magistracy as a whole does not find mention except Presidency Magistracy. This is so because both executive and judicial functions are now combined in the same functionary from which judiciary has to be separated. To what extent, the judicial magistracy would be separated from the existing Executive pattern may be stated to have been in a way suggested under Article 237. In order that these separated judicial magistracy would be brought under the effective and complete control of the High Court under Article 237, the Governor may have to fix a date by public notification from which date any class or classes of Magistrates in the State may be brought within the category of "judicial service" as finds mention under Article 236(b) subject to such exceptions and modifications as may be specified in the notification. Article 237, therefore, which may provide the clue to understand the implications under Article 50 may have to be stretched to its legal consequences so as to deduce the logical and lawful inference of the scope under Article 50.

“Any class or classes of Magistrates” as is mentioned under Article 237 can be properly construed if we would be in a position to appreciate the dictum of the classification of magistracy which in the absence of any clarification in our Constitution has to be referred to the relevant provisions under the Criminal Procedure Code by virtue of which the class or classes of Magistrates have been created.

Though, therefore, under section 6 in Chapter II of the Code of Criminal Procedure, different classes of Criminal Courts in India are mentioned, difficulties arise in laying down the position and the powers of such Courts unless we travel into the latter parts of the Code of Criminal Procedure which in the present Report we are not discussing.

In my view, there is no escape from the conclusion that under the Directive Principles of the Constitution, in any matter in which evidence has to be taken by a tribunal or authority and decision has to be reached on appreciation of such evidence that must be by a judicial authority which is to be independent of the Executive control in the fullest significance of their term.

It is not possible in this short note to discuss in detail the effect of such a principle on the different sections of the Criminal Procedure Code. I refrain from, therefore, at this stage to discuss even these sections which are dealt with in the present Report—like section 144 or sections 108 to 110 and many others.

V. General questions which need consideration before particular sections are considered.

I had expressed the view that it is not by tinkering amendments of particular sections of the Code of Criminal Procedure that the ideals which had been laid down by the Government when the Law Commission was appointed or the manner in which reform in procedure can be effected, can be fully implemented. For a proper and satisfactory criminal administration topics which require serious considerations are—

(i) the type of men who should be incharge of administration of criminal justice.

(ii) The terms and conditions under which the persons responsible should be holding their appointments.

(iii) Can the investigation and enquiry as in force be made more rational so as to reduce harassment of innocent persons and expedite bringing to justice persons really accused of commission of such offence.

(iv) How far and to what extent the method of trial can be modified or reformed keeping in view the trust of the general public in the judiciary and if possible, reducing the number of appeals after ensuring that the original trial is more satisfactory, expeditious and less expensive as at present.

One cannot overlook the fact that the higher appointments which are made on the executive and administrative side are after All-India competitive examination where the best intellect may be represented. The terms and conditions of such services are more attractive than what can be offered to the State Judicial Service. It is common knowledge, for all those who are intimately connected with the judicial administration in the States are aware of the fact that because of such comparatively lower grades of pay and other terms of appointments, very few are attracted who have attained high academic attainments and are of high intellectual calibre. During the last few years, appointments of Munsifs had been very difficult in Bengal because of paucity of very competent candidates. Mere separation of executive from judicial will be of little assistance or ensure improvement unless the terms and conditions of service are brought at par with those for the Executive and Administrative side.

Persons are also not attracted to the State Judicial Service because those who go in for the Executive Branch have chances of promotions in diverse departments of administration which one joins the Judicial Service cannot have.

As regards the improvement of investigation, there is the possibility of improvement if we turn our eyes to the procedure which is in vogue in the "Continental System"—keeping in view, no doubt, always that we must not divert from the Rule of Law.

As the Report does not deal with the latter sections and Schedules of the Code, it is not necessary to refer to the method of trial now in vogue and the various provisions for Appeals and Revisions.

Reference need be made to the observations as appearing in the 14th Report that sufficient time had not elapsed at that stage in 1962 after the various amendments of 1955 had been introduced. The Commission had not at that stage considered "revision of the Code in toto". The position is, however, altogether different in 1967 when we are revising the Code in its entirety and with the wider terms of reference for introducing such changes as are deemed necessary and appropriate.

CONCLUSION

In view of the very short time available, it is not possible for me at this stage to deal exhaustively with all the points that arise or with the different sections.

Sd/-

(Rama Prasad Mookerjee).