<table>
<thead>
<tr>
<th>Block</th>
<th>CRIMINAL JUSTICE PROCESSES</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNIT 1</td>
<td>Investigation and Prosecution Processes 5</td>
</tr>
<tr>
<td>UNIT 2</td>
<td>Trial Processes 21</td>
</tr>
<tr>
<td>UNIT 3</td>
<td>Correctional Processes 34</td>
</tr>
<tr>
<td>UNIT 4</td>
<td>Juvenile Justice System 47</td>
</tr>
</tbody>
</table>
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BLOCK INTRODUCTION

The basic principles of criminal justice process is that everyone is presumed to be innocent in the eyes of law unless proved otherwise guilty in the court of law. Continuous rise in crimes and criminal activities both in number and nature is a great threat to peace and security of society and the State. This has compelled the State to create various statues such as the police, the prosecution and the judiciary respectively to investigate, prosecute and punish criminals. Block 2 gives an overview of the police, prosecution and the judiciary. In this Block, you will get an idea of the various processes to punish criminals. In all there are four units in this block.

Unit 1 deals with ‘Investigation and Prosecution Processes’. In this unit, we have tried to explain the processes of investigation of cognizable and non-cognizable offences. We have also elaborated the concepts and processes of framing of charge and victim compensation scheme.

Unit 2 is on ‘Trial Processes’. In this unit, the various stages of a criminal trial have been explained. The unit also elaborately discusses the constitutional rights of the accused and legal aid.

Unit 3 focusses on the ‘Correctional Processes’. In this unit, we have addressed the development of prison reforms in India after independence. The concepts of probation and other alternatives to imprisonment have also been discussed in detail.

Unit 4 deals with ‘Juvenile Justice System’. In this unit, we have highlighted the significant developments on Juvenile Justice System both internationally and in India. Apart from this, we have also discussed the salient features of the Juvenile Justice Amendment Act, 2006.

After going through all the four units, you will be able to have basic idea of the criminal justice processes in India.
UNIT 1 INVESTIGATION AND PROSECUTION PROCESSES

Content
1.0 Objectives
1.1 Introduction
1.2 The Police and Investigation of Cognizable Offences
1.3 The Police and Investigation of Non-cognizable Offences
1.4 Territorial Limits of the Police to Investigate Cognizable Offences
1.5 Framing of Charge
1.6 Current Practices and Procedures for Withdrawal of Prosecution
1.7 Victim Compensation Scheme
1.8 Power of Police to Arrest Restricted
1.9 Let Us Sum Up
1.10 Further Readings and References

1.0 OBJECTIVES

By the end of this unit, you will be able to:
• understand the process of investigation of cognizable and non-cognizable offences by the police;
• analyze the various processes involved in framing of charge;
• identify the current practice and procedures for withdrawal of prosecution; and
• have an understanding of the victim compensation scheme.

1.1 INTRODUCTION

The practice of crimes and criminal activities is of ancient in origin. People commit crimes for various reasons. Generally, they indulge in criminal activities to satisfy their physical or psychological needs. Love, lust, hate, anger, jealousy, and anxiety are some of the important motivating factors for crimes. Continuous rise in crimes and criminal activities both in number and nature is a great threat to peace and security of the society and the State. According to some estimates, in India alone, more than 60 lakh crimes of different kind are being reported every year. More than 90 lakh criminal cases are awaiting adjudication. This has compelled the State to create by statutes strong agencies such as the police, the prosecution and the judiciary respectively to investigate, prosecute and punish criminals and ensure its citizens peace and security in their daily lives. These functionaries are collectively known as ‘Criminal Justice machinery.’
Investigation of crime refers to systematic and procedural way of collection, collation and comprehension of facts relating to a crime by the police or any other authorized authority. The paramount duty of the police is to investigate crimes and render necessary assistance to the prosecution and the judiciary to prosecute and punish criminals under law. However, the task of investigation is tough and tiresome process involving various phases and facets. It generally commences with reporting or registration of crimes and passes through the stages of arrest of accused; search and seizure; examination of witnesses; collection of evidence; bail and remand process and preparation and filing of charge sheet/final report to courts. The Code of Criminal procedure (hereinafter referred to as CrPC) provides for procedures to be followed by the investigating police in efficient and effective investigation. Thus, the investigating police must acquaint themselves with various procedures, rules and orders laid down under the Code of Criminal Procedure, the Evidence Act, the Penal Code, Special and Local Laws and the Police Manuals. They should also keep abreast of day-to-day judgements of the Supreme Court and High courts.

1.2 THE POLICE AND INVESTIGATION OF COGNIZABLE OFFENCES

The police are a vital and indispensable executive organ of the State for prevention and detection of crimes. The same has been clearly set out in the Preamble to the Police Act, 1861. Section 2(h) of CrPC has defined the term “investigation” as: “All the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf.” In other words, it refers to systematic and procedural way of collection, collation and comprehension of facts pertaining to a crime.

The police are clothed with powers under Section 156 CrPC to conduct investigation in cognizable offences. Under the section an officer-in-charge of a police station, without the order of a Magistrate, may investigate any cognizable case declared under any law in force. Investigation of cognizable offence is the province of the police. In normal course, the judiciary is not supposed to interfere with smooth conduct of investigation. As per Section 2(o) of CrPC the police officers of and above the rank of a head constable in a police station can investigate cognizable case. The police officers who are working in Corps of Detectives and Central Bureau of Investigation are also empowered to investigate. When it is referred to a cognizable case under Section 156 CrPC, it is defined under Section 2(c) CrPC as: “Cognizable offence” as an offence for which, and “cognizable case” refers to “a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.” In other words, the police can arrest without a warrant from a competent Magistrate.

The Code of Criminal Procedure also provides for investigation of cognizable offences by a private person. Under Section 202 (1) of CrPC a Magistrate is empowered to entrust investigation to a private person, if he thinks so, for special and specific reasons. However, such person shall not have power to arrest a person without warrant from the Magistrate. Of course, such instances of entrusting investigation to private persons are very rare in the annals of criminal investigation. Only when the Magistrate has a reason to lose confidence and faith in the investigating police then only he can entrust the investigation of cognizable offences to a private person.
1.3 THE POLICE AND INVESTIGATION OF NON-COGNIZABLE OFFENCES

Under the scheme of CrPC, the police are not vested with powers to investigate non-cognizable offences on their own volition as non-cognizable offences are considered to be petty, private criminal wrongs which may be committed in the society in normal course and do not deserve to be investigated and punished severely. Such offences may be investigated by the police, provided, a competent Magistrate orders so in writing. The aggrieved person can, however, approach jurisdiction judicial Magistrate with a complaint and the latter may take necessary steps for the enquiry and trial of the offender. Section 155 (1) CrPC has categorically laid down that if any person furnishes information to an officer-in-charge of a police station of the commission of a non-cognizable offence, the police officer shall enter or cause to be entered the substance of the information in a book- Station House Diary/General Diary- prescribed under the Police Act, 1861, for this purpose. The police officer shall then refer the informant to the Magistrate. The police officer has no further duty unless he is ordered by a Magistrate to investigate the case.

The phrase “non-cognizable offence” has been defined under Section 2(l) CrPC, as: “An offence for which, and “non-cognizable case” refers to a case in which, a police officer has no authority to arrest without warrant.” Powers of the police to investigate a non-cognizable case depends on the order of a competent Magistrate. As envisaged under Section 155(2) CrPC that no police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial. In other words, the police can investigate non-cognizable offence with the written order of a competent Magistrate. So also they can arrest a person for the commission of a non-cognizable offence only with a written warrant from such a Magistrate. If a police officer investigates a non-cognizable case without the order of a Magistrate, such a non-conformance to the mandatory provisions laid down in Section 155(2) may be an important factor in vitiating the ultimate proceedings and may also be considered as violation of Article 21 of the Constitution of India. Therefore, the police should be very conscious and cautious of their duties and responsibilities and should not give room for such misadventures and get trapped in the dragnet of law.

1.4 TERRITORIAL LIMITS OF THE POLICE TO INVESTIGATE COGNIZABLE OFFENCES

As far as territorial limits of the police for investigation of cognizable offences are concerned Sections 177 to 189 CrPC have clearly laid down several provisions. In normal course, when offences are reported in a particular police station limits then police in that police station will have jurisdiction to register the case and proceed with investigation. Section 178 CrPC provides for when an offence committed partly in one local area and partly in another or an offence committed is continuous one and continued to be committed in more local areas than one any one of the police stations having jurisdiction can receive complaint and register case and investigate. In so far as registration of complaint there is no territorial bar and the police can continue with the investigation of a case till the jurisdictional police take over the case for further investigation.
1.5 FRAMING OF CHARGE

One of the basic requirement of a fair trial in criminal cases is to give precise information to the accused as to the accusation against him. This is very important to the accused in the preparation of his defence. In all trials under the Code of Criminal Procedure (Cr.P.C.) the accused is informed of the accusation in the beginning itself. In case of serious offences the Code requires that the accusations are to be formulated and reduced to writing with great precision and clarity. This charge is then to be read and explained to the accused person. All this has an important effect on the administration of criminal justice.

The framing of charge is a very important stage in Criminal trial. Any charge framed which is inconsistent with the provisions of law is liable to be set aside. The framing of the charge is enumerated in Section 228 of Cr.P.C.

Meaning of Charge

The Code does not give any proper definition of the term “charge”. Section 2(b) only says that “charge” includes any head of charge when the charge contains more heads than one.
The sections dealing with charge do not mention who is to frame the charge. The provisions dealing with different types of trials however provide that it is always for the court to frame the charge and not the prosecutors. The court may alter or add to any charge at any time before the judgment is pronounced. But if a person has been charged, the court cannot drop it. He has either to be convicted or acquitted.

**Framing of Charge in Trial Before a Court of Session**

By reading Sections 227 and 228 of Cr.P.C. together we can understand provisions regarding framing of charge in trial before a court of session.

If upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf (S.227) the Judge is of opinion that there is ground for presuming that the accused has committed an offence which:

a) is not exclusively triable by the court of session, he may, frame a charge against the accused and, by order transfer the case for trial to the chief Judicial Magistrate, and there upon the chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant cases instituted on a police report;

b) is exclusively triable by the Court, he shall frame in writing a charge against the accused [S.228(1)].

The purpose of Section 227 and 228(1) of the Code is to ensure that the court should be satisfied that the accusation made against the accused person is not frivolous and that there is some material for proceeding against him. The stage prior to the framing of a charge is not expected to be a dress rehearsal of a trial, or in other words, the details of all materials which the prosecution will produce or rely on during the stage of the trial, are not expected to be produced or referred to before the judge at the time of the opening of prosecution. Nor is it obligatory on the part of the court to give reasons for its framing charges.

Sections 227 and 228 are inter-related and should be read together. The general principles in regard to the discharge of the accused person under S. 227 are quite relevant and applicable while considering the provision in S. 228(1) relating to the framing of charge against the accused.

**Framing of Charge in Warrant Cases by Magistrates**

If upon such consideration of the police report and the documents sent with it under S. 173, the examination of the accused if any, and hearing the parties, the magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under chapter XIX of the Code of Criminal Procedure, which such magistrate is competent to try and which in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused [S. 240(1)].

Section 240(1) above requires a magistrate to consider the documents referred to in S. 173 before framing charges. The documents referred to in S. 173 consist of records of investigation which are not admissible in evidence at the trial but can be made use of for limited purpose as stated in S. 162. This material does not at the stage of framing a charge have the status of evidence tendered on oath nor has its veracity been tested by cross-examination or contradicted by the evidence which the accused may lead in defence. It may be that at the trial, the material
Criminal Justice Processes

on the basis of which a charge has been framed may not stand the test of cross-examination or is rendered unacceptable but these considerations become available only at the conclusion of the trial and do not enter into consideration at the stage when the magistrate has to make up his mind as to whether or not he should frame a charge.

The order framing the charges does substantially affect the person’s liberty and according to the Supreme Court, it is not possible to countenance the view that the court must automatically frame the charge merely because the prosecuting authorities, by relying on the documents referred to in S. 173, consider it proper to institute the case. The responsibility of framing the charges is that of the court and it has to judicially consider the question of doing so. Without fully adverting to the material on the record it must not blindly adopt the decision of the prosecution. Nor should it be influenced by the counsel for the complainant.

**Guidelines for Framing Charge Under Ss. 239 & 240**

The stage at which the magistrate is required to consider whether to discharge or to frame a charge is of vital importance both to the prosecution as also the accused. In view of this Ss. 239 and 240 prescribe some definite guidelines which the magistrate must observe and comply with before arriving at his conclusion of discharging the accused or of framing a charge against him. These sections require that the magistrate must consider the police report and all the documents furnished by the police along with such report and if need be, to examine the accused, hear the arguments of both the sides and then arrive at his conclusion, independent of and uninfluenced by the police opinion, whether the material placed before him if accepted at its face value, would furnish a reasonable basis or foundation for the accusation. In doing so, the magistrate is of course expected to apply his judicial mind to the facts of the case keeping throughout in view the essential ingredients of the offence for which the accused is sought to be charged. Once a person has been charge-sheeted, there is no question of dropping any charge. He has either to be acquitted or convicted.

**Explaining the charge to the accused**—After the framing of the charge, it shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried. The section requires that the charge should not only be read out but should also be explained to the accused in a manner which ensures that the accused has understood it properly. If he has been made aware of the offences, a mistake in charges while taking cognizance may not prejudice the accused. The considerations mentioned in section 1.4 are also applicable here.

In a warrant case, a magistrate is competent to pass an order after the charge is framed, either acquitting the accused or convicting him for the offence. If he has to acquit the accused, he has necessarily to find him not guilty to the charge on the evidence that is already on record. But the absence of the complainant does not empower him to acquit the accused. There is no provision of law which enables a magistrate to dismiss the complaint or pass an order of discharge in a warrant case after framing a charge. Once a charge is framed, ordinarily the magistrate has to proceed with the trial which may ultimately result in acquittal or conviction of the accused.

**Points to consider while Framing Charge with Some Illustrative Cases**

a) **No Jurisdictional Error**

Wrong transfer of case to the Chief Judicial Magistrate by sessions Court under section 228 of Cr.P.C. suffers from jurisdictional error. In the case of **State of
Karnataka v. Laxman Yamanappa Dalawai, the Sessions Court without even framing of charges, transferred the case to the CJM. The order of CJM convicting the accused under Section 408 of Penal Code was held to be without jurisdiction as Sessions Judge had no power to transfer the case committed to him to the CJM under S.228. He ought to have tried case himself.

b) Charge should be on the basis of material on record

In the case of Sunil Kumar Jha v. State of Bihar, on the basis of complaint, the police registered a case under Section 498-A, 304B and 201/ 34 of I.P.C. for the un-natural death of woman within 7 years of her marriage. The police after investigation filed charge sheet against the petitioner only under Section 306 of I.P.C. However the trial Judge framed charge against the petitioner under Section 304-B and 201 by his order. The impugned order was challenged before the High Court. The High Court held that it is well settled that framing of charge on the basis of mere vague allegation in the absence of any material to connect the accused with the alleged offence would amount to an abuse of the process of the court. While framing the charges against the accused from the material on record, the court should see that a, prima facie case against the accused is made out. In this case, it is manifestly clear that the learned Judge while framing the charge has proceeded mechanically and not even applied his judicial mind. There is no indication at all that the Judge has considered any material presuming that the accused persons have committed an offence under Section 304-B and 201 of the Indian Penal Code., the impugned order passed by the learned Judge is bad in law and is liable to be quashed.

Check Your Progress II

Note: Use the space provided for your answers.

1) What is the meaning of charge? What are the guidelines for framing charge under section 239 & 240?

2) Discuss the procedure of framing of charge in warrant cases by magistrates.

3) Enlist the points to consider while framing charge.
1.6 CURRENT PRACTICES AND PROCEDURES FOR WITHDRAWAL OF PROSECUTION

Under the criminal justice process the withdrawal from prosecution has been justified on the ground of public peace, for the promotion of peace and security in a locality, to handle a disorderly situation or for halting a false and vexatious prosecution. The power to withdraw prosecution can be exercised by the Public Prosecutor (PP) only on the request of the State government or complainant. The decision whether to withdraw or not is only that of the PP and cannot be delegated to any other authority including the State government. But in reality, the PP has no role in deciding on withdrawal of the case and it is the executive that decides on the withdrawal.

In recent times, it has been noticed that public prosecutors have been pressurized by various forces to withdraw the prosecution where high profile people are involved. In Bhopal gas leak case criminal charges were withdrawn as the Union of India arrived at a settlement with the Union Carbide Corporation. In Best Bakery case (2004) also the Supreme Court unprecedentedly ordered a retrial in Maharashtra virtually indicting the government interference in Gujrat riot cases. Therefore, in present times, courts must be very cautious in granting the application for the withdrawal from prosecution.

Withdrawal of Prosecution

a) Meaning and scope

Section 321 enables the public prosecutor to withdraw from the prosecution of any person on certain considerations with the consent of the court. Normally, once prosecution is launched, its relentless course cannot be halted except on sound considerations. Justice ordinarily demands that every case must reach its destination and not interrupted en route. As custodian of administration of justice, it is the duty of the State to prosecute those who commit crimes. Under the Code, prosecution of an offender for serious offences is primarily the responsibility of the executive, hence, withdrawal from the prosecution is an executive function of the public prosecutor. The section provides for “the withdrawal from the prosecution” and not “the withdrawal of the prosecution”. Withdrawal from a prosecution means retiring or stepping back or retracting from the prosecution, in other words, withdrawal of appearance from the prosecution or refraining from conducting or proceeding with the prosecution. However, when the court consents to such withdrawal from the prosecution the accused person shall be discharged or acquitted in accordance with the provisions of cls. (a) and (b) of S. 321. The withdrawal from prosecution under the section may be justified on broader considerations of public peace, larger considerations of public justice and even deeper considerations of promotion of long lasting security in a locality, order in a disorderly situation or for halting a false and vexatious prosecution.

b) Who may apply for withdrawal

Section 321 of the Code enables the public prosecutor or assistant public prosecutor in charge of a case to withdraw from the prosecution any person either generally or in respect of any one or more of the offences for which such person is tried with the permission of the court. The effect of such withdrawal is that the proceedings come to an end.
If the prosecution is being conducted by the complainant on a private complaint, the Public Prosecutor is not entitled to apply for withdrawal of the prosecution in such a case.

c) Conditions for withdrawal of prosecution

For the withdrawal of prosecution, following conditions must be fulfilled-

i) Application for withdrawal from prosecution must have been made by the public prosecutor or assistant public prosecutor;

ii) Such public prosecutor or assistant public prosecutor must be in charge of the case; and if the Public Prosecutor in charge of the case has not been appointed by the Central Government and the offence, in respect of which the withdrawal from prosecution is sought, falls within any of the four categories mentioned in the proviso to S. 321, then in such a case, the prosecutor cannot move the court for obtaining its consent unless he has been permitted by the Central Government to do so. In such a case the court is also required to direct the prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution. The above provision requiring the permission of the Central Government has been enacted with a view to avoid any possible conflict of interest between the State Government and the Central Government.

iii) Consent for such withdrawal must have been granted by the court.

d) Time when prosecution can be withdrawn

Withdrawal from prosecution can be sought “at any time before the judgment is pronounced”. The words ‘before the judgment is pronounced’ clearly fix the outer limit or the ultimate point of time up to which withdrawal can be sought. Hence, an application for withdrawal of prosecution can be made at any time after the court has taken cognizance of the case but before it pronounces judgment. A case cannot be withdrawn after the accused is convicted by the trial court and the appeal against such conviction is pending. An appeal cannot be treated as continuation of the original proceedings while considering the provisions of Section 321.

e) Object and purpose of withdrawal of prosecution

The primary object of Section 321 appears to be to reserve power to the Executive Government to withdraw any criminal case on larger ground of public policy such as expediency of prosecution; maintenance of law and order; maintenance of public peace and harmony, social, economic and political; changed social and political situation; avoidance of destabilization of a stable Government. It may be necessary and expedient in public interest to withdraw from prosecutions arising out of mass agitations, communal riots, regional disputes, industrial conflicts, student unrest, etc. Wherever issues involve emotions and there is a surcharge of violence in the atmosphere, it has often been found necessary to withdraw from prosecutions in order to bring about a peaceful settlement of issues. To persist with prosecutions where emotional issues are involved may even be counter productive.
f) **Duty of public prosecutor**

Under section 321 it is the public prosecutor and not any executive authority who is entrusted by the Code with the power to withdraw from a prosecution. Therefore, though the public prosecutor may receive instructions from the government to withdraw from a prosecution, before making an application under Section 321, he has to apply his mind to the facts of the case independently without being subject to any outside influence. The statutory responsibility of deciding upon withdrawal vests in the public prosecutor. It is non-negotiable and cannot be bartered away in favour of those who may be above him on the administrative side. The Criminal Procedure Code is the only master of the public prosecutor and he has to guide himself with reference to the Code only. He cannot surrender his discretion, not even to the Government.

The public prosecutor must be straight, forthright and honest.

If the government is of the opinion that it would be in public interest to withdraw from prosecution, it may advise the public prosecutor to make an application for the said purpose. The public prosecutor, before initiating proceeding for withdrawal from prosecution may seek guidance from the policy makers, where large and sensitive issues of public policy are involved. It is his duty to protect administration of criminal justice against possible abuse or misuse by the Executive. He has to act as ‘Minister of Justice’. The sole consideration in deciding for withdrawal of prosecution is administration of justice and not political favours nor party pressures nor like concerns. The decision to withdraw must be of the public prosecutor, not of other authorities, even of those whose displeasure may affect his continuance in office.

g) **Duty of court**

The section confers wide discretion on the court to grant or withhold consent, but as in the case of exercise of all discretion, it must also be exercised judicially and on sound legal principles and not arbitrarily or unreasonably. No hard and fast rule can be laid down as to when consent should be granted and when it should be refused. It must ultimately depend upon the facts and circumstances of each case. On the one hand, grant of permission should not be considered as an empty formality and consent should not be granted for the mere asking. While on the other hand, the court cannot sit over the decision of the public prosecutor and refuse consent by reappreciating the grounds which led him to request the court for withdrawal of prosecution. If the court is of the opinion that the view of the public prosecutor is one which could in the circumstances be taken by any reasonable man, the court cannot substitute its own opinion for that of the public prosecutor.

At the same time, court should not grant permission unless it is satisfied that grant of permission would sub serve the ends of justice and there is no attempt to interfere with the normal course of justice for illegitimate objects. The act of granting consent is a judicial act and the court is entitled to ask the public prosecutor the reasons for withdrawal of prosecution in order to satisfy itself whether the public prosecutor has applied his mind uninfluenced by irrelevant and extraneous considerations and permission is not sought with an ulterior motive unconnected with this vindication of the law which the executive organs are duty bound to further and maintain. If the chances of conviction are far-fetched and bleak and
no adequate evidence is forthcoming in support of the prosecution, it is in public interest to allow prosecution to be withdrawn.\textsuperscript{34}

It is the duty of the court to appraise itself of the reasons which prompt the public prosecutor to withdraw from the prosecution. The court has a special responsibility in the administration of criminal justice. \textit{The ultimate guiding consideration must always be the interest of administration of justice and that is the touchstone on which the question must be determined whether the prosecution should be allowed to be withdrawn.}\textsuperscript{35}

h) \textbf{Locus standi of complainant}

\textit{De facto} complainant has no \textit{locus standi} in the matter of withdrawal from prosecution against the accused by the public prosecutor. It is, therefore, not necessary for the court to issue notice to the complainant or to afford hearing.\textsuperscript{36} He, however, can bring true facts to the knowledge of the court so as to enable the court to take an appropriate decision on the application of public prosecutor.\textsuperscript{37} In exceptional cases, \textit{e.g.}, in Veerappan case, a party interested in proper administration of justice may even challenge a decision of the court granting sanction.\textsuperscript{38}

i) \textbf{Effect of withdrawal of prosecution}

If the withdrawal from the prosecution is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences.\textsuperscript{39} If the withdrawal is made after a charge has been framed or when under the Code no charge is required to be framed, he shall be acquitted in respect of such offence or offences.\textsuperscript{40} Such discharge or acquittal will operate as a bar to a retrial.\textsuperscript{41} But if the order is not passed on merits or withdrawal is on a technical ground, no such bar will operate.\textsuperscript{42}

1.7 \textbf{VICTIM COMPENSATION SCHEME}

After section 357 of the principal Code, Section 357A has been inserted providing for Victim Compensation Scheme\textsuperscript{43} —

\section*{357A.}

1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).

3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.
4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer incharge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.

1.8 POWER OF POLICE TO ARREST RESTRICTED

Cr.P.C. (Amendment) Act, 2008 got President’s accent on February 21, 2009 which brings about major changes in the Criminal Procedure Code. This newly enacted law take away the powers of the police to arrest in cases of alleged offences which carry a maximum sentence up to seven years of imprisonment.

Once the law, Cr.P.C. (Amendment) Act, 2008, becomes effective, the police, instead of arresting the accused, will be obliged to issue him/her a “notice of appearance” for any offence punishable with imprisonment up to seven years. The person can be arrested only if he/she does not appear before the police in response to the notice.

Seven years or less is the maximum penalty for a lot of offences. These offences include such as attempt to commit culpable homicide, kidnapping, death by negligence, cheating, voluntarily causing grievous hurt, outraging a woman’s modesty, robbery, attempt to suicide.

These amendments have been made in section 41 of the Cr. P.C. Under Section 41, as it originally stood, a police officer may, without an order of a magistrate and without a warrant, arrest any person who has been concerned in any cognizable offence. The rationale of the amendment in section 41 of the code of criminal procedure has been justified by the Home Minister of India Shri P. Chidambaram on the ground that the provision was being capable of being misused and was in fact actually being misused in practice. He substantiated this claim of misuse of the arrest law by the police using it more of an engine of harassment rather than an instrumentality of fair investigation by citing the various reports of the law commission of India, the Malimath committee of reforms, and the landmark Supreme Court judgment in the case of DK Basu v. State of West Bengal. In fact it was misuse of this law that had necessitated the delivering of DK Basu judgment in which various dos’ and don’ts were prescribed to be strictly complied by the police force while investigating a case and arresting an accused.
Check Your Progress III

Note: Use the space provided for your answers.

1) What are the conditions for withdrawal of prosecution?

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2) Explain the victim compensation scheme.

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1.9 LET US SUM UP

This unit covers investigation process, prosecution system, framing of charge, and current practices and procedures regarding withdrawal of prosecution.

1.10 FURTHER READINGS AND REFERENCES

- Bare Act of Criminal Procedure Code, 1973 with Latest Amendments
- 203rd Report of Law Commission of India
- 221st Report of Law Commission of India
- 226th Report of Law Commission of India
- 233rd Report of Law Commission of India
- Law Commission of India, 14th Report, 1958
- Law Commission of India, 41st Report, 1969
- Law Commission of India, 154th Report, 1996
(Endnotes)

1 Sunil Kumar Jha v. State of Bihar, 1997(2) Crimes 131 (Patna)


4 S.227 Cr.P.C. says If upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for doing so.

5 See S.173 of Cr.P.C. concerning report of police officer on completion of investigation

6 Chapter XIX relates to Trial of warrant Cases by Magistrate

7 See s.162 for evidentiary value of statement made to police


11 Badamo Devi v. State, 1980 Cri LJ 1143 (HP HC)


13 Jodha Singh v. Emperor, AIR 1923 All 285, 286.


17 1997(2) Crimes 131 (Patna); See also Suketh Sah & others v. State of Bihar, 1995 (4) Crimes 593 (Pat)


S.321 Withdrawal from prosecution—The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences “for which he is tried; and, upon such withdrawal,—

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences:

Provided that where such offence—

(i) was against any law relating to a matter to which the executive power of the Union extends, or

(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or

(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the Prosecutor in charge of the case has not been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent, to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution.


Criminal Justice Processes


32. Id.; see also Subhash Chander v. State (Supra); Sheonandan Paswan v. State of Bihar (supra).


39. S. 321(a).

40. S.321(b)


43. Inserted by act 5 of 2009, w.e.f. 31/12/2009 (incorporates recommendations of Law commission,152nd Report,1994)

44. (Protection of victim has already been discussed in detail in Unit 2 block 2 of Course 3 and compensatory jurisprudence in Unit 2 of block 3 of Course 3)

45. Ss.41, 41A to 41D and 309 yet to be notified to become effective

UNIT 2  TRIAL PROCESSES

Content
2.0  Objectives
2.1  Introduction
2.2  Stages of a Criminal Trial
2.3  Constitutional Rights of the Accused
2.4  Procedural Safeguards to the Accused
2.5  Rights to Legal Consultation and Legal Aid
2.6  Let Us Sum Up
2.7  Further Readings and References

2.0  OBJECTIVES

By the end of this unit, you will be able to:
- delineate the purpose of Criminal Justice System;
- understand the evolution of the Criminal Justice System; and
- recognize the components of the Criminal Justice System.

2.1  INTRODUCTION

With the rise of concerns for human rights, International Conventions have included the basic rights of an accused and have made it mandatory for signatory countries to follow them stringently. Any law interfering with the basic privileges would go against the notions of liberty and humanity. Some of these aspects have been included in the Universal Declaration of Human Rights, 1948 (UDHR). Article 3 of UDHR declares that “Everyone has the right to life, liberty and security of person.” The same principle has been reiterated emphatically in Article 21 of the Constitution of India. It is matter of common knowledge and experience that the principle of liberty is being violated everywhere, and by those very people who are supposed to protect it. In order to fill the gap between theory and practice, the legislators have provided for legal provisions to secure the adequate implementation of the rights of accused. In this Unit, we will discuss the stages of criminal trial, constitutional provisions regarding liberty and protection of human rights of the accused. These constitutional provisions have been given concrete shape by the Code of Criminal Procedure which confers a number of rights and liberties upon an accused, which implies corresponding duties on the arresting authorities.

2.2  STAGES OF A CRIMINAL TRIAL

The Code of Criminal Procedure, 1973 (the Cr.P.C.) is the procedural law providing the machinery for punishment of offenders under the substantive criminal law, be it the Indian Penal Code, 1860 or any other penal statute.
The Cr.P.C contains elaborate details about the procedure to be followed in every investigation, inquiry and trial, for every offence under the Indian Penal Code or under any other law. It divides the procedure to be followed for administration of criminal justice into three stages: namely investigation, inquiry and trial.

**Investigation** is a preliminary stage conducted by the police and usually starts after the recording of a First Information Report (FIR) in the police station. If the officer-in-charge of a police station suspects the commission of an offence, from statement of FIR or when the magistrate directs or otherwise, the officer or any subordinate officer is duty bound to proceed to the spot to investigate facts and circumstances of the case and if necessary, takes measures for the discovery and arrest of the offender.

**Inquiry** consists of a magistrate, either on receiving a police report or upon a complaint by any other person, being satisfied of the facts.¹

**Trial** is the judicial adjudication of a person’s guilt or innocence. Under the Cr.P.C., criminal trials have been categorized into three divisions having different procedures, called warrant, summons and summary trials.

A **warrant case** relates to offences punishable with death, imprisonment for life or imprisonment for a term exceeding two years. The Cr.P.C. provides for two types of procedure for the trial of warrant cases by a magistrate, triable by a magistrate, viz., those instituted upon a police report and those instituted upon complaint. In respect of cases instituted on police report, it provides for the magistrate to discharge the accused upon consideration of the police report and documents sent with it. In respect of the cases instituted otherwise than on police report, the magistrate hears the prosecution and takes the evidence. If there is no case, the accused is discharged. If the accused is not discharged, the magistrate holds regular trial after framing the charge, etc. In respect of offences punishable with death, life imprisonment or imprisonment for a term exceeding seven years, the trial is conducted in a session’s court after being committed or forwarded to the court by a magistrate.

A **summons case** means a case relating to an offence not being a warrant case, implying all cases relating to offences punishable with imprisonment not exceeding two years. In respect of summons cases, there is no need to frame a charge. The court gives substance of the accusation, which is called “notice”, to the accused when the person appears in pursuance to the summons. The court has the power to convert a summons case into a warrant case, if the magistrate thinks that it is in the interest of justice.

a) **Framing of charge or giving of notice**

This is the beginning of a trial. At this stage, the judge is required to sift and weigh the evidence for the purpose of finding out whether or not a *prima facie* case against the accused has been made out. In case the material placed before the court discloses grave suspicion against the accused that has not been properly explained, the court frames the charge and proceeds with the trial. If, on the contrary, upon consideration of the record of the case and documents submitted, and after hearing the accused person and the prosecution in this behalf, the judge considers that there is not sufficient ground for proceeding, the judge discharges the accused and records reasons for doing so.
The words “not sufficient ground for proceeding against the accused” mean that the judge is required to apply a judicial mind in order to determine whether a case for trial has been made out by the prosecution. It may be better understood by the proposition that whereas a strong suspicion may not take the place of proof at the trial stage, yet it may be sufficient for the satisfaction of the court in order to frame a charge against the accused person.

The charge is read over and explained to the accused. If pleading guilty, the judge shall record the plea and may, with discretion, convict him. If the accused pleads not guilty and claims trial, then trial begins. Trial starts after the charge has been framed and the stage preceding it is called inquiry. After the inquiry, the charge is prepared and after the formulation of the charge, trial of the accused starts. A charge is nothing but formulation of the accusation made against a person who is to face trial for a specified offence. It sets out the offence that was allegedly committed.

b) **Recording of prosecution evidence**

After the charge is framed, the prosecution is asked to examine its witnesses before the court. The statement of witnesses is on oath. This is called examination-in-chief. The accused has a right to cross-examine all the witnesses presented by the prosecution. Section 309 of the CrPC provides that the proceeding shall be held as expeditiously as possible and in particular, when the examination of witnesses has once begun, the same shall be continued day-to-day until all the witnesses in attendance have been examined.

c) **Statement of accused**

The court has powers to examine the accused at any stage of inquiry or trial for the purpose of eliciting any explanation against incriminating circumstances appearing before it. However, it is mandatory for the court to question the accused after examining the evidence of the prosecution if it incriminates the accused. This examination is without oath and before the accused enters a defence. The purpose of this examination is to give the accused a reasonable opportunity to explain incriminating facts and circumstances in the case.

d) **Defence evidence**

If after taking the evidence for the prosecution, examining the accused and hearing the prosecution and defence, the judge considers that there is no evidence that the accused has committed the offence, the judge is required to record the order of acquittal. However, when the accused is not acquitted for absence of evidence, a defence must be entered and evidence adduced in its support. The accused may produce witnesses who may be willing to depose in support of the defence. The accused person is also a competent witness under the law. The accused may apply for the issue of process for compelling attendance of any witness or the production of any document or thing. The witnesses produced by him are cross-examined by the prosecution. The accused person is entitled to present evidence in case he so desires after recording of his statement. The witnesses produced by him are cross-examined by the prosecution. Most accused persons do not lead defence evidence. One of the major reasons for this is that India follows the common law system where the burden of proof is on the prosecution, and the degree of proof required in a criminal trial is beyond reasonable doubt.
e) **Final arguments**

This is the final stage of the trial. The provisions of the CrPC provide that when examination of the witnesses for the defence, if any, is complete, the prosecutor shall sum up the prosecution case and the accused is entitled to reply.

f) **Judgement**

After conclusion of arguments by the prosecutor and defence, the judge pronounces his judgment in the trial. Here, it is relevant to mention that the CrPC also contains detailed provisions for compounding of offences. It lists various compoundable offences under the Indian Penal Code, of which 21 may be compounded by the specified aggrieved party without the permission of the court and 36 that can be compounded only after securing the permission of the court. Compounding of offences brings a trial to an end. Under the CrPC an accused can also be withdrawn from prosecution at any stage of trial with the permission of the court. If the accused is allowed to be withdrawn from prosecution prior to framing of charge, this is a discharge, while in cases where such withdrawal is allowed after framing of charge, it is acquittal.

### 2.3 CONSTITUTIONAL RIGHTS OF THE ACCUSED

a) **Presumption of Innocence**

The basic principle of criminal law jurisprudence that an individual is presumed to be innocent till the contrary is proved against him has been enshrined in Article 21 of Indian Constitution along with Article 14(2) of the International Covenant of Civil and Political Rights, 1966. Article 11 of the Universal Declaration of Human Rights declares that Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

Section 101 of the Indian Evidence Act casts a reasonable burden upon the prosecution to prove the case against the accused, as every accused has the right to have the benefit of presumption of innocence till his guilt is proved beyond reasonable doubt.

b) **Right to Fair Trial**

The most important principle that no person shall be deprived of his life and liberty except according to the procedure established by law has been enshrined in Article 21 of the Constitution, whose scope has been extended by judicial interpretation by the Supreme Court. It gives protection not only against executive action but also against legislation. This principle is also contained in Article 9 of the International Covenant on Civil and Political Rights 1966.

Article 21 implies some inalienable rights for all people including the accused and the condemned. To reinforce the effect of Article 21, Article 20 and 22 specifically provide for certain express rights in respect of arrest, detention and conviction for offences. The European Convention for the Protection of
Human Rights and Fundamental Freedoms has incorporated this right as a basic human right and states in Article 6(1) that “every person charged has a right to fair trial” and in Article 6(2) that “everyone charged with a criminal offence will be presumed to be innocent until proven guilty according to law.”

c) **Right Against Ex-Post Facto Operation of Criminal Law**

The second principle is that no person can be accused and convicted of an offence for an act, which was not an offence under the law in force on the date when it was committed. This is a guarantee against *ex-post facto* operation of Criminal Law. This principle has been enshrined in Article 20(1) of the constitution of India and Article 11(2) of the Universal Declaration of Human Rights which says that “No one shall be held guilty of any penal offence on account of any act or omission, which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed”.

d) **Protection against Double Jeopardy**

The third important principle in ensuring Human Rights to the accused is the ‘Protection against double jeopardy’ – that is no person can be punished for the same offence twice. This has been enshrined in the Indian Constitution in Article 20 (2) which lays down that no person can be prosecuted and convicted for the same offence more than once. This provision also finds mention in the Code of Criminal Procedure (hereinafter referred to as Code) in Section 300, which says that if a person has been either acquitted or convicted by a Court of competent jurisdiction, he cannot be tried for the same offence again, nor for another offence on the same facts. However, if the consequences of the act tried for, constitute a separate and distinct offence, he may be tried for the consequent offence if it be established that the act had not resulted in the consequences at the time when the earlier trial had taken place, or that the Court trying him of the previous offence was unaware of the consequences of his act.

e) **Immunity against Self-Incrimination Article 20(3) of the Constitution**

Right against self incrimination as envisaged in Article 20(3) of the Constitution of India is fundamental right of an accused to; remain silent to questions relating to the offence alleged against him. This privilege has been conferred upon by the Doctrine of Presumption of Innocence, which is considered as a cardinal principal in the administration of criminal justice in all countries. This principle has been accommodated in the Code under different sections like Section 313(2), which lays down that the accused shall not be administered oath. This provision follows from the principle tenet of criminal law that the burden of proof in all criminal cases is on the prosecution. Hence, the accused cannot be compelled to be a witness against himself. However, if in course of examination, the accused gives some answers which may be used as evidence against him, the prosecution is not barred from using them in course of the trial. Also, there is no bar against compelling the accused to produce documentary or real evidence which may be used against him in course of the trial.
Check Your Progress I

Note: Use the space provided for your answers.

1) Discuss the stages of a criminal trial.

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2) Enlist the constitutional rights of the accused.

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2.4 PROCEDURAL SAFEGUARDS TO THE ACCUSED

The Criminal Procedure Code (CrPC) expressly lays down a number of provisions relating to the rights of the accused at the time of arrest and during the pendency of the trial. Indian Penal Code (IPC) and Evidence Act also make some provisions in this regard. This section will deal with those rights which the accused is entitled to at the time of arrest and after his arrest has been affected under the Code. These rights are of extreme essence for the ends of justice to be met.

a) At the Time of Arrest

No arrest can be made because it is lawful for the police officer to do so. The police officer must be able to justify the arrest. Section 46 of the Code lays down the procedure to be followed to affect the arrest of a person. Arrest being a restraint of liberty of a person, it can be effected by actually contacting or touching the body of such person or by his submission to the custody of the person making the arrest. Since in most cases, there is no submission of the arrestee by word or action, actual contact is required to affect an arrest. However, where a person confesses to the police officer of having committed an offence it shall amount to a submission to the custody of the police officer by the person and there is no need for touching in such a case. Sub-section (2) of the section says that the arresting authority may use all reasonable means to affect such arrest, subject to the condition that he is prohibited to use such force as will cause death to such person, who is not accused of an offence punishable with death or imprisonment for life. Here, the intention of the framers of the Code is very clear that the amount of force used to affect the arrest should be reasonable, and any deviation from this reasonability test will amount to violation of the law. By an amendment to the Code in 2005, a special provision has been laid down to affect the
arrest of a woman. Section 6 of the Amendment Act has added an additional clause 4 to Section 46 of the existing Code, which says that “save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the First Class within whose local jurisdiction the offence is committed or the arrest is to be made”. Thus, there is an express bar on the police to affect the arrest of a woman between sunset and sunrise.

b) **Safeguards against Search of the Person, Property or Belongings of the Accused**

Even regarding search, the Code lays down certain procedure to be followed, which has been covered under Section 51 of the Code. (See also Ss. 93, 94, 97, 100(4) to (8) and S. 165 of Cr.P.C.) Section 51(2) lays down that if a woman needs to be searched, the search must be done by another woman with strict regard to decency. Also it has laid down that if a search is to be conducted in a house which is under the occupation of a female, who according to her custom does not appear in public, she must be served a prior notice stating the proposed search thereby affording her an opportunity to withdraw herself before the search is conducted. Though the Code is silent on the presence of witnesses at the time of conducting the search. Section 44 of the Police Act. 1861 impliedly requires the police officer to search a person in the presence of witnesses, and mention the full particulars of the search in a Police diary.

c) **Right Against Torture**

Some protective provisions are contained in the Indian Penal Code, which seek to punish violation of right to life. Section 220 of IPC provides for punishment to an officer or authority who detains or keeps a person in confinement with a corrupt or malicious motive. Sections 330 and 331 of IPC provide for punishment of those who inflict injury or grievous hurt on a person to extort confession or information in regard to commission of an offence. Illustration (a) and (b) to Section 330 make a police officer guilty of torturing a person in order to induce him to confess the commission of a crime or to induce him to point out places where stolen property is deposited. Section 330, therefore, directly makes torture during interrogation and investigation punishable under the Indian Penal Code. Prosecution of the offender is an obligation of the State in case of every crime. Section 25 of the Evidence Act also provides that no confession made to a police officer, shall be, proved as against a person accused of any offence.

d) **Right to Know the Grounds of Arrest**

The right to be informed of the grounds of arrest is a precious right of the arrested person. Article 22 (1) of Indian constitution says that “no person who is arrested shall be detained in custody without being informed of the grounds of arrest.” Section 50(1) specifies that in case of an arrest without warrant, the person so arrested must be intimated about the full particulars of the offence or the grounds of such arrest. It is reasonable, rather commonsensical to expect that the grounds of arrest should be communicated to him in a language understood by him; otherwise it would amount to
violation of the constitutional norm. If the arresting authority does not specify the grounds of such arrest or notify the substance of the warrant under which the arrest has been made, the arrest would be unlawful. If the arrest was made by a subordinate police officer so deputed by a senior officer, such subordinate officer must notify to the accused the substance of the order issued by his superior, specifying the offence or other cause of the arrest. Violation of this provision shall vitiate the arrest making it illegal.

e) **Right of Accused to Know of the Accusation**—Fair trial requires that the accused person is given adequate opportunity to defend himself. Sections 228, 240, 246 and 251 of the Code provide in unambiguous terms that when an accused person is brought before the court for trial, the particulars of the offence of which he is accused shall be stated to him. In case of serious offences, the court is required to frame in writing a formal charge and then to read and explain the charge to the accused person.

f) **Right to Bail**

The right of bail is one of the most important rights granted to the accused by the Code. Section 436 says that it is the right of every accused arrested on a bailable offence to be released on bail. Section 50(2) specifies that where the person is arrested for a bailable offence, the police officer shall inform him of the right to be released on bail so that he can arrange for sureties.

Even in non-bailable offences, the accused may be released on bail at the discretion of the Court if it is reasonably satisfied that such release will not endanger public peace. Moreover, certain special concessions have been made for women, children and the infirm with regard to their right of acquiring bail in non-bailable offences.

Further, Section 36 of the Amendment Act has provided that no person shall be kept in detention for a period longer than the maximum period provided for the offence charged with. Moreover, it has been provided that if a person has already undergone detention for a period amounting to one-half of the maximum period prescribed for the offence, he shall be released on personal bond with or without security. These are extremely welcome provisions in view of the fact that overcrowding of prisons by under trials is a grave problem in India. It is hoped that the plight of under trials will improve in future.

g) **Right against Illegal Detention, and Provision for Production before Magistrate**

Sections 56, 57 and 76 of the Code gives effect to Article 22(2) of the Constitution which says that any person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate. Section 56 of the Code specifies that any police officer making an arrest without a warrant must, without unnecessary delay produce the arrested person before a Magistrate or the officer-in-charge of the police station. If the arrest is made under the authority of a warrant, such an
arrested person must be produced before a Magistrate within a period of twentyfour hours, excluding the time required for transporting the accused from the place of arrest to the Magistrate’s Court\textsuperscript{17}. That apart, it has been laid down that no person arrested without a warrant shall be detained for a period exceeding twentyfour hours, without the express permission of a Magistrate under Section 167.

The provision for judicial scrutiny has been created with view:

i) to prevent unlawful and violent means of extracting confessions,

ii) to protect the right of every person not to be punished without establishment of guilt,

iii) to afford the audience of a judicial officer, and an early recourse on all questions of bail and discharge\textsuperscript{18}.

If a police officer fails to produce an arrested person before a Magistrate within twenty four hours, he shall be guilty of wrongful detention\textsuperscript{19}. The Supreme Court in Anwar Hussain v. Ajoy Kumar Mukherjee\textsuperscript{20}, held that if the arrest by a public service is illegal, it will amount to false imprisonment, and person so arrested is entitled to bring a civil suit against such erring officer to recover damages.

h) Evidence to be Taken in Presence of Accused

Section 273 of the Code requires that all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader to ensure fair trial. The right created by the section is further supplemented by S. 278, which \textit{inter alia} provides that wherever the law requires the evidence of a witness to be read over to him after its completion, the reading \textit{shall} be done in the presence of the accused, or of his pleader if the accused appears by pleader and in a language understood by the accused person.\textsuperscript{21} Besides section 138 of the Evidence Act gives the accused right to test the evidence by cross examination.

i) Right to Speedy Trial

Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and retrial. A criminal trial which drags on for unreasonably long time is not a fair trial. The court may drop proceedings on account of long delay. Section 309(1) of the Code gives directions to the courts with a view to have speedy trials and quick disposals. It says “In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded”.
j) **Right to Medical Examination**

When any person is arrested, he shall be examined by a registered medical practitioner and where arrested person is female, the examination of her body shall be made only by a registered female medical practitioner.\(^\text{22}\)

k) **Right to Health and Safety**

It shall be duty of the person having the custody of an accused to take reasonable care of the health and safety of the accused.\(^\text{23}\)

### 2.5 RIGHTS TO LEGAL CONSULTATION AND LEGAL AID

This section will deal with the aspect of the criminal justice system which ensures the right of an accused of legal advice for a trial, which in case of indigent accused may be extended to free legal aid at the expense of the State.

a) **Right of Accused to Consult a Legal Practitioner of His Choice**

Article 22(1) of the Constitution of India provides inter alia, that no person who is arrested shall be denied the right to consult and to be defended by a legal practitioner of his choice. Defence by a lawyer of one’s own choice is one of the characteristic features of the adversarial system that is practised in India, without which the ends of natural justice will be frustrated. The right of the accused to have a counsel of his choice is fundamental and essential to a fair trial\(^\text{24}\). This constitutional provision has been rati­fied by the Code in Section 303, which says that “any person accused of an offence before a criminal Court, or against whom proceedings are instituted, may of right be defended by pleader of his choice.”

This right commences from the moment of arrest\(^\text{25}\), and it is the duty on part of the Court to give a just and fair hearing to the defence counsel and any violation of this rule will vitiate the trial\(^\text{26}\). The right to be defended by a legal practitioner of one’s own choice has its roots in the landmark American case of Powell v. Alabama\(^\text{27}\), where the American Supreme Court held that the right to be heard would be wasted if it did not comprehend the right to be represented by a counsel. Even an intelligent man is often incapable to understand the intricacies of legal procedure, and hence without the service of a qualified lawyer, he stands the risk of being put on trial without a proper charge, and convicted upon incompetent evidence or evidence irrelevant to the issue. Hence, the right of interview with a qualified legal practitioner is of extreme essence for the ends of justice to be met.

b) **Right of Free Legal Aid for an Indigent Accused**

In case of an indigent accused who is too poor to afford the services of a lawyer, the Constitution through Article 21 implicitly guarantees the right of free legal aid at the expense of the State. This constitutional right has been given practical implication by its inclusion in the Code under Section 304. Such an impoverished accused may apply for this right under that section for the fulfillment of his right. However, it cannot be denied simply because he had failed to apply for it\(^\text{28}\).
The right of free legal aid commences from the moment the accused is produced before the Magistrate for the first time in accordance with the requirement of Section 57 of the Code. Such pleader shall be assigned to the accused, by Sessions Court, and shall be remunerated by the State Government, according to the rules framed by the High Court. In Ranchod Mathur Wasawa v. State of Gujarat, Justice Krishna Iyer in his eloquent style said that it shall be the duty of the Court to ensure that the pleaders so appointed should have the competence to handle complex cases, and this practice of appointing lawyers should not be extended as a patronising gesture to raw entrants at the Bar. He further went on to say that the lawyer so appointed should be given sufficient time and facility to prepare for his defence so that the cause of justice may be served.

However, the accused claiming free legal assistance has to prove his economic status, and cannot claim the benefit of the provision if he has the sufficient means to engage a lawyer on his own. In Ashok Kumar v. State of Rajasthan, it was held that the fact that the accused has already engaged a lawyer will go against his claim of destitution. Unless expressly refused with a sufficient and justified cause, the failure to provide free legal aid would vitiate the trial, entailing the conviction and the sentence to be set aside. However, if the accused had not availed of the free legal assistance provided under the Legal Aid Scheme, and prefers to plead guilty, the trial will not be vitiating if the Judge is satisfied that the plea of guilt was voluntary and genuine.

The Code of Criminal Procedure provides a set of just and fair rights to the accused so that he can maintain his basic human dignity as envisaged by the founding fathers of our Constitution. These rights have been further reinforced by a number of judicial decisions that have come about in the past several years in conformity with most of the set international standards.

Check Your Progress II

Note: Use the space provided for your answers.

1) Enlist the procedural safeguards to the accused.

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2) Discuss the concept of legal aid.

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2.6 LET US SUM UP

This Unit covers the various stages of criminal trial that includes framing of charge or giving of notice, recording of prosecution evidence, statement of accused, defence evidence, final argument, judgment and the constitutional rights of accused.

2.7 FURTHER READINGS AND REFERENCES

Bare Act of Criminal Procedure Code,1973 with Latest Amendments


Chopra, Nirmal, “Rights of an Accused and the Ground Realities” 2008 Criminal Law Journal 6 (Jr)

(Footnotes)

1 See Chapter XIII of Cr.P.C.

2 See Chpter VII & Ss. 228 and 240 of Cr.P.C.

3 See Sections 51 to 53, Code of Criminal Procedure, 1973. See also Sections 8 and 9 of the Cr. P.C. (Amendment) Act, 2005, which have amended Section 53 of the existing Code.


7 Bharose Ram Dayal v. Emperor, AIR 1911 Nag 86.

8 This provision is modeled on the 84th Law Commission Report Recommendation.


10 Article 22(1) of the Constitution of India, which says that no person shall be detained in custody without being in-formed of the grounds of such arrest.

11 Satish Chandra Rai v. Jodu Nahdan Singh, ILR 1926 Cal 748.
14 See Ss. 228, 240, 246, 251, Code of Criminal Procedure.
16 See also S. 151(2) of Cr.P.C.
21 See S. 279 and S. 317(2) of Code of Criminal Procedure.
22 S. 54 Cr.P.C. as amended by Act 5 of 2009.
26 Muthu Karuppa Seervai v. Emperor, AIR 1928 Mad 1234.
27 287 US 45 (1932).
29 AIR 1974 SC 1143.
30 See also Hussainara Khatoon v. Home Secretary, State of Bihar, AIR 1979 SC 1377 : 1979 Cri LJ 1052.
31 1995 Cri LJ 1231 (Raj).
32 Kailash Nath v. Emperor, AIR 1947 All 436.
UNIT 3  CORRECTIONAL PROCESSES

Content
3.0  Objectives
3.1  Introduction
3.2  Development of Prison Reform in India after Independence
3.3  Probation
3.4  The National Law on Probation
3.5  Alternatives to Imprisonment
3.6  Present Law and Practices in India
3.7  Let Us Sum Up
3.8  Further Readings and References

3.0  OBJECTIVES

By the end of this unit, you will be able to:

- trace the development of prison reform in India after independence;
- understand the concept of probation and the national law on probation; and
- identify alternatives to imprisonment.

3.1  INTRODUCTION

The oldest penal institution is actually the ‘Jail’ which is also commonly called a ‘prison’ in many lands. In the early stage, jail functioned as a place for detaining prisoners awaiting trial and execution of sentence. Getting off to a slow start in the sixteenth century imprisonment as a form of punishment became the major form of punishment of the nineteenth century. From nineteenth century onwards and following in the twentieth century, certain individualized measures of offenders were introduced into prison. Sentences. Thus, began concept of institutional correction.

The idea of correctional imprisonment had been foreshadowed in Europe as in England and on the continent imprisonment as a means of reforming character had sometimes been imposed by religious and secular authorities. The Roman Catholic Church had sometimes released the prisoner upon showing of repentance. In England, the houses of correction was invented to take care of the widespread vagrancy and idleness that arose when great numbers of the rural population were forced to vacate their cottages. The idea of prisons as a correctional and rehabilitation method was advanced in England in 1778 when parliament authorized the construction of a “Penitentiary”, whose purpose as stated in the law was “by sobriety, cleanliness and medical assistance, by a regular series of labour, by solitary confinement during the intervals of work, and by due religious instructions to preserve and amend the health of the unhappy offenders, to injure them to habits of industry, to guard them from pernicious company, and to accustom
them to serious reflection and to teach them both the principles and practice of every Christian and moral duty”. John Howard, the prison reformer who fathered this law, declared: “The term penitentiary clearly shows that Parliament had chiefly in view to the reformation and amendment of those to be committed to such places of confinement” (Sutherland and Cressey, P.485).

3.2 DEVELOPMENT OF PRISON REFORM IN INDIA AFTER INDEPENDENCE

After Independence in 1951, the Government of India requested the United Nations, under the Technical Assistance Programme, to lend an expert in Criminology and Correctional Administration for training a batch of jail officers and to advise the Government of India for furthering development of correctional administration in India. Dr. Walter C. Reckless, and expert of the U.N.O., arrived in India on October 21, 1951.

Dr. Reckless’s Report have some valuable recommendations, both National and State Level, for improving correctional administration in India, particularly of jail administration, some of which could be summarized as under:

**National Level**

i) An advisory Bureau of Correctional Administration should be established at the Central Government immediately so that the states could be helped in the development of their correctional programmes;

ii) The Government of India should consider the need for specialized technical assistance in this field;

iii) Fellowships in the correctional field to prepare competent persons to fill higher positions, e.g., Inspector General of Prisons and his Deputies;

iv) The Central Government should encourage the development of Professional conferences of the superior staff members; and

v) An All India conference of persons working in the correctional field, both adults and juveniles.

**State Level**

i) Establishment of whole time revising boards for selection of prisoners for mature release;

ii) Revision of jail manual, with greater responsibility on the superintendent and staff members for constructive programmes for Prisoners;

iii) Superior staff of a jail to have training for their work;

iv) The larger states should develop integrated departments of correctional administration under one Minister, including Jails, Borstals, Revising Boards, Probation and After Care.

v) Professional individualized services and handling of the prisoners by specialist like Supervisor of Education, Vocational Guide, Recreation Officer, Clinical Psychologists, Therapeutic Psychiatrist, etc.

vi) Special institution for training.
Almost at the same time the Government of India called a Conference (Eighth) of the Inspector General of Prisons at Bombay from 11 to 13 March, 1952. On the recommendations of that Conference, the Government of India asked the Government of Bombay to set-up a Committee and take up the revision of Jail Manual and the Central act relating to prisons. The Committee took its first meeting in June, 1957 at Bombay followed by twelve other sittings and visited to twenty eight correctional institutions. The Committee prepared a Model Prison Manual and its Report which was circulated to all the State Governments, but till 1980 only four States, namely, Andhra Pradesh, Karnataka, Kerala and Maharashtra had revised their jail manuals in accordance with the Model Prison Manual.

The Government of India constituted a Working Group in 1972 to examine measures for streamlining and improving the jail administration and conditions of living in the prisons.

The Group emphasized the need of a national Policy on Prisons. It also suggested the inclusion of prison administration in the Five Year Plan and amendment of the Indian Constitution to include the subject of prisons, and allied institutions in the Concurrent List. The Seventh Finance Commission in its Report in 1978 acknowledged the facts that jails had been neglected far too long.

With this background and large scale criticism of the prison administration due to inhuman treatment of the prison personnel and unsatisfactory living conditions and prolonged detention of undertrial prisoners the Government of India appointed an All India Committee on Jail Reforms in 1980 with Mr. Justice (Retired) A.N. Mulla as Chairman. The Committee in 1983 submitted a 511 pages report to the Government of India. With a strong recommendation of a national Policy in Prisons. Meanwhile, the Eighth Finance Commission submitted its Report in 1984 which recommended support central assistance for improvement of existing infrastructure of the prisons.

Thereafter, the national Human Rights Commission (NHRC) after acquainted with problem of prisoners in the prisons in India in general took initiation to formulate a national prison law by consolidation the existing prisons law framed during British period more than two hundred years back. A draft Bill (INDIAN PRISONS BILL, 1995 proposed) was circulated to all the State Governments in India during February, 1999 regarding formulation of comprehensive law in Prisons. The NHRC had submitted its recommended bill for adoption by the Government of India which is still under consideration of the Law Ministry.

Check Your Progress I

Note: Use the space provided for your answers.

1) What is penitentiary?

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3.3 PROBATION

Etymologically probation means “I prove my worth” derived from the Latin word ‘probatus’ meaning ‘tested’ or ‘proved’. Don M. GotFredson observed probation as “a procedure by which a convicted person is released by the court without imprisonment, subject to conditions imposed by the court. Thus, probation is part of the decision making process of judges at the time of sentencing. “The legal concept of probation as a criminal justice system is ‘Conditional suspension of sentence’. It is the modern trend of community-based correctional treatment of offenders. In U.S.A. the Advisory Committee on Penal Institutions, Probation and Parole to the national Commission of Law Observance and Enforcement defines probation as follows:

“Probation is a process of treatment, prescribed by the Court for persons convicted of offences against the law, during which the individual on probation lives in the community and regulates his own life under conditions imposed by the court ….. and is subject to supervision by a probation officer. Length of the probation period varies, and is determined by the court.

Devid L. Sills defines probation as a procedure for “release of convicted criminals or adjudicated delinquents on a conditional basis in order to assist them in pursuing a non-criminal life”.

Edwin H. Sutherland says, probation is a status of a convicted offender during a period of suspension of the sentence by the court.

In India, the system of probation finds its statutory recognition at present in section 4 (1) of the Probation of Offenders Act, 1958 (20 of 1958) which runs as follows:

“When any person found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that having regard to the circumstance of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then notwithstanding anything contained in any other law for the time being in force, the court may instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour.”

Objectives Behind Probation

“Probation is a method of penal non-institutional treatment of offenders, developed as an alternative to imprisonment out of a realization that short-term sentences,
specially in case of juvenile and youthful offenders, were not only ineffective, but also harmful, as these brought the young offenders in contact with the confirmed criminals in prisons and most of all, removed their fear of the unknown, viz, prisons. Probation is one more step in the progressive realization that the sentence should fit the offender and not the offence.”

“The traditional concept of crime and punishment has been radically changed in the twentieth century. The focus has now shifted from the crime to the criminal. Probation has more important social virtue in that it prevents a severance of domestic and family ties and the stigma invariably associated with imprisonment. In sentencing, the focus is now on social justice and human rights. Probation system is a technique of individualized treatment of offenders. “Probation came into existence to some selected types of persons from the rigours of punishment even if found guilty by a court of law.” Jails Committee (1919-20) observes that there seems to be no reasonable doubt that the probation system represents a very substantial economy.

Philosophy Behind Probation

Criminologists as well as Sociologists differ greatly in their conception of Crime or deviance. None is unquestionably true. All definitions attempt to serve more or less some specific purposes. As this study concerned mainly with reformation of prisoners so we may focus in the criminologists who postulated that an offender can be reformed. The criminologists who. Believe in the theory of reformation looked crime as deviance, which is frequently defined as rule – breaking. Those who believed that an offender can be reformed and rehabilitated, they gave the definition of deviance in their own ways. Thorsten Sellin holds that, any act that violates the conduct. Norms of the group is deviant. Albert A. Kohen considers that deviance is any act that violates the institutional “expectations which are shared and recognized as legitimate within the social systems. Walter Miller views deviance as any behaviour which goes against rules of dominant culture. Still another sociologist Cavan suggests that only those acts which violate in most conventional norms are to be considered deviant. Thus, assumption in each of the se definitions is that we may apply some known commonly accepted standard in determining what is deviant and what is not. To consider the concept of deviance, the sociological school of Criminologists observe the factors like who does the behaviour, how it is done and under what circumstances are taken into account in deciding what is deviant behaviour. The approach of this School of Criminologists in defining deviance looks not at the legal rules but at the way a particular behaviour is reacted to by other. Charles E. Fraizer observed : “Deviance is behaviour that violates the standard of the person performing the act, the perceived standards of some persons or some group that is important to that actor or both.” This is a definition that puts the emphasis on the actor’s own perceptions of the quality of his conduct.

Most theorists of deviance ultimately based their ideas to a consideration of deviance as it forms a stable part of an individual’s action pattern. Our purpose in the consideration of deviant behaviour focuses on two aspects :

I) First, the emergence and abandonment of deviant behaviour patterns.

II) Second, how social forces believed to induce deviance work in the private walls of deviant actors.
Deviance as seen by various theorists proceeds through three phases:

i) Emergence

ii) Patterning

iii) Change.

**Emergence** refers to the first instances of deviant behaviour.

**Patterning** refers to the point when any particular form of deviance becomes a normal part of individual behaviour tendency.

**Change** or abandonment of deviant behaviour.

Patterns refers to the point the actor discontinues the deviant behaviour.

The thirst area of this work deals with how deviant behaviour changes in real world cases and particularly in the Prison. The Central thesis of this theoretical approach is that deviance is a result of negative social control and that deviant behaviour can be changed by socializing process.

**Origin and Development Of Probation System**

**Historical Antecedents in U.S.A. and England.**

Although probation system has its statutory recognition in last century yet it has some historical antecedents.

**Pardons**

In 12th Century in the criminal justice system, ‘Pardon’ was one aspect of “King’s authority to determine the punishment to be imposed for various offences. The pardon includes the power to commute or remit prescribed penalty.”

**Suspension of Sentences**

It is said that probation evolved from the common law procedure of suspended sentence. At common law the courts has an inherent power to temporarily suspend sentences. In the United States “the courts could indefinitely suspend a sentence as a Common Law” practice. “The suspension of sentence, nevertheless, was the early stage of what was known today as formal probation.” By this system the defendant was allowed to appeal to the crown for a pardon.

**Benefit of Clergy**

Historically the probation system has some similarity with the English system of Benefit of Clergy in the sense that both reflect a criminal justice method for lessening punishment. Most writers in the field accepted benefit of clergy as “a primary historical influence in the rise of probation.”

**Recognizance and Bail**

In the 14th Century the practice of recognizance (recall to mind) evolved. In recognizance, the offender has to keep peace and to recall minding that he was subsequently to appear in court. It is still in vogue in Irish Probation system. Bail at that time involved placing the offender under custody of another. So, some relation lies between probation and recognizance and bail.

**Filing of Cases**

In 19th Century in U.S.A. at Massachusetts a practice was in vogue which was called filing of case where “aim was to lessen the sentence or to recognize extenuating circumstances”. Filing required consent of both parties and the court
may take further action at any time upon a motion of either party. Thus, the two conditions, (1) suspension of sentence, and (2) imposed conditions, make filing of causes one of the forerunners of contemporary probation.

**History and Development of Probation in India**

**Ancient Period**

Dr. P.K. Sen in his Tagore Law Lecture on ‘Penology old and new’ and rightly pointed out that the idea of releasing an offender after due admonition (i.e., the basic idea of probation system) is not borrowed in India from U.S.A. or England. The Hindu Law givers laid down that punishment must be regulated by consideration of the motive and nature of the offence, the time and place, the strength, age, conduct, learning and economic position of the offender and above all, by the fact whether the offence was repeated. These ideas were envisaged by the Smriti writers as early as 300 B.C. The Smriti writers were aware of the complexities of human nature and they paid due attention to individuality of an offender in criminology. Their foresight was remarkable. Though in their writings there was no direct reference of release of offenders on probation yet their views seem to support the modern concept of probation.

In Manusmriti we found the modern idea of releasing an offender after gentle admonition. Manu also told that after scientifically considering the tendencies of repeated inclination in the offender, his antecedents and capacity the punishment should be awarded. (Manusmriti, Vol. VIII, Sloka -129). About 2000 years ago, Brahshastri in his ‘Dandabheda Vyavastha’ referred to admonition as punishment. “According to Brashaspati a gentle admonition should be administered to a man for light offence”. The ideas revealed in *Brahaspati Samhita* clearly shows that modern idea of individualization of punishment was thought in those days too. The caste and social status of the offender, his knowledge and education, his pecuniary and other circumstances and all that went to make up his individuality were duly considered in awarding punishment.

Brihaspati suggested that a king should punish elders, domestic priests and persons commanding respect with gentle admonition only.

In *Bridharit Smriti* also we found the punishment of admonition.

Narada remarked that the nature of the offence, its times and place should be carefully considered and ability and motive of the offender should be thoroughly examined before inflicting punishment.

Yajnavalkya also laid down that having ascertained the guilt, the place and time, as also the capacity, the age and means of the offender, punishment should be given to those deserving it.

Kautilya in this *Arthashastra* advised the king to award punishment which should neither be mild nor severe. Narada prescribed a lesser punishment for the first offender found guilty of cut purse.

Vishnu said that the king should pardon no one for having offended twice. Apashtamba said that a spiritual teacher, a priest and a prince may protect a criminal from punishment by their intercession in case of grave offence. Thus, the Smriti writers were aware of the principle that a reformation or correction of offender was one of the important objects of punishments for the offence. They also prescribed punishment of expiation for petty offences. Thus we found that the philosophy of probation is not entirely new in Indian Criminal Law and views of our ancient law had support for the modern probation system.
In *Brahmabaibarta Purana* Lord Mahadev told to Brahmba that if people commit offence it is the duty of pious man to forgive him.

Maurya rulers were in favour of mild punishment. One of the edicts of the *Emperor Ashok* contains provision for remission of punishment. He advised his officers to examine and reduce punishment awarded to prisoners and consideration of circumstances which substantially coincide with those mentioned by *Smriti* writers.

**Medieval Period**

During the Muslim reign in India upto advent of British rulers the administration of criminal justice was based on Islamic criminal law which did not recognize principles of correctional method or admonition. But during Maratha rule and Peshwa period we get traces of principles of probation if we take the concept of probation in a very broad sense so as to include cases where an offender was not at once awarded punishment but given a chance to improve himself. The cases are:

i) **Case of Vishwanath Bhatt Patankar**

In 1775-76 one Vishwanath Bhatt Patankar of Mouje Khed, was arrested for committing thefts. As he was unable to furnish security, the district officer sent him to Huzur, Janardan Bhatta Bhide stood surety for him promising that he would not again commit theft or any other offence.

ii) **Case of Janki Lagadin**

In 1785-86, one Janki Lagadin was imprisoned at Fort Visapur for adultery. Her father Shivaji Gaikwad prayed for her release. The prayer was granted on his standing as surety for her future good conduct. [These can be said to be the earliest cases of probation in India].

**Modern Period**

**Before Independence**

Though the probation system almost rooted in ancient Indian criminology but found its legal recognition for the first time in 1898 by section 562 of the Cr. P.C. (Act XX of 1898). The said section was actually taken from the English *Probation of First Offenders Act*, 1887. This Section 562 was amended by the amendment of Cr. P.c. in 1923 which radically changed the law of Probation in India. Section 562 did not contain any specific provision empowering an appellate court or a High Court as a court of Revision in matters of probation which was provided in new section. The period of Probation under old section of 1898 was not to exceed one year. Moreover, under the new Section 562 of 1923 amended Cr.P.C. a court may grant probation in case of offender not under age of 21 years for offences punishable with not more than 7 years and in case of offender below 21 years as a woman for offences punishable with death or imprisonment for life. In the year, 1973 the new Cr.P.C. provides almost the same provision in section 360.

Thereafter in 1931 the Government of India circulated a proposed draft of Probation of Offender Bills to the then local governments for their views. However, owing to preoccupation with other important matters the Bill could not be proceeded. In 1934 the Government of India informed the Provincial governments that as there was no immediate prospect of central legislation on the subject, so there would no objection if the provinces undertake such legislation themselves. In
pursuance of the above suggestion some provinces enacted their own probation laws. The enactments are: The C.P. & Berar Probation of offenders Act, 1937, the Bombay Probation of Offenders Act, 1938, the U.P. First Offenders’ Probation Act, 1938, The West Bengal First Offenders Probation Act, 1954.

3.4 THE NATIONAL LAW ON PROBATION

After independence the Joint Committee on the Bill to provide for release of offenders on probation was presented to Lok Sabha on the 25th February 1958. Mr. Hukum Singh was the Chairman of that joint Committee. The descent views on the Bill were expressed by Rajendra Pratap Singh, Jagdish Awasthi, Yadav Narayan Jadhav, Abdur Rezzak Khan, Sushila Nayar and Y.S. Parmar. Thus, new era in the field of probation started in India by enactment of the Probation of Offenders Act, 1958 (Act 20 of 1958) by the Parliament of India on 16th May, 1958. The Act provides for different dates for different states and different parts of the states to apply the Act (except Jammu and Kashmir) so that they will have an opportunity to create the necessary infrastructure before the Act is applied.

Release of Offenders on Probation

Section 4 of the Propation of Offenders Act, 1958 (PO Act) provides conditions to be considered to extend the benefit of probation to any convicted offender. If we analyze Section 4 of the PO Act we will get the following criteria provided to the Court for releasing an offender on Probation. These are:

i) Nature of Offence,
ii) Circumstances of the Case,
iii) Character of the Offender,
iv) Age of the Offender.

i) Nature of Offence

Offences are generally divided into two groups:

i) indictable offence, and
ii) non-indictable offence or pity offence.

Other Aspects of The PO Act

Preamble

The basic purpose of the PO Act was stipulated in the Preamble of the Act with the words: “An Act to provide for the release of Offenders on probation after due admonition and for matters connected therewith”. This preamble is too short to presume any specific object of the Act. However, Dr. N.L. Mitra has described the phenomenon of Probation as adopted in India in the following words, “Here the young offender, specially the first offenders charged with minor offences, are released and live with their families while they are under the supervision of the Probation Officer for their upkeep and necessary correction”.

Extent and Commencement

Section 1 of the PO Act provides that the Act may be called the Probation of Offenders Act and it extends to the whole of India except the State of Jammu and Kashmir. It also provides that the Act will come into force in a State on such date as the State Government may by notification in the Official Gazette appoint different dates for different parts of the State. Therefore, the PO Act does not
provide any unified date of enforcement but envisaged that proper steps be taken by the state Governments to develop infrastructural needs before the Act is brought into force.

**Definitional Discourse**

Section 2 of the Act though defined ‘Probation Officer’ but not defined probation or other related words. However, Section 2 (d) provides that the words and expression used but not defined criminal Procedure, 1898 (now Cr.P.C., 1973) shall have

**Offenders to Pay Compensation and Costs**

In view of victims perspectives the PO Act provides in section 5 that the Court may direct the released probationers to pay compensation and costs to the injured person. The section runs as follows:

“The Court directing the release of an offender under Section 3 or Section 4 may, if it thinks fit, make at the same time further order directing him to pay –

a) such compensation as the Court thinks reasonable for loss or injury caused to any person by the commission of the offence; and

b) such costs of the proceedings as Court thinks reasonable.”

However, from the reported cases as well as for my own field survey it is revealed that in very few cases this section was applied by the Courts in India. In *Bhagawan and another v. State of Haryana* (1986 Cr. LJ 1869 P&H) the High Court held that while releasing the offender on probation, Court can order him to pay compensation to the injured complainant.

**3.5 ALTERNATIVES TO IMPRISONMENT**

The major form of punishment in the modern era is imprisonment. Beginning in the nineteenth century and following into the twentieth century certain individualizing measures were introduced into penal servitude and prison sentences and there by certain substitutes for imprisonment use developed. The modern attitude to punishment is that it is an individualized treatment process and a sure response to carry individual events of crime. The question, what punishment is, cannot be distinguished from who is the offender and what are his offending phenomena. The modern criminologists and penologists have a tendency of a micro – approach to study the person and phenomena of offence situation. They are prone to analyze not only the bio-socio-politico cultural phenomena but also the psycho pathological and genetic phenomena of the offender. According to Jackson Toby whether punishment is or is not necessary rests ultimately on the following empirical questions.

i) The extent to which identification with the victim occurs;

ii) The extent to which non-conformity is prevented by the anticipation of punishment;

iii) What are the consequences for the morale of conformists of punishing the deviant or of treating his imputed pathology; and

iv) The compatibility between punishment and rehabilitation.

Thus, the use of discretion of the court in the sentencing process gradually recognized some alternatives of imprisonment as a process of correction of the convict in the criminal justice process.
Conceptual Evolution of Alternatives to Imprisonment

The impact of political economic and social changes at the end of the 18th century had much to do with the reforms of penal code, the system of punishment and the lamentable conditions of the existing penal institutions. The writings of philosophers and criminologists like Cesare Beccaria, John Howard, Jeremy Bentham and William Eden focused attention on much needed revisions in the penal code, the system of punishment and the lamentable conditions of the penal institutions. One is apt to be satisfied with the explanation that changes in the penal system have emanated from the social and political forces that fought about a decline in the security of punishment, especially corporal and capital punishment, and a substitution of imprisonment.

The American Correctional Association in 1960 promulgated Declaration of principles to promote improved practices in the treatment of juvenile offenders. This Declaration contained 33 principles of which following definitely suggests for alternatives to imprisonment such as:

Principle II: The forces for the prevention and control of crime and delinquency ultimately must find their strength from the qualities of the society itself. The properly functioning basis of institutions such as family, the school and the church, as well as the economic and political institutions and a society united in the pursuit of worthwhile goals are the best guarantees against crime and delinquency. The willingness of the society to maintain a rationally organized and properly financed system of corrections, directed towards the reclamation of criminals and juvenile delinquents, is a prerequisite of effective control.

Principle VII: The correctional facilities comprising both institutional and non institutional treatment viz. probation and parole should be planned and organized as an integrated system under a central authority responsible by guiding, controlling unifying and utilizing the whole.

Principle VIII: The variety of treatment programmes corresponding to the different needs of the offenders suggests a diversification of correctional institutions resulting in a system of specialized institutions so classified and coordinated and so organized in staff and program so as to meet the needs of those offenders who present specific problems. The spirit of continued experimentation with new types of institutions and agencies which show promise of more effective results should be encouraged and supported.

Principle IX: Repeated short sentences imposed for recessing misdemeanors or petty offenses are ineffective, both as means of correction and as a punitive deterrent. These sentences often are a contributing factor in the career of the petty recidivist. An integrated system of control by means of special institutional facilities and community supervision is essential for the solution of this problem. Further research and experimentation with agencies and institutions other than the conventional type (Jail) offer the greatest promise.

Principle XIV: The sentence determining the treatment for the offender should be based on a full consideration of the social and personality factors of the particular individual. In many jurisdictions, these investigations may be made at different levels, so that the essential information is available to the court or treatment authority at the time of making crucial case decisions.

Principle XXIV: Some of the Criminal law violators who are found by the courts to be criminally responsible, but who are abnormal from the point of view
of modern disciplines of psychiatry and psychology, are in need of psychotherapy. Diagnostic and treatment facilities for such mentally abnormal offenders should be further developed at the appropriate stages of the correctional process.

**Principle XXVII.** Probation has came to be accepted as the most efficient and economical method of treatment for a great number of offenders.

**Principle XXXIII.** The Correctional process has as its aim the reincorporation of the offender into the society as a normal citizen. In the course of non institutional treatment the offender continues as a member of the conventional community. In the course of his institutional stay constructive community contacts should be encouraged. The success of the correctional process in all its stages can be greatly enhanced by energetic, resourceful and organized citizen participation.

Among all the alternatives of imprisonment probation is said to be the best one. It involves conditional suspension of punishment. Probation system has developed in U.S.A. and British Commonwealth originally from power of the court to suspend sentence. Consequently, the forerunners of probation, prior to definite legislative provisions, are found to be - ‘Benefit of Clergy, judicial reprieve, giving surety/bond’ to the court that peace will be kept and release on bail without recognizance. Moreover, in the common law practice there was a system of filing of cases after finding of guilt by laying them aside without imposing sentence but with the understanding that the court may take action at any time in future.

The practice of substitution of fines for short sentences have been developed in many countries. England’s Criminal Justice Administration Act, 1914 introduced a provision whereby time to be given for payment of fines and the Money Payment (Justices Procedure) Act, 1935 provided for inquiries to be made into the offender’s financial status and for his supervision on probation before commitment to prison was imposed. The system was also in practice in Germany. Germany passed laws between 1923 and 1924 allowing fines to substitute short sentences under three months and attempted to keep the commutation of fines to imprisonment at a minimum by using a system of installment payment of fines. In the United States, there was also a system of installment payment of fines. In some cases, offenders have been placed on probation during the period of payment of installment fine. A practice was also developed by Magistrates to surmount imprisonment for non-payment of fines in certain cases, such as weekend sentence.

### 3.6 PRESENT LAW AND PRACTICES IN INDIA

The legal provisions in India regarding use of alternatives to imprisonment are provided:

First – In Indian Penal Code in various sections the court has the option either to award sentence of imprisonment or fine.

Secondly – The Section 360 of Criminal Procedure Code on Order to release on probation of good conduct or after admonition.

Thirdly – Under section 320 on Compounding of Offences

Fourthly – Under sections 265A to 265L on Plea Bargaining as provided by Criminal Law Amendment Act, 2005 w.e.f., 5.7.2006.
Check Your Progress II

Note: Use the space provided for your answers.

1) Define probation. Discuss the objectives and philosophy behind probation?

2) Trace the origin and development of the Probation System.

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3.7 LET US SUM UP

The modern attitude to punishment is that it is an individualized treatment process and a sure response to every individual events of crime. With that end in view the discretionary power of the Court gradually recognized some alternatives of imprisonment. There are few penologists who argued that due to socio-economic factors imprisonment was used increasingly. But the condition of prison as institutional treatment of offenders gradually being replaced by other alternatives like – probation, admonition, fines etc.

3.8 FURTHER READINGS AND REFERENCES


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UNIT 4  JUVENILE JUSTICE SYSTEM

Content

4.0  Objectives

4.1  Introduction

4.2  The Genesis of Child Protection Laws: From Child Welfare to Child Rights

4.3  Significant International Developments

4.4  Development of Juvenile Justice in India

4.5  The Juvenile Justice (Care and Protection of Children) Act, 2000

4.6  The Juvenile Justice Amendment Act, 2006

4.7  Let Us Sum Up

4.8  Further Readings and References

4.0  OBJECTIVES

By the end of this unit, you will be able to:

- understand the genesis of child protection law from an international perspective;
- trace the development of Juvenile Justice System in India
- identify the salient features of WILL Juvenile Justice (Care & Protection of Children) Act, 2000; and
- explain the strengths of the Model Rules, 2007.

4.1  INTRODUCTION

All over the world, the primary responsibility for the care of children has been with family and elders of any community. However, as a result of industrialisation, urbanization and the breakdown of traditional community and family networks, few children grow up in a secure and safe home environment. New industrialization has resulted in an increase in pockets of poverty. This has led more and more women to enter the labour market, where women and children are being seen as commodities, who can be traded for money. The threat of abuse and violence being perpetrated upon children, both outside the home and inside, is a reality. Children are being trafficked and traded for sex, and there is an increase in the reporting of incidents of sexual abuse within the family.

There are some categories of children who are more vulnerable than others. One mode of categorising these children is to term them ‘children in especially difficult circumstances’. A further classification of vulnerable children is that of delinquent and non-delinquent.

Delinquency is any act, conduct, or situation which might be brought before the court and adjudicated upon. The word ‘juvenile’ comes from the Latin word *juvenis* which means young. Over the years, the word became associated with wrong behaviour.
4.2 THE GENESIS OF CHILD PROTECTION LAWS: FROM CHILD WELFARE TO CHILD RIGHTS

As we mentioned earlier, the traditional ‘keepers of environment’ for children in most cultures, have been families and communities. They have looked after children and protected them from injury or harm. These spaces have offered unquestioned safety and stimulated opportunities for physical, emotional, mental and spiritual well being of the child. The family’s responsibility to take care of its children did not arise from any written legal framework. It was essentially a social and cultural relationship, wherein the family held the principal responsibility for taking care of children. The role of the family is today well recognised with the right to a family being considered as one of the most important rights of a child under the Convention on the Rights of the Child (CRC).

However, today we are also aware of the issue of abuse within the family. Families are often patriarchal, with sex and age determining the roles, responsibilities and opportunities that different members get. Boys are often treated better than girls – fed, clothed and educated better. There are instances of female foeticide and infanticide. Girls are married off early. Paradoxically, it has become important to demand for ‘the child’s right to a safe family’ rather than ‘the child’s right to family’.

Similarly, the assumption that the community can offer absolute protection for children is not valid any more. This is especially true in case of sexual abuse when the abuser is part of the same community. In such a situation, the community’s honour is held over and above the right of the child vis-a-vis the abuser. Often, the child or his/her family is excluded and silenced in the name of the community’s interest.

The family and the community often subsume the ‘best interest’ of the children within their own institution. For example, what is best for the community or the family is often taken to be the rule to ascertain if it is best for the child or not. There is no place for individuality/childhood that does not align with the institutional values.

The need for protection of children is higher when there is an abnormality in the environment that further breaks down reliable and familiar structures of safety, increasing children’s vulnerability and risk. For example, post wars, during conflicts, environment catastrophes which escalate deprivations, loss of livelihoods, security and shelter.

4.3 SIGNIFICANT INTERNATIONAL DEVELOPMENTS

Phase I (1901-1947): The discourse on Child Rights began with the idea of child welfare in the early part of this century. The signing of a declaration by the League of Nations in 1924 that included issues such as child labour, hazardous work, trafficking and sexual exploitation ended the international invisibility of children. While there had been many movements and activism for ensuring children freedom from being treated as the property of their parents, there was inadequate global momentum towards this. During this phase, the need for child rights as a separate
entity arose primarily due to sexual exploitation of children, especially across countries. It was the fear of losing their children, future leaders, to other communities and countries that created the political will to act.

**Phase II (1948-77):** The emergence of Child Protection in international instruments can be traced to the Declaration on Rights of Child (1959). It emphasised the need to protect and safeguard, rather than empower children.

**Phase III (1978-88):** The drafting of the Convention on the Rights of the Child was one of the most significant developments of this era. The Convention which came into force on September 2, 1990, emphasised the importance of child protection with special reference to Foster Placement & Adoption (nationally and internationally), UN Standard Minimum Rules for Administration of Juvenile Justice and Declaration of Protection of Women and Children in armed conflict.

**Phase IV (1989-2000):** The process of international standard setting for child rights continued. One of the highlights in this phase was the shift in the perception of children as persons who needed to be protected to being the enablers of change. They were now seen as being entitled to rights and not just as receivers of protection.

**Beijing Rules**

In November 1985, the United Nations adopted the Minimum Rules for Administration of Juvenile Justice (also called the Beijing Rules). They provide a framework within which a national juvenile system should operate and a model for States to develop a fair and humane system. The international body spelled out the need to promote juvenile welfare to the best possible extent....’ The focus of these rules was the juvenile offender’, which meant a child who was alleged to have, or had committed an offence. According to Rule, 2(2) (a) of the Beijing Rules “A juvenile is a child or a young person who under the respective legal system may be dealt with for an offence in a manner which is different from an adult.” One weakness of this definition is that it allows the national legal system to define juvenile. As a result, in some countries, children who are accused of serious offences are treated as if they are adults, and in such cases, the Beijing Rules will not apply.

The Beijing Rules envisage that:

- A comprehensive social policy is in place to ensure the well-being of juveniles.
- Reaction to juvenile offenders is always to be in proportion to the circumstances of both the offenders and the offence.
- Police officers who deal extensively with juveniles are specially trained.
- Detention during trial is used as a measure of last resort and for the shortest period of time.
- The placement of a juvenile in an institution is always to be a disposition of last resort and for the minimum necessary period.
- Necessary assistance, such as, housing, vocational training and employment is to be provided to facilitate the rehabilitative process.
The Beijing Rules are not a treaty and they are, therefore, not binding. However, the incorporation of some of the rules into the Convention on the Rights of the Child has effectively made them binding on State Parties.

**Standards for the Prevention of Juvenile Delinquency**

The United Nations Guidelines for the Prevention of Juvenile Delinquency known as Riyadh Guidelines were adopted in 1990. The main focus of the guidelines is early protection and preventive measures, with particular attention to children who are subject to social risk. The term social risk means, children who are vulnerable due to circumstances and whose health, safety and education may be at risk. The guidelines recommend that both the family and the school should be involved to help integrate children better. The guidelines also recommend counselling and information about the prevention of drug, alcohol and substance abuse.

**Check Your Progress I**

**Note:** Use the space provided for your answers.

1) Trace the genesis of child protection law.

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2) Enlist the significant international developments that reinforced the discourse on child rights.

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**4.4 DEVELOPMENT OF JUVENILE JUSTICE IN INDIA**

The history of juvenile justice in India begins with the British Rule in the 1860’s. During the British regime, the Government formulated legislations that had a protective provision for children. These included:

- **The Apprentice Act, 1850** was the first legislation for children without parental care. It stated that the children between 10-18 years who were convicted by courts should be provided vocational training for rehabilitation.
• **The Indian Penal Code, 1860** exempted all children under the age of 7 years from all criminal responsibility. It also exempted children between 7 and 12 years, who have not attained maturity or understanding to judge the consequence of their conduct, from criminal responsibility.

• **The Reformatory Schools Act, 1897** gave courts the discretion to send a convicted child under 15 years to reformatory schools for 3-7 years, and permitted boys over 14 years to be released for employment.

It is clear that these laws were motivated primarily by the reality of children who were convicted by courts, that is, child offenders. There was inadequate or lack of knowledge about a set of children who need care and protection, but are not necessarily within the criminal net. It was no surprise then that what is seen as a significant achievement in the formulation of the Juvenile Justice Act was the report of the Indian Jail Committee in 1919-1920.

**The Indian Jail Committee (1919-1920)** was mandated with the job of suggesting measures for jail management. In its recommendation, the committee for the first time demanded separating imprisoned offenders according to their age and sentence. This led to a breakthrough in the way child offenders were to be treated, paving the way for a separate system to deal with children in conflict with the law. The suggestions in the Report continue to influence the Juvenile Justice Acts that have been passed since then.

The highlights of the report were that it:

- Recognised that child offenders are products of an unfavourable environment and are entitled to an opportunity to change themselves, given better surroundings.

- Emphasised that it is undesirable to expose young children to prison life.

- Recommended special children’s institutions, equipped to train children for life after discharge.

- Demanded separate institutions for intellectually or physically disabled children and girls.

- Emphasised the need for after care support and maintenance of records of children discharged from institutions. These were seen as valuable information for policy making.

- Recommended establishment of children’s courts with procedures that are child sensitive, flexible and friendly. Recognising that only a small number of children commit crimes, it suggested that the regular Magistrate should sit for special hours in a special room. This was to make the Magistrate realise that he/she is dealing with a different kind of case requiring special treatment. Probation officers were to assist the Magistrate to get to know the child - his family, food habits, and other such personal details.

As we can see, these were important and very significant recommendations to change the way children were to be treated by the legal system. These recommendations led to the formulation of the Children Act in Madras in 1920. This was followed by Acts in Bombay and Bengal. By 1951, there were 6 provinces with their Children’s Acts. Yet, the care for neglected juveniles continued to be seen and understood within the context of child offenders.
Criminal Justice Processes

Post-independence, our Constitution provided for a Welfare State. While Article 15 states that no citizen should be discriminated against on grounds of religion, race, caste, sex, it also provides for the exception that the State may discriminate in favour of women and children, thereby justifying special laws for the protection of children. Article 21A states that the State shall provide free and compulsory education to all children of the age six to fourteen years in such manner as the State may by law determine.

Article 45 of the Constitution provides that the State shall endeavour to provide early childhood care and education for all children until they complete the age of six years. Under Article 39 (e), it is the duty of the State to ensure that children of tender age are not abused and forced by economic necessity to enter vocations unsuited to their age and strength. Article 39(f) stipulates that children should be given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity.

Article 51(k) lays down a duty that all parents or guardians should provide opportunities for education to his child/ward between the age of six and fourteen years.

In 1951, in response to the problems with various State-level Children’s Acts, the Central Government felt the need to make a uniform law for children.

Children’s Act, 1960: One of the important aspects of this was that for the first time, it differentiated between offenders and non-offenders. Another transformational shift was the provision of alternative non-institutional ways of resolving a case. These included -

- warning the child
- probation with supervision/without supervision
- fining the parents/child
- sending the child to institutional care when the State felt the parents were not fit to take care of children. The institutions that were offered were - Children’s Home (for non-offenders), Special Homes (for offenders) or Imprisonment (when a child commits a serious offence).

The Juvenile Justice Act, 1986

This Act brought unity in procedures, institutions, court services and facilities for neglected children. For the first time, it separated the categories of children in need of care and protection from that of children in conflict with the law. It ordered setting up of Juvenile Welfare Boards and Juvenile Homes for neglected children Child in Need of Care and Protection (CNCP); and Juvenile Courts and Special Homes for child offenders Children in Conflict with Law (CCL). The focus shifted from correctional measures to growth and development of children, resulting in a higher dependence on family, community and social organisation to deal with children in distress.

The 1986 Act was also influenced by international advocacy on juvenile justice at the time, especially the adoption of the 1985 Beijing Rules. Recognising the need to protect the human rights of every child, the Act focused not just on child offenders but also on preventing children from becoming offenders, especially among children at high risk, such as homeless and street children.
While the Act on paper was a dramatic shift from its predecessors, implementation remained a challenge. There were concerns about how juveniles were being treated in detention centres that were designated as special homes. The significant problems that continued in the Act were:

- increased focus on institutional care than non-institutional services and after care.
- absence of a uniform age of who was considered a child- for a girl it was 16 years, and for a boy 18 years.
- despite a separate classification of children as offenders and non-offenders, the impact was partial because both categories of children remained in a Observation Home pending their inquiry. Thus, children who committed offences were kept in the same place as neglected children. This is clearly contrary to the spirit of the Constitution and the international commitment to juvenile justice under the Beijing Rules.
- the processes and mechanisms did not adequately emphasise on why children become offenders, strategies for prevention and/or after care rehabilitation.

The reason for this was evident from the composition of the Board which was tilted in favour of the law (having two magistrates and one social worker).

### 4.5 THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000

There were several areas in the Juvenile Justice Act, 1986 which did not meet international standards for the protection of children. The Act was, therefore, replaced by the Juvenile Justice (Care and Protection of Children) Act, 2000. The preamble to the Act states the purpose for which it was enacted as being that of amending the law related to juveniles “by catering to their development needs and by adopting a child-friendly approach in adjudication” in the best interests of the child and other matters connected with the ultimate rehabilitation of the child.

#### Salient Features of the Juvenile Justice Act, 2000

It defined children as anyone below the age of 18 years, as per the Convention on the Rights of the Child. The Act provides for reception, classification, and pre-trial detention of juveniles. There are provisions for children’s homes or shelter homes for children in need of care and protection; there is also provision for the monitoring of these homes by the Central and State Governments.

It separated children into two categories – Children in need of care and protection and children in conflict with the law. This separation was towards decriminalising children who had not committed any offence. The children in conflict with the law (CCL) were to be kept in Observation Homes, and children in need of care and protection (CNCP) were to be sent directly to Juvenile Homes. However, this separation is implemented only in the last stage as police is still empowered to contact both the categories of children for conducting inquiries. Also, both categories of children eventually were subjected to custodial care as one of the options.

It exhibited, a greater willingness of the State to work with NGOs to develop strategies for implementing the Act. This intention was visible by a change in the composition of the Juvenile Justice Board (JJB) - from two magistrates and a
Criminal Justice Processes


Non-institutional services are provided as alternatives to institutionalisation. The Act empowers the Board to give a child in adoption, with the child’s consent. It allows adoptive parents to adopt children of the same sex, irrespective of the number of existing biological children.

Rehabilitation and social integration of a child is an important aspect of the Act. New dispositional alternatives such as group counselling and community service have been provided to the Juvenile Justice Boards. Restoration of the child to the family is now considered a prime objective of any children’s home or shelter home.


Let us try and understand in some detail about what happens to a child when he/she is brought into the Juvenile Justice system. We will walk with the child from the point of his/her coming in contact with the Juvenile Justice system to the final order being passed.

Children in conflict with the Law:

Children in conflict with the law continue to be referred to as “juveniles” at many places in the Act, with all the connotations that go with it, and the word “child” is used to describe those who need looking after (for purpose of this text, we are using the word ‘child’).

Who is this child: A child in conflict is any child who has committed/allegedly committed an offence against the law.

Finding the child: As soon as a child in conflict with the law is caught by the police, he/she will be placed under the charge of the Special Juvenile Police Unit (SJPU) or the designated police officer. The SJPU, or the designated police officer will present him/her to the Juvenile Justice Board (JJB). The child may be produced before an individual Board member when the Board is not sitting.

As soon as the child is caught by the police, the officer-in-charge has to inform the parent/guardian of the child (if they can be found), and direct them to the JJB where the child will appear.

The Inquiry: The inquiry by the JJB into the offence committed by the juvenile should be completed within a period of 4 months from the date of its commencement, unless the period is extended by the Board having regard to the circumstances of the case.

During this period, the Child will stay in an Observation Home

The Order: After the inquiry is over, if the JJB is satisfied that the child has committed an offence, it may –

- allow the child to go home after advice or admonition.
- give counselling to parents/guardian/juvenile.
- direct the child to go for counselling and similar activities.
- order the child to perform community services.
- order the parent of the child or the child herself/himself (if over 14 years and earns) to pay a fine.
- direct the child to be released on probation of good conduct and placed under care and protection of parents/guardian.
- pass an order directing the juvenile to be sent to a special home.

**The Juvenile Justice Board (JJB):** It will be constituted for a district or a group of districts by the State Government to discharge the duties towards children in conflict with the law. It will consist of a magistrate and two social workers of which at least one will be a woman. The appointed magistrate should have special training in child psychology or welfare; and only such social workers with at least seven years experience in children’s health, education, or welfare activities pertaining to children will be eligible.

The power of the JJB will be that of a metropolitan magistrate, or a judicial magistrate of the first class.

**The Observation Homes:** These are institutions set up by the State Governments either by themselves or in association with voluntary organisations. They provide temporary shelter to children in conflict with the law, during the pendency of an inquiry before the JJB.

Every child who is not placed under the charge of parent/family or guardian and is sent to an observation home shall be initially kept in the reception unit of an I Observation Home for preliminary inquiries. This will include classification according to age, consideration of their physical and mental status and degree of the offence committed.

**On conviction by the JJB, the Child is sent to a Special Home**

**The Special Homes:** A State Government may establish and maintain either by itself, or under an agreement with a voluntary organisation, special homes in every district for reception and rehabilitation of juveniles.

Children in need of care and protection are sent directly to the children’s homes by the Child Welfare Committee (the competent authority set up to receive such children and pass necessary orders for their rehabilitation, restoration and social re-integration).

**Children in Need of Care and Protection**

**Who is this child:** Children whose parents are incapable of looking after them, or are abandoned, missing or runaways, victims of natural and man-made calamity, victims of abuse and exploitation, mentally or physically challenged, HIV/AIDS affected or infected, suffering from terminal illnesses, trafficked for labour and/or sexual purposes - are the children in need of care and protection.

**Finding the child:** Any concerned person or organisation can produce a child in need of care and protection before the Child Welfare Committee. These include:

- Police, or SJPU or a designated officer.
- Any public servant.
Childline (a registered voluntary organisation) or by any other voluntary organisation recognised by the State Government.

- Any social worker or institution authorised by the State Government.

The law also provides for the child to produce her/himself before the Committee if s/he needs care and protection. This is in recognition of the child as a human being capable of expressing her/his views and taking decisions for her/himself and is also in line with the principle of best interest of the child.

**The Child Welfare Committee:** The Child Welfare Committee (CWC) shall consist of a chairperson and four other members appointed by the State Government, of which at least one shall be a woman, and another an expert on child related matters. The CWC shall have the final authority to dispose of cases for the care, Juvenile Justice System protection, treatment, development and rehabilitation of children as well as to provide for their basic needs and protection and human rights.

**The Inquiry:** The inquiry by the CWC will be completed within four months of the date of its commencement.

**During the period of inquiry, the Child will stay in a Children’s Home**

**The Order:** The CWC has the power to restore the child in need of care and protection to his/her parent/guardian, or any fit person or a fit institution. After completion of the inquiry, if the CWC believes that the child has no family or support, or that sending to the family may not be in the best interest of the child, the Committee may allow the child to stay in a children’s home or shelter home till the age of 18 years.

**The Children’s homes:** The State Government may establish itself or in association with a voluntary organisation, Children’s home in every district for receiving children in need of care & protection during pendency of inquiry. Post the inquiry, they can continue to stay, in the homes for the care, protection, development, training, education and rehabilitation.

**The Shelter homes:** The State Government may recognise reputed and capable voluntary organisations and provide them assistance to set up shelter homes for juveniles or children.

**Restoration:** The restoration of, and protection of a child will be the prime objective of any children’s home or the shelter home. This may be either to parents/guardians, adoption, foster care or through sponsorships.

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**4.6 THE JUVENILE JUSTICE AMENDMENT ACT, 2006**

As we have seen above, there were gaps in the Juvenile Justice (Care and Protection of Children) Act, 2000 which both law and policy makers felt were important to address in view of responses from groups working with juveniles and children in need of care and protection. Therefore, a number of proposed amendments were introduced through the Juvenile Justice Amendment Act, 2006. Some of the important areas addressed in the amendments are:

The amendment states clearly the definition of the term juvenile as “someone who has not completed the eighteenth year of age as on the date of commission of
such offence.” It also makes it obligatory for the court to make an enquiry if it has found that an accused person was a juvenile at the time the offence was committed. It should then record the finding as nearly as may be. Such a claim as to juvenility may be raised in any court at any stage even if such accused person is no longer a juvenile on or before the commencement of the Act. The section also lays down that if the court finds the accused to be a juvenile, this finding will override any conviction made by another court. This is a very important amendment since there has been considerable confusion before courts on the question of the age of the juvenile and how to deal with cases in which the accused is found to be a juvenile after the commission of the offence and conviction.

The amendment makes it clear that a juvenile in conflict with the law and a child in need of care and protection should be produced before the Board and Committee respectively, within 24 hours, excluding the time of journey and in no circumstances should a juvenile be placed in police lock-up or in a jail. A Magistrate is empowered to review dependency of cases before the Board and to ensure that more sittings be held if required to ensure speedy justice for juveniles.

Understanding the problems created by institutionalisation for juveniles, a provision has been introduced for the Board to reduce the period of stay for a juvenile in a special home to less than three years and in no case, should the period be more than that prescribed.

The privacy and identity of the child is to be protected, and no publication of address or any other detail that would reveal the identity of the child is allowed. The only exception is that such disclosure may be permitted in the best interests of the child.

Institutions working for children in need of care and protection should register under the Act within six months of the amendment.

As far as rehabilitation is concerned, the amendment has broadened the scope of responsibility. It has been provided that the restoration of the child may be done to the parent, adopted person, guardian, any fit person or institution.

The option to be adopted is available for orphan, abandoned or surrendered children in tune with State Government or Central Adoption Resource Authority guidelines. A detailed procedure has been specified for adoption under each of the categories of children.

Adoption may be given to a person irrespective of marital status. A child of the same sex may be adopted, irrespective of the number of living biological sons or daughters. Childless couples may also adopt.

There is a provision of transfer of children to other homes within the state or outside the state in consultation with the Board and the Committee and with the concerned State Government.

A Child Protection Unit has been provided for in the State and in every district to monitor the importance of the Act, maintenance of homes, rehabilitation and co-ordination with other agencies.

**Model Rules**

Another important amendment is that the Juvenile Justice Act, 2000 under Section 68, authorises the Central Government to make rules on all the matters on which the State Governments can make rules. As we are aware, the Rules to any
enactment are the part of the main legislation and specify the procedure for implementation of the Act. State Governments are to make Rules in accordance with Model Rules framed by the Central Government. Following this, the Central Government has notified the Model Rules 2007 on October 26, 2007. These rules are binding on all states till the states make their own rules.

The amendment is an important attempt to remedy the gaps and lacunae evident in the JJ Act of 2000. It has taken the bold step of making secular adoption possible, although there are still some grey areas such as which Court has the jurisdiction to hear adoption applications. However, some detailed guidelines have been specified about the categories of adoption and the procedure to be followed by the Child Welfare Committee. As far as juveniles are concerned, the Amendment Act as well as the Model Rules lay down clear guidelines for the verification of age, a question that has been a very contentious one in adjudication.

Strengths of the Model Rules, 2007

- **Diversion:** The Rules make a mention of the Principle of Diversion, an internationally accepted principle based on the idea that children should be diverted from the formal juvenile justice system through mediation and reconciliation programmes.

- **Definitions:** The model rules has included a longer list of definitions which will help in better interpretation of the Act and limiting the discretion of the competent authorities. Examples of these are the ‘Best interest Principle’, ‘Child Friendly’ which will however require more contextualisation.

- **Age Determination:** The Rules lay down clear procedure and principles for determining the age of the juvenile under Rule 12. This states that a matriculation certificate, or date of birth certificate issued by a school, or given by a Panchayat, or municipal authority should be used as proof. It is only in the absence of these that a medical opinion should be sought from a Medical Board constituted for the purpose.

- **Child Protection Units:** The inclusion of Child Protection Units in the Amendment Act has creditable community participation and therefore decentralised the administration of justice in India.

- **Inspection Committee:** The Rules provide clear mandate and guidelines for the functioning of the Inspection Committees vis a vis the functioning of the system, especially the Management Committees and Children’s Committees. This will enable greater accountability and also ensure that child participation and grievance redressal systems are institutionalised in every Home. The need for ‘sensitive, independent and fair grievance redressal systems accessible to children’ has been one of the recommendations by the UN Committee on the Rights of the Child on country reports on juvenile justice.

- **Social Audit:** It is creditable that the Model Rules (Rule 64) has interpreted the provisions of the Act in the spirit in which it has been drafted — i.e., providing for an audit for a range of services, institutions and processes. The Act states that Social Audit is to be done for Children’s Homes — which in a narrow sense will mean only Children’s Homes set up under Section 34 but in the wider sense should include any residential facility set up under the Act.
Advisory Boards: It is creditable that Advisory Boards are provided for at the Central, State, District, and city level in Rule 93.

Check Your Progress II

Note: Use the space provided for your answers.

1) Trace the development of the Juvenile Justice System in India.

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2) Discuss the salient features of the Juvenile Justice Act, 2000.

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3) Highlight the major amendments which were introduced through the Juvenile Justice Amendment Act, 2006

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4) What are the strengths of the Model Rules, 2007?

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4.7 LET US SUM UP

In a changing world driven by industrialisation, profits and the breakdown of family structures, there is a greater need to protect and care for children who belong to the vulnerable sections of society. The passing of the Central Children’s Act was another important landmark in the history of juvenile legislation. The important features of the JJ Act of 1986 included the distinction that it made between children in conflict with the law and children in need of care and protection.
However, there still remained a high stress on the question of institutionalisation within the Act. The Juvenile Justice (Care and Protection) Act 2000 that replaced the JJ Act of 1986, brought in some important features. Among these were the definition of children to be those below the age of 18 years, allowing for secular adoption of children and the rehabilitation and social integration of child under the Act. The JJ Amendment Act, 2006 and the Model Rules of 2007 made further advances; adoption procedure was laid down as well as norms prescribed for verifying the age of the child. Stringent norms were laid down for protecting the privacy and identity of the child. There are also provisions for monitoring the functioning of various homes under the Act and in the Rules.

4.8 FURTHER READINGS AND REFERENCES


Arlene Manoharan, Critique and Recommendations related to Delegated legislation under the Juvenile Justice (Care and Protection) of Children Amendment Act 2006 and JJ Model Rules 2007, Centre for the Child and the Law, National Law School of India University, 2008.


The *Juvenile Justice (Care and Protection of Children) Act, 2000*.