LAW COMMISSION OF INDIA

FORTIETH REPORT

(LAW RELATING TO ATTENDANCE OF PRISONERS IN COURTS)

February, 1969

GOVERNMENT OF INDIA ● MINISTRY OF LAW

LAW COMMISSION,

K. V. K. Sundaram,
Chairman

Shastri Bhavan, New Delhi,

March 10, 1969.

Shri P. Govinda Menon,
Minister of Law,
Government of India,
New Delhi.

DEAR LAW MINISTER,

I have pleasure in sending herewith the Fortieth Report of the Law Commission on the law relating to the Attendance of Prisoners in Courts. Revision of the law on the subject was undertaken in view of the suggestion relating to section 3 of the Prisoners (Attendance in Courts) Act, 1955, made by a State Government, which was forwarded to the Commission by the Ministry of Home Affairs for the Commission's consideration.

The previous Commission decided to take up the consideration of the subject in November, 1967, and issued a press communique, inviting the opinions of individuals and bodies interested in the subject. That Commission, at its meeting held on 20th February, 1968, considered a draft Report for circulation to State Governments.

After the re-constitution of the Commission in March, 1968, the various amendments required in the existing law were discussed at several meetings held in April, 1968. Tentative proposals (alongwith draft amendments) on the subject were then circulated to State Governments, High Courts, leading Bar Associations and other interested persons and bodies in July, 1968, for their comments. The comments received were considered by the Commission at its meetings held on 29th November, 1968, and 13th and 14th January, 1969. The Report was then prepared and finally approved on 4th February, 1969.

Yours sincerely,
K. V. K. SUNDARAM.

CONTENTS

REPORT ON THE REVISION OF THE LAW RELATING TO ATTENDANCE OF PRISONERS IN COURTS

INTRODUCTORY

Genesis of the Report.

1. Revision of the law relating to the attendance of prisoners in courts was taken up by the Law Commission in the following circumstances. The Government of Bombay brought to the notice of the Government of India a minor difficulty[1] felt in the administration of the Prisoners (Attendance in Courts) Act, 1955, in consequence of the separation of the executive from the judiciary in that State, and the matter was referred by the Government of India to the Law Commission. Though the point raised by the State Government related to a single provision in the Act, the Law Commission considered it desirable to examine the entire law on the subject.

Procedure followed.

2. A note discussing various sections of the Act and the English law on the subject, and analysing section 491 of the Code of Criminal Procedure and other analogous provisions, was prepared. The matter was considered by the Commission and tentative proposals on the subject were formulated and circulated to the State Governments, High Courts and leading Bar Associations for opinion. Most of the comments that we have received have favoured the proposed changes.

PRESENT LAW AND ITS HISTORY

Existing laws on the subject.

3. The law on the subject is to be found mainly in the Prisoners (Attendance in Courts) Act, 1955. This Act contains provisions authorising the removal of prisoners to a civil or criminal court for giving evidence or for answering to the charge of an offence. Sections 491 & 542 of the Code of Criminal Procedure, 1898, also deal with the same subject. Similar provisions authorising the removal of prisoners from the place where they are confined are contained in section 29 of the Prisoners Act, 1900, and in section 3 of the Transfer of Prisoners Act, 1950.

The law before 1955.

4. Before 1955, the law relating to the attendance of prisoners in courts, whether for the purpose of giving evidence in regard to matters pending before them or for the purpose of answering to a criminal charge, was contained mainly in the last part of the Prisoners Act, 1900. As a consolidating and revising measure, this Act incorporated in itself the provisions of the Prisoners' Testimony Act, 1869, which previously dealt with the above subject.

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1 See paragraph 35 (*ii*) *infra*.

Need for special provisions.

5. The basic provision of the Prisoners Act, 1900, *viz.*, section 3, requires every officer in charge of a prison to receive and detain all prisoners duly committed to his custody by any court according to the exigency of any writ, warrant or order by which such person has been committed or until such person is discharged or *removed*, in due course of law. Specific statutory provisions were accordingly necessary to secure the temporary removal of a prisoner in custody to a civil or criminal court which happened to require his attendance and these provisions were made with elaborate care in sections 34 to 52 of the Act. The various details naturally differed in respect of civil and criminal courts, superior and subordinate courts, and courts in presidency towns and courts elsewhere.

Provisions in Code of Criminal Procedure as originally enacted.

6. Despite the fact that it was a consolidating measure, the Prisoners Act left untouched two important provisions on the same subject contained in the Code of Criminal Procedure, 1898. Clauses (c), (d) and (e) of section 491(1) of the Code as originally enacted empowered each of the presidency High Courts to direct—

> "(c) that a prisoner detained in any jail situate within its ordinary original civil jurisdiction be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such court;
>
> (d) that a prisoner detained as aforesaid be brought before a court-martial or any commissioner acting under the authority of any commission from the Governor-General in Council for trial or to be examined touching any matter pending before such court-martial or commissioners respectively;
>
> (e) that a prisoner within such limits be removed from one custody to another for the purpose of trial.".

Section 542 of the Code similarly empowered any Presidency Magistrate to issue an order to the officer in charge of a jail within the presidency town requiring him to bring a prisoner confined in jail before the Magistrate for examination as a witness or as accused person.

Scope of section 491 widened in 1923.

7. The scope and ambit of section 491 of the Code was considerably widened by the Criminal Law Amendment Act, 1923. Instead of only the three High Courts at Calcutta, Madras and Bombay, all the High Courts in British India were conferred the power of issuing directions of the nature of *habeas corpus*. And furthermore, instead of being restricted in territorial extent to the limits of the ordinary original civil jurisdiction of the High Court, the power was made exercisable within the limits of its appellate criminal jurisdiction, *i.e.*, the Province or Provinces over which the High Court had authority.

Inconsistency between Code and Prisoners Act.

8. As far as the High Courts *qua* criminal courts were concerned, there was an overlap and an inconsistency between the provisions of the Code and the provisions of the Prisoners Act. While the power under section 491 of the Code to direct the production of any prisoner for being examined as a witness was unfettered, the identical power under section 37 of the Prisoners Act was limited by the power of the Provincial Government to exclude any prisoners or class of prisoners from the obligation and by the power of the jailer to abstain from complying with the direction of the court for one or other of the reasons specified in section 42 of the Act. Since, however, the occasion for calling up a prisoner to give evidence in a pending matter before any High Court was extremely rare, this inconsistency in the legal provisions did not give rise to any practical, or even perceptible, difficulty. In regard to the three Presidency Magistrates' Courts, there was a similar overlap and inconsistency between section 542 of the Code and Part IX of the Prisoners Act, but this too appeared to have passed unnoticed.

Cumbersome provisions in Prisoners Act.

9. Some of the provisions of the Act for securing the attendance of a prisoner in court to give evidence or to stand his trial for an offence were found to be cumbersome. The observance of these provisions resulted in avoidable delay in the trial of criminal cases and in needless detention of prisoners who were already under trial. To mention a few examples, under section 38, where the prisoner was confined in a district other than that in which the court was situate, the order of the court had to be routed through the District Magistrate or the Sub-divisional Magistrate, within whose jurisdiction the prisoner was confined. Under section 39, where the prisoner was in a presidency town or in a prison more than 100 miles away, a subordinate court requiring his attendance had to apply to the High Court for making the order, and this order again had to be sent to the officer in charge of the prison through the District Magistrate or Sub-divisional Magistrate concerned. Under section 40, a criminal court (including a High Court) in one province requiring the attendance of a prisoner confined in another province had to approach the Government of that province which could, if it thought fit, direct the temporary removal of the prisoner for the purpose in view.

Legislation of 1955—Constitutional angle.

10. Legislation was consequently undertaken in 1955 to simplify the unduly complicated and dilatory procedure laid down in Part IX of the Prisoners Act, 1900, to repeal that Part and to re-enact its provisions with suitable modifications as a separate law. As a matter of constitutional interest, it should be noted that, apart from sections 34 to 52 comprising the said Part IX, the Prisoners Act was a law relating to entry 4 of the State List in the Seventh Schedule, which reads "Prisoners, reformatories, Borstal institutions and other institutions of a like nature, and

persons detained therein, etc.". The specified sections of this Act were, in pith and substance, provisions relating to criminal procedure and civil procedure covered by entries 2 and 13, respectively, in the Concurrent List. This separation of the Concurrent List matters from an existing law relating in the main to a State subject was desirable from the constitutional point of view.

Extension to Part B States.

11. The re-codification was also necessary from the legislative angle, since the Prisoners Act only extended to the former British Indian Provinces, *i.e.*, to the Part A States and Part C States of India, and not to the Part B States. It was felt that there should be a single law on the subject extending to the whole of India (except the State of Jammu and Kashmir).

Extension to persons under preventive detention.

12. During the pendency of the Prisoners (Attendance in Courts) Bill before Parliament, it was apparently decided to extend the scope of the new law to persons under preventive detention. Relying on the preamble to the Prisoners Act, 1900, the Bombay High Court had held[1] its provisions inapplicable to persons detained in prisons by executive authority. Apart from the fact that section 4 of the Preventive Detention Act, 1950, relating to the removal of detenus from one place to another, was hardly appropriate for authorising such removal for a purpose unconnected with the object of their detention, several High Courts[2] had emphasised that the power of preventive detention could not be used to help investigation of an offence alleged to have been committed by a detenu. Accordingly, while the long title of the Prisoners (Attendance in Courts) Act, 1955, refers to "persons confined in prisons", the definition in clause (a) of section 2 states that "references to confinement in a prison, by whatever form of words, include references to confinement or detention in a prison under any law providing for preventive detention". In passing, it may be noted that this definition excludes from the scope of the Act those persons who are kept under detention in places other than "prisons" as defined in clause (b) of section 2.

Salient features of the 1955-Act.

13. While the Prisoners (Attendance in Courts) Act, 1955, (hereinafter referred to as the 1955-Act) enlarged the territorial extent, amplified the scope, and generally simplified the provisions of Part IX of the Prisoners Act, 1900, the salient features of the law remained the same. Despite the fact that the provisions applicable to civil courts differed in detail from the provisions applicable to criminal courts, as indeed in the nature of things they had to, they

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1 *Taherally* v. *Chanabassappa*, I.L.R. 1944 Bom. 724.

2 *Dilbagh Singh* v. *Emp.*, A.I.R. 1944 Lah. 373 ; *Labarama* v. *State*, 55 C.W.N. 13; *Maledath Malyali* v. *Commissioner of Police*, A.I.R. 1950 Bom. 202 ; *Narayanamma* v. *Hyderabad State*, A.I.R. 1950 Hyd. 68.

were brought together—one could even say, jumbled together—to a greater extent than in the Prisoners Act, sacrificing clarity for the sake of brevity.

TRANSFER OF PROVISIONS TO THE TWO CODES

Transfer of provisions to the two Codes recommended.

14. When the law relating to prisoners was revised and consolidated in 1900, there was perhaps some advantage in including in that Act the provisions contained in the Prisoners' Testimony Act, 1869. Officers in charge of prisons might have found it convenient to be provided with a single *vade-mecum*, but from the point of view of the civil and criminal courts and of the litigant public it would have been desirable to separate the provisions concerning civil courts from those concerning criminal courts and put them in appropriate niches in the two procedural Codes. The contrary view has been expressed in one of the comments[1] received by us. It is said that there are other instances of special provisions relating to civil and criminal courts being found in the same Act and special Acts (*e.g.*, the Indian Soldiers Litigation Act, 1925) regulating civil porated in a separate Act, which would make reference comment, there is an "advantage, not merely for prison officers but for the courts and the litigant public, in having the provisions relating to a special class of persons incorporated in a separate Act, which would make reference to them easier and which, not having to be read with other provisions of the vast Act like either of the two Codes, would be easier to follow and interpret". We have already noticed that connected and slightly inconsistent provisions on the subject exist in the Code of Criminal Procedure. In substance, the provisions of the 1955-Act modify or supplement the ordinary rules regulating the procedure of civil and criminal courts whenever they have to issue process compelling the attendance of free individuals. We are of the view that the special provisions, which are doubtless required in the case of prisoners and detenus, could conveniently be incorporated in the two Codes.

Proposed analysis.

15. It is accordingly proposed, in what follows, to analyse the 1955-Act, first from the point of view of the civil courts and see how best the provisions concerning them can be placed in the Code of Civil Procedure, and then to do a similar analysis from the point of view of the criminal courts.

PROVISIONS RELATING TO CIVIL COURTS

Section 1—Extent.

16. The 1955-Act does not extend to the State of Jammu and Kashmir. Since the Code of Civil Procedure, 1908, also does not at present extend to this State the proposal to include in the Code the provisions in the Act relating to civil courts will not affect the *status quo*.

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1 Comment of the West Bengal Law Commission.

Section 2—Definitions.

17. (i) As already mentioned[1], the object of the definition of "confinement in a prison" in clause (a) of section 2 is to bring within the scope of the Act persons detained in a prison, and not elsewhere, under the Preventive Detention Act, 1950, or any other law providing for preventive detention. With this definition, or rather rule of construction, the subsequent sections apply in relation to persons so *detained* in prisons as they apply to persons *confined* in prisons under the orders of a court. The definition, however, is not aptly worded. It would be clearer and more appropriate to use the phrase "confined or detained in a prison" instead of the phrase "confined in a prison" in the six or seven places where it occurs, and to define "detained" as including detained under any law providing for preventive detention.

In this connection, we have considered whether courts should have the power to require the production of persons who for special reasons are detained in places other than prisons. We are of the view that it is neither necessary nor desirable to extend the scope of the existing Act to such persons.

(ii) In the definition of "prison", the expression "reformatory, Borstal institution or other institution of a like nature" has apparently been taken from entry 4 of the State List in the Seventh Schedule to the Constitution. Though the Reformatory Schools Act, 1897, refers to reformatory schools, and not to reformatories, it is likely that in future reformatories other than reformatory schools may come into existence. Hence, no change in the language is suggested.

(iii) There would be no need for a definition of "State Government" in the Code of Civil Procedure. Since, in relation to a Union territory, it would mean the Central Government under the General Clauses Act, it would only be necessary to formally delegate its powers and functions under the new provisions to the Administrator under article 239 of the Constitution.

Section 3—Guidance for issuing order instead of commission.

18. (i) So far as civil courts are concerned, sub-section (1) of section 3 provides that any such court may require the attendance of a prisoner by issuing an order to the officer in charge of the prison, but only if it is within the State. While it appears from the wording that whenever a civil court thinks that the evidence of a prisoner within the State is material, the court will normally issue an order under this section for the production of the prisoner, clause (b) of section 7 shows that the court has the option of issuing a commission for examining the witness in prison if the prison is more than 50 miles distant from the courthouse. Considering the inconvenience, expense and risks

1 Paragraph 12, *supra*.

involved in the production of prisoners in court, the Commission is of the view that if the prison is within easy reach of the court-house, the civil court may normally require the attendance of the prisoner for giving evidence in person. Otherwise, the civil court will normally consider it sufficient to issue a commission for examining him in person, but if it thinks that, in the circumstances of the particular case, examination on commission will not be adequate, it may order the production of the prisoner in court. If the prison is in another State, examination on commission will, as at present, be the only procedure available to the civil court.

As regards the limit of distance to be specified in the rule we think it should be such as to enable the prisoner being brought to the court-house in the morning and taken back to the prison in the evening. We propose 25 Kms. (about 16 miles) for this purpose. In practice this would mean that the prison would be within the town, in which the civil court holds its sitting.

In suggesting this provision we have taken into account the fact that Order 16, rule 19(b), precludes the court from summoning a witness residing at a place more than 200 miles away from the court-house. This rule would, of course, be no bar to the production of a prisoner in court under the proposed new rule even if the prison in which he was confined was more than 200 miles from the court-house. For a prisoner, it is immaterial whether he is less than 200 miles or more than 200 miles away from the court-house, since adequate arrangements will be made for his escort and conveyance and for looking after him while in transit.

Counter-signature by district judge unnecessary.

(ii) Under sub-section (2) of section 3, where an order under sub-section (1) is made by a civil court subordinate to a district judge, it will not have effect unless it is countersigned by the district judge. We are of the view that this restriction is not necessary and that the subordinate civil judiciary may be trusted to exercise their powers under this section with discretion and care. If magistrates of the first class can be so trusted, there is no reason why the judges of civil courts, some of whom are higher in rank than those magistrates, cannot be entrusted with this power. It should also be noted that after the separation of the judiciary from the executive, many officers are civil judges and magistrates of the first class at the same time. It is certainly anomalous that while an officer functioning as magistrate of the first class can make an effective order under section 3 without having to submit it to a higher authority, he cannot do so while functioning as a civil court. In practice also, the procedure of submitting the order to the district judge for countersignature does not appear to be anything more than formal routine, and may be safely dispensed with.

Prior deposit of expenses by party.

(iii) Before a civil court makes an order under section 3 for securing the attendance of a prisoner in court, it is desirable that it should require the party concerned to deposit the costs and expenses involved in the execution of the order, including the expenses that will have to be incurred by the State in providing escort. Under the 1955-Act, this is left to be prescribed by rules under section 9(2)(f). We recommend an express rule in the Code of Civil Procedure for the purpose. In drawing it up, the provisions of Order 16, rule 2, have been kept in mind.

One of the comments[1] on this proposal has drawn attention to section 50 of the Prisoners Act of 1900, which after laying down that no order shall be made by a civil court for the attendance of a prisoner unless the costs and charges of the execution of such order were first deposited, provided as follows :—

> "Provided that, if, upon any application for such order, it appears to the Court to which the application is made that the applicant has not sufficient means to meet the said costs and charges, the Court may pay the same out of any fund applicable to the contingent expenses of such Court, and every sum so expended may be recovered by the Provincial Government from any person ordered by the Court to pay the same, as if it were costs in a suit recoverable under the Code of Civil Procedure.".

It is suggested that as a provision for legal aid to indigent persons it deserved to be retained. The comment further states that when Part IX of the Act of 1900 was re-enacted as the Prisoners (Attendance in Courts) Act, 1955, "the above provision was eliminated which perhaps is not a change of which independent India may feel proud. if the law is now amended, the authorities may consider whether the provision contained in the Act of 1900 should not be restored.".

In our view, however, the general scheme of the Code does not contemplate any such concession regarding expenses of witnesses in civil litigation. Under Order 16, even a pauper has to pay the expenses of witnesses, and all that the Code provides is that under section 35, the court can award costs of the suit including those expenses to the pauper. It will not, therefore, be in order to put in the Code a special provision giving a temporary concession for expenses simply because the witness is a prisoner, when the main provisions of the Code as to witnesses do not give any such facility to an indigent party.

(iv) It has been suggested[2] that in the proposed rules provision should also be made for the production of a prisoner before a civil court when his appearance is re-

1 Comment of the West Bengal Law Commission.

2 Comment of the District and Session Judge, Andamans.

quired for purposes other than giving evidence[1], *e.g.*, as a party. We do not consider any such widening of the scope of the existing Act is necessary. Such cases would be of very rare occurrence.

19. Section 4 empowers the State Government to exclude by general or special order any person or class of persons from the operation of section 3, and lays down that "so long as any such order remains in force, the provisions of section 3 shall not apply to such person or class of persons". The question may arise whether the State Government is competent to make such an order in regard to a person for whose attendance a civil (or criminal) court has earlier issued an order under section 3, and if it does, which order will prevail. Having regard to the considerations underlying section 4, the Commission is of the view that the State Government should have power to make an order under section 4 prevailing even over an earlier order of the court, and this should be made clear in the corresponding provision in the Code. Section 4.

We have for this purpose, proposed that the words whether "before or after the order of the State Government" should be added in the provision corresponding to section 4.

In one of the comments[2] which we received on our tentative proposals, it was stated that these words involve "avoidable conflict of decisions by the court and the Government", and are also likely to cause delay in the progress of the case. When the Government arrests a person, it is stated, it must have means to know whether such person should or should not be produced before the court, and there is no reason why precisely at that moment the Government should not take the appropriate decision in the matter. Moreover, if the question of exemption is taken up by the Executive after the Civil Court has ordered the production of a prisoner, it may cause delay, which may turn out to be absolutely unjustified if ultimately the Government does not agree to pass an order of exemption.

We do not agree with this view of the matter. At the time when a person is arrested, the Government would hardly apply its mind to the question whether his production in court should or should not be barred. In our view, no serious delay is involved or likely to be involved in the change which we have suggested. In any case, the matter is one of policy, relating to the maintenance of law and order, and we think it proper that the State Government's order, whether made earlier or later, should prevail.

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1 Order 5, rule 3, and Order 10, rule 4, Code of Civil Procedure, 1908, have been referred to, in this connection.

2 Comment of the District and Sessions Judge, Andamans.

Section 5. 20. Section 5 requires the officer in charge of a prison to comply with an order passed under section 3 and delivered to him in due course, and indicates the manner in which the order is to be carried out. In the application of this section to a person under preventive detention, the question might be raised whether the order of the court under section 3 is sufficient authority for removing the person from the place of detention, or whether a supplementing order of the State Government made under section 4 of the Preventive Detention Act, 1950, is necessary. We are of the opinion that the former is the correct answer, and accordingly do not consider that any clarificatory amendment is required.

Section 6. 21. (i) Section 6 authorises the officers in charge of a prison to abstain from complying with a court's order in certain specified circumstances. Civil Courts are not concerned with the proviso, which is applicable only where "the order has been made by a criminal court".

(ii) Although the implication of section 4 is fairly clear that[1] the officer in charge of a prison must abstain from carrying out a court's order if it had inadvertently been made in respect of an exempted person, it is desirable to mention this expressly along with the four grounds specified in section 6.

(iii) Clause (a) of section 6 appears to be unduly cumbrous. Declaration of unfitness by a prescribed authority in the prescribed manner is unnecessary. It should be sufficient if the medical officer attached to the prison certifies that the prisoner is by reason of sickness or infirmity unfit to be removed. In such cases, the officer in charge cannot be expected to comply with the court's order. The clause may be simplified and shortened as above.

(iv) With reference to clause (b) of section 6, one of the comments[2] is that there should not be an absolute bar against removing prisoners who are under committal for trial or under a remand pending trial or pending an investigation. It is stated :—

> "A prisoner cannot certainly be removed to another Court for the purpose of giving evidence there when his own trial is going on. But apart from that one case, it is not easy to see why he cannot be removed when he is simply awaiting trial under commitment or otherwise or when an investigation concerning some alleged offence committed by him is proceeding. It appears that in the corresponding provisions of the English Act, such as the Criminal Procedure Act, 1953, and the County Courts Act, 1934 there is no such bar, but, on the other hand, prisoners under

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1 As to section 4, see paragraph 19, *supra*.

2 Comment of the West Bengal Law Commission.

commitment are expressly mentioned amongst prisoners, against whom an order for their attendance can be made."

We, however, find that this clause has been there at least since 1900 and in the absence of serious practical difficulty we do not think it should be omitted or modified.

Sections 7 and 8.

22. Sections 7 and 8, which provide for the issue of commissions for the examination of prisoners and the procedure for the execution of such commissions, do not call for any comments. When a corresponding provision is made in the Code of Civil Procedure, it will naturally take a simplified form.

Section 9.

23. Section 9 empowers the State Government to make rules for carrying out the purposes of the Act. A perusal of the existing rules in one or two States shows that almost all the matters dealt with by the rules can be adequately covered by executive instructions and a rule-making power is practically unnecessary.

First Schedule.

24. The First Schedule gives the form in which an order under sub-section (1) of section 3 is to be made. So far as the officer in charge of the prison (to whom the order is addressed) is concerned, the indication in the order that the attendance of the specified prisoner in court is required "to give evidence in a matter now pending before the said court" is doubtless sufficient, but there is no good reason why the prisoner should be kept in the dark as to the nature of the pending matter, the name of the party who has cited him as a witness and other such broad details. It is desirable that the form of the order should be revised so as to give this information at least to the extent to which it is the practice to give in an ordinary summons to a witness.

Provisions to be made in C.P.C.

25. It will be clear from the above detailed consideration of the provisions of the 1955-Act concerning the civil courts that these could appropriately and with advantage be made in a separate Order in the First Schedule to the Code of Civil Procedure, 1908. The most suitable place will be immediately after Order XVI which deals with summoning and attendance of witnesses. In order that the proposed new Order may apply to the courts of small causes in the presidency towns, rule 1 of Order LI will require an amendment. The form of order requiring the production of the prisoner for giving evidence may be given in Appendix B of the First Schedule to the Code.

Draft Amendments appended.

26. We have given in the Appendix to this Report a draft of the amendments to the Code of Civil Procedure, 1908, recommended by us.

PROVISIONS RELATING TO CRIMINAL COURTS

Power of High Courts under section 491(1) (*c*), Cr.P.C.

27. We have already noticed[1] that, in addition to the 1955-Act, there are two sections in the Code of Criminal

1 Paragraphs 6 to 8, *supra*.

Procedure, *viz.*, sections 491 and 542, which also provide for the bringing up of prisoners before criminal courts either for giving evidence or for answering to a criminal charge. Under clause (c) of the former section, the High Court for any State or Union territory has the power to direct[1] that a prisoner detained in any jail within the State or Union territory be brought before the Court to be examined as a witness in any matter pending or to be inquired into in that Court. As a criminal court, every High Court has the same power conferred on it by the 1955-Act in respect of prisoners as well as persons kept in prisons under preventive detention, whether within the State or in another State. While the High Court's power under the Code is not limited in any way, its power under the 1955-Act is subject to the State Government's power to exclude individual prisoners and class of prisoners and to other limitations laid down in the Act. It is desirable that the discrepancies between these two statutory powers should be removed. We recommend that clause (c) of section 491(1) of the Code be omitted, and that the High Court's power to issue directions for this purpose be regulated by the new section which we are proposing below.

Suggestions to retain power considered.

28. One of the comments[2] received by us suggests that the position under section 491(c) should be preserved. We think, however, that there is no need to do so. The position that exists in this respect appears to be fortuitous and not the result of any policy deliberately adopted in the matter. In another comment[3], it is stated:—

> "The ordinary power of requiring the attendance of a prisoner for the purpose of giving evidence in a pending proceeding is a power shared in common by all inferior and superior courts; but the power of requiring the production of a prisoner by a writ of *habeas corpus* belongs to the superior Courts alone. In the language of the English law, the first is the power of issuing ordinary judicial writs, and the second is the power of issuing high prerogative writs. The superior Courts have both the powers, and they use the one normally and the other on extraordinary occasions, when it becomes necessary to bring out the most potent weapon in their armoury. The two powers are certainly not the same, and if provisions for the exercise of the power of the first kind by all Courts are made in a certain statute and provisions for the exercise of power of the second kind by superior Courts are made in another Statute, it is a clear mistake to say that there is a discrepancy between the two sets of provisions.".

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1 This corresponds to the writ known in England as *habeas corpus ad testificandum*.

2 Comment of the Bar Association of India.

3 Comment of the West Bengal Law Commission.

It is difficult to understand why it is a clear mistake to call a spade a spade. The above comment recognises the patent fact that the power conferred on the High Courts by section 491 (1) (c) of the Code is not exactly the same as the power conferred on all criminal courts (including the High Courts when they exercise criminal jurisdiction) by the 1955-Act. We have consequently to consider whether the existence side by side of two such slightly different powers in regard to the same matter should be allowed to continue. The direction of a High Court is equally potent to achieve its object from whichever part of its armoury of powers, whether it be the part labelled "High Prerogative" or the one marked "Statutory", it takes out the weapon. Since it is declared in article 226 of the Constitution that every High Court shall have power to issue to any authority directions, orders or writs, including writs in the nature of *habeas corpus*, for any purpose, the special gleam, if any, on the power derived from the Code provisions—a gleam perhaps attributable to its chapter heading which reads "directions of the nature of a *habeas corpus*"—has practically faded away. In fact, the question arises whether section 491 of the Code serves any purpose at all and whether in view of the comprehensive wording of article 226, there is any longer any justification of keeping the said section in the Code[1]. While leaving this question for further consideration, we need only mention that the power under clause (c) of section 491(1) is no less statutory than the power under the 1955-Act, and when the provisions of this Act are transferred to the Code the said clause will have to be omitted.

Power of High Courts under section 491(1) (*d*).

29. Clause (d) of section 491 (1) empowers a High Court to direct[2] that a prisoner detained in the State or Union territory be brought before a court-martial or any commissioners for trial or to be examined touching any matter before such court-martial or commissioners, respectively. While the reference to a court-martial is readily understandable, the reference to "commissioners" requires explanation. In the Code as enacted in 1898, the reference[3]

1 See Basu's Commentary on the Constitution of India, 5th Ed., Vol. 3, pp. 443—444.

2 This corresponds to the writ known in England as *habeas corpus ad respondendum*. The original object of this writ was to bring up a prisoner confined by the process of an inferior court and to charge him on any cause of action in the superior court. At present, however, it is used to bring up prisoners who are detained in custody under civil or criminal process, before magistrates or courts of record for trial or examination on any other charge.

3 This was apparently a short and simple adaptation for Indian conditions of the provision in the Habeas Corpus Act, 1803 (43 Geo. 3 c. 40), which empowers a court of record "to award a writ or writs of *habeas corpus* for bringing any prisoner or prisoners before any court-martial, or before any commissioners of bankruptcy, commissioners for auditing the public accounts or other commissioners acting by virtue or under the authority of any commission or warrant from His Majesty, his heirs or successors for trial or to be examined touching any matter pending before such court-martial or commissioners respectively".

was to any commissioners[1] "acting under the authority of any commission from the Governor General-in-Council". These words were omitted by the Government of India (Adaptation of Indian Laws) Order, 1937, for reasons which are not easy to appreciate. The result was to leave the words "any commissioners" completely unqualified, and to make it impossible to understand what sort of "commissioners" were intended to be benefited by the provision. It is doubtful whether in recent years any High Court had occasion to issue a direction under clause (d) to facilitate a trial or inquiry before "any commissioners". If at all the power is needed for a commission set up under the Commissions of Inquiry Act, 1952, or similar statutory commissions, the matter can be provided for by the relevant Act. It is unnecesary to retain it in section 491. After omission of this portion of section 491(1)(d), it will apply only to courts-martial, for which section 549 of the Code of Criminal Procedure is the more appropriate place. Therefore, we recommend that clause (d) of section 491(1) may be omitted, and in section 549 of the Code, a sub-section on the lines of section 491(1)(d), modified as above, may be added.

We do not consider it necessary from the practical point of view that this clause should apply in relation to persons under preventive detention, or to prisoners detained in prisons outside the jurisdiction of the High Court.

Power of High Courts under section 491(1)(*e*).

30. The next clause of section 491(1)—clause (e)—empowers a High Court to direct[2] "that a prisoner within such limits be removed from one custody to another for the purpose of trial". Under this widely worded clause, there is no limitation as to the kind of custody—civil, criminal, military or other—*from* which a prisoner may be transferred or as to the kind of custody *to* which he may be transferred, so long as the transfer is for the purpose of trial. In a Patna case[3], a person who was tried by a special court which had no jurisdiction was, on an application for *habeas corpus*, not discharged but ordered to be removed to another jail and to be produced in the court of the sub-divisional magistrate to take his trial. The order was made under clause (e) of section 491(1). This appears to be the only reported reliance on this clause. It may well be regarded as obsolete and omitted.

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1 See par-graph 6, *supra*.

2 This corresponds to the writ known as *Habeas Corpus ad deliberandum et recipiendum*. It has, for instance, been granted in England to remove a person in custody in one country for contempt to take his trial for perjury in another country. The writ is obsolete, as modern legislation adequately provides for the removal of prisoners from one custody to another for various purposes.

3 *Sukhdeo* v. *Emp.*, A.I.R. 1943 Patna 288.

31. Section 542 of the Code which has not been amended subsequently, reads as follows:— Repeal of section 542 recommended.

"542. (1) Notwithstanding anything contained in the Prisoners' Testimony Act, 1869, any Presidency Magistrate desirous of examining, as a witness or an accused person, in any case pending before him, any person confined in any jail within the local limits of his jurisdiction, may issue an order to the officer in charge of the said jail requiring him to bring such prisoner in proper custody, at a time to be therein named, to the Magistrate for examination.

(2) The officer so in charge, on receipt of such order, shall act in accordance therewith and shall provide for the safe custody of the prisoner during his absence from the jail for the purpose aforesaid.".

As already noted[1], this section is slightly different in scope and effect from the 1955-Act, although the latter applies equally to the courts of presidency magistrates. There is no point in having two different provisions for the same purpose. We recommend that section 542 should be repealed.

32. We now turn to the provisions of the 1955-Act in its application to criminal courts, including the High Courts and Presidency Magistrates' Courts, and consider what modifications are necessary or desirable in those provisions before they are incorporated in the Code. Provisions of 1955-Act concerning criminal courts.

33. In as much as the Code also does not extend to the State of Jammu & Kashmir, the territorial extent of the provisions of the 1955-Act will remain unaltered. We would, however, recommend that the Jammu & Kashmir Code of Criminal Procedure should be brought into line with the Indian Code by making similar amendments. Section 1.

34. For the reasons already indicated[2], the definition of "confinement in a prison" will be replaced by a definition of "detained", the definition of "prison" will be slightly modified and the definition of "State Government" will be omitted. Here again, a formal delegation of powers and functions under the new provisions to the Administrators of all the Union territories under article 239 of the Constitution will be necessary[3]. Section 2.

35. (i) Under section 3, any criminal court in a State may issue an order to the officer in charge of a prison, whether within the same or another State, requiring him Section 3—application to security proceedings.

1 Paragraph 8, *supra*.

2 Paragraph 17, *supra*.

3 *Cf.* Paragraph 17, *supra*.

to produce before the court any prisoner or detenu either for the purpose of giving evidence in a matter pending before the court or for the purpose of answering to a charge of an offence which has been made, or is pending, before it. Since sub-section (2) refers to "charge of an offence", it does not enable a criminal court to direct the production of a prisoner for the purpose of defending himself in proceedings under sections 107 to 110 of the Code of Criminal Procedure. As there could hardly be any such cases, we do not consider that the provision should be modified to cover them.

Countersigning by Sessions Judge or Chief Judicial Magistrate instead of District Magistrate.

(ii) Sub-section (3) provides that no order made under sub-section (1) or sub-section (2) by a criminal court which is inferior to the Court of a first class magistrate shall have effect unless it is countersigned by the District Magistrate to whom that court is subordinate or within the local limits of whose jurisdiction that court is situate. This provision gave rise to a slight difficulty in States where the separation of the judiciary from the executive had taken place and the judicial magistrates of the second or third class were not subordinate to the District Magistrate. In Punjab, the difficulty was surmounted by an amendment of the 1955-Act substituting "Chief Judicial Magistrate" for "District Magistrate" in sub-section (3) of section 3. In Bombay, where judicial magistrates are subordinate only to the Sessions Judge, the position is that a judicial magistrate of the second or third class making an order under section 3 has to submit it to the District Magistrate of the district for countersignature. Although this may not be a serious difficulty, it is certainly anomalous to bring in the head of the executive administration of the district into an essentially judicial matter. It would be more appropriate to provide for the submission of such cases to the Sessions Judge or Chief Judicial Magistrate to whom the court making the order is subordinate.

Countersigning necessary.

(iii) We have, in this connection, considered whether the procedure of countersignature could be dispensed with (as recommended above in the case of subordinate civil courts)[1], but come to the conclusion that scrutiny by a higher authority is desirable in the case of lower ranking magistrates.

Procedure for countersigning.

(iv) In order to enable the countersigning officer to decide the matter expeditiously, it is desirable that the magistrate should submit the case with a statement of facts indicating why he considers it necessary to secure the personal attendance of the prisoner. The 1955-Act leaves the procedure in this respect to be prescribed by

1 Paragraph 18 (*ii*), *supra*.

rules *vide* section 9(2) (a), whereas section 36(2) of the Prisoners Act, 1900, contained the necessary direction to the inferior court and also expressly provided that the District Judge or Magistrate could, after considering the inferior court's statement, decline to countersign the order. We recommend that a provision on those lines should be made in the Code.

36. The comments above[1] on sections 4 and 5 apply equally in regard to criminal courts. Sections 4 and 5.

37. (i) As to section 6, so far as criminal courts are concerned (and the proviso only applies to them), clauses (ii) and (iii) of the proviso are obscurely and cumbrously worded. The intention appears to be that when the prison is near enough to the court-house where the evidence is to be taken, the prisoner should not be kept away on the ground that he is under committal for trial or under remand. It should be quite practicable to take him to the court in the morning and bring him back to prison in the evening after giving evidence. The distance of 5 miles mentioned in clause (iii) of the proviso could, however, be safely increased to 25 Kms. (roughly 15 miles), without causing any inconvenience to the prison authorities. Section 6.

(ii) The comments above[2] on section 6 apply equally in relation to criminal courts, and the section should be re-drafted accordingly.

38. Section 7 has no application to criminal courts. Section 7.

39. Section 8 will require formal re-drafting from the point of view of the criminal courts. Section 8.

40. As in the case of the civil courts[3], there will be practically no need for a rule-making power vested in the State Government for supplementing the provisions of the Code. Executive instructions to prison authorities will be sufficient "for carrying out the purposes" of the new provisions. Section 9.

41. The forms given in the two Schedules should be revised so that the prisoner may obtain before-hand an idea of the purpose for which he is being taken to the criminal court, whether it be for answering to a criminal charge or for giving evidence in a case. The officer in charge of the prison should be required to give the prisoner a copy of the order. Schedule

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1 Paragraph 19—20, *supra*.

2 Paragraph 21 (*ii*) and (*iii*), *supra*.

3 *Cf.* Paragraph 23, *supra*.

Amendments to Criminal Procedure Code recommended.

42. We have given in the Appendix to this Report a draft of the amendments to the Code of Criminal Procedure, 1898, recommended by us.

1. K. V. K. SUNDARAM—*Chairman.*
2. S. S. DULAT.
3. MRS. ANNA CHANDI.
4. R. L. NARASIMHAM.
5. S. BALAKRISHNAN.

Members.

P. M. BAKSHI,

Joint Secretary and Legal Adviser.

NEW DELHI;

The 20th February, 1969.

APPENDICES

APPENDIX I.—Draft amendments to the Code of Civil Procedure, 1908.

(1) In the First Schedule to the Code, after Order XVI, the following Order shall be inserted:—

"ORDER XVIA

Attendance of witnesses confined or detained in prisons.

Definitions.

1. In this Order,—

(a) 'detained' includes detained under any law providing for preventive detention;

(b) 'prison' includes—

(i) any place which has been declared by the State Government, by general or special order, to be a subsidiary jail; and

(ii) any reformatory, Borstal institution or other institution of a like nature.

Power to require attendance of prisoner to give evidence.

2. Where it appears to a Court that the evidence of a person confined or detained in a prison within the State is material in a suit, the Court may make an order requiring the officer in charge of the prison to produce that person before the Court to give evidence:

Provided that, if the distance from the prison to the court-house is more than twenty-five kilometres, no such order shall be made unless the Court is satisfied that the examination of such person on commission will not be adequate.

Expenses to be paid into court.

3. (1) Before making any order under rule 2, the Court shall require the party at whose instance or for whose benefit the order is to be issued, to pay into Court such sum as appears to the Court to be sufficient to defray the expenses of the execution of the order, including the travelling and other expenses of the escort provided for the witness.

(2) Where the Court is subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to any rules made in that behalf.

Power of State Government to exclude certain persons from operation of rule 2.

4. (1) The State Government may, at any time, having regard to the matters specified in sub-rule (2), by general or special order, direct that any person or class of persons shall not be removed from the prison in which he or they may be confined or detained, and thereupon, so long as the order remains in force, no order made under rule 2, whether before or after the order of the State Government, shall have effect in respect of such person or class of persons.

(2) Before making an order under sub-rule (1), the State Government shall have regard to the following matters, namely:—

(a) the nature of the offence for which, or the grounds on which, the person or class of persons have been ordered to be confined or detained in prison;

(b) the likelihood of the disturbance of public order if the person or class of persons is allowed to be removed from the prison; and

(c) the public interest, generally.

Officer in charge of prison to abstain from carrying out order in certain cases.

5. Where the person in respect of whom an order is made under rule 2—

(a) is certified by the medical officer attached to the prison as unfit to be removed from the prison by reason of sickness or infirmity; or

(b) is under committal for trial or under remand pending trial or pending a preliminary investigation; or

(c) is in custody for a period which would expire before the expiration of the time required for complying with the order and for taking him back to the prison in which he is confined or detained; or

(d) is a person to whom an order made by the State Government under rule 4 applies;

the officer in charge of the prison shall abstain from carrying out the Court's order and shall send to the Court a statement of reasons for so abstaining.

Prisoner to be brought to Court in custody.

6. In any other case, the officer in charge of the prison shall, upon delivery of the Court's order, cause the person named therein to be taken to the Court so as to be present at the time mentioned in such order, and shall cause him to be kept in custody in or near the Court until he has been examined or until the Court authorises him to be taken back to the prison in which he was confined or detained.

Power to issue commission for examination of witness in prison.

7. (1) Where it appears to the Court that the evidence of a person confined or detained in a prison, whether within the State or elsewhere in India, in material in a suit but the attendance of such person cannot be secured under the preceding provisions of this Order, the court may issue a commission for the examination of that person in the prison in which he is confined or detained.

(2) The provisions of Order XXVI shall, so far as may be, apply in relation to the examination on commission of such person in prison as they apply in relation to the examination on commission of any other person.".

(2) In the First Schedule to the Code, in rule 1 of Order LI, after the word and letter "Order V", the word and letters "Order XVIA" shall be inserted.

(3) In the First Schedule to the Code, in Appendix B, after form No. 19, the following form shall be inserted:—

"No. 20

ORDER REQUIRING PRODUCTION IN COURT OF PERSON IN PRISON FOR GIVING EVIDENCE (ORDER 16A, RULE 1)

In the Court of .....

.....)

..... *Vs.* .....

(Full title of suit)

To

The Officer in charge of the ..... (name of prison)

WHEREAS the attendance of ..... (name of prisoner) ....., at present confined/detained in the above-mentioned prison, is required

on behalf of the plaintiff/defendant in the above-mentioned suit for giving evidence:

You are hereby required to produce the said .... under safe and sure conduct before this Court at ..... on the ..... day of ..... 19 by ..... a.m. there to give evidence in a matter now pending before this Court and after this Court has dispensed with his further attendance, cause him to be conveyed under safe and sure conduct back to the prison.

You are further required to inform the said .... of the contents of this order and deliver to him the attached copy thereof.

The ..... day of .....19 .

Judge.".

APPENDIX II.—Draft amendments to the Code of Criminal Procedure, 1898.

(1) In sub-section (*1*) of section 491, clauses (*c*), (*d*) and (*e*) shall be omitted.

(2) After section 491, the following section shall be inserted, namely:—

"491A. (*1*) Whenever, in the course of an inquiry, trial or other proceeding under this Code, it appears to a Criminal Court,— Power to secure attendance of prisoners.

(*a*) that a person confined or detained in a prison should be brought before the Court for answering to a charge of an offence, or

(*b*) that it is necessary for the ends of justice to examine such person as a witness,

the Court may make an order requiring the officer in charge of the prison to produce such person before the Court for answering to the charge or, as the case may be, for giving evidence.

(*2*) Where an order under sub-section (*1*) is made by a Criminal Court which is inferior to the Court of a Magistrate of the first class, it shall not be forwarded to, or acted upon by, the officer in charge of the prison unless it is countersigned by the Sessions Judge, District Magistrate or Chief Judicial Magistrate, as the case may be, to whom that Court is subordinate.

(*3*) Every order submitted for countersigning under sub-section (2) shall be accompanied by a statement of the facts which, in the opinion of the

Court, render the order necessary, and the authority to whom it is submitted may, after considering such statement, decline to countersign the order.

(*4*) The State Government may, at any time, having regard to the matters specified in sub-section (*5*), by general or special order, direct that any person or class of persons shall not be removed from the prison in which he or they may be confined or detained, and thereupon, so long as the order remains in force, no order made under sub-section (*1*), whether before or after the order of the State Government, shall have effect in respect of such person or class of persons.

(5) Before making an order under sub-section (*4*), the State Government shall have regard to the following matters, namely:—

(*a*) the nature of the offence for which, or the grounds on which, the person or class of persons has been ordered to be confined or detained in prison;

(*b*) the likelihood of the disturbance of public order if the person or class of persons is allowed to be removed from the prison; and

(*c*) the public interest, generally.

(*6*) Where the person in respect of whom an order is made under sub-section (*1*)—

(*a*) is certified by the medical officer attached to the prison as unfit to be removed from the prison by reason of sickness or infirmity; or

(*b*) is under committal for trial or under remand pending trial or pending a preliminary investigation; or

(*c*) is in custody for a period which would expire before the expiration of the time required for complying with the order and for taking him back to the prison in which he was confined or detained; or

(*d*) is a person to whom an order made by the State Government under sub-section (*4*) applies;

the officer in charge of the prison shall abstain from carrying out the Court's order and shall send to the Court a statement of reasons for so abstaining;

Provided that where the attendance of such person is required for giving evidence at a place not more than twenty-five kilometres distant from the prison, the officer in charge of the prison shall not so abstain for the reason mentioned in clause (*b*).

(7) Subject to the provisions of sub-section (6), the officer in charge of the prison shall, upon delivery of an order made under sub-section (1) and duly counter-signed, where necessary, under sub-section (2), cause the person named in the order to be taken to the Court in which his attendance is required, so as to be present there at the time mentioned in the order, and shall cause him to be kept in custody in or near the Court until he has been examined or until the Court authorises him to be taken back to the prison in which he was confined or detained.

(8) The provisions of this section shall be without prejudice to the power of the Court to issue under section 503 a commission for the examination, as a witness, of any person confined or detained in a prison; and the provisions of Chapter XL shall apply in relation to the examination on commission of any such person in the prison as they apply in relation to the examination on commission of any other person.

(9) In this section—

(a) 'detained' includes detained under any law providing for preventive detention;

(b) 'prison' includes—

(i) any place which has been declared by the State Government, by general or special order to be a subsidiary jail; and

(ii) any reformatory, Borstal institution or other institution of a like nature.".

(3) Section 542 shall be omitted.

(4) In section 549, the following sub-section shall be PRISON FOR ANSWERING TO CHARGE OF OFFENCE.

"(3) Any High Court may, whenever it thinks fit, direct that a prisoner within the limits of its appellate criminal jurisdiction be brought before a court-martial for trial or to be examined touching any matter pending before such court-martial.".

(5) In Schedule V, after form XLI, the following forms shall be inserted, namely:—

XLIA.—ORDER REQUIRING PRODUCTION IN COURT OF PERSON IN PRISON FOR ANSWERING TO CHARGE OF OFFENCE.

(*See section* 491A.)

To

The Officer in charge of the.....

(*name of prison*)

at.....

WHEREAS the attendance of.....

(*name of prisoner*)

at present confined/detained in the above-mentioned prison, is required in this Court to answer to a charge of.....

(*state shortly the offence charged*)

You are hereby required to produce the said .... under safe and sure conduct before this Court..... on the .....day of ..... 19...., by..... a.m. there to answer to the said charge and after this Court has dispensed with his further attendance, cause him to be conveyed under safe and sure conduct back to the said prison.

And you are further required to inform the said..... ..... of the contents of this order and deliver to him the attached copy thereof.

Given under my hand and seal of the Court, this ..... day of .....19..

(*Seal*) (*Signature.*)

Countersigned.

(*Seal*) (*Signature.*)

XLIB—ORDER REQUIRING PRODUCTION IN COURT OF PERSON IN PRISON FOR GIVING EVIDENCE.

(*See section* 491*A*.)

To

The Officer in charge of the.....

(*name of prison*)

at.....

WHEREAS complaint has been made before this Court that ..... of .....

(*name of accused*)

has committed the offence of.....

(*state offence concisely with time and place*)

and it appears that ..... at present

(*name of prisoner*)

confined/detained in the above-mentioned prison, is likely to give material evidence for the prosecution/defence:

You are hereby required to produce the said..... ..... under safe and sure conduct before this Court at ..... on the .....day of ..... 19...., by..... a.m. there to give evidence in the matter now pending before this Court, and after this Court has dispensed with his further attendance, cause him to be conveyed under safe and sure conduct back to the said prison.

And you are further required to inform the said..... ..... of the contents of this order and deliver to him the attached copy thereof.

Given under my hand and the seal of the Court, this ..... day of .....19..

(*Seal*) (*Signature.*)

Countersigned.

(*Seal*)

(*Signature.*)

GMG IPND—TSW—116 M of Law—12-8-1970—3,000