



**Directorate of Distance Education
NALSAR University of Law, Hyderabad
&
Truth Labs, Hyderabad**

Reading Material

M.A. (Criminal Law & Forensic Science)

1.1.2. Criminal Law and Legislative underpinnings

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FOREWORD

Law regulates the misconduct, misbehaviour and mischievous acts perpetrated by few people against the humanity or the government or the nature by violating accepted norms of normal human behaviour and code of conduct. Whenever such acts exceed the limits of tolerance, new acts are being passed such as Nirbhaya Act, Anti Ragging Act, Elderly Care and Maintenance Act etc. in the recent times.

Science constantly generates new knowledge about the nature of men and materials in the universe through observation, experiments and research which will be put to use for further development and application by people. Application of such scientific knowledge is converted into new technologies like information technology, biotechnology, nuclear technology, nanotechnology etc. as well as cutting edge technologies recently emerged such as artificial intelligence, machine learning, internet of things, virtual reality, augmented reality, drone technology and so on, that have now gone beyond the imagination of science fiction. Misuse and abuse of these new technologies as we witness in our day-to-day life can be countered through appropriate legislations coupled with application and use of modern forensic science and technology tools that are constantly being developed by the same scientists and technologists.

With such technologies embedded into daily life, the new generation of law students must think creatively and innovatively to come up with suitable legislations to counter the risks, threats and vulnerabilities faced by the individuals, groups and the nation as a whole.

The course is designed to provide various methods to enforce the new and upcoming laws to prevent, detect, defend the victims and punish the wrong doers indulging in such technology-based crimes with proper application of modern advances in forensic sciences and technology.

This M.A. Course in Criminal Law and Forensic Science currently offered enables legal professionals to hone their skills by gaining comprehensive insights coupled with knowledge and expertise of forensic experts and technologists equipped with state-of-the-art equipment.

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UNIT-I

GENERAL PRINCIPLES OF CRIMINAL LAW

INTRODUCTION

The substantial criminal law gives us an insight into the definitions of offences recognized and provides the punishments accordingly. The Indian Penal Code is the criminal code of India which deals with the criminal law exhaustively where majority of offences are defined and punishments are prescribed.

The module begins with discussing the definition of crime, essential elements of crime, and various other aspects of crime.

Learning Objectives:

1. To learn the basic concepts about the law and its various sources.
2. To understand the nature of the Crime
3. To know the general principles of criminal law

1.1: DEFINITION, NATURE, SOURCES AND SIGNIFICANCE OF LAW¹

Law is a system of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the imposition of penalties. Also known as rules or regulations, code of conducts, etc. laws are essentially made and enforced by the government. They are meant to control or change our behavior and unlike moral rules, they can be enforced by the courts. It is a notional pattern of conduct to which actions do or ought to conform.

The large body of Laws is based mainly on general principles of justice, fair play and convenience, which have been worked out by governmental bodies to regulate human activities. In broader sense, 'Law' denotes the whole process by which organized society, through government bodies and personnel (Law-makers, Courts, Tribunals, Law Enforcement Agencies and Executive, Penal and corrective Institutions etc.) attempt to apply rules and regulations to establish and maintain peaceful and orderly relations amongst the people in the society. The idea of 'Law' as guide to human conduct is as old as the existence of the civilized society. The relevance of law to human behavior has become so intimate today that every person has his or her own conception about its nature which is influenced, of

¹ The Course material of Master's in Aviation Law and Transport management of DDE, NALSAR, compiled by Prof. V. Balakista Reddy

course, by his/her own perspective. Not surprisingly the search for an agreed definition of 'Law' has been an endless journey.

There have been conflicting and divergent views of jurists regarding the nature, concept, basis and functions of Law. 'Law' has been regarded as a divinely ordained rule or a tradition of the old customs or recorded wisdom of the wise men or philosophically discovered system of principles which expresses the nature of things or as a body of ascertainties and declaration of an eternal and immutable moral code, or as a body of agreements of men/women in politically organized society, or as a reflection of divine reason or as a body of commands of the sovereign, or as a body of rules discovered by human experience, or a body of rules developed through juristic writings and judicial decisions or as a body of rules imposed on men/women in society by the dominant class, or as a body of rules in terms of economic and social goals of the individuals.

Various jurists have defined the meaning of law, however there is no unanimity of opinion regarding the true definition of law. The reason for lack of unanimity on the subject is that the subject has been viewed and dealt with by different jurists so as to formulate a general theory of legal order at different times and from different points of view, that is to say, from the point of view of nature, source, function and purpose of law, to meet the needs of certain given period of legal development. Therefore, it is not practicable to give a precise and definite meaning to law which may hold good for all times to come. However, it is desirable to refer to some of the definitions given by different jurists so as to develop an understanding of the term "law". The various definitions of law propounded by legal theorists serve to emphasize the different facets of law and build up a complete and rounded picture of the concept of law.

In the following pages we will discuss some prominent definitions and conceptions of law. For the purpose of clarity and better understanding of the nature and meaning of law, we may classify the various definitions into five broad classes:

- Idealistic,
- Positivistic,
- Historical,
- Sociological, and
- Realistic.

(a) *Idealistic Definition of law*: Under this class fall most of the ancient definitions given by Roman and other ancient Jurists. **Ulpine** defined Law as "the art or science of what is equitable and good." Cicero said that Law is "the highest reason implanted in nature." Justinian's Digest defines Law as "the standard of what is just and unjust." In all these definitions, propounded by **Romans**, "justice" is the main and guiding element of law. **Ancient Hindu** view was that 'law' is the command of God and not of any political

sovereign. Everybody including the ruler is bound to obey it. Thus, 'law' is a part of "Dharma". The idea of "justice" is always present in Hindu concept of law.

Salmond, the prominent modern idealistic thinker, defines law as "the body of principles recognized and applied by the State in the administration of justice." In other words, the law consists of rules recognized and acted on by the courts of Justice. It may be noted that there are two main factors of the definition. First, that to understand law, one should know its purpose: Second, in order to ascertain the true nature of law, one should go to the courts and not to the legislature. **Vinogradoff** described Law as "a set of rules imposed and enforced by society with regard to the attribution and exercise of power over persons and things."

(b) *Positivistic Definition of Law*: According to Austin, "Law is the aggregate of rules set by man as politically superior, or sovereign, to men as political subject." In other words, law is the "command of the sovereign". It obliges a certain course of conduct or imposes a duty and is backed by a sanction. Thus, the command, duty and sanction are the three elements of law. **Kelsen** gave a 'pure theory of law'. According to him, law is a 'normative science'. The legal norms are 'Ought' norms as distinct from 'Is' norms of physical and natural sciences. Law does not attempt to describe what actually occurs but only prescribes certain rules. The science of law to Kelson is the knowledge of hierarchy of normative relations. All norms derive their power from the ultimate norm called *Grundnorm*.

(c) *Historical Definition of Law*: **Savigny's** theory of law can be summarized as follows:

That law is a matter of unconscious and organic growth. Therefore, law is found and not made.

Law is not universal in its nature. Like language, it varies with people and age.

Custom not only precedes legislation but it is superior to it. Law should always conform to the popular consciousness.

Legislation is the last stage of law making, and, therefore, the lawyer or the jurist is more important than the legislator.

According to **Sir Henry Maine**, "The word 'law' has come down to us in close association with two notions, the notion of order and the notion of force".

(d) *Sociological Definition of Law*: **Duguit** defines law as "essentially and exclusively as social fact." **Ihering** defines law as "the form of the guarantee of the

conditions of life of society, assured by State's power of constraint". There are three essentials of this definition. First, in this definition law is treated as only one means of social control. Second, law is to serve social purpose. Third, it is coercive in character. **Roscoe Pound** analyzed the term "law" in the 20th century background as predominantly an instrument of social engineering in which conflicting pulls of political philosophy, economic interests and ethical values constantly struggled for recognition against background of history, tradition and legal technique. Pound thinks of law as a social institution to satisfy social wants – the claims and demands and expectations involved in the existence of civilized society by giving effect to as much as may be satisfied or such claims given effect by ordering of human conduct through politically organized society.

(e) *Realist Definition of Law*: Realists define law in terms of judicial process. According to **Holmes**, "Law is a statement of the circumstances in which public force will be brought to bear upon through courts." According to Cardozo, "A principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged is a principle or rule of law." From the above definitions, it follows that law is nothing but a mechanism of regulating the human conduct in society so that the harmonious co-operation of its members increases and thereby avoid the ruin by coordinating the divergent conflicting interests of individuals and of society which would, in its turn, enhance the potentialities and viability of the society as a whole.

To summarise, following are the main characteristics of law and a definition to become universal one, must incorporate all these elements:

Law pre-supposes a State.

The State makes or authorizes to make, or recognizes or sanctions rules which are called law.

For the rules to be effective, there are sanctions behind them.

These rules (called laws) are made to serve some purpose. The purpose may be a social purpose, or it may be simply to serve some personal ends of a despot.

Separate rules and principles are known as "laws". Such laws may be mandatory, prohibitive or permissive. A mandatory law calls for affirmative act, as in the case of law requiring the payment of taxes. A prohibitive law requires negative conduct, as in the case of law prohibiting the carrying of concealed weapon or running a lottery. A permissive law is one which neither requires nor forbids action, but allows certain conduct on the part of an individual if he desires to act.

Laws are made effective:

- by requiring damages to be paid for an injury due to disobedience;
- by requiring one, in some instances, to complete an obligation he has failed to perform;
- by preventing disobedience; or
- by administering some form of punishment.

The law, and the system through which it operates, has developed over many centuries into the present combination of statutes, judicial decisions, custom and convention. By examining the sources from which we derive our law and legal system, we gain some insight into the particular characteristics of our law. The State, in order to maintain peace and order in society, formulates certain rules of conduct to be followed by the people. These rules of conduct are called “laws”.

1.2 SOURCES OF INDIAN LAW:

The expression “sources of law” has been used to convey different meanings. There are as many interpretations of the expression “sources of law” as there are schools and theories about the concept of law. The general meaning of the word “source” is origin. There is a difference of opinion among the jurists about the origin of law. Austin contends that law originates from the sovereign. Savigny traces the origin in Volkgeist (general consciousness of the people). The sociologists find law in numerous heterogeneous factors. For theologians, law originates from God. Vedas and the Quran which are the primary sources of Hindu and Mohammedan Law respectively, are considered to have been revealed by God. Precisely, whatever source of origin may be attributed to law, it has emanated from almost similar sources in most of the societies.

The modern Indian law as administered in courts is derived from various sources and these sources fall under the following two heads:

- Principal sources of Indian Law.
- Secondary sources of Indian Law.

Principal Sources of Indian Law: The principal sources of Indian law are:

1. Customs or Customary Law.
2. Judicial Decisions or Precedents.
3. Statutes or Legislation.
4. Personal Law e.g., Hindu and Mohammedan Law, *etc.*

1.2.1 Customs or Customary Law:

Custom is the most ancient of all the sources of law and has held the most important place in the past, though its importance is now diminishing with the growth of legislation and precedent.

A study of the ancient law shows that in primitive society, the lives of the people were regulated by customs which developed spontaneously according to circumstances. It was felt that a particular way of doing things was more convenient than others. When the same thing was done again and again in a particular way, it assumed the form of custom.

Customs have played an important role in moulding the ancient Hindu Law. Most of the law given in Smritis and the Commentaries had its origin in customs. The Smritis have strongly recommended that the customs should be followed and recognized. Customs worked as a re-orienting force in Hindu Law. Custom as a source of law has a very inferior place in the Mohammedan Law. However, customs which were not expressly disapproved by the Prophet were good laws. It was on the basis of such customs that Sunnis interpreted many provisions of the law, especially the law of divorce and inheritance. In India, many sects of Mohammedans are governed by local customary law.

1.2.2 Judicial Precedents:

In general use, the term “precedent” means some set pattern guiding the future conduct. In the judicial field, it means the guidance or authority of past decisions of the courts for future cases. Only such decisions which lay down some new rule or principle are called judicial precedents. Judicial precedents are an important source of law. They have enjoyed high authority at all times and in all countries. This is particularly so in the case of England and other countries which have been influenced by English jurisprudence. The principles of law expressed for the first time in court decisions become precedents to be followed as law in deciding problems and cases identical with them in future. The rule that a court decision becomes a precedent to be followed in similar cases is known as doctrine of *stare decisis*.

The reason why a precedent is recognised is that a judicial decision is presumed to be correct. The practice of following precedents creates confidence in the minds of the litigants. Law becomes certain and known and that in itself is a great advantage. Administration of justice becomes equitable and fair.

1.2.3 General Principles of Doctrine of Precedents:

The first rule is that each court lower in the hierarchy is absolutely bound by the decisions of the courts above it. The second rule is that in general higher courts are bound by their own decisions. This is a special feature of the English law which is adopted in India.

Supreme Court

The expression ‘all courts’ used in Article 141 refers only to courts other than the Supreme Court. Thus, the Supreme Court is not bound by its own decisions. However, in practice, the Supreme Court has observed that the earlier decisions of the Court cannot be

departed from unless there are extraordinary or special reasons to do so (AIR 1976 SC 410). If the earlier decision is found erroneous and is thus detrimental to the general welfare of the public, the Supreme Court will not hesitate in departing from it. English decisions have only persuasive value in India. The Supreme Court is not bound by the decisions of Privy Council or Federal Court. Thus, the doctrine of precedent as it operates in India lays down the principle that decisions of higher courts must be followed by the courts subordinate to them. However, higher courts are not bound by their own decisions (as is the case in England).

High Courts

The decisions of High Court are binding on all the subordinate courts and tribunals within its jurisdiction. The decisions of one High Court have only a persuasive value in a court which is within the jurisdiction of another High Court. But if such decision is in conflict with any decision of the High Court within whose jurisdiction that court is situated, it has no value and the decision of that High Court is binding on the court. In case of any conflict between the two decisions of co-equal Benches, generally the later decision is to be followed.

In a High Court, a single judge constitutes the smallest Bench. A Bench of two judges is known as Division Bench. Three or more judges constitute a Full Bench. A decision of such a Bench is binding on a Smaller Bench. One Bench of the same High Court cannot take a view contrary to the decision already given by another co-ordinate Bench of that High Court. Though decision of a Division Bench is wrong, it is binding on a single judge of the same High Court. Thus, a decision by a Bench of the High Court should be followed by other Benches unless they have reason to differ from it, in which case the proper course is to refer the question for decision by a Full Bench.

The High Courts are the Courts of co-ordinate jurisdiction. Therefore, the decision of one High Court is not binding on the other High Courts and has persuasive value only. Pre-constitution (1950) Privy Council decisions are binding on the High Courts unless overruled by the Supreme Court.

The Supreme Court is the highest Court and its decisions are binding on all courts and other judicial tribunals of the country. Article 141 of the Constitution makes it clear that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The words "law declared" includes an obiter dictum provided it is upon a point raised and argued (*Bimladevi v. Chaturvedi*²). However, it does not mean that every statement in a judgment of the Supreme Court has the binding effect. Only the statement of ratio of the judgment is having the binding force.

² AIR 1953 All. 613

Kinds of Precedents: Precedents may be classified as: (a) declaratory and original, (b) persuasive, (c) absolutely authoritative, and (d) conditionally authoritative.

Declaratory and original precedents: According to Salmond, a declaratory precedent is one which is merely the application of an already existing rule of law. An original precedent is one which creates and applies a new rule of law. In the case of a declaratory precedent, the rule is applied because it is already a law. In the case of an original precedent, it is law for the future because it is now applied. In the case of advanced countries, declaratory precedents are more numerous. The number of original precedents is small but their importance is very great. They alone develop the law of the country. They serve as good evidence of law for the future. A declaratory precedent is as good a source of law as an original precedent. The legal authority of both is exactly the same.

Persuasive precedents: A persuasive precedent is one which the judges are not obliged to follow but which they will take into consideration and to which they will attach great weight as it seems to them to deserve. A persuasive precedent, therefore, is not a legal source of law; but is regarded as a historical source of law. Thus, in India, the decisions of one High Court are only persuasive precedents in the other High Courts. The rulings of the English and American Courts are persuasive precedents only. Obiter dicta also have only persuasive value.

Absolutely authoritative precedents: An authoritative precedent is one which judges must follow whether they approve of it or not. Its binding force is absolute and the judge's discretion is altogether excluded as he must follow it. Such a decision has a legal claim to implicit obedience, even if the judge considers it wrong. Unlike a persuasive precedent which is merely historical, an authoritative precedent is a legal source of law. **Absolutely authoritative precedents in India:** Every court in India is absolutely bound by the decisions of courts superior to itself. The subordinate courts are bound to follow the decisions of the High Court to which they are subordinate. A single judge of a High Court is bound by the decision of a bench of two or more judges. All courts are absolutely bound by decisions of the Supreme Court. In England decisions of the House of Lords are absolutely binding not only upon all inferior courts but even upon itself. Likewise, the decisions of the Court of Appeal are absolutely binding upon itself.

Conditionally authoritative precedents: A conditionally authoritative precedent is one, which, though ordinarily binding on the court before which it is cited, is liable to be disregarded in certain circumstances. The court is entitled to disregard a decision if it is a wrong one, i.e., contrary to law and reason. In India, for instance, the decision of a single Judge of the High Court is absolutely authoritative so far as subordinate judiciary is

concerned, but it is only conditionally authoritative when cited before a Division Bench of the same High Court.

1.2.4 Doctrine of *Stare Decisis*:

The doctrine of stare decisis means “adhere to the decision and do not unsettle things which are established”. It is a useful doctrine intended to bring about certainty and uniformity in the law. Under the stare decisis doctrine, a principle of law which has become settled by a series of decisions generally is binding on the courts and should be followed in similar cases. In simple words, the principle means that like cases should be decided alike. This rule is based on public policy and expediency. Although generally the doctrine should be strictly adhered to by the courts, it is not universally applicable. The doctrine should not be regarded as a rigid and inevitable doctrine which must be applied at the cost of justice.

1.2.5 Doctrine of Ratio Decidendi: The underlying principle of a judicial decision, which is only authoritative, is termed as ratio decidendi. The proposition of law which is necessary for the decision or could be extracted from the decision constitutes the ratio. The concrete decision is binding between the parties to it. The abstract ratio decidendi alone has the force of law as regards the world at large. In other words, the authority of a decision as a precedent lies in its ratio decidendi. Prof. Goodhart says that ratio decidendi is nothing more than the decision based on the material facts of the case. Where an issue requires to be answered on principles, the principles which are deduced by way of abstraction of the material facts of the case eliminating the immaterial elements is known as ratio decidendi and such principle is not only applicable to that case but to other cases also which are of similar nature.

It is the ratio decidendi or the general principle which has the binding effect as a precedent, and not the obiter dictum. However, the determination or separation of ratio decidendi from obiter dictum is not so easy. It is for the judge to determine the ratio decidendi and to apply it on the case to be decided.

1.2.6 Obiter Dicta: The literal meaning of this Latin expression is “said by the way”. The expression is used especially to denote those judicial utterances in the course of delivering a judgment which taken by themselves, were not strictly necessary for the decision of the particular issue raised. These statements thus go beyond the requirement of the particular case and have the force of persuasive precedents only. The judges are not bound to follow them although they can take advantage of them. They some times help the cause of the reform of law.

Obiter Dicta are of different kinds and of varying degrees of weight. Some obiter dicta are deliberate expressions of opinion given after consideration on a point clearly brought and argued before the court. It is quite often too difficult for lawyers and courts to see whether an expression is the ratio of judgment or just a causal opinion by the judge. It is open, no doubt, to other judges to give a decision contrary to such obiter dicta.

1.3 STATUTES OR LEGISLATION:

Legislation is that source of law, which consists in the declaration, or promulgation of legal rules by an authority duly empowered by the Constitution in that behalf. It is sometimes called Jus scriptum (written law) as contrasted with the customary law or jus non-scriptum (unwritten law). Salmond prefers to call it as “enacted law”. Statute law or statutory law is what is created by legislation, for example, Acts of Parliament or of State Legislature. Legislation is either supreme or subordinate (delegated).

Supreme Legislation is that which proceeds from the sovereign power in the State or which derives its power directly from the Constitution. It cannot be repelled, annulled or controlled by any other legislative authority. Subordinate Legislation is that which proceeds from any authority other than the sovereign power. It is dependent for its continued existence and validity on some superior authority. The Parliament of India possesses the power of supreme legislation. Legislative powers have been given to the judiciary, as the superior courts are allowed to make rules for the regulation of their own procedure. The executive, whose main function is to enforce the law, is given in some cases the power to make rules. Such subordinate legislation is known as executive or delegated legislation. Municipal bodies enjoy by delegation from the legislature, a limited power of making regulations or bye-laws for the area under their jurisdiction. Sometimes, the State allows autonomous bodies like universities to make bye-laws which are recognised and enforced by courts of law.

The rule-making power of the executive is, however, hedged with limitations. The rules made by it are placed on the table of both Houses of Parliament for a stipulated period and this is taken as having been approved by the legislature. Such rules then become part of the enactment. Where a dispute arises as to the validity of the rules framed by the executive, courts have the power to sit in judgment whether any part of the rules so made is in excess of the power delegated by the parent Act.

In our legal system, Acts of Parliament and the Ordinances and other laws made by the President and Governors in so far as they are authorized to do so under the Constitution are supreme legislation while the legislation made by various authorities like Corporations, Municipalities, etc. under the authority of the supreme legislation are subordinate legislation.

1.3.1. Personal Laws:

In many cases, the courts are required to apply the personal law of the parties where the point is not covered by any statutory law or custom. In the case of Hindus, for instance, their personal law is to be found in the Shruti, which includes four Vedas.

The 'Smritis' which are recollections handed down by the Rishi's or ancient teachings and precepts of God, the commentaries written by various ancient authors on these Smritis. There are three main Smritis; the Codes of Manu, Yajnavalkya and Narada.

Hindus are governed by their personal law as modified by statute law and custom in all matters relating to inheritance, succession, marriage, adoption, co-parcenary, partition of joint family property, pious obligations of sons to pay their father's debts, guardianship, maintenance and religious and charitable endowments.

The personal law of Mohammedans is to be found in the holy Koran. The actions, precepts and sayings of the Prophet Mohammed which though not written during his life time were preserved by tradition and handed down by authorised persons. These are known as Hadis. Ijmas, i.e., a concurrence of opinion of the companions of the Prophet and his disciples. Kiyas or reasoning by analogy. These are analogical deductions derived from a comparison of the Koran, Hadis and Ijmas when none of these apply to a particular case.

Digests and Commentaries on Mohammedan law, the most important and famous of them being the Hedaya, which was composed in the 12th century, and the Fatawa Alamgiri which was compiled by commands of the Mughal Emperor Aurangzeb Alamgiri.

Mohammedans are governed by their personal law as modified by statute law and custom in all matters relating to inheritance, wills, succession, legacies, marriage, dowery, divorce, gifts, wakfs, guardianship and pre-emption.

1.4 DEFINITION OF CRIME:

Whatever attempt may be made to define crime, it is clear that it is an offence committed by an individual in society. Criminal science is therefore a social study, and its aims are to discover the causes of criminality, to devise the most effective methods of reducing its amount, and to perfect the machinery for dealing with those who have committed crimes. It has three main branches, criminology, criminal policy, and criminal law.²

Criminology is concerned with the cause of crime, and comprises (a) criminal biology, which investigates causes of criminality which may be found in the mental and physical constitution of the delinquent himself (such as hereditary tendencies and physical defects), and (b) criminal sociology, which deals with enquires into the effects of environment as a

cause of criminality.

Criminal policy is the name given to that branch of criminal science which studies the means by which the volume of harmful conduct society can be limited. It makes use of the information provided by criminology, and its subjects for investigation therefore are (a) the appropriate measures of social organization whereby harmful activities may be prevented, and (b) the treatment to be accorded to those who have caused harm. Under the last-mentioned heading fall decisions as to which transgressions can be adequately left in the class of torts, to be redressed by civil actions for compensation brought by the victim, and which need to be dealt with by the special sanctions imposed by criminal law, and further, which of those sanctions are appropriate in each case. These range from the penalty of death, through various degrees of deprivation of liberty down to such measures as medical treatment, supervision on probation, and mere warnings. Since it is criminal policy, which must dictate the principles by which harms are to be classed as crimes and criminals are to be detected and treated, it is clear that criminal law, which forms the third branch of criminal science, is the instrument of criminal policy.

In legal phraseology Crime means any act, which the law of the country visits with punishment, and in this sense it is synonymous with the word 'Offence'. In other words 'it is an act committed or committed in violation of public law forbidding or commanding it'.

According to Bentham, 'if the question relates to a system of laws already established, offences are whatever the legislature has prohibited for good or for bad reasons. If the question relates to a theoretical research for the discovery of the best possible laws according to the principles of utility, we give the name of offence to every act which we think ought to be prohibited by reason of some evil which it produces or tends to produce.'

According to Halsbury's Laws of England; "a crime is an unlawful act or default which is an offence against the public, and renders the person guilty of the act or default liable to legal punishment."

The common principles, which run through this whole field of criminal law, are seven fundamental principles, which permeate and unify this branch of law. They are (1) legality, (2) harm, (3) act (effort) (4) *mens rea*, (5) the concurrence of the *mens rea* with the act to form the conduct, (6) causation, that is, a causal relationship between the conduct and the harm, and (7) the punitive nature of the sanction. These are the seven basic principles which comprise the foundation of the criminal law.

There are certain acts, which the large majority of civilized people look upon with disapprobation, as tending to reduce the sum total of human happiness, which is the ultimate aim of all laws. These we call Wrongs, such, for instance, as lying, gambling, cheating,

stealing, homicide, etc. The evil tendencies of these acts widely differ in degree. Some of them are not considered sufficiently serious for law's notice. These we only disapprove. We call them mere moral Wrongs. Moral Wrongs are checked to great extent by social laws and laws of religion. There are other more serious wrongs which the law takes notice of, either-

- for punishment, i.e., infliction of pain upon the wrong-doer, or,
- for indemnification, i.e., for making good the loss to the person injured by the Wrong.
- Wrong dealt with under the first head are called Crimes, those under the second head are called Civil injuries.
- According to Blackstone, Crime are public wrongs and affect the whole community; civil injuries are private wrongs and concern individuals. Public and private wrongs are, however, not exclusive of one another, for what concerns individuals must necessarily concern the community of which the individual is a unit, and similarly everything that affects or concerns the community, must also concern and affect the individuals that form that community.

1.5: Difference between Civil and Criminal Law

Civil law deals with the disputes between individuals, organizations, or between the two, in which compensation is awarded to the victim. The object of civil law is the redress of wrongs by compelling compensation or restitution: the wrongdoer is not punished; he only suffers so much harm as is necessary to make good the wrong he has done. The person who has suffered gets a definite benefit from the law, or at least he avoids a loss.

Criminal law is the body of law that deals with crime and the legal punishment of criminal offenses. In Criminal Law the main object of the law is to punish the wrongdoer; to give him and others a strong inducement not to commit same or similar crimes, to reform him if possible and perhaps to satisfy the public sense that wrongdoing ought to meet with retribution.

In civil law the cases are filed by the private party, whereas in criminal law the cases are filed by the government because any offence though committed against a particular person is considered as a violation of the criminal law and hence an offence against the state.

The standard of proof in both the set of laws is also different. Where on one hand, in civil law the principle applied to determine the standard of evidence is 'Preponderance of evidence' i.e. the claimant must produce evidence beyond the balance of probabilities. On the

other hand in criminal law the guilt of the accused needs to be proved beyond a reasonable doubt. Similarly the natures of punishment in both the cases are also different. In a civil matter, punishment is usually in the form of compensation i.e. monetary relief for the injuries or damages, or an injunction in nuisance. In a criminal matter, a guilty defendant is subject to custodial imprisonment or non-custodial punishment fines or community service. In exceptional cases, the death penalty may also be awarded.

According to Austin, an offence which is pursued at the discretion of the injured party and his representatives, is a Civil injury; an offence which is pursued by the Sovereign and his subordinates is a Crime. This is a distinction not of substance but of procedure, and so far as the Indian Criminal Law is concerned, there are a number of offences which cannot be pursued except by the injured party. These lie on the border-line between Crime and civil injuries. For the true basic distinction between Crimes and Civil injuries we must look to the principles upon which civilised communities have selected some wrongs for retributive and others for remedial justice. I do not think in any country any principles were definitely laid down before making the selection, but this itself does not negative the existence of the principle.

Crimes are comparatively grave wrongs than Civil injuries. They are graver because they constitute greater interference with the happiness of others, and affect the well-being not only of particular individuals but of the whole community considered in its social aggregate capacity. They are graver because the impulse to commit them is often very strong, or because the advantage to be gained by the wrongful act and the facility with which it can be accomplished are often so great or the risk of detection so small, that human nature inclined to take the shortest cut to happiness is likely to be tempted often to commit such wrongs. They are graver also because they are ordinarily deliberate acts directed by an evil mind and hurtful to society by the bad example they set. Being graver wrongs they are singled out for punishment with the object partly of making an example of the criminal, partly of deterring him from repeating the same act, partly of reforming him by eradicating the evil will, and partly of satisfying society's feeling of vengeance which the act is supposed to evoke. Civil injuries, on the other hand, are the less serious wrongs, the effect of which is supposed to be confined mainly to individuals, and in which none of the graver elements, which mark out a criminal act, are present. Sometimes a criminal act, which is essentially a personal wrong, is selected for punishment, not because of its gravity or of its effect on society, but because the injury to individual is of a nature that damage cannot be assessed on any reasonable basis or the pain caused to the individual wronged is wholly disproportionate to any pecuniary loss suffered by him.

The idea that all Crimes are wrongs against the State or the community, and that, it is the proper function of the State to pursue Crimes without reference to modern criminal

Jurisprudence, it would be perfectly correct to say that in all. Serious offences it is the State that prosecutes the offender irrespective of the wishes of the individual injured and is also entitled to drop the prosecution at its will. Upon an examination of the Code of Criminal Procedure, you will observe the proportion of compoundable offence, to those that are non-compoundable, is very small, and the right of 'compounding' is limited to comparatively minor offences in which individual injury is minor offence in which individual injury is more largely involved. (s. 345 Cr. P.C.)

1.6 Essentials of the Crime:

1. *Mensrea* – Mental element:

An act to be criminal must ordinarily be an act done with malice or criminal intent. This is called the condition of criminality, or according to some jurists, the state of imputability, and it includes both positive and negative states of the mind, such as intention, will, knowledge, negligence, rashness, heedlessness, etc.

Actus non facit reum nisi mens sit rea (the act itself does not make a man guilty unless his intentions were so) is a well-known legal maxim from which follow the other proposition *actus me invito factus non set meus actus* (an act done by me against my will is not my act). It is this requisite of a Crime that introduces the question of will, intention, malice and various other states of mind. It also brings in questions of compulsion, mistake, insanity, drunkenness infancy, idiocy and other conditions of mind precluding imputability or what is more commonly called criminal responsibility and which you will find are provided for in Chapter IV of the Indian Penal Code.

The Indian Penal codes gives full effect to the doctrine of *mens rea*, and that it does so in two ways. In the first place the Chapter of General exceptions which controls all the offences defined in the Code as well as all offences under special and local laws, deals with the general condition which negative *mens rea*, and thereby exclude criminal responsibility. Under section 6, "throughout this Code every definition of an offence, every penal provision and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the chapter entitled "General Exception," though those exception are not repeated in such definition, penal provision or illustration."

2. *Actus reaus*:

When you have got a human being and an evil intent, these two are not sufficient to constitute a Crime. The law does not punish a mere criminal intent. "the thought of man," said Brian, C.J., " is not triable, for the Devil himself know not the

thought of man.” The criminal intent must manifest itself in some voluntary act or omission. An omission to be punishable must be in breach of a legal duty.

If one allows his wife or young children to die of starvation he commits a crime, because the law casts on individuals the obligation to maintain their wives and young children. Your neighbour, for instance, is dying of starvation. Your granary is full. There is no law that requires you to help him out of your plenty.

Given, a human being an evil intent and an act in furtherance of such intent you require an injury to another human being or to Society at large of the nature to complete a criminal offence.

When an offence is committed it leads to the arrest of the offender, his trial and ultimate punishment. What acts constitute an offence and their appropriate punishment are matters which deal with the substantive penal law, the trial and the determination of punishment in any particular case are Matters concerning the law of Procedure. The principles of the law of Crimes mainly arise in connection with the substantive law. The substantive law of Crime in India to be found in the Indian Penal Code and the law of Procedure, in the Criminal Procedure Code and in the Evidence Act.

On the other hand as an example of a civil injury, pure and simple, we may take an ordinary case of a breach of contract. *A* borrows money from *B* promising to pay within a year. *A* fails to keep his promise. This gives rise to a civil injury for which *B* can obtain adequate compensation in a civil action. Although it may be said that *A*'s action is also injurious to Society at large as setting a bad example, which, if generally followed, may become a matter of public concern, but in vast majority of such cases the breach of promise by the debtor would be found to be due to his inability to pay and would not be attributable to any evil intent. It would be wrong to treat such an acts as a crime, because, in the first place, money compensation is an adequate remedy which will fully indemnify the individual wronged, and the costs generally allowed against the unsuccessful party in a Civil action will cause sufficient pain to deter *A* from making such a breach in the future if he can help it.

There may, however, be cases of mere Civil injury which it may be necessary to punish as a Crime, either because the inconvenience caused is so great that money compensation is not adequate, or if adequate is obtainable under conditions so harassing as to be prohibitive, or because the chances of detection are so small that unless punished as a Crime great many others may be tempted to act in the same way and take the risk, or because the evil has become so widespread as to become a matter of public concern. You will find in Sections 490, 491 and 492 of the Indian Penal

Code, examples of Crimes which in reality are mere instances of breach of contract.

It is important to note that the *actus reus*, which is the result of conduct, and therefore an event,³ must be distinguished from the conduct which produced the result. For example, in simple case of murder it is the victim's death (brought about by the conduct of the murder) which is the *actus reus*; the *mens rea* is the murderer's intention to cause that death. In other words, the crime is constituted by the event and not by the activity (or in certain cases, as we shall see, by the omission to act), which caused the event.

The law may indeed (a) command, or (b) permit harm to be inflicted. Accordingly (a) no crime is committed when a duly appointed executioner puts to death a condemned criminal; for although he does so, with the full intent to kill yet this deed, so far from being forbidden, was commanded by the law it is therefore not an *actus reus* on his part⁵

As to (b) another instance of harm which is legally justified is found in the operation of the rule which allows a person in certain situations to employ even fatal force in order to prevent another from committing a crime, or in arresting one who has committed a serious offence. Again, hurt of a less serious kind is not forbidden when inflicted in the reasonable chastisement of a child by a parent, or by a schoolmaster to whom the parent has delegated, or is deemed to have delegated, his authority.

Every movement of our body is an act. The striking of blow is an act. The winking of the eye is an act. A mere expression of the face is an act.

"An action," says Sir Fitz James Stephen "is a motion or more commonly a group of related motions of different parts of the body. Actions may be either involuntary or voluntary, and an involuntary action may be further subdivided according as it is or is not accompanied by consciousness."

"Instance of involuntary actions are to be found not only in such motion as the beating of the heart and the heaving of the chest but in many conscious acts- coughing for instance, the motions which a man makes to save himself from falling and an infinite number of other. Many acts are involuntary and unconscious, though as, far as others are concerned, they have all the effects of conscious act, as, for instance, the struggles of a person in a fit of epilepsy. The classification of such actions belongs more properly to physiology than to law. For legal purposes it is enough to say that no involuntary action, whatever effects "Such being the nature of an action, every movement of our body is an act. The striking of blow is an act. The winking of the eye is an act. A mere expression of the face is an act.

1.7 Omissions:

An omission to be punishable must be an illegal omission or one in breach of a legal duty. This principle is incorporated in Section 32 of the Indian Penal code which provides that in every part of the code, except where a contrary intention appears from the context, words, which refer to acts done, extend also to illegal omission.

The word “illegal” is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action and a person is said to be “legally bound to do” whatever it is illegal in him to omit (Section 43).

Omissions in breach of a legal duty by a few familiar instances-

A jailor starves to death the prisoners in his charge. He is guilty of murder.

A physician in charge of a hospital omits to prescribe for a patient in his ward. The physician is responsible for the consequence of his omission.

A stationmaster omits to put up a danger signal with the intention of bringing about a collision in order that it may lead to loss of human life. The other necessary elements of Section 299, Indian Penal Code, being present, he is guilty of murder.

The important question, to ask in connection with omissions, is what are illegal omissions, or omissions in breach of a legal duty. Now a legal duty may be contractual, it may be statutory or it may be founded on rules of justice, equality and good conscience.

There are certain omissions for which the Code specifically provides, e.g.-

- Omission to produce documents to public servants by a person legally bound to produce. (Section 175)
- Omission to give notice of information when legally bound to give it. (Section 176)
- Omission to assist a public servant. (Section 187)
- In other case the question depends upon the applicability of Section 32 as explained by Section 43.

1.8 Stages of Commission of Crime:

There are four stages in the commission of crime.

1. Intention
2. Preparation
3. Attempt and
4. Accomplishment.

In the first stage the plan to commit the offence is in the mind and hence most of the cases are not punishable.

Preparation also is generally not punished. There are, however, exceptional cases where the contemplated offence may be so grave that it would be of the utmost importance to stop it at its earliest stage. Instances of such exceptional cases are to be found in Sections 122 and 126, Indian Penal Code, whereby preparing to wage war against the Sovereign or to commit depredation on the territories of any friendly power are made punishable.

The difference between a preparation and an attempt is thus explained by Lord Blackburn in *Reg. Vs. chessman* (1 L.& c. 140, 1862): “There is no doubt a difference between a preparation antecedent to an attempt and the actual attempt, but if the actual transition has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime.”

“The word attempt,” said Chief Justice Cockburn, “clearly conveys with it the idea that if the attempt had succeeded the offence charged would have been committed. An attempt must be to do that which if successful would amount to the felony charged.” (*M’ McPherson’s case*, D. and B. 202).

Neither of the two cases cover the whole ground of difference between preparation and attempt. They deal with two different aspects of the question. Lord Blackburn deals with cases where the offender had not gone through all the steps necessary to constitute the complete offence. For instance, it covers the case of an accused that pursued his enemy with a gun and was arrested before he got near enough to shoot. It ignores a case in which the offender has taken all the necessary steps to commit the complete offence, but has failed to produce the consequence without which the offence is not complete. It does not, for instance, apply to the case of the man who fires at his enemy, but misses either for his want of skill or because of a defect in the gun or because he had mistaken something else for his enemy.

An act or series of acts constitutes an attempt-

1. If the offender has completed all or at any rate all the more important steps necessary to constitute the offence, but the consequence which is the essential ingredient of the offence has not taken place.
2. If the offender has not completed all the steps necessary to constitute the offence, but has proceeded far enough to necessitate punishment for the protection of society.

Regarding (a) the non-production of the consequence may be due solely to want of skill on the part of the accused or it may be due to other cause operating on the offender personally or it may be due to causes in no way connected with the offender.

In all these causes attempt in the legal sense is complete.

Illustration.—A shoots at B intending to kill him, but misses his mark for want of skill or for any defect in the gun. It is clearly an attempt.

Suppose, A purchases a gun and it is proved that he had held out a threat that he will kill 'B' with a gun and intended to do so. Still it is the state of preparation only, for the purchase of a gun may be for quite an innocent purpose. Besides the purchase of a gun maybe far removed both as regards time and space from the last act necessary to kill or by the intervention of several other act without which the accused could not effect his purpose. You cannot say with any confidence that either he will walk that several miles or complete the rest of the process to accomplish his object. The probability should, in every case, be a question of fact and cannot be determined by any rigid rules of general application. Suppose, however, having purchased the gun the man loads it, goes out with it meets his victim and chases him, but is unable to overtake his, he must be held guilty of an attempt. His act will cause as much alarm as if he had fired and missed his aim. In all human probability he would have fired, if he could overtake his victim. This probability, along with the alarm that the acts cause, takes it beyond the limit of a mere preparation.

If a man merely purchases a stamp paper with the intention of forging a document, even if the intention is proved he should not be punished for his act only amounts to a preparation both because the presumption of innocence is not negative and because of the remoteness and consequent probability of a change of intention. But as soon as he begins to write on the paper, the stage of preparation is exceeded, and it should be considered to be an attempt when the forgery is not completed. In such a case, it is not reasonable to suppose that having commenced the writing he not complete the document. But suppose an man is found to have commenced writing on a stamped paper a year ago and to have left he work unfinished, it would not be right to punish him, for his conduct is clearly indication of a change of intention.

Difference between Preparation and Attempt: As regards the distinction between a preparation and an attempt it has been said that where there has been merely the procuring if means for the commission of an offence and there is a gap between this and the commencement of an act that would, in all likelihood, lead to the offence, the mere procuring of means is not punishable as an attempt. This is based mainly on the ground that in most cases of this kind the acts so far as they are accomplished may, to the outside world, look perfectly innocent, and partly on the ground that in the interval that must elapse between he preparation and the commencement of the acts leading up o the offence there may be change in the mind of the wrong does.

Queen vs. Peterson ³ was a case of a conviction for attempt to commit bigamy and the attempt consisted of the publication of the banns of marriage. The learned Judge (Pearson J.) quoted with approval the following passage from Mayne's Indian Penal Code:-

“Preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations have been made”

Although 'the intent is the essence of the crime' of attempt, a criminal intention is not sufficient for criminal liability. A 'bare intention is not punishable':² Some act in furtherance of the intention is required. What kind of act, though, is required? How far must the intending criminal have progressed in actualizing her intention, or how close must she have come to committing the complete offence, if she is to be guilty of an attempt?

Stephen's Definition of Attempt: Stephen suggested one such criterion. A criminal attempt requires an 'act done with intent to commit a crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted'.⁶¹

The Law Commission read this as implying 'a measure of approval' for the 'first act' test.⁶² This would be true if we replaced 'constitute' by 'end in';⁶³ and it would then be right to portray this as a much wider test than Parke B's test in *Eagleton*.⁶⁴ It is, however, a misreading of Stephen's test: when properly interpreted, these two tests can be seen to be quite similar.⁶⁵ When I go to buy the tools with which to commit burglary, I perform an act with intent to commit that crime, one of a series which would end in its commission if successfully completed.

Abhyananda Mishra Case: The principle evolved in the above case is this: A person commit the offence of Attempt to commit a particular offence' when (i) he intends to commit that particular offence; and (ii) he, having made preparation and with the intention to commit the offence, does an act towards its commission: such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing the offence.

1.9 Abetment:

When several persons are concerned in a criminal act and take different part in it, it has been considered necessary to make a dissection between them according to the degree of culpability of each.

The classification of offenders under the English law is as follows:

³ (1 All., p. 316, 1876)

Principal and accessories, principal of first and second degrees, and accessories before and after the fact.

Whoever actually commits or takes part in the actual commission of a crime is a principal in the first degree.

Whoever aids or abets the actual commission of a crime is a principal in the second degree.

An accessory before the fact is one who directly or indirectly incites, counsels, procures, encourages or commands any person to commit a felony which is committed in consequence thereof. Such a person when present at the actual commission of the crime is a principal in the second degree.

An accessory after the fact to a felony is one who knowing a felony to have been committed by another receives, comforts, or assists him, in order to enable him to escape from punishment.

The distinction between principal and accessories has reference only to felonies. In treasons and misdemeanors all persons who aid or abet in the commission of crime are regarded as principals, whether they are present or absent when it is committed.

Under the English law crimes are classified under three heads, treasons, felonies and misdemeanors.

The Indian Penal Code makes a broad distinction between principals and abettors. The Code does not recognize accessories after the fact as abettors. It provides for special provisions such as : a person who knowing for having reason to believe that an offence has been committed cause any evidence of the commission of that offence to disappear with the a person who conceals an offender with similar intent (section 212), or a person who harbours a State prisoner or prisoner of war (Section 130), or harbour deserters (section 136), or harbours offenders who have escaped from custody or whose apprehension has been ordered (section 216), or harbour robbers or dacoits (Section 216A), is guilty of a substantive offence.

Even the simple distinction in Indian law between principal and abettor is without a difference in cases in which the punishment for abetment is the same as the punishment for the actual perpetration of the crime.

Under the Indian Penal Code abetment is constituted

1. by instigation,
2. by conspiracy or

3. by aid intentionally rendered.

Conspiracy is generally understood to mean an agreement between two or more persons to do or cause to be done anything illegal or to do a legal act by illegal means. A criminal conspiracy under section 107 has a more restricted meaning.

A person is said to abet the doing of a thing by conspiracy if he engaged with one or more other person or person in any conspiracy for the doing of that thing, if an act or illegal omission taken place in pursuance of that conspiracy, and in order of the doing of that thing.'

By Instigation: Instigation ordinarily means inciting or urging a person to do a thing. A with a warrant from court has come to apprehend B. C willfully representing A that D is B and caused his apprehension. Here C abets by instigation the apprehension of D. Whoever instigates, provoke, incite, urge, or encourage in doing some thing is called abettor. Instigation can be made by letter or by telephone provided contents are made known to the addressee.

Cases: R v Mohit Pandey ⁴:

A woman was prepared to die for Sati. A procession followed her to the cremation ground and the people stood by her funeral pyre. They were all saying 'Ram and Ram'. Accused has asked her also to say 'Ram'. Was the accused guilty of any offence?

Answer: Accused was guilty of abetment for actively conniving at the act of the woman in killing herself by jumping into the fire. There is a silent approval producing the effect of incitement was held to be an abetment by instigation in this case.

Ramkumar v State of HP⁵

A couple was taken to police station where husband was kept separately and the wife was raped and tortured. She was crying and her cries were heard by other police personnel. No police came to her rescue. Are they liable?

Answer: Silence of the police personnel after hearing the cries of help amounts active connivance with perpetrators of wrong and hence they are abettors. It was held that silence of the other police officers was sufficient enough to bring their cases within the purview of section 107.

⁴ (1871) 3 NWPR 316.

⁵ 1996 SCC (Cr) 100 1995 supp (4) SCC 67.

Prem Narain v State⁶ :

A person was holding a knife and was waiting to attack another person. Mr B shouted the words “Mar do sale ko, mouka achha hai, kya dekhat hai mar sale ko”. What is liability of Mr B. He is liable for abetment of murder.

Difference between abetment by conspiracy and offence of conspiracy:

Abetment by Conspiracy S 107(second)	Offence of Conspiracy
Combination + some act or illegal omission needed to constitute abetment by conspiracy. Abettor need not connect the offence to the real culprit (explan 5 to 108). His engagement in conspiracy and some act to indicate will be sufficient to constitute abetment by conspiracy.	A mere agreement to commit a crime is the gist of the offence of conspiracy. Some overt act is necessary where the conspiracy is to commit an illegal act, other than offence. If C is for committing an offence overt act is not essential. Even if conspired act is not committed, the agreed persons are liable for agreement.
In abetment to conspiracy, a person instigates the other to agree.	In conspiracy both share the intention and agree upon. Design is worked out.
Even if the abetted changes his mind, or there is no agreement, abettor is liable.	In the absence of agreement there is no liability.
If abetted agreed to conspiracy, the abettor is liable as abettor and conspirator.	If two or more agreed in a conspiracy, each one is liable for conspiracy.

Faguna Kanta Nath v State of Assam⁷,

Principal offender Khalilur Rahman, police officer, demanded Rs 200 to allow passage of rice taken by Narendra Nath Brahma. He also threatened that if not, the rice and carts would be seized. Brahma pleaded inability to give that much amount but ultimately agreed to pay Rs 150. However he had only Rs 80, which he offered immediately and the rest

⁶ AIR 1957 All 177.

⁷ AIR 1959 SC 673

was to be given later. He also agreed to execute a promissory note. Khalilur Rahman asked Brahma to hand over that money to Faguna Kanta Nath, another police officer, who took it, counted it and handed back to the Khalilur Rahman, Khalilur has put the money in his trouser. Before that both Khalilur and Faguna Kanta went aside and held a conference and agreed on the rate. Whether Khalilur Rahman liable for bribery under S 161 IPC and Faguna for abetment under 161, 165? What is the liability of Faguna, if Khalilur is acquitted for want of evidence?

Answer: If there is sufficient evidence to prove the bribery of Khalilur, he would be liable under s 161 and Faguna would be held guilty under 161 and 165 for aiding and abetting the crime. If Khalilur is acquitted, there is no possibility of convicting Faguna for abetting. Though it is true that for convicting for abetment, the abetted crime need not have to be taken place, it is necessary that abetted act must be a crime to make abettor guilty.

Khalilur was charged as principal offender under Section 161 IPC for bribery and Faguna was charged with abetment to bribery under Section 165A. Section 165 says whoever abets any offence punishable under s 161 or 165, whether or not that offence is committed in consequence of the abetment, shall be punished with imprisonment of either description for a term, which may extend to three years or with fine or with both.

Because of lack of sufficient evidence Khalilur was acquitted, but Faguna was convicted of abetment.

1.10 Joint Liability:

SS 34 and 149

Section 34 says, when several persons in furtherance of the common intention of all do a criminal act, each of such persons is liable for that act in the same manner as if it were done by him alone.

Section 149 provides that, if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

For proper understanding of the definition of the unlawful assembly section 149 should read in conjunction with section 141 of the penal code which may be read as follows:

An Assembly of five or more persons is designated an “unlawful assembly”, if the common object of the persons composing that assembly is-

First, to overawe by criminal force, or show of criminal force, or any public servant in the exercise of the lawful power of such public servant; or **Second**, to resist the execution of any law, or of any legal process; or **Third**, to commit any mischief or criminal trespass, or other offence; or **Fourth**, By means of criminal force or show of criminal force, to any person to take or obtain possession of any property or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth, By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation; An assembly, which was not unlawful when it assembled, may subsequently become an unlawful assembly.

Section 109 provides that, whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation- An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

Section 34 of the Penal Code deals with common intention: it merely enunciates a principle of joint liability for criminal acts done in furtherance of common intention of the offenders. It means, that if two, or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually.

The ingredients of section 34:

(i) Several persons must have a common intention and pre-arranged plan to commit an offence; (ii) in furtherance of which the criminal act is done; (iii) each of such persons must actually participate in the commission of the offence in some way or other at the time the crime is actually being committed.” (iv) The participation must be in doing the act, not merely in its planning. But this participation need not in all cases be by physical presence. In offences involving violence, normal presence at the scene of offence on the principle of joint

liability may be necessary, but such is not the case in respect of other offences where the offence consists of diverse acts which may be done at different times and places.

Difference between Joint Liability and Abetment:

Section 34	Abetment 107
This required closer association of more than one criminals in the actual act of crime	107 punishes instigator simpliciter, abetment is complete though it is not accomplished
Same guilty mind, intention or knowledge and sharing of it, presence and sharing or participation in actual criminal act are essential components of liability under 34.	Person abetted may not be capable, may not have same guilty mind or knowledge of abettor, presence also may not be needed; still, abettor can be punished.

Abetment by Willful Misrepresentation/Concealment: 107

Explanation 1 to s 107 says that abetment includes abetment by wilful misrepresentation and wilful concealment. Illustration makes it clear. If B, knowing that Z has to be arrested, wilfully represents to A, a Police Officer who came with arrest warrant, that C is Mr Z and secures the arrest of C. Here B has abetted A by instigation the apprehension of C through misrepresentation.

Abetment by facilitation

Explanation 2 says that whoever facilitates commission of crime either prior to or during the commission of that crime, is said to have aided doing of that act, hence abetted the crime.

Abetment of offence, s 108

Abetting the commission of an offence or commission of any act, which would be offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor. (Section 108)

Abetment by illegal omission

Explanation 1 says that the abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act. If A asks B, the guardian not to give food to C, his ward. If such denial of food continues it may amount to an offence. A is guilty of abetting B to starve C and thereby injure or attempt to kill or even for murder if it resulted in death of C.

Absence of Abetted act

Section 108 and explanations make out a principle that even if abetted crime is not committed abettor would be guilty.

Illustration: A instigates B to murder D. B refuses to do so. A is guilty of abetting B to commit murder.

Abetted effect

Explanation 2 says to constitute the offence of abetment it is not necessary that the act abetted should be committed or that the effect requisite to constitute the offence should be caused.

- A instigates B to murder D. B in pursuance of instigation stabs D. D recovers from wound because of excellent medical care. A is still guilty of instigating B to commit murder. To make A guilty D need not die.

Abetting an innocent

- Explanation 3 says it is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.
- If A abets a child or lunatic to commit an act which may not be a crime if child or lunatic commits it independently, A would still be guilty of abetment of that crime.
- A abets B a child under seven years to kill Z. Child does the act in the absence of A, A guilty of abetment, though B was not capable by law of committing offence.
- A, with an intention to commit theft, instigates B to take property belonging to Z out of Z's possession, making B to believe that it was his property. B commits the act of taking the property. B is not guilty of any offence. A is guilty of theft and is liable to same punishment as if B had committed theft.

Abetment of abetment

- Explanation 4 says since the abetment of an offence being an offence, the abetment of such an abetment is also an offence.
- A instigates B to instigate C to murder Z. B accordingly instigates C to murder Z and C commits that offence. B and A are liable for murder to the same punishment.
- Explanation 5 says it is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed.

Section 108A punishes abetment in India of offences outside India.

Punishment of abetment

If abetted crime is punished, punishment for abetment is same, s 109

Where there is no punishment prescribed for abetment to commit an offence, and the offence abetted is committed, in consequence of abetment, the punishment provided for the offence is punishment for abetment. (s 109). If in consequence of the instigation, or in pursuance of the conspiracy, or with the aid, it constitutes that an offence is committed in consequence of abetment (explanation says)

If different than abetted offence is committed, s 110

Where abetted commits an offence other than what is abetted with intention or knowledge different from those of abettor, punishment for the abettor will be the punishment provided for the offence which would have been committed with intention of abettor. (Section 110)

Liability of abettor when one act abetted and different act done, s 111

When an act is abetted and a different act is done, the abettor is liable for the act done in the same manner and to the same extent as if he had directly abetted it. Provided the act done was **a probable consequence** of the abetment, and was committed under the **influence of the instigation**, or with the **aid or in pursuance of the conspiracy**, which constituted the abetment.

Cumulative punishment for act abetted and acts done, s 112

- In addition to abetted act, another act is committed for which the abettor is liable under previous section, abettor is liable to punishment for each of the offences. (s112)
- A instigates B to resist by force any arrest made by public servant. B resists and in process B voluntarily causes grievous hurt to the officer, A will be liable to punishment for both these offences if A knew that B was likely voluntarily to cause grievous hurt in resisting public officer.

For a different effect caused by act other than effect of abetted act, s 113

- When an act is abetted with the intention on the part of the abettor of causing a particular effect, and abetted act causes a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the same extent as if he had abetted with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect. (s113)
- If A instigates B to cause grievous hurt to Z. B causes grievous hurt to Z, but Z dies in consequence. If A knew that the grievous hurt abetted was likely to cause death, A liable to be punished with the punishment provided for murder.

If the abettor is present when offence is committed, s 114

- If abettor is present when offence is being committed, he shall be deemed to have committed such act or offence. (s 114)

Abetment of offence punishable with death or life Imp. S 115

- If abetted crime is not committed- imp for 7 years + fine (s115)
- If act causing harm be done in consequence – imp for 14 years + fine

Abetment of offence punishable with imprisonment , s 116

- If abetted act is not committed – if no express provision is made, one-fourth of longest term provided for that offence, or such fine, or both

If abettor or abetted is public servant, whose duty is to prevent

- If offence not committed, - one half of the longest term or fine or both

Abetting offence by public or more than 10 persons- 3 yrs imp + or – fine. S 117

Concealing design to commit offence punishable with death or life s 118

- If committed – 7 yrs - If not committed- one fourth of longest term

Concealing design by public servant, if committed, one-half, if not 10 yrs, 119

Concealing design to commit offence punishable with imp, if committed- one-fourth, If not committed one-eighth of longest term provided for offence, s 120

Abetment, Common Intention and Conspiracy

- Section 114 says if the abettor is present when the offence is committed, he shall be deemed to have committed it. Section 34 and 114 apply where the offence is committed. In abetment or conspiracy offences abetted need not have taken place.

Problem: From following narration, find out the liability at each stage.

- A plans a dacoit and invites B,C, D to join him. They agreed. **Ans: Liable under Conspiracy 120 B, not under 34, 114, 149**
- A says I am old I only keep watch outside the house where dacoit is to be committed: **A is abettor s 114**

- On way to commit dacoit, ABCD ask E to join, E refuses: ***ABCD liable as abettors s 115***
- E agrees to join them. ***Ans: Unlawful Assembly formed with number reaching five and guilty under section 149 r/w s 141 for being a mere member.***
- E gets hurt on the way, four proceed to rob, E guilty u/s 149 as member, S 34 has not come in to play.
- E joins but says “I am not for murder, I agree only for dacoit”, if A and B go forward and kill their old enemy in the process, A and B liable under section 34 read with 302 etc, as they have separately developed a common intention, whereas common object of E A B C D is to only to rob, and the murder ensued was not consequence of or in furtherance of that common object.

1.11 CRIMINAL CONSPIRACY:

Conspiracy means breathing together. Two or more persons, agreeing to do a prima facie unlawful act or a lawful act by unlawful means, is the definition of conspiracy.

Section 120A and 120B, which were added to Penal Code in 1913 to make conspiracy a substantive offence.

- English Law defined conspiracy as the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim or only as a means to it.
There are four essentials:
- two or more persons
- Agreement between the parties.
- For unlawful purpose; and

Agreement:

Agreement is something more than the intention. It indicates the acceptance of intention by each other. The offence of conspiracy is complete as soon as parties have agreed to that act. The entire agreement has to be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve. The Conspiracy consists not merely the intention of two or more but in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. It is an independent offence. It does not disappear because other offences are committed in pursuance of conspiracy. Conspiracy as a crime can exist separately along with crimes committed. A criminal plot, a design, engaging in exchange of promises capable of being enforced make the intention into an agreement. It is

a step after formulation of intention, a step nearer to abetment and also a step prior to preparation, it may also become the starting point of preparation. Abetment and conspiracy merge or overlap on one side while conspiracy and preparation overlap on the other side.

A mere agreement to commit crime is enough even if nothing has been done in pursuance of the agreement. For example, the very fact that two or more persons found with bomb making material in their possession, indicates a pre-engaged plan to endanger somebodies life and that they can be charged with the criminal conspiracy. In similar situation found in the case *Amrit Lal Hazara v Emperor*⁸, the accused pleaded that he had not committed any crime thus not guilty. The High Court observed that persons might be guilty of criminal conspiracy even though the illegal act which they had conspired to do or cause to be done had not been done. Conspiracy differs from other charges. The engagement or confederacy to do some act makes it a crime. However, in the absence of evidence was not found to be sufficient to sustain the charge, they were acquitted.

Conspiracy requires two minds and their unity. A person cannot conspire with his own 'one man company'. There need not be communication between each conspirator and every other, if there is a design common to all.

If there are two conspirators and one is acquitted, the remaining member alone cannot be convicted for conspiracy, because it needs unity of at least two minds. In *Bhagat Ram v State of Rajasthan*⁹, two persons had conspired to extort Rs 2000 from A as illegal gratification, and one of them was acquitted. The offence of conspiracy cannot survive the acquittal of the alleged co-conspirators. If there is no proof to show that the remaining isolated accused had design along with other accused other than those who are acquitted, that accused must be acquitted, as conspiracy was not proved.

Illegal act or legal act by illegal means:

The subject matter of conspiracy is to commit an illegal act or legal act by illegal means. Section 43 defines what is illegal, it means everything which is an offence or which is prohibited by law. Once agreement reached was about committing an illegal act, the question whether means are legal or not does not arise. If agreement is reached to commit offence, and that conspiracy continues for some time, the members at the time of agreement reached and its continuance will be guilty of conspiracy. Section 120B applies to those who are members of conspiracy during its continuance. In *Abdul Kadar v State*¹⁰, a couple of South African nationals conspired to commit some offences in India. The place of conspiracy was South Africa, then they moved to India. When they were charged under 120B they pleaded that

⁸ ILR 42 Cal 957

⁹ (1972) 2 SCC 466 or AIR 1972 SC 1502

¹⁰ AIR 1964 Bom 133

they did not conspire on the territory of India and committed no offence on Indian soil so they were not liable. Since these two were parties to the conspiracy during its continuance when all of them were in Bombay they were held liable.

Cases: State v VC Shukla, Sanjay Gandhi and others¹¹,

VC Shukla, Sanjay Gandhi were convicted under 120B, 409, 435, 411, 414 and 201 of IPC by the Sessions Judge Delhi in respect of burning of all prints (both positive and negative) of the film *Kissa Kursika*, and awarded sentences not exceeding two years of imprisonment. State went in appeal for enhancement of sentences and the accused for acquittal. All these appeals were transferred to the Supreme Court from Delhi High Court. The film was made by Amrit Nahata, a member of Parliament in 1975 during the emergency declared by Mrs Indira Gandhi regime. It was a grotesque which means ridiculously exaggerated satire aimed at criticizing Mrs Indira Gandhi's administration. The Central Board of Film Censors raised objections to several scenes and depictions as they resemble Mrs. Gandhi and Sanjay Gandhi. Nahata applied for certification and submitted the film for examination. It was viewed on 24 April 1975 by a committee of the Board which suggested drastic cuts. One member disagreed and thus it was referred to Revising Committee. The committee after viewing it agreed by majority of 6:1 for certification of the film. Mr NS Thapa, chairman disagreed and according to rule 25 (ii) of the Cinematograph (Censorship) Rules 1958, a reference was made to the Central Government on 8 May 1975. Amrit Nahata was directed deposit the positive print of the film comprising 14 reels of 35 mm. In the meantime, Emergency was proclaimed on the night between 25th and 26th June 1975. Mr Vidyacharan Shukla became incharge of Information and Broadcasting Ministry and he wanted to ban the film. In pursuance of the Center's decision the coordination committee directed seizure of negatives, positives and all other materials relating it to be taken in the custody of the central government. The Bombay police seized the entire film on 1 August and deposited the same in the godown of the board.

The prosecution alleged that under the instructions or directions of Sanjay Gandhi the 13 trun with the film material were brought to Maruthi Complex and burnt down between 10 – 23 November 1975, to destroy all prints of the film *Kissa Kursi Ka*, with active connivance of Accused one and two.

The Supreme Court held that there is no evidence to show that there was an meeting of minds between Shukla and Sanjay Gandhi nor is there any material to indicate that Sanjay played any role in the banning of the film. The decision to ban the film appears to have been taken by the ministry headed by Shukla. Motive cannot be attributed to Minister because an independent witness the Chairman of Board Mr Thapa also of the view that the film should not be certified for public exhibition. Even the act of seizure of the film material is a routine

¹¹ AIR 1980 SC 1383

follow up of the direction and necessary for implementation of the direction given by the Government. The film and other material vanished into thin air. There is no doubt about it. But the Supreme Court held that Shukla and Sanjay could not be convicted in the absence of proof, which would exclude all reasonable doubt. The court observed that prosecution failed to prove the case against the appellants and thus the appeal was allowed. It is well settled that in order to prove a criminal conspiracy there must be direct or circumstantial evidence to show that there was an agreement between two or more persons to commit an offence. There must be meeting of minds resulting in an ultimate decision taken by the conspirators regarding the commission of offence. Though direct proof of conspiracy is generally impossible, from the circumstances, the inference of agreement can be drawn. There was no evidence that connects the accused with destruction of the film material.

It is well established that mere passive cognizance of a conspiracy is not sufficient, there must be active co-operation in other words, and joint evil intent is necessary to constitute the offence. This is implied in the meaning of the term conspiracy itself¹².

In Pulin Behary's case it appeared that certain members of a society found to be revolutionary were not acquainted with the real object of the society, of not having been admitted to its secrets, and it was held that it would not be proper to convict such members of the charge of conspiracy. In such Cases there is no agreement of two minds and not even mental participation in each other's designs.

In **Subramaniam Swamy v. A Raja**¹³, it was held that, "*suspicion cannot take the place of legal proof and existence of a meeting between the accused persons is not by itself sufficient to infer the existence of criminal conspiracy.*"

The Indian law regarding evidence to prove conspiracy is practically the same and Section 10 of the Indian Evidence Act provides as follows:-

‘when there is reasonable ground to believe that two or more persons have conspired together to commit an offence, or an actionable wrong , anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well as for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was party to it.

¹² (Wharton, Vol. II, Art. 1341a).

¹³ (2012) 9 SCC 257.

SPECIAL CHARACTERISTICS OF CRIMINAL CONSPIRACY:

1. Conspiracy is intention to commit crime and joining hands with persons having same intention.
2. Acts subsequent to the achieving of object of conspiracy may tend to prove that a particular accused was party to the conspiracy.
3. Once the object of conspiracy has been achieved, any subsequent act which may be unlawful would not make the accused a part of the conspiracy by giving shelter to the absconder.
4. Conspirators will be enrolled in a chain, all will be members of a single conspiracy if they so intended and agree, even though, each member knows only the person who enrolled him.
5. When two or more persons agree to commit a crime of conspiracy despite the fact that no step is taken by any such person to carry out their common purpose, a crime is committed by each and every one who joins in the agreement.
6. It is not necessary that all conspirators should agree to the common purpose at the same time.
7. What part each conspirator is to play may not be known to everyone or the fact as to when a conspirator joined the conspiracy and when he left.
8. A criminal conspiracy is a partnership in crime and that there is in each conspiracy a joint or individual agency for the prosecution of a common plan.
9. If two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement, the act of each of them, things said, done or written by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by each one of them. This joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement, but also to collateral acts incident to and growing out of the original purpose. However, a conspirator is not responsible for the acts done by a co-conspirator after the termination of the conspiracy.
10. A man may join a conspiracy by word or deed. Criminal responsibility for a conspiracy requires more than a merely passive attitude.
11. One who commits an overt act with knowledge of the conspiracy is guilty and one who passively consents to the object of a conspiracy, goes along with other

conspirators, actually standing by while the others put the conspiracy into effect is guilty, though he intends to take no active part in the crime.

1.12 General Exceptions (ss 76 TO 106):

Having dwelt at some length upon mens rea as a necessary condition of criminality and discussed with reference to the Indian Penal Code the precise meaning to be attached to the more important words used in the definition of offences to indicate the evil intent essential to constitute the different offences. The general conditions of non-imputability shall be discussed here. Strictly speaking these are rules of evidence carrying either conclusive or rebuttable presumptions, The basis of these exemptions are from their very nature subjective.

The burden of proving the exemptions from criminal liability is on the person who wants to bring his case within any one of such exceptions. Thus, it is the accused who is required to show that his case falls within one of the general exception provided in chapter IV, or within any special exception (s), of proviso contained in any other part of the IPC, or any other law. However, the burden is no higher than that which rests upon a party to civil proceedings.

1.12.1: Infancy:

Section 82 of the IPC gives protection to a child under a particular age from criminal prosecution and punishment. This is based on the principle that an infant is incapable of distinguishing between right and wrong and so no criminal responsibility could be fastened in regard to his deeds. Section 82 grants absolute immunity to a child below seven years of age on the ground that such a child is *doli in capax* that is incapable of doing a criminal act,⁴⁸ because a child under such age group cannot form the necessary intention to commit a crime.

Section 83 provides qualified immunity to a child above seven years of age and below twelve years of age. In it is shown that the child has not attained the requisite degree of understanding to judge the nature and consequences of his conduct, he is exempted from criminal liability in the, consequence of his conduct, he is exempted from criminal liability. In the absence of such proof a child above seven years of age is as much liable for his criminal act as adults is. His maturity of understanding can be inferred from the nature and quality of the act subsequent conduct of the doer and other allied factors. For instance, if a child aged nine years picks up necklace valued at Rs. 40 lying on the table in his friend's house and immediately sells it for Rs. 20 and misappropriates the amount, the act of the child shows that he was sufficiently

nature and consequence of his deed. Hence the child will not get protection under the section. His act would amount to theft.

However, no absolute rule as regards the age of discretion is found. It differs from country to country. In Malaysia and England, the age of complete immunity is ten years and a child between the age of ten and 14 years enjoys qualified immunity respectively in the United States the age of absolute incapacity form state between eight to twelve years.

Both according to English as well as Indian Law a child under seven is *doli incapax*, and against this presumption no averment can be received. An infant above the age of seven and below the age of twelve is according to Indian Law not responsible for his acts, if he has not attained sufficient maturity of understanding to Judge of their nature and consequence

1.12.2: Defence of Insanity: Sec 84

84. Act of a person of unsound mind. —Nothing is an offence, which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

The defence of insanity in criminal cases is to be found in section 84 of the Indian Penal Code, 1860, which is reproduced below:

This section embodies a fundamental maxim of criminal jurisprudence, viz., that an act does not constitute a crime unless it is done with a guilty intention. In order to constitute a crime, the intent and the act must concur. The section⁵⁹ fastens no culpability on instance persons, because they can have no rational thinking or the necessary guilty intent.

Section 84 uses the expression “unsoundness of mind”⁶⁰ to include “insanity,” “madness” or “lunacy” for the definition of each of these may differ in degree and kind. These terms are often used synonymously, but precise definitions are hard to come by. Whether the “unsoundness of mind” is temporary or permanent natural or supervening, whether it arise from disease, or exists from the time of birth, it is included in this expression. Thus an idiot, a person non compos mentis by sickness, a lunatic who has lucid intervals of reason, a person naturally mad, and/or delirious,

and one whose reasons is clouded by alcohol, all are persons of “unsound mind,” provided that their unsoundness makes them obvious to the nature and criminality of an act: their unsoundness⁵¹ must reach that degree which the latter part of this section requires.

Test of Insanity: Section 84 embodies two mental conditions which exempt a man from responsibility for his wrongful act, namely,

- that his unsoundness of mind was such that he was “incapable of knowing the nature of the act,” or
- that it had precluded him from understanding that the act he was doing was wrongful.⁶⁸

Cases: Ashiruddin Ahmed v. The King⁶⁵ the Calcutta High court has tried to formulate a third test in the accused, Ashiruddin Ahmad, according to his version, in his dream was commanded by someone in paradise to sacrifice his own five-year old son. The next morning he took his son to a mosque and killed him by thrusting a knife in his throat. He then went straight to his uncle, but, finding a chaukidar nearby, took him to a tank at some distance, and then told the story. The court laid down that to get the benefit of section 84 the accused should establish any one of the following three elements, ⁶⁶ namely, that the nature of the act was not known to the accused or that the act was not known by him to be contrary to law, or that the act was known by him to be wrong. The court held that this third element was established by the accused, because he believed that his dream was a reality. It said that the “accused was clearly of unsound mind and that acting under delusion of his dream he made this sacrifice believing it to be right.”

In Mahammad Hussain v. Emperor¹⁸³ the accused killed his wife on the ground that he had found her with his father in an illicit liaison. The evidence disclosed that for three or three-and-half years prior to the occurrence the accused had suffered at intervals from fits and mental unsoundness in course of which he was subject to delusions. The Oudh Chief Court regarded the accused's allegation as obviously untrue. The father was seventy or seventy-five years old and the wife were eight months advanced in pregnancy. The court held that he had killed her under the influence of a delusion which had produced in his mind, a bona fide belief that the woman had been guilty of abominable conduct but this delusion did not prevent him from knowing the nature of his act. The accused's conduct as a whole was that of a man who believed that in killing his wife he had done something morally justifiable even though the law might see fit to punish him. The court accordingly convicted him.

Irresistible Impulse:

Advances in medical science and psychology have shown that many insane persons may be fully able to distinguish between what is right and what is wrong, yet they have no power to choose and do the right because they are driven by some uncontrollable, free or irresistible impulse to do the wrong. Deep-seated emotional currents may move men to act more often than their realistic reason. Courts in India have, however, consistently adhered to the "right and wrong" test requiring the aberration of intellectual faculties.¹⁵⁴

1.12.3: DEFENCE OF NECESSITY:

Stephen's Definition of the Criminal Law: Compulsion by necessity is one of the curiosities of law, the subject on which the law of England is so vague, if cases raising the question should ever occur, the judges should be practically able to lay down any rule which they consider expedient.

Brooke LJ:**3 necessary requirements for the application of the doctrine of necessity**

- (i) The act is needed to avoid inevitable and irreparable evil.
- (ii) No more should be done than is reasonably necessary for the purpose to be achieved.
- (iii) The evil inflicted must not be disproportionate to the evil avoided.

Bishambher v. Roomal AIR 1951 ¹⁴Facts: The accused molested a snake charmer's girl (tribal people), 200 people were about to kill the accused, Village Panchayat headman intervened- told accused to shave his head and to parade on a donkey as punishment for the offence that he had committed, accused prosecuted the village headman, village headman argued that the punishment that he had given was necessary to prevent the accused's death at the hands of the angered people. High Court accepted it as a defence of necessity.

1.12.4: DEFENCE OF ACCIDENT:**(Section 80)**

Accident in doing a lawful act -Nothing is an offence, which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

¹⁴ All 500, (1951) 52 Cr LJ 179.

Essentials of the defence of accident

- No criminal intention or knowledge
- Lawful act in a lawful manner by lawful means
- Proper care and caution

Cases: **State of Madhya Pradesh v. Rangaswami**¹⁵: Accused went for hunting for a hyena, saw it in his farm house, next day (It was raining in the evening, light was also not proper), heard some sounds behind the bush, turned out to be a man, defence of accident taken and accepted

State of Orissa v. Khora Ghasi ¹⁶Facts: Midnight, accused guarding his fields, bears entered fields before on several occasions and destroyed crops, accused heard sound, thought that a bear had come, shot a thief, defence of accident accepted

Atmendra v. State of Karnataka¹⁷

Facts: 2 brothers were fighting for property, divided their house. There was a coconut tree growing in the house compound. Panchayat settled matter by deciding that the coconuts that fell could be consumed by the brother in whose part of the compound they fell, one brother employed a person to pluck coconuts from the tree, the other brother's son brought a rifle and fired a shot, that brother died.

1.12.5: Defence of Intoxication: (sections 85-86)

Section 85: Act of a person incapable of judgment by reason of intoxication caused against his will

Section 86: Offences requiring a particular intent or knowledge committed by one who is intoxicated

R v. Beard ¹⁸Facts of R v. Beard: Beard is a watchman in some factory, in drunken state, at 6 p.m., 15 year old girl passes by him, Beard called her, makes an attempt to commit rape on her, she tried to resist, Beard made an attempt to shut her mouth, put

¹⁵ AIR 1952 Nag 268.

¹⁶1978 CriLJ 1305

¹⁷AIR 1998 SC 1985, 1998 (4) SCC 256.

¹⁸ 1919 14 Cr. App. R 110

his hand on her throat, she died of suffocation.

Defense counsel: Beard did not know what he was doing, trying to keep her from screaming.

Basdev v. State of Pepsu¹⁹: Retired military person in Punjab, marriage ceremony, Basdev took alcohol in excess, wanted to sit in a chair, told 14 year old boy who was sitting to get up, boy refused to get up, Basdev told the boy that he will kill the boy, boy died when Basdev fired a shot at him.

1.12.6: Defence of Consent

(Sections 87-92)

Section 87: ESSENTIALS:

1. A person may not consent to any intentional causing of death under any circumstance.
2. He may not consent to the intentional causing of grievous hurt or to an act likely to cause death, unless the harm caused is for his benefit. Such a benefit may not be a pecuniary benefit nor a benefit to be derived by any person other than the person harmed.
3. A guardian may not consent to an act intended to cause death or which is an attempt to cause death under any circumstances except for the benefit of the minor, unless the harm caused is for the purpose of causing “preventing death or grievous hurt, or the curing of any grievous disease or infirmity”
4. When the consent of the guardian cannot justify the act itself, it will also not justify the abetment of such an act.

Volenti non fit injuria is a complete defence in torts, but consent is not a complete defence in crimes.

There are certain rights that are inalienable such as rights pertaining to body of a person (87- 92)

- Consent must be free/ voluntary/ cannot be vitiated by force
- Consent may be express or implied- in surgical operations
- Consent can't be given to cause grievous hurt or death.

Stephen's definition - Consent means a consent freely given by a rational and sober

¹⁹ AIR 1956 SC 488.

person so situated as to be able to form a rational opinion upon the matter to which he consents. Consent is said to be given freely when it is not procured by force, fraud or threats of whatever nature.

1.12.7: Right of Private Defence (SS 96-106):

Essentials:

1. There should be an apprehension.
2. Immediate or imminent threat to life or property.
3. Not only to one's property, but also to property of another.

Section 96: Things done in private defence

Section 97: Right of private defence of the body and of property

Section 98: Right of private defence against the act of a person of unsound mind, etc.

Exceptions: (s. 99)

Section 99: Acts against which there is no right of private defence

Section 100: When the right of private defence of the body extends to causing death
Section 103 and 104

Section 103: When the right of private defence of property extends to causing death

Section 104: When such act extends to causing any harm other than death

Section 105 and 106- right of private defence exists as long as imminent danger is there.

Section 105: Commencement and continuance of the right of private defence of property

Section 106: Right of private defence against deadly assault when there is risk of harm to innocent person

Section 101- can be applied to police authorities

Section 101: When such right extends to causing any harm other than death

Section 102- Commencement and continuance of the right of private defence of the body

Cases: **Mohinder Pal Jolly v. State of Punjab**²⁰ **Facts:** Mohinder Pal Jolly was an industrialist, workers were on strike and gathered in front of his office, they started stoning his office, Mohinder fired shots at the workers, 2 workers were killed, pleaded right of private defence.

Held: There was disproportionate use of force, was held liable

²⁰ AIR 1979 SC 577

Omkarnath Singh v. State of Uttar Pradesh AIR 1974 SC 1550

Facts: The accused and the deceased had been involved in a fight. The accused gave a severe blow to the deceased who fell down. The accused chased him and then killed him. Is right of private defence applicable in this case?

Amjad Khan v. State ²¹**Facts:** There were local Muslims and Sindhi refugees, refugees were in majority, Amjad Khan's brother's shop was looted, his brother and other family members were pelted with stones, mob tried to attack their house, Amjad fired shots at the mob, some people were killed.

Vishwanath v. State of Uttar Pradesh ²²**Facts:** Vishwanath's sister was not on good terms with her husband who used to ill-treat her, the sister went to her parents' home, her husband tried to drag her out of the house, Vishwanath came and tried to rescue his sister, had a pen knife, slashed across the chest of his brother-in-law who died, pleaded that he had accidentally done it while exercising his right of private defence.

Puran Singh v. State of Punjab²³: If a person is a trespasser and he is in possession of the land, he will enjoy right of private defence, in case of any attack on land and property.

1.13. PUNISHMENT:

Definition: According to Bentham "Punishment, whatever shape it may assume, is an evil. The matter of evil, therefore, is the sort of matter here in question: —the matter of evil in almost all the shapes of which it is susceptible. In considering this matter, two objects, constant accompaniments one to the other, enquire to be distinguished; —viz. 1. The act by which the evil is considered as being produced; and, 2. What is considered as being the result of that same act, the evil itself that is thus produced? Punishment may be defined—an evil resulting to an individual from the direct intention of another, on account of some act that appears to have been done or omitted"²⁴.

More progress has been made in the matter of definition by several writers. Professor Jerome Hall has set out a detailed description of punishment in the following terms:

²¹ AIR 1952 SC 165

²² AIR 1960 SC 67

²³ AIR 1975 SC 1674

²⁴ Jeremy Bentham, "Rationale of Punishment", P.1.

“First, punishment is a privation. Second, it is coercive. Third, it is inflicted in the name of State; it is ‘authorized’. Fourth, punishment presupposes rules, their violation, and a more or less formal determination of that, expressed in a judgment. Fifth, it is inflicted upon an offender who has committed harm, and this presupposes a set of values by reference to which both the harm and the punishment are ethically significant. Sixth, the extent or type of punishment is in some defended way related to the commission of the harm, and aggravated or mitigated by reference to the personality of the offender, his motives and temptation.”²⁵

Eminent Penologists Benn and Flew²⁶ have given some elements of punishment:

- i. It must involve pain and its consequences must normally be considered unpleasant.
- ii. It must be for an offence against legal rules.
- iii. It must be given to an actual offender who has committed the offence.

Criminal sanctions can have non-punitive as well as punitive purposes. Seven purposes of criminal sanctions are noted frequently:

- i. Restraint or incapacitation: to stop the behaviour in question.
- ii. Individual or specific deterrence: the use of a punishment to reduce the likelihood that the person who receives it will offend again in the future.
- iii. General Deterrence: punishing one person to reduce the likelihood that others will pursue the same kind of punishment.
- iv. Reform or rehabilitation: imposing a punishment, usually in this case called a “treatment” to correct what went wrong in the person who committed the crime.
- v. Moral Affirmation or Symbolism: a punishment intended to reaffirm the moral norm that has been violated, by making the offender a symbol of the consequences of violation, and by in this way drawing “moral boundaries” between the good and bad in society.
- vi. *Retribution*: the use of a punishment to balance the harm done – in effect to return the offence in kind.

²⁵ Jerome Hall “General Principles of Criminal Law”, 1st ed, 1947, p. 310.

²⁶ Prof.Hart, H.L.A. in Radzinowicz & Wolfgang [Ed, Crime and Justice, Vol.II, 1971:21.

- vii. *Restitution or Compensation*: the imposition of a sanction that also seeks to reestablish balance, but now usually with the currency of the money.
- viii. *Principal of Legality*: The historical and the actual meaning of the principle of legality is “limitation on penalization by officials, affected by the required prescription and application of specific rules”.²⁷ On the Continent this aspect of the principle of legality has been formulated with definite reference to the criminal law: “*nulla poena sine lege*.” This maxim has several meanings. In a narrow connotation, it concerns only the sanctions of penal laws: no person shall be punished except in pursuance of a statute, which fixes a penalty for criminal conduct. The prohibition is that no conduct shall be held criminal unless it is described in the hypothesis of a penal statute. In addition this maxim has been understood to include the rule that penal statutes must be strictly construed. A final important signification of the principle is that penal laws shall not be retroactive²⁸.

The Indian Penal Code, 1860 in sec 53 enumerates six kinds of punishments to which offenders may be liable under the provisions of the Penal Code. These six punishments are the Punishments of Death, Imprisonment for Life, Imprisonment, which may be simple or rigorous, Forfeiture of Property and Fine.

The fight against or favouring capital punishment is the most dramatic aspect of penal reform. This is the highest punishment provided in the Indian Penal Code. Death penalty is awarded for the following offences in the Indian Penal Code: namely

1. Waging war against Government²⁹,
2. Abetment of mutiny³⁰,
3. Giving false evidence resulting in conviction and death of an innocent person³¹,

²⁷ Permanent Court of International Justice, Series A/B, No.65 at 53, 56(Advisory opinion, 1935);Jerome Hall “Principles of Criminal Law”, P.19.

²⁸ Supra.n.26, p.55.

²⁹ **121.** "Waging, or attempting to wage war, or abetting waging of war, against the Government of India Whoever wages war against the 53[Government of India], or attempts to wage such war, or abets the waging of such war, shall be punished with death, or 51[imprisonment for life] 54[and shall also be liable to fine].

³⁰ **132. Abetment of mutiny, if mutiny is committed in consequence thereof**

Whoever abets the committing of mutiny by an officer, soldier, 75[sailor or airman] in the Army, 76[Navy or Air Force] of the 53[Government of India], shall, if mutiny be committed in consequence of that abetment, be punished with death or with 4[imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

4. Murder³²,
5. Abetment of suicide of a minor or an insane person³³, Attempted Murder by life convicts³⁴,
6. Dacoity with Murder³⁵.

Solitary Confinement: The Indian Penal Code recognizes solitary confinement as a form of punishment. Sections 73-74³⁶ of the Code deals with such punishments. But it is only a form of rigorous imprisonment and not distinct from it. Solitary confinement is reserved for the most exceptional cases of unparalleled atrocity and brutality³⁷. The peculiarity about this punishment is except in these two sections the code doesn't

³¹ **194. Giving or fabricating false evidence with intent to procure conviction of capital offence**

Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which is capital 102[by the law for the time being in force in 103[India]] shall be punished with 104[imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine;

If innocent person be thereby convicted and executed- and if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment herein before described.

³² **302. Punishment for murder**

Whoever commits murder shall be punished with death, or 104[imprisonment for life], and shall also be liable to fine.

³³ **305. Abetment of suicide of child or insane person**

If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication, commits suicide, whoever abets the commission of such suicide, shall be punished with death or 104[imprisonment for life], or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

³⁴ **303. Punishment for murder by life-convict**

Whoever, being under sentence of 104[imprisonment for life], commits murder, shall be punished with death.

³⁵ **396. Dacoity with murder**

If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or 152[imprisonment for life], or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

³⁶ **73. Solitary confinement**

Whenever any person is convicted of an offence for which under this Code the Court has power to sentence him to rigorous imprisonment, the Court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole, according to the following scale, that is to say-

a time not exceeding one month if the term of imprisonment shall not exceed six months;

a time not exceeding two months if the term of imprisonment shall exceed six months and 48[shall not exceed one] year;

a time not exceeding three months if the term of imprisonment shall exceed one year.

74. Limit of solitary confinement

In executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the periods of solitary confinement of not less duration than such periods; and when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

³⁷ Re Munuswamy AIR 1947 Mad 386.

mention about this punishment and it also would never prescribe it as a punishment to any specific offence and it is left to the discretion of the Judge subject to the condition that the substantive sentence pronounced should be rigorous imprisonment.

Fine as an additional or alternative form of punishment has been increasingly favoured by the law as well as judicial authorities.³⁸ They are singularly more appropriate in offences relating to traffic, employment of persons unauthorized by law, violation of laws regarding manufacture and distribution of goods. Fine is very frequently imposed in relation to property crimes, like embezzlement, fraud, theft, violation of lottery and gambling laws and minor offences, like loitering and disorderly conduct.³⁹ In the Indian Penal Code the provision for fines, as punishments has been justified by its framers thus:

“Fine is the most common punishment in every part of the world and it is a punishment in every part of the world and it is a punishment the advantages of which are so great and obvious that we propose to authorize the courts to inflict it in every case. Imprisonment, transportation banishment, solitude, compelled labour are not equally disagreeable to all men. With fine the case is different⁴⁰”

Imprisonment in default of Fine:

Sec 64 of the penal code empowers the courts to impose the punishment of imprisonment for default of fine. The section runs as follows

“64. Sentence of imprisonment for non-payment of fine
47[In every case, of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable 34[with imprisonment or fine, or] with fine only, in which the offender is sentenced to a fine,] it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence”.

The propriety of the imposition of imprisonment in default of fine is viewed to be harsh as majority of the offenders are from below poverty line and can't pay fine.

³⁸ Quoted, Gordon Rose, The struggle for Penal Reform, 1961; Ibid at P. 757.

³⁹ Siddiquie, A, Criminology, Problems and Perspectives, pp.51-53.

⁴⁰ Draft Penal Code A. Reprint.A p.87 quoted by R.C.Nigam, Law of crimes in India.

Learning outcomes:

1. Will be able to differentiate to differentiate a civil wrong from crime.
2. Will be able to have an understanding about the key concepts of substantial criminal law.

Model Questions:

1. How to define the crime and examine the difference between the crime and civil wrong?
2. What are inchoate offences?
3. What are the stages of commission of crime?
4. What is the difference between preparation and attempt?
5. What are the special characteristics of conspiracy?
6. What is the definition of Abetment? What are the differences and similarities in between Abetment and Conspiracy?
7. What is the right to private defence? Examine under what circumstances and provisions the offender can claim this right?
8. Define what is necessity. Discuss when the offender can avail this defence.
9. Discuss about the defence of accident?
10. Analyse the provisions relating to the defence of consent? Examine whether it's a complete defence or a partial one?
11. What are the essential ingredients of "legal punishment"?

UNIT-II

SPECIFIC OFFENCES

INTRODUCTION

This Unit clearly indicates the importance attached to the preservation and protection of right to life and liberty. Every system of jurisprudence recognizes four cardinal rights of the subjects of the state: rights relating to person, property, reputation and liberty and the invasion on any of these rights has been looked upon an injury to the community as a whole, an offence against the state as such rather than against only the individual adversely affected. The offences covered by this module cover every aspect of human life. The offences range from a technical assault or a slight show of violence to the deliberate killing of the person and are of many kinds. The law views them with different grades of severity according to the circumstances attending their commission and the consequences involved.

Learning Objectives:

1. To learn the offences affecting human life such as grievous hurt, Homicide
2. To create awareness about the offences relating to sexual assault along with recent amendments.
3. To understand the nuances of the offences relating to property and Sate.

2.1: RAPE:

SECTIONS 375, 376

There has been a significant increase in sexual offences and sex crimes that have been reported over the past few years in India.

The Nirbhaya incident in December 2012 brought about a radical change in people's tolerance towards sexual offences and women's rights. Followed by more incidences of rape in different parts of the country which has highlighted a lacuna in the Indian legal system

The following is the provision relating to Rape

Sec 375. “A man is said to commit rape except in the case hereinafter excepted if he has sexual intercourse with a woman under circumstances falling within any of the following 6 descriptions –

1. Against her will
2. Without her consent
3. With her consent when her consent has been obtained by putting her or any person in whom she is interested in fear of death or hurt.
4. With her consent when the man knows that he is not her husband and her consent is given because she believes that he is another man to whom she is or believes herself to be married.
5. Explanation – penetration is enough to constitute sexual intercourse.
6. Exception – sexual intercourse by a man with his wife who is above 15 is not rape

This provision is a gender specific provision. I.e., this offence is committed by a man against a woman.”

The Legislature awakened only after the brutal gang rape of a 23 year old girl of Delhi in a moving bus *Mukesh & Anr. v. State for NCT of Delhi & Ors.*⁴¹, famously known as the ‘Nirbhaya Rape Case’ and brought major and much needed changes through the Criminal Law (Amendment) Act, 2013

This section defines rape as forcible penetration of the vagina by the penis. This raises questions about the adequacy and sufficiency of this definition of rape. The scope of the law does not extend to acts of forced oral sex, sodomy or penetration by foreign objects.

This form of sexual violence is especially prevalent among children and young girls. It is included within the ambit of Section 354 which deals with outraging the modesty of a woman. Inclusion with Section 354 is a gross denial of justice as it prescribes a paltry sentence of two years for such a serious offence.

Section 375 of the Indian Penal Code, 1860 limited rape to penile vaginal penetration and stated that the victims could only be female and perpetrators male. The Amendment Act of 2013 was a huge improvement over this in many ways. Firstly the offence of rape was replaced with sexual assault. It includes within its ambit a wider range of sexual offences than just penile vaginal penetration. It is also gender neutral and hence now both men and women can be victims and perpetrators. Five new subsections were added to Section 375. As per the 2013 Amendment Act Section 376A of the Indian Penal Code

⁴¹*Mukesh&Anr. v. State for NCT of Delhi &Ors., S.L.P. (Criminal) Nos. 3119-3120 of 2014.*

states that the punishment for such a crime can also include death. Section 376E provides for life imprisonment without parole, extending to a death sentence for repeat offenders.

They are as follows:

1. penetration by penis into anus, mouth, vagina or urethra
2. Ss. (b) penetration by object into anus, vagina, urethra, mouth.
3. Ss. (c) manipulates any part of the body of another person so as to cause penetration into the vagina, urethra, anus or any part of body of such person or makes the person to do so with him or any other person makes the other person do so to him or any other person.
4. Ss (d) applies his mouth to the vagina, urethra, anus, penis of another person or 34 any other person.
5. Ss. (e) touching vagina, anus, breast, penis of the complainant or making the complainant touch the accused's vagina, anus, penis, breast or that any of 35 circumstances under which forced sexual intercourse would be held to be rape. The first five of them were accepted in toto. The sixth was however amended to increase the age of consent to 18 years from the initial age of 16 years. And a new seventh situation was added which talks about cases where the person is unable to communicate consent.

However it retained the exception of forced marital intercourse to rape. A new proviso has been added that lack of physical resistance will not amount to consent. This position had already been established in the Mathura rape case. Section 375 after the amendment thus not only includes penetration by the penis but it also includes other offences like forced oral sex, penetration by foreign objects, sodomy as also forced sexual touching among other things. With respect to Section 376, which deals with punishment, Sub clause 1 now states that there shall be rigorous imprisonment for seven years which may extend to life and fine. With respect to aggravated sexual assault, a number of other sexual assaults have been included. In addition to the earlier offences, it now includes:

- Ss.(c) Sexual assault by armed forces
- Ss. (f) Sexual assault by Relative, guardian, teacher, person in position of trust or authority.
- Ss. (i) Sexual Assault on person incapable of giving consent.

- Ss. (j) Sexual Assault by a person in a position of economic or social dominance.
- Ss. (k) Sexual Assault on person suffering from mental or physical disability.
- Ss. (l) Sexual Assault which causes grievous harm or disfiguring or maiming or endangering the life of the person.
- Ss.(m) Persistent Sexual Assault

Consent of the prosecutrix:

A woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted.

On the other hand, submission under the influence of fear or terror is not consent and will not exonerate a person from liability.

Difference b/w Consent and Submission: A woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. On the other hand, submission under the influence of fear or terror is not consent and will not exonerate a person from liability.

Tukaram v. State of Maharashtra (Mathura Rape Case)⁴² –: s Mathura, an 18 year old harijan orphan was called to the police station on an abduction report filed by her brother. When they were about to leave the station, Mathura was kept back. The lights of the station were turned off, the constables locked the door from within and the constable Ganpat took her to the toilet and raped her. Tukaram, another constable molested her and also tried raping her but couldn't succeed as he was heavily drunk.

Judgment – Trial Court – acquitted the accused as they said it was passive submission
High court – found Ganpat guilty of rape and Tukaram guilty of molesting her. Distinguished between consent and passive submission and held that the mere passive or helpless surrender of the body to lust induced by threats or fear cannot be equated with desire or will.

Moreover, the fact that Mathura was involved in a police case filed by her brother and she was alone in the police station in the dead of the night can be sufficient to presume that the initiative to gratifying sexual pleasure proceeded from the accused.

Her subsequent conduct in making a statement immediately not only to her relatives but also the crowd leave no doubt that she was subjected to sexual intercourse.

⁴² AIR 1979 SC 185.

Supreme Court – the court reversed the findings of the HC and held that before they left the police station, Ganpat had caught Mathura's hand and her natural impulse would have been to wither shake it off or appeal to her brother, lover and aunt for help. But she did neither and meekly followed him into the police station. Even while being raped, she didn't appeal for help from inside the station that were heard by ppl outside.

Secondly, the onus is always on the prosecution to prove affirmatively all the ingredients of an offence. Thus the onus is on them to prove that all ingredients of 375 were present in the present case.

The SC held that sexual intercourse in this case does not amount to rape.

This judgment has been severely criticised. The Criminal Law Amendment Act of 1983 was passed to nullify the effect of the judgment of the court in Tukaram.

Criminal Law Amendment Act, 1983 has added the following 2 new Sections.

1. **S. 114-A, Indian Evidence Act, 1872 – Presumption of absence of consent in certain prosecutions for rape** – in cases falling under clauses a, b, c, d, e, g of sub section 2 of section 376, when sexual intercourse by the accused has been established, and the question now is whether there was consent of the woman alleged to be raped, the court shall presume the absence of consent.
2. **S. 327, CrPC** – Trial for rape should be conducted in camera.

Case: Gurmeet Singh v. State of Punjab⁴³ – the prosecutrix (prx) was a girl below 16 studying in the 10th std. at about 12:30 noon, when she was returning home from school, a blue ambassador stopped near her, and the accused came out of the car, caught hold of her and pushed her into the car where 2 of his accomplices were waiting. She was taken to a faraway place and raped in turns by the 3 men. When she tried raising an alarm, she was threatened with death. Next morning, at around 6 am she was dropped at the same place she was abducted from. There was however, immense delay in filing of the FIR because the prx chose to write her exam the next day and only then returned home and told her mother about it. There was a lapse of around 4 days. Apex court held the accused liable (said consent given under the fear of grievous hurt is not consent and her conduct is not unnatural as a girl would think before reporting such a crime for fear of aspersions being cast on her character) and laid down the following guidelines –

Delay in lodging FIR is not material when properly explained.

⁴³ (1996) 2 SCC 384

Testimony of the victim in cases of sexual assault is vital and unless there are reasons that necessitate a corroboration of her testimony, there is no difficulty in convicting the accused on the basis of her testimony alone.

Trial of sexual offences must be in camera and by a lady judge whenever possible.

Court must refrain from making observations like the girl is of immoral character. It is the duty of the court to see that the victim is not unnecessarily harassed during cross examination.

Case: Delhi Domestic Workers Union Forum v. UoI⁴⁴

On 10th Feb, 1993, 6 domestic servants were travelling by train and at around 11 pm, they were sexually assaulted and raped by 7 army personnel. The court, while discussing the plight of these servants and the lacunae in law and delay in disposal of such cases, directed the NCW to evolve a scheme for compensation and rehab of rape victims. Important points from the judgment:

- The complainants of sexual assault cases must be provided with legal representation right from the filing of FIR in the police station till the end of the case.
- Police should inform the victim of her right to representation before any questions are asked
- A list of advocates willing to act in such cases must be kept at the police station
- Anonymity of the victim must be maintained
- The criminal Injuries Compensation Board must pay the victim compensation in case of no conviction. If accused is convicted, he must be asked to pay the compensation.

Case: Bodhisatva Gautham (B) v. Subhra Chakravarthy⁴⁵

There was initially a period of romance b/w B and S who was his student and on one occasion he told her that he wanted to marry her, and with this assurance, he succeeded in developing a sexual relationship with her and she became pregnant. He kept deferring the marriage on the pretext of taking the permission of his parents. One day, he took her

⁴⁴ (1995) SCC (1) 14

⁴⁵ (1996) 1 SCC 490

before the god he worshipped, put vermilion on her forehead and accepted her as his lawful wife. She became pregnant on two more occasions and he succeeded in insisting that she abort.

The SC awarded an interim compensation of Rs. 1000 payable by the accused to the victim each month, pending the trial. The court observed that if the court trying an offence of rape has the jurisdiction to award compensation in the final stage, there is no reason to deny the court the right to award an interim compensation.

2.2: POCSO ACT, 2012

POCSO Act was enacted in 2012 to offer a legal framework with an aim to protect children from various forms of sexual abuse. Though the act is named as protection of children from sexual offences, the provisions of the act are merely punitive and punish the offender after the commission of offense. It does not contain any preventive provisions so as to actually protect children from sexual abuse. Before the enactment of POCSO Act, there was no special law for the protection of children and cases of child sexual abuse were tried under three sections of the IPC (Indian Penal Code). This has been elucidated in the study: L Kacker, N Mohsin, A Dixit & S Varadan, Study on child abuse: India, 2007, B.B. Crime Sci, 2,(2015).

“The only crimes registered were rape (sexual intercourse without consent—section 376), outraging modesty of a woman (unspecified acts—section 354) and unnatural acts defined as “carnal intercourse against the order of nature with any man, woman or animal” (anal sex, homosexuality or bestiality—section 377). Consequently, other forms of non-penetrative sexual assaults, harassment and exploitation were not explicitly recognized as crimes and therefore not recorded (assuming they were reported).”

As it can be clearly made out from the above few lines the Pre-POCSO period had implemented criminal laws with scant regard to the rights of children. One such case of legal compromise of child rights can be seen in the judgment of **State v. Pankaj Chaudhary**. The accused could only be prosecuted for “outraging the modesty of a woman” for digital penetration of the anus and vagina of a 5 year old child. The prosecution was unsuccessful in proving rape as the High Court ruled that digital penetration was not recognized as an offence under the Indian Penal Code, 1860. It is only after intense activism and incessant lobbying child rights activists could successfully persuaded the state to enact a special law for the protection of children.

Section 2 (1) (d) of the POCSO act defines child as “anyone” who is under the age of 18. Therefore, it is interesting to note that definitions of sexual offences given in POCSO act are gender-neutral which essentially means, regardless of gender, POCSO act applies equally to every child.

It must be noted that POCSO act is both substantive and procedural in nature. Notwithstanding any provisions contained in IPC, 1860, Cr.P.C, 1973 and Indian Evidence Act, if a case involves child and of sexual nature, the provisions and procedures provided POCSO act must be followed.

The offences defined under POCSO act and the punishments prescribed for the same are outlined below:

Penetrative Sexual Assault: Section 3 of the POCSO act defines Penetrative Sexual Assault as follows,

“A person is said to commit "penetrative sexual assault" if-

- a) He penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or*
- b) He inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or*
- c) He manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or*
- d) He applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”*

The punishment prescribed for the abovementioned offence is not less than 7 years which may extend to imprisonment for life + fine

Aggravated Penetrative Sexual Assault: It is given under section 5 of the POCSO act. It has sub-sections 5(a) to 5(u) describing various types of penetrative sexual assault that are in severe nature or perpetrated by persons in position of authority. The punishment provided for the same offence: Rigorous imprisonment - not be less than 10 years - may extend to imprisonment for life + fine

Sexual Assault: Section 7 of the POCSO act defines Sexual Assault as follows,

“Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

Aggravated Sexual Assault: It is given under section 9 of the POCSO act. It has sub-sections 9(a) to 5(u) describing various types of sexual assault that are in severe nature or perpetrated by persons in position of authority. The punishment provided for the same offence: Rigorous imprisonment - not be less than 5 years - may extend to 7 years + fine

Sexual Harassment: Section 11 of the POCSO act defines Sexual Assault as follows,

“A person is said to commit sexual harassment upon a child when such person with sexual intent,-

- i. Utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or
- ii. Makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or
- iii. Shows any object to a child in any form or media for pornographic purposes; or
- iv. Repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or
- v. Threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or
- vi. Entices a child for pornographic purposes or gives gratification therefore.”

The punishment prescribed for the abovementioned offence is up to 3 years + fine

Use of child for pornographic purposes: Section 13 of the POCSO act defines Sexual Assault as follows,

“Whoever, uses a child in any form of media (including programme or advertisement telecast by television channels or internet or any other electronic form or printed form, whether or not such programme or advertisement is intended for personal use or for distribution), for the purposes of sexual gratification, which includes-

- a) Representation of the sexual organs of a child;*
- b) Usage of a child engaged in real or simulated sexual acts (with or without penetration);*

- c) *The indecent or obscene representation of a child, shall be guilty of the offence of using a child for pornographic purposes.*”

The punishment prescribed for the abovementioned offence includes punishment for using child for pornographic purposes as well as for storage of child porn.

The POCSO act also punishes anyone who abets commission of sexual offence on a child. Section 16 of the POCSO act defines what constitutes abetment of an offense and the punishment for the same is prescribed under section 17 of the said act.

Section 16 reads as follows,

A person abets an offence, who-

“First. - Instigates any person to do that offence; or

Secondly. - Engages with one or more other person or persons in any conspiracy for the doing of that offence, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that offence; or

Thirdly. - Intentionally aids, by any act or illegal omission, the doing of that offence.”

It is important to note that the act also provides punishment for an attempt to commit any of the offences mentioned and described in the act.

The procedural aspects of the POCSO act involve designation of special courts, also known as child friendly courts, with a special judge, special public prosecutors and child friendly procedures to be followed in such courts. It is worthwhile to note that the welfare of a child is paramount to law and for the purpose of the same the POCSO act contains so many child friendly provisions. It also has a provision for mandatory reporting and prescribes punishment for those who fail to report any incident of abuse that comes to their knowledge.

2.3 Culpable Homicide:

SECTION 299- CULPABLE HOMICIDE

Whoever causes death by-

- doing an act with the intention of causing death
- or with the intention of causing such bodily injury as is likely to cause death
- or with the knowledge that such an act is likely to cause death commits the offence of culpable homicide

Explanation 1- causes **bodily injury** – to person suffering from disorder, disease or bodily infirmity, and thereby **accelerates the death** of that other, is deemed to have caused his death.

Explanation 2- where death is **caused by bodily injury**, the **person causing such bodily injury** shall be deemed to have caused the death, although by resorting to **proper remedies and skilful treatment** the death might have been prevented.

Explanation 3- causing of death of child in mother's womb- NOT homicide.

Culpable homicide- when death of **living child** caused if **any part of the child has been brought forth**, though the child may not have breathed or been completely born.

2.3.1. ESSENTIALS OF CULPABLE HOMICIDE:

1. death of a person
2. act of another person
3. act should have been done
 - a) with the intention of causing death
 - b) with the intention of causing such bodily injury as is likely to cause death
 - c) with the knowledge that such an act is likely to cause death

Stephen defined murder as: *"killing of a human being by another human being"*.

Lord Edward Coke: *Murder is when a man unlawfully killeth any reasonable creature or rerum naturae (living creature) under the Kings peace with malice aforethought, either **express by the party or implied by law**, so as the party wounded or hurt dies of the wound within a day and a year after the sin.*

The Homicide Act, 1957, UK gives the following definition:

"Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought, express or implied, as is required for a killing to amount to murder when not done in the course or furtherance of another offence."

Death caused by effect of words: In such cases, where intention is there, and accused knows of such conditions as can result in death if such things are said, even if it is to induce to have poison or something, held liable as if for a physical assault which caused death. *Bhupinder Singh v. State of Punjab*⁴⁶.

Death caused without intention by doing an Unlawful Act

Illustration (c) to section 299 makes it clear that the person, if not intending to kill, will not be liable for CH or murder, but only for intended crime. Ex- theft.

2.4: MURDER - SECTION 300

Except in the cases hereinafter mentioned, culpable homicide is murder if

- the act by which the death is caused is done with the **intention** of causing death, or
- if it is done with the intention of causing such **bodily injury** as the offender **knows to be likely to cause the death of the person to whom the harm is caused**, or
- if it is done with the intention of causing bodily injury to any person and the **bodily injury intended to be inflicted is sufficient in the ordinary course of nature** to cause death, or
- if a person committing the act knows that it is so **imminently dangerous** that it must, in **all probability, cause death or such bodily injury as is likely to cause death**, and commits such act **without any excuse** for incurring the risk of causing death or such injury as aforesaid.

Exception 1- When culpable homicide is not murder

Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by **grave and sudden provocation**, causes the death of the **person who gave the provocation** or causes the death of **any other person by mistake** or accident.

This is subject to the following provisos-

That the provocation is **not sought or voluntarily provoked** by the offender as an excuse for killing or doing harm to any person.

⁴⁶ 1988 CrLJ 1097 SC.

That the provocation is not given by anything done in **obedience to the law**, or by a **public servant in the lawful exercise of the powers** of such public servant
That the provocation is not given by anything done in the lawful exercise of the right of **private defence**.

Explanation- Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a **question of fact**.

Exception 2- Culpable homicide is not murder if the offender, in the exercise in **good faith** of the **right of private defence** of person or property, **exceeds the powers** given to him by law and causes the death of the person against whom he is exercising such right of defence **without premeditation**, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3- Culpable homicide is not murder if the offender, being a **public servant** or **aiding a public servant** acting for the **advancement of public justice**, **exceeds** the powers given to him by law, and causes death by doing an act which he, in **good faith**, **believes to be lawful and necessary** for the due discharge of his **duty** as such public servant and **without ill-will** towards the person whose death is caused.

Exception 4- Culpable homicide is not murder if it is committed **without premeditation** in a sudden fight in the **heat of passion upon a sudden quarrel** and **without** the offenders having taken **undue advantage** or acted in a **cruel or unusual manner**.

EXPLANATION- IT IS IMMATERIAL IN SUCH CASES WHICH PARTY OFFERS THE PROVOCATION OR COMMITS THE FIRST ASSAULT.

Cases: 300 (1): **Rawalpenda Venkalu v. State of Hyderabad** ⁴⁷: **Facts:** Moinuddin was sleeping in his field at 11, the accused (3-4) went to the hut, bolted the door from outside and then set fire, the servant was trying to open the door, went to the village to get help. Fire was extinguished, the accused set fire again, did not let others help, and the body was completely burned. All 3 were charged like this- all had assisted each other in committing murder of someone, 3 confessions,

Case: Virsa Singh v. State of Punjab⁴⁸ : Virsa Singh's sister was teased with Khem Singh, at a ceremony, the scuffle started. Here Virsa Singh was accused of the murder of

⁴⁷ AIR 1956 SC 171

⁴⁸ AIR 1958 SC 465

Khem Singh and only one spear thrust was found in the body of Khem Singh and it was ascertained on examination by a doctor that this injury was enough in the ordinary course of nature to cause the death of a person. Punctured wound two and a half inches deep (2 coils of intestines were observed as coming out), the accused then tried to take the victim to the hospital after trying to revive the victim.

The contention of Virsa was that there was no intention to cause such bodily injury as is sufficient in the ordinary course of nature to cause death. They said that the intention was required not only for the bodily injury inflicted but also that it must be intended that the bodily injury is sufficient in the ordinary course of nature to cause death.

Held – the judges held that the argument of Virsa was fallacious. If there is an intention to cause such bodily injury that is sufficient in the ordinary course of nature to cause death then there is an intention to cause death itself. And if this were to be the interpretation then clause 3 would have been redundant.

They upheld the conviction of Virsa Singh and dismissed the appeal.

J. Vivian Bose has evolved the following four pronged test:

- 1) Subjectively, bodily injury has to be proved.
- 2) Prove the nature of the injury
- 3) Whether this bodily injury was inflicted intentionally?
- 4) Is the injury sufficient in the ordinary course of nature to cause death?

Case: Gyarsibai w/o Jagannath v. State⁴⁹,

Facts: In this case, an ill treated wife left home without the knowledge of her husband. When she discovered that her husband was following her, she panicked and threw herself and her baby into the well. While she was rescued, her child died. The evidence pointed to the act being culpable homicide not amounting to murder under exception 4. The main thing held in the above two cases was that merely causing death with the knowledge that the act is imminently dangerous, that it must in all probability cause death, is not murder. In order that such an act constitute murder it is necessary that it should be done without any excuse for incurring the risk.

Case: State of Andhra Pradesh v. Rayavarupu Punnayya and Anr⁵⁰.

Facts: He was being followed by people. He was being beaten. Passerby – “Why are you beating him like a buffalo”. Injury only on hands and feet, 42-47 bones were broken.

⁴⁹ AIR 1953 MB 61.

⁵⁰ AIR 1977 SC 45.

The Supreme Court gave guidance to be followed in every case of homicide.

“Whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder,' on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300, Penal Code is reached. This is [the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four Clauses of the definition of murder' contained in Section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third Clause of Section 299 is applicable. If this question is found in the positive, but the case comes, within any of the Exceptions enumerated in Section 300, the offence would still be 'culpable homicide not amounting to murder', punishable under the First Part of Section 304, Penal Code.”

2.4.2. Culpable Homicide not amounting to Murder:

1. Grave and Sudden Provocation:

Essentials:

1. The offender must have done the act while deprived of his self-control
2. he must have been so deprived because of provocation
3. the provocation must be grave and sudden
4. the offender must not have sought the provocation
5. the provocation must not have been generated by anything done –
 - the provocation is not sought or voluntarily provoked by the offender
 - either in obedience to the law or by a public servant in the lawful exercise of his powers
 - in the lawful exercise of the right of private defence

An important point to note here is that the person can either kill the provocateur or any other person by mistake or accident. However, in a situation where X tells Y that his wife

is sleeping with Z, Y can't claim the defence of grave and sudden provocation if he kills Z. this is because X is the person who has provoked Y and Z has not been killed either by mistake or accident.

Case: K.M. Nanavati v. State of Maharashtra ⁵¹- the accused, a naval officer was charged with the murder of P, a business man for having an illicit affair with his wife. On coming to know from his wife about the illicit relationship with. the deceased, he went to the ship, took from the stores an automatic revolver and 6 cartridges on a false pretext, loaded the same, went to the flat of P and shot him dead after a heated exchange of words (Notably – “Am I supposed to marry every woman I sleep with!”). The court held here that the test to be applied is that of the effect of the provocation on a reasonable man and due importance must be given to the fact whether sufficient interval has elapsed since the receiving of the information which caused the provocation to allow a reasonable man to cool down.

Devku Bhika v. State of Gujarat⁵²- the deceased, the headmaster of a school belonged to a high caste and the accused, unemployed for long, belong to a lower caste. The accused approached the deceased for a job available at the school and the deceased asked the accused if he could send his wife home at night for immoral purposes. The accused was taken aback after which the deceased charged the accused of being impotent. The deceased further said that his wife had sent him a letter inviting him and he carried the letter in his hand bag. The accused snatched the hand bag, didn't find the letter but found a knife with which he stabbed and killed him. Punished under 304 (CH not amounting to murder).

Exception 2 – CH is not murder if the offender, **in exercise of his right of private defence** of person or property, **exceeds the power** given to him by law and causes death of the person against whom he is exercising the right –

1. w/o pre meditation and
2. w/o intention of doing more harm than is necessary.

Lachhmi Koeri v. State of Bihar ⁵³- the accused was suspected of committing a theft and constables H and S were deputed to arrest him. They spotted him coming out of a toddy shop and a chase ensued. They finally caught up with him and during the scuffle the accused took out a knife and gave a blow on H's arm. They both fell into the *nala* where the accused continued to give him severe blows which caused H's death.

⁵¹ AIR 1962 SC 605.

⁵² AIR 1995) SC 2171.

⁵³ AIR 1960 Pat 62.

The question was whether the accused had the right to PD. Held- that the accused exceeded his right to pvt defence with the intention of doing more harm than was necessary. His first knife blow caused the accused to fall into the Nala. He could have fled the scene then but he continued to give fist blows to H who succumbed to his injuries the next morning. Thus the accused can't avail of exception 2 and is liable for murder (punished under S. 302).

Exception 3 – Culpable Homicide not amounting to murder if the offender,

1. is a public servant/aiding a public servant
2. acting for the advancement of public justice
3. exceeds the power given to him by law
4. causes death
5. by an act which he does in good faith and believes to be lawful and necessary for the discharge of his duty
6. W/o any ill will towards the person whose death is caused.

Lock up deaths are covered under this Section.

Exception 4 – Sudden fight – Culpable Homicide is not to murder if –

1. It is committed w/o pre meditation (**Munney Khan v. State of Madhya Pradesh**⁵⁴ in a sudden free fight in the heat of passion upon a sudden quarrel
2. With out the accused having taken undue advantage or acted in a cruel or unusual manner.

It is immaterial in such cases which party offers the provocation or launches the first assault.

Exception 5 – CH is not murder when the person whose death is caused is above the age of 18 and takes the risk of death with his own **consent**.

Dasrath Paswan v. State of Bihar⁵⁵– the accused was an 18 year old man who had failed the 10th grade thrice. He took his last failure so much to heart that he decided to kill himself. When he informed his wife, a literate woman aged 19, about his decision, she asked him to first kill her and then kill himself. He killed her but before he could kill himself was arrested.

⁵⁴ AIR 1971 SC 1491

⁵⁵ AIR 1958 SC 190.

The prosecution contended that the consent given by the wife was under undue pressure of widowhood and cannot be construed as consent. However, this contention was struck down by the court that held that it can't be reasonably argued that the deceased gave the consent under fear or misconception of fact and the accused was held liable under Part I of S. 304.

2.5: DEATH PENALTY- S. 302

S 302: Whoever causes death shall be punished with death or imprisonment for life and shall also be liable to fine.

The provision doesn't contain any guideline to impose death penalty and is left to the discretion of the judge completely. Hence the Judiciary has evolved a doctrine called as "rarest of rare Doctrine". In the following cases the doctrine was applied.

Bachan Singh v. State of Punjab – the accused was sentenced to death under S. 302 for the murder of 3 persons. The constitutionality of S. 302 of the IPC and Section 354(3) of the CrPC (which says that when a death sentence is given then the judgment must incorporate the "special reasons" for which such a punishment has been given) was questioned in this case.

Judgment - It was held that death penalty is violative of neither Art 19 nor Art 21 of the constitution. It is consistent with Art 21 which states that the personal liberty or life of an individual shall not be taken away except according to the **procedure established by law**.

Machi Singh v. State of Punjab - laid down the following propositions of law with regarding to awarding the death penalty.

Also certain relevant factors were laid down with regarding to ascertaining rarest of rare cases –

- a) Manner of commission of murder
- b) Motive for commission of murder
- c) Anti social nature of crime
- d) Magnitude of crime
- e) Personality of the victim of murder

Jagmohan Singh v. State of UP – it was contended on behalf of the appellant that the delegation of legislative powers to the judiciary is vitiated by the vice of excessive delegation and so ultra vires to the provisions of the constitution. The court however held that the policy as regards law, with most crimes is to fix a maximum penalty which is intended for the worst cases and leave it to the determination of the judge as to in which cases the max or min punishment should be applied.

Rajendra Prasad v. St of UP – SC held that for persons convicted of murder, life imprisonment is the rule and death sentence is the exception and it ought not to be done save in the rarest of rare cases.

Dhananjay Chatterjee alias Dhana v. State of West Bengal⁵⁶: Hetal Parekh a young 18 years old school-going girl was raped and murdered on 5.3.1990 between 5.30 and 5.45 p.m. in her flat No. 3-A, on the third floor of 'Anand Apartment'. The appellant was challenged and tried for rape and murder and also for an offence Under Section 380 IPC, for committing theft of a wrist watch from the said flat. The appellant Dhananjay was one of the security guards deputed to guard the building. After successive complaints from the parents of Hetal to the proprietor who had appointed Dhana of his misbehaviour with Hetal, he was to be replaced. The day the transfer was to take place, Hetal's mother had gone to the temple when he entered their house and repeatedly raped her and then killed her. The Supreme Court rejected the appeal and confirmed the sentence of death imposed upon the appellant for the offence Under Section 302 IPC.

The sordid episode of the security guard, whose sacred duty was to ensure the protection and welfare of the inhabitants of the flats in the apartments, should have subjected the deceased a resident of one of the flats, to gratify his lust and murder her in retaliation for his transfer on her complaint, makes the crime even more heinous. The offence was not only inhuman, and barbaric but it was a totally ruthless crime of rape followed by cold blooded murder and an affront to the human dignity of the society.

Ravindra Trimbak v. State of AP - the appellant killed his eight month pregnant wife Vijaya in conspiracy and with the help of his father. The motive of putting an end to Vijaya's life was to secure freedom from matrimonial bond for the appellant, an engineering college lecturer, who could re-marry after receiving higher dowry. The heinous part of the crime was that the head of the victim was severed and the body was cut into 9 pieces.

“We have given considered thought to the question and we have not been able to place the case in that category which could be regarded as 'rarest of the rare' type. This is because dowry deaths have ceased to belong to that species of killing. The increasing number of dowry deaths would bear this.”

This judgment is completely flawed. When you look at rarest of rare cases, you look at each case individually and not a species of cases, nor it is about the number of incidents ie, you will check each case of dowry death to see if it is heinous enough to award the death penalty. If the judge's logic were to hold good, then murders being very common nowadays should not invoke death penalty at all!

⁵⁶ 1994 (2) SCC 220.

Sushil Murmu v. State of Jharkhand⁵⁷: 11th December, 1996 turned out to be a heart-breaking day for Somlal Besra. In the evening of that day he found his son Chirku Besra missing from house. He searched for him making inquiries from various persons. Information surfaced that he was sacrificed before Goddess Kali by the appellant. Two other persons, his wife and mother were also said to be parties to the gruesome killing. All the three accused persons were tried for offences punishable under Sections 302 and 201 of the Indian Penal Code, 1860. The appellant was found guilty for both the accusations and was sentenced to death for the former and 7 years rigorous imprisonment for the latter.

Deena v. UoI – the SC upheld the constitutional validity of S. 302. Here the main contention of the appellant was that hanging, as a mode of punishment is a cruel and barbarous method of executing a death sentence which is violative of Art 21 of the Constitution. The court held that the mandate of Art 21 is that death sentence shall not be executed in a cruel, barbarous or degrading manner. Hanging as a mode of execution is not harsh. It is no different from other forms of execution such as electrocution and lethal injection and over the years has almost been perfected into a science. Public hanging, however, will be violative of Art 21.

2.6: Kidnapping: SS 359- 361

359 – Kidnapping- It is of two types:- kidnapping from India and kidnapping from lawful guardian

361 – Kidnapping from lawful guardianship

Essentials :-

- (1) **takes or entices** a minor or a person of unsound mind
- (2) male -16 female -18; unsound mind
- (3) from lawful guardianship
- (4) without the consent of lawful guardian

Expl – the word “lawful guardian” here means any person who is lawfully entrusted with the care and custody of such minor.

363 – Punishment for Kidnapping – punished with imprisonment of either description for a term which may extend to 5 years, and shall also be liable to fine.

⁵⁷ AIR 2004 SC 394.

Cases :-Vardarajan v. State of tamil nadu⁵⁸- the girl was about to complete her 18th year with her parents doing senior B .Sc. she and the accused were seen conversing with each other and spending much time together with her elder sister. Being questioned she told her sister that they were going to get married soon. The girl was taken away by her father to another part of the city to prevent the affair. Two days later she rang up the accused and told him that she would meet him at a particular place. Accordingly accused waited with his car at the place she told him to come. They got married and he was later prosecuted for kidnapping her. It was held he was not guilty as he had not done anything to take her away. Thus no taking is there.

Case:- Thakori Lal Vadgama v. State of Gujarat⁵⁹- the accused was charged for kidnapping a minor girl, Mohini below 15 years of age from the lawful guardianship of her father under section 361 IPC. It was established that the accused had at an earlier stage solicited, or induced Mohini to leave her father's protection by conveying or indicating an encouraging suggestion , that he would give her shelter. Holding the accused liable for kidnapping under section 361 the SC said that the mere circumstances that his act was not the immediate cause of her leaving her parental home or guardian's custody would constitute no valid defence and would no absolve him of liability.

Right against kidnapping is a right given to the guardian and not the minor. The words “take” or “entice” are intended to be read together so that each takes to some extent the colour and content of the other. The language of the section conveys that if a minor leaves her parent's home completely uninfluenced by any promise, offer or inducement emanating from a guilty party, then an offence under S. 361 is not made out. But if a guilty party has laid a foundation by inducement, allurement or threat and if this can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or going to the guilty party, then prima facie it would be difficult for the accused to plead the ground that the minor had voluntarily come to him.

2.7: Abduction:

S.362

1. Whoever by force compels, or
2. by deceitful means induces
3. a person to go from any place is said to abduct that person

“nullum Poena Sine lege – if there is no punishment it is not an offence.

Abduction by itself is not an offence.

⁵⁸ **AIR 1965 SC 942.**

⁵⁹ **(1973) 2 SCC 413**

361 makes the taking or enticing of any minor person or person of unsound mind “out of the keeping of the lawful guardian “, an offence. The meaning of the words keeping of the lawful guardian came up for consideration before the SC in **State of Haryana v. Raja Ram**, the court observed that the word keeping in the context connotes the idea of charge, protection , maintenance and control.

364 – Kidnapping or Abducting in order to murder –

1. Any person who kidnaps or abducts a person in order to murder him/her, or
2. so that such person may be disposed of such that he/she is put in danger of being murdered
3. Shall be punished with imprisonment for life or rigorous imprisonment for a period which may extend to 10 years and shall also be liable to fine.

364 A – Kidnapping for Ransom

366 – Kidnapping, abducting or inducing a woman to compel her marriage etc.

Essentials –

1. Kidnapping or abducting any woman
2. such kidnapping or abducting must be –
 - a) with the intent that the woman be compelled or knowing that she is likely to be compelled to marry someone against her will.
 - b) In order that she may be forced or seduced to illicit intercourse or knowing it likely that she will be forced or seduced to illicit intercourse
 - c) By criminal intimidation or abuse of authority or by compulsion inducing any woman to go from any place with the intent that she may be, or with the knowledge that she will be forced or seduced to illicit intercourse with some person.

If a girl is under 18 she can be both abducted and kidnapped. But if she’s over 18 she can only be abducted.

State of Haryana v. Raja Ram – the prosecutrix was a young girl of 14 yrs. She became friendly with a person called Jai Narain, aged 32, who was a frequent visitor. When Jai Narain was forbidden by the prosecutrix’s father from coming home, he sent messages through one raja ram. She was constantly persuaded to leave the house and come with Jai Narain, who would keep her in a lot of comfort. One night, the prosecutrix arranged to meet jai narain in his house and went to meet him where she was seduced by Jai Narain. Jai Narain

was convicted under 376 for rape of minor and Raja Ram under 366. The question before SC was whether Raja Ram could be said to have taken the prosecutrix since she willingly accompanied him. The SC held that taking or enticing is not necessarily by force or fraud. Persuasion by the accused which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract his section 361.

Lawful guardian is different from legal guardian. Legal guardian is one who is appointed by the court but lawful is wider term. It includes teacher, relatives etc., who are lawfully entrusted with the care and custody of the minor.

2.8: OFFENCES AGAINST PROPERTY:

2.8.1. Theft

Theft is defined under Section 378 to be, 'Dishonestly taking of any moveable property out of the possession of any person without the consent of that person or moving that property in order to such taking

The essential ingredients are:

1. Dishonest intention to take the property
2. The property must be movable property
3. Moving of property must be out of the possession of some person
4. The said taking must be without that person's consent
5. In order to take the property must be moved

The term dishonestly is defined in Section 24 as causing wrongful gain and wrongful loss. In *K. N. Mehara vs. State of Rajasthan*⁶⁰, the accused without the consent of the proper authorities took out a Government aircraft for an unauthorized flight and hence, temporarily deprived the owner, the Government, of its legitimate use. This is wrongful gain to the wrong person and wrongful loss to the Government. Hence, the accused was convicted of committing theft.

In *Pyarelal vs. State of Rajasthan*⁶¹ the accused, a superintendent in the Chief Engineer's office helped the electricity contractor by providing him a file. The contractor took out one of the important documents and replaced it with

⁶⁰ (AIR 1975 Sc 369)

⁶¹ (AIR 1963 SC 1094).

another. It was held that though the superintendent was in custody of the file, possession was with the Chief Engineer and his removal of the file would constitute the offence of theft.

Movable property is defined in Section 22 as any corporeal property except land and things attached to the earth or permanently fastened to anything which is attached to earth. Only movable property can be the subject of theft. As long as it is attached to earth and is not movable property it cannot be the subject of theft.

SUBJECT MATTER OF THEFT:

- Taking salt against the will of the Government from a swamp is theft.
- Electricity, because it is not a movable property is not a subject of theft. But, Section 39 of the Indian Electricity Act makes punishable the act of dishonest abstraction, consumption or use of electricity. Hence, it is deemed to be a theft within this section.
- Fish in open and unenclosed water are *ferae naturae* and hence not the subject of theft
- Birds in the wild state are not the subject of theft
- Animals other than domestic animals are subjects of theft if they are enclosed in a private property

There are five explanations to Section 378. First explanation provides that a thing as long as it is attached to earth, is not a movable property and hence is not the subject of theft. But it becomes capable of being the subject of theft as soon as it is severed from the earth. As per the second explanation, a moving effected by the same act⁶ which effects the severance may be a theft, The third explanation says that a person is said to cause a thing to move by removing an obstacle which had earlier prevented it from moving or by separating it from an other thing as well as by actually moving it. According to the fourth explanation, a person who by any means causes an animal to move is said to have moved that animal everything which is moved as a consequence of the animal being moved. In the last explanation, it is stated that the consent may be express or implied and may be given either by the person in possession or by any person having for that purpose authority either express or implied.

Section 379 provided punishment for a term of three years or a fine or both. Section 380 deals with theft in dwelling house and the punishment for the same. This section gives more security to the property kept in a house. Theft by a clerk or

servant of the property in possession of master is discussed in Section 381. Section 382 deals with a more aggravated form of the offence of theft after preparation made for causing death, hurt or restraint in order to the committing of the theft.

2.8.2. Extortion

The offence of extortion is dealt with in Section 383. Extortion is defined as intentionally putting any person in fear of any injury to that person, or any other, and thereby dishonestly inducing the person so put in fear to deliver to any person any property or valuable security of anything signed or sealed which maybe converted into a valuable security.

The essential ingredients are:

- Intentionally putting a person in fear of any injury.
- Dishonestly inducing the person so put in fear to deliver to any person any property or valuable security or anything signed or sealed which maybe converted into a valuable security

It is not necessary that the person threatening should himself receive the property but it is compulsory that some kind of threatening should be there. In *Ashok Kumar vs. Jagatchander* (27 Cal. 925) a sub-inspector of police wrongfully arrested, confined and demanded money of another person. He threatened him by saying that unless the money was paid he would not be released. The other person obtained money from a money lender and gave it. It was held that the offence of extortion was committed.

Distinction between Theft and Extortion:

THEFT	EXTORTION
Possession is obtained without consent	Possession is obtained by intentionally putting a person in fear and thereby obtaining consent
Restricted to movable property alone.	Any property can be the subject of extortion
The element of force or compulsion is absent	The element of force or compulsion is always present

Section 384 provides the punishment for extortion. The punishment provided is imprisonment for a term of three years or a fine or both. Section 385 deals with aggravated forms of extortion and their respective punishments.

2.8.3. Robbery: S 390:

Section 390 defines robbery as – It is either the aggravated form of theft or the aggravated form of extortion. All elements of either theft or extortion must be present in robbery.

When theft is robbery:

In order to commit theft, or in committing theft, or after committing theft, in order to carry away the property obtained by theft, if the offender voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint or fear of instant death or of instant hurt or of instant wrongful restraint, that theft is known as robbery.

When extortion is robbery:

If the offender at the time of committing extortion. In the presence of the person put in fear, put him in fear of instant death, hurt, or wrongful restraint to himself or any other person and thereby inducing him then and there to deliver up the thing extorted, it will amount to robbery.

In order to convict a person for committing robbery it should be proved that he has committed either theft or extortion. The use of violence will not convert the offence into robbery. Violence should be used in order to achieve any one of the objects stated in section 390. There is a difference between robbery based on extortion and robbery based on theft. In the case of extortion amounting to robbery, the entire danger must have preceded the act of delivery. In the case of theft amounting to robbery, it is immaterial whether the use of violence was before or after the delivery of the property.

Briefly it can be stated as:

- Robbery = theft + violence or fear of instant violence, or
- Robbery = extortion + presence of the offender = fear of instant violence + immediate delivery

Punishment for robbery is rigorous imprisonment for ten years and fine. If robbery is committed on the highway between sunset and sunrise, then rigorous imprisonment for 14 years and fine is provided under section 392. Section 393 provides punishment for attempt to commit robbery, i.e., rigorous imprisonment for 7 years and fine. If hurt is caused in committing or attempting to commit robbery, the punishment is imprisonment for life or rigorous imprisonment for 10 years and fine (S. 394)

2.8.4. Dacoity: S 391:

Section 391 defines the offence of dacoity as when five or more persons jointly commit or attempt to commit robbery or where the whole number of persons conjointly commit or attempt to commit robbery, and the persons present and aiding such commission or attempt amount to five or more every person so committing attempting or aiding is said to commit dacoity.

Dacoity is robbery committed by five or more persons. Attempt as well as the actual offence is dealt with by the same section. It is considered as a serious offence and hence various stages of the offence are made punishable. Preparatory stage which is generally not punishable is punishable in the case of dacoity (S.399). Mere assembling for the purpose of committing dacoity is made punishable under Section 402. The term conjointly refers to concerted actions of the persons participating in the transaction. All the persons who are participating in the commission of the offence should share the object. Mere presence is not sufficient it is to be proved that the offender has contributed something towards the commission of the offence.

Section 396 deals with dacoity with murder. While committing dacoity, if murder is committed by a dacoit all the dacoits would be convicted if it is proved that they were conjointly committing dacoity. If at the time of committing the robbery or dacoity the offender uses a deadly weapon or causes death or grievous hurt to any person minimum punishment for 7 years is prescribed under Section 397. Section 398 provides minimum punishment for 7 years if at the time of attempting to commit robbery or dacoity is dealt with in Section 399. Habitual thieves and robbers are subjected to punishment under Section 400 and 401. Assembling for the purpose of committing dacoity is provided under Section 402.

In *Ghoulthu Modie vs. State of Bihar*⁶² when the police party conducted the raid during night they found the accused persons sitting in a lonely house under construction. Incriminating articles such as fire arms, bombs were recovered from their possession. They were charged under Section 399 and 402. The court held that the prosecution failed in providing the factors of preparation by the assembly of persons. Hence, all of them were acquitted.

2.8.5. Criminal Misappropriation:

Dishonestly misappropriating or converting to one's own use any movable property belonging to another person is known as criminal misappropriation (S. 403). In the case of criminal misappropriation the possession is not obtained by fraudulent means. The property somehow comes into the possession of the accused. First explanation to this section says that a dishonest misappropriation for a time only is a misappropriation within the meaning of this Section. Second explanation makes it clear that misappropriation implies appropriation by a person who is not entitled to it. If a person finds a property which is not the possession of any other person and takes that property for the purpose of protecting it for the owner, he is not guilty. But if he appropriates it to his own use, when he knows or has the means of discovering the owner, he can be convicted. The property in this case is restricted to movable property only. Section 404, deals with aggravated form of criminal misappropriation.

2.8.6. Criminal Breach of Trust

This offence is a species of criminal misappropriation and is defined in Section 405. This offence is committed by a person who is entrusted with property or domination over property. When he dishonestly misappropriates the property or converts it to his own use the offence is committed.

The essential ingredients are:

- The accused was entrusted with property or domination over property.
- The accused misappropriated it or converted it to his own use or used it and disposed it off.
- He did so in violation of any direction of law prescribing mode in which such trust was to be discharged.

⁶² (1986 Cri LJ 1081).

Stolen Property:

Section 410 describes what stolen property is. The position of which has been obtained by theft. Extortion, robbery, dacoity or property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed is termed as stolen property. Stolen property ceases to be stolen property, if it comes into the possession of another person. Who is legally entitled to it? The identity of the stolen property should not be lost after coming into the possession of the accused. So long as the article remains the same in substance though it may be altered, it does not cease to be stolen property. E.g. If a stolen gold ornament is melted into a gold piece, it is still stolen property. But if it is exchanged for another article, the second article obtained cannot be called stolen property.

Section 411 deals with dishonestly receiving stolen property. Section 412 to 414 deals with aggravated forms of receiving stolen property and their respective punishments.

2.8.7. Cheating

As per Section 415, a person is said to cheat when he by deceiving another person fraudulently or dishonestly induces the person so deceived to deliver any property to him or to consent that he shall retain any property or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he was not so deceived and which act or omission causes or is likely to cause harm or damage to that person in body, mind, reputation or property. Receiving any person and fraudulently or dishonestly inducing him to deliver any property is the gist of the offence.

First of all there should be deception. As a result of such deception some person should be induced to do any of the acts specified in Section 415. Deception means making a person to believe something which is false. Mere deception is not sufficient to constitute the thing which is false. Mere deception is not sufficient to constitute the offence. But the offender should knowingly make false representation.

The terms dishonestly and fraudulently are used together. The possession is obtained by dishonest intention i.e., either wrongful loss to the complainant or wrongful gain to the offender or to another person.

The essential ingredients are:

- The accused must deceive the complainant fraudulently or dishonestly or intentionally
- The complainant must have been induced to
 - Deliver any property or allow any person to retain any property
 - Do or omit to do anything which he ought not have done, if he was not so deceived.
- The act of omission is likely to cause any harm to the complainant in body, mind, reputation or property.
 - Explanation to the section says that a dishonest concealment of facts is a deception within the meaning of this section.

In *Abhayananad Mishra vs. State of Bihar*⁶³ the accused applied to get permission to appear in the M.A. examination of Patna University as a private candidate. In his application he stated that he was a graduate having B. A. degree and was a teacher in a school. Certain certificates were attached to the application and hence the admission card was sent to him allowing him to appear in the examination. Before the examination was held, it was discovered that the certificates were forged and he was not a teacher. Immediately the admission card was withdrawn and he was prosecuted for cheating.

The Supreme Court held that by making false representation, the accused deceived the University. It would have been the offence of cheating if the University did not withdraw the admission card. But the University withdrew the admission card and hence he could not commit the offence of cheating hence was convicted for attempt to commit cheating.

Section 417 provides punishment for cheating. Cheating by personation is discussed under Section 416. A person is said to cheat by personation if he cheats by pretending to be some other person or he or any other person other than he or such other person really is. Explanation states that the offence is committed whether the individual personated is real or imaginary.

The offence of cheating by personation is completed if the accused pretends to be some other person

The essentials of the offence are
that:

The accused

⁶³ (AIR 1961 SC 1968).

- Pretended to be some other person
- Knowingly substituted one person for another
- Represented that he or any other person is a person other than he or such other person really is

In *Kanumukala Krishna Murthy vs. State of A.P.*⁶⁴ the accused was working in the Medical Services in a temporary post. He applied for a permanent post to the Public Service Commission making false representation. He produced false certificates also. After an interview he was selected and began to draw a salary. He made a false representation as to his name, place of birth, father's name and also that he had the required M.B.B.S. degree, which he did not. He was convicted under Section 419 for presentation as Kaza Krishna Murthy.

Section 418 and 420 deals with aggravated forms of cheating. Section 420 is species of cheating in which delivery of property or destruction of valuable security is involved in other words there must be deception. By the deception, the accused must dishonestly induce the complainant 1) to make, alter or destroy the whole, or any part of the valuable security or 2) to convert anything which is signed or sealed into valuable security. In *State of U.P. vs. Jyoti Prasad*⁶⁵ the accused made a fraudulent representation that his institution was recognized by the Government and thereby induced persons or part with their money. He was convicted under Section 420.

2.9: OFFENCES AGAINST THE STATE

2.9.1 Sedition:

Sections 121 to 130 of the Indian Penal Code, lay down the provisions relating to offences against the State. Sections 121 to 123 deal with Waging War. Section 124 deals with Assaulting President, Governor etc., with intent to compel or restrain the exercise of any lawful power. Section 124 A deals with the offence of Sedition.

Sedition (Sec. 124-A)

Meaning and Definition:

Section 124. A of the Indian Penal Code speaks about the offence of sedition. Section means disturbing the tranquility of the State by word, deed or writing and leading ignorant person to subvert the Government. Defaming the Government/State also comes within the

⁶⁴ AIR 1965 SC 353.

⁶⁵ [AIR 1962 All 582].

meaning of sedition. Section 124.A of the Penal Code confers wide power on the State to punish those who, by their conduct jeopardize the safety and stability of the state.

To invoke the jurisdiction of Sec.124.A, the following points are to be considered:

- Intention of the Speaker;
- The effect produced; and
- Whether his action caused disaffection or produced hatred or contempt of Government.
- In English Law, sedition is nothing but defamation of the established Government.

Ingredients:

To constitute an offence under Sec. 124.A, the following are the essential elements to be satisfied:

- The accused must bring or attempt to bring into hatred or contempt or disaffection towards the Government;
- By words or by signs or by visible representation or otherwise.

Defences:

Following are the defences available to a person charged with the offences of sedition (Sec.124.A) to get exemption from the Criminal Liability.

That he did not speak or write the words, or make the sign or representation, or did not any other act in question; or

- That he did not thereby bring or attempt to bring into hatred or contempt or excite or attempt to excite disaffection; or
- That such disaffection was not towards the Government of India.

In determining whether an offence under this section is committed or not the following principles may be kept in mind:

- No specific number of persons is necessary to constitute an offence under this section.
- The number concerned and the manner in which they are equipped or armed is not material.
- The true criterion is *quo animo*. Did the gathering assemble?

- The object of the gathering must be to attain by force and violence an object of a general public nature thereby striking directly against the King's (Government's) authority.
- There is no distinction between principal and accessory and all who take part in the unlawful act incur the same guilt.

2.9.2 Waging War (Ss.121-123)

Waging war means taking part in an armed insurrection revolution or mutiny. Mere collection of arms and ammunition do not amount on the waging war. A person, taking part in an organized armed attack on the constituted authorities for the subversion of Government and the establishment of another in its place would be guilty of the offence of waging war.

According to Section 121, whoever wages war or attempts to wage or imprisonment the waging of such war shall be punished with death or imprisonment for life. This is highest form of treason and hence is punishable with death penalty.

Section 122 deals with collection of arms etc., with intention of waging war against the Government of India. It is punishable by Section 122.

Learning outcomes

The student will be able to learn the significance of right to life and property in this chapter. He will have a fair idea about all important offences affecting the life and property of a person.

Model Questions:

1. Define Homicide and discuss the essentials of culpable homicide amounting to Murder or Murder with the help of relevant cases?
2. Discuss the difference between Culpable homicide amounting to Murder and Culpable Homicide not amounting to Murder.
3. Analyse the exception Grave and Sudden Provocation with the help of Nanavathi's case

4. Critically evaluate the offence of Abduction and how it is different from the offence of Kidnapping
 5. Define the offence of theft and lineate the differences between Theft and extortion.
 6. Write a short note on the following
 - a) Sedition
 - b) Criminal Misappropriation
 - c) Cheating
-

UNIT-III

CYBER CRIMES

INTRODUCTION

This unit focuses on all kinds of cybercrimes, relevant provisions from Information and technology Act, 2000 including 2008 Amendment. It also throws light on other legislations, which shall be read along with IT Act.

Learning Objectives:

1. To understand the special nature of the cyber crime and its peculiar characteristics.
2. To know about various cyber crimes such as Hacking, Phishing and Pharming.
3. To have awareness about the liabilities of Intermediaries and the role to be played by them
4. To learn about the powers of enforcement agencies in dealing with cyber crime investigation and collection of Evidence.
5. To introduce new developments in the cyber space such as Internet of Things, Artificial intelligence, Block Chain Technology etc.

3.1. Definition of Cyber Crime:

Cyber crimes, in general sense can be described as a crime that involves a computer (as a source as well as a target) and a network⁶⁶. Cyber Crime may be said to be those species, of which, genus is the conventional crime, and where either the Computer is an object or subject of the conduct constitution Crime”, “any Criminal Activity that uses a computer either as an instrumentality, target or a means for perpetuating further crimes comes within the ambit of cyber crime” a definition of Cyber Crime may be “Unlawful acts wherein the computer is either a tool or target or both”. According to Organization for Economic Cooperation and Development (OCED), “The computer Crime is any illegal, unethical or unauthorized behavior involving automatic processing and/or transmission of data”⁶⁷. According to Cambridge dictionaries cybercrimes can be defined as “a Criminal or illegal activity that is

⁶⁶ Moore, R. (2005) "Cyber crime: Investigating High-Technology Computer Crime," Cleveland, Mississippi: Anderson Publishing

⁶⁷ Dr. Mrs. K Sita Manikyam "Cyber Crimes Law & Policy Perspectives" Page no- 44, Edn (2009)

done using internet⁶⁸.

3.2. CYBER JURISDICTION:

The jurisdiction is the most crucial question posed in any court of law. If the court does not have jurisdiction, the matter would not proceed in the court. The court (Domestic or International) without jurisdiction does not have any authority to entertain the matter, to decide rights and duties or impose penalty or punishment. The cyberspace has raised the basic problems of jurisdiction in international laws and domestic laws because of its de-territorial nature.

1. Jurisdiction in cyberspace cannot be easily decided because of a virtual world where there is no street address and can't be seen by eyes that is why its jurisdiction to lies in space, whereas in the physical world it is easy to decide the place of jurisdiction.
2. cyber jurisdiction is at the intersection of different areas of law and courts all around the globe have issued landmark rulings involving the use of internet in which they have tried to resolve conflicts of jurisdiction when the offender was located in its territory or based in the location where the act was perpetrated or in the location of the computer system or of the servers or when one of its nationals has committed the offence when residing in another country or simply where the damage or effect was produced⁶⁹.

In the beginning, there was nothing (pre-1991): In the earliest days of the internet, and the pre-internet networks that led to the internet, the discussions were not focused on the jurisdictional issues, therefore it can be said that internet predates internet jurisdiction.

- The World Wide Web (1991-99): Internet during this era gave rise to legal issues regarding jurisdiction, there were significant calls for states to refrain from making jurisdictional claims over the internet and internet related activities.
- The phase of over-regulation (2000-09): Around this time court and legislators had developed aggressive attitude claiming jurisdictional power extension to any internet conduct that impacted, or had the potential to impact, on their territory or citizen.

⁶⁸ Prabhash Dalei & Tannya Brahme, "Cyber law in India: An analysis", International Journal of Humanities & applied Science (IJHAS), page No- 1, Vol- 2 (2013), last seen 26/9/2016

⁶⁹ 2 HISTORY AND EVOLUTION 1 Shelke Atmaram, Issues and challenges in protecting copyright in cyberspace a comparative analysis, (Feb. 4, 2018, 18:12), <http://shodhganga.inflibnet.ac.in/bitstream/10603/113328/5/chapter%20ii.pdf.html>.

- The phase of under regulation (2010-14): From around 2010, courts and legislators around the world seemed to have accepted the impossibility of viewing an online presence as an indication of an intention to do business with the world at large
- Era of hyper-regulation (2015- Present) : During the current era internet jurisdiction remains the hot topic and the current landscape of hyper-regulation is clearly worst of all phases because understanding of complex issues involved is increasing and we are not making progress with the actual problems involved.

3.3. Introduction to Information and Technology Act, 2000:

The IT Act, 2000 was drafted on the footsteps of United Nations Model Law on Electronic Commerce (1996) referred as the UNCITRAL Model. The latter law was recommended by the General Assembly of United Nations on 30 January 1997 by a resolution. The Indian IT act, originally containing 94 sections traversing 13 chapters and 4 schedules provides legal framework for electronic governance as it gives identification to electronic records and digital signatures. The Act amended various sections of the major laws of India namely, The Indian Penal Code, 1860, The Indian Evidence Act, 1872 and many others.

The project aims to draw the caricature of how the cyber law was enacted and amended and how it should be amended in a more subtle way and intrinsically to check the malpractices happening through the means of electronic commerce. The project is an attempt to see the shortcomings of the amendments till date and how it can be amended in a better way.

Indian Information Technology Act, 2000 mentions that, cyber crime is, *“An Act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as —electronic commerce, which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Banker’s Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto.”*

3.4: Cyber Crimes: An Overview:

Cyber crimes”are illegal acts wherein the computer is either a device or a target or each. Cyber crimes involve criminal activities, which might be conventional in nature, illustratively robbery, fraud, forgery, defamation and mischief, all of which are questionably to the Indian penal code (IPC). The abuse of computer systems has additionally given a start to a gamut of new age crimes, which might be addressed by the Information Technology Act, 2000. The time period ‘cybercrime’ can discuss with offenses inclusive of criminal past against information, infringement of content and copyright, fraud, unauthorized access, child

pornography and cyber-stalking. Cyber crimes involve offences like assault not only on individual but on organization too. These crimes can also encompass something from an individual's emotional or financial state to a Nation's protection."

Cyber crimes have increased to embrace sports that go international borders and might now be considered a worldwide epidemic. The global felony device ensures cyber criminals are held responsible for the international criminal courtroom. Law enforcement organizations are confronted with specific challenges and the anonymity of the Internet only complicates the problems. There are problems with accumulating proof, cross-jurisdictional troubles and miscommunication associated with reporting."

To a great extent it is well known that victims of net crimes are often indisposed to record an offense to authorities. In some cases, the man or woman or business enterprise won't also be aware against the law has been committed. It is ironical that even after such advancement the victims of the cybercrimes are still reluctant to file their complaint regarding ambiguous process and irresponsive authorities.

Global cooperation is essential if an effective reaction is to be located against international cyber crime. Many computer-based crimes are initiated 'offshore' and this offers considerable demanding situations to any international locations law enforcement groups. It's far essential that companies from around the world formulate actionable plans to dig up, chase, and execute cyber criminals.

3.5. CYBER SECURITY:

India's domestic social and political environment as a rapidly developing post-colonial nation has deeply shaped its approach towards cyber space and cyber security. India's capacity for cyber security was initially limited due to a lack of awareness coupled with a lack of technology to evolve adequate structures for cyber security, the latter being cemented by international technology control regimes such as the Wassenaar Arrangement.⁷⁰ Further, cyber security policy in India has historically been aligned with sovereignty considerations, in particular, with state-sponsored terrorism as well as internal security. Aligning policy objectives with sovereignty and security concerns, cyber security has therefore mostly been approached from a state-centric perspective with the discourse being one of national security as against a broader multi-stakeholder perspective concerning social or economic aspects of cyber security.⁷¹"

⁷⁰ Saikat Datta, Internet Democracy Project, Cybersecurity, Internet Governance and India's Foreign Policy: Historical Antecedents, (January 2016) available at <https://internetdemocracy.in/reports/cybersecurity-ig-ifp-saikat-datta/>.

⁷¹ Id.

Legislative History – “The rapid proliferation of computer technology and the internet in India only took place in the last decade, although its roots lie in the liberalization of the Indian economy in the early 1990s. As a result, the development of regulation for cyberspace was belated. Due to the lack of widespread use of computers and the internet until the late 1990s, there was little pressure for development of laws to regulate computers and cyber space. India’s overarching law for regulating information technology, the Information Technology Act, was enacted in the year 2000, and even then, did not adequately address issues of cyber security, only introducing and penalizing the incidence of hacking.

Thereafter, in 2004, the Indian Computer Emergency Response Team (CERT-in) was established, and has since played the dominant role in cyber security in India. The Cert-in annual reports, which provide yearly statistics of cyber attacks, provide a picture of the exponential growth in cyber threats over the last decade.⁷²

Data released by the government provides some context to the increasing relevance of cyber security policy making. As per the cyber crime data for the years 2010-2013, maintained by National Crime Records Bureau (NCRB), a total of 1791, 2876 and 4356 Cyber Crime cases were registered under Information Technology Act respectively. Further, a total of 422, 601 and 1337 cases were registered under Cyber Crime related Sections of Indian Penal Code (IPC) during the same years.⁷³ In addition, the number of incidents reported to the CERT-In increased exponentially, from 22060 in 2010 to 96383 in 2013. These included security incidents including phishing, scanning, spam, malicious code, website intrusions etc. As per the CERT in Annual Report for 2016, 8,311 security breach incidents were reported in the country in January 2015 alone, an increase from 5,967 recorded the previous year.

An increase in cyber-terrorism incidents, both internationally and domestically towards the end of the last decade gave an increased impetus to establish cyber security mechanisms.⁷⁴ Subsequently, the IT Act was amended in 2008 to define the role of CERT-In, and introduced penal actions against cyber-threats, including cyber-terrorism, identity theft and data protection. The 2008 amendment also introduced a system of recognizing ‘Critical Infrastructure’ and mechanisms for their protection. However, the development of effective cyber security infrastructure under the IT Act has been belated.

The National Cyber Security Policy, which sets out policy objectives for the government was introduced only in 2013, years after cyber security was putatively recognized as an area of concern, and has not been updated since. The central agency responsible for CII protection,

⁷² https://www.cert.org/historical/annual_rpts/

⁷³ <http://ncrb.nic.in/StatPublications/CII/CII2015/FILES/Compendium-15.11.16.pdf>

⁷⁴ Saikat Datta, Internet Democracy Project, Cybersecurity, Internet Governance and India's Foreign Policy: Historical Antecedents, (January 2016) available at <https://internetdemocracy.in/reports/cybersecurity-ig-ifp-saikat-datta/>.

the NCIIPC, similarly, was only notified in 2014, after a six-year gap from its conceptualization under the IT Act.

There is some tension between cyber security and state surveillance in India. In dealing with encryption and encrypted communications, essential aspects of secure communication, the government has preferred to forgo strong encryption for easier surveillance. Internet Governance and India's Foreign Policy: the draft National Encryption Policy, precipitated by the widespread adoption of encryption by widespread instant communication technologies such as WhatsApp.⁷⁵ The draft policy regulated algorithms and key sizes that could be used for encrypted communications, and required communication services operating in India to deposit encryption keys with the Government.

Prior to the introduction of the Indian Information Technology Act, India did not have existing criminal law addressing issues of cyber security, such as targeted attacks against computer infrastructure. However, existing criminal law has been used to prosecute instances of 'data theft', which includes unauthorized access to computers.⁷⁶

There are no incidents of courts interpreting common law duties of care which are owed under tort law (for example for maintaining confidence), for the protection of data or computer resources, although there may be some support for such a duty within the interpretation of the tort of breach of confidence in India.⁷⁷

3.6. HACKING:

The relevant provision is:

- 1. Whoever with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means, commits hacking.**
- 2. Whoever commits hacking shall be punished with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.**

⁷⁵ <http://www.thehindu.com/opinion/op-ed/arun-mohan-sukumar-on-indias-draft-encryption-policy/article7685128.ece>

⁷⁶ <http://ncrb.nic.in/StatPublications/CII/CII2o15/FILES/Compendium-15.11.16.pdf>

⁷⁷ <https://indiankanoon.org/doc/149860325/>

The essentials of the provision:

- There should be intent on the part of the accused to cause wrongful loss or damage to the public or any person.
- There should be knowledge of an attributable to the accused that he is likely to cause wrongful loss or damage to the public or any person
- The accused must destroy or delete or alter any information residing in a computer resource
- The accused must diminish the value or utility of any information residing in a computer resource
- The accused must affect any information residing in a computer resource injuriously by any means.
- Any person who breaches a protected system leaves himself open to criminal liability under section 70 IT Act. Anyone who access or attempts to access a protected system commits an offence and can be punished with imprisonment for a term of ten years and can also be fined.).
- Hacking includes the following activities as per law.
- Unauthorized access to information systems
- Disruption, interference
- Introduction of malicious software
- Downloading, extraction copying
- Destroying altering info
- Stealing, concealing, altering computer source code. 1 crore, 3 yrs, 1 lakh

3.7. CRYPTO CURRENCY- BITCOIN:

Legal Status of Bitcoin Currency is generally defined as tokens used as money in a country. In addition to metal coins and paper bank notes, money orders, traveler's checks, it also includes electronic money or digital cash. To fit in this definition, which is not exhaustive, either bitcoin has to be physical and movable, and fungible. It is movable and fungible but not physical. Electronic money or digital cash may include bitcoin but then it needs a legal backing from an authorized entity, which is not the case in India as of now. "Currency" includes all currency notes, postal notes, postal orders, money orders, cheques, drafts,

travellers cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank, as per Section 2(h) of Foreign Exchange Management Act, 1999.

As is evident from the above definition, bitcoin doesn't fit in any of the illustrative names, however if RBI wants, it can certainly notify it to be included in the above definition. RBI hasn't notified bitcoin as legal tender in India and therefore it couldn't be termed as real currency for the time being.

Provisions under law: Coins in India are governed by the Coinage Act, 2011. Section 2(a): "coin" means any coin which is made of any metal or any other material stamped by the Government or any other authority empowered by the Government in this behalf and which is a legal tender including commemorative coin and Government of India one rupee note. Explanation.--For the removal of doubts, it is hereby clarified that a "coin" does not include the credit card, debit card, postal order and e-money issued by any bank, post office or financial institution; (b) "commemorative coin" means any coin stamped by the Government or any other authority empowered by the Government in this behalf to commemorate any specific occasion or event and expressed in Indian currency;

On study of above, bitcoin is certainly not metal or even any other material for that matter. Moreover, it's not legal tender. If it was to become e-money in the near future, still it could not be coin as per the Coinage Act, since e-money is specifically excluded from the above definition. Consequently, bitcoins cannot be considered as coins now or in the days to come.

Digital currency Apart from traditional currency or real currency, there's another kind called digital currency. On a broader level, it is an electronic based currency holding similar attributes of a real currency, involving prompt payment and transaction settlement.

There are two forms of digital currency: Virtual currency and crypto currency. Digital currency is largely backed and regulated by the Central Bank, more like electronic money. Virtual currency, on the other hand is unregulated and decentralized.

Bitcoins could be termed as virtual currency- they have been categorized as such by ECB. They are decentralized, unregulated and have few attributes of a real currency. Then there are two kinds, crypto-currencies and non-crypto currencies.

Since, bitcoin is purely based on crypto-graphical system, where it has a private and a public key, and each transaction gets recorded on the ledger.

Those, which are governed by a central repository or a designated entity for sake of trust over

transactions taking place, are termed as centralized currency. Bitcoin doesn't work like that. Transactions in bitcoin happen on a decentralized P2P system, where all entities operate independently, and hold the entire risk of dealing in the same.

Convertibility In the words of Internal Revenue Service (IRS) 'Virtual currency that has an equivalent value in real currency or which acts as a substitute for a real currency is called 'convertible' virtual currency'. European Union has categorized bitcoins as a convertible decentralised virtual currency. Since it is convertible into fiat currency or legal tender of the country, it is prima facie convertible or fungible.

3.8. ROBOTICS AND IT:

Responsible Research and Innovation (RRI) has necessitated an inquiry into roboethics, that is, the ethical aspects of developing robot technology. This inquiry becomes inevitable with the changing nature and usage of robotics- from merely acting on human orders to working in partnership with humans. 'roboethics' is a relatively new field and was coined by Gianmarco Veruggio in 2002. It mainly refers to a code of ethics for robot engineers, developers, designers, manufacturers and users. Despite the wide range and ever increasing human robot interaction (HRI), the literature on roboethics is lacking. Scholars like Isaac Asimov, have stressed on the responsibility of robotists and also the wider community of people engaged in robotic technology development. Ethical standards for robotists put forth by countries like Japan, South Korea, Britain and internationally, by ISO. But all these attempts being scattered and in their nascent stage, there is no uniformity as to ethical standards for robotics.

It was only in 1998 that the Commission on Ethics of Scientific Knowledge and technology (COMEST) was established to come up with uniform guidelines for roboethics. The resultant report, as adopted on 14th September, 2017, addressed various issues of robot ethics by investigating into laws and policies of various countries like UK, Japan, South Korea and made various recommendations as to development of a uniform ethics code. The report points out that all the debates around robotics, whether personal, political or societal, revolve around and are divided between the concepts of techno optimism (use of technology to lead a better future) and techno-pessimism (skepticism about implications of technological advancements). A law or a public policy regulating robots must aim to recognize these contradictory positions. In the Indian scenario, these contradictory positions have translated into the tussle over unrestricted technological innovation on one hand and regulatory restrictions on technology over the other.

SURGICAL ROBOTS: COMPUTER INTEGRATED SURGICAL SYSTEMS Minimally Invasive Surgery (MIS), from the time of its inception in 1980's has employed robots for

improving the quality and precision of surgical procedures. Small incision, reduced pain, faster recovery, lower blood loss are some of the advantages of the computer integrated surgical systems. Owing to their expediency, such systems are rapidly evolving in terms of research, development and usage. The most recent and widely used technology is the 'Da Vinci robotic system' developed by Intuitive Surgical Inc. India is gradually becoming a hub for robotically performed surgical procedures and the most commonly employed technology is the da vinci system. With a pool of over fifty surgical robots and three hundred doctors trained in this technology, an estimated seven hundred robotic surgeries are conducted in over a month.³⁶ This technology is being employed for various purposes including urology, gynecology, cardiothoracic, head and neck, pediatric and other procedures. With the growth in market for such technologies, ethical and legal concerns over the use of robots in the medical field, particularly for performing surgeries are also increasing. Safety and autonomy are the primary concerns. Since these technologies are in their stage of infancy, chances of malfunction are higher. At the same time, the hospital administration and the doctors are likely to over-recommend such procedures in order to get returns on their investment. The scattered initial availability and heavy investment might lead to monopolization and consequently, increase in prices of such procedures. The latest model of da Vinci costs about US \$ 1.75 million. This also raises privacy issues, as there might be a conflict between the hospital's interest in recording and preserving the long-term data using these technologies, on the other hand, the right of patient to keep their personal data private. Owing to these ethical and moral complications, State interference and regulation of this technology is not only desirable but also inevitable. The legal considerations before coming up with a regulatory framework for surgical robots in general and da Vinci technology in particular involve both civil and criminal issues. Considering the question of 'liability', one of the drawbacks of using robotic technology in medical practice is the possibility of malfunctioning of such technology. The consequences of such failure become severe when they directly affect the patient. The technical inquiry involved in such circumstances is to differentiate between an injury caused by doctor's negligence and one caused by technological malfunction. The legal inquiry centres around the issue of liability. Who is to be held responsible and consequently, who shall bear costs of the damage- doctor performing the surgery (user of technology), the manufacturer/ developer of the said robot or both. A similar question came before the US Supreme Court in *O'Brein v. Intuitive Surgical Inc*⁷⁸. *Masacek v. Bryn Mawr Hospital*⁷⁹ in both the cases, the Courts contemplated upon the issue of the liability of da Vinci robots in failed surgeries. However, considering the element of uncertainty in robotic behaviour with changes in environment, and in cases where the behaviour of a robot is unpredictable, the manufacturer cannot be held liable. In 2015, EU came up with 'Guidelines on regulating Robotics' that would act as a framework for a future robotlaw. The guidelines address this

⁷⁸ *O'Brein v. Intuitive Surgical Inc* 2011 U.S. Dist. LEXIS 80868 (N.D. Ill. July 25, 2011).

⁷⁹ *Masacek v. Bryn Mawr Hospital* 610 F. Supp. 2d 401 (E.D. Pa. 2009).

issue of ‘Civil liability’ of surgical robots in case of a failed surgery. They suggest the adoption of a ‘negligence rule’- taking into account every relevant circumstance that contributed to the damage. The need for coming up with ‘uniform insurance standards’ was also acknowledged. In order to ascertain whether to attribute the responsibility on doctor’s negligence, or technical malfunction, the commission recommended installation of an ‘internal black box’. To record every command- given and executed. This shall also solve the problem of establishing the fault of either party in the Court. It is also recommended that even in case of fault of robotic machinery, the initial cost shall be borne by the hospital in accordance with the general principle that the hospital is not only to be held responsible for its staff, but also for the means employed in performance of its surgeries. The report stressed on the idea of ‘informed consent’ where the patient is made fully aware of the possible consequences as well as the difference from conventional procedures before such a procedure is initiated. The guidelines also lay down strict professional requirements in order to qualify as a surgeon for robot assisted surgeries. Indian policy makers can learn from these recommendations. Surgical robots are no longer the future but have also become a reality. Its scope and usage is ever expanding. A regulatory framework to develop it further would solve the dual purpose.

The increase in visibility and usage of robot technology over the years has clearly raised concerns over regulation of such use. The concerns arise from both ethical and legal perspective. Ethical concerns mainly centre on the necessity to retain human control over robots as they lack subjectivity, moral and humane reasoning. This led to the emergence of robo ethics, which stresses on the responsibility of robotists and also the wider community of people engaged in robotic technology development. Ethical standards for robotists put forth by countries like Japan, South Korea⁸⁰, Britain⁸¹, and internationally, by ISO.

But all these attempts being scattered and in their nascent stage, there is no uniformity as to ethical standards for robotics. From the legal perspective, problem arises in the two main areas where robotics are currently used include the lethal autonomous weapons in the warzone and the surgical da vinci robots.

The technology is rapidly evolving, but the society and the law needs to catch up. For regulating LAWS technology, the best possible solution is International regulation of autonomous weapons as opposed to a pre-emptive ban. The states must ensure accountability for lethal action by any weapon system used by them in armed conflict; acknowledging the dual nature of the technology involved, any regulation should not hamper civilian research

⁸⁰ South Korean Robot Ethics Charter, 2012 4o World Commission on Ethics of Scientific Knowledge and Technology (COMEST) UNESCO.

⁸¹ Report of COMEST on Robotics Ethics, SHS/YES/COMEST-1o/17/2 REV. Paris, 14 September 2017 page 35

and development in these technologies.; there is a need to keep potential military applications, using these technologies under review.’ Other issues that need to be addressed by International regulation would be the conditions of use, sale restrictions, exports, illegal usage, and responsibility in case of accidents or malfunction in such systems. For the purpose of resolving the liability problem for surgical robots, the suggestion of EU Guidelines on robo law to adopt a ‘negligence rule’- taking into account every relevant circumstance that contributed to the damage. Recommendations as to installation of an ‘internal black box’ in order to ascertain whether to attribute the responsibility on doctor’s negligence, or technical malfunction can be considered. Even in case of fault of robotic machinery, the initial cost shall be borne by the hospital in accordance with the general principle that the hospital is not only to be held responsible for its staff, but also for the means employed in performance of its surgeries. Strict professional requirements in order to qualify as a surgeon for robot assisted surgeries. The law should stress on the idea of informed consent. Some of the solutions proposed by the COMEST report may also be incorporated. These include Shared responsibility between the robot designers, investors, manufacturers, development of techniques by robotists and manufacturers to anticipate the impact of robotic actions and exercise of standards of care while using robots. Another way is that the developers imbibe certain ethical principles in the Robotic algorithm.

3.9 Data Protection:

First serious effort towards data protection can be traced back to United Nations International Conference on Human Rights, 1948⁸². UDHR stated that nobody should be subject to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. This leads to an awareness regarding importance of privacy and culminated in many national protection laws⁸³.

In 1980, the Committee of Ministers of the Organisation for Economic Cooperation and development (OECD) issued guidelines on the protection of Privacy and Transborder Flows of Personal Data. It encouraged balance between protection and need for unhindered flow of data across borders.

One year after this, Council of Europe promulgated a convention For The Protection of Individuals with Regard to Automatic Processing of Personal Data ⁸⁴.

⁸² Fred H. Cate, “EU Data Protection Directive, Information Privacy, and the Public Interest”, 80 Iowa L. Rev. 431 (1994-95), p. 431,

http://heinonline.org/HOL/Page?handle=hein.journals/ilr80&div=25&g_sent=1&collection=journals.

⁸³ Ryan Moshell, “And Then There Was One: The Outlook for a Self-Regulatory United States Amidst a Global Trend toward Comprehensive Data Protection”, 37 Tex. Tech L. Rev. 357 (2004-2005), p.365.

http://heinonline.org/HOL/Page?handle=hein.journals/text37&div=19&g_sent=1&collection=journals

⁸⁴ Supra, n.6.

OECD Privacy Guidelines

This was the first impactful multilateral initiative to tackle the then budding problem of online privacy and data protection. It was followed by two subsequent declarations in 1985(on trans border data flows) and 1998(on protection of privacy on global networks). Even in 2003, the working party on Information Security and Privacy issues certain guidelines on Policy regarding Online Privacy. Thus it has been updating itself with time and re-assessing issues⁸⁵. It consists of eight principles, which are as follows⁸⁶:

1. Collection Limitation
2. Data Quality
3. Purpose Specification
4. Use Limitation
5. Security Safeguards Principle
6. Openness Principle- there should be a general policy of openness about developments, practices and policies with respect to personal data
7. Individual Participation Principle
8. Accountability Principle

These principles have been the backbone of many laws adopted by Europe, North America and Australia. These are simple and flexible providing a broad framework. They form the very basis of our data protection approach and in that context are still relevant today.

Europe: EU Directive

EU Directive on data protection, more specifically Directive 95/46/EC of the European Parliament and of the Council, is the most expansive, comprehensive and popular document in the area of data protection. It came into effect on October 24, 1998 and since then has changed the way data protection has been looked at all around the world, and not just in Europe. Not only is it phenomenal in itself, it has influenced national legislations in Europe, helped advance US law on data protection and is oft cited as an efficient policy to be followed in any country grappling with data protection laws.

Its scope is so broad it covers almost all processing of personal data by whatever means and not limited by business sector or field of use. It is a harmonizing directive seeking basic structure to which member states can conform. It has binding effect only to the extent of its incorporation in domestic laws.

Significant provisions

It has ex ante and ex poste controls⁸⁷. Ex ante control is over data “controllers” which sets

⁸⁵ Supra, n.3, p. 6.

⁸⁶ <http://oecdprivacy.org/> (accessed on 10-10-12)

⁸⁷Gregory Shaffer, 'Globalisation and Social Protection : The Impact of EU and International

certain requirements, which have to be fulfilled before the data is processed. These include informing the data subject of the identity of the controller or its representative, purpose of collection and other necessary information, which may be required for fair processing.

Ex poste controls on enterprises lets individuals monitor and challenge their data after it is processed. They have a permanent right to access and can correct data in case it is wrong. They are also given the power to trace third parties who have their information and to what use it is putting it⁸⁸.

Directive gives a lot of other rights to individuals. They have right to be informed before their personal data is disclosed for the first time to third parties for the purposes of direct marketing and they have the right to object free of charge to such disclosure or uses⁸⁹. They also have be expressly informed of the identity of the party or parties to which data may be sold and in case it is not done so, the consent is deemed invalid⁹⁰.

In 2008, certain amendments were made to the Act, and the most important additions are:

Section 43A: It imposes liability on a body corporate which is negligent in maintaining reasonable security while dealing with sensitive personal data in computer source and hence causing harm to any person, to pay damages by way of compensation. This is a civil remedy.

Section 72A: It has been introduced for data protection purpose. It provides for imprisonment upto three years or fine upto five lakh rupees or both, if any person, including an intermediary, while working under lawful contract, discloses personal information about another person without his consent or in breach of such contract, with an intention or knowing that it will cause wrongful harm or wrongful gain. This is a criminal remedy.

Information Technology Act, 2000 has certain provisions, which can be applied to protect data.

Following gives an overview:

Section 43⁹¹: It gives protection against unauthorised use of computer system and imposes

Rules in the Ratcheting Up Of US Data Privacy Standards", Yale Journal of International Law, Vol. 25, 2000, pp. 16-18, http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=gregory_shaffer&sei-redir=1&referer=http%3A%2F%2Fscholar.google.co.in%2Fscholar%3Fhl%3Den%26a%3DUS%2Bdata%2Bprotection%2Blaws%26btnG%3D%26as_sdt%3D1%252C5%26as_sdt%3D#search=%22US%20data%20protection%20laws%22 . (accessed on 13-10-12)

⁸⁸ Article 12

⁸⁹ Article 14(b)

⁹⁰ Article 10 (c)

⁹¹ It includes:

heavy penalty.

Section 65: It provides for protection of computer source code and penalty (in form of imprisonment up to three years or fine up to two lakh rupees or both), if anyone knowingly or intentionally conceals, destroys, alters it or causes another to do as such.

Section 66: It provides imprisonment upto three years or fine upto five lakh rupees or both , if a person fraudulently or dishonestly commits an act given in section 43.

Section 69: It gives power to Government to intercept information *in the interest of sovereignty and integrity of India, defense of India, security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of any cognizable offence relating to other sections.*

Section 70: It provides protection to the data stored in the protected system⁹². Any access or attempt to secure access of that system in contravention of the provision of this section will make the person accessed liable for punishment of imprisonment which may extend to ten years and shall also be liable to fine.

Section 72: It provides protection against breach of confidentiality and privacy of the data. Any person upon whom powers have been conferred under IT Act and allied rules to secure access to any electronic record, book, register, correspondence, information document of

If any person without permission of the owner or any other person who is in-charge of a computer, computer system or computer network -

(a) accesses or secures access to such computer, computer system or computer network or computer resource (ITAA 2008)

(b) downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium;

(c) introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network; 10.28 Information Systems Control and Audit (d) damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network;

(e) disrupts or causes disruption of any computer, computer system or computer network;

(f) denies or causes the denial of access to any person authorized to access any computer, computer system or computer network by any means;

(g) provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made there under,

(h) charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network,

(i) destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means (Inserted vide ITAA-2008)

(j) Steals, conceals, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used for a computer resource with an intention to cause damage, (Inserted vide ITAA 2008)

he shall be liable to pay damages by way of compensation to the person so affected (change vide ITAA 2008)

⁹² protected systems are those computers, computer system or computer network to which the appropriate government, by issuing gazette information in the official gazette, declared it as a protected system

other material discloses it to any other person, shall be punished with imprisonment which may extend to two years or with fine which may extend to one lakh rupees or both.

Section 79: It gives protection to network service providers for third party data subject to certain conditions⁹³.

Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011

Personal Information- Rule 2(a)(i) defines it as *any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person.*

Sensitive personal data or information- Rule 3 defines it as *such personal information which consists of information relating to;—*

- (i) password;*
- (ii) financial information such as Bank account or credit card or debit card or other payment instrument details ;*
- (iii) physical, physiological and mental health condition;*
- (iv) sexual orientation;*
- (v) medical records and history;*
- (vi) Biometric information;*
- (vii) any detail relating to the above clauses as provided to body corporate for providing service; and*
- (viii) any of the information received under above clauses by body corporate for processing, stored or processed under lawful contract or otherwise:*

⁹³S. 79

(2) The provisions of sub-section (1) shall apply if-

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored; or

(b) the intermediary does not-

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf (Inserted Vide ITAA 2008)

(3) The provisions of sub-section (1) shall not apply if—

(a) the intermediary has conspired or abetted or aided or induced whether by threats or promise or otherwise in the commission of the unlawful act (ITAA 2008)

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation: For the purpose of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.

provided that, any information that is freely available or accessible in public domain or furnished under the Right to Information Act, 2005 or any other law for the time being in force shall not be regarded as sensitive personal data or information for the purposes of these rules.

Requirements: the Rules provide for various requirements to be fulfilled by body corporates which are dealing with collection, transfer, disclosure of personal information. Broadly speaking, these mandate:

- Such body corporate should publish a privacy policy⁹⁴ for handling of or dealing in user information including sensitive personal information, on its website accessible by providers of information.
- Sensitive personal data cannot be collected without consent of provider unless it is for a lawful purpose associated with body corporates' functions and is necessary for it. Certain knowledge⁹⁵ should be provided to the provider while doing so.
- Information should not be stored for longer than required and should be used for the specified purpose.
- Providers have right to refuse consent or withdraw it later, they can also review information given and rectify it if necessary
- Body corporate shall have a Grievance Officer to address grievances of provider of information, details of the same to be published on the website.
- Information is to be kept secure according to the reasonable security practice and procedures given in Rule 8. This requires implementing such security practices and standards and have a comprehensive documented information security programme and information security policies that contain managerial, technical, operational and physical security control measures that are commensurate with the information assets being protected with the nature of business.

⁹⁴ It should provide for

(i) clear and easily accessible statements of its practices and policies;
(ii) type of personal or sensitive personal data or information collected under rule 3;
(iii) purpose of collection and usage of such information;
(iv) disclosure of information including sensitive personal data or information as provided in rule 6;
(v) reasonable security practices and procedures as provided under rule 8.

⁹⁵ (a) the fact that the information is being collected;
(b) the purpose for which the information is being collected;
(c) the intended recipients of the information; and
(d) the name and address of —
(i) the agency that is collecting the information; and
(ii) the agency that will retain the information

- Disclosure to third party requires prior consent from the provider, unless it is sought by Government agencies mandated under law to obtain information but this is not to be shared with any other person.
- Such information should not be published; also third party receiving it should not disclose it further.
- Sensitive information may be transferred to such body corporate that provides same level of data protection as adhered to by the Body Corporate under these Rules. Transfer is allowed only if it is necessary for performance of lawful contract and consent of provider has been taken for such transfer.

3.10. CYBER-STALKING:

Cyberstalking is a new form of computer related crime, occurring in our society. Cyberstalking simply put, is online stalking. It has been defined as the use of technology, particularly the internet, to harass someone. Common characteristics include false accusations, monitoring, threats, identity theft, and data destruction or manipulation. Cyberstalking usually occurs with women, who are stalked or harassed by men, or with children who are stalked by adult predators or pedophiles. Cyberstalkers need not have to leave their home to find, or harass their target, and has no fear of physical violence since they believe that they cannot be physically touched in cyberspace. They use internet, e-mail and other electronic communication devices to stalk persons.

Cyberstalking is the use of the internet or other electronic means to stalk or harass an individual, group, or organization. It may include false accusations, defamation, slander and libel. It may also include monitoring, identity theft, threats, vandalism, solicitation for sex, or gathering information that may be used to threaten, embarrass or harass.

Stalking on the Internet can take a variety of guises. A direct form of online stalking may involve the sending of unwanted e-mails which are abusive, threatening or obscene from one person to another. It may involve electronic sabotage, in the form of sending the victim hundreds or thousands of junk e-mail messages (the activity known as “spamming”) or sending computer viruses. Indirect forms of harassment may involve a cyberstalker impersonating his or her victim on-line and sending abusive e-mails or fraudulent spams in the victim’s name. Victims may be subscribed without their permission to a number of mailing lists with the result that they receive hundreds of unwanted e-mails every day.

Thus, generally speaking, cyberstalking is repeated unwanted communication, whether direct or indirect, takes place over a period of time, via one or more mediums of internet or

electronic communications. The message themselves must be unwanted, and the content can be—but is not limited to threatening, sexually harassing, emotionally harassing or bullying, or general misinformation provided the message creates reasonable fear in the victim.

Legal definition of stalking as provided in section 354D of the Indian Penal Code:

(1) Any man who—

follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or monitors the use by a woman of the internet, email or any other form of electronic communications,

Provided that such conduct shall not amount to stalking if the man who pursued it proves that—it was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or in the particular circumstances such conduct was reasonable and justified.

The Indian Information technology Act 2008 (amended) does not directly address stalking. But the problem is dealt more as an "intrusion on to the privacy of individual" than as regular cyber offences which are discussed in the IT Act 2008. Hence the most used provision for regulating cyber stalking in India is section 72 of the Indian information technology act (Amended), 2008 which runs as follows;

Section 72: *Breach of confidentiality and privacy: Save as otherwise provided in this Act or any other law for the time being in force, any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made there under, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.*

And also section 72A of the Information Technology Act, 2000 (amended in 2008), which runs as follows:

Section 72A: *Punishment for Disclosure of information in breach of lawful contract (Inserted vide ITAA-2008): Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or*

wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person shall be punished with imprisonment for a term which may extend to three years, or with a fine which may extend to five lakh rupees, or with both.

Section 66A of the Information Technology Act, 2008 (ITAA 2008) states[vii], “Punishment for sending offensive messages through communication service, etc:

Any person who sends, by means of a computer resource or a communication device,-

- (a) any information that is grossly offensive or has menacing character; or
- b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, or ill will, persistently makes by making use of such computer resource or a communication device,
- (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages (Inserted vide ITAA 2008) shall be punishable with imprisonment for a term which may extend to three years and with fine.

Explanation: For the purposes of this section, terms “Electronic mail” and “Electronic Mail Message” means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.”

(The Supreme Court struck down the above provision as unconstitutional in *ShreyaSinghal v. Union of India*)

In practice, these provisions can be read with section 441 of the Indian Penal Code, which deals with offences related to Criminal trespass and runs as follows: Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property , or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate , insult or annoy any such person, or with an intent to commit an offence, is said to commit criminal trespass.

If the cyber stalking is done only to annoy the victim and is not resulted to serious offences like severe defamation, sexual crimes, identity theft or even grave crimes like terrorism, it is treated as a bailable offence.

The criminal law (amendment) Act, 2013

Prior to February 2013, there were no laws that regulated Cyberstalking in India. In 2013, parliament made amendments to the Indian Penal Code, 1860 introducing cyberstalking as a criminal offence. A special committee under Justice Verma was formed for this purpose and based upon the report of the committee, several laws were introduced. The Criminal Law (Amendment) Act, 2013 added **Section 354D** in the Indian Penal Code, 1860 to define and punish the act of stalking. This section is as follows:

(1) Any man who—

- (i) follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or
- (ii) monitors the use by a woman of the internet, email or any other form of electronic communication, commits the offence of stalking;

Provided that such conduct shall not amount to stalking if the man who pursued it proves that—

- i. it was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or
- ii. it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or
- iii. in the particular circumstances such conduct was reasonable and justified.

(2) Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Stalking has been defined as, any man who follows or contacts a women, despite clear indication of disinterest to such contact by the women, or monitoring of use of internet or electronic communication of a woman. A man committing the offence of stalking would be liable for imprisonment up to 3 years for the first offence, and shall also be liable to fine and for any subsequent conviction would be liable for imprisonment up to 5 years and with fine.

The term cyberstalking can be used interchangeably with online harassment. Cyberstalker does not present a direct threat to a victim, but follows the victim's online activity to collect information and make threats or other forms of verbal intimidation. A potential stalker may not want to confront and threaten a person offline, but may have no problem threatening or harassing a victim through the internet or other forms of electronic communications.

The available legal remedies are insufficient to deal with the diverse cases of cyberstalking as the definition provided in section 354D of Indian Penal Code, 1860 is not gender neutral and just ignores man as a potential victim of cyberstalking.

Karan Girotra v. State

The only reported case till date to reach the judiciary on cyber-stalking is also merely an application to grant anticipatory bail.⁹⁶ This case dealt with a woman, Shivani Saxena, whose marriage could not be consummated; as a result she filed for divorce by mutual consent. In the midst, she came across Karan Girotra while chatting on the internet, who told her he loved her and wanted to marry her. On the pretext of introducing her to his family, Girotra invited Saxena over to his house, drugged her and assaulted her sexually. He continued to assure her that he would marry her and began sending her obscene pictures from the night she was assaulted. He also threatened to circulate the pictures if she did not marry him.⁹⁷ As a result, an engagement ceremony was performed between the two after which he continued to assault her and eventually called off her engagement to her.⁹⁸ As a result, Saxena filed a complaint under Section 66-A of the IT Act.

Though the Court rejected the plea of anticipatory bail on the ground that nude and obscene pictures of Saxena were circulated by Girotra, an act which requires serious custodial interrogation, nonetheless it made some scathing remarks. According to the Court Saxena had failed to disclose her previous marriage to Girotra merely because she agreed to perform the engagement ceremony, even though such mention was made when Girotra had first professed his love to Saxena.⁹⁹ The Court also took note that there was a delay in lodging the FIR by Saxena. What is more shocking is that the Court held that Saxena had consented to the sexual intercourse and had decided to file the complaint only when Girotra refused to marry her.¹⁰⁰

3.11. PHISHING/IDENTITY THEFT:

Identity theft and identity fraud are terms used to refer to all types of crime in which someone wrongfully obtains and uses another person's personal data in some way that involves fraud or deception, typically for economic gain.¹⁰¹ Unlike one's fingerprints, which are unique and cannot be given to someone else for their use, one's personal data – especially

⁹⁶ Karan Girotra v. State, 2012 VAD (Delhi) 483.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ IDENTITY THEFT vii (Claudia L. Hayward ed., 2004).

Social Security number, bank account or credit card number, telephone calling card number, and other valuable identifying data – can be used, if they fall into the wrong hands, to personally profit at another's expense. In the United States and Canada, for example, many people have reported that unauthorized persons have taken funds out of their bank or financial accounts, or, in the worst cases, taken over their identities altogether, running up vast debts and committing crimes while using the victims' names. In many cases, a victim's losses may include not only out-of-pocket financial losses, but substantial additional financial costs associated with trying to restore his reputation in the community and correcting erroneous information for which the criminal is responsible.¹⁰²

The scope of the crime of identity theft is wide in its sweep. It broadly includes two steps:

- a. Wrongfully collecting personal identification information of other people.
- b. Wrongfully using the PII collected above.

Phishing has been a serious concern in India. Various scams and court cases illustrate the extent of phishing in the Indian context.

Following are some of the Indian phishing scams:¹⁰³

RBI Phishing Scam: The phishing email disguised as originating from the RBI, promised its recipient prize money of Rs.10 Lakhs within 48 hours, by giving a link which leads the user to a website that resembles the official website of RBI with the similar logo and web address. The user is then asked to reveal his personal information like password, I-pin number and savings account number.

IT Department Phishing Scam: The email purporting to be coming from the Income Tax Department lures the user that he is eligible for the income tax refund based on his last annual calculation, and seeks PAN CARD Number or Credit Card details.

ICC World Cup 2011: In this scam, the internet users of the host countries i.e. India, Bangladesh and Sri Lanka where the matches of the world cup were going on were specifically targeted by fraudsters. The Modus Operandi was similar to the banking phishing attack. The fraudsters through the similar looking fake website of organizers of the event tried to lure victims with special offers and packages for the World Cup final. The Users were asked for credit card details to book tickets and packages along with their personal information which once submitted would be used to compromise the online banking account

¹⁰² *Identity Theft and Identity Fraud*, US Department of Justice, available at <http://www.justice.gov/criminal/fraud/websites/idtheft.html#what>is (last visited, 7-11-2012).

¹⁰³ Neeraj Arora, *Phishing scams in India and legal provisions*, available at <http://www.neerajaarora.com/phishing-scams-in-india-and-legal-provisions/> (last visited, 6-11-2012).

of the victim leading to financial losses to the victim.

Google: Recently, the users of the Google email services, “Gmail” purportedly received a legal notice from the Gmail team which wanted users to refurbish their account name, password, occupation, birth date and country of residence with a warning that users who did not update their details within 7 days of receiving the warning would lose their account permanently. However, the spokesperson of the Google denied any such legal notice coming from them and stated it to be a phishing attack designed to collect personal information, called ‘spoofing’ or ‘password phishing’.

Phishing has become a concept well discussed in Indian Courts by now. In *National Association of Software v. Ajay Sood and Ors.*,¹⁰⁴ the court elucidated the concept of phishing as a cybercrime wherein criminals aim to defraud people using computers and internet by pretending as genuine entity such as a bank to extract personal sensitive information including password and credit card details and misuse the same for making wrongful financial gains.

In *Shri Umashankar Sivasubramanian v. ICICI Bank*,¹⁰⁵ petitioner filed a case for compensation under Section 43 wherein petitioner was victim of phishing attack through impersonating email that appeared to be bank’s official communication asking him to update his personal account information. The bank took defence that the plaintiff was negligent. The court held that bank had not adopted due diligence measures in securing its internet banking system in such a manner that a customer would recognize a mail from the bank and directed it to pay sum of rupees 12,85,000/- as compensation to the petitioner.

Nigerian 419 scam: Other forms of internet frauds include the Nigerian scam, also known as “419 scam”¹⁰⁶ in which recipients of an unsolicited e-mail are asked to provide a safe bank account for the transfer of frozen or illegal funds. Quite often, the scammers will ask for a financial contribution in order to bribe officials or to cover a processing fee. Once this initial money is collected, the scammers either disappear or clean out the victim’s bank account.¹⁰⁷ A similar example of internet fraud involves the victim’s supposed winning of a previously unknown foreign lottery. The scammers promise to forward the winnings in exchange for a

¹⁰⁴ 119 (2005) DLT 596.

¹⁰⁵ Petition number 2462/2008 before Adjudicating Officer at Chennai, available at http://www.naavi.org/cl_editorial_10/umashankar_judgement.pdf (last visited, 8-11-2012).

¹⁰⁶ Named after its Nigerian Criminal Code, the “419” penal law was revised and expanded with the issuance in April 1995, of Presidential Decree No. 13 entitled Advance Fee Fraud and other Fraud Offenses Decree 1995.

¹⁰⁷ R.K. CHAUBEY, AN INTRODUCTION TO CYBER CRIME AND CYBER LAWS 423 (Kamal Law House, Kolkata, 2008).

substantial processing fee.¹⁰⁸

3.12. SKIMMING:

This is a prevalent method which can be described as a cyber crime as against an internet crime.

In every credit card there is a magnetic strip at the back that carries information about the specific card. Many criminals use a skimming machine to clone a credit card. Then, this fake card is used by the cyber criminals on the internet or otherwise to make unauthorized purchases or debits from user's accounts online.¹⁰⁹ For instance, to upgrade a prepaid mobile talk time, to purchase online adult content or engage in online gambling or other activities. Some fraudsters engage in committing frauds such as booking air tickets with stolen credit cards and sold to customers for half the amount.¹¹⁰

3.13. Data Theft:

The terms 'data theft', 'data breach', 'identity theft' and 'phishing', are commonly and loosely used in common parlance and cannot be strictly used as legal expressions, although identity theft is now defined in Section 66C of the IT Act. These crimes have elements of theft and cheating, from the legal perspective. These crimes can be huddled together under a class that could be called "data crimes" or "data related crimes" from the legal and academic perspective. Since communication devices such as mobile phones and computer resources are hubs of important data and information and not merely hardware, crimes with respect to such devices and resources, could also be put in the same class of "data crimes" or "data related crimes". Simply put, identity theft being a sub-set of data theft, it is necessary to consider the legal provisions regarding data theft and data crimes in India before legal provisions relating to identity theft are considered.

Data is like a chameleon that plays comedy with our traditional law relating to theft.¹¹¹ Theft is a crime that has existed in our law since time immemorial. Section 378 of the Indian Penal

¹⁰⁸ Factsheet 18: Online Privacy, Privacy Rights Clearinghouse, Privacy and the Internet: Travelling in Cyberspace Safely, available at <https://www.privacyrights.org/fs/fs18-cyb.htm> (last visited, 6-11-2012).

¹⁰⁹ KARNIKA SETH, COMPUTERS, INTERNET AND NEW TECHNOLOGY LAWS 342 (LexisNexis Butterworths Wadhwa, 2012).

¹¹⁰ *Guide for payment card holders to avoid falling victim to frauds*, Cyber Cell Mumbai, available at <http://cybercellmumbai.gov.in/html/write-ups/guide-for-payment-cardholders-to-avoid-falling-victim-to-frauds.html> (last visited, 7-11-2012).

¹¹¹ VIVEK SOOD, *supra* note 13, at p. 138.

code defines “theft” in the following words:

Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person’s consent, moves that property in order to such taking, is said to commit theft.

As per the aforesaid definition, there can be theft in law of only movable property that is required to be moved. The term “movable property” is intended to include corporeal property of every description except land and things attached to the earth or permanently fastened to anything which is attached to the earth.¹¹² This is further clarified by Explanation 1 to Section 378 – “A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.” Theft has been held to be an offence that applies only to tangibles.

Electricity, for instance, has been held as not covered within the ambit of “movable property”. The Supreme Court in *Avtar Singh v. State of Punjab*¹¹³ held that stealing of electricity is theft not because of section 378 of IPC but because of section 39 of the Electricity Act.

Similarly, even in India, the IT (Amendment) Act, 2008 brings into existence the offence of “data theft”, where theft is of pure data which is not even encapsulated in a medium such as CD, computer pen-drive or floppy. Clauses (b) and (j) of Section 43, reproduced below, cover “data theft”, which has been made punishable by Section 66 after the 2008 amendment Act. These clauses are:

43. Penalty and Compensation for damage to computer, computer system, etc. –

If any person without permission of the owner or any other person who is in charge of a computer, computer system or computer network, -

(b) downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium;

(j) Steals, conceals, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used for a computer resource with an intention to cause damage;

The punishment for offence under Section 66 i.e. ‘computer related offence’ which substantially includes data theft, has been amended by the IT (Amendment) Act, 2008, with an increase in fine from Rs. 2 Lacs to Rs. 5 Lacs. This provision has been used by the courts

¹¹² Section 22, Indian Penal Code, 1860.

¹¹³ AIR 1965 SC 666 (¶ 6).

to punish data theft by hacking in various occasions. For example, in *State of Maharashtra v. Rajkumar Kunda Swami*,¹¹⁴ the court quashed bail granted to the accused for committing hacking of computer records and transferring moneys illegally into fake accounts created by him. In *Abhinav Gupta v. State of Haryana*,¹¹⁵ an employee was alleged to have stolen confidential information and copyrighted materials from his past employer and disclosing the same to a competitor entity where he took employment later. The accused filed a petition under Section 438 Code of Criminal Procedure, 1973, by which he sought anticipatory bail as an FIR was lodged against him by his past employer under Section 66 of IT Act, 2000 and Sections 420 and 406 of the Indian Penal Code, 1860. JCB, the past employer, produced screenshots of accused person's email inbox that showed that he had transferred sensitive information to his new employer. The Court was of the view that such acts prima-facie amounted to hacking under Section 66 of the IT Act, 2000 and rejected his bail petition as it did not accept his submission that the information was transferred in exercise of his duties. The court observed that transfer of information further to a competitor company where he joined cannot be justified.¹¹⁶

To summarize, the following legal provisions in the I.T. Act, 2000 as amended by the IT (Amendment) Act, 2008 can be said to apply to “data crimes” or “data related crimes”:

- Section 66B: Whoever dishonestly receives or retains any stolen computer resource or communication device knowing or having reason to believe the same to be stolen computer resource or communication device, shall be punished with imprisonment of either description for a term which may extend to three years or with fine which may extend to rupees one lakh or with both.
- Section 66C: Whoever, fraudulently or dishonestly make use of the electronic signature, password or any other unique identification feature of any other person, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to rupees one lakh.
- Section 66D: Whoever, by means of any communication device or computer resource cheats by personation, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to one lakh rupees.
- Section 66 read with Section 43(b): Whoever downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer

¹¹⁴ (2002) 104 Bom LR 567.

¹¹⁵ 2008 CriLJ 4356, decided on 25th April, 2008.

¹¹⁶ KARNIKA SETH, *supra* note 38, at p. 373.

network including information or data held or stored in any removable storage medium, without the permission of the owner/person incharge, is liable for imprisonment upto three years or with fine upto rupees five lakhs or with both.

- Section 66 read with Section 43(h): Whoever Charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network without the permission of the owner/person incharge, is liable for imprisonment upto three years or with fine upto rupees five lakhs or with both.

Besides the abovementioned provisions, there are provisions which cover the act of ‘hacking’ though not called so in the provisions. These provisions are:

- Access to a computer [Section 43(a) read with Section 66]
- Downloading, copying or extraction of data from a computer [Section 43(b) read with Section 66]
- Introduction computer virus and contaminants [Section 43(c) read with Section 66]
- Causing damage to a computer [Section 43(d) read with 66]
- Causing disruption of a computer [Section 43(e) read with Section 66]
- Causing denial of access to a computer [Section 43(f) read with Section 66]
- Affecting critical information infrastructure [Section 70]
- Cyber terrorism [Section 66F]

Hence, all the above provisions are capable of being invoked in a case of data theft being identity theft, depending on the method by which such identity theft is committed.

3.14. Pornography:

Section 67 of the IT Act lays down the law that obscenity is an offence when it is published or transmitted or caused to be published in any electronic form. The expressions, ‘publishing’ or ‘transmission’ have not been specifically defined under the IT Act, but in Taxmann’s commentary under the IT Act, ‘publishing means making information available to people’. The commentary also states that ‘transmission’ and not mere possession, of obscene information is an offence. Transmission may be addressed to an intended recipient for his personal use. But that is not relevant. The act of ‘transmission’ is sufficient to constitute an offence under section 67 of the IT Act. Therefore if any obscene material is published or transmitted in any electronic form it is an offence under section 67 of the IT

Act. The scope is very wide as far as this section is concerned as the provision covers any digital medium including calculators, washing machines etc,

In one of the incidents three Karnataka ministers were caught watching porn in the Karnataka State Assembly on mobile phone recently. They were caught on camera viewing obscene clips on the floor of Karnataka legislative Assembly could face jail and one of them even a non-bailable arrest-warrant. As the law stands today Mr.Savadi and Patil can be booked Section 292 of IPC for public exhibition, etc., of an obscene object. The third minister J Krishna Palemar, who was in possession of the mobile phone, could face a non-bailable warrant if a complaint is registered against him. Palemar can be convicted with imprisonment up to five years and penalty up to Rs 5 lakh. No complaint has been filed against them under the IT Act so far. All three ministers resigned the very next day taking moral responsibility.

This incident raises a few pertinent questions.

1. Whether watching pornography *per se* is an offence or it is only an issue of morality?
2. What is the connect between obscenity and pornography?
3. Is it that everything which is obscene is necessarily a 'pornographic material'?
4. What is the standard of morality that was observed to decide that the clip watched was porn or obscene? Should we apply local standards or global? Could India adopt and follow western standards where till today more than 40% population are uneducated What shall be the stand of India with regarding pornography keeping in view that internet governance is global and the issue is local?
5. Should the country take a decision to block all porn websites in the wake of the recent developments at the international scenario such as ICANN issuing licenses to porn websites?
6. What are the implications if pornography is not banned in India owing to the diversity in culture and traditions, uneducated public in India? As pointed out by the Indian police department is pornography one of the causes for rise of sexual offences?
7. The American case of *State v Herberg*¹¹⁷ is a glaring example of the dangerous impact of pornography on men resulting in grave sexual assaults on innocent women. The summary of the case is as **follows**:

"On July 17, 1981, David Herberg forced a 14-year-old girl into his car, tied her hands with his belt, and pushed her to the floor. With his knife, he cut her clothes off, then

¹¹⁷ *State v Herberg*, 324 NW 2d 346, 347 (Minn, 1982), discussed in Edith L Pacillo, 'Note: Getting a Feminist Foot in the Courtroom Door: Media Liability for Personal Injury Caused by Pornography' (1994) 28 *Suffolk University Law Review* 123, 123.

inserted the knife into her vagina, cutting her. After driving a short distance, he forced the girl to remove his clothing, stick a safety pin into the nipple of her own breast, and ask him to hit her. He then orally and anally raped the girl. He made her bum her own flesh with a cigarette, defecated and urinated in her face, and compelled her to eat the excrement and to drink her own urine from a cup. He strangled her to the point of unconsciousness, cut her body several times, then returned her to the place where he had abducted her. In reviewing Herberg's criminal appeal, the Supreme Court of Minnesota noted that when Herberg committed these acts, he was 'giving life to some stories he had read in various pornographic books.' Officials seized these books from him during his arrest”.

The Internet Corporation for Assigned Names and Numbers (ICANN) has given the .XXX top-level domain (TLD) its final approval in March, 2011. The TLD is meant to give pornographic websites a clearly marked home on the Internet, but it has gone through so many ups and downs over the last 11 years and it has finally gone through.

3.15. Child Pornography:

Child pornography is identified as a heinous crime that may operate as a gate to further crimes, like sex tourism and sexual abuse, aside from being a record of a sexual assault on a child.¹¹⁸ Defined by the World Health Organization, child sexual abuse consists of the involvement of a child in sexual activity that he or is incapable of wholly understanding.¹¹⁹

In the case of Jagdish Chavla and others vs the State of Rajasthan¹²⁰, it was argued by the accused that simply being in possession of a blue film could not make a person guilty under section 292 of IPC unless it was further proved that the purpose of keeping the same was selling or letting it on hire. Therefore without proving the purpose of keeping the same no offence mentioned in section 292 was made out and the proceedings were quashed. Under section 111 of the IPC, the abettor is held to be equally guilty of the offence which he has abetted provided it is proved that the offence is a probable consequence of the abetment.

The punishment for an offence under section 292 of the IPC is on first conviction with imprisonment (simple or rigorous) for a term which may extend to two years, and with fine which may extend to two thousand rupees, and in the event of a second or subsequent

¹¹⁸FINAL REPORT OF THE INTERNET SAFETY TECHNICAL TASKFORCE, 'ENHANCING CHILD SAFETY AND ONLINE TECHNOLOGIES' (2008) AVAILABLE AT <http://cyber.law.harvard.edu/pubrelease/isttf/> (last accessed on October 2, 2011).

¹¹⁹MINISTRY OF WOMEN AND CHILD DEVELOPMENT, GOVERNMENT OF INDIA (2007) : A STUDY ON CHILD ABUSE: INDIA 2007 AVAILABLE AT <http://wcd.nic.in/childabuse.pdf> (last accessed October 2, 2011), p.73.

¹²⁰1999 CR LJ 2562 (Raj).

convictions, with imprisonment (simple or rigorous) for a term which may extend to five years, and also with fine which may extend to five thousand rupees.

The punishment for an offence under section 67 of the IT Act is on first conviction with imprisonment (simple or rigorous) for a term which may extend to five years, and with fine which may extend to one lakh rupees, and in the event of a second or subsequent convictions, with imprisonment (simple or rigorous) for a term which may extend to ten years, and also with fine which may extend to two lakh rupees.

3.16. Liability of Intermediaries:

ISPs across the world have absolutely no vested interest in the freedom of expression of its consumers. Their sole concern is avoiding the financial burden that is created the moment it attempts to question an order for a ban. In terms of reasonableness, the court is to examine the restriction from the standpoint of the interests of the general public of the general public, and not from the point of view of the persons upon whom the restriction are imposed.¹²¹ Because of this indiscriminate blocking, the direct and inevitable consequence of a law imposing liability on them will hence be the infringement of the right to freedom of speech and expression of their consumers.

The approach of the US has been in favour of the ISPs with respect to the statutory safeguards and their liberal interpretations by the court.¹²² Recognition was made that if the intermediaries were held liable every time objectionable content was found online, an adverse effect on Internet as a medium of expression would be seen.¹²³ Thus, even when there were fit cases for it, criminal prohibitions have generally not been laid against ISPs.¹²⁴

The Amendment Act of 2008 to the Information Technology Act modified the definition of intermediary to include all manners of service providers, including cyber cafes.¹²⁵ The recommendations made to the various intermediaries to aid in regulation of the

¹²¹Hanif Quareshiv. State of Bihar, AIR 1858 SC 751, Municipal Comm. v. Jan Mohd. Usmanbhai, (1986) 3 SCC 20.

¹²²ANJALI ANCHAYIL AND ARUN MATTAMANA, INTERMEDIARY LIABILITY AND CHILD PORNOGRAPHY: A COMPARATIVE ANALYSIS, JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND TECHNOLOGY VOL 5, ISSUE 1 (2010).

¹²³SETH F. KREIMER, CENSORSHIP BY PROXY: THE FIRST AMENDMENT, INTERNET INTERMEDIARIES, AND THE PROBLEM OF THE WEAKEST LINK, UNIVERSITY OF PENNSYLVANIA LAW REVIEW VOL. 155:11.

¹²⁴ANJALI ANCHAYIL AND ARUN MATTAMANA, INTERMEDIARY LIABILITY AND CHILD PORNOGRAPHY: A COMPARATIVE ANALYSIS, JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND TECHNOLOGY VOL 5, ISSUE 1 (2010).

¹²⁵ Section 2(w) of the Information Technology Act, 2000:

Internet are similar in the suggesting of the creation of proper logs and filters despite the expansion of the term.¹²⁶

The Act envisages the use of intermediaries to regulate the Internet. Take for example, Section 67C, where it imposes liability on intermediaries for the retention and production of information. Section 79 was also amended; it specifies the conditions under which liability will not be imposed on intermediaries. Liability is imposed if either the intermediary conspires or abets in the commission of the unlawful act or where the intermediary, upon receiving actual knowledge or being notified by the appropriate Government or agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit unlawful acts, fails to expeditiously remove or disable access to material without vitiating the evidence. A change was seen in the new requirement of “actual knowledge,” which may mean receipt of information from a third party and not necessarily information arising out of its own inquiry upon the content of the information. This second situation essentially depicts a “notice and take down” process, as established under copyright law. Preventive due diligence is no longer required on behalf of the intermediaries.

This part of the Amendment has been framed in accordance with the EU Directives on E-Commerce with respect to the determination of the extent of responsibility of intermediaries for third party data or content.¹²⁷ If the ISP is only serving as a mere conduit as per Article 12 or providing a temporary cache under Article 13 for the sole purpose of making the transmission of content more efficient, and if it is acting in a mere technical, automatic and passive nature, and if the ISP has no knowledge or control over the content being stored or transmitted, no liability is imposed. As for the “notice and take down” procedure under Article 14(1)(b), the EU recommends the ISPs develop individualistic procedures after consulting rights holders.¹²⁸

In terms of holding intermediaries liable, the IT Act sets up a legal procedure under which the Government of India can mandate filtering by the ISPs. An example of this would be where after the Mumbai terrorist attack, journalists were asked to refrain from updating

"intermediary" with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online market places and cyber cafes.

¹²⁶ REPORT OF THE COMMITTEE APPOINTED BY THE BOMBAY HIGH COURT TO RECOMMEND MEASURES TO PROTECT AND SHIELD MINORS FROM PORNOGRAPHIC AND OBSCENE MATERIAL ON THE INTERNET AVAILABLE AT www.cyquator.com/Html/vol1.pdf (last accessed October 2, 2011), pgs. 25-26, 28, 32-33.

¹²⁷ ASSWAT, VIKAS, INFORMATION TECHNOLOGY (AMENDMENT) ACT, 2008: A NEW VISION THROUGH A NEW CHANGE, Intellectual Property Facilitation Centre for MSMEs.

¹²⁸ *Ibid.*

their Twitter accounts on grounds of security.¹²⁹ Hence, a stark contrast can be seen between American and Indian law with respect to intermediary liability. India is more akin to the EU position on liability in this sense.¹³⁰ But this does not hold true with respect to child pornography. Both the EU and the US provide blanket immunity to intermediaries whereas India holds them strictly liable for each and every depiction of child pornography regardless of any knowledge or intent it may have. The former two give intermediaries leeway so as to allow them to effectively carry out their functions. This is not a consideration that the Legislature was concerned about in India.¹³¹

3.17. Cyber Terrorism:

The phrase Cyber Terror germinated in the 1990s when Barry Collin used it for the first academically documented time¹³² to refer to how the waves of terrorism were increasingly falling on the shores of the virtual world. While this usage could be broad enough to also engulf the use of internet by terrorists in conventional ways, the way in which various scholars, the FBI or the Indian law understand, cyber terrorism is a narrower dominion whereby terrorists seek to use technology to unleash disruptive activities in cyberspace¹³³ like disabling or deleting critical infrastructure or information.¹³⁴

Cyber terrorism has also been defined within the Indian statutory framework¹³⁵ and is understood through its manifestations in the shape of denial of service attacks or the introduction of computer contaminants as attacks which seek to attack computers and computer networks.¹³⁶ However, cyber terrorism in the form of what can be referred to as electronic Pearl Harbors¹³⁷ is opined to be¹³⁸ an avenue which terrorist psyche is not very keen on because of it lacking the desired dramatic and political impact¹³⁹ which is so

¹²⁹FREEDOM HOUSE, FREEDOM ON THE NET 2009-INDIA AVAILABLE AT <http://www.unhcr.org/refworld/docid/49d4759128.html> (last accessed October 2, 2011).

¹³⁰ANJALI ANCHAYIL AND ARUN MATTAMANA, INTERMEDIARY LIABILITY AND CHILD PORNOGRAPHY: A COMPARATIVE ANALYSIS, JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND TECHNOLOGY VOL 5, ISSUE 1 (2010).

¹³¹ANJALI ANCHAYIL AND ARUN MATTAMANA, INTERMEDIARY LIABILITY AND CHILD PORNOGRAPHY: A COMPARATIVE ANALYSIS, JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND TECHNOLOGY VOL 5, ISSUE 1 (2010).

¹³² Barry Collin, 1997. The Future of Cyberterrorism, *Crime & Justice International Journal*. 15.

¹³³ Nagpal, R. 2013. *Defining Cyber terrorism*. [online] Available at: http://www.asianlaws.org/library/cyber-laws/defining_cyber_terrorism.htm [Accessed: 9 Oct 2013].

¹³⁴ See, L. Tafoya, W. 2013. *Cyber Terror*. [online] Available at: <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/november-2011/cyber-terror> [Accessed: 9 Oct 2013].

¹³⁵ Section 66F of the Information Technology Act, 2000

¹³⁶ See, *Ibid*.

¹³⁷ Lewis, J. 2005. The Internet and Terrorism. *American Society of International Law Procedure*, 99 pp. 112--115.

¹³⁸ *Ibid*.

¹³⁹ *Ibid*.

intrinsically linked with terrorism.

India and terror financing:

In India, the number of cases of terror financing escalated from 200 in 2009 to 1400 in 2012 according to the Financial Intelligence Unit¹⁴⁰. The International Monetary Fund has pointed out how India, in particular, is at a huge risk of terrorist financing.¹⁴¹ India's efficacy in countering terror financing has also been questioned by the multi-national Financial Action Task Force (FATF) an inter-governmental organization which was founded in 1989 by the G7 to develop policies.¹⁴²

The 26/11 Mumbai attacks are an exemplification of the use of internet for commanding and controlling heinous attacks. Real time communication was used by handlers sitting in Pakistan to both command the terrorists who were on the site as well as by the terrorists themselves who constantly monitored online social media to better their minute by minute strategy.¹⁴³

Dead Drops and Steganography:

An extremely creative way devised by terrorists of using the internet is of dead drops. Dead drops are traditionally associated with the world of espionage as depictive of exchange of information without the two parties actually ever having to meet.¹⁴⁴ This way there is never any evidence of there being a conspiracy. Internet dead drops go a step further by also erasing the very information which is exchanged. After creating free email accounts the information is saved in an email draft without being sent, later the other participant is given the adequate account details and accesses the draft.¹⁴⁵

In India, one such glaring example of the use of dead drops is by terrorist David Coleman Headley, who planned for 26/11 attacks.¹⁴⁶

India brought in the Information Technology Act of 2000¹⁴⁷, its initial law on

¹⁴⁰ Rediff. 2013. *Crores being pumped into India by ISI to finance terror*. [online] Available at: <http://www.rediff.com/news/report/crores-being-pumped-into-india-by-isi-to-finance-terror/20130401.htm>.

¹⁴¹ See, India: Observance of Standards and Codes FATF Recommendations for Anti-Money Laundering and Combating the Financing of Terrorism, *International Monetary Fund*, 2011

¹⁴² 'Indian laws cannot counter terror-funding'. 2010. *The Indian Express*, [online] July 18th. Available at: <http://www.indianexpress.com/news/indian-laws-cannot-counter-terrorfunding/648241/>.

¹⁴³ Acharya, A, Mandal, S and A. Mehta (2009). *Terrorist attacks in Mumbai: picking up the pieces*. International Centre for Political Violence and Terrorism Research S. Rajaratnam School for International Studies Nanyang Technological University, Singapore

¹⁴⁴ See, Schneier. 2013. *Schneier on Security: Webmail as Dead Drop*. [online] Available at: https://www.schneier.com/blog/archives/2012/11/webmail_as_dead.html.

¹⁴⁵ See, Hummel, M. 2008. Internet terrorism. *Homeland Security Rev.*, 2 p. 117 – 130.

¹⁴⁶ India Today. 2013. *Headley used 'electronic dead drop' method for communication : India, News - India Today*. [online] Available at: <http://indiatoday.intoday.in/story/Headley+used+'electronic+dead+drop'+method+for+communication/1/75395.html> [Accessed: 9 Oct 2013].

¹⁴⁷ Act of the Indian Parliament, No 21 of 2000.

Information Technology mainly to regulate the use of internet. Section 69 of the IT Act deals with interception, monitoring and decryption¹⁴⁸ of information and allows for the Controller¹⁴⁹ to direct any agency of the Government to intercept any information transmitted through any computer resource if he feels that it is expedient to do so in the interest of the sovereignty of the state.¹⁵⁰

The Indo-US Cyber Security Forum (IUSCSF) was set up in 2001 with an aim towards protecting all the critical and important infrastructure within an economy which is knowledge based.¹⁵¹ IUSCF also involved setting up an India Information Sharing and Analysis Centre (ISAC) directed mainly towards dealing with hacking.¹⁵² This response has more to deal with cyber terrorism than with the use of the internet by terrorists.

Despite Section 69 of the IT Act and the CERT-In, according to the Freedom House Report the Indian Government rarely censored internet content up till 2008.^{153, 154} Even of those incidences where censorship has been exercised, most has to do with piracy issues and child pornography.

It was in 2008 that an Amendment¹⁵⁵ was brought in to reinforce the fact that the Government has power to block websites.

- Section 69 A, introduced by the Amendment, provides for the power to issue directions for blocking for public access of any information through any computer resource where it is expedient so to do in the interest of sovereignty and integrity of India, defence of India inter alia.¹⁵⁶
- Section 69 B deals with monitoring of traffic data or information.
- Section 66 F of the Act was introduced to deal exclusively with cyber terrorism and punishes those who with intent to “*threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people*” carry out denial of service attacks, attempt to penetrate a computer source without authorization, or introducing any computer contaminants which are likely to cause death, destruction of property, damage, or disruption of supplies and services.

¹⁴⁸ "Decryption" according to the Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009 is defined as the process of conversion of information in non-intelligible form to an intelligible form via a mathematical formula, code, password or algorithm or a combination thereof

¹⁴⁹ The Controller of Certifying Authorities appointed under sub-section (l) of section 17 of the Act

¹⁵⁰ Section 69, Information Technology Act 2000.

¹⁵¹ See, Ministry of External Affairs, Government of India 2006. *India-US cyber security Forum - Fact Sheet*. [press release] March 2nd.

¹⁵² Ibid.

¹⁵³ "India Country Report", Freedom on the Net 2012, Freedom House.

¹⁵⁴ Made effective from 27 October 2009

¹⁵⁵ Information Technology (*Amendment*) Act 2008

¹⁵⁶ Section 69A

- Also punishable is the obtaining of information without authorization knowing that it might be used to damage the security of the State, lead to defamation, or incitement to an offense. The punishment is imprisonment for life.

The Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009 further prescribe for detailed guidelines to do the same. Internet Service Providers are also required to block websites which are identified by the Telecom Authority. Only the Secretary in the Ministry of Home Affairs, in case of the Central Government or the Secretary in charge of the Home Department, in case of a State Government or Union territory can issue these orders¹⁵⁷ and the intermediary is expected to provide all facilities required to decrypt. This direction is forwarded to a Review Committee within seven days along with the reasons for the decryption.¹⁵⁸

The National Security Database was set up post the 2008 Mumbai Attacks and plans to bring within its ambit Reverse Engineering, Digital Forensic Analysis to mention a few.

The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 were passed to allow for the blocking of websites which had terrorist content inter alia by a court order.

In 2011, the government introduced rules under the IT Act that would compel companies to remove objectionable content within 36 hours of receiving an official notice and oblige cybercafés to install surveillance cameras and submit records of their users' online activity to the government.

While Quantum Computing may be a little time to come into our normal usage, Artificial Intelligence has already made big inroads to the activities of companies.

3.18. Artificial Intelligence:

Artificial intelligence (AI) in the real sense means an ability to replicate human intelligence in machine operations. It requires the computers to respond to dynamic situations through a cognitive ability to analyse the situation and apply the best possible solution including those which have never been tried before.

AI should therefore include speech recognition, learning, planning and problem solving.

¹⁵⁷ Section 2(d) of the Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009 rules defines competent authority to include these two persons.

¹⁵⁸ Rule 7, Ibid.

While it is possible to load a computer with “Knowledge” in the form of how to respond automatically to known stimuli, where there is a need to apply reasoning and accept the most optimal of the available solutions it is a challenge. Human Beings often work on “Instincts”. Most of the “Instincts” are built on sub conscious memory and do not necessary come out of extra sensory perceptions.

In the case of computers, “Machine Learning” is a process that builds memory out of past incidents and is like a human being who acquires experience as we pass through life. This may be automatic in the sense that the machine may document its experience by itself without a further human input and use that for future decision making.

However the inputs if any as a post facto approval as well as how the Computer should interpret the automated machine observations is programmed through a computer logic created by a human being. Every act of an AI led machine therefore has its causation through programming done by a human being.

The machine perceptions depend on the sensory inputs to deduce different aspects of the world. Humans not only see and hear things but also “feel” things. This sense of “feeling” will not be possible for a computer. “Feeling” may not always lead to the correct decision making and delinking it from the decision making process may actually lead to better decisions in certain circumstances. But it is a philosophical question if “Feeling” must be part of every decision making and an efficient decision from the perspective of the society cannot be divested of the “feeling”.

The AI can therefore be very near human intelligence and good for routine jobs but may still fall short of human intelligence at the highest level. The AI works on “algorithms” that are capable of quickly analysing different data inputs and processing them into a decision output. The humanoid robots like the “Sophia” have presented themselves well in the society. However, many of the accidents that have been reported from the Robotic operations in the industry and unsubstantiated reports from Japan about a rogue military robot have raised the concerns of AI malfunctioning.

Presently research is still going on in the field of “Artificial Neuron Network” which is an attempt to replicate the biological neuron network. The “Speed” factor has been addressed by the development of the “Quantum Computing technology” and today’s AI led platforms are capable of mimicking the human intelligence to a large extent.

Adaptive resonance theory (ART) is a particular philosophy driving unsupervised artificial neural network models. It uses a specific architecture, often useful in some types of neural networks, to try to build the capacity for new learning while keeping in place fundamental existing models. Experts describe adaptive resonance theory as partially an effort to remain

open to new learning without sacrificing knowledge of existing patterns – hence the words “adaptation” and “resonance.”

While we can leave the technology experts to continue their research in replicating human intelligence and to the scientific fiction writers to flag the risks, Cyber Law and Data Protection Law makers need to factor in the need to “Fix Responsibility” for AI led decisions in data processing.

In ITA 2000/8 it is clearly laid down that an action of an automated system is attributed to the person who caused the system to act in the specified manner. In Other words, the liability arising out of the activities AI led machines will be that of its “Owner” and the “Software Developer” based on the software transfer contract.

Law has to still decide how “Data Being seen by an AI machine” be treated under Data Protection laws. Will it be a “Data Disclosure”?, should there be some form of contractual commitment by the AI machine before it is allowed to read the data? Etc., need to be sorted out.

For the time being, we can resolve the legal issue by substituting the AI machine with the person to whom its action is attributed, to fix the liabilities arising out of AI operations. We may have to wait several more years to develop Jurisprudence in this matter.

Some experts argue that in future we do not need Courts, Lawyers and Judges since “AI” can take decisions based on the written law, submitted arguments and evidences. But if such a day comes then the human element in judgements which today enable Judiciary to be dynamic will be killed. While adopting Cyber Law to the emerging technologies we need to also incorporate the discussions on “Philosophy and Purpose of Law” and consider if the change is desirable or not.

3.19. Big Data:

Big Data is a term used when huge quantity of data is collected from different sources and the accumulated data is available for analysis to reveal patterns, trends and associations that are not visible when data is seen in silos.

The Source of Big Data is the information transmission nodes and the public data storage points. It could involve mostly “Anonymous Data” or “Pseudonymous Data” and if so, it is outside the purview of Data protection laws. Beyond these, data is stored in private custody, behind Firewalls and unless it is transferred from the place of creation across an open network, it may never become accessible to Big Data Sniffers. This private data is normally protected and hence should not without permissions from the data owners, be part of the big data.

When Big Data Sniffers “Mine” for data, they may not target any specific type of data or an individual. The data collected from an omnibus data collection drive may later get filtered and classified into different types of data and tagged accordingly for further harnessing. If however, an acquirer of “Big Data” from the public space also has access to some private data and thereby renders the data “Identified”, then there is an element of Data Protection regulation that may get invoked.

Components of Big Data are

- a) Personal Data collected from Individuals including individualized data such as emanating from devices embedded to the human body such as Wearable s and Medical implants.
- b) Corporate Data which includes business information as well as personal data of individuals in the hands of a corporate either as custodians of employee data or as intermediaries processing data of customers and public.
- c) Environmental data including those collected from Weather satellites, Mapping devices, CCTVs in public places etc where the primary aim is not to collect personal data but it becomes part of the overall data collected.
- d) Meta Data which is “Data about Data” which involves transactions of Netizens, tracking of data movement over a public network and includes “Log Records” of all kinds. Though this data is impersonal at the time of collection, they are amenable to further analysis and conversion from a de-identified state to an identified state.

Big Data is a concern for Privacy Protection since the consent that a data subject might have provided when he shares his data with a service provider may become redundant since Big Data Analytics may identify a data simply from its own intelligent computations of the Big Data. With the identity the data subject may also be “Profiled”. The “Profile” may later be used for decision making that may affect the data subject.

Whether such analytics is accurate and inferences drawn are correct depends on the strength of the AI algorithms that run behind the scene. But Privacy Activists still consider that “Any kind of profiling of an individual whether accurately or otherwise” is an infringement of Privacy.

This was part of the controversy in the Cambridge Analytica incident where data collected for one purpose was used in another context in the form of profiled data.

Data Protection professionals working with Big Data need to therefore ensure that while they work with data and its aggregation, personal data is never identified with a living individual. Otherwise they may be infringing on the data protection laws. In fact most data protection laws consider re-identification of pseudonymized/de-identified data as an offence.

The conflict between Data Scientists and Privacy Protectionists will be like the conflict between “Freedom of Speech” and “Right to Privacy”. It is unlikely to be resolved to the satisfaction of the industry.

The Concept of “Legitimate Interest Policy” which Personal Data Standard of India (PDPSI) considers as a key policy control tries to address this conflict to some extent.

3.20. Internet of things (IoT):

Internet of things (IoT) is the term which is being used to describe the world of consumer goods that are connected to Internet. The devices that can be classified as IoT include CCTVs, security systems, cars, smart electricity meters, the cars, the microwave ovens, lights, speaker systems etc. The devices may also include “Baby Monitoring Cameras”, Medical devices which generate what is considered “Sensitive Personal Information” requiring special efforts of protection.

It is estimated that there will be are more than 300 billion devices that can connect to internet by 2020. The Ipv6 system enables the connectivity of these devices with a unique IP address and hopefully support this new world of connected devices.

Primarily the connectivity is designed to enable the owner of the device to operate it remotely through the internet and probably with an app on the mobile. Hence the data associated with the activity of an IoT device will be traceable to the activity of an individual and hence becomes part of his activity profiling.

Hence IoT data becomes part of the data that needs to be protected for “Privacy Protection”. Additionally, in certain cases, the connectivity may be linked to the manufacturer for the purpose of maintenance and updation. Because of this connectivity IoT also gives raise to exploitation by Cyber Criminals for committing Cyber Crimes including using the network to launch Denial of Service Attacks. Hence there is a need to develop an effective security system to ensure that the IoT connected network.

In terms of Data Protection Compliance of an organization therefore, if the organization is either a manufacturer supplier of IoT devices or a supplier of intermediary

services, it is necessary to ensure that the data inflow from these device need to be factored into the data protection regime. The device identity itself may not be considered “Individually Identifiable Personal Information” and therefore data flowing in with only the device identity can be considered as outside the purview of Personal Data Protection. However, if in the organization, the device ID can be mapped to the purchaser who is an individual, then the data assumes the nature of Personal Information.

Hence such organizations need to keep the “Purchaser-Device ID Mapping” which is part of the “Maintenance Data base” secure from the general data that may be flowing in about the performance of the device, which is part of the “Big Data” that the organization may keep accumulating. The current Data protection laws expect “Privacy by Design” which can be extended to the designing of the IoT devices and their communication systems. It may be necessary to ensure encryption of data flowing from the device to the central command center or to the consumer owner so that security in transmission is ensured. If some data has to be stored within the device, any exfiltration of this data especially through remote log in must be secured. Failure in this respect could be considered as failure of the Data Protection at the manufacturing end.

3.21. Block Chain Technology:

“Block Chain” is a term which became popular as the platform that supports “Bitcoin” as a “Crypto Currency”. Technologists today are trying to present “Block Chain” as a technology and “Bitcoin” as only a product based on the technology. Hence there is an attempt to find other use cases in which the “Block Chain System” can be used. It is in this context that we can take a quick glance at this technology.

Block Chain essentially is a system where several users come together in a network to maintain a decentralized ledger of events with an agreed procedure for adding new transaction to the current ledger as an authenticated event. The transaction as and when it occurs is broadcast to all the members and when a majority of them duly add it to the current ledger as per the agreed procedure it is deemed to have been authenticated.

In a “Bitcoin” transaction, if A transfers 1 bitcoin to B, this transaction is broadcast to all the Bitcoin nodes. Each of the nodes try to create a list of transactions since the last successful “Block creation”. They then proceed to add a variable (nonce value) and calculate a hash value of the block. If the hash value satisfies the criteria fixed by the block creation, the person is considered to have succeeded in creating a new block which gets added to the earlier chain of blocks and he is rewarded with an issue of new bitcoins as per the rule. (This is the mining activity). If the hash value does not meet the criteria, the nonce value is changed and a new hash value is calculated and so on.

All successful creation of blocks is added to the previous block chain and will contain the identity of the successful miner. The Bitcoin protocol ensures that the transactions and the block are digitally signed for authentication and encryption. The identity of the parties is in the form of encrypted private key of persons and hence does not contain the identifiable personal information. This concept of a “Group of people” expressing endorsement of an event by adding their approval one after another can be called the “Block Chain technology”. However for a “Block” to be called “Successful” and added permanently to the transaction database, it is necessary for a minimum number of people to authenticate the transaction.

In the Bitcoin block chain the nodes that participate in the authentication are manned by “Public” and they do not hold any specific authority to approve. On the other hand in a “Private Block Chain”, the power to approve may be restricted with a few designated persons. One of the essential features of the “Block Chain Technology” is that an approved transaction gets added to the earlier set of transaction and the transaction chain grows. It is like a ledger, which is brought for signature to a person, and he signs it and passes on the entire ledger to another person.

In a normal Banking transaction, we create “Transaction Vouchers” which move from one authenticator to another and when fully approved, some body maintains a centralized ledger where it is added. Only the “Voucher” is transmitted and not the “Ledger”. In comparison, if Block Chain technology is to be used, the authenticated ledger itself has to move with every successful authentication.

Such a system may not be ideal in all kinds of transactions but may be of use in recording transactions which have a short life cycle. From the Data Security point of view, if every authentication is digitally signed with hashing of content with private key and encrypted with the receiver’s public key, then the content is protected against loss of confidentiality in transit and also incorporate the authentication of the sender.

If however the content is not encrypted, depending on the nature of the content, there will be “Privacy” issues. Some of the Banks in India are reportedly experimenting on the use of Block chain technology for some part of their transaction recording. But these experiments may not be similar to the “Decentralized” public ledgers maintained in the case of Bitcoin where several persons are authorized to interact with the block and authenticate. What is normally done is to use the system of “Add authentication and move the entire file to the next person” in a sequential manner.

Every transmission is digitally signed, and encrypted with the public key of the addressee. The recipient decrypts the content with his private key, adds his comments/authentication, digitally signs the previous message with his added content, encrypts with the public key of the next addressee and forwards it until it reaches its

destination at the end of the life cycle when it is archived. In India, if the digital signature is one which is approved under ITA 2000/8, legal sanctity can be built into the system.

In summary we can take note that there are interesting technological developments that are occurring around us which leave a significant impact on the Data Protection aspects and those who frame the laws and those who need to follow them need to ensure that laws are not distorted due to misinterpretation as well as emergence of new technology that changes the foundation of the law as enacted.

Learning outcome:

The student will be able to understand the difference between the crime committed in the real world and the virtual world. He will be able to appreciate the recent developments that are taking place in the cyber space.

Model Questions:

1. Define ‘ cyber crime’ and various kinds of cyber crimes
2. Discuss the essentials of cyber terrorism
3. What are the rules and regulations, which an intermediary shall follow? Discuss with the help of relevant cases.
4. What are the offences that are committed against women in cyber space?
5. Write short note on the following
 - a) IoT (Internet of Things).
 - b) Block Chain technology
 - c) Cyber terrorism

UNIT-IV SPECIAL LAWS

INTRODUCTION

This Unit examines the recent developments of criminal law. The unit discusses newer crimes as drug offences, money laundering, corporate crimes which became a menace to the civil society.

Learning Objectives:

1. To understand the nature and scope of white color crimes.
2. To learn the objectives of various special laws such as Money Laundering Act, NDPS Act etc.

4.1: DRUG OFFENCES - NARCOTIC AND PSYCHOTROPIC SUBSTANCES ACT:

Brief Note:

The illegal trafficking in narcotics and psychotropic substances poses a serious trouble to the health of the citizens and it causes a deterrent effect on the society. This trafficking even cause a de-stability to the national economy and it is the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988 which provides for the detention of such persons. The central government or the state government or any officer authorized by either of the government can order for the detention of any person in order to prevent illicit trafficking of narcotic drugs and the detention can be ordered for a maximum period of one year but in exceptional circumstances it can be extended up to 2 years. In that period when the act was enacted India was facing a huge problem of transit traffic in illicit drugs. This lead to abuse and addiction of drugs resulting the death and a death like situation to many of its citizens. The addiction of the drug also increased the demand of drugs and since it was legally not possible the illegal cultivation and manufacturing of the drugs started.

A number of legislative, administrative and preventive measures were taken but every law, every action even the Narcotic Drugs and Psychotropic Substances Act, 1985 failed to eliminate completely the illicit trafficking of the drugs and it was then when the necessity of Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988 was

felt. In order to curb down the illicit trafficking of drugs it was necessary to immobilize the traffickers by way of preventative detention and the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988 played a very eminent role in this. There was a law The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 provides for preventive detention in relation to smuggling of drugs and psychotropic substances, but it cannot be invoked to deal with persons engaged in illicit traffic of drugs and psychotropic substances within the country and hence a separate legislation called Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act 1988 was enacted for preventive detention of persons engaged in any kind of illicit traffic in narcotic drugs and psychotropic substances. The Narcotic Drugs and Psychotropic Substances Act, 1985 views drug offences very seriously and prescribes stiff penalties. Narcotic Drugs and Psychotropic Substances have several medical and scientific uses. However, they can be and are also abused and trafficked.

India's approach towards Narcotic Drugs and Psychotropic Substances is enshrined in Article 47 of the Constitution of India which mandates that the 'State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health'. The same principle of preventing use of drugs except for medicinal use was also adopted in the three international conventions on drug related matters, viz., Single Convention on Narcotic Drugs, 1961, Convention on Psychotropic Substances, 1971 and the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. India has signed and ratified these three conventions. India's commitment to prevention of drug abuse and trafficking predates the coming into force of the three conventions.

The Act follows a graded system of punishment with the punishment varying with the quantum of punishment being dependent upon whether the offence pertains to small, commercial and intermediate quantities of narcotic drugs and psychotropic substances. For offences involving commercial quantities of drugs, a minimum penalty of ten years rigorous imprisonment is prescribed, which may extend to twenty years. Repeat offences attract one and half times the penalty and in a few cases even the death penalty. The three kinds of offenders under the Act are-

- a) Those who produce these drugs;
- b) The Kingpin who procure from the producers and deal in trade of drugs at a large scale;
- c) The carriers; and in the fourth would fall the consumers, namely drug addicts.;

Alongside with these stringent provisions, the Act has procedural safeguards as follows:¹⁵⁹

¹⁵⁹ <http://dor.gov.in/ndpsact> (accessed on 05.04.15)

- a) **Personal search:** Any person being searched has a right to be searched before a Gazetted Officer or a Magistrate (Section 50). The officer searching the person has to explain to the person that he has a right to be searched before a Gazetted Officer or a Magistrate and if the person wishes to be searched before a Gazetted Officer or a Magistrate he should be taken to the Gazetted Officer or the Magistrate and searched. However, if the officer has reason to believe that it is not possible to take him to a Gazetted officer or a magistrate without giving him a chance to part with the drug, controlled substance, etc., he can search him under Section 100 of the Cr. P. C. [Section 50(5) and 50 (6)].
- b) **Searches:** As per Section 41 of the NDPS Act, Gazetted Officers of the empowered Departments can authorize searches. Such authorization has to be based on information taken down in writing. As per Section 42, searches can be made under certain circumstances without a warrant (from a magistrate) or an authorization (from a Gazetted Officer). In case of such searches, the officer has to send a copy of the information taken in writing or the grounds of his belief to his immediate official superior within 72 hours.
- c) **Arrests:** The person who is arrested should be informed, as soon as may be, the grounds of his arrest [Section 52 (1)]. If the arrest or seizure is based on a warrant issued by a magistrate, the person or the seized article should be forwarded to that magistrate [Section 52(2)]. The officer who arrests a person has to make a full report to his official superior within 48 hours [section 57].

Officers: Officers acting in discharge of their duties in good faith under the Act are immune from suits, prosecution and other legal proceedings (Section 69).

Addicts: Addicts charged with consumption of drugs (Section 27) or with offences involving small quantities will be immune from prosecution if they volunteer for de-addiction. This immunity may be withdrawn if the addict does not undergo complete treatment (Section 64A).

Offenders: Central or state governments can tender immunity to an offender in order to obtain his evidence in the case. This immunity is granted by the government and not by the court (Section 64).

Juvenile offenders: Juvenile offenders (below 18 years of age) will be governed by the Juvenile Justice (Care and Protection of Children) Act, 2000. Immunities to diplomats as applicable.

OFFENCE & PENALTIES UNDER NDPS ACT, 1985

Offence	Penalty	Section
1. Cultivation of opium, poppy straw, cannabis or coca plants without license.	Rigorous imprisonment up to 10 years and fine up to Rs. 1 lakhs	Poppy Straw- Section 15 Poppy & Opium- Section 18 Cannabis- Section 20 Coca Plant & Leaves- Section 16
2. Embezzlement of opium by licensed cultivator	Rigorous imprisonment of 10 to 20 years and fine of Rs. 1 to 2 lakhs (regardless of the quantity)	Section 19
3. Production, manufacture, possession, sale, purchase, transport, import inter-state, export inter-state or use of drugs	Small quantity - Rigorous imprisonment up to 6 months or fine up to Rs.10,0000 or both *More than small quantity but less than commercial quantity - Rigorous imprisonment up to 10 years and fine up to Rs. 1 lakh *Commercial quantity - Rigorous imprisonment of 10 to 20 years and fine of Rs. 1 to 2 lakhs. Small and commercial quantities are defined for each drug separately through a notification. Quantities for important drugs are notified.	Opium - Section 18 Prepared opium - Section 17 Cannabis - Section 20 Manufactured drugs or their preparations - Section 21 Psychotropic substances - Section 22
4. Import, export or transshipment of narcotic drugs and psychotropic substances	Same as above	Section 23
5. External dealings in NDPS, i.e., engaging in or controlling trade whereby drugs are obtained from outside India and supplied to	Rigorous imprisonment of 10 to 20 years and fine of Rs. 1	Section 24

a person outside India.	to 2 lakhs (regardless of the quantity)	Section 25
6. Knowingly allowing one's premises to be used for committing an offence.		Section 25A
7. Violations pertaining to controlled substances (precursors).	Same as for the offence	Section 27A
8. Financing traffic and harboring offenders.	Rigorous imprisonment of 10 to 20 years and fine of Rs. 1 to 2 lakhs (regardless of the quantity)	Attempts - Section 28 Abetment and criminal conspiracy - Section 29
9. Attempts, abetment and criminal conspiracy.	Rigorous imprisonment of 10 to 20 years and fine of Rs. 1 to 2 lakhs (regardless of the quantity)	Section 30
10. Preparation to commit an offence.	Same as for the offence	Section 31 Death - Section 31A
11. Repeat offence		
12. Consumption of drugs	Half the punishment for the offence.	Section 27 Immunity - Section 64A
	One and half times the punishment for the offence. Death penalty in some cases.	
	Cocaine, morphine, heroin - Rigorous imprisonment up to 1 year or fine up to Rs. 20,000 or both Other drugs - Imprisonment up to 6 months or fine up to Rs. 10,000 or both	Section 32
13. Punishment for violations not elsewhere specified	Addicts volunteering for treatment enjoy immunity from prosecution. Imprisonment up to 6 months or fine or both	

The court is empowered to instead of straightway sentencing the addict convict to imprisonment, release him for undergoing medical treatment for de-addiction on his

executing, necessary bond prescribed under the Act. The comprehensive and stringent action initiated against items and the preceding Para by the NDPS Act, 1985 has been further intensified with the enactment of Prevention of Illicitly Trafficking in NDPS Act, 1988, providing for preventive detention for drug traffickers and the NDPS (Amendment). Act 1989, providing for capital punishment for drug traffickers in certain cases and for the forfeiture of their properties.¹⁶⁰

Amendment to NDPS Act, 2014

- A new set of “essential narcotic drugs” in section 2(viia) of the Act – a list, which the Central Government can notify on the basis of expediency in medical practice. Drugs identified as essential will be subject to Central Rules under section 9(1)(a), which will apply uniformly throughout the country, bringing to an end the unwieldy and inept practice of obtaining multiple State licenses for possession, transport, purchase, sale, distribution, use and consumption.
- Section 71, which significantly impact the health and rights of people who use drugs. The NDPS Act now allows for “management” of drug dependence, thereby legitimizing opioid substitution, maintenance and other harm reduction services. Secondly, it authorizes the Government to “recognize and approve” treatment centres, which currently operate without license or accreditation, and inflict violence and torture on drug users. The amendments will allow for instituting evidence based and human rights compliant standards for drug treatment facilities, whether public or private.
- The death penalty, which, until now, was mandatory for a subsequent offence involving a certain quantity of drugs under section 31A, as an alternative to imprisonment for 30 years under section 31.
- The punishment for small quantity offences from a maximum of 6 months to 1 year imprisonment. Consumption of drugs continues to be punishable.

4.2 CORPORATE CRIMES:

Traditionally, criminal liability could not be attributed to the Corporations on the ground that an artificial person cannot possess Mens Rea. This difficulty was overcome by the Courts around the world through various decisions by evolving theories and now it is well settled that a corporation can possess Mens Rea and cannot escape criminal liability.

Corporate criminal liability became a topic of discussion in India after the unfortunate Bhopal gas tragedy. Due to the leakage of methyl isocyanate thousands of people died and

¹⁶⁰[delhi.gov.in/wps/wcm/connect/doi_socialwelfare/SocialWelfare/Home/Our+Services/Drug+Deaddiction/\(accessed on 05.04.15\)](http://delhi.gov.in/wps/wcm/connect/doi_socialwelfare/SocialWelfare/Home/Our+Services/Drug+Deaddiction/(accessed on 05.04.15))

suffered long lasting health issues. Even though Indian government had filed a case in US Court for 3.3billion against Union Carbide Corporation ultimately government signed a settlement agreement to the extent of \$470 million.¹⁶¹ The agreement was widely criticized for its low settlement amount and was challenged in Supreme Court. But Supreme Court upheld the settlement agreement ordering the criminal proceedings to continue. Criminal proceedings were initiated against company officials under Sect.304A dealing with causing death by negligence. Court found the directors guilty but sentences against them could not be enforced since they were absconding. The theory of absolute liability generated in *M.C.Mehta v Union of India*¹⁶² was judicial response to the Bhopal gas tragedy. Bhopal gas tragedy highlighted the need to have a system of corporate liability in place where persons occupying position of authority would have the responsibility to ensure that the activities are conducted within lawful limits¹⁶³. Corporate criminal liability forces the higher officials to act to ensure that the activities of the corporation do not go against public interest or safety.

Indian law recognized that corporates can be punished for offences which are punishable with mandatory imprisonment by way of fine in the case of *Standard Chartered Bank v Directorate of Enforcement*¹⁶⁴. Indian Supreme Court pointed out that it was not the intention of the legislature to give complete immunity from prosecution to corporate bodies for grave offences. In giving out this judgment 5 member bench of Supreme Court depended on rational in *United States v United Supply*¹⁶⁵ wherein Justice Holmes held that “the natural inference when a statute prescribes 2 independent penalties is that it means to inflict them so far as it can and if one of them is impossible, it does not mean on that account let defendant escape”. The *Standard Chartered Bank* decision left open the question whether a corporate entity can be held liable for offences requiring Mens Rea. The issue was settled in the case of *Iridium India Telecom ltd v Motorola Incorporated & Ors*¹⁶⁶ wherein Supreme Court clarified that company can be treated in the same manner as an individual for being convicted of an offence including one that requires Mens Rea. Corporations play a significant role in our society with their far reaching economic and political influence. Their separate legal entity ensures that when Mens rea and actus reus are present they can be held criminally liable for their actions. Deterrent and retributive effects of criminal law are applied on them irrespective of the doctrine *societas delinquere non potest*.

Theories of corporate personality:

- Fiction theory – Savigny and Salmond were the two main advocates of this theory. Savigny described corporations as fictitious persons who exist only for juridical

¹⁶¹<http://www.thehindu.com/opinion/op-ed/Crime-no-punishment/article16266665.ece>

¹⁶² 1987 AIR 1086

¹⁶³ Richard S.Gruner, *Corporate Criminal Liability and Prevention*, Law Journal Press, 4, 2004

¹⁶⁴ (2005) 4 SCC 530

¹⁶⁵ 215 U.S 50 (1909)

¹⁶⁶ (2011) 1 SCC 74

purposes. According to fiction theory corporation is a mere creature of law and it has no existence apart from law. While natural person is born with a personality that law only has to recognize the legal personality of corporate entities is a result of legal fiction. Being the result of a fiction a corporate entity possesses only those properties which its charter confers upon it. Savigny suggested that corporate property belonged to fictitious entity and not to any real person or entity. Savigny held *these fictitious or ideal persons have capacity for proprietary rights, but are incapable of knowing, intending or willing*¹⁶⁷. *The relation of corporation or members to these fictitious persons is that of tutor and pupillus in Roman law or between committee of his estate and a lunatic in the common law. The fictitious persons can acquire property through their guardians, and if they take advantage of contracts can be held for the burden. They can be held for unjust enrichment but not for delict (tort or crime). In case of misbehavior by their guardians they may be put an end to or regulated by administrative proceeding*¹⁶⁸. One major criticism of Fiction theory is that it fails to account for the fact that State itself is a corporation which is capable of creating other corporations.

- **Concession theory-** Concession theory is similar to Fiction theory or sometimes it is considered as a part of Fiction theory. It suggests that legal personality can flow only from law. Juristic personality along with the capacity to act is granted as a concession by the state and is entirely depended on the discretion of the state. It bases fictitious personality on a fictitious entity. This grant can be denied or deprived by the State and also enables it to place restrictions upon such entities. It was clearly explained in the case of *Dartmouth College v Woodward*¹⁶⁹ by Chief Justice Marshall who held “*A Corporation is an artificial being, invisible, intangible, existing only in contemplation of law. Being the mere creature of law it possess only those properties which the charter of its creation confers upon it either expressly or as incidental to its existence*”
- **Realist theory** – According to this theory corporate entity has a real existence and possesses real personality. It holds that a corporate entity has a separate will from its individual members and has all the characteristics of a natural person. *It is realist in the sense that the entities real (significant) personality is the group apart from attributing of legal personality to it by the state*¹⁷⁰. The will of an individual would be different from the will of a group when he associates with a particular group¹⁷¹.

¹⁶⁷ Savigny, *Jural relations* (transl. by Rattigan, 1884) 178

¹⁶⁸ Roscoe Pound, *Jurisprudence*, St.Paul Minn: West Pub.Co Vol IV,(1959) 214-215

¹⁶⁹ 4 L.Ed.629 (1819)

¹⁷⁰ Supra note 20, 245

¹⁷¹ Avatar Singh & Dr Harpreet Kaur, *Introduction to Jurisprudence*, Lexis Nexis, Third Edition,

Gierke and Maitland were the main proponents of this theory and they held that legal personality is independent of recognition by the State. It holds that a corporation is not a fiction and not a collective name for individuals but it is a living organism and a real person. Dicey observed that *“when a body of twenty or two thousand, or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a bond which by no fiction of law, but by the very nature of things, differs from the individuals of whom it is constituted”*¹⁷²

- **Bracket theory** – This theory emphasizes that person is confined only to human beings. Ihering was the major proponent of this theory. According to this theory only members of the corporation are persons and names of the members of the corporation are kept in brackets. The members of an incorporated association are considered as the bearers of *rights* and as bound by the duties which for convenience are referred as to as the rights and duties of the corporation. *It is argued that where there are a number of members, as it is were, a bracket is put around their names and given a name of its own. But the real and only persons are its members. The juristic person is but a convenient mode of referring them. In order to get at reality we must erase the bracket.*¹⁷³

In India the criminal liability of corporation arises predominantly in 3 ways: 1) Statutes specifically provide for criminal liability of corporations 2) Criminal liability of corporation under IPC 3) Corporations held liable under strict liability.

Strict liability offences are offences which do not have a mental element. If a company is accused of an offence of strict liability, it is unnecessary to prove that individuals who formed the company's directing mind and will were responsible for committing the offence.¹⁷⁴ Unless settled by the statute it is the Courts duty to decide whether an offence is strict liability or not. Courts have found strict liability particularly appropriate where criminal penalties are invoked to enforce regulation of economic activity of general importance.¹⁷⁵ If an offence is one of strict liability it is unnecessary to examine the mental state of any person on trial for the offence, whether accused is a natural person or not.

Section 11 of IPC defines the term persons. It says the word includes corporations, associations or any body of persons whether incorporated or not. However earlier it was believed that a corporation cannot be made liable for criminal offences like a natural person since it lacked a physical body and mind. These contentions were raised in the

364, 2009

¹⁷² Ibid

¹⁷³ Supra note 20, 250

¹⁷⁴ Supra note 34, 641

¹⁷⁵ Id, 642

case of *Ananth Bandu v State of Corporation of Calcutta*¹⁷⁶ where the Calcutta High Court made it clear that a company is not outside the purview of criminal jurisprudence. Court also held that when only imprisonment is prescribed as punishment, Company cannot be prosecuted against since it is physically impossible to imprison a company. This decision was in tune with the principle *lex non cogit ad impossibilia*. However nothing shall prevent the Courts from enforcing other modes of punishment if prescribed. It was also held by the Court that when mens rea is essential to constitute an offence a company cannot be prosecuted for the same. Later in the case of *State of Maharashtra v Messrs Syndicate Transport Co ltd and others*¹⁷⁷ corporate criminal liability was further expanded. In this case the issue in question was whether a company can be charged with offences 403, 406 and 420 under IPC which requires mens rea. It was argued on behalf of the company that since its not a natural person it is incapable of having the requisite mens rea and the definition 'persons' under Section 11 of IPC should be understood in a limited sense. Court disapproved of this contention and held that corporate entity normally acts through its directors, employees or agents and hence the state of mind or knowledge of its directors employees or agents should be treated as that of the corporation itself. Court held that a corporation should be held liable criminally for the actions of its agents or directors provided they were acting under the authority of the company. Court also made it very clear that for offences resulting in imprisonment as sole mode of punishment a trial cannot be instituted against a company since no effective order by way of sentence can be passed.

In *Kalpanath rai v State*¹⁷⁸ a registered company East West Travel and Trade Links was convicted under Section 3(4) of TADA for harbouring terrorists. Company was imposed with fine against which an appeal was filed in Supreme Court. Court held that even though Section 3(4) does not mandate men rea it has to be read with Section 3(1) which prescribes intention as an essential element. Since company is a juristic person Court held it is incapable of forming mens rea and hence it could not be prosecuted against. Court also noted there is no specific provision in TADA making a company liable for the actions of its officers. In *Assistant commissioner v velliappa textiles*¹⁷⁹, company was accused of submitting false returns. Supreme Court held that a company can be prosecuted for offences involving a sum of Rs One lakh or less because discretion was given to the Court to impose either fine or imprisonment but for offences involving a sum of more than Rs One Lakh mandatory imprisonment has to be imposed and hence a company cannot be prosecuted for such offences. Court was of the view criminal liability can be imposed only after necessary legislative changes since there were many

¹⁷⁶ AIR 1952 Cal 759

¹⁷⁷ AIR 1964 Bom 19

¹⁷⁸ (1997) 8 SCC 732

¹⁷⁹ (2003) 11 SCC 405

statutes which prescribed only imprisonment and not fine. Court also opined that while constructing a penal statute if 2 views are possible court is obliged to adopt the interpretation which will not result in imposition of punishment. However in *Standard chartered bank v directorate of enforcement*¹⁸⁰ the Supreme Court held that a company can be imposed with fine irrespective of the fact that mandatory imprisonment is prescribed in the statute. The legislation concerned was Foreign Exchange Regulation Act (1973) which prescribed mandatory imprisonment along with fine. Court held that strict interpretation of penal provisions means the words should not be interpreted in such a way that an act which was not intended to be an offence becomes an offence. It also held that legislative intent was to punish corporate for their crimes and statute never intended to remove corporations from criminal liabilities. Court also pointed out that when 2 punishments are prescribed for the same offence the intention of the legislature is to impose them to the extent possible and it is not to exonerate any person from liability.

In *Iridium india telecom ltd v Motorola inc*¹⁸¹ the complainant was Iridium India who had invested in a telecommunication project initiated by Motorola which turned out to be a failure. The complaint was made under Section 120b conspiracy and also under Section 420 Cheating. Criminal proceedings were initiated against Motorola which were later quashed by Bombay High Court under Section 482. Against this order Iridium India approached the Supreme Court by way of appeal. Supreme Court held that a corporation can be prosecuted for offences involving Mens Rea and it adopted the directing mind and will test used in UK to determine whose mens rea is to be considered as the company's mens rea. It is interesting to note that the Privy Council decision in *Merdian* which adopted a more flexible approach and by way of which even actions of low level employees could be attributed to the company was avoided by the Supreme Court. In *Sunil Bharati Mittal v CBI*¹⁸² Supreme Court made it clear that alter ego or directing mind principle is used to impute liability on company for actions of directors and not vice versa. Court observed that directors of a company can be prosecuted only when the statute specifically says so or when there is sufficient evidence to show that the crime has taken place with their knowledge or approval. Unless any of these 2 circumstances exist directors cannot be prosecuted against only on the basis of alter ego theory. Recent development in India in the field of corporate criminal liability has been the establishment of Special Courts by Section 435 of Companies Act to try offences under the Act which are punishable by imprisonment for more than 2 years. The Section reads the following:

¹⁸⁰Supra note 16

¹⁸¹ Supra note 18

¹⁸² 2015 4 SCC 609

(1) The Central Government may, for the purpose of providing speedy trial of offences punishable under this Act with imprisonment of two years or more, by notification, establish or designate as many Special Courts as may be necessary. Provided that all other offences shall be tried, as the case may be, by a Metropolitan Magistrate or a Judicial Magistrate of the First Class having jurisdiction to try any offence under this Act or under any previous company law.

(2) A Special Court shall consist of a single judge who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.

(3) A person shall not be qualified for appointment as a judge of a Special Court unless he is, immediately before such appointment, holding office of a Sessions Judge or an Additional Sessions Judge.

Corporate frauds can be known as acts exploiting the processes with the intention of getting their greedy hands on assets, both tangible and intangible.¹⁸³ Few of the major corporate crimes in Indian financial sector were masterminded by an ill-reputed finance guru namely Harshad Mehta. Among the scams on his account, the Sensex scam in the year 1992 is rated as one of the major corporate crimes ever committed in India. It was later found that Harshad Mehta diverted money from the banking system to finance his dealings in the security market. The greed of Mehta did not end there. Another scam broke out after 6 years, in 1998. He emerged as a finance guru then advising investment on only those companies with which he had a connection. Taking track of these scams will help us unfold the regulatory loopholes that prevailed at that point of time and how the system has bettered itself after the scams. This will also assist us in understanding the modus operandi of corporate crimes and the laws dealing with such crimes. Nevertheless an understanding of these scams is a prerequisite for any meaningful analysis of policy alternatives to improve the functioning of the financial system.

Tools used in the Harshad Mehta (1992) scam:

Mehta had used two instruments in this scam.

- 1) Ready Forward Deal, and
- 2) Bank Receipts.

Ready Forward Deal - The Ready Forward Deal (in short known as RF) is in fact a secured short term loan from one bank to another bank, against government securities. The loan can be for varying periods such as 15 days, 81 days and so on. The securities are in fact sold by borrower bank to lender bank for a fixed price and they are sold back

¹⁸³ MICHAEL J COMER, INVESTIGATING CORPORATE FRAUD 4 (2003)

to the borrower bank at a premium, once loan is due for repayment. In India, banks have to keep 38.5% of their demand and time liabilities (DTL) in government securities, so as to comply with Statutory Liquidity Ratio (in short referred to as SLR) requirements. By way of RF deals, banks manage SLR in between themselves. Thus, a bank with a temporary increase in SLR engages into a RF deal with another bank which has surplus SLR securities. When SLR comes back normal, the RF deal is closed and securities are returned to the other bank.¹⁸⁴

Bank Receipt – Bank Receipts (BRs) are issued by the borrower bank which sells the securities, to the other bank confirming sale of securities. In fact, original security documents are not transferred to the lending bank and instead, a Bank Receipt is issued for this purpose. A Bank Receipt (BR) contains a promise to deliver the securities to the buyer as and when demanded and also that until so demanded, the borrower holds the securities in trust for the lender. It also acts as the receipt for borrowed money.

Bank Receipts were begun to be used in RF deals because it was the convenient way of transferring securities. In some cases, it was also because actual delivery of securities is not possible due to non-existence of certificates, or only a single certificate for investment of several hundreds of crores of rupees is available etc. In fact, RBI had directed the banks not to use BRs in government securities. For government securities, physical documents are not issued. RBI records transactions on government securities in a ledger namely Subsidiary General Ledger (SGL) at its Public Debt Office (PDO). When someone who holds government securities sell them to another, he fills up an SGL transfer form and gives it to the buyer. This SGL form is used for making entries at the PDO. But, in reality, PDO did not function properly and did not make book entries in time, due to which BRs came to be resorted generally by the banks.¹⁸⁵

Partners to the scam:

The banks which partnered with Mehta in accomplishment of his illegal motives were two small banks namely Bank of Karad (BOK) and the Metropolitan Co-operative Bank (MCB). These banks agreed to issue fake BRs to Mehta who would in turn transfer it to other banks for RF deals. The loan amount was credited into Mehta's accounts.

Manohar J. Pherwani who was Chairman of the Unit Trust of India (UTI) for almost a decade, was heard to be hands in glove with Mehta. In the background of the scam, he quit as chairman of the NSE and Infrastructure Leasing & Financial Services Ltd (IL&FS) in 1992. Nimesh Shah was also speculated to have had a role in the scam

¹⁸⁴ Samir K. Barua & Jayanth R. Varma, *Securities Scam: Genesis, Mechanics and Impact* (Nov 18, 2015), <http://www.iimahd.ernet>

¹⁸⁵ Samir K. Barua & Jayanth R. Varma, *Securities Scam: Genesis, Mechanics and Impact* (Nov 18, 2015), <http://www.iimahd.ernet>

however he escaped from firm allegations.¹⁸⁶

Modus Operandi and results earned by Mehta:

The way found by Mehta to his great advantage was the relatively easy way of doing RF deals with Bank Receipts. He persuaded Bank of Karad (BOK) and the Metropolitan Co-operative Bank (MCB) to issue fake BRs or in other words, BRs with no backing of securities. Under the mistaken impression that it is making a secured loan, lending bank lends money whereas in fact, the loan was unsecured.

Harshad Mehta could amass a large amount of money through these fake BR deals. He made speculative investments in stock market with this colossal sum of money and when it was time to repay the money, the shares were sold for a profit and the BR was returned. Around Rs. 3,500 - 4000 crores¹⁸⁷ (₹40 billion / US \$ 600 million) was diverted from the banking sector to stock market during the period April 1991 to May 1992. Harshad Mehta bought bulky shares at higher prices, thereby prompting a sudden rise in the Sensex. This amounted to massive stock manipulation which speaks of deliberate attempt to interfere with the free and fair operation of the market and create artificial changes with respect to the price of a security. Mehta mainly traded heavily in the shares of Associated Cement Company (ACC). The share price of ACC shot up from Rs. 200 to nearly 9000 per share which is a 4400% rise in its price. Mehta justified his investment in ACC saying that its shares had been undervalued and offered "replacement cost theory" as justification. This theory says that older companies should be valued on the basis of the investment that would be required to set up a similar company.

As a result of the large scale investment into the stock market, the market began to bully high. In February 1991, the Bombay Stock Exchange Sensitive Index (Sensex) was at around 1000 points and it rose from there to a peak of 4500 by March 1992, as a result of the boom. Mehta was nicknamed as the 'Big Bull' since he was identified to be the person behind this bull run in the stock market. The new government which came to power in 1991 had initiated economic liberalization and privatization which opened up new horizons of growth for private sector. It was also thought as one reason for the economic boom. After Harshad Mehta sold his shares on a single day, market crashed like anything. Within next two months, Sensex dropped from 4500 points to 2500 points, wiping out share value to the tune of Rs. 1,00,000 crores.¹⁸⁸

¹⁸⁶ Harshad Mehta & Ketan Parekh Scam, KNOWLEDGE CENTRE (Nov 17, 2015), <http://flame.org.in/knowledgecenter/scam.aspx>

¹⁸⁷ The RBI appointed Janakiraman committee estimates the scam amount at Rs 4,300 crore

¹⁸⁸ HARSHAD MEHTA, Wikipedia (Nov 18, 2015), https://en.wikipedia.org/wiki/Harshad_Mehta#cite_note-Flame-6

Harshad Mehta was charged with 27 criminal offenses but he was convicted only for four of them prior to his death. Roughly, 600 civil suits were filed against him in various courts. CBI arrested Mehta and his brothers on 9 November 1992 on charges of misappropriation of shares. It was alleged that more than 2.8 million shares of 90 odd companies with a value of ₹ 2.5 billion (US \$ 38 million) were misappropriated by them through forged share transfer forms.

In September 1999, Bombay High Court convicted and sentenced Mehta to five years rigorous imprisonment and a fine of ₹25000 (US \$ 380). The appeal to Supreme Court of India was disposed of in 2003 confirming the High Court's judgment.¹⁸⁹ While under Criminal custody in the Thane prison, Mehta complained of chest pain one night and he was soon admitted to the Thane civil Hospital. However, he breathed his last on 31 December 2001 following a heart ailment. He was 47 years old at the time of death.¹⁹⁰ He is survived by his wife and one son. At the time of his death, many litigations were pending against him in various courts. The Income Tax department and public sector banks (PSBs) have successfully recovered major part of their claims out of the scam, from his assets. In March, 2011, Supreme Court ordered the official receiver of the assets of Harshad Mehta Group (HMG) to pay Rs 1,995.66 crore to the IT department and Rs 199.25 crore to the State Bank of India (SBI) in settlement of their claims.¹⁹¹

After the scam, Securities and Exchange Board of India (SEBI) banned him for life from engaging in stock market-related activities. The scam was investigated by different bodies such as Income Tax Department, Directorate of Enforcement, Central Bureau of Investigation (CBI) and the Joint Parliamentary Committee (JPC). A special court was set up by the central government to conduct speedy trial of accused in the scam. By way of an ordinance, the properties of the accused were attached and transactions after April 1, 1991 were voided by the government. This invalidation of share transactions resulted in creation of "tainted" shares in the market without any value. Nadkarni Committee was set up to make recommendations on the light of deficiencies in the system as noted after the scam. The committee proposed to permit RF deals and that the entire settlement and clearing system be streamlined and computerized.

¹⁸⁹ Supreme Court upholds Harshad Mehta's , THE TIMES OF INDIA (Nov 17, 2015), <http://timesofindia.indiatimes.com>

¹⁹⁰ 'Big Bull' Harshad Mehta dead, BUSINESS LINE (Nov 17, 2015), <http://www.thehindubusinessline.com>

¹⁹¹ Harshad Mehta & Ketan Parekh Scam, KNOWLEDGE CENTRE (Nov 17, 2015), <http://flame.org.in/knowledgecenter/scam.aspx>

4.3. 1998 SCAM - IN DETAIL

After six years from the 1992 scam, Harshad Mehta identified another crooked way to earn money. He can even be described as a career criminal since he used his shrewd brain mostly for wrong purposes, to amass wealth.¹⁹² This time, Mehta chose another way for price Rigging. Price Rigging means 'an illegal action performed by a group of conspiring businesses that occurs when the firms agree to artificially inflate prices in an attempt to recognize higher profits at the expense of the consumer.'¹⁹³ This is also known as 'Pump and Dump' scam, wherein fraudster hypes and promotes stock incessantly and when it reaches peak, they sell off and earn profit.¹⁹⁴ Mehta understood that internet is a good way to influence investors at that point of time. So he launched a website in his name as www.harshad.com, to provide analysis of market trends and to give stock tips to the class of investors. He also managed to sack few media managers to provide him columns at various leading news papers. A Hindi news paper namely Navbharat Times owned by Bennet Coleman & Company agreed to publish the column.

Things being so, Prof. Manubhai Shah of Consumer Education and Research Centre (CERC), Ahmedabad filed a complaint against the write-ups of Mehta, to the Press Council of India (PCI). In the complaint, Prof. Manubhai objected to the write ups saying that such a fraudster should not be allowed to influence investors. The Times of India group defended their decision to include the article saying that he is only a suspect and he has the right to freedom of speech and expression. Press Council later referred the matter to an Inquiry Committee for further scrutiny. However, at the end, PCI did not restrain the newspaper from carrying the article, instead, it observed that such publications are an 'unhealthy and unethical practice'.¹⁹⁵ Along with the publication, what Mehta did next was to collaborate with few companies to raise the prices of its shares. He also found several ideal brokers to put through the trade. Accordingly, he began giving security investment tips to investors through the website and through a Hindi news paper. In those columns, he began making investment recommendations of those companies alone with whose owners he had an understanding in this regard.

The major companies he had set up a tie were BPL, Videocon and Sterlite. As a result of luring stock tips from Mehta, investors invested heavily on shares of these companies. It seems that they had not learned any lesson from the 1992 scam masterminded by Mehta. Thereby, from April 1998 to June 4, 1998, the share prices of BPL, Videocon and Sterlite went up by 137 per cent, 232 per cent and 41 per cent respectively. This

¹⁹² NEAL SHOVER AND ANDY HOCHSTETLER, CHOOSING WHITE COLLAR CRIME 130 (2006)

¹⁹³ http://www.investopedia.com/terms/p/price_rigging.asp (Jan 11, 2015)

¹⁹⁴ DR. STEPHEN HILL, CORPORATE FRAUD: PREVENTION AND DETECTION 93 (2010)

¹⁹⁵ Sucheta Dalal, Bull in the media ring, <http://www.suchetadalal.com>

happened so despite the fact that BSE fell down by 11 per cent in the relevant period due to several factors.

The dealings of Harshad Mehta were directed through some other companies which were created for this particular purpose. These companies were known as Damayanti group. They included Damayanti Finvest, CDP Fincap and Leasing, KRN Finvest and Leasing, Rijuta Finvest and Ikshu Finvest. Another set of companies was also set up by Mehta, they being Money Television Industries, Esquire International, Starshare Investment and Finanz, Stable Constructions and New Prabhav Finvest. It was found that these companies cornered large portion of shares of Videocon, BPL and Sterlite. Cornering means to have a great share of one company or industry to be in hand which will help to manipulate its prices.¹⁹⁶ As a result of the cornering of shares, its prices rose considerably and led to price manipulation. It created an artificial market which collapsed subsequently and affected investors' interests at large.

The investigations conducted by SEBI found that the companies were formed as cover for Harshad Mehta. For committing price manipulations, SEBI suspended 17 brokers from the market. The suspensions were for periods ranging from one to three years. The then BSE president J C Parekh was asked to relinquish his office. Investigations forced BSE vice president Rajendra Banthia to resign. After conducting a detailed inquiry, SEBI debarred Harshad Mehta for life from dealing in securities. This debar was ordered under Section 11 and 11B of SEBI Act read with Regulation 11 of SEBI (Prohibition of Fraudulent and Unfair Trade Practices for dealing in securities) Regulations. Likewise, under sections 11 and 11B of the SEBI Act, BPL Limited, Videocon International and Sterlite Industries were debarred from the capital market for a period of four, three and two years respectively. Prosecution of Harshad Mehta and these three companies was also ordered under section 24 of SEBI Act.¹⁹⁷

4.4. MONEY LAUNDERING: PREVENTION OF MONEY LAUNDERING ACT:

Money Laundering has been a crime which has not been talked about much. Laundering allows criminals to transform illegally obtained gain to legitimized funds. Criminals want their funds laundered so that they can move their money in the society freely and without any fear of getting caught. Also, laundering prevents the police from confiscating the money which is actually illegal.

¹⁹⁶ Cornering the market, Wikipedia (Jan 11, 2015)
https://en.wikipedia.org/wiki/Cornering_the_market

a. ¹⁹⁷ Sebi debars Harshad Mehta from securities dealing; BPL, Videocon, Sterlite restricted, BUSINESS HEADLINES (Nov 17, 2015)
<http://www.rediff.com>

A. STAGES IN TRADITIONAL MONEY LAUNDERING

(i) Placement: This is the basic stage where the launderer places the illegal funds into the financial system. This could be done by depositing it into a bank, or introducing it into the retail economy through the purchase of goods (usually of high value), property, or business assets.¹⁹⁸ In case of bank deposits, the trend is to use a process called “smurfing”, i.e. breaking up of large amounts of cash into smaller amounts so that the transactions fall below the reporting requirements of a given jurisdiction. Thus, in USA, banks must report domestic transactions over \$10,000 and international transactions over \$5,000 to the Treasury Department and so transactions will be structured accordingly.¹⁹⁹ In India, deposits over Rs. 50,000/- are noted by requiring presentation of the PAN card; thus launderers would keep their deposits to lesser than this amount.²⁰⁰ Thus, the aim of this stage is to remove the illegal money from the area of acquisition, and escape detection by the authorities in doing so.

(ii) Layering: This is the process by which the source and ownership of the funds are sought to be concealed. This is usually done by undertaking multiple and complex financial transactions, such as international wire transfers or placing funds in an overseas bank. The aim here is to distance the funds from their criminal origin and make it difficult for anyone to trace the trail of the funds. Due to the large number of transactions undertaken each day, authorities are unlikely to catch a launderer at this stage of the process.²⁰¹

(iii) Integration: This stage involves the reintroduction of funds back into the legitimate economy. This could be done by various means that bring legitimacy to the funds – most common are creating anonymous dummy corporations or investing in real estate. Once this is complete, the launderer has cleansed (‘laundered’) his ill-gotten money.²⁰²

The Prevention of Money Laundering Act was passed in 2002 to prevent such acts from happening in the country. There have been reports about many money laundering scams which have been reported by the newspapers in the recent years.²⁰³

This Act mainly talks about the prevention of the act and also the “adjudicating authority” which has the power vested in it to punish those who are responsible for such an act. The Act is divided into ten chapters. Chapter 1 is the preliminary section talking about the short

¹⁹⁸ JAMES RICHARDS, TRANSNATIONAL CRIMINAL ORGANIZATIONS, CYBERCRIME, & MONEY LAUNDERING: A HANDBOOK FOR LAW ENFORCEMENTS OFFICERS, AUDITORS, & FINANCIAL INVESTIGATORS 46-47 (1999).

¹⁹⁹ Bank Secrecy Act (BSA), FinCen Form 104.

²⁰⁰ Reserve Bank of India, Master Circular on Maintenance of Deposit Accounts, RBI/2012-13/53, July 2, 2012, ¶2.4.

²⁰¹ ANGELA VENG MEI LEONG, THE DISRUPTION OF INTERNATIONAL ORGANISED CRIME 33 (2007)

²⁰² *Supra*, note 11, Straub, 519.

²⁰³ Combating the peril of Money Laundering, available at: <http://www.indiaforensic.com/whatism.html>

title and the definitions of the various terms which are used in the act. Chapter 2 entails the details about the offence of money laundering and the punishment for the same. The punishment for it is rigorous punishment for not less than three years and it may extend to seven years if the offence involves money more than five lakh rupees. Chapter 3 talks about Sections 5 – 11 which entail the Attachment, Adjudication and Confiscation of property which has been obtained by money laundering. Chapter 4 has Sections 12 to 15 which talk about the various obligations of Banking and Financial institutions and Intermediaries in this regard. Chapter 5 contains Sections 16 to 24 which talks about summons, seizures and searches of illegal property. Chapter 6 has the details about Appellate Tribunal and which spread from Sections 25 to 42. Sections 43 to 47 are the ones in Chapter 7 talking about Special Courts. Chapter 8 contains Sections 48 to 54 talking about the Authorities under the said act. Chapter 9 talks about the Reciprocal Arrangement for Assistance in Certain matters and Procedure for Attachment and Confiscation of Property. Last, Chapter 10 has Miscellaneous topics being talked about in Sections 62 to 75. The act also mentions the Schedule which talks about sections from various other Acts and also the Indian Penal Code which are in relation to Money Laundering in some way or the other.²⁰⁴

A. PREVENTION OF MONEY LAUNDERING ACT, 2002 (PMLA)

The central objective of the Act was to provide for confiscation of property derived from, or involved in, money laundering. Interestingly, the term “*money laundering*” is not specifically defined in the Act. Section 3, as the charging section, specifies money laundering as directly or indirectly attempting to indulge or actually being involved in any process or activity connected with the proceeds of crime and projecting it as untainted property. In *Hari Narayan Rai v. Union of India*, the Jharkhand High Court held that the term “*laundering*” as used in the Section comprises involvement in “*any process or activity by which the illicit money is being projected as untainted.*” The relevant date was not the date of acquisition of illicit money but the date on which it was being processed for projecting it untainted.²⁰⁵

The researcher submits that the term “*process*” or “*activity*” could be widely interpreted to involve acts of cyber laundering as well. In any event, this section attaches the criminality to the ends and not the means employed, and hence such an interpretation is reasonable.

This interpretation is further confirmed by two other definitions. Section 2(rb) defines “*payment system*” as a system that enables payment to be effected between a payer and a beneficiary, involving clearing, payment or settlement service or all of them. It thus appears to encompass electronic payment systems as well. Section 2(v) defines “*property*” as “*any property or assets of every description, whether corporeal or incorporeal, movable or*

²⁰⁴ The Prevention of Money Laundering Act, 2002

²⁰⁵ B.A. No. 6829 of 2010, 4th February, 2011 (Jharkhand HC) : MANU/JH/0302/2011.

immovable, tangible or intangible....wherever located.” This could be extended to property acquired through online transactions as well.

The Act, in Section 12, prescribes various obligations on banks, financial institutions and intermediaries to maintain records detailing the nature and value of transactions which may be prescribed along with various reporting requirements. Several banks also have an e-records maintenance policy, which covers wire transfers. However, the definition of “banks”, “financial institutions” and “intermediaries” does not include online banks and cashless services, which means they are not bound by these reporting obligations. This is a major lacuna in the law against cyber laundering.

The Act, in Section 4, prescribes rigorous imprisonment for a term not less than three years and upto seven years and fine which upto five lakh rupees for money laundering offenders. The laundered proceeds or property is also liable to be confiscated as per Section 5. In *B. Rama Raju v. Union of India*²⁰⁶, the Andhra Pradesh High Court further held under Section 5, the property in possession of any person other than the one who has been charged with for committing the offence can also be attached and confiscated. The validity of the confiscation is to be challenged and decided by the Adjudicating Authority and Appellate Authority, which is setup under the Act itself. The constitutional validity of these bodies has been confirmed by the Supreme Court²⁰⁷, which found that these authorities could remain impartial and independent in the exercise of their functions despite the Executive having a significant hand in their appointment.

The FATF did point out several concerns with the PMLA, when India sought membership initially in 2006, including certain concerns relating to electronic transactions:

- a) Commodities market out of the ambit of PMLA.
- b) Designated Non-Financial Businesses and Professions, aside from casinos are also not subjected to PMLA.
- c) The identification and verification of beneficial ownership of legal persons is not required, which is significant in cases of cyber laundering.
- d) In the United States, as way back as 1934, it was already noted that insider trading was not a smooth and Legal business style. Trading which was conducted by Director, Managers and other Senior Officers in any company was to be reported to the regulator. Furthermore, it was to be openly disclosed to the Securities and Exchange Commission. This was addressed in the 1934 Securities Exchange Act, section 16(b) and 10(b). The

²⁰⁶ [2011] 164 CompCas 149 (AP).

²⁰⁷ *Pareena Swarup v. Union of India*, 2008 (13) SCALE 84.

disclosure is to be done in the normal course of duties or as required by law. Otherwise, any person who has corporate inside information and has not disclosed it is not allowed to purchase and sell or sell and purchase securities of the company freely.²⁰⁸

- e) The Securities Exchange Act and such other Acts help to minimize the breach of fiduciary duties of those in possession of material and non-public information. For example, section 16(b) of the Securities Exchange Act prohibits profit by corporate insiders and that profits gained from their type of business will belong to the company. Section 10(b) of the same Act prohibits the use of different types of manipulation or deceit in connection with the purchase of security. In fact, prior to 1980, in the United States of America it was not allowed to trade or communicate to others on the inside information. The regulations changed radically when several laws were passed to stiffen penalties for Insider Trading and regulators started many more cases against Wall Street.²⁰⁹

4.4 .1 CASES OF MONEY LAUNDERING IN INDIA:

B. Rama Raju s/o B. Ramalinga Raju vs. Union of India²¹⁰ (Satyam Scam):

The Satyam scandal is one of the biggest corporate frauds which took place in India. The company was earlier considered as an ideal in the IT sector in terms of profit making. The scam was about maintenance of false records, practicing false audit. There was concealment of basic information such as revenues, profits which company earned, interests, liabilities. The relevant information was hidden just to show that the company is in good health and even the independent directors were not given correct information and were kept in dark as to the actual work of the company. The scam was of over 8,000 crore and it shocked the whole nation. The money earned through the scam was used to purchase thousand acres of land in Andhra Pradesh and also was used to purchase two infrastructure companies.

The accused in the scam were charged under various offences such as cheating, criminal conspiracy, and forgery, breach of trust, faking accounts and violating number of income tax laws. The Special CBI court found Ramalinga Raju and nine other guilty of many offences and so it convicted all the accused.

Abdul Karim Telgi and Sohail Khan vs. Union of India²¹¹ (Telgi Scam)

This scam is also known as fake stamp paper scam. Abdul Kareem Telgi who was just a

²⁰⁸ Security Exchange Act 1934

²⁰⁹ Why is Insider Trading even Illegal by Christopher Mathews Times, July 26, 2013

²¹⁰ (2011) 1 SCC 560

²¹¹ 2014(2) JLJ136

B.Com graduate was the person behind this scam. He used to sell fake stamps and also paper stamps and sealed fake documents which resulted in heavy financial loss to the government. In this illegal work Telgi very well received support from various department and institution of the government. Though this scam Telgi managed to generate huge wealth but on the other it caused around 20,000 crore loss to the government and it indirectly the financial root of the country. The scam was investigated by a Special Investigation Team, which found Telgi along with his wife and others guilty of many offences such as cheating, counterfeiting causing loss to government, tax evasion etc. The Special court sent all the accused to 10 years' extensive jail and Telgi was also penalized Rs 101 crores.

Centre for Public Litigation and Others vs. Union of India and Others²¹² with Dr. Subramanian Swami vs. Union of India and Others²¹³ (2G Scam)

It was one of the magnanimous scam which caused around Rs. 1.76 Lakhs Crore loss to the government revenue. This scam was related to the telecom sector. The point in the scam was that the Telecom Ministry under Mr. A. Raja in the year 2008 issued 122 Licenses of the 2 G Spectrum to 85 companies including many new Telecom Companies with little or no experience in the telecom sector, at a price set in the year 2001. The licenses were also allotted without following the law laid down by the Telecom Regulatory Authority of India. Since the number of users in the year 2008 had increased to 20 times to that of 2001 so it caused huge loss to the government. The scam got disclosed by the audit report of the CAG. Later on CBI also conducted an investigation in this scam and it filed charge sheet against Mr. A. Raja, Ms. K. Kanimozhi and 15 others were arrested. The Supreme Court found the above accused guilty and sentenced them to imprisonment. The Court also quashed down the 122 2G licenses.

Dr. Jagannath Mishra, Lalu Prasad ... vs The State Of Bihar Through C.B.I.²¹⁴ (Fodder scam):

Popularly known as “Chara Ghotala”, this scam took place in the State of Bihar where about 950 crore were looted by the government officials in the period of ten years. The scam involved fraudulent reimbursements for fodder, medicines and husbandry supplies **for non-existent livestock** from the treasury of Bihar. Also whatever supplies were made by the animal husbandry department for welfare of livestock, much more was shown on paper and payment was made against it. Total 54 different cases were filed relating to the scam out of which 45 have been decided and it has led to the conviction of more than 500 accused.

The scam took within its ambit many political leaders of Bihar including the two former

²¹² Writ Petition (Civil) No. 423 Of 2010

²¹³ Writ Petition (Civil) No. 10 Of 2011

²¹⁴ 1999 (1) BLJR 347

Chief Ministers of Bihar. Lalu Prasad was sentenced to five year imprisonment but he was later granted bail. The scam got unearthed by the report of CAG and it also made Lalu Prasad Yadav to resign from the post of Chief Minister.

Union of India vs. Hassan Ali Khan & Anr.²¹⁵

The respondent is the accused in the case. The accused is said to have violated the provisions of PMLA Act. The accused first got caught in the ambit of Income Tax but later on through the report and documents submitted by Income Tax, the Directorate of Enforcement registered a case against him. Later on during inquiry it was found that the accused used to deal in foreign currencies worth Rs. 36,000 crores in Indian currency and he also the laws under FEMA. The Directorate of Enforcement arrested the accused and produced the accused before the Special Judge for grant of custody but the same was denied and the accused was granted bail. Then Union of India filed a special leave petition before the Supreme Court on the ground that the accused has prima facie committed the offence punishable under PMLA. The Supreme Court reversed the order of the Special Court and sent the accused into custody. Thereafter the accused was remanded into police custody from time to time.

Arun Kumar Mishra vs. Directorate Of Enforcement²¹⁶

The case relates to five employees of Punjab National Bank who are said to maintain five different fake accounts in name of non-existent persons and using this account for deposit and withdrawal purposes. By doing this the five persons misappropriated the funds of PNB from which they gained profit and in turn it leads to loss to the concerned bank.

The above offence was committed in the year 2005 and it is said that the offence is against the Section 13 of Prevention of Corruption Act, Section 120B of Indian Penal Code and Section 3 of the PMLA. However on the applicability of PMLA it was argued that the particular provision of the PMLA came into effect from in the year 2009 and so it can't be made applicable retrospectively. Also Article 20(3) bars ex post facto application of law.

On the basis of the arguments the court stated that disposed of the case stating that it would be against Part III of the Constitution. Hence the Directorate of Enforcement is free to initiate fresh proceeding as per the law thereafter if the offence of money laundering is established against the accused.

Binod Kumar vs State of Jharkhand & Ors²¹⁷

The case relates with the generation of crores of money by few ministers of a state

²¹⁵ [2011] 11SCR 778

²¹⁶ In The High Court Of Delhi (2015)

²¹⁷ Civil Appeal No. 2689 Of 2011

including a former Chief Minister. The case was brought before the High Court by the Income Tax. The argument given by the State was that the accused in a very less span of time generated huge amount and invested the same in shares and purchasing both within India and Outside India and hence violated the provisions of Prevention of Corruption Act, Indian Penal Code and PMLA. The High Court directed the CBI to conduct investigation in the case along with Directorate of Enforcement. Aggrieved by the order of the High Court, the appellant filed an appeal before the Supreme Court requesting to quash the order of investigation passed by the High Court. The argument raised was that prima facie no offence is committed under the PMLA.

However the Supreme Court refused the argument of the appellant and came to the conclusion that there arises no need to interfere with the order passed by the High Court. Hence the appeal stands dismissed

Cyber laundering

With the advent of the internet and its increasing use for financial transactions and business, money laundering has obtained a new field of operation. Thus, “cyber laundering” may be described as the process of *“utilizing Internet-based electronic wire transfer methods, such as Internet banking or online gambling, in furtherance of disguising the source of illegally obtained money.”*²¹⁸ In essence, the object remains the same i.e. to legitimise illegal funds and hide their source; however, the classification of an act as cyber laundering rests on the internet being a mode of preparation, execution or conclusion of that activity.

A. TRADITIONAL MECHANISMS THAT MAY BE APPLIED FOR CYBER LAUNDERING

- (i) Wire Transfers: This is akin to the physical transfers of money that would happen earlier. However, wire transfers i.e. electronic transfers allow swift and nearly risk free conduit for moving money between countries. Considering that on average 700,000 wire transfers occur daily in any major jurisdiction like the US, UK or India, moving billions of dollars, illicit wire transfers are easily hidden. This is often employed for bulk-cash movements across jurisdictions and into banks where the regulations are not so strict.
- (ii) Cash intensive business: Any business typically involved in receiving large cash inflows will use its accounts to deposit both legitimate and criminally derived cash, claiming all of it as legitimate earnings. A service-based business is best suited for such a mechanism of laundering. Modern versions of this comprise online based cash intensive

²¹⁸ Stephen Jeffrey Weaver, *Modern Day Money Laundering: Does the Solution Exist in An Expansive System of Monitoring & Record Keeping Regulations?*, 24 Ann. Rev. Banking & Fin. L. 443, 444 (2005).

businesses like data-entry, translations and software support that are even often be entirely fictitious. The source of the funds is difficult to trace when payments are made in cash.²¹⁹

- (iii) Casinos: These are themselves a cash intensive business, and were a hotbed for money laundering activity earlier. The individual would walk in to a casino with cash and buy chips, play for a while and then cash in his chips, for which he would be issued a cheque. He could deposit this into his bank account, and claim it as gambling winnings, for which he would then pay a negligible (as compared to his total illegal earning) amount of tax. Presently, the advent of online casinos has made this mechanism all the more viable for launderers. There is no need to take physical cash anywhere; E-cash may be spent at online casinos and then the winnings can be converted into legitimate physical currency.²²⁰
- (iv) Trade-based laundering: In trade based transactions, laundering could be done by under-valuing or over-valuing invoices in order to disguise the movement of illegal funds. Online trade based laundering operates in a similar manner and invoices can be quickly created and easily tampered with in order to adjust illegal amounts with legal payments.
- (v) Round Tripping: In this mechanism of laundering, money would be deposited in a controlled foreign corporation offshore, such as in a tax haven with minimum regulatory requirements, and then shipped back as foreign direct investments, exempt from taxation.²²¹ Jurisdictions which allow related transactions to be done electronically, simply make the task simpler for the launderers.
- (vi) Shell companies / Black Salaries / Fictitious Loans: Shell companies are meant to disguise the true beneficial owner of the assets. Black salaries are either where salaries are 'paid' to employees who don't actually exist, or illegal funds are used to pay parts of the salaries of employees. Fictitious loans are advanced to launderers who 'repay' them using their illegal funds. Each of these mechanisms is facilitated by moving the associated transactions online, which further disguises the identities of the beneficiaries.²²²
- (vii) Bank Capture: Launderers would simply buy controlling interest in a bank and use it at their whims for their illegalities. The advent of online banks and payment portals, like PayPal and DigiCash mean that such a mechanism can easily be moved online.

²¹⁹ *Supra*, note 10, Weimer, 222.

²²⁰ Financial Action Task Force, *Report on the Vulnerabilities of Casinos and the Gaming Sector*, 1 February 2012, available at <http://www.fatfi.org/media/fatf/documents/reports/Vulnerabilities%20of%20Casinos%20and%20Gaming%20Sector.pdf>

²²¹ See the definition given by the Supreme Court of India in *Vodafone International Holdings B.V. v. Union of India*, (2012) 6 SCC 369, 105.

²²² Kim-Kwang Raymond Choo and Russell G. Smith, *Criminal Exploitation of Online Systems by Organised Crime Groups*, *Asian journal of criminology* 3(1) 37-59, 46 (2008).

- (viii) *Internet Banking*: This works in a similar manner to the physical world. It is generally an avenue for “smurfing” activities by launderers. They undertake small transactions through internet banks and avoid reporting requirements.
- (ix) *Real Estate and Online Auctions*: The advent of online shopping through MagicBricks²²³, 99 Acres, and other such property portals has meant that money laundering through the purchase of real estate can now move online. Online auctions are another mechanism, by creating fake auctions, or grossly overstating the price or worth of goods.

4.4.2 EFFORTS OF THE UNITED NATIONS AGAINST MONEY LAUNDERING²²⁴

The main objective was set up by the General Assembly at its Twentieth Special Session, 8-10 June, 1998, for all member States on the drug trafficking problem.²²⁵ The issue was seen as a key element of the drug trafficking, as the finance and profits of this activity were obtained through money laundering. Several international conventions followed, which are discussed briefly below:

a. United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (“Vienna Convention”)

This was the first international legal instrument to embody the money-laundering aspect and the first instrument which criminalised money laundering. Article 3(v)(b)(i) and Article 3(v)(b)(ii) criminalize the financing of any of the offences covered under the Convention and attempts to disguise the source of funds used for such financing. The elements of the crime are essentially (a) knowingly engaging in a financial transaction; (b) with the proceeds of a crime; (c) for the purpose of concealing or disguising the illicit origin of the property. As this Convention was formulated in 1988, there is no specific provision dealing with cyber laundering, though this definition is quite wide to encompass cyber laundering used to finance or disguise the profits obtained by drug trafficking.

b. UN Convention against Transnational Organized Crime, 2000 (“Palermo Convention”)

The Palermo Convention was the second international instrument that considered the issue of money laundering and criminalized several facets of the offence. It widened the scope of the money-laundering offence by applying it to the proceeds of all serious crimes, and not

²²³ See <http://www.magicbricks.com/>; <http://www.99acres.com/>

²²⁴ This section is the ORIGINAL WORK OF THE RESEARCHER, who has gone through the Conventions and summarized the important provisions. See also United Nations Office on Drugs and Crime, *An Overview of the UN Conventions and other International Standards concerning Anti-Money Laundering and Countering the Financing of Terrorism*, (2007), available at http://www.imolin.org/pdf/imolin/Overview%20Update_0107.pdf

²²⁵ UNGA Special Session on Drugs, Twentieth Special Session, Resolution A/S-20/14.

just drug trafficking. Article 6 criminalizes the laundering of proceeds of crime by requiring State parties to adopt legislative and other measures against conversion or transfer of 'property', knowing that such property is the proceeds of a crime, for the purpose of concealing or disguising the illicit origin of such property. Another interesting provision is Article 19 of the Convention, which provides for joint investigation by States for cross border offences. This provision is of significance in the context of cyber laundering, which always has an international element.

c. UN Convention against Corruption, 2003 ("UNCOC")

The UNCOC creates a comprehensive domestic supervisory and regulatory regime for banks and non-banking financial institutions, as well as any entities particularly susceptible to being involved in money-laundering. It also calls for the establishment of Financial Intelligence Units (FIUs).²²⁶ Article 23 deals with the laundering of the proceeds of an act of corruption. The provision is similar to Article 6 of the Palermo Convention, except that it relates to money laundering concerned with offences of corruption alone. Article 24 criminalizes 'concealment' of property when then person involved knows that such property is the result of any of the offences under the UNCOC. This would cover the position of intermediaries that help carry out transactions, including over the internet. Article 27 criminalizes the participation and attempt to launder money as well, while Article 28 clarifies that knowledge, intent or purpose, established from objective circumstances is required to prove the offence.

The UNCOC also has a specific provision covering cyber laundering. Article 14(3) deals with preventive measures against money laundering and requires financial institutions and 'money remitters' to include on forms for the electronic transfer of funds and related messages, certain accurate and meaningful information on the originator, maintain such information throughout the payment chain, and apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator. This provision is an excellent trend to dealing with the problem of cyber laundering, but attempting to eliminate anonymity of the transacting parties. Even where this is not done at the first stage, the requirement of enhanced scrutiny which would fall on subsequent internet-based banks or financial institutions would ensure some prevention against cyber laundering.

Other significant instruments by the United Nations

There are some other significant instruments or programmes against cyber laundering that have been framed by the UN. The International Convention for the Suppression of the Financing of Terrorism, 1999, requires Member States to take measures to protect their financial systems from being misused by persons planning or engaged in terrorist activities.²²⁷

The Global Programme against Money-Laundering, Proceeds of Crime and the Financing

²²⁶ UNCOC, Article 58.

²²⁷ Article 8, International Convention for the Suppression of the Financing of Terrorism, 1999.

of Terrorism is an ongoing program led by the UN Office on Drugs and Crime (UNODC). It aims to assist nations in adopting legislation that gives effect to the universal legal instruments against money-laundering and countering the financing of terrorism. It further aims to strengthen international information exchange and mutual legal assistance. The UNODC itself uses the program to monitor and analyse problems and responses, raises public awareness, and act as a coordinator of initiatives carried out jointly by the UN and other international organizations.²²⁸

In 2009, through collaboration between the Commonwealth Secretariat, the IMF and the UNODC, a Model Law on money laundering and the financing of terrorism was produced.²²⁹ It was based upon the previous international instruments concerning money laundering and the financing of terrorism, the FATF “40+9 Recommendations”, discussed below²³⁰, and global best practices. States considering the provisions should take care to adapt the underlying concepts and specific language to accord with their own fundamental legal principles. Section 3 of the Model Law sets out a wide definition of “money laundering” to include *conversion or transfer of proceeds of a crime, concealment or disguise of proceeds of crime, acquisition, possession or use of proceeds and participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling any of the above offences*. The definition is not concerned with the mode of conversion, concealment or disguise etc. which makes it applicable to both traditional money laundering and cyber laundering.

It may be noted that all of these international instruments provide for similar measures of punishment for money launderers. The measures include confiscation of laundered money or property obtained using laundered funds, freezing of accounts, imprisonment and fines.²³¹ Other measures include black listing of companies, banks and financial institutions found to violate reporting and regulatory requirements and hefty penalties and fines.

Financial Action Task Force (FATF)

In 1989, an intergovernmental body, known as the Financial Action Task Force (FATF) was setup to combat money laundering and provide an international coordinated response to it. The main objective of the FATF is *“the development of and promotion of policies, both at national and international levels, to combat money laundering and terrorist financing.”*

The FATF’s efforts brought anti-money laundering guidelines into prominence globally. In 1990, the FATF issued a set of 40 Recommendations for improving national legal systems, enhancing the role of the financial sector and increasing cooperation. These were revised first

²²⁸ United Nations Office on Drugs and Crime, *Objectives of the Global Programme against Money Laundering*, available at <http://www.unodc.org/unodc/en/money-laundering/programme-objectives.html>

²²⁹ United Nations Office on Drugs and Crime, *Model Law*, available at http://www.unodc.org/documents/money-laundering/Model_Provisions_2009_Final.pdf

²³⁰ *Infra*, Ch.5, Part C.

²³¹ Article 12, Palermo Convention; Article 5, Vienna Convention; Article 31, UNCAC.

in 1996 and again in 2003 to reflect changes in money laundering techniques, including cyber laundering. These measures are considered the “*international measure for anti-money laundering programs*”²³² and “*benchmark standard*” around the world.²³³ Following the 9/11 terror attack, 9 special recommendations that deal specifically with terrorist financing were prepared and the collation is now called the “40+9 Recommendations”.

Recommendation 1 requires that countries criminalise money laundering based on the Vienna and Palermo Conventions. The effort must be to include the widest range of predicate offences. Recommendation 20 requires development of modern and secure techniques of money management that are less vulnerable to cyber laundering.

The benefits of implementing the FATF Recommendations have been recognized by the Parliamentary Standing Committee, in its report on the Prevention of Money Laundering Act (Amendment Bill), 2011,²³⁴ including securing a more transparent and stable financial system that is more attractive to foreign investors and preventing terrorist financing. After India prepared an Action Plan for changes in legislations, regulatory and institutional framework to confirm to FATF standards, it was finally granted membership in the FATF in June 2010.

4.4.3. INSIDER TRAINING

Trading in Company stocks capital markets or bonds is a business that has been going on in the world for many years. As noted by Kanishk, economies in the last two decades have been marked by rapid growth in the size of the capital market and the volumes of business transacted. It is a flourishing and uncreative business which involves great finances.²³⁵

Trading in company stocks or bonds entails knowing the equity state of its owner, since buying stocks means that one is purchasing ownership in the company that issues the security. This means that doing such a trade will have to involve people who have to be exposed to the assets of the company that would be due to stock holders after discharge of all claims. It also shows that, among other things, the individual will have been exposed to facts and details which show how much bond owners will be able to receive from their investments if the company goes to bankruptcy. What all this means is that, such a person will have to be exposed to vital information since he is automatically the person who is inside the company and at the same time he has a place in the trading of that company. This, in specific terms, is seen as insider Trading.

²³² *Supra*, note , Straub, 527.

²³³ *Supra*, note , Leong, 59.

²³⁴ See <http://www.prindia.org/uploads/media/Money%20Laundering/SCR%20Prevention%20of%20Money%20Laundering%20Bill%202011.pdf>

²³⁵ The Columbia Electronic Encyclopedia, 6th Ed. 2012

Insider Trading is when individuals who are officials of a company or have a close working relation with the company concerned participate in the process of buying and selling using their accessibility to non-public information. According to Gopichander (2007:3) it refers to “dealing in a company.”²³⁶ Looking at this basic elaboration of insider Trading one sees a misbehavior of the individual which, as will be elaborated below, shows elements of illegality.

But according to SEBI (Prohibition of Insider Trading) Regulation 1992, 2002 and 2015 does not directly define the term Insider Trading but it defines the term Insider, who is an Insider, who is a connected person and what is price sensitive information. Therefore according to the regulations:-

- (i) An insider is any person who is connected or in possession of or having access to unpublished price sensitive information.²³⁷
- (ii) Connected person means any person who- (i) is a director, as defined in clause (13) of section 2 of the Companies Act, 1956 (1 of 1956) of a company, or is deemed to be a director of that company by virtue of sub-clause (10) of section 307 of that Act or occupies the position as an officer or an employee of the company or holds a position involving a professional or business relationship between himself and the company whether temporary or permanent and who may reasonably be expected to have an access to unpublished price sensitive information in relation to that company; this is according to 1992 regulation but after the amendments of 2015 now a connected person includes all persons and their immediate relatives with a contractual, fiduciary or employment relationship with the company.²³⁸

For example before the amendments of the regulation in January 2015, an insider who is a corporate officer from some corporation may be knowing some insider information which are not known by the public and he knows he can make a huge profit from the said information if he buys or sells his shares but instead of doing it himself he gives the information to a close relative who will perform the act on behalf of him. Now when this close relative acts on the said inside information he was been provided by the said corporate officer and gained a profit by the regulation of 1992 and 2002 he was not considered as a connected person but according to the strengthening of the new amendment of January 2015 now this person can be treated as a connected person and be punished by the concerned laws.

- (i) "Unpublished price sensitive information" means any information, relating to a company or its securities, directly or indirectly, that is not generally available

²³⁶ Gopichander M.L. Insider Trading: Insights, 2007

²³⁷ SEBI (Prohibition of Insider Trading) Regulation, 1992, 2002, 2015

²³⁸ Ibid

which upon becoming generally available, is likely to materially affect the price of the securities and shall, ordinarily including but not restricted to, information relating to the following:- financial results, dividends, change in capital structure, mergers, de-mergers, acquisitions, delisting's, disposals and expansion of business and such other transactions, changes in key managerial personnel and material events in accordance with the listing agreement.²³⁹

- (ii) From the brief elaboration above, it will clearly be seen that, insider trading involves individuals who are closely connected to the company. Such individuals are more knowledgeable about the inner financial and business levels of the company. From the outset they are trusted from the inside but at the same time they are either also trusted from the outside potential customers or they can easily make themselves be trusted. This means that, they can easily gain the confidence of the inside management and the outside companies. Their information and the knowledge they have becomes as asset to them and they can create a price to the buying partners.
- (iii) In the United States, as way back as 1934, it was already noted that insider trading was not a smooth and Legal business style. Trading which was conducted by Director, Managers and other Senior Officers in any company was to be reported to the regulator. Furthermore, it was to be openly disclosed to the Securities and Exchange Commission. This was addressed in the 1934 Securities Exchange Act, section 16(b) and 10(b). The disclosure is to be done in the normal course of duties or as required by law. Otherwise, any person who has corporate inside information and has not disclosed it is not allowed to purchase and sell or sell and purchase securities of the company freely.²⁴⁰
- (iv) The Securities Exchange Act and such other Acts help to minimize the breach of fiduciary duties of those in possession of material and non-public information. For example, section 16(b) of the Securities Exchange Act prohibits profit by corporate insiders and that profits gained from their type of business will belong to the company. Section 10(b) of the same Act prohibits the use of different types of manipulation or deceit in connection with the purchase of security. In fact, prior to 1980, in the United States of America it was not allowed to trade or communicate to others on the inside information. The regulations changed radically when several laws were passed to stiffen penalties for Insider Trading and regulators started many more cases against Wall Street.²⁴¹

²³⁹ Supra

²⁴⁰ Security Exchange Act 1934

²⁴¹ Why is Insider Trading even Illegal by Christopher Mathews Times, July 26, 2013

Learning Outcome:

1. The student will be able to understand the special characteristics of insider trading along with various other RBI violations such as insider trading.
2. The student will have an idea about various scams committed including Harshad Mehtha Scam.

Model Questions:

1. What are the offences recognized by NDPS Act?
2. What is insider trading?
3. Define 'corporate crime'
4. Discuss the stages of Money Laundering?

SUGGESTED READINGS

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