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Client/Matter: -None-

[s 1] Title and extent of operation of the Code.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

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The Indian Penal Code

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The introductory chapter of the *Penal Code* consists of a Preamble and five sections. The Preamble sets forth the necessity and object of the general *Penal Code* for the country. Section 1 titles the Code and states the extent and scope of its operation. Section 2 fixes criminal responsibility for offences committed within the territory of India by any person. Sections 3 and 4 impose punishment with respect to offences committed without and beyond India, while section 5 is a saving clause.

Preamble.— *Whereas it is expedient to provide a general Penal Code for* ¹ *[India]; It is enacted as follows:—*

COMMENTS

Preamble.—The Preamble of the Code has set forth in very lucid terms the main objective of the legislation to provide for a general *Penal Code* for India. The preamble of an Act states the reasons and main objectives which the legislature intended to achieve by the Act. In other words, it is the key which opens the minds of the makers of the Code. However, a Preamble is not an integral part of a statute in the sense that, were it deleted, the real import of the statute would ordinarily be changed. It may be looked into for clearing up any ambiguity, or for explaining the meaning of words which might have more than one denotation, or for keeping the effect of the Act.² But if the text (enacting part) is clear and unambiguous, the Preamble can neither restrict, nor enlarge the scope of the textual provisions.

Codification of the *Penal Code*.—When the British took over the administration of the country from Muslim and Maratha rulers during the 18th century, the administration of criminal justice was in a very deplorable state. There was no uniformity in the application of criminal law in either the Mofussil or the Presidency Courts. Chaos reigned in the conflicting and contradictory decisions on similar points. For instance, in the Bengal Presidency serious forgeries were punishable with imprisonment, for double the term fixed for perjury in the Bombay Presidency³ and vice versa.

Accordingly, with a view to simplifying the criminal law of the country on the pattern of common law, a Law Commission was appointed in 1834 with Lord Macaulay as its chairman and Macleod, Anderson and Millet as members. The committee submitted a draft *Penal Code* to the Governor-General in Council on 14 October 1837. A small committee, consisting of Bethune and Peacock was appointed on 26 April 1845 to revise it. The committee submitted the revised version in two parts, one in 1846 and the other in 1847. This revised version was presented to the Legislative Council of India in 1856 and was finally approved and passed after a thorough revision and careful consideration of the provisions clause by clause. The Governor-General in Council gave assent to the *Penal Code of India* on 6 October 1860 and it finally came into force on 1 January 1862.

[s 1] Title and extent of operation of the Code.—

This Act shall be called the *Indian Penal Code*, and shall ⁴[extend to the whole of India ⁵[***].]

[s 1.1] Title and Extent of Operation of the Code

Section 1 of the Code declares that the name of the Code shall be the “*Indian Penal Code*” and that it will operate throughout the territory of India.⁶

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- 1 The words “British India” have successively been subs. by the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Schedule (w.e.f. 1-4-1951), to read as above.
 - 2 See Maxwell, *Interpretation of Statutes*, 12th Edn, (1969), pp 6-9; *Sardar Inder Singh v State of Rajasthan*, AIR 1957 SC 510 [[LNIND 1957 SC 13](#)] (516) : 1957 SCR 605 [[LNIND 1957 SC 13](#)] : 1957 SCJ 376 [[LNIND 1957 SC 13](#)] .
 - 3 Bombay Regulation (14 of 1827), sections 16–17.
 - 4 The original words have successively been amended by Act 12 of 1891, section 2 and Schedule I, the A.O. 1937, the A.O. 1948 and the A.O. 1950 to read as above.
 - 5 The words “except the State of Jammu and Kashmir” omitted by the Jammu and Kashmir Reorganisation Act, 2019 (34 of 2019), sections 95, 96 and Fifth Schedule, Table-1 (w.e.f. 31-10-2019). Earlier these words were substituted by Act 3 of 1951, section 3 and Schedule, for “except Part B States” (w.e.f. 1-4-1951).
 - 6 Under *Article 1(3) of the Constitution of India*, the territory of India shall comprise—(a) the territories of the States; (b) the Union territories specified in the First Schedule; and (c) such other territories as may be acquired.

[s 2] Punishment of offences committed within India.—

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[s 2] Punishment of offences committed within India.—

Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within ⁷[India]⁸[***].

[s 2.1] Territorial Jurisdiction

Section 2 of the Penal Code deals with the intra-territorial operation of the Code. It refers to offences committed within India and declares that every person shall be liable to punishment under the Code for every act or omission contrary to the provisions of the Code of which he shall be guilty within the territory of India. The section asserts the principle of criminal liability on the basis of the locality and place of the offence committed.

It is a well-recognised concept of criminal jurisprudence that the exercise of criminal jurisdiction depends upon the locality of the offence committed, and not upon the nationality or locality of the offender.⁹ Thus, to invoke the provisions of the Code, it must be established that the offence for which the accused is charged was committed within the territory of India. The territory of India for the purposes of application of its laws would comprise not only its land, its internal waters, such as rivers, lakes and canals, but also that portion of sea lying along and washing its coast, which is commonly called its maritime territory. The territorial waters of India extend into the sea to a distance of 12 maritime miles from the appropriate base line.¹⁰

The “territory” of a State also includes its ships, aircrafts, whether armed or unarmed, and the private ships of its subjects on the high seas or in foreign tidal waters, and foreign private ships while within its ports. Likewise, on the principle of *cuius est solum, eius est usque ad coelum et ad inferos* (whoever is the owner of the soil, it is his even to the firmament, and to the center of the earth). The column of air resting on the territory of the state is included within the territory of the country.¹¹

[s 2.2] “Every person” Meaning

The section makes “every person” irrespective of his nationality or allegiance, or his rank, status, caste, colour or creed, liable to punishment under the *Penal Code* for an offence committed within India. The phrase “every person” has a wider connotation. It includes not only citizens, but non-citizens and even foreigners visiting the country. However, it does not include a non-judicial person,¹² such as a corporation or a company, because a company cannot be indicted and charged for offences, such as murder, dacoity, robbery adultery bigamy and rape, etc., as these can only be committed by a human being. Of course, a corporation is liable for criminal acts or omissions of its directors or agents or servants¹³ and for contempt of court¹⁴ on the principles of vicarious liability.

Thus, a foreigner who enters India, by accepting the allegiance and protection of Indian laws, is as much liable for committing an offence under the Code as a resident is. A foreigner can neither take the plea of ignorance of the law¹⁵ nor that he was unaware of the criminal nature of the act in question since it was not an offence in his country.¹⁶ Thus, a foreigner who initiates an offence outside India that takes effect on the Indian territory is liable under the *Penal Code* for the offence in question.¹⁷ The criminal liability for an offence arises on the basis of the laws applicable in the country where the offence is committed, and not on the basis of laws applicable in the country of the person committing it.¹⁸ Even the corporal presence of the accused is not required for holding him liable for committing an offence, provided all the ingredients of the offence occur within the municipal territory of the country trying the offence.

Mobarik Ali: In *Mobarik Ali v State of Bombay*,¹⁹ a Pakistani citizen, while staying at Karachi, made false representations to the complainant at Bombay through letters, telephone calls and telegrams and induced the complainant to part with money amounting to over rupees five lakh to the agents of the accused at Bombay, so that, rice could be shipped from Karachi to India as per agreement. But the rice was never supplied. The accused was arrested, while he was in England, and brought to Bombay as a result of extradition proceedings, where he was prosecuted and convicted under *section 420 of the Penal Code* for cheating. The Supreme Court upheld the conviction and held that the offence was committed by the accused at Bombay, even though he was not physically present there at the material time.

[s 2.3] Exemption from Criminal Prosecution

Though according to *section 2 of the Penal Code* “every person” is liable to punishment under the Code for an offence, there are certain exceptions to the general rule of criminal liability, which are based on the principle of

[s 2] Punishment of offences committed within India.—

expediency, on convention or on an agreement or understanding between nations. For instance, the law provides immunity from criminal prosecution to high dignitaries, the heads of foreign governments (sovereign states),²⁰ ambassadors, diplomatic agents,²¹ Consuls, United Nations representatives,²² the President of India and Governors of states, etc.²³ This is based on the well-recognised principle that the exercise of criminal jurisdiction would be incompatible with the high status and dignity which such persons possess. Immunity from criminal prosecution to such persons has been universally acknowledged by all countries.

Similarly, alien enemies cannot be tried in respect of acts of war by criminal courts. In such cases, trials take place under the provisions of military law. However, alien enemies, whether friendly or hostile, may be tried by the ordinary criminal courts for any crime committed by them.

Likewise, a foreign army enjoys the privilege of exclusion from criminal jurisdiction, if the army remains with the consent of the State on its soil. Warships and men-of-war of a foreign state in foreign waters are also exempt from the criminal jurisdiction of the State within whose territorial jurisdiction they are found.

[s 2.4] Right to Silence

In *RV Breckls*,²⁴ the Court of Appeal held that no adverse inference is to be drawn in case of the appellant charged of robbery, false imprisonment and attempted murder for adhering to right to silence on the advice of solicitor *vide* section 34 of Criminal Justice and Public Order Act, 1994.²⁵ The appellant lured the victim to a fourth floor of a flat where he was detained, robbed and finally pushed out of a window by the appellant and a co-defendant. While summing of the case to the Jury the Judge directed that an adverse inference might be drawn from their silence pursuant to section 34 of the Criminal Justice and Public Order Act, 1994 from the failure of the appellant defendants, to mention in their first interviews (questioning) before Police facts upon articles they had relied at trial, that led to their conviction. The appellants exercised their right to remain silent at trial at the advice of their solicitor.

While allowing the appeal and setting aside the conviction, the Court held that unfairness caused by the misdirection's rendered the appellant's convictions unsafe.

[s 2.5] Right to Take a Cheek Swab of Arrestee's DNA is Legitimate Procedure

In *Maryland v King*,²⁶ US Supreme Court by a majority of 5 to 4 held taking and analyzing a cheek swab of the arrestee's DNA²⁷ is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment. DNA technology is most significant method of identification of criminal judicial system.

Kennedy J:

In 2003, a man concealing his face and armed with a gun broke into a woman's home in Salisbury, Maryland. He raped her. The police were unable to identify or apprehend the assailant based on any detailed description or other evidence they then had, but they did obtain from the victim a sample of the perpetrator's (criminal's) DNA.

In 2009, Alonzo King was arrested in Wicomico County, Maryland, and charged with first-and second-degree assault for menacing (threatening) a group of people with a shotgun. As a part of a routine booking procedure for serious offenses, his DNA sample was taken by applying a cotton swab or filter paper — known as a buccal swab — to the inside of his cheeks. The DNA was found to match the DNA taken from the Salisbury rape victim. King was tried and convicted for the rape.

The Court of Appeals of Maryland, on review of King's rape conviction, ruled that the DNA taken when King was booked for the 2009 charge was an unlawful seizure because obtaining and using the cheek swab was an unreasonable search of the person. It set the rape conviction aside.

US Supreme Court granted *certiorari* (writ from a higher court to a lower court requesting the record for a review) and reversed the judgment of the Maryland court by a majority of 5 to 4.

- (i) Search using buccal (cheek of the month) swab to obtain defendant's DNA sample after arrest for serious offense was reasonable, and
- (ii) The analysis of defendant's DNA did not render the DNA identification impermissible under the Fourth Amendment.²⁸

The Supreme Court held that taking and analyzing a cheek swab of defendant's DNA was, like fingerprinting and photographing, a legitimate police booking procedure that was reasonable under the Fourth Amendment because, *inter alia*,

- (1) the legitimate government interest served by the Act was the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody,
- (2) DNA identification of arrestees, of the type approved by the Act, was no more than an extension of methods of identification long used in dealing with persons under arrest, and
- (3) regarding defendant's legitimate expectations of privacy, the intrusion of a cheek swab to obtain a DNA sample was a minimal one.

In light of the context of a valid arrest supported by probable cause, respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. In identifying respondent so that proper name could be attended to his charges for taking pre-trial custody, DNA identification of an arrestee is a reasonable search which is a routine booking procedure.

¹ The words "British India" have successively been subs. by the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Schedule (w.e.f. 1-4-1951), to read as above.

² See Maxwell, Interpretation of Statutes, 12th Edn, (1969), pp 6-9; *Sardar Inder Singh v State of Rajasthan*, AIR 1957 SC 510 [[LNIND 1957 SC 13](#)] (516) : 1957 SCR 605 [[LNIND 1957 SC 13](#)] : 1957 SCJ 376 [[LNIND 1957 SC 13](#)] .

³ Bombay Regulation (14 of 1827), sections 16–17.

⁷ The original words "the said territories" have successively been amended by the A.O. 1937, the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Schedule (w.e.f. 3-4-1951), to read as above.

⁸ The words and figures "on or after the said first day of May 1861" rep. by Act 12 of 1891, section 2 and Schedule I.

[s 2] Punishment of offences committed within India.—

- 9 *Mobarak Ali Ahmed v State of Bombay*, AIR 1957 SC 857 [[LNIND 1957 SC 81](#)] : (1958) 1 SCR 328 : 1957 SCJ 111 : 1957 Cr LJ 1346 .
- 10 See Gazette of India, Extra., Pt III, section 2, 30 September 1967.
- 11 See Hari Singh Gour, *The Penal Law of India*, 11th Edn, vol I, 2001, pp 128-147.
- 12 See *IPC*, section 11 for definition of “person”.
- 13 *State of Maharashtra v Syndicate Transport Co Pvt Ltd*, AIR 1964 Bom 195 [[LNIND 1963 BOM 47](#)] .
- 14 *Aligarh Municipal Board v Ekka Tanga Mazdoor Union*, AIR 1970 SC 1767 : (1970) 3 SCC 98 : 1970 Cr LJ 520 : 1970 CAR 381 ; KD Gaur *Criminal Law: Cases and Materials*, (3rd Edn, 1999), pp 189-194.
- 15 *State of Maharashtra v MH George*, AIR 1965 SC 722 [[LNIND 1964 SC 208](#)] : (1965) 1 SCR 123 [[LNIND 1964 SC 415](#)] : (1965) 35 Comp Cas 557 : (1965) 1 Cr LJ 641 .
- 16 *R v Esop*, (1836) 7 ER 203 . The accused was indicted for committing an unnatural offence on board an Indian ship lying in St. Catherine docks. The accused's plea, that the act in question was not an offence in the country of his origin Baghdad, was negatived.
- 17 *Wheeler v Emperor*, (1929) 29 Cr LJ 1089 .
- 18 *Sardar Gurdial Singh v Raja of Faridkot*, [1894 AC 670](#) PC.
- 19 *Mobarik Ali v State of Bombay*, AIR 1957 SC 857 [[LNIND 1957 SC 81](#)] : (1958) 1 SCR 328 : 1957 Cr LJ 1346 . See KD Gaur, *Criminal Law: Cases and Materials*, 5th Edn, 2008, pp 22-25 for facts and decision of the case.
- 20 *Schoonar Exchange v M'Faddon*, (1812) 7 Cranch 116 at pp 136-137. Marshall CJ, has very lucidly explained the justification for exemption from criminal liability in the following words: “one sovereign having in no respect amenable to another and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express licence, or in the confidence that the immunities belonging to his independent sovereign states, though not expressly stipulated, are reserved by implication, and will be extended to him.”
- 21 *The Parliament Belge*, (1880) 5 PO 197 (207): “The immunity of an ambassador from the jurisdiction of the courts of the country to which he is accredited is based upon his being the representative of the independent sovereign or State which sends him, upon the faith of his being admitted to be clothed with the same independence of and superiority to all adverse jurisdiction as the sovereign authority whom he represents would be.”
- 22 See JG Starke, *An Introduction to International Law*, (1971, 7th Edn), pp (259-264); ‘Vienna Convention of Diplomatic Relation. Vienna Convention of Consular Relation, Diplomatic Privilege Act, gives immunity to a diplomatic agent against criminal prosecution in England, United Nations (Privileges and Immunities) Act, 1947, confers immunities on United Nations and its Representatives as well as on other International organisations.
- 23 *Constitution of India*, Article 361(2) provides that “no criminal proceedings shall be instituted against the President or Governor of a State, in any Court during his term of office.” ‘See *Statham v Statham and the Gaekwad of Baroda*, (1912) IA 1992 . Held, the Gaekwad of Baroda, being head of a State (Princely) enjoyed all the attributes of sovereignty

[s 2] Punishment of offences committed within India.—

and so could not be prosecuted on a criminal charge for adultery. See Chapter IV *IPC* (sections 76 to 106.) for provisions relating to exemptions from criminal liability on the basis of absence of requisite *means rea* for the commission of the crime.

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- 26** 33 S Ct 1958 (2013) : 2013 US Lexis 4165. Judges: Kennedy J, delivered the opinion of the Court, in which Roberts CJ, and Thomas, Breyer, and Alito JJ, joined. Scalia J, filed a dissenting opinion, in which Ginsburg, Sotomayor, and Kagan JJ, joined.
- 27** DNA = Deoxyribonucleic acid.
- 28** 4th Amendment to US *Constitution* deals with unreasonable searches and seizures.

[s 3] Punishment of offences committed beyond, but which by law may be tried within, India.—

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The Indian Penal Code

CHAPTER I INTRODUCTION

The introductory chapter of the *Penal Code* consists of a Preamble and five sections. The Preamble sets forth the necessity and object of the general *Penal Code* for the country. Section 1 titles the Code and states the extent and scope of its operation. Section 2 fixes criminal responsibility for offences committed within the territory of India by any person. Sections 3 and 4 impose punishment with respect to offences committed without and beyond India, while section 5 is a saving clause.

Preamble.— *Whereas it is expedient to provide a general Penal Code for* ¹ *[India]; It is enacted as follows:—*

COMMENTS

Preamble.—The Preamble of the Code has set forth in very lucid terms the main objective of the legislation to provide for a general *Penal Code* for India. The preamble of an Act states the reasons and main objectives which the legislature intended to achieve by the Act. In other words, it is the key which opens the minds of the makers of the Code. However, a Preamble is not an integral part of a statute in the sense that, were it deleted, the real import of the statute would ordinarily be changed. It may be looked into for clearing up any ambiguity, or for explaining the meaning of words which might have more than one denotation, or for keeping the effect of the Act.² But if the text (enacting part) is clear and unambiguous, the Preamble can neither restrict, nor enlarge the scope of the textual provisions.

Codification of the *Penal Code*.—When the British took over the administration of the country from Muslim and Maratha rulers during the 18th century, the administration of criminal justice was in a very deplorable state. There was no uniformity in the application of criminal law in either the Mofussil or the Presidency Courts. Chaos reigned in the conflicting and contradictory decisions on similar points. For instance, in the Bengal Presidency serious forgeries were punishable with imprisonment, for double the term fixed for perjury in the Bombay Presidency³ and vice versa.

Accordingly, with a view to simplifying the criminal law of the country on the pattern of common law, a Law Commission was appointed in 1834 with Lord Macaulay as its chairman and Macleod, Anderson and Millet as members. The committee submitted a draft *Penal Code* to the Governor-General in Council on 14 October 1837. A small committee, consisting of Bethune and Peacock was appointed on 26 April 1845 to revise it. The committee submitted the revised version in two parts, one in 1846 and the other in 1847. This revised version was presented to the Legislative Council of India in 1856 and was finally approved and passed after a thorough revision and careful consideration of the provisions clause by clause. The Governor-General in Council gave assent to the *Penal Code of India* on 6 October 1860 and it finally came into force on 1 January 1862.

[s 3] Punishment of offences committed beyond, but which by law may be tried within, India.—

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Any person liable, by any ²⁹[Indian law] to be tried for an offence committed beyond ³⁰[India] shall be dealt with according to the provisions of this Code for any act committed beyond ³¹[India] in the same manner as if such act had been committed within ³²[India].

[s 3.1] Extra-territorial Operation

Sections 3 and 4 of the *Penal Code* give extra-territorial operation to the Code. Thus, a person may be held liable under the *Penal Code* for committing offences beyond the territory of India.

Section 3 gives criminal jurisdiction to the courts to try for an offence committed by a person beyond the territory of India provided such a person is subject to the Indian law.³³ For instance, if a soldier in the Indian Army commits a murder in Nepal, while in service, he is liable to be prosecuted for murder in India.³⁴ The accused will be liable for the offence in the same manner and to the same extent as if it were committed within India. The scope of section 3 is wide enough inasmuch as it makes not only Indian citizens liable for offences committed abroad, but also those who are covered by any special law bringing them under Indian jurisdiction.

[s 3.2] Extradition

In *Soering v United Kingdom*, *European Court of Human Rights*, 161 Eur Ct HR (ser. A) (1989) : [\(1989\) 11 EHRR 439](#),³⁵ it was held that extradition of a prisoner from UK to USA would not be allowed to face murder charges in Virginia USA when the applicant's extradition would subject him to risk of being sentenced to death when such penalty is not provided *vide Article 3* of the European Convention of Human Rights in UK.

The applicant, Jens Soering, was born on 1 August 1966 and is a German national. He is currently detained in prison in England pending extradition to the United States of America to face charges of murder in the Commonwealth of Virginia.

The homicides in question were committed in Bedford County, Virginia, USA in March 1985. The victims, William Reginald Haysom (aged 72) and Nancy Astor Haysom (aged 53), were the parents of the applicant's girlfriend, Elizabeth Haysom, who is a Canadian national. Death in each case was the result of multiple and massive stab and slash wounds to the neck, throat and body. At the time, the applicant and Elizabeth Haysom, aged 18 and 20 respectively, were students at the University of Virginia. They disappeared together from Virginia in October 1985, but were arrested in England in April 1986 in connection with cheque fraud.

Soering applied to the European Commission of Human Rights alleging an *Article 3* right to humane treatment violation.

Allowing the application and rejecting extradition it was held that in the circumstances of the present case, the applicant's extradition to the United States would subject him to the risk of being sentenced to death, and executed, in Virginia for a crime for which that penalty is not provided by the law of the United Kingdom.

When a person's right to life is involved, no requested State can be entitled to allow a requesting State to do what the requested State is not itself allowed to do.

Extraditing somebody in such circumstances would be repugnant to European standards of justice, and contrary to the public order of Europe.

[s 3] Punishment of offences committed beyond, but which by law may be tried within, India.—

The applicants surrender by the United Kingdom to the United States could only be lawful if the United States were to give absolute assurances that he will not be put to death, if convicted of the crime he is charged with.

Since the Federal Government of the United States is unable to give any undertaking as to what may or may not be decided or done, by the judicial and other authorities of the Commonwealth of Virginia, extradition rejected.

[s 3.3] Extradition Proceeding

Lakes'³⁶ Extradition proceedings leading to Extradition of accused from Canada to United States by the Minister of Justice is reasonable.

Accused sold crack cocaine to undercover officer in Ontario in Canada and once in Detroit, Michigan USA. Accused charged in Ontario with six offences in relation to transactions, including that he had conspired to traffic in controlled substance over relevant period of time. Accused not charged with offence of trafficking in relation to Detroit transaction. Accused pleaded guilty and sentenced to three years' imprisonment in addition to eight months spent in pre-trial custody. Crown counsel agreed to joint submission of three years because indictment had been issued against accused in US and accused would likely serve time there in addition to Canadian sentence.

After accused served Canadian jail sentence, US requested that he be extradited. Accused committed for surrender and Minister of Justice ordered his surrender. Minister found that surrender would not unjustifiably infringe accused's rights under section 6(1) of Canadian Charter of Rights and Freedoms, Accused's application for judicial review was dismissed. Accused appealed, Appeal dismissed.

Minister identified proper test and provided sufficient reasons for decision to order accused's surrender. It was reasonable for Minister to conclude that accused's extradition to US constituted justifiable infringement of his section 6(1) Charter rights. It was reasonable for Minister to conclude that accused had not already been punished for conduct underlying US indictment, Minister's analysis was sufficient. *Explanation* based on what Minister considers most persuasive factors is sufficient for reviewing court to determine whether his conclusion was reasonable. Minister's deference to US owing to fact that alleged conduct occurred within its territory provided sufficient basis for concluding that his decision was reasonable.

¹ The words "British India" have successively been subs. by the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Schedule (w.e.f. 1-4-1951), to read as above.

² See Maxwell, Interpretation of Statutes, 12th Edn, (1969), pp 6-9; *Sardar Inder Singh v State of Rajasthan*, AIR 1957 SC 510 [[LNIND 1957 SC 13](#)] (516) : 1957 SCR 605 [[LNIND 1957 SC 13](#)] : 1957 SCJ 376 [[LNIND 1957 SC 13](#)] .

³ Bombay Regulation (14 of 1827), sections 16–17.

[s 3] Punishment of offences committed beyond, but which by law may be tried within, India.—

- 29** Subs. by the A.O. 1937 for “law passed by the Governor General of India in Council”.
- 30** The original words “the limits of the said territories” have successively been amended by the A.O. 1937, the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Sch (w.e.f. 3-4-1951), to read as above.
- 31** The original words “the limits of the said territories” have successively been amended by the A.O. 1937, the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Schedule (w.e.f. 3-4-1951), to read as above.
- 32** The original words “the said territories” have successively been amended by the A.O. 1937, the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Schedule, (w.e.f. 3-4-1951) to read as above.
- 33** The operation of the section is restricted to the cases mentioned in the Indian *Extradition Act, 1962* and *CrPC* (1973), section 187 (power to issue summons or warrants for offences committed beyond local jurisdiction).
- 34** *Indian Army Act, 1950*. See Nawaz Khader, *Criminal Jurisdiction and International Law*, (1962); Indian Year Book of International Affairs, vol I, p 210.
- 35** 161 Eur Ct HR (ser. A) (1989) : [\(1989\) 11 EHRR 439](#) .
- 36** *US v Lake, Talib Steven Lake v Canada, (Minister of Justice)*, (2008) SCC 23 : (2008) 1 SCR 761 .

[s 4] [Extension of Code to extra-territorial offences.—

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³⁷[s 4] [Extension of Code to extra-territorial offences.—

The provisions of this Code apply also to any offence committed by—

³⁸[(1) any citizen of India in any place without and beyond India;

(2) any person on any ship or aircraft registered in India wherever it may be;]

[s 4] [Extension of Code to extra-territorial offences.—

39[(3) any person in any place without and beyond India committing offence targeting a computer resource located in India.]

⁴⁰[Explanation.—In this section—

- (a) the word “offence” includes every act committed outside India which, if committed in India, would be punishable under this Code;
- (b) the expression “computer resource” shall have the meaning assigned to it in clause (k) of sub-section (1) of *section 2 of the Information Technology Act, 2000.*]

⁴¹[Illustration]

⁴²[***] A, ⁴³[who is ⁴⁴[a citizen of India]], commits a murder in Uganda. He can be tried and convicted of murder in any place in ⁴⁵[India] in which he may be found.

⁴⁶[***]

[s 4.1] Crimes Committed outside India

Section 4, clause (1) of the *Penal Code* extends the operation of the Code to an offence committed by a citizen of India in any place without and beyond India and clause (2) to an offence committed by any person on any ship, or aircraft registered in India.

The rationale behind extension of criminal jurisdiction of the courts in India, even if the offence is committed outside and beyond India, is based on the contention that every sovereign State can regulate the conduct of its citizens, wherever they might be for the time being.⁴⁷ A, an Indian (Hindu male) citizen, who has a wife and three children living in India, goes to the United States for higher studies. There, he marries an American girl. The provisions of this Code would apply to A, on his return to India, since bigamy is an offence for which, he would be prosecuted under *section 494, IPC*.

But, as held by the Supreme Court in *Fatima Bibi Ahmed Patel v State of Gujarat*,⁴⁸ (2008), the Code has no application for an offence committed by a foreigner outside India even though he acquires citizenship later on. In other words, if at the time of the commission of the offence the accused person is not a citizen of India, then the provisions of *section 4, IPC* and *section 188, CrPC* have no application whatsoever. Similarly, if an Indian citizen after relinquishing his citizenship, acquires another country's citizenship, say, United States of America, he is not subject to the jurisdiction of Indian Courts.

In other words, the test for the determination of the questions of the applicability of section 4 is citizenship at the time of the commission of the offence and not citizenship acquired subsequently.

[s 4.2] Admiralty Jurisdiction

Section 4 of clause (2) of the *Penal Code* gives admiralty jurisdiction⁴⁹ to the Indian Courts and the power to try offences committed on any ship, or aircraft registered in India, wherever it might be. A ship is considered to be a floating island and belongs to the country whose flag the ship is flying, and likewise also aircrafts. Thus, all vessels, ships or aircrafts are considered to be part of the territory of the country whose flag they fly. A person committing a crime on board, whether an Indian citizen or a foreigner, is amenable to the Indian Courts, if the vessel is flying an Indian flag and is registered in India. It may be noted that the *Indian Penal Code (Amendment) Bill, 1972* had proposed to widen the scope of extra-territorial jurisdiction by making the provisions of the Code applicable to an offence committed outside India by an alien⁵⁰ in the service of the Government, or of any corporation owned or controlled by the Government of India. However, the Bill could not see the light of day.

[s 4] [Extension of Code to extra-territorial offences.—

If a foreigner after committing a crime outside India steps into India, he may be sent back to the country where the offence was committed for trial, on the proper requisition by that country *vide* the Indian *Extradition Act* of 1962.

[s 4.3] Cyber Crime Targeting a Computer Resource Located in India

By the insertion of sub-section (3) in *section 4 of IPC* by the Information Technology (Amendment) Act, 2008 (10 of 2009), the territorial operation of the Code is extended to any offence committed by any person in any place without and beyond India targeting a computer resource located in India.

[s 4.4] Limitation for Launching of Prosecution

There was no fixed period of limitation for launching of criminal proceedings under the earlier *Code of Criminal Procedure* of 1898 (5 of 1898). However, the *Code of Criminal Procedure, 1973* (2 of 1974), which came into operation with effect from 1 April 1974, has fixed the period of limitation for taking cognizance of offences⁵¹ as listed in clause (2) to section 468 of the Code. Lapse of time will, therefore; now be a bar to setting criminal proceedings in motion in certain cases.⁵²

[s 4.5] Time Limit for Trial and Disposal of Criminal Cases not Valid

The right to speedy trial and fair procedure has travelled through several milestones on the path of constitutional jurisprudence starting from *Maneka Gandhi*,⁵³ *Hussainara Khatoon*,⁵⁴ *Abdul Rehman Antulay*,⁵⁵ *Kartar Singh*,⁵⁶ *Raj Deo Sharma (I)*,⁵⁷ *Raj Deo Sharma (II)*,⁵⁸ *Common Cause, A Registered Society (I)*,⁵⁹ *Common Cause, A Registered Society (II)*⁶⁰ to *P Ramachandra Rao*⁶¹ handed over by a seven-member *Constitution Bench* of the Apex Court on 16 April 2002.

The mental agony, expense and strain with which a person in criminal trial has to undergo and which, coupled with, delay result in impairing the capacity or ability of the accused to defend himself have persuaded the Supreme Court to declare in *Maneka Gandhi* the right to speedy trial a manifestation of fair, just and reasonable procedure in *Article 21*, speedy trial, again, would encompass within its sweep all its stages including investigation, inquiry, trial, appeal, revision and retrial – in short everything commencing with an accusation and expiring with the final verdict – the two being respectively the *terminus ad quo* and *terminus ad quem* – of the journey which an accused must necessarily undertake once faced with an implication.

Hussainara Khatoon: In *Hussainara Khatoon*, the Apex Court held that it is the constitutional obligation of the state to provide speedy trial to the accused and paucity of funds or resources is no defence to denial of right to justice emanating from *Articles 21, 19* and *14* and the preamble of the *Constitution* as also from the Directive Principles of State policy.

Raj Deo Sharma: The denial of such fundamental right to the accused person, on account of failure on the part of prosecuting agencies and the executive to act, and their turning an almost blind eye at securing expeditious and speedy trial so as to satisfy the mandate of *Article 21 of the Constitution* have persuaded the Supreme Court in *Raj Deo Sharma* and *Common Cause* to devise solution by engrafting a bar of limitation beyond which the criminal proceedings or trial shall not proceed.

A three-judge Bench of the Apex Court divided the offences into two categories for the purpose of closing of trial after a fixed period of time, *viz.*, (i) those punishable with imprisonment for a period not exceeding seven years and (ii) those punishable with imprisonment for a period exceeding seven years as stated below—

Name of offence	Nature and period of delay
-----------------	----------------------------

[s 4] [Extension of Code to extra-territorial offences.—

1. Offence punishable with imprisonment for a period not exceeding seven years, whether the accused is in jail or not.	Completion of two years from the date of recording the plea of the accused on the charges framed, whether the prosecution has examined all the witnesses or not within the said period of two years.
2. Offence punishable with Imprisonment for a period exceeding seven years, whether the accused is in jail or not	Completion of three years from the date of recording the plea of the accused on the charges framed, whether the prosecution has examined all the witnesses or not within the said period.

As a result of period of limitation it was felt that though the bar of limitation, judicially engrafted, is meant to provide solution, but a solution of this nature gives rise to greater problems like scuttling a trial without adjudication, stultifying access to justice and giving easy exit from the portals of justice. Such general remedial measures cannot be said to be apt solutions.

P Ramchandra Rao: Accordingly, the Supreme Court in *P Ramchandra Rao* (2002)⁶² reviewed all the previous cases and held that the two or three-judges Bench decision in *Common Cause* and *Raj Deo Sharma* run counter to that extent to the dictum of the five judges *Constitution Bench* in *AR Antulay* case⁶³ and therefore cannot be said to be good law to the extent they are in breach of the doctrine of precedents.

The court accordingly overruled *RD Sharma* and *Common Cause* cases and held that it must be left to the judicious discretion of the court seized of an individual case to find out from the totality of circumstances of a given case if the quantum of time consumed up to a given point of time amounted to violation of *Article 21*, and if so, then to terminate the particular proceedings, and if not, then to proceed ahead. The test is whether the proceeding or trial has remained pending for such a length of time that the inordinate delay can legitimately be called oppressive and unwarranted, as suggested in *AR Antulay*.

Antulay: The *Constitution Bench* in *Antulay*, said that:

- (i) fair, just and reasonable procedure implicit in *Article 21 of the Constitution* creates a right in the accused to be tried speedily;
- (ii) right to speedy trial flowing from *Article 21* encompasses all the stages, namely, the stage of investigation, inquiry, trial, appeal, revision and retrial;
- (iii) who is responsible for the delay and what factors have contributed towards delay are relevant factors. Attendant circumstances, including nature of the offences, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on—what is called the systemic delays must be kept in view;
- (iv) each and every delay does not necessarily prejudice the accused as some delays indeed work to his advantage.

However, the guidelines laid down in *AR Antulay* are not exhaustive but only illustrative.

[s 4] [Extension of Code to extra-territorial offences.—

- 1 The words “British India” have successively been subs. by the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Schedule (w.e.f. 1-4-1951), to read as above.
- 2 See Maxwell, Interpretation of Statutes, 12th Edn, (1969), pp 6-9; *Sardar Inder Singh v State of Rajasthan*, AIR 1957 SC 510 [\[LNIND 1957 SC 13\]](#) (516) : 1957 SCR 605 [\[LNIND 1957 SC 13\]](#) : 1957 SCJ 376 [\[LNIND 1957 SC 13\]](#) .
- 3 Bombay Regulation (14 of 1827), sections 16–17.
- 37 Subs. by Act 4 of 1898, section 2, for section 4.
- 38 Subs. by the A.O. 1950, for clauses (1) to (4).
- 39 Ins. by Act 10 of 2009, section 51(a)(i) (w.e.f. 27-10-2009).
- 40 Subs. by Act 10 of 2009, section 51(a)(ii), for Explanation (w.e.f. 27-10-2009). Explanation, before substitution, stood as under:
“Explanation.—In this section the word “offence” includes every act committed outside India which, if committed in India, would be punishable under this Code.”.
- 41 Subs. by Act 36 of 1957, section 3 and Schedule II, for “*Illustrations*” (w.e.f. 17-9-1957).
- 42 The brackets and letter “(a)” omitted by Act 36 of 1957, section 3 and Schedule II (w.e.f. 17-9-1957).
- 43 Subs. by the A.O. 1948, for “a coolie, who is a Native Indian subject”.
- 44 Subs. by the A.O. 1950, for “a British subject of Indian domicile”.
- 45 The words “British India” have been successively amended by the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Schedule (w.e.f. 1-4-1951), to read as above.
- 46 *Illustrations* (b), (c) and (d) omitted by the A.O. 1950.
- 47 See Story’s Conflict of Laws, section 1; RC Nigam, Law of Crimes in India, (vol I, 1965) pp 276-279.
- 48 AIR 2008 SC 2392 [\[LNIND 2008 SC 1174\]](#) : 2008 Cr LJ 3065 : 2008 AIR SCW 3962 : (2008) 6 SCC 789 [\[LNIND 2008 SC 1174\]](#) . Per SB Sinha and Lokeshwar Singh JJ. Appellant Fatima Bibi was a citizen of Mauritius and her son and daughter-in-laws were residing at Kuwait. Appellant had been visiting India on visas and staying in India with her relatives in Gujarat. Son of the appellant Hanif Ahmad Patel was married to the complainant-respondent on 22 April 2002.
- 49 See Hari Singh Gour, *Penal Law of India*, 11th Edn, vol I, (2001), pp 157-158. The jurisdiction to try offences committed on high seas is known as admiralty jurisdiction. High seas have been recognised as no man’s territory.
- 50 See *IPC (Amendment Bill)*, 1972, section 4; For details see KD Gaur, *Criminal Law: Cases and Materials*, 3rd Edn (1999), Butterworths, New Delhi, pp 327-334.
- 51 See *Code of Criminal Procedure*, 1973 (2 of 1974) Chapter 36, sections 467-473.
- 52 *CrPC*, 1973, section 468 reads as follows:—

Bar to taking cognizance after lapse of the period of limitation.—(1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be—

[s 4] [Extension of Code to extra-territorial offences.—

- (a) six months, if the offence is punishable with fine only;
- (b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;
- (c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.
- (3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.

53 *Maneka Gandhi v UOI*, (1978) 1 SCC 248 [[LNIND 1978 SC 25](#)] : AIR 1978 SC 597 [[LNIND 1978 SC 25](#)] : (1978) 2 SCR 621 [[LNIND 1978 SC 25](#)] : (1978) 2 SCJ 312 .

54 *Hussainara Khatoon (II) v Home Secy., State of Bihar*, (1980) 1 SCC 91 : 1980 SCC (Cri) 40 [[LNIND 1979 SC 241](#)] ; *Hussainara Khatoon (IV) v Home Secy., State of Bihar*, (1980) 1 SCC 98 [[LNIND 1979 SC 188](#)] : (1979) 2 SCJ 529 : AIR 1979 SC 1369 [[LNIND 1979 SC 188](#)] : (1979) 3 SCR 352 : (1979) 2 SCJ 529 : 1979 Cr LJ 1045 .

55 *Abdul Rehman Antulay v RS Nayak*, (1992) 1 SCC 225 [[LNIND 1991 SC 673](#)] : 1992 SCC (Cri) 93 [[LNIND 1991 SC 673](#)] : AIR 1992 SC 1701 [[LNIND 1991 SC 673](#)] : 1992 Cr LJ 93 : 1991 Supp (3) SCR 325 .

56 *Kartar Singh v State of Punjab*, (1994) 3 SCC 569 : 1994 SCC (Cri) 899 .

57 *Raj Deo Sharma (II) v State of Bihar*, (1999) 7 SCC 604 [[LNIND 1999 SC 856](#)] : 1999 SCC (Cri) 1324 .

58 *Raj Deo Sharma v State of Bihar*, (1998) 7 SCC 507 [[LNIND 1998 SC 940](#)] : 1998 SCC (Cri) 1992 : AIR 1999 SC 3524 [[LNIND 1999 SC 856](#)] .

59 “Common Cause”, *A Registered Society v UOI*, (1996) 6 SCC 775 [[LNIND 1996 SC 2015](#)] : 1997 SCC (Cri) 42 [[LNIND 1996 SC 897](#)] .

60 “Common Cause”, *A Registered Society v UOI*, (1996) 4 SCC 33 [[LNIND 1996 SC 897](#)] : 1996 SCC (Cri) 589 [[LNIND 1996 SC 897](#)] .

61 *P Ramchandra Rao v State of Karnataka*, AIR 2002 SC 1856 [[LNIND 2002 SC 296](#)] : (2002) 4 SCC 578 [[LNIND 2002 SC 296](#)] , judgment was delivered by Justices (SP Bharucha CJ and Syed Shah Mohammed Quadri, RC Lahoti, N Santosh Hegde, Doraiswamy Raju, Ruma Pal and Arijit Pasayat JJ). See KD Gaur Criminal Law: Cases and Materials, 5th Edn, 2008, pp 18-22.

62 *P Ramchandra Rao v State of Karnataka*, AIR 2002 SC 1856 [[LNIND 2002 SC 296](#)] : (2002) 4 SCC 578 [[LNIND 2002 SC 296](#)] . The appellants in these appeals were accused of offences under the *Prevention of Corruption Act, 1988*. Long delays in the prosecutions having taken place, they sought acquittal from the trial court. The trial court granted such acquittal. The State preferred appeals against the orders of acquittal. The learned Single Judge, by the orders under challenge, set aside the orders of acquittal and restored the cases to the trial Court for fresh disposal. Accordingly, the accused came to the Apex Court. Appeal dismissed.

63 *AR Antulay v R S Nayak*, 1992 (1) SCC 225 [[LNIND 1991 SC 673](#)] : 1992 SCC (Cr) 93.

[s 5] [Certain laws not to be affected by this Act.—

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Preamble.— *Whereas it is expedient to provide a general Penal Code for* ¹ *[India]; It is enacted as follows:—*

COMMENTS

Preamble.—The Preamble of the Code has set forth in very lucid terms the main objective of the legislation to provide for a general *Penal Code* for India. The preamble of an Act states the reasons and main objectives which the legislature intended to achieve by the Act. In other words, it is the key which opens the minds of the makers of the Code. However, a Preamble is not an integral part of a statute in the sense that, were it deleted, the real import of the statute would ordinarily be changed. It may be looked into for clearing up any ambiguity, or for explaining the meaning of words which might have more than one denotation, or for keeping the effect of the Act.² But if the text (enacting part) is clear and unambiguous, the Preamble can neither restrict, nor enlarge the scope of the textual provisions.

Codification of the *Penal Code*.—When the British took over the administration of the country from Muslim and Maratha rulers during the 18th century, the administration of criminal justice was in a very deplorable state. There was no uniformity in the application of criminal law in either the Mofussil or the Presidency Courts. Chaos reigned in the conflicting and contradictory decisions on similar points. For instance, in the Bengal Presidency serious forgeries were punishable with imprisonment, for double the term fixed for perjury in the Bombay Presidency³ and vice versa.

Accordingly, with a view to simplifying the criminal law of the country on the pattern of common law, a Law Commission was appointed in 1834 with Lord Macaulay as its chairman and Macleod, Anderson and Millet as members. The committee submitted a draft *Penal Code* to the Governor-General in Council on 14 October 1837. A small committee, consisting of Bethune and Peacock was appointed on 26 April 1845 to revise it. The committee submitted the revised version in two parts, one in 1846 and the other in 1847. This revised version was presented to the Legislative Council of India in 1856 and was finally approved and passed after a thorough revision and careful consideration of the provisions clause by clause. The Governor-General in Council gave assent to the *Penal Code of India* on 6 October 1860 and it finally came into force on 1 January 1862.

⁶⁴[s 5] [Certain laws not to be affected by this Act.—

Nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of the Government of India or the provisions of any special or local law.]

[s 5.1] Saving Clause

Section 5 of the Code is a saving clause to *section 2, IPC*. It excludes the operation of the *Penal Code* in those cases where separate provisions have been made by any local or special law to deal with such offences as mentioned therein. The saving clause is in accordance with the maxim *generalia specialibus non derogant*. That is to say, the general words do not repeal or modify special legislation. Special law means a law applicable to a particular subject,⁶⁵ and local law⁶⁶ means a law applicable to a particular part of India. A State Government may pass a law that will be applicable within the territorial jurisdiction of that State only. The Maharashtra Control of Organized Crime Act is an example of such an enactment. Delhi Government has adopted the MCOC Act from 10 January 2002 to deal with organized crimes efficiently⁶⁷ in the State of Delhi. Where a conflict occurs between the Code and the special or local law, the Code shall not apply. If there is no conflict between the two, the effect may be given to both. But a person cannot be punished both under the *Penal Code* and the special law or local law for the same offence on the principle of double jeopardy.⁶⁸

[s 5.2] Double Jeopardy

Evans: Retrial barred in *Evans v Michigan*, 133 S Ct 1069 (2013) : 2013 US Lexis 1614. The US Supreme Court held that retrial following a Court-decreed of acquittal is barred under the Double Jeopardy Clause of US Constitution.

After the State of Michigan rested its case at petitioner's arson trial, the trial Court acquitted the petitioner, concluding that the State had failed to prove that a building petitioner allegedly burned was not a dwelling, a fact the court mistakenly believed was an element of the offence.

The State appealed, and Court of Appeals of Michigan held that the State could retry petitioner because the trial court made an error of law.

The US Supreme Court disagreed and held retrial following a court-decreed acquittal was barred under the *Double Jeopardy Clause of the US Constitution*, even in cases where a court misconstrued the statute under which a defendant was charged, and the court's order acquitting petitioner, although based on an error of law, prevented the State from retrying the case. In contrast to procedural rulings, which resulted in orders dismissing a case or granting a mistrial on a basis that was unrelated to factual guilt or innocence, acquittals were substantive rulings that concluded criminal proceedings and raised significant double jeopardy concerns, since the *Double Jeopardy Clause*, bars retrial following a court-decreed acquittal, even if the acquittal is based upon an egregiously remarkably erroneous foundation. A mistaken acquittal is an acquittal nonetheless, and the Supreme Court has long held that a verdict of acquittal cannot be reviewed, on error or otherwise, without putting a defendant twice in jeopardy, and thereby violating the US Constitution.

Blueford: In *Blueford v Arkansas*, 132 S Ct 2044 (2012) : 2012 US Lexis 3941, the US Supreme Court by a majority of 6 to 3 held that the *Double Jeopardy Clause*⁶⁹ protects against being tried twice for the same offense. The clause does not, however, bar a second trial if the first ended in a mistrial.

Roberts CJ of US Supreme Court delivered opinion of the Court.

One-year old Matthew McFadden, Jr, suffered a severe head injury on 28 November 2007, while home with his mother's boyfriend, Alex Blueford. Despite treatment at a hospital, McFadden died a few days later.

The State of Arkansas charged Blueford with capital murder, but waived the death penalty. The State's theory at trial was that Blueford had injured McFadden intentionally, causing the boy's death "[u]nder circumstances manifesting extreme indifference to the value of human life."

[s 5] [Certain laws not to be affected by this Act.—

The defense, in contrast, portrayed the death as the result of Blueford accidentally knocking McFadden onto the ground.

The trial court instructed the jury (12 in number) that the charge of capital murder included three lesser offenses:

- (i) first-degree murder,
- (ii) manslaughter, and
- (iii) negligent homicide.

The court addressed the order in which the jury was to consider them:

- (i) If you have a reasonable doubt of the defendant's guilt on the charge of capital murder, you will consider the charge of murder in the first degree;
- (ii) If you have a reasonable doubt of the defendant's guilt on the charge of murder in the first degree, you will then consider the charge of manslaughter.
- (iii) If you have a reasonable doubt of the defendant's guilt on the charge of manslaughter, you will then consider the charge of negligent homicide.

Jury was unanimous against guilt as to capital murder and 1st-degree murder, but deadlocked on manslaughter, with no vote on negligent homicide. After further deliberation, when a verdict-still could not be reached, a mistrial was granted.

On retrial, petitioner's motion to dismiss the capital and 1st-degree murder charges due to Double Jeopardy was denied. The Supreme Court of Arkansas affirmed.

In appeal the judgment of the Supreme Court of Arkansas that petitioner could be retried on all charges was affirmed by the United States Supreme Court by 6 to 3 decision.

[s 5.3] *Expost Facto* Law Violates VIth Amendment to US Constitution

Peugh: In *Peugh v US*, 133 S Ct 2072 (2013) : 186 L Ed 2d 84 (2013) 10 June 2013, US Supreme Court, 2013, held that *Ex-Post Facto* law that calls for a greater punishment than the punishment in effect when the crime was committed violates Sixth Amendment to US Constitution.⁷⁰

Petitioner Peugh was convicted of five counts of bank fraud for conduct that occurred in 1999 and 2000. At sentencing, he argued that the *ex post facto* clause required that he be sentenced under the 1998 version of the Federal Sentencing Guidelines in effect at the time of his offenses rather than under the 2009 version in effect at the time of sentencing.⁷¹ Under the 1998 Guidelines, Peugh's sentencing range was 30 to 37 months, but the 2009 Guidelines assigned more severe consequences to his acts, yielding a range of 70 to 87 months.

[s 5] [Certain laws not to be affected by this Act.—

The District Court rejected Peugh's *ex post facto* claim and sentenced him to 70 months' imprisonment. The Seventh Circuit affirmed.

While allowing the appeal and reversing the sentence and remanding the case by a majority of 5 to 4, the US Supreme Court held that a retrospective increase created a sufficient risk of a higher sentence to constitute an *ex post facto* violation. When defendant committed his crime, the recommended sentence was 30 to 37 months. When he was sentenced, it was 70 to 87 months. Such a retrospective increase in the measure of punishment raised clear *ex post facto* concerns. The presence of discretion applying amended sentencing guidelines that increases a defendant's recommended sentence notwithstanding that sentencing courts possess discretion to deviate from the recommended sentencing range did not displace the *ex post facto* clause's protections.

- 1 The words "British India" have successively been subs. by the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Schedule (w.e.f. 1-4-1951), to read as above.
- 2 See Maxwell, Interpretation of Statutes, 12th Edn, (1969), pp 6-9; *Sardar Inder Singh v State of Rajasthan*, AIR 1957 SC 510 [[LNIND 1957 SC 13](#)] (516) : 1957 SCR 605 [[LNIND 1957 SC 13](#)] : 1957 SCJ 376 [[LNIND 1957 SC 13](#)] .
- 3 Bombay Regulation (14 of 1827), sections 16–17.
- 64 Subs. by the A.O. 1950, for section 5.
- 65 See *IPC*, section 41.
- 66 See *IPC*, section 42.
- 67 The provisions under MCOC Act are similar to the *Prevention of Terrorism Act*, 2001 (POTA). The Act empowers the police with unprecedented powers and authority to tap phones, attach property, question the sources of suspect's income, etc. Also the confessional statements made in the presence of a Deputy Commissioner of Police, tape recordings and recorded phone conversation will be admissible as an evidence in a court of law.
- 68 128 S. Ct 1346 (25 March 2008).
- 69 The *Double Jeopardy clause* provides that no person shall be subject for the same offence to be twice put in jeopardy of life or limb. US Const. amend. V The clause guarantees that the State shall not be permitted to make repeated attempts to convict the accused, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility of punishment.
- 70 The US *Constitution* 6th Amendment to *Constitution* forbids the passage of *ex post facto* laws, a category that includes every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.

[s 5] [Certain laws not to be affected by this Act.—

- 71** The United States *Constitution* 6th Amendment to *Constitution* forbids the passage of *ex post facto* laws, a category that includes every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.

End of Document

[s 6] Definitions in the Code to be understood subject to exceptions.—

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[s 6] Definitions in the Code to be understood subject to exceptions.—

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 Exceptions”, though those exceptions are not repeated in such definition, penal provision, or illustration.

ILLUSTRATIONS

(a) The sections, in this Code, which contain definitions of offences, do not express that a child under seven years of age cannot commit such offences, but the definitions are to be understood subject to the general exception which provides that nothing shall be an offence which is done by a child under seven years of age.

(b) A, a police-officer, without warrant, apprehends Z, who has committed murder. Here A is not guilty of the offence of wrongful confinement; for he was bound by law to apprehend Z and therefore the case falls within the general exception which provides that “nothing is an offence which is done by a person who is bound by law to do it”.

[s 6.1] Object

The object of section 6 is to clarify that all those exceptional and extenuating circumstances which have been grouped together under Chapter IV of the Code under the title “General Exceptions” control the entire Code. This has been explained by the two illustrations appended to the section which relate to sections 82 and 76 of the Code respectively. The provisions of section 6 are also applicable to local and special laws as specified in section 40 of this Code. This has been done to avoid repetition of the provisions again and again in the Code. The proper place for the section would have been Chapter IV of the Code.

Khuraijam Somoi Singh: In *Khuraijam Somoi Singh v State of Manipur*,² Gauhati High Court held that:

[s 6] Definitions in the Code to be understood subject to exceptions.—

Section 6 of the IPC is an extraordinary provision which obligates the court to consider whether a case is covered by any one of the Exceptions under Chapter IV of the *IPC*. *Section 6 of IPC*, accordingly should be read as a proviso to *section 105 of Indian Evidence Act*,³ that apart section 6 of the Code imposes statutory obligation on the court to consider as to whether the case is covered by any exception or not.

1 Proceedings of the Legislative Council (1860), p 1261.

2 *Khurajam Somoi Singh v State of Manipur*, 1997 Cr LJ 1461 (Gau) : 1997 (2) Gau LR 168 . *Section 105 Evidence Act*, when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions.....is upon him, and the courts shall presume the absence of such circumstances.

3 *Khurajam Somoi Singh v State of Manipur*, 1997 Cr LJ 1461 (Gau) : 1997 (2) Gau LR 168 . *Section 105 Evidence Act*, when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions.....is upon him, and the Courts shall presume the absence of such circumstances.

[s 7] Sense of expression once explained.—

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[s 7] Sense of expression once explained.—

Every expression which is explained in any part of this Code is used in every part of this Code in conformity with the explanation.

This section is based on the Roman maxim *Inclusio unius est exclusio alterius* (the inclusion of one is the exclusion of another) or *expressio unius est exclusio alterius* (the mention of one is the exclusion of another). Thus, the “terms” explained in the Code bear one and the same meaning throughout the Code wherever used.⁴ It is a general rule of interpretation that a word which occurs more than once in the same statute must be given one and the same meaning throughout the Act, unless it appears from the context that the legislature used the word in a different sense.⁵

¹ Proceedings of the Legislative Council (1860), p 1261.

⁴ Hari Singh Gour, *The Penal Law of India*, 11th Edn, (2001), vol I, p 167.

⁵ *Rameshwar Prasad*, (1931) 32 Cr LJ 1266 .

[s 8] Gender.—

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[s 8] Gender.—

The pronoun “he” and its derivatives are used of any person, whether male or female.

The pronoun “he” designates both male and female, unless otherwise expressly mentioned in the specific sense. The Madhya Bharat (now Madhya Pradesh) High Court in the case of *Girdhar Gopal v State*, AIR 1958 MB 147 (148), held that the pronoun “he” used in *section 354 of the Penal Code* (he will thereby outrage her “modesty”) applies to either a man or a woman. Thus, a man as well as a woman may be held guilty of the offence of assaulting or using criminal force against any woman with the intention or knowledge that the woman’s modesty will be outraged under *section 354 of the Penal Code*.

¹ Proceedings of the Legislative Council (1860), p 1261.

[s 9] Number.—

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[s 9] Number.—

Unless the contrary appears from the context, words importing the singular number include the plural number, and words importing the plural number include the singular number.

¹ Proceedings of the Legislative Council (1860), p 1261.

[s 10] “Man”, “Woman”.—

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[s 10] “Man”, “Woman”.—

The word “man” denotes a male human being of any age; the word “woman” denotes a female human being of any age.

[s 10.1] “Third Gender”

National Legal Service Authority: In a historic case of *National Legal Service Authority v UOI*,⁶ Supreme Court has given recognition to members of Transgender Community (i.e. TG Community) who are neither male nor female, at the time of birth, as “Third Gender” for the purposes of safeguarding and enforcing appropriately their fundamental and other legal, social and economic rights guaranteed under the *Constitution*—Supreme Court, 2014 National Legal Service Authority and Mata Nasib Kaurji Women Welfare Society⁷ filed Writ Petitions in the Supreme Court on behalf of TG Community⁸ and Hijras/Eunuchs to seek a legal declaration of their gender identity than the one assigned to them, male or female, at time of the birth and to claim legal status as a “third gender” with all legal and Constitutional protection. They claim that nonrecognition of their gender identity violates their Constitutional rights guaranteed under *Articles 14, 15, 16 and 21 of the Constitution*; and that every person of that community has a legal right to decide their sex orientation and to a spouse and determine their identity. It is claimed that since TGs are neither treated as male or female, nor given the status of a “third gender”, they are being deprived of many of the rights and privileges which other persons enjoy as citizens of the country. TGs are deprived of social and cultural participation and hence restricted access to education, health care and public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals etc., which deprives them of the Constitutional guarantee of equality before law and equal protection of law. Further, it was also pointed out that the community also faces discrimination to contest election, right to vote, employment, to get licences etc., and, in effect, treated as an outcast and untouchable, and that the state cannot discriminate them on the ground of gender, violating *Articles 14 to 16 and Article 21 of the Constitution of India*.

It was further submitted on behalf of the Transgender persons that they be declared as a socially and educationally backward class of citizens and must be accorded all benefits to that class of persons, which are being extended to male and female genders; and that the right to choose one’s gender identity is integral to the right to lead a life with dignity, which is undoubtedly guaranteed by *Article 21 of the Constitution of India*. It was therefore, submitted that, subject to such rules/regulations/protocols, transgender persons may be afforded the right of choice to determine whether to opt for male, female or transgender classification, so that their views also could be heard.

Allowing the petition the Supreme Court held that TGs are being treated as “third gender” for the purpose of safeguarding and enforcing appropriately their human rights guaranteed under the *Constitution* and that the court spelled out following direction in para 129 of the judgment to be implemented forthwith by the Central and State Governments. The guidelines are stated below:

- (1) Hijras, Eunuchs, apart from binary gender (male or female), be treated as “third gender” for the purpose of safeguarding their rights under Pt III of our *Constitution* and the laws made by the Parliament and the State Legislatures.
- (2) Transgender persons’ right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity, such as male, female or as third gender.
- (3) We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.
- (4) Centre and State Governments are directed to operate separate HIV Sero-surveillance Centres since Hijras/Transgenders face several sexual health issues.
- (5) Centre and State Governments should seriously address the problems being faced by Hijras/Transgenders, such as fear, shame, gender dysphoria (degeneration), social pressure, depression, suicidal tendencies, social stigma, etc., and any insistence for declaring one’s gender is immoral and illegal.
- (6) Centre and State Governments should take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.
- (7) Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.
- (8) Centre and State Governments should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.
- (9) Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life in ancient times.

It is alleged that an Expert Committee has already been constituted by the Government to make an in-depth study of the problems faced by the transgender community and suggest measures that can be taken by the Government to ameliorate their problems and to submit its report with recommendations. The Apex Court directed that the recommendations should be examined based on the legal declaration made in this judgment and implemented within six months of the pronouncement of the judgment.

It is a welcome judgment and will go a long way in safeguarding the transgenders’ rights and whipping out social strings attached to transgender community.

[s 10.2] Scope

The terms “man” and “woman” have been used in the Code in a generic sense, meaning a living human being but not one in the womb. The scope of the section is wide. It does not prescribe any particular age for the purpose of definition of the terms man and woman, for instance, even a boy of 4 years and a girl of 3 years of age are man and woman within the meaning of this section.⁹

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- 1 Proceedings of the Legislative Council (1860), p 1261.
 - 6 *National Legal Service Authority v UOI*, Writ Petition No. 400 of 2012 decided on 15 April 2014, judgment was delivered by KS Radhakrishnan and AK Sikri JJ of the Supreme Court.
 - 7 Writ Petition No. 604 of 2013.
 - 8 TG Community comprises of *Hijras (neither men nor women)*, *eunuchs*, *Kothis*, *Aravanis*, *Jogappas*, *Shiv-Shakthis* etc., and they, as a group, have got a strong historical presence in India. In the Hindu mythology and other religious texts; a prominent role has been played by them in the Royal Courts of the Islamic world. The concept of *tritiya prakrti* or *napunsaka* has also been an integral part of vedic and puranic literatures. The word “napunsaka” has been used to denote absence of procreative capability.
 - 9 *Emperor v Tatia Mahadev*, (1912) 14 Bom LR 961 [[LNIND 1912 BOM 148](#)] ; *Major Singh v State of Punjab*, AIR 1967 SC 63 [[LNIND 1966 SC 130](#)] .

[s 11] “Person”.—

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[s 11] “Person”.—

The word “person” includes any Company or Association or body of persons, whether incorporated or not.

Section 11 of the Code has not defined the term “person” in a narrow and technical sense but has given a wider meaning to the term to include both a natural person (a human being, whether a man or a woman) and an artificial person, such as, a company, or an association, or a body of persons or an idol which is a legal person. Corporations are indictable for offences of *quasi*-criminal nature, such as non-repair of highways, bridges, nuisance, trespass, forgery, etc., for which fine is either the sole punishment or an alternative punishment to imprisonment. But a corporation would not be criminally liable for offences such as murder, robbery, offences against the state, public tranquility and the like for which imprisonment or the death sentence is the punishment prescribed by law.¹⁰ An unborn child in the mother’s womb is a “person” for the purposes of section 11 of the Code.

¹ Proceedings of the Legislative Council (1860), p 1261.

¹⁰ Kenny’s Outlines of Criminal Law, 19th Edn, JWC Turner (1966), pp 75-78; see *State of Maharashtra v Syndicate Transport Pvt Ltd*, AIR 1964 Bom 195 [[LNIND 1963 BOM 47](#)].

[s 12] “Public”.—

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[s 12] “Public”.—

The word “public” includes any class of the public, or any community.

In common parlance the word “public” means the general body of mankind, or of a state or community. However, the Code merely states that “public” includes, “any class of people or any community”. Thus, the Code has not left the word “public” to be interpreted in a wider context to mean “general body of persons only”, but restricted its scope to include any particular group or community.

¹ Proceedings of the Legislative Council (1860), p 1261.

[s 13] “Queen”.—

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[s 13] “Queen”.—

[Rep. by the A.O. 1950.]

¹ Proceedings of the Legislative Council (1860), p 1261.

[[s 14] “Servant of Government”.—

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¹¹[[s 14] “Servant of Government”.—

The words “servant of Government” denote any officer or servant continued, appointed or employed in India by or under the authority of Government.]

The words “servant of Government” include an employee of any cadre or grade appointed or employed in India by the Central Government or the State Governments.

¹ Proceedings of the Legislative Council (1860), p 1261.

¹¹ Subs. by the A.O. 1950, for section 14.

[s 15] “British India”.—

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[s 15] “British India”.—

[Rep. by the A.O. 1937.]

¹ Proceedings of the Legislative Council (1860), p 1261.

[s 16] “Government of India”.—

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Chapter II of the *Penal Code*, which runs into 47 sections commencing from *sections 6 to 52A, IPC*, is for the most part an elaborate interpretation clause. The leading terms used in the text of the Code have been defined and explained. The purpose of this chapter is to offset ambiguity and to avert the possibility of misinterpretation of the different provisions in the Code.¹

[s 16] “Government of India”.—

[Rep. by the A.O. 1937.]

¹ Proceedings of the Legislative Council (1860), p 1261.

[[s 17] “Government”.—

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¹²[[s 17] “Government”.—

The word “Government” denotes the Central Government or the Government of a ¹³[***] State.]

The word “Government” has been given a wider definition to include Central, State as well as local Government of a state.¹⁴

¹ Proceedings of the Legislative Council (1860), p 1261.

¹² Subs. by A.O. 1950, for section 17.

¹³ The word and letter “Part A” omitted by Act 3 of 1951, section 3 and Schedule (w.e.f. 1-4-1951).

¹⁴ *Ratanlal and Dhirajlal, The Law of Crimes*, 25th Edn, (2002), p 57.

[[s 18] “India”.—

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¹⁵**[[s 18] “India”.—**

“India” means the territory of India excluding the State of Jammu and Kashmir.]

India includes the state of Jammu and Kashmir, which is an integral part of the Republic of India and is included in the list of states in the First Schedule of the *Constitution of India*.¹⁶ However, the position of the state of Jammu and Kashmir differs from other states owing to the constitutional changes that took place in 1947.¹⁷ Accordingly, a special status has been accorded to the state of Jammu and Kashmir under *Article 370 of the Constitution of India*; as a result of this the Union laws, such as the *Indian Penal Code*, *Code of Criminal Procedure*, *Law of Evidence*, etc., have no application to the state of Jammu and Kashmir.

Thus, for the purposes of application of the *Indian Penal Code*, the meaning of India is restricted to the territory of India excluding the state of Jammu and Kashmir. The state of Jammu and Kashmir has a separate *Penal Code* – known as the *Ranbir Penal Code*, which largely resembles the *Indian Penal Code*.

¹ Proceedings of the Legislative Council (1860), p 1261.

¹⁵ Subs. by Act 3 of 1951, section 3 and Schedule, for section 18 (w.e.f. 1-4-1951). Earlier section 18 was repealed by the A.O. 1937 and was again inserted by the A.O. 1950.

¹⁶ *Article 1(2) of the Constitution* says, “The States and the territories thereof shall be as specified in the First Schedule”. At present there are 29 States and 7 Union Territories, viz., *States*: Andhra Pradesh, Telangana, Assam, Bihar, Gujarat, Kerala, Madhya Pradesh, Tamil Nadu, Maharashtra, Karnataka, Orissa, Punjab, Rajasthan, Uttar Pradesh, West Bengal, Jammu and

[[s 18] "India".—

Kashmir, Nagaland, Haryana, Himachal Pradesh, Manipur, Tripura, Meghalaya, Sikkim, Mizoram, Arunachal Pradesh, Goa, Chhattisgarh, Uttaranchal, and Jharkhand;

Union Territories: Delhi, Andaman and Nicobar Islands, Lakshadweep, Dadra and Nagar Haveli, Daman and Diu, Pondicherry and Chandigarh.

- 17** On accession of the State of Jammu and Kashmir by Maharaja of Jammu and Kashmir – a princely State with the Union of India (on 27 October 1947), a responsible government based on adult franchise was formed in the State on 5 March 1948. On 25 November 1949, Yuvraj Karan Singh, to whom the power was entrusted by the Maharaja, issued a proclamation directing that the *Constitution of India* be adopted by the Constituent Assembly of the State insofar as it was applicable to Jammu and Kashmir in order to govern the relationship with the Union of India. And on 26 January 1950, when the *Constitution of India* came into operation, *Article 370* was enacted to provide a special status to Jammu and Kashmir within the Union of India.

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[s 19] “Judge”.—

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[s 19] “Judge”.—

The word “Judge” denotes not only every person who is officially designated as a Judge, but also every person,—

who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or

who is one of a body of persons, which body of persons is empowered by law to give such a judgment.

ILLUSTRATIONS

(a) A Collector exercising jurisdiction in a suit under Act 10 of 1859, is a Judge.

(b) A Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment, with or without appeal, is a Judge.

(c) A member of a panchayat which has power, under *Regulation VII, 1816, of the Madras Code, to try and determine suits, is a Judge.

(d) A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another court, is not a Judge.

[s 19.1] “Judge”

In popular parlance, the word “Judge” means only a Judge of the Supreme Court or a High Court. But the section has not restricted the meaning of a “judge” to only those officially designated as a “judge”, such as a Supreme Court Judge, High Court Judge, District Judge, Assistant Sessions Judge and Subordinate Judge. It includes all those persons authorised under the provisions of law to exercise jurisdiction in a suit or proceedings, whether civil, criminal or of *quasi judicial* nature and deliver judgment. For instance, a Magistrate,

[s 19] “Judge”.—

an Arbitrator, a *Sarpanch* or a *Panch* of a Panchayat empowered by law to give judgment in exercising jurisdiction in a suit or in a proceeding, is a judge within the meaning of section 19 of the Code.

[s 19.2] Legal proceedings

Legal proceedings, in the context of this provision, come close to what are known as judicial proceedings.¹⁸ In *Abboy Naidu v Kannianppa Chettiar*, AIR 1929 Mad 175 [[LNIND 1928 MAD 256](#)] (176), the Madras High Court has defined the term “legal proceeding”, as a proceeding regulated or prescribed by law in which a judicial decision is accorded.

¹ Proceedings of the Legislative Council (1860), p 1261.

¹⁸ *CrPC*, 1973, section 2(i) “Judicial proceeding” includes any proceeding in the course of which evidence is or may be legally taken on oath.

[s 20] “Court of Justice”.—

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[s 20] “Court of Justice”.—

The words “Court of Justice” denote a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially.

ILLUSTRATION

A panchayat acting under ¹⁹Regulation VII, 1816, of the Madras Code, having power to try and determine suits, is a Court of Justice.

[s 20.1] “Court of Justice”

Originally in common law the “court” meant the King’s palace,²⁰ but later it included places where justice is administered, and the person or persons who administer it.

The “Court of Justice”,²¹ according to *section 20, IPC* includes judge or judges who are empowered to conduct judicial proceedings. In other words, the “court” means a place where justice is judicially administered. However, when a judge is merely performing an administrative function he is not a “Court of Justice”.

[s 20.2] Power and Jurisdiction of a Judge

Defendant at a Public Place i.e., Railway Station was found in possession of articles with blade and sword in his bag contrary to section 139 of the Criminal Justice Act, 1988. The Judge believing Jury will not be able to find any verdict other than guilty directed them to return guilty verdict, which was upheld by the court of appeal but set aside by the House of Lords.

Setting aside the convictions and allowing the appeal, the House of Lords in *RV Wang* (2005) held that there were no circumstances in which a Judge was entitled to direct a Jury to return a verdict of guilty. No matter how

[s 20] "Court of Justice".—

inescapable a Judge might consider a conclusion to be, in the sense that any other conclusion would be perverse, it remained his duty to leave the decision to the Jury and not to dictate what that verdict should be.

1 Proceedings of the Legislative Council (1860), p 1261.

19 Rep. by the Madras Civil Courts Act, 1873 (3 of 1873).

20 *Halsbury's Laws of England*, 3rd Edn, (1955), vol 9, 342.

21 The *Indian Evidence Act, 1872*, section 3: " "Court" includes all judges; and Magistrates, and all persons except arbitrators, legally authorised to take evidence."

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[s 21] “Public servant”.—

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[s 21] “Public servant”.—

The words “public servant” denote a person falling under any of the descriptions hereinafter following; namely:—

²²[***]

Second.—Every Commissioned Officer in the Military, ²³[Naval or Air] Forces ²⁴ ²⁵[***] of India;

²⁶[Third.—Every Judge including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions;]

Fourth.—Every officer of a Court of Justice ²⁷ [(including a liquidator, receiver or commissioner)] whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person specially authorized by a Court of Justice to perform any of such duties;

Fifth.—Every juryman, assessor, or member of a panchayat assisting a Court of Justice or public servant;

Sixth.—Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority;

Seventh.—Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

Eighth.—Every officer of ²⁸[the Government] whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

Ninth.—Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of ²⁹[the Government], or to make any survey, assessment or contract on behalf of ³⁰[the Government], or to execute any revenue process, or to investigate, or to report, on any matter affecting the pecuniary interests of ³¹[the Government], or to make, authenticate or keep any document relating to the pecuniary interests of ³²[the Government], or to prevent the infraction of any law for the protection of the pecuniary interests of ³³[the Government] ³⁴[***];

Tenth.—Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district;

³⁵ [Eleventh.—Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election;]

³⁶[Twelfth.—Every person—

- (a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government;
- (b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956).]

ILLUSTRATION

A Municipal Commissioner is a public servant.

Explanation 1.—Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2.—Wherever the words “public servant” occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

³⁷[Explanation 3.—The word “election” denotes an election for the purpose of selecting members of any legislative, municipal or other public authority, of whatever character, the method of selection to which is by, or under, any law prescribed as by election.]

³⁸[***]

[s 21.1] “Public Servant”—Meaning

Section 21 of the Code does not define the term “public servant”, but simply enumerates the various categories of persons who constitute the great mass of the community and are included in the category of “public servant”. The categories stated in the section are merely illustrative and by no means exhaustive. Broadly speaking, a “public servant” must first be a servant, and secondly, a “public servant”. It is not necessary that a servant should receive any salary or remuneration for his work. An honorary servant discharging a public duty is as much a servant as a stipendiary (receiving stipend) on the payroll of the Government. Likewise, a minister in a Central or a State Government, who does not take pay from the Government and works as an honorary one, is a public servant since he is entrusted to discharge public duty by virtue of holding the particular office.³⁹ Again, all those who discharge a delegated function of administration of the state are public servants. Thus, the tests as to whether a person is a public servant or not are:

- (1) Whether he is in the service or on the payroll of the Government—Central, State or Local Government of a state;
- (2) Whether he is entrusted with the performance of any public duty. Accordingly, a teacher in a Railway school, who was being paid by the Railway, which is a department of the Government of India, was held to be a public servant. He was entrusted with a public duty to teach boys.⁴⁰ But a teacher⁴¹ functioning as an examiner for a university was not held to be a public servant under clause (9) of

[s 21] “Public servant”.—

section 21, Indian Penal Code, 1860 and so, he could not be held guilty under repealed *section 161, IPC*,⁴² when he allegedly accepted a bribe for rewarding higher marks to a candidate at the examination.

However, the judgment is no more valid after the repeal of *sections 161 to 165A, IPC* by *section 31 of the Prevention of Corruption Act, 1988*.⁴³ The meaning and scope of the definition of “public servant” in clause (c) of *section 2 of Prevention of Corruption Act, 1988* has been enlarged. Accordingly, a university teacher as well as an examiner is now a “public servant”⁴⁴ *vide* sub-clause (xi) to clause (c) of *section 2 of Prevention of Corruption Act, 1988*.

A person to be an officer must hold some office. The holding of an office implies charge of a duty attached to that office. As held by Apex Court in *State of Maharashtra v Brijlal Sadasukh Modani*, AIR 2016 SC 2015, sprinkle of aid by Government to society would bring its employee within definition of “public servant”. Even, any grant or any aid at time of establishment of society or in any construction or in any structural concept or any aspect would be an aid, as the term aid has not been defined. Notices issued to employee of Co-operative Bank to give details of property acquired by him is justified. Question as to whether said Bank/Society has ever been granted any kind of Government aid or not is left to be dealt with in course of trial. Thus, whether said employee is public servant or not, would also be decided during trial.

[s 21.2] Distinction between “Public Servant” and “Government Servant”

- (1) A public servant is not necessarily a Government servant.
- (2) A public servant may not be on the payroll of the Government.⁴⁵ That is to say, a public servant may act honorarily with no wages or money for his service. On the other hand, a Government servant always remains on the payroll of the Government.
- (3) The term “public servant” in a wider connotation might include a Government servant. In other words, “public servant” is the *genus* and “Government servant” is a *species* of the said *genus*.
- (4) “Public servant” has been discussed in *section 21* and “Servant of Government” under *section 14 of the Penal Code*.

¹ Proceedings of the Legislative Council (1860), p 1261.

²² Clause *First* omitted by the A.O. 1950.

²³ Subs. by Act 10 of 1927, section 2 and Sch I, for “or Naval”.

²⁴ The original words “of the Queen while serving under the Government of India, or any Government” have successively been amended by the A.O. 1937, the A.O. 1948 and the A.O. 1950 to read as above.

²⁵ The words “of the Dominion” omitted by the A.O. 1950.

²⁶ Subs. by Act 40 of 1964, section 2, for clause *Third* (w.e.f. 18-12-1964).

²⁷ Ins. by Act 40 of 1964, section 2 (w.e.f. 18-12-1964).

[s 21] "Public servant".—

- 28** Subs. by the A.O. 1950, for "the Crown". Earlier the words "the Crown" were substituted by the A.O. 1937, for the word "Government".
- 29** Subs. by the A.O. 1950, for "the Crown". Earlier the words "the Crown" were substituted by the A.O. 1937, for the word "Government".
- 30** Subs. by the A.O. 1950, for "the Crown". Earlier the words "the Crown" were substituted by the A.O. 1937, for the word "Government".
- 31** Subs. by the A.O. 1950, for "the Crown". Earlier the words "the Crown" were substituted by the A.O. 1937, for the word "Government".
- 32** Subs. by the A.O. 1950, for "the Crown". Earlier the words "the Crown" were substituted by the A.O. 1937, for the word "Government".
- 33** Subs. by the A.O. 1950, for "the Crown". Earlier the words "the Crown" were substituted by the A.O. 1937, for the word "Government".
- 34** Certain words omitted by Act 40 of 1964, section 2 (w.e.f. 18-12-1964).
- 35** Ins. by Act 39 of 1920, section 2.
- 36** Subs. by Act 40 of 1964, section 2, for clause Twelfth (w.e.f. 18-12-1964).
- 37** Ins. by Act 39 of 1920, section 2.
- 38** Explanation 4 omitted by Act 40 of 1964, section 2 (w.e.f. 18-12-1964). Earlier Explanation 4 was inserted by Act 2 of 1958, section 2 (w.e.f. 12-2-1958).
- 39** *PV Narasimha Rao v State (CPE CBI)*, AIR 1998 SC 2120 [[LNIND 1998 SC 1259](#)] : 1998 (4) Supreme 1 : (1998) 4 SCC 626 [[LNIND 1998 SC 1259](#)] : 1998 Cr LJ 2930 : (1998) 1 SCJ 529 .
- 40** *State of Ajmer [Now Rajasthan] v Shivji Lal*, AIR 1959 SC 847 [[LNIND 1959 SC 67](#)] : (1959) Supp (2) SCR 739 : 1959 SCJ 911 : 1959 Cr LJ 1127 : (1960) 1 LLJ 239 [[LNIND 1959 SC 67](#)] ; *RR Choudhary and S Gangoli v State of Uttar Pradesh*, AIR 1959 SC 1310 : 1959 Cr LJ 1497 : (1960) 1 SCR 290 . Held, Railway employees are public servants within the meaning of section 21, IPC, *Akhtar Alam v State of Bihar*, (1969) 1 SCC 141 : (1969) 1 SCR 142 . Held, a head clerk in the service or pay of the State Electricity Board is an officer within clause (12) of section 21, IPC.
- 41** *State of Gujarat v MP Dwivedi*, AIR 1972 SC 392 : (1972) 11 SCWR 13 : (1972) 2 SCC 392 [[LNIND 1972 SC 257](#)] : 1972 Cr LJ 1247 .
- 42** IPC, section 161 makes the act of taking gratification other than legal remuneration in respect of an official act by a public servant punishable in law. See for detailed discussion the commentary to section 161 given in Chapter IX *infra*.
- 43** Repealed with effect from 9 September 1988. The provisions of sections 161 to 165A, IPC have now been incorporated in sections 7 to 12 of the PCA, 1988 and penalties enhanced.
- 44** *Dilawar Balu Kurane v State of Maharashtra*, (2002) 1 Scale 47 [[LNIND 2002 SC 1739](#)] : (2002) 2 SCC 135 [[LNIND 2002 SC 1739](#)] : AIR 2002 SC 564 [[LNIND 2002 SC 1739](#)] . Apex Court held that a Lecturer in a private college appointed by Shivaji University as an examiner for evaluating examination answer scripts is a public servant within the meaning of PCA, 1988. See KD Gaur, Criminal Law: Cases and Materials (3rd Edn, 1999), pp 656, 668; Chapter IX for detail discussion on "public servant."
- 45** *State v Air Commodore Kailash Chand*, AIR 1980 SC 522 [[LNIND 1979 SC 504](#)] : (1980) 1 SCC 667 [[LNIND 1979 SC 504](#)] : (1980) 2 SCR 697 [[LNIND 1979 SC 504](#)] : 1980 CAR 38 : 1980 Cr LJ 393 . On re-employment in the Auxiliary Air Force the respondent retained his character as a Public Servant because he was required to undergo training and to be called for services as and when required.

[s 22] “Movable property”.—

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[s 22] “Movable property”.—

The words “movable property” are 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.

[s 22.1] “Property”

Property is a legal term to denote every kind of interest or right which has an economic interest. It may be tangible as well as intangible. For instance, land, building, machinery, motor cars, etc are tangible and the right of reversion, copyright, patent right and goodwill etc. are intangible properties. Property, according to the Indian law is classified into movable⁴⁶ and immovable⁴⁷ and according to the English law into real and personal property.

[s 22.2] “Movable Property”

According to *section 22, IPC* the words “movable property” are intended to include corporeal property (which is perceptible by the senses in contradistinction to incorporeal rights which are not so perceivable, such as obligations of all kinds) of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth. The definition is that of the expression “movable property” and not of “property”, and can apply to all corporeal property except property excluded from the definition. Thus, movable property does not include growing crops⁴⁸ or standing timber,⁴⁹ as long as they stand unsevered from the earth upon which they grow. But as soon as they are severed they become movable property and capable of theft.

[s 22.3] “Movable Property” and “Immovable Property”

The distinction between movable and immovable property has been well explained by Holloway, J., in an old Madras case of *Sukey Kurdaba v Gonda*, as follows:

[s 22] “Movable property”.—

Movability may be defined to be a capacity in a thing of suffering alteration of the relation of place, and immovability, incapacity for such alteration. If, however, a thing cannot change its place without injury to the quality by virtue of which it is, what it is, it is immovable. Certain things, such as a piece of land are in all circumstances immovable. Others, such as a tree attached to the ground are, so long as they are so attached, immovable, but when the severance has been affected they become movable.⁵⁰

Thus, stones and precious jewels, such as gold, diamond, etc., so long they are imbedded in the earth are immovable property, being a part of the earth, but as soon as they are acquired and carried away, they become movable property. Hence, in the instance of a swamp possessed by the Government, removal of salt from it converted the swamp into movable property and the accused was held liable for theft.⁵¹

1 Proceedings of the Legislative Council (1860), p 1261.

46 (i) *General Clauses Act, 1897* (X of 1897), section 3(36) says: “Movable property” shall mean property of every description except “immovable property”.

(ii) The Indian *Registration Act, 1908* (XVI of 1908), section 3 says: “movable property” includes standing timber, growing crops and grass, fruit upon and juice in trees and property of every other description except immovable property.”

(iii) The Indian *Companies Act, 1913* (VII of 1913), section 98 says, that “shares or other interest of any member in a company shall be movable property, transferable in manners provided by the articles of the company”.

47 (i) *General Clauses Act, 1897* (X of 1897), section 3(26): “Immovable property” shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.”

(ii) The *Transfer of Property Act, 1882*, section 3 says: ““Immovable property” does not include standing timber, growing crop or grass”.

48 *Shivram*, (1891) ILR 15 Bom 702.

49 *Nallemdan Chettiar v Emperor*, AIR 1930 Mad 509 [[LNIND 1929 MAD 378](#)] .

50 (1872) 6 Mad HC 71 (73). Quoted in Mulla on the *Transfer of Property Act, 1882*, Vth Edn, (1962), p 16. See *Santabai v State of Bombay*, AIR 1958 SC 532 [[LNIND 1958 SC 28](#)] .

51 *Tamma Ghantayya*, (1881) ILR 4 Mad 228.

[s 23] “Wrongful gain”.—

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[s 23] “Wrongful gain”.—

“Wrongful gain” is gain by unlawful means of property to which the person gaining is not legally entitled.

“Wrongful loss”.—“Wrongful loss” is the loss by unlawful means of property to which the person losing it is legally entitled.

Gaining wrongfully, losing wrongfully.—A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

[s 23.1] Wrongful Gain and Wrongful Loss

The *Penal Code* in section 23 has incorporated the principle of criminal jurisprudence, that wrong itself (*mala in se*) is not punishable, unless it is prohibited by law (*mala prohibita*). The section lays down the test of wrongfulness as “unlawfulness”.⁵² An act may be unlawful either by being unenforceable by law, or punishable by law, for instance, an agreement not to institute a civil suit against a debtor for realisation of a debt is unlawful in the former sense, but not so in the latter. In other words, “unlawful”⁵³ in law, means “illegal” as defined in *section 43, IPC*. Thus, to constitute “gain” and “wrongful loss”, there must be an unlawful acquisition by unlawful means. For example, if a person takes a house on hire for immoral purposes under the pretext of opening a school in it, gain of the house has been effected by an unlawful means, though it cannot be said that he is not legally entitled to its possession, and its acquisition does not constitute wrongful loss.

The two terms “wrongful gain” and “wrongful loss” are related to the acquisition of a specific property by one party, who causes wrongful loss to another. For instance, if X takes away Y’s watch out of Y’s possession, without Y’s consent and with the intention of keeping it, he causes, “wrongful loss” to Y and wrongful gain to himself and so X is guilty of theft under *section 379, IPC*. Likewise, when a postman signs a postal receipt himself and makes it appear to have been signed by the addressee and retains the parcel for himself, such a retention is wrongful gain.⁵⁴ But to deprive a person temporarily of a thing in jest with the ultimate object of restoring it to the owner does not amount to causing loss. For example, when A removed a box belonging to B

[s 23] “Wrongful gain”.—

and left it concealed in a storeroom with the object of teaching a lesson to *B*, who happened to be very careless, it did not amount to wrongful loss to *B* and so *A* was not adjudged guilty of theft.⁵⁵

[s 23.2] “Gaining wrongfully” and “losing wrongfully”

The words “gaining wrongfully” or losing wrongfully’ as defined in section 23 need not be confined only to the actual acquisition, or to the actual deprivation of property, and could also cover cases of wrongful retention of property on the one hand and wrongfully being kept out of property on the other. In *KN Mehra v State of Rajasthan*,⁵⁶ the appellant, a cadet on training in the Indian Air Force Academy, Jodhpur, took off an aircraft on 14 May 1962 without authorisation (and without observing any of the formalities prerequisite to an aircraft flight) and landed in Pakistan. The appellant was arrested and brought to India on 17 May 1962 and prosecuted for theft of aircraft under *section 379, IPC*. Held, that taking out the aircraft by the appellant for an unauthorised flight had in fact given the appellant temporary use of the aircraft for his own purpose, and had temporarily deprived the owner of the aircraft, *viz.*, the Government, of its legitimate use of the particular aircraft for the Indian Air Force on that day. Such an act was clearly a gain or loss by an unlawful means within *section 23, IPC*.

¹ Proceedings of the Legislative Council (1860), p 1261.

⁵² In common language, unlawful means, is not justified by law. See Ratanlal and Dhirajlal, *The Law of Crimes*, 23rd Edn, p 71.

⁵³ *Shivram*, (1891) ILR 15 Bom 702.

⁵⁴ *Mahalingaya Muddayya Pujari Re*, (1959) Cr LJ 881 : AIR 1959 Mys 185 .

⁵⁵ *Nabi Baksh*, (1897) 25 Cal 416 .

⁵⁶ AIR 1957 SC 369 [[LNIND 1957 SC 14](#)] : 1957 SCR 623 [[LNIND 1957 SC 14](#)] : 1957 SCJ 386 .

[s 24] “Dishonestly”.—

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[s 24] “Dishonestly”.—

Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing “dishonestly”.

[s 24.1] “Dishonestly”

In popular parlance the word “dishonestly” means having deviated from honesty. But the *Penal Code* in section 24 has given a technical meaning to the word “dishonestly”, to include an intentional act, to cause wrongful gain and wrongful loss to another. The word “dishonestly” has been used in relation to property. Hence, “intention” must be to cause wrongful gain or wrongful loss to a person. For instance, if *A* finds a ring belonging to *B* on a table in *B*’s room and removes it for his own use, *A*’s act is dishonest since it amounts to wrongful gain to *A* and wrongful loss to *B*.

Thus, nothing is dishonest under the Act, which is not intended to be dishonestly. And nothing can be said to have been intended by a man, unless it was his immediate and probable intention. In other words, unless it was his dominant motive, he cannot be said to be dishonest. But, as “intention” is a psychological act, the only means by which a court can judge it, is by inference from the external acts and conduct of a party. A dishonest intention may be presumed only if an unlawful act is done, or if a lawful act is done by unlawful means.⁵⁷ Where a person takes away a thing with the intention of causing wrongful loss to the proprietor who is entitled to it, it cannot be said that his intention was not dishonest, though he had no intention to convert it.

The test to be applied for determining “dishonestly” is not the test of a hypothetical reasonable man, – but rather of the person whose intention is to be read. The court must then put itself as far as possible in his situation for the purpose of seeing what must have been his intention. His habit of life, manner of thought, associations and belief may have influenced him in his action. It is, therefore, essential to take all these elements into consideration. There is no golden rule of conjectural test. The sole test is what was the intention of the accused at the time of the act occurred for which purpose only the primary and not the more remote intention of the accused must be ascertained.⁵⁸

[s 24] “Dishonestly”.—

A, an accountant, fraudulently paid money to B, to be kept in a deposit for payment to Y. On demand by Y, the accused made false reports to the effect that Y's money, held as a revenue deposit, was to be transferred to the civil court, upon which a cheque for making the transfer was drawn up, which the accused altered to conceal his previous fraud. It was held, that the accused's immediate intention being merely to conceal his previous fraud, he could not be convicted of forgery, though he could be convicted of making a false record.⁵⁹

¹ Proceedings of the Legislative Council (1860), p 1261.

⁵⁷ *Sansar Singh v Emperor*, AIR 1934 All 711 ; *Lal Mohammad v Emperor*, AIR 1931 Pat 317 .

⁵⁸ *Queen-Empress v Girdhari Lal*, (1886) ILR 8 All 653.

⁵⁹ *Queen-Empress v Haradhan Alias Rakhal Dass Ghosh*, (1892) ILR 19 Cal 380.

[s 25] “Fraudulently”.—

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[s 25] “Fraudulently”.—

A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

[s 25.1] “Fraudulently”

The *Penal Code* does not define the word “fraudulently”. It simply says there can be no fraud unless there was an intention to defraud. Thus, here it makes intention as the genesis of fraud, whereas in the law of contract, fraud is clearly defined.⁶⁰ In general, fraud is used in three different ways, *viz.*,

- (1) To deprive a man of his right, either by obtaining something by deception, or artifice, or by taking something wrongfully without the knowledge or consent of the owner;
- (2) To withhold wrongfully from another what is due to him, or wrongfully to prevent one from detaining what he may justly claim; or
- (3) To defeat or frustrate wrongfully another’s right to property.

However, the section uses the “term” “fraudulently” in the first sense. The word “defraud” has a double meaning; it may or may not imply deprivation of property. Its meaning must be sought by a consideration of the context in which the word “fraudulent” is used. For instance, the word “fraudulently” is used in *sections* 464 and 471, *IPC* together with the word “dishonestly” and presumably in a sense not covered by the latter word. If, however, it be held that “fraudulently” implies deprivation, either actual or intended, then apparently that word would perform no function which could not be fully discharged by the word “dishonestly”, and its use is mere surplusage. So far as such a consideration carries any weight, it obviously inclines in favour of the view that the word “fraudulently” should not be confined to transactions in which deprivation of property constitutes a part.⁶¹ In the words of Sir James Stephen:

[s 25] "Fraudulently".—

...Whenever the words 'fraud', or 'intent to defraud' or 'fraudulently' occur in the definition of a crime, two elements, at least, are essential to the commission of a crime: namely, *first*, deceit or an intention to deceive or, in some cases, mere secrecy; and *secondly*, either actual injury or possible injury or an intent to expose some person either to actual injury or to risk a possible injury, by means of that deceit or secrecy. "This intent," he adds, is very seldom the only or the principal intention entertained by the fraudulent person, whose principal object, is nearly in every case, is his own advantage. A practically conclusive test as to the fraudulent character of a deception for criminal purposes *i.e.*

Did the author of the deceit derive any advantage from it which could not have been had, if the truth had been known? If so, it is hardly possible that, the advantage should not have had an equivalent in loss, or risk of loss to someone else; and if so, there was fraud.⁶²

Dr Vimla: In *Dr Vimla v Delhi Administration*,⁶³ the Supreme Court observed that the expression "defraud" involves two elements, namely, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable, or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a noneconomic or nonpecuniary loss. A benefit or advantage to the deceiver will almost certainly cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied.

Certainly, Dr Vimla was guilty of deceit, for though her name was Vimla, she signed in all the relevant papers as Nalini, and made the insurance company believe that her name was Nalini, but the said deceit did not either secure to her advantage or cause any non-economic loss, or injury to the insurance company. In the result, the appellant was not held guilty of the offence under sections 467 and 468, *IPC* for forgery.

Dr S Dutt: In *Dr S Dutt v State of Uttar Pradesh*, 1966 Cr LJ 459 (SC), the Supreme Court said that a person is said to do a thing fraudulently, if he does that thing with intent to defraud but not otherwise. The last three words "but not otherwise" clearly indicate that the intent must be an "intent to defraud". The words with "intent to defraud" indicate not a bare intent to deceive, but intent to cause a person to act or omit to act, as a result of the deception played upon him, to his disadvantage. This is the most extensive meaning that may be given to the expression "with intent to defraud" in the Code. And the words "but not otherwise" clearly show that the words "intent to defraud" are not synonymous with the words intent to deceive and require some action resulting in some disadvantage which, but for the deception, the person deceived would have avoided.

The word fraudulently has been used in various sections of the Code, viz., offences against public justice (sections 206 to 210, *IPC*), counterfeit coins and stamps (sections 242, 243, 262 and 263) and offences relate to documents and property, marks including electronic records⁶⁴ (sections 463 and 464, *IPC*), etc.

[s 25.2] Dishonestly and Fraudulently

The words "dishonestly" and "fraudulently", although they appear to be very close to each other in meaning and in standard dictionaries the definition of one is synonymous to the other, the two differ in meaning in law. According to the definition given to the word "fraudulently" (section 25), deceit is an essential ingredient of the term fraudulently, whereas it is not required, in case of "dishonestly" (section 24).

Thus, in the case of "dishonestly", there must be a wrongful gain to one party and a wrongful loss to the other. A meets a bullock carrying a box of treasure belonging to B. He drives the bullock towards the road leading to his house in order that he may take the treasure. The act of A is done with dishonest intention since he does it with the object of wrongful gain to himself and wrongful loss to B. But in the case of "fraudulently", the act must be accompanied by deceitful means. For instance, if A produces a false certificate that represents himself as a

[s 25] "Fraudulently".—

graduate of a particular University and seeks permission to appear at the M.A. examination privately, A is said to have acted fraudulently since he has deceived the authorities.⁶⁵

Again, in the case of dishonestly there must be a pecuniary or economic gain or loss, while in fraudulently this is not always so. The elements which constitute an act fraudulent are deceit and intention to deceive and in some cases even mere secrecy. Thus, when there is neither an intention to deceive nor secrecy, the act though dishonest is not fraudulent, as explained in the case of *Dr Vimla v Delhi Administration*, AIR 1963 SC 1572 [[LNIND 1962 SC 397](#)] .

¹ Proceedings of the Legislative Council (1860), p 1261.

⁶⁰ The *Indian Contract Act, 1872, section 16*.

⁶¹ *Queen-Empress v Abbas Ali*, (1897) ILR 25 Cal 512 (FB).

⁶² Per Benerji J, in *Queen-Empress v Muhammad Saeed Khan*, ILR 21 All 113 (115).

⁶³ AIR 1963 SC 1572 [[LNIND 1962 SC 397](#)] : 1963 Supp (1) CR 585 : (1963) 2 Cr LJ 434 . The appellant purchased an Austin 10 Horse Power car in the name of her minor daughter and got the insurance policy transferred in her name. Subsequently, the car met with accidents on two occasions and so the appellant filed two claims against the insurance company. In connection with these claims, she signed the claim forms as Nalini and also the receipts acknowledging the payments of the compensation money as Nalini. On these facts the appellant was prosecuted under *section 467, IPC* for committing fraud. Held, accused not guilty for forgery, because there was neither injury to the Insurance Company nor advantage to the accused.

⁶⁴ *Section 463 of IPC* has been extensively amended to include "Electronic Media" vide First Schedule read with *section 91 of the Information Technology Act, 2000*.

⁶⁵ *Abhayananda Mishra v State of Bihar*, AIR 1961 SC 1698 [[LNIND 1961 SC 202](#)] .

[s 26] “Reason to believe”.—

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[s 26] “Reason to believe”.—

A person is said to have “reason to believe” a thing, if he has sufficient cause to believe that thing but not otherwise.

[s 26.1] “Reason to believe”

The phrase “reason to believe” under section 26 signifies the existence of such facts and circumstances which are sufficient in the ordinary course of nature to believe (the existence of the facts in question) a thing, but not otherwise.

A man cannot be held liable for receiving stolen property under *section 411, IPC*, unless it is proved that there existed sufficient ground to convince a reasonable man that the property with which the person was dealing was stolen property. What is sufficient cause in a given case depends upon the facts and circumstances of each case, such as education, knowledge, intelligence, position and status of the receiver, the time, place and a host of other factors. For instance, if *A* comes to *B* at night under suspicious circumstances and offers to sell a valuable necklace for Rs 10 only, *B*, may not know that the necklace is stolen, but he has sufficient reason to believe that the necklace may be stolen as is apparent from the low price demanded.

¹ Proceedings of the Legislative Council (1860), p 1261.

[s 27] Property in possession of wife, clerk or servant.—

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[s 27] Property in possession of wife, clerk or servant.—

When property is in the possession of a person's wife, clerk or servant, on account of that person, it is in that person's possession within the meaning of this Code.

Explanation.—A person employed temporarily or on a particular occasion in the capacity of a clerk or servant, is a clerk or servant within the meaning of this section.

[s 27.1] "Possession"

The *Penal Code* has done away with the artificial distinction made by the English law between "possession" and "custody" so that what amounts to a mere custody in English law would be deemed to be possession under the Code. The term possession under English law is used as regards the owner, whereas "custody" is used to signify such a relation towards the thing as would constitute possession, if the person having custody had it on his own account.

[s 27.2] Constructive Possession

According to section 27, the property in possession of a wife will be deemed to be in possession of the husband, for all practical purposes. However, this provision will not apply with respect to the possession of a Hindu wife's *stridhan* or ornaments gifted to her or to her exclusive property. The section further provides that a master will be deemed to be in possession of property lying with a servant or clerk having authority to keep the property.

To invoke the provisions of section 27 the conjugal relationship between a husband and wife must be in continuance. If there has been a separation or a divorce, the possession of the property by a wife cannot be deemed to be in possession of her husband. Similarly, a servant or a clerk must be in the service of the master at the material point of time and the possession must be authorised by the master.

[s 27] Property in possession of wife, clerk or servant.—

The possession of a person in cases other than those specified in the section would be his own possession and not of another for whom he might be holding it in trust.

1 Proceedings of the Legislative Council (1860), p 1261.

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[s 28] “Counterfeit”.—

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[s 28] “Counterfeit”.—

A person is said to “counterfeit” who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.

⁶⁶[Explanation 1.—It is not essential to counterfeiting that the imitation should be exact.

Explanation 2.—When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised.]

[s 28.1] “Counterfeit”

Ordinarily counterfeiting implies the idea of an exact imitation, but for the purpose of the *Penal Code* there can be counterfeiting even though the imitation is not exact and there are differences in detail between the original and the imitation, so long as the resemblance is so close that deception may thereby be practised. In other words, the difference between the counterfeit and the original is not limited to a difference existing only by reason of faulty reproduction.⁶⁷ But where the trademark of a company is put on an article belonging to or manufactured by that company, the trademark is not counterfeit even though the article may be very old. The article being genuine there can be no deception since the very element of intention to deceive is lacking.⁶⁸

[s 28.2] Ingredients of “Counterfeit”

The main ingredients of counterfeiting as laid down in *section 28, IPC* are:

- (1) Causing one thing to resemble another thing;
- (2) Intending by means of that resemblance to practise deception;
- (3) Knowing it to be likely that deception will thereby be practised.

Thus, if one thing is made to resemble another thing and the intention is that by such resemblance deception would be practised, or even if there is no intention but it is known to be likely that the resemblance is such that deception will thereby be practised, this is counterfeiting. For instance, if duplicates are made of an original document in such a way that a person might be deceived by the resemblance, the accused will be liable for “counterfeiting” the document.⁶⁹

According to *Explanation 1* to section 28, it is not essential to counterfeiting that the imitation should be exact. *Explanation 2* states that where the resemblance is such that a person might be deceived thereby, it shall be presumed until the contrary is proved, that the person causing one thing to resemble another thing was intending by means of that resemblance to practise deception, or knew it to be likely that deception would thereby be practised.⁷⁰ This explanation lays down a rebuttable presumption where the resemblance is such that a person might be deceived thereby. In such a case the intention or the knowledge is presumed unless the contrary is proved.

The term counterfeit has been used in offences relating to coin and Government stamps occurring in Chapters XII (sections 230-263A) and XVIII (sections 421-424) of the Code.

¹ Proceedings of the Legislative Council (1860), p 1261.

⁶⁶ Subs. by Act 1 of 1889, section 9, for *Explanation*.

⁶⁷ *State of Uttar Pradesh v Hafiz Mohd Ismail*, AIR 1960 SC 669 [[LNIND 1960 SC 29](#)] ; *State of Bombay v Geoffrey Manners and Co*, AIR 1951 Bom 45 [[LNIND 1950 BOM 70](#)] .

⁶⁸ *Dina Nath Kapoor v State*, (1963) 1 Cr LJ 282 ; *Sumat Prasad Jain v Sheojannan Prasad*, AIR 1972 SC 2488 [[LNIND 1972 SC 399](#)] : (1973) 1 SCC 56 [[LNIND 1972 SC 399](#)] : (1973) 1 SCR 1050 [[LNIND 1972 SC 399](#)] : (1973) 2 SCJ 204 : 1972 CAR 417 .

⁶⁹ *Prafulla Kumar Roy*, (1953) 58 Cal WN 96.

⁷⁰ *State of Uttar Pradesh v HM Ismail*, AIR 1960 SC 669 [[LNIND 1960 SC 29](#)] : (1960) 2 SCR 911 [[LNIND 1960 SC 29](#)] : (1961) 1 SCJ 166 : 1960 Cr LJ 1017 . See for facts of the case *section 486, IPC, infra*.

[s 29] “Document”.—

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[s 29] “Document”.—

The word “document” denotes any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter.

Explanation 1.—It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice, or not.

ILLUSTRATIONS

A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.

A cheque upon a banker is a document.

A power-of-attorney is a document.

A map or plan which is intended to be used or which may be used as evidence, is a document.

A writing containing directions or instructions is a document.

Explanation 2.—Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures or marks within the meaning of this section, although the same may not be actually expressed.

ILLUSTRATION

A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words “pay to the holder” or words to that effect had been written over the signature.

[s 29.1] Document

The word "document" is used in section 29 of the Code to denote not the substance upon which human ideas are delineated, but the ideas themselves, as expressed in conventional signs addressed to the eyes. But the mere expression of ideas does not convert a writing into a document, unless the writing was intended to be used or could be used as evidence of that matter. Thus a draft purporting to have been written by a fictitious person charging *B* with murder, the object of the writing being to blackmail, was a "document" though the draft was not to be used as evidence. But the court held that, since it might have been used as evidence it was a document within the meaning of the Code, and since it was a false document, it was a forgery.⁷¹

The term "evidence" is not used here in the sense of admissible or legal evidence as defined in the *Indian Evidence Act, 1872*.⁷² The word "evidence" or the word "evident" only means that which can be seen with the "naked eye". It is not necessarily synonymous with the word "proof".⁷³

¹ Proceedings of the Legislative Council (1860), p 1261.

⁷¹ *Queen v Shafait Ali*, (1868-69) 2 Beng LR (A Cr) 12; *Ramaswami*, ILR (1918) 41 Mad 589 .

⁷² See *Indian Evidence Act, 1872, section 3*. For meaning of Evidence.

⁷³ *Dharmendra Nath Shastri v Rex through Sheoraj Singh*, AIR 1949 All 353 [[LNIND 1948 ALL 53](#)] (355) : ILR (1949) All 619 .

[[s 29A] “Electronic record”.—

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⁷⁴[[s 29A] “Electronic record”.—

The words “electronic record” shall have the meaning assigned to them in clause (t) of sub-section (1) of section 2 of the *Information Technology Act, 2000*.]

New communication system and digital technology have brought dramatic changes in the public life. In other words, a revolution has taken place in all fields including business transactions. With a press of button or a click of mouse one can interact and communicate with persons sitting across the globe and conduct business in a fraction of seconds. This has necessitated the drafting of a new legislation known as the *Information Technology Act, 2000* to provide legal recognition for transaction carried out by means of electronic communication, commonly referred to as “E-commerce” (i.e. “electronic commerce”). The new technology provides for the use of an alternative device to paper based method of documentation and storage of information to facilitate electronic filing of documents in offices, banks, business houses, educational institutions, hospitals and the Government establishments etc. At present, many legal provisions recognise paper based records and documents which should bear signature. Since electronic commerce eliminates the need for paper based transactions there is an urgent need for legal changes to facilitate e-commerce.

Accordingly, keeping in view, the international obligation set out by the United Nations Commission on International Trade Law a number of consequential amendments of the existing provisions as well as additions of new provisions have taken place in the *Indian Penal Code, 1860*, *Indian Evidence Act, 1872*, the *Banker’s Books Evidence Act, 1891* and the *Reserve Bank of India Act, 1934* etc.

Section 29A has been inserted⁷⁵ in the *Penal Code* vide *Information Technology Act, 2000*, to define the term “electronic record” in terms of clauses (t) to sub-section (1) of section 2 of the Act which reads as follows:—

Section 2(1)(t) “electronic record” means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.

1 Proceedings of the Legislative Council (1860), p 1261.

74 Ins. by Act 21 of 2000, section 91 and Sch I (w.e.f. 17-10-2000).

75 Ins. by *Information Technology Act, 2000, section 91*, Sch I.

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[s 30] “Valuable security”.—

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Chapter II of the *Penal Code*, which runs into 47 sections commencing from *sections 6 to 52A, IPC*, is for the most part an elaborate interpretation clause. The leading terms used in the text of the Code have been defined and explained. The purpose of this chapter is to offset ambiguity and to avert the possibility of misinterpretation of the different provisions in the Code.¹

[s 30] “Valuable security”.—

The words “valuable security” denote a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished or released, or where by any person acknowledges that he lies under legal liability, or has not a certain legal right.

ILLUSTRATION

A writes his name on the back of a bill of exchange. As the effect of this endorsement is transfer the right to the bill to any person who may become the lawful holder of it, the endorsement is a “valuable security”.

[s 30.1] Valuable Security

A valuable security is a document of some value. That is to say, a document which of itself creates or extinguishes legal rights, or at least purports to create or extinguish them. If, therefore, the document is executed by a minor or is unstamped, or contains blanks, or does not specify the name of the executer, or the date, or place of execution, or is infected with any other form of invalidity it is, nevertheless, a valuable security, because it purports to be a document.⁷⁶

It may be noted that every document is not a valuable security, though all securities are documents. In other words, “document” is the *genus* of which “valuable security” is a *species*. Only those documents which create, confer, extend, transfer, restrict, extinguish or release any legal right⁷⁷ constitute a valuable security. For instance, an income tax assessment order,⁷⁸ account books⁷⁹ passport,⁸⁰ lottery ticket,⁸¹ etc., which confer legal rights, are a valuable security within the meaning of *section 30 of the Penal Code*.

But documents which confer no legal right are not a valuable security. Accordingly, an acknowledgment of receipt of an insured parcel,⁸² a copy of a lease security,⁸³ a *sanad* (document) conferring a certain dignity upon the grantee,⁸⁴ and account books containing entries not signed by a party,⁸⁵ are not a valuable security.

[s 30] “Valuable security”.—

The words “valuable security” have been used in a number of sections in the *Penal Code*, viz., (i) sections 327 and 329 (voluntarily causing hurt or grievous hurt to extort a valuable security, (ii) sections 347-348 (wrongful confinement to extort a property or confession etc.), (iii) section 420 (cheating and thereby inducing the person dishonestly to deliver a valuable security), (i) section 467 (forgery of a valuable security) and (ii) section 477 (fraudulent cancellation or destruction of a valuable security).

1 Proceedings of the Legislative Council (1860), p 1261.

76 ILR 12 Mad 148.

77 See *Salmond on Jurisprudence*, 12th Edn, (1966) pp 217-232, for meaning of “legal right”.

78 *Ishwar Lal Girdhari Lal Parekh v State of Maharashtra*, AIR 1969 SC 40 [[LNIND 1968 SC 143](#)] .

79 *Kizhakkeppallikl Moosa v State*, AIR 1963 Ker 68 .

80 *Daniel Hailey Walcott v State*, AIR 1968 Mad 349 [[LNIND 1967 MAD 140](#)] .

81 *Chacko*, (1970) Ker LT 358 .

82 *Sadholal v Emperor*, AIR 1917 Pat 699 : 1 Pat LJR 391 : 34 IC 992 : 17 Cr LJ 272.

83 *Naro Gopal*, (1868) 5 BHC (Cr C) 56.

84 *Jan Mahomed*, (1884) 10 Cal 584 .

85 *Hari Prasad v State*, 1953 Cr LJ 1964 .

[s 31] “A will”.—

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[s 31] “A will”.—

The words “a will” denote any testamentary document.

[s 31.1] “Will” – Meaning

A “Will” is the legal declaration of a person as to how his property will be disposed of, after his death. The provisions relating to a “Will” have been codified in the *Indian Succession Act, 1925*.⁸⁶ The “Will” becomes operative only after the death of the man who makes it, and as such it is revocable by its author, i.e., the person making it at any time during his life.

¹ Proceedings of the Legislative Council (1860), p 1261.

⁸⁶ The *Indian Succession Act, 1925*, section 2(h): “Will” means the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death.

[s 32] Words referring to acts include illegal omissions.—

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[s 32] Words referring to acts include illegal omissions.—

In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.

[s 32.1] Act – Meaning and Scope

In common language, the term “an act” means a positive act, i.e., something done voluntarily by a human being. For instance, speaking, walking, writing or doing anything that amounts to an act. If the “act” is involuntary and against the will of the doer, it is not an act of a person. It will be termed as an act done under coercion or threat for which the person may not be liable as specified in section 94 of the Penal Codes discussed in Chapter IV.

[s 32.2] “Act” “Includes Illegal Omissions”

The scope of an “act” under *section 32, IPC* is widened to include “illegal omissions” when the law imposes an obligation on the part of a father, or a husband to provide food, clothing, shelter and medical aid to his children, aged parents and wife respectively. If he omits to fulfil the statutory obligation as laid down in *section 125⁸⁷* of the *Criminal Procedure Code, 1973*, he is liable in law. This is based on the principle that omission to discharge statutory obligation is actionable.⁵ An important feature of *section 125, CrPC* is that it casts duty on the part of both son and daughter alike to maintain parents (father and mother), if they are not able to maintain themselves. In *Vijay Manohar*,⁸⁸ rejecting the appellant’s contention that only “son” and not “daughter” is burdened with the obligation to maintain his parents, the Apex Court said:

Section 125(1)(d)⁸⁹ has imposed a liability on both the son and daughter to maintain their father or mother who is unable to maintain himself or herself. The legislature in enacting *CrPC, 1973* thought it wise to provide for the maintenance of the parents of a person when such parents are unable to maintain themselves. The purpose of such enactment is to enforce social obligation and we do not think why daughter should be excluded from such obligation to maintain their parents.

[s 32] Words referring to acts include illegal omissions.—

Om Prakash: Similarly, in *Om Prakash v State of Punjab*, AIR 1961 SC 1782 [[LNIND 1961 SC 201](#)]⁹⁰ the Supreme Court of India held the appellant husband liable under *section 307, IPC* for attempt to commit murder of his wife, Bimla Devi, by deliberately and systematically starving her for days together by depriving her of the food necessary for human existence. The act amounts to intentional act of attempt to murder.

Likewise, if a person, who is legally bound to produce a document before a court (*section 175, IPC*), to furnish certain information to a public servant (*section 176, IPC*), or to assist a public servant when bound by law to give assistance (*section 187, IPC*) illegally omits to do so, he commits an offence and is liable to prosecution.⁹¹ However, omission in general is not punishable unless made so by a statute. For instance, if A sees a child drowning in a tank, in the absence of any relationship between A and the child, he is guilty of no offence if he allows the child to die.

R v Nursing, (2013) 1 All ER 1139 : Ill-treatment or neglect of person lacking capacity. This is an appeal against conviction by Ligaya Nursing who, on 15 May was convicted of neglect of a person who lacked capacity, contrary to section 44 of the Mental Capacity Act, 2005.

(2) The appellant was a trained mental health nurse with a general nursing qualification, and for many years she and her husband ran a care home until it closed in the early 1990s.

(3) Miss Peggy Gill was born in 1931. A lady with a significant learning disability, she was resident in the care home run by the Nursings from 1987 until it closed. She then went to live at the property owned by the Nursings at 68 Portsmouth Road, Woolston where some of the rooms were rented out. Miss Gill occupied an annex at the top of the house. While she lived there she was plainly in need of care. This was provided by the appellant. Miss Gill's learning disabilities meant that her brain functioned at the level of a child between five and nine years' old, or on a different view, at the level of about a seven-year-old child.

While allowing the appeal against conviction court of appeal held the purpose of section 44 of the Mental Capacity Act, 2005, which provides in sub-sections (1)(a) and (2), that if a person (D) has the care of a person (P) who lacks, or whom D reasonably believes to lack, capacity D is guilty of an offence if he ill-treats or wilfully neglects P, is clear. Those who are in need of care are entitled to protection against ill-treatment or wilful neglect. Ill-treatment and wilful neglect within section 44 are distinct offences. The question whether those in need of care have been so neglected must be examined in the context of sections 1, 2 and 3 of the Mental Capacity Act, 2005, which provide that, to the greatest extent possible, their autonomy should be respected. The evidential difficulties when the offence of neglect is charged do not make it legally uncertain. Section 44 makes it an offence for an individual responsible for the care of someone who lacks the capacity to care for himself to ill-treat or wilfully to neglect that person. Those in care who still enjoy some level of capacity for making their own decisions are entitled to be protected from wilful neglect which impacts on the areas of their lives over which they lack capacity. However, section 44 does not create an absolute offence; actions or omissions, or a combination of both, which reflect or are believed to reflect the protected autonomy of the individual do not constitute wilful neglect.

Irving Pulp: In *Irving Pulp & Paper Ltd v CEP, Local 30 Communications, Energy and Paper Works Union of Canada, Local 30*, it was held that random workplace alcohol testing is not legal.

Union and employer were parties to collective agreement concerning workmen at employer's paper mill, dangerous workplace. Collective agreement was silent as to availability of drug and alcohol testing in workplace, purporting to rely upon management rights clause and workplace health and safety standards, employer unilaterally instituted mandatory random alcohol testing for workers in safety-sensitive positions. Union objected testing policy.

[s 32] Words referring to acts include illegal omissions.—

Grievance was upheld by Labour Arbitration Board holding that employer could not unilaterally impose random testing absent evidence of serious problem with workplace alcohol use.

Employer brought application for judicial review. Application was granted. Applications' judge holding that while standard of review was reasonableness, decision was unreasonable as on balance employer was entitled to protect workplace safety in dangerous industry. Union's appeal was dismissed and Union appealed to Supreme Court of Canada.

While allowing the appeal Supreme Court of Canada reinstate decision of Board. Impugned Board decision essentially imported test for random alcohol testing of individual employees into group context. That test for individuals was supported by authority, and held that absent cause such as reasonable suspicion of impairment or recent substance abuse treatment, random testing constitutes undue invasion of worker privacy.

[s 32.3] Breach of Duty of Care: *R v Adomako*

In *R v Adomako* (*John Asare*), [\(1995\) 1 AC 171](#) (HL), House of Lords held that Involuntary and Reckless Manslaughter by Gross Negligence of an Anaesthetist is punishable.

In cases involving involuntary manslaughter by breach of a duty of care the relevant questions are:

whether there existed a duty of care,

- (i) whether there had been a breach of that duty,
- (ii) whether the breach had caused the death and, if so,
- (iii) whether the breach should be characterised as gross negligence and a crime.

Held, it is for a jury to decide whether the accused's acts were so bad that in all the circumstances they amounted to a crime. It is not necessary for a judge to refer to the test of recklessness.

D was acting as an anaesthetist during an operation when a tube from the ventilator came free, causing the death of the patient. *D* was convicted of manslaughter and his appeal dismissed by the court of Appeal.

While dismissing *D*'s appeal the House of Lords held that the question whether *D*'s acts of omissions were so bad as to be criminal having regard to the risk of death involved was one for the jury and it was not appropriate to interfere with their decision.

[s 32.4] Death by failure to perform duty is punishable Instant

In common law a person is criminally liable for failure to perform any duty imposed by law. In *R v Instan*, (1893) 1 QB 450, the accused lived with her aunt aged 73. The aunt was suffering from a disease and during the last ten days of her life was supplied neither food nor medical attendance by the accused, whereby her death was accelerated. While holding the accused liable for manslaughter (culpable homicide), the court held that if a person dies in consequences of another person's willful failure to perform a legal duty recognised by criminal law, such other person is liable for accelerating the death of the deceased owing to the non-performance of that duty.

[s 32] Words referring to acts include illegal omissions.—

Similarly, the Supreme Court of the state of Virginia (United State) in *Davis v Commonwealth*, (1897) 42 Law Ed 71, affirmed the sentence of 10 years of imprisonment awarded by the trial court to the accused, Mary B. Davis, who caused the death of her mother, Emily B. Carter, as a result of failure to provide her with heat, food, liquids and other necessities of life. The court held that the accused's breach of duty was so gross and wanton as to show a callous and reckless disregard to Carter's life, and that Davis's criminal negligence proximately caused Carter's death.

O'conor: In *R v O'conor*, (1985) 230 Va 201 : SE 2d. 375,⁹² a man living apart from his wife and earning wages, did not send money to his wife. His children living with the wife were partly supported by an aunt. Held, the omission on the husband's part to send any money for the children was wilful neglect within section 1 of the Prevention of Cruelty to Children Act, 1904.

**[s 32.5] Dentist's refusal to treat HIV patient amounts to Breach of duty resulting in discrimination:
*Brogden v Abbot***

Refusal by the petitioner Dentist Brogden to fill cavities of an HIV infected (Respondent) patient Abbot at his office amounted to discrimination under 42 USCS section 12182 of the Americans with Disabilities Act, 1990. Case Remanded for findings as to whether treatment amounted to health risk to dentist who refused patient in office treatment. US Supreme Court – 5 to 4.

Respondent Abbot was infected with human immunodeficiency virus (HIV). Petitioner dentist informed respondent of his policy against filling cavities of HIV infected patients at his office. Respondent sued petitioner under 42 USCS § 12182 of the Americans with Disabilities Act, 1990 (ADA). After discovery, the parties filed cross-motions for summary judgment. The judgment of the trial court, which ruled in favor of respondent, was affirmed by the court of Appeal. The human immunodeficiency virus (HIV) has been identified as the cause of acquired immune deficiency syndrome (AIDS). HIV infection progresses in:

- (1) an initial stage of acute or primary infection;
- (2) a so-called asymptomatic phase, in which the virus tends to concentrate in the lymph nodes; and
- (3) asymptomatic stage.

The woman respondent whose HIV infection was in the asymptomatic phase went to the petitioner – a dentist's office for a dental examination and disclosed her infection. The dentist discovered a cavity and informed the woman of his policy against filling cavities of HIV-infected patients in his office. The dentist offered to perform the work at a hospital at no extra charge, though the woman would have had to pay for use of the hospital's facilities.

The woman declined and filed suit against the dentist in the United States District Court for the District of Maine, in which suit it was alleged, among other matters, that:

- (1) the dentist had violated a provision of the Americans with Disabilities Act of 1990 (ADA) [42 USCS 12182(a)] which prohibits discrimination against any individual on the basis of disability in the enjoyment of the services of any place of public accommodation; and

[s 32] Words referring to acts include illegal omissions.—

- (2) the woman's HIV infection had deterred her from having children and thus (a) substantially limited her "major life activity" of reproduction, and (b) came within the definition of "disability" for purposes of an ADA provision [42 USCS 12102(2)(A)].

The dentist claimed that his refusal of in-office treatment was covered by another ADA provision [42 USCS 12182(b)(3)] under which an individual need not be permitted to participate in or benefit from public accommodations where such individual poses a direct threat to the health or safety of others.

The District Court, in granting the woman summary judgment, concluded that:

- (1) the woman's asymptomatic HIV infection was a disability under the ADA, and
- (2) treating her in the dentist's office would not have posed a direct threat to the health and safety of others (912 F Supp 580 : US Distt LEXIS 19312).

The United States Court of Appeals for the First Circuit affirmed:

The judgment of the court below, which affirmed a trial court's grant of summary judgment in favour of respondent in a suit alleging discrimination on the basis of her HIV disability under the Americans with Disabilities Act of 1990 (ADA), was affirmed insofar as it determined that respondent's HIV was a disability under the ADA. However, the judgment was vacated and remanded for a redetermination on the issue of dental treatment risk.

On *certiorari*, the United States Supreme Court vacated the Court of Appeals' judgment and remanded the case for further proceedings. In an opinion by Kennedy J, joined by Stevens, Souter, Ginsburg, and Breyer JJ, it was held that:

- (1) the woman's HIV infection even in the so-called asymptomatic phase, was a disability under 12102(2)(A), because the infection was an impairment which substantially limited the major life activity of reproduction; but
- (2) remand was necessary because, although there were reasons to doubt whether the dentist had advanced sufficient evidence on the question of risk to the health and safety of others:
 - (a) the Court of Appeals, in determining as a matter "of law that the woman's infection posed no direct threat to the dentist's health and safety, might have placed mistaken reliance on various items of evidence; and
 - (b) the Supreme Court, in accepting the case for review, had declined to grant *certiorari* on the question whether the dentist had raised a genuine issue of fact for trial, with the result that the briefs and arguments presented to the Supreme Court did not concentrate on the question of sufficiency of evidence.

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- 1** Proceedings of the Legislative Council (1860), p 1261.
- 87** *Criminal Procedure Code* (1973), Chapter IX, sections 125 to 128 provide for maintenance of wife, children and parents. See Supreme Court's decision in *Mohd. Ahmed Khan v Shah Bano Begam*, AIR 1985 SC 945 [\[LNIND 1985 SC 145\]](#). The Court held that a Muslim husband is liable to maintain the wife on divorce so long as she has not married as in case of members of other communities. However, the Parliament amended the law exempting Muslims from the purview of section 125 CrPC, 1973 nullifying the effect of the judgment, because of resistance of Muslims.
- Do you approve of the *Muslim Women (Protection of Rights on Divorce) Act, 1986* which has overruled *Shah Bano's* case and held that section 125 CrPC, 1973 is not applicable in the case of Muslim women for maintenance on divorce? See Krishnan Iyer, VR, the *Shah Bano* case, *the Constitution and the Court*, (1986) 13(1) Indian Bar Review, pp 1-21; *Sirajmohmed Jan Mohamad Khan v Hafizunnisa Yasin Khan*, AIR 1981 SC 1972 [\[LNIND 1981 SC 384\]](#) : (1981) 4 SCC 250 [\[LNIND 1981 SC 384\]](#) : 1981 CAR 339 .
- 88** *Vijay Manohar v Kashi Rao Raja Rao*, AIR 1987 SC 1100 [\[LNIND 1987 SC 200\]](#) : (1987) Cr LJ 977 (SC) : (1987) 2 SCC 278 [\[LNIND 1987 SC 200\]](#) : 1987 CLR 281 (SC).
- 89** *CrPC, 1973, section 125(1)(d)*; If any person having sufficient means neglects or refuses to maintain... (d) his father or mother unable to maintain himself or herself." a Magistrate... may... order ... to make a monthly allowance."
- 90** The appellant and his wife's relations were strained; she was deliberately starved and was not allowed to leave the house and only sometimes a morsel of bread or grass husk mixed in water after five or six days used to be given. Her condition deteriorated to such an extent that she was reduced to a skeleton. One day, she found her room unlocked and her husband and mother-in-law away from the house. Availing of this opportunity, she went out of the house and managed to reach to Civil Hospital, Ludhiana, where she met a Lady Doctor and told her of her sufferings. The Lady Doctor found her condition very critical and reported the matter to the police for initiation of prosecutions of the accused.
- 91** *Ramaya Naika*, (1903) ILR 26 Mad 419.
- 92** See *George E Dix and M Mihall Sharlot, Criminal Law Cases and Materials* 1987, pp 180-186. See *Pierce v Commonwealth*, 135 Va 635 (1935). Held, when a death results from an omission to perform a legal duty, the man is liable to culpable homicide, if the death results from a malicious omission of the performance of a duty, the offence is murder. See *Om Prakash v State of Punjab*, AIR 1961 SC 1782 [\[LNIND 1961 SC 201\]](#) : (1962) 2 SCR 254 [\[LNIND 1961 SC 201\]](#) : (1961) 2 Cr LJ 848 : 1962 (1) SCJ 189 .

[s 33] “Act”, “Omission”.—

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[s 33] “Act”, “Omission”.—

The word “act” denotes as well a series of acts as a single act : the word “omission” denotes as well a series of omissions as a single omission.

The *Penal Code* has not defined the word “act”. Accordingly, the word “act” is to be interpreted in the light of its general meaning, as laid down by Murphy J, in *Bhogi Lal Chimanlal v Nanavati*:

... It must necessarily be something short of a transaction which is composed of a series of acts, but cannot, I think, in the ordinary language be restricted to every separate willed movement of a human being, for when we speak of an act of shooting or stabbing, we mean the action taken as a whole and not the numerous separate movements involved.⁹³

The word “act” does not mean only any particular, specific, instantaneous act of a person but denotes, according to section 33 of the Code, as well a series of Act.

Thus, where more than one “act” is done in succession and these are closely connected with each other, they are not to be separated from each other, with one intention assigned to one and another intention to the other. For example, if a person gives 10 slaps to another, he will not be punished for 10 slaps separately; the slaps will be treated as one “act” for the purposes of punishment.

¹ Proceedings of the Legislative Council (1860), p 1261.

[s 33] “Act”, “Omission”.—

93 *Emperor v Bhogilal Chimanlal Nanavati*, AIR 1931 Bom 409 : (1931) 33 Bom LR 648 .

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[[s 34] Acts done by several persons in furtherance of common intention.—

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⁹⁴[[s 34] Acts done by several persons in furtherance of common intention.—

When a *criminal act* is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.]

[s 34.1] Object

Section 34 is intended to meet a case in which it may be difficult to distinguish between *criminal act* of individual members of a party, who act in furtherance of a common intention of all, or to prove exactly what part was taken by each of them. The reason why all are deemed guilty in such cases is that the presence of an accomplice (or accomplices) gives encouragement, support, protection and confidence to a person actually engaged in the commission of an illegal act. Accordingly, every person engaged in the commission of a crime is held responsible by virtue of his or her participation in the *criminal act*, even if the particular act in question was not performed by the one or the other member of the group.⁹⁵

The law relating to group liability (also termed as joint liability, constructive liability or vicarious liability) has been elaborately dealt with in sections 34 to 38, 120A, 121A, 149, 396 and 460 of the Code.⁹⁶ These provisions may be broadly classified into five categories, viz.—

- (1) Where the *criminal act* is done with the common intention of the group (sections 34 to 38);
- (2) Where the offence is committed with the common object of an unlawful assembly (section 149);
- (3) Where the persons are charged of a criminal conspiracy (sections 120A and 121A);
- (4) Where five or more persons conjointly in the commission of dacoity commit murder (section 396); and
- (5) Where persons are jointly concerned in committing the offence of lurking house-trespass or house-breaking by night (section 460).

[[s 34] Acts done by several persons in furtherance of common intention.—

[s 34.2] Principle

Section 34 of the Penal Code creates no specific offence. It only lays down a rule of evidence that if two or more persons commit a crime in furtherance of a common intention, each of them will be liable jointly on the principle of group (or joint) liability. Thus if two or more persons commit an illegal act conjointly, it is the same as if each of them had done the act separately and each will be liable constructively for the act in the same manner as if it were done by him alone.

In 1870, by the *IPC (Amendment) Act 27 of 1870*, section 34 was amended by the insertion of the words “in furtherance of the common intention of all”, so as to make the object of the section clear. The original section 34 was as follows:

When a *criminal act* is done by several persons each of such person is liable for that act in the same manner as if the act was done by him alone.

Section 34 incorporates the common sense principle of joint liability laid down in the case of *Reg v Cruse*,^{1838 C&P 541}.⁹⁷ A police constable along with his assistants went to A's house in order to arrest him. On seeing the police constable, B, C, D and others came out of the house, gave him a blow and drove off the constable and his assistants. The court evolved the doctrine of joint liability and held that each of the members of the group B, C and D were equally responsible for the blow, whether one actually struck it or not.

[s 34.3] Ingredients of section 34

To attract the application of section 34, the following three conditions must exist, viz.,

- (1) A *criminal act* must be done by several persons;
- (2) There must be a common intention of all to commit that *criminal act*;
- (3) There must be participation of all in the commission of the offence in furtherance of that common intention.⁹⁸

[s 34.3.1] Criminal act done by several persons

Section 34 is to be read along with the preceding section 33 which makes it clear that the “act” spoken of in section 34 includes a series of acts as a single act. It follows that the words “when a *criminal act* is done by several persons” in section 34, may be construed to mean “when criminal acts are done by several persons”. The acts committed by different confederates in the criminal action may be different, but all must in one way or the other participate and engage in the criminal enterprise. For instance, one may only stand as a guard to prevent a person coming to the relief of the victim, or may otherwise facilitate the execution of the common design. Such a person also commits an “act” as much as his co-participants actually committing the planned crime. In the case of an offence involving physical violence, however, it is essential for the application of section 34 that the person who instigates or aids in the commission of the crime, must be physically present at the actual scene of the crime for the purposes of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those, who in one way or the other facilitate the execution of the common design, is itself tantamount to actual participation in the *criminal act*. The essence of section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed on the spot and thereby intended by all those present.⁹⁹

[[s 34] Acts done by several persons in furtherance of common intention.—

[s 34.3.2] Common intention

The essence of joint liability under section 34 lies in the existence of a common intention to do a *criminal act* in furtherance of the common objective of all the members of the group. The word “common intention” implies a prior concert, that is, a prior meeting of minds and participation of all the members of the group in the execution of that plan.¹⁰⁰ The acts done by each of the participants may differ and may vary in character, but they must be actuated by the same common intention. *A*, an accused along with two other co-accused, *B* and *C*, proceeded to *D*’s house in order to avenge an insult by the brother of *D*. They opened fire on the members of *D*’s family. It was found that the shots of *A* did not hit anyone, but the shots of *B* and *C* succeeded in killing *D*. Since the Act of firing was done in furtherance of the common intention of the group to take revenge, *A* is as much liable for the offence of murder as are *B* and *C*.

In the absence of common intention the criminal liability of the members of the group might differ according to the degree and mode of the individual’s participation in the act. For instance, where *X*, *Y* and *Z*, with the intention of assaulting *A*, give him a beating during the course of which *X*, who had previous enmity with *A* stabs him in the abdomen resulting in *A*’s death, the act of stabbing is not done in furtherance of the common intention of the group. The common intention in this case was merely to inflict simple hurt. Hence, *Y* and *Z* would be liable for causing simple hurt (section 323, *IPC*) only, but *X* for causing murder of *A* under section 302, *IPC*.

The plan to execute a crime need not be elaborate, nor is a particular interval of time required for the purpose. The scheme may be chalked out suddenly, but all the members must consent to it. In other words, there must be a prior concert among the members of the group in regard to the design in question, so that each of them is aware of the act to be committed.

Barendra Kumar Ghosh: In *Barendra Kumar Ghosh v King Emperor*, AIR 1925 PC 1 [[LNIND 1924 BOM 206](#)],¹⁰¹ the appellant was charged and convicted under section 302 read with section 34, *IPC* with the murder of a Sub-Postmaster. The appellant’s contention that he was the man outside the room, and not the man who fired the fatal shot, and so not liable for murder, was rejected by the court. While refusing the appellant’s claim, the Privy Council said that, even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things, “they also serve who only stand and wait”. Lord Sumner speaking through the court stated that:

Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself; for “that act” and “the act” in the latter part of the section must include the whole section covered by a *criminal act* “in the first part because they refer to it”.¹⁰²

Mahboob Shah: In *Mahboob Shah v Emperor*, AIR 1943 PC 118, the appellant was charged for murder under section 302 read with section 34, *IPC*. The facts, in brief are as follows:

Allah Dad, the deceased, and a few others were going to the Indus river in a native boat to cut and collect reeds on the banks of the river. When they had travelled a mile downstream, they saw Mohammad Shah, the father of Wali Shah (who absconded and was never caught) bathing on the bank of the river. Mohammad Shah warned them against collecting reeds from land belonging to him. Allah Dad, in spite of this protest, collected reeds from that property. While placing them in the boat, he was accosted by one Qasim Shah, the nephew of Mohammad Shah, who tried to remove the reeds from the boat. He then caught the rope of the boat and pushed Allah Dad, whereupon the latter picked up the bamboo pole used for propelling the boat, about 10 feet long and six inches thick, and struck Qasim Shah. Qasim Shah shouted for help. Whereupon Wali Shah and Mahboob Shah appeared on the scene with loaded guns. On seeing them, Allah Dad and his friend, Hamidullah, tried to escape by running. But they were prevented from doing so

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by Wali Shah and Mahboob Shah. Wali Shah fired at Allah Dad who died almost instantly. Mahboob Shah fired at Hamidullah causing him slight injuries.

The trial court sentenced Mahboob Shah to seven years rigorous imprisonment for attempt to murder. But on appeal, the Lahore High Court convicted him also for murder under *section 302* read with *section 34* of the *Penal Code* for murder of Allah Dad and sentenced him to death. Wali Shah, the real culprit, was absconding. Mahboob Shah went in appeal to the Privy Council against the conviction and the sentence of death passed against him by the Lahore High Court for the murder of Allah Dad.

Their Lordships of the Privy Council allowed the appeal and set aside his conviction for murder since there was no evidence and there were no circumstances from which it might be inferred that the appellant must have been acting in concert with Wali Shah in pursuance of a concerted plan, when he rushed with him to the rescue of Ghulam Qasim.

Sir Madhavan Nair, while delivering the judgment of the Privy Council observed that:

To invoke the aid of section 34 successfully, it must be shown that the *criminal act* complained against was done by one of the accused persons in furtherance of the common intention of all; if this is shown, the liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section, it should be proved that the *criminal act* was done in concert pursuant to the pre-arranged plan.¹⁰³

Kripal Singh: In *Kripal Singh v State of Uttar Pradesh*, AIR 1954 SC 706, the Supreme Court held that a common intention may develop on the spot after the offenders have gathered there. A previous plan is not necessary. Common intention can be inferred from the conduct of the accused and the circumstances of the case. In the present case three accused, A, B and C were charged under *sections 302* read with *section 34* of the *Penal Code* for murder.

There was a long-standing dispute over land between the accused and the deceased X. One morning the accused, while working in their field saw two labourers going to the field of X to work there. The accused shouted at them not to do so, but the labourers paid no heed and walked on. Thereupon the accused rushed at them and began belabouring them with the handles of their spears. Meanwhile, X arrived and intervened and the accused attacked him. First B and C attacked him on his legs and he fell down. Then A stabbed X in the head with his spear. He then put his leg on X's chest to extract the spear blade which had stuck in X's jaw. The blow had gone through the skull and injured the brain, so that X died on the spot.

So far as A was concerned, the court held that the blow was given with deliberate intention on the head of a fallen and helpless man lying on the ground, and was given with such force as to penetrate the skull with a sharp and pointed instrument. Accordingly, conviction under *section 302, IPC* and sentence of death were maintained.

As regards B and C, the court observed that, in view of the circumstances of the case, it could not be said that what developed between all the accused on the spot was a common intention to kill X. The only common intention that could be attributed to them was the intention to beat X with weapons which were likely to produce grievous injuries. Therefore, they were not guilty under section 302 read with section 34. But even though the

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injuries they themselves had caused were simple, they were guilty under sections 326 read with section 34 because of the common intention of all to attack X with sharp cutting weapons.

Rishi Deo Pandey: In *Rishi Deo Pandey v State of Uttar Pradesh*, AIR 1955 SC 331 : 1955 Cr LJ 873, two accused A and B who were brothers, were seen standing near the cot of the victim who was sleeping. A, armed with a *gandasa* and B, with a *lathi*, when a hue and cry was raised the two ran together. The medical evidence showed that the deceased died of an incised wound on the neck, which was necessarily fatal. The Supreme Court held that the Court of Sessions was justified in coming to the conclusion that B shared with A the common intention to cause death and there was no reason to interfere with the conviction under sections 302 read with section 34, IPC.

Sheoram Singh: In *Sheoram Singh v State of Uttar Pradesh*,¹⁰⁴ the Supreme Court held that common intention may develop suddenly during the course of an occurrence, but still unless there is cogent evidence and clear proof of such common intention, an accused cannot be vicariously held guilty under section 34, IPC.

Khacheru Singh: Common intention can be proved from the circumstances of a case which illuminate the state of mind of the accused. In *Khacheru Singh v State of Uttar Pradesh*, AIR 1956 SC 546, several persons attacked a man with *lathis* when he was passing through a field. The man eluded them and they gave chase; on overtaking him they once again attacked him. Held, these facts were sufficient to prove that the accused had been actuated with the common intention to assault the victim. Conviction under section 326 read with section 34 was sustained.

[s 34.3.3] Participation in the *Criminal Act* – Harbans Kaur

The participation in the *criminal act* of a group is a condition precedent in order to fix joint liability. And there must be some overt act indicative of a common intention to commit an offence in order to sustain a conviction with the aid of section 34. In *Zabar Singh v State of Uttar Pradesh*, AIR 1957 SC 465 : 1957 Cr LJ 581, the Supreme Court held that for application of section 34, it is essential that the court find that the accused shared with others a common intention to commit a crime and participated in its commission. If there is no clear and acceptable evidence on record of circumstances from which a previous concert between him and other persons, known or unknown, and his participation in a joint *criminal act* can be reasonably inferred, conviction with the aid of section 34 is not justified.

In view of the fact that, though the prosecution case was that A had fired the fatal shot, the High Court did not come to the finding that A had fired it, and that in view of the omission in the dying declaration of the names of B and C, they were acquitted because there was an element of doubt as to whether they were the associates of the man who fired the fatal shot, and that there was nothing on record to show that A participated in the offence in any other manner, the conviction of A also could not be sustained and he had to be set at liberty.

The law requires that the accused must be present on the spot during the occurrence of a crime and take part in its commission. For instance, the Supreme Court in *Prabhu Babaji Navle v State of Bombay*, AIR 1956 SC 51 : 1956 Cr LJ 147, held that mere presence or rushing to the spot at the time of occurrence, in the absence of any other evidence as to conduct, does not suffice as part of common intention to participate in the crime.

Jumman: In *Jumman v State of Punjab*, AIR 1957 SC 469 : 1957 Cr LJ 586, the court went on to hold that the mere presence of a person armed with a deadly weapon at the spot of a crime does not necessarily make him a participator in a joint crime in every case, because for the purpose of section 34 only such presence makes a man a participant in a joint crime as is established to be with the intention of lending weight to the commission of a joint crime.

In the present case on appeal, the Supreme Court acquitted all the accused, against whom the only evidence was that they were present on the spot armed with lathis, and observed that the mere fact that an accused was

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proved to have been carrying a lethal weapon and was present on the spot when the fight took place, did not establish a common intention to commit murder or any other offence. Carrying of a weapon under these circumstances might well be ascribed to a natural desire to protect oneself in case of trouble.

Although the law requires the presence of the accused on the spot of the occurrence of a crime, the accused need not be physically present at the actual place of crime; he might remain in the vicinity ready to help and warn his fellow criminals about the approach of danger or to assist them in any other way.¹⁰⁵ In crimes, such as forgery, deceit, conspiracy, etc. in which the offences are of diverse nature and might be committed at different times and places, the persons might not be required to be physically present at the actual place of the occurrence.¹⁰⁶

[s 34.3.4] Mere Presence of accused not indicative of common intention: Sahrunnisa

In *State of Uttar Pradesh v Sahrunnisa*,¹⁰⁷ (2009), the state of Uttar Pradesh went in appeal before the Apex Court against the acquittal of the two respondents (accused Nos. 3 and 4) by the High Court against their convictions under sections 300, 302 read with section 34, IPC by Session Court.

The present case is one such dreadful and hair-raising example of superstition committed in the name of “*Peer Paigamber*”, wherein two innocent boys aged 7 and 4 years lost their precious lives while the third barely escaped death. The accused claimed that two boys were killed by way of sacrifice and that they would regain their lives. Very unfortunately, in all this, the father *Abdul Hafez Khan* (accused 1) and *Shakila Bano* (accused 2), his daughter, the paternal aunt of the unfortunate boys were involved, while their own mother (accused 3) and Siraj Khan (accused 4, husband of the accused 2) had to remain as a mute spectator to this gruesome act of cruelty.

The Sessions Judge found all the accused guilty for offences under section 302 read with section 34, IPC and also under section 307 read with section 34, IPC and sentenced them to imprisonment for life and imprisonment for three years under section 307, IPC read with section 34, IPC for attempt to murder.

On appeal, the High Court confirmed the conviction and sentence of the two accused namely A1 and A2. However, the High Court acquitted A3, Sahrunnisa and A4, Siraj Khan giving them benefit of doubt.

Dismissing the appeal the Apex Court while refuting the state's claim of involvement of respondents in the gruesome acts of murder in which these two respondents were present, said their presence by itself cannot be of criminal nature in the sense that by their mere presence a common intention can be attributed to them. Indeed, they have not done anything. No overt act is attributed to them.

The case of *Sahrunnisa* (A3) is one of a Mohammedan lady, whose husband and daughter were overpowered by the superstitious belief. The force of the superstition was so overpowering that A1 and A2 probably were convinced of the non-existent supernatural powers of A2. A poor Mohammedan lady coming from the humble background, whose husband and daughter claimed these powers could not have ordinarily opposed which was being done and, therefore, had to see with open eyes the death of her two sons. Her act of not opposing the gruesome acts does not speak in favour of her nurturing the common intention.

The High Court was undoubtedly right that she could be afraid of A1 and A2 as she herself might be under the superstitious psyche. By their mere presence, common intention cannot be attributed to them. Conduct of wife of main accused in not opposing gruesome acts could be due to superstitious psyche—Acquittal of respondents is proper.

[s 34.3.5] Test for conviction under section 34

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Section 34 can be invoked even in those cases where some of the co-accused may be acquitted, provided it can be proved either by direct evidence or inference that the accused and others have committed an offence in pursuance of a common intention of the group.¹⁰⁸ For instance, in *Wasim Khan v State of Uttar Pradesh*,¹⁰⁹ it was held that a single accused could also be convicted by reason of the application of section 34, if it were established beyond doubt that such an accused shared the common intention to commit the offence with some person other than the one who was acquitted.

In the present case, three accused persons who had been jointly tried before a Sessions Court were found guilty under *section 302* read with *section 34, IPC*. On appeal, the High Court acquitted two of them by giving them the benefit of doubt as to their identity, but it confirmed the conviction of the remaining accused because, after carefully considering the evidence, it was satisfied that his identity was clearly established and that he had committed the offence jointly with two other unidentified persons. Held, that there was no illegality in such a conviction.

Bharwad Mepa Dana: In *Bharwad Mepa Dana v State of Bombay*,¹¹⁰ the Supreme Court held that where some of the accused charged at a joint trial under section 34 were acquitted, the test for determining whether the remaining accused, whether one or more, could be convicted under section 34 is this—Did the remaining accused share a common intention to commit a crime only? Did they participate in the commission of a crime? If on the evidence on record such intention and participation are established, there is nothing illegal in their conviction under *section 34, IPC*.

[s 34.3.5.1] Involvement of co-accused attracts section 34, IPC: Aqeela

In *Uttar Pradesh v Smt. Aqeela*,¹¹¹ the circumstance that accused Smt. Aqeela was fat and heavy lady, the circumstances that she bore enmity with the deceased inasmuch as that she was fighting a case under *sections 107* read with *section 116, CrPC*, and the circumstance that she along with her son and son's associate attacked the deceased first by throwing acid, which unfortunately had fallen upon "K" and "S" and yet she assisted her sons in assaulting the deceased by means of knife by catching hold of the deceased, fully go to prove that all three accused appellants shared the common intention for committing the murder of the deceased.

[s 34.3.5.2] Termination of pregnancy by incompetent doctor: Surendra Chauhan

In *Surendra Chauhan v State of Madhya Pradesh*, AIR 2000 SC 1436 [[LNIND 2000 SC 515](#)] , Doctor "S" was not competent to terminate the pregnancy of "A" nor his clinic had the approval of the Government. Even basic facilities for abortion were not available in his clinic. "C" took "A" to the clinic of "S" with intent to get her pregnancy terminated. In view of incompetency of doctor and absence of even basic facilities A's death was caused by "S" in furtherance of the common intention of both "S" and "C".

[s 34.3.6] Distinction between "same" or "similar" intention and "common intention"

The partition that divides same or similar intention and common intention is often very thin, but nevertheless the distinction is real and substantial. To constitute common intention it is necessary that the intention of each person be known to all the others and be shared by them,¹¹² whereas this is not so in the case of same or similar intention.

Gaya Prasad: In *Gaya Prasad Ram Lal v State of Maharashtra*,¹¹³ the evidence found by the High Court was that R and M were assaulted at a narrow open space surrounded by huts on all sides except for two small openings, one in the east, the other in the west. The attack on R was not unpremeditated. The suddenness was accentuated by the shout given by the appellant. The ghastly attack in the narrow space could not, by combination of circumstances, have been preceded by any commotion. The incident commenced with the appellant shouting "maro" "maro" (beat, beat).

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One of the accused was armed with a knife, and the shout which the appellant gave established that this accused should commence the attack on *R* with a knife. Thus, the appellant shared the intention of the other two accused to commit the murder of *R*. It was found that the other two accused and the appellant were members of an unlawful assembly with the common intention to commit the murder of *R*.

The shout of the appellant established beyond any doubt that he shared the common intention to commit the murder of *R*.

[s 34.3.6.1] Absence of involvement of co-accused will not attract section 34, IPC, Prem Sagar

In *Prem Sagar v Dharambir*,¹¹⁴ co-accused “*K*” is supposed to have followed deceased and to have prevented him while he was trying to run away. However, eye-witness who is relative of both the parties has clearly accepted in his cross-examination that it was accused “*D*” who caused his fall. There is no other evidence against co-accused “*K*”. Hence, it can be said that the prosecution has not linked him with the occurrence in a manner as to attract applicability of section 34, IPC for making “*K*” liable along with accused “*D*”.

Allowing the appeal and setting aside the conviction of *K*, the Apex Court said that when the eye-witness himself has stated that it was accused “*D*” who caused fall of deceased, it was not for the High Court to say it was a slip of tongue. Had it really been so, different course was to be adopted before the trial court, which the prosecution did not do. That being so, the conviction of the co-accused “*K*” cannot be maintained along with “*D*”.

Arjun Das: In *State of Orissa v Arjun Das Agrawal*, AIR 1999 SC 3229 [[LNIND 1999 SC 694](#)] , – the Apex Court held that mere instigation to the other accused will not attract section 34, IPC unless there is active involvement of the co-accused in the *criminal act* in the impugned case. Regarding accused-respondent “*A*” it is found from the evidence on record that this accused neither went inside the house of the deceased nor took any part in the commission of the murder. He only instigated by shouting the other accused persons. There is nothing in evidence to show that due to his instigation more blows were given by the accused person.

Therefore, no inference can be drawn that this accused-respondent had common intention of causing death of the deceased or that he actually participated in the *criminal act*. Therefore, High Court rightly acquitted the particular accused.

Girija Shankar: Similarly, it was found in *Girija Shankar v State of Uttar Pradesh*, AIR 1993 SC 2618 [[LNIND 1993 SC 660](#)] , that material on record confirmed that co-accused person did not share the common intention to kill the deceased. There is no evidence to show that co-accused persons were aware that main accused was carrying a gun or that he intended to use it. The trial court having accepted that there was no evidence of any type to show preconcert came to a hypothetical conclusion that it may have developed at the spot. There is no material to support the conclusion. The High Court unfortunately did not specifically deal with this aspect. Under the circumstances while allowing the appeal the Apex Court held that inevitable conclusion is that the appellant cannot be convicted in terms of section 302 read with section 34, IPC.

[s 34.3.6.2] Charge under section 34 presupposes sharing of common intention: Krishnan: (2003)

The Apex Court in *Krishnan v State of Karnataka*,¹¹⁵ has reiterated the principle that section 34 has been framed to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them.

In the impugned case four persons attacked the deceased because she was allegedly having illicit relationship with a man. One inflicted a cut injury on the backside near the shoulder of the deceased with *gada* uttering with the loud voice “die with this”, the other gave blow with *aruval* on the head of the deceased on the right side,

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and the other two accused caused cut blow on her neck. Thereafter all ran away. The injury in the head was fatal.

The appellants (other two accused) argued that since they caused injury in the back that was not fatal they should not be held guilty for murder.

Rejecting the appellant's contention, the court said, that the principle of joint liability requires proof of common intention and doing of separate acts, similar or diverse, by several persons and if all are done in furtherance of a common intention of all, each person is liable for the result of them all as if he had done them himself; for "that act" and "the act" in the latter part of the section must include the whole section covered by a "criminal act" in the first part, because they refer to it.¹¹⁶

The court referred *Israr v State of Uttar Pradesh*, AIR 2005 SC 249 [[LNIND 1995 ALL 872](#)] , wherein the principal accused gave a *gandasa* (sharp edged instrument) blow from the sharp side on the head of the deceased, which proved fatal. The co-accused assaulted the deceased with the *gandasa* on the backside near the shoulder of the deceased. It was held that attack at different places on different sides with the weapons of assault did not show absence of common intention.

Dismissing the appeal by the two accused, the court held that the acts in the present case may have been different in character but they were actuated by one and the same common intention and attracted the provisions of section of section 302 read with section 34 against both the accused who had filed appeal before the Supreme Court against their conviction in respect of the said offence.

[s 34.3.6.3] Non-framing of charge would not vitiate the conviction if no prejudice is caused to the accused: Lallan Rai (2003)

In *Lallan Rai v State of Bihar*,¹¹⁷ the Apex Court held that non-framing of charge would not vitiate the conviction under section 302, IPC read with section 34, IPC if no prejudice is caused thereof to the accused for procedural law is the handmade of justice and *Code of Criminal Procedure* is no exception thereto.

The fact that the accused had merely distanced him from the scene cannot absolve the accused of liability for the commission of crime. Of course, it depends upon the fact situation under consideration. The evidence in the impugned case showed that all the accused encircled the informant and other witnesses inflicted injuries on the deceased with deadly weapons resulting in his death. The entire gamut of the matter in issue left no doubt of the concerted action by reason of simultaneous conscious mind of persons participating in the action to bring out the death of the deceased and it was this piece of evidence, which brought in the element of section 34, IPC even though no charge was framed thereunder.

A plain look at statute reveals that essence of section 34, IPC is simultaneous consensus of mind of persons participating in the criminal action to bring out a particular result. Such consensus can be developed on the spot; the requirement of the statute is sharing of common intention upon being present at the place of the occurrence. The conviction and sentence under section 302, IPC could be held in the present case by adding section 464, CrPC.¹¹⁸

[s 34.3.6.4] Criminal act in furtherance of common intention does not mean "common intention of all" or "intention common to all": Israr

In *Israr v State of Uttar Pradesh*, the appellant-accused was convicted under section 302 read with section 34, IPC who had restrained movement of the deceased, held him while co-accused inflicted knife blow.

While dismissing the appeal and upholding the conviction of appellant-accused under section 302 read with

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section 34 proper, the Apex Court said that essence of criminal liability under *section 34, IPC* is in the existence of a “common intention in furtherance of a *criminal act*” and not “common intention of all” or “intention common to all”. As a result, when an accused is convicted under section 302 read with section 34, in law it means that the accused is liable for the act, which caused death of the deceased in the same manner as if he did it alone.

The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. Thus, even if no injury has been caused by the particular accused section 34 is applicable.¹¹⁹ To apply section 34 it is not necessary to show some overt act on the part of the accused.¹²⁰

No doubt, a person is only responsible ordinarily for what he does and *section 38, IPC* ensures that.¹²¹ But section 34 as well as section 35¹²² provides that if the *criminal act* were the result of the common intention, then every person who did the *criminal act* with such intention would be responsible for the total offence irrespective of the share, which he had in its perpetration. The logic, highlighted illuminatingly by the Judicial Committee of the Privy Council in *Barendra Kumar Ghosh v Emperor*, AIR 1925 AC 1, is that in crimes as in other things “they also serve who only stand and wait.”

[s 34.3.6.5] Credibility of a witness

As regards credibility of a witness is concerned, the Apex Court said that the trustworthy and reliable evidence of eyewitnesses couldn't be discarded on ground that they are friends or relatives of deceased. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person.

[s 34.3.6.6] Age No bar for giving testimony

The Supreme Court in a recent case on 21 February 2008¹²³ where a 12-year-old girl was the sole witness to the crime of murder held that her statement cannot be rejected on the ground that she was a minor.¹²⁴ In a rare incidence the girl gave a vivid description of the manner in which her father Babban Misal was diabolically murdered in the dead of the night intervening 9-10 July 1998 in Maharashtra by her brother, mother and the latter's lover.

The daughter deposed that her father was objecting to the extra-marital relationship of her mother with the two accused paramours. On the date of the incident, the accused murdered Babban in the house and then put the body in a shawl, stacked salt on it and covered it with gunny bags before burying it in a pit. She said that her mother “washed the blood spilled on the floor with a bucket of water and a cloth and poured it outside the house. After burying the body, all four returned home. The paramours went home and the mother locked the room in which her father was killed and then went to sleep.”

Upholding the life term imposed on the accused for murder the Bench rejected the defence plea that since the girl was a minor; her evidences as the sole witness did not inspire confidence. The court said:

A child of tender age could be allowed to testify if she/he has intellectual capacity to understand questions and give rational answers. Her evidence is as concise and precise and as it is specific and vivid. It is neither embellished nor embroidered. It is the evidence of a child who has seen through the unusual and cruel incidence. She was a girl of tender age who saw the killing of her father by her mother and others.

Falsus in uno Falsus in omnibus: The maxim *Falsus in uno Falsus in omnibus*, i.e., false in one thing, false in all is not applicable in India. It is merely a rule of caution. Witnesses cannot be branded as liar and the court may apply it in a given set of circumstances depending on the facts and circumstances in a particular case. It is

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not a 'mandatory rule of evidence to be applied uniformly. It has to be ascertained from the facts and circumstances of a case.

Ramdeo Kahar.—In *Ramdeo Kahar v State of Bihar*,¹²⁵ the appellants (three in number) moved the Apex Court against the verdict of Patna High Court confirming the sentence and conviction passed by the trial court for murder of Mauji Yadav under section 302, IPC read with section 34, IPC.¹²⁶

Dismissing the appeal the Apex Court held that only because the accused did not find Patali and instead committed the murder of Mauji Yadav by itself may not be sufficient to arrive at a conclusion that they had no intention to commit any offence of causing murder. Furthermore, whether they had the requisite intention or not must also be judged from the surrounding circumstances. All of them also left the place of occurrence together, they fired shot together at random so as to prevent the prosecution witness to chase them. Common intention may develop suddenly at the spot. In this case, the genesis of the occurrence has been proved. The motive for commission of the offence has sufficiently been established.

[s 34.3.6.7] Distinction between common intention (section 34) and common object (section 149)

Sections 34 and 149, IPC deal with cases of constructive criminal liability imposed on a person for an act not actually done by him but by his associates. However, there is a clear distinction between the provisions of sections 34 and 149, IPC, as stated below. The scope and extent of the two sections should not be confused.

[s 34.3.6.7.1] Section 34 is Explanatory while section 149 creates a specific offence

Section 34 is an explanatory clause which falls in Chapter II of the Code dealing with "General Explanations" and creates no offence, whereas, section 149 finds its place in Chapter VIII: "Offences Against Public Tranquillity; and creates a specific offence in the membership of an unlawful assembly itself, for which the participants may be liable to punishment. In other words, section 34 only explains that when a *criminal act* is jointly done by several persons who are actuated by a common intention in furtherance of that intention, each of them is liable for it as if the whole of it had been done by him alone. On the other hand, section 149 creates constructive criminal liability for an act done entirely by another person provided the conditions of that section are fulfilled.

Object is a different state of mind from intention, and though the object of the members of an unlawful assembly may be common, their intentions may differ. In section 34, the principal element is the common intention of several persons to commit a crime, and it provides that if in furtherance of the common intention several acts are done by several persons which result in a crime, each one of those persons is liable for that crime (act) in the same manner as if all those acts were done by him alone.

On the other hand, in section 149, there is no question of common intention; what is required is only a common object.

Shiv Ram: In *Shiv Ram v State of Uttar Pradesh*,¹²⁷ the Apex Court held that the unlawful assembly could develop a common object in the spur of moment when five persons were put to death in a brutal manner. It provides that if any one member of an unlawful assembly commits an offence, then all the other members of that assembly are liable for it, even though there was no common intention between him and them to commit it, provided that the conditions of that section are fulfilled, namely:

- (a) that the offence was committed in prosecution of the common object of that assembly, or
- (b) that it is of such a nature that the other members knew it to be likely to be committed in prosecution of that object.

Thus, the community of intention required by section 34 is replaced in section 149 by community of object, which is quite a different element.¹²⁸ Common intention presupposes prior consent and meeting of minds,

[[s 34] Acts done by several persons in furtherance of common intention.—

whereas a common object may be formed without that. There may be cases where the object of the group is one, but the intentions of the participants differ.

Chittarmal.—In *Chittarmal v State of Rajasthan*,¹²⁹ (2003) the Apex Court observed that there is a clear distinction between common intention and common object in that common intention denotes action in concert and necessarily postulates the existence of a prearranged plan implying a prior meeting of the minds, while as common object does not necessarily require proof of prior meeting of minds or preconcert.

The appellants armed with lethal weapons came together and simultaneously started assaulting the deceased. Though the appellants were charged under *section 302* read with *section 149, IPC*, but the court found common intention in respect of the appellant's only. Hence the appellant's were convicted under *section 302* read with *section 34, IPC* and acquitted the remaining accused as they neither shared the common intention nor participated in the act.

[s 34.3.6.7.2] Section 34 is applicable even if no injury has been caused by particular accused himself

Hardeep Singh: In *Hardeep Singh v State of Haryana*, AIR 2008 SC 3113 [[LNIND 2008 SC 1289](#)], the Apex Court held that challenge in this appeal is the judgment of a Division Bench of the Punjab and Haryana High Court dismissing the appeal filed by the appellants four persons – Gurcharan Singh (acquitted), Hardeep Singh, Harjinder Singh and Jaswinder Singh, who faced trial for murder of Amrik Singh.

Rejecting the defence contention that evidence of prosecution witnesses does not inspire confidence, the apex court held that it is also clear from the prosecution evidence that on hearing of the exhortation of Gurcharan Singh (acquitted), Jaswinder Singh and Harjinder Singh had given blows on the legs of the deceased. After he fell down, Hardeep Singh gave blows on the head. Similarly Harjinder Singh also gave blows on the head.

After the deceased fell down, Jaswinder Singh did not attack on any vital part of the deceased's body. He assaulted on the arm of the deceased. Taking note of the aforesaid circumstance, appeal filed by the accused appellants Hardeep and Harjinder Singh was dismissed.

However, in case of Jaswinder Singh the apex court while allowing the appeal partly held that the appropriate conviction of Jaswinder Singh would be under *section 304, Pt II, IPC*. His conviction is accordingly altered from *section 302* to *section 304, Pt II, IPC* for culpable homicide. Custodial sentence of eight years would meet the ends of justice. The appeal is allowed to the aforesaid extent.

[s 34.3.6.7.3] Distinction between “participation” and “membership”

The essential feature of *section 34* is participation in action, and unless the court is satisfied that an accused has participated, that is, taken some part in the actual commission of an offence, he cannot be held guilty by the application of *section 34*. On the other hand, *section 149* requires no participation in the commission of an offence, and this element is replaced by the requirement as to membership of the unlawful assembly at the time of its commission by another member of that assembly.¹³⁰

[s 34.3.6.7.4] Difference in number of participants

Section 34 can be invoked even if two persons are involved in a crime, whereas *section 149* postulates the existence of an unlawful assembly, which can be formed only if the members of the group are five or more in number as provided under *section 141, IPC*.

[s 34.3.6.7.5] Difference in operation of section 34 and section 149

Section 34 requires some overt act, however small, for operation of its provisions, whereas under *section 149* mere membership in the assembly suffices to fix criminal liability.

[[s 34] Acts done by several persons in furtherance of common intention.—

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- 1** Proceedings of the Legislative Council (1860), p 1261.
- 94** Subs. by Act 27 of 1870, section 1, for section 34.
- 95** See *Barendra Kumar Ghosh v King Emperor*, 1924-25 LR 40 PC : AIR 1925 PC 1 [[LNIND 1924 BOM 206](#)] .
- 96** See KD Gaur, *Criminal Law: Cases and Materials*, 3rd Edn, 1999, pp 213-235.
- 97** See Shamsul Huda, *Principles of the Law of Crimes*, pp 133-135.
- 98** *Parichhat v State of Madhya Pradesh*, (1972) 4 SCC 694 : AIR 1972 SC 535 : 1972 Cr LJ 322 (SC).
- 99** *Ramaswami Ayyanger v State of Tamil Nadu*, (1976) 3 SCR 876 [[LNIND 1976 SC 128](#)] : AIR 1976 SC 2027 [[LNIND 1976 SC 128](#)] : (1976) 3 SCC 779 [[LNIND 1976 SC 128](#)] : 1976 Cr LJ 1536 : 1976 CAR 185 .
- 100** *Pandurang Tukia and Bhillia v State of Hyderabad*, AIR 1955 SC 331 ; *Khacheru Singh v State of Uttar Pradesh*, (1982) 3 SCC 218 [[LNIND 1981 SC 107](#)] : 1982 CLR 570 (SC) : 1982 SCC (Cri) 696 [[LNIND 1981 SC 107](#)] ; *Baleshwar Rai v State of Bihar*, 1964 Cr LJ 564 ; *Abraham Sheikh v State of West Bengal*, AIR 1965 SC 1263 [[LNIND 1964 SC 233](#)] : (1964) 6 SCR 172 [[LNIND 1964 SC 1](#)] : (1964) 2 Cr LJ 350 ; *Matiullah Sheikh v State of West Bengal*, AIR 1965 SC 132 [[LNIND 1964 SC 56](#)] : (1964) 6 SCR 978 [[LNIND 1964 SC 56](#)] : (1965) 1 Cr LJ 126 ; *Harbans Kaur v State of Haryana*, AIR 2005 SC 2969 : (2005) 9 SCC 195 [[LNIND 2005 SC 211](#)] : JT 2005 (3) SC 233 [[LNIND 2005 SC 211](#)] .
- 101** On 3 August 1923, the Sub-Postmaster at Sankeritolla Post Office was counting money at his table when several persons entered the Post Office and called on him to give up the money. Almost immediately afterwards they fired a pistol at him. He was hit at two places and died almost at once. Without taking any money, the assailants fled separately. As they ran, one appellant was arrested while the other escaped.
- 102** *Ibid.*, p 7.
- 103** AIR 1945 PC 118 [[LNIND 1945 PC 5](#)] : (1945) 47 Bom LR 941.
- 104** AIR 1972 SC 2555 [[LNIND 1972 SC 381](#)] : (1973) 3 SCC 110 [[LNIND 1972 SC 381](#)] : (1973) 1 SCR 939 [[LNIND 1972 SC 381](#)] : 1973 Cr LJ 26 . In *Sunder Singh v State of Punjab*, AIR 1962 SC 1211 [[LNIND 1962 SC 18](#)] . Held that common intention to commit murder may develop on the spot after a chance meeting with the opposite party. Need not be a pre-arranged plan in every case.
- 105** *Tukaram Ganpat Pandare v State of Maharashtra*, AIR 1974 SC 514 : (1974) 4 SCC 544 : 1974 CAR 132 .
- 106** *Mobarak Ali Ahmed v State of Bombay*, AIR 1957 SC 857 [[LNIND 1957 SC 81](#)] : 1957 SCR 328 : 1958 SCJ 111 : (1957) 1 Cr LJ 1346 .
- 107** AIR 2009 SC 3182 [[LNIND 2009 SC 1397](#)] : 2009 Cr LJ 4151 : 2009 AIR SCW 5105 : (2009) 9 Scale 170 [[LNIND 2009 SC 1397](#)] ; VS Sirpurkar and RM Lodha J.
- 108** *Prabhu Babaji Navle v State of Bombay*, AIR 1956 SC 51 : 1956 Cr LJ 147 .
- 109** AIR 1956 SC 400 [[LNIND 1956 SC 24](#)] : 1956 SCR 191 [[LNIND 1956 SC 24](#)] : (1956) SCJ 437 : 1956 Cr LJ 790 ; *Krishna Govind Palie v State of Maharashtra*, AIR 1963 SC 1413 [[LNIND 1963 SC 12](#)] : (1964) 1 SCR 678 [[LNIND 1963 SC 12](#)] : (1963) 2 Cr LJ 351 ; *Barendra Kumar Ghosh v King Emperor*, AIR 1925 AC 1 .
- 110** AIR 1960 SC 289 [[LNIND 1959 SC 202](#)] : (1960) 2 SCR 172 [[LNIND 1959 SC 202](#)] : 1960 SCJ 478 [[LNIND 1959 SC 202](#)] : 1960 Cr LJ 424 .
- 111** 1999 Cr LJ 2754 : 1999 All LJ 1160 : 1999 (38) All Cri C 40 : 1999 (24) All Cri R 263 : 1999 (1) Crimes 323

[[s 34] Acts done by several persons in furtherance of common intention.—

- 112** *Hardev Singh v State of Punjab*, (1973) CLR (SC) 93. The common intention must be to commit that particular crime, although the actual crime may be committed by any one of those sharing the common intention.
- 113** AIR 1971 SC 1112 : 1971 Cr LJ 824 : 1971 SCC (Cri) 497 : 1971 CAR 145 .
- 114** AIR 2004 SC 21 [[LNIND 2003 SC 912](#)]: (2004) 1 SCC 113 [[LNIND 2003 SC 912](#)] : 2004 Cr LJ 17.
- 115** (2003) 7 SCC 56 [[LNIND 2003 SC 587](#)] : AIR 2003 SC 2978 [[LNIND 2003 SC 587](#)]: 2003 SCW 3688 (SC).
- 116** *Charan Singh v State of Punjab*, AIR 1998 SC 323 [[LNIND 1997 SC 1369](#)].
- 117** (2003) 1 SCC 268 [[LNIND 2002 SC 705](#)] : AIR 2003 SC 333 [[LNIND 2002 SC 705](#)]: 2003 Cr LJ 465.
- 118** CrPC, 1973, section 464: **Effect of omission to frame, or absence of, or error in, charge.**—(1) *No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error or omission or irregularity in the charge including any misjoinder of charge, unless, in the opinion of the court of appeal, confirmation or revision, a failure of justice has in fact been occasioned, thereby.*
- 119** *Ch. Pulla Reddy v State of Andhra Pradesh*, AIR 1993 SC 1899 : AIR 1993 SCW 1843 : 1993 Cr LJ 2246.
- 120** *Anil Sharma v State of Jharkhand*, (2004) 5 SCC 679 [[LNIND 2004 SC 590](#)] : AIR 2004 SC 2294 [[LNIND 2004 SC 590](#)]: 2004 (2) BLJR 1068 : 2004 Cr LJ 2527.
- 121** *Abraham Sheikh v State of West Bengal*, AIR 1965 SC 1263 [[LNIND 1964 SC 233](#)]: (1964) 6 SCR 172 [[LNIND 1964 SC 1](#)] : (1964) 2 Cr LJ 350. See commentary under section 38, IPC.
- 122** See commentary under section 35, IPC.
- 123** Times of India, 22 February 2008, Lucknow, p 7. The Bench consisted of Arijit Pasayat and P Sathasivam JJ.
- 124** *Indian Evidence Act*, section 118 did not prescribe any particular age as a determining factor to treat a witness to be a competent witness.
- 125** AIR 2009 SC 1803 [[LNIND 2008 SC 2500](#)]: 2009 Cr LJ 1775 : 2009 AIR SCW 1392 : (2009) 1 Scale 634, SB Sinha and Cyriac, Joseph JJ.
- 126** On or about 29 May 1997 at about 3 p.m. *Sanjib Yadav* (informant) along with his father *Mauji Yadav* were working in his field. *Lakhan Yadav*, *Ragho Yadav*, *Anil Yadav*, *Inderdeo Yadav*, *Ramjee Yadav* and *Dwarika Yadav* were sitting under the shadow of a pipal tree at some distance.
- 127** AIR 1998 SC 49 : (1998) 1 SCC 149 : 1997 CLR 790 (SC) : 1998 Cr LJ 76 . Accused persons under belief that the family members of deceased were giving shelter to suspects who alleged to have killed brother of the main accused committed murders in most brutal manner by severing three heads and roasting alive an innocent boy of 10 years in smouldering (burn slowly without flame) fire.

[[s 34] Acts done by several persons in furtherance of common intention.—

128 *Mannam Venkatadas v State of Andhra Pradesh*, (1971) 3 SCC 254 : AIR 1971 SC 1467 : 1971 Cr LJ 1145 : 1971 SCC (Cri) 479 ; *Nanak Chand v State of Punjab*, AIR 1955 SC 274 [[LNIND 1955 SC 3](#)] : (1955) 1 SCR 1201 [[LNIND 1955 SC 3](#)] : 1955 SCJ 241 : 1955 Cr LJ 721 .

129 (2003) 2 SCC 266 [[LNIND 2003 SC 14](#)] : AIR 2003 SC 796 [[LNIND 2003 SC 14](#)] : 2003 Cr LJ 889 (SC).

130 *Mohan Singh v State of Punjab*, AIR 1963 SC 174 [[LNIND 1962 SC 118](#)] : (1963) 1 Cr LJ 100 : 1962 Supp (3) SCR 848 .

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[s 35] When such an act is criminal by reason of its being done with a criminal knowledge or intention.—

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Chapter II of the *Penal Code*, which runs into 47 sections commencing from sections 6 to 52A, *IPC*, is for the most part an elaborate interpretation clause. The leading terms used in the text of the Code have been defined and explained. The purpose of this chapter is to offset ambiguity and to avert the possibility of misinterpretation of the different provisions in the Code.¹

[s 35] When such an act is criminal by reason of its being done with a criminal knowledge or intention.—

Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

[s 35.1] Act done with a criminal knowledge

Section 35 is complementary to section 34 in as much as it supplements the principle of joint liability embodied in section 34. However, the two sections differ in scope. For instance, section 34 deals with a case wherein an act is done by several persons in furtherance of the common intention of all; whereas section 35 enacts that when an act is criminal by reason of its being done with a criminal intention or knowledge, each of such persons who joins in the act with the same knowledge or intention is responsible for the act in the same manner as if it were done by him alone. But if several persons join in an act, each having a different intention or knowledge from the others, liability will be fixed only according to the intention and knowledge of the individual concerned and not further. Where group of persons, say, *A*, *B* and *C* proceed to take forcible possession of land during which one of them commits murder, all of them will be equally liable for murder if they have joined the party with the knowledge or intention of committing murder, though only one of them commits the murder. But if it is proved that only one accused (i.e., *A*) intended to murder, another (i.e., *B*) wanted to plunder the crop, while the third (i.e., *C*) had no particular intention and merely joined the assembly to see the fun, the guilt of each will differ according to the criminal knowledge or intention of each of the participants. Thus, *A* could not be charged for robbery and the *B* and *C* for murder because the three accused did not possess a common intention. All the three acted with different intentions or knowledge.

The measure of criminal liability under section 34 is determined on the basis of joint intention, and under section 35 on the basis of like intention of the group. That is to say, the liability of each will be determined according to the extent of intention or knowledge of each accused.

[s 35] When such an act is criminal by reason of its being done with a criminal knowledge or intention.—

Section 34 is limited to offences which are independent of intention or knowledge, that is, those in which intention and knowledge is presumed from the very nature of the act in question,¹³¹ while section 35 is concerned with those cases in which intention or knowledge must be expressly proved.¹³²

COMMENTS

R v Jogee: In *R v Ruddock*,¹³³ question before the UK Supreme Court was whether the foresight is sufficient to establish liability? The court propounded guidelines to establish liability in such cases.

The necessary mental element in cases of secondary liability arising out of a prior joint criminal venture, known as “parasitic accessory liability” or “joint unlawful enterprise”, is an intention to assist or encourage the commission of the crime. Foresight does not equate with intent to assist; the correct approach is to treat it as evidence of intent. The recognition of the difference between foresight and intent is consistent with other cases of secondary liability at common law, as well as Parliament’s approach to inchoate criminal liability in section 44(2)¹³⁴ of the Serious Crime Act, 2007 and, more generally, proof of criminal intent in section 8 of the Criminal Justice Act, 1967. The introduction of the principle in *Chan Wing-Siu v R*, [\[1984\] 3 All ER 877](#) that if two people set out to commit an offence (crime A), and in the course of that joint enterprise one of them (D1) commits another offence (crime B), the second person (D2) is guilty as an accessory to crime B if he foresaw the possibility that D1 might act as he did, was based on an incomplete and erroneous reading of previous case law, coupled with generalised and questionable policy documents. Foresight of what might happen is no more than evidence from which a jury can infer the presence of a requisite intention. It may be strong evidence, but its adoption as a test for the mental element for murder in the case of a secondary party was a serious and anomalous departure from the basic rule, which resulted in over-extension of the law of murder and reduction of the law of manslaughter and produced the striking anomaly of requiring a lower mental threshold for guilt in the case of the accessory than in the case of the principal.

The longstanding previous practice of inferring intent to assist from a common criminal purpose which includes the further crime, if the occasion for it were to arise, is a legitimate one; however, it is illegitimate to treat foresight as an inevitable yardstick of common purpose. The question of intent (including conditional intent) is a question for the jury to be decided by a process of inference from the facts and circumstances proved, namely whether D2, who joined with others in a venture to commit crime A, shared a common purpose or common intent which included, if things came to it, the commission of should be committed, may be conditional. Further, liability does not depend on there being some form of agreement between the defendants; it depends on proof of intentional assistance or encouragement, conditional or otherwise. If a jury is satisfied that D2 intended to encourage or assist the deliberate infliction of serious bodily injury and/or intended that that should happen if necessary, and D1 did act with intent to cause serious bodily injury and death resulted, D1 and D2 will each be guilty of murder. If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter.

So also, if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carries the risk of some harm (not necessarily serious) to another, and death in fact results. The test of intent is objective. Moreover, there will normally be no occasion to consider the concept of “fundamental departure”. What matters is whether D2 encouraged or assisted the crime, whether it be murder or some other offence; he need not encourage or assist a particular way of committing it, although he may sometimes do so, and knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but it is evidence and no more.

[s 35] When such an act is criminal by reason of its being done with a criminal knowledge or intention.—

1 Proceedings of the Legislative Council (1860), p 1261.

131 See AIR 1925 PC 1 [[LNIND 1924 BOM 206](#)] ; *Adam Ali Taluqdar v King-Emperor*, AIR 1927 Cal 324 .

132 See *Mahboob Shah v Emperor*, AIR 1945 PC 118 [[LNIND 1945 PC 5](#)] .

133 [\(2016\) 2 All ER 1](#) : (2016) UK SC 8 : (2016) UK PC 7; Lord Neuberger P, Lady Hale DP. Lord Hughes Lord Toulson and Thomas SCJJ.

134 Section 8 provides: “A court or jury, in determining whether a person has committed an offence—(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.”

[s 36] Effect caused partly by act and partly by omission.—

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[s 36] Effect caused partly by act and partly by omission.—

Wherever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.

ILLUSTRATION

A intentionally causes Z's death, partly by illegally omitting to give Z food, and partly by beating Z. A has committed murder.

[s 36.1] Effect caused partly by act and partly by omission

Section 36, IPC embodies the commonsense rule that when an offence is the effect partly of an act and partly of an omission, the legal consequence would be the same as if the offence was committed by "an act" or by an "omission" alone. For instance, when A intentionally causes Z's death partly by illegally omitting to give him food and partly by beating him, A has committed murder inasmuch as the effect of A's act of omission to provide food to Z and A's act of beating Z has resulted in Z's death.

¹ Proceedings of the Legislative Council (1860), p 1261.

[s 37] Co-operation by doing one of several acts constituting an offence.—

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[s 37] Co-operation by doing one of several acts constituting an offence.—

When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

ILLUSTRATIONS

(a) A and B agree to murder Z by severally and at different times giving him small doses of poison. A and B administer the poison according to the agreement with intent to murder Z. Z dies from the effects of the several doses of poison so administered to him. Here A and B intentionally co-operate in the commission of murder and as each of them does an act by which the death is caused, they are both guilty of the offence though their acts are separate.

(b) A and B are joint jailors, and as such have the charge of Z, a prisoner, alternatively for six hours at a time. A and B, intending to cause Z's death, knowingly co-operate in causing that effect by illegally omitting, each during the time of his attendance, to furnish Z with food supplied to them for that purpose, Z dies of hunger. Both A and B are guilty of the murder of Z.

(c) A, a jailor, has the charge of Z, a prisoner. A, intending to cause Z's death, illegally omits to supply Z with food; in consequence of which Z is much reduced in strength, but the starvation is not sufficient to cause his death. A is dismissed from his office, and B succeeds him. B, without collusion or co-operation with A, illegally omits to supply Z with food, knowing that he is likely thereby to cause Z's death. Z dies of hunger. B is guilty of murder, but, as A did not co-operate with B. A is guilty only of an attempt to commit murder.

[s 37.1] Co-operation in doing several acts constituting offence – Principle

Section 37 enunciates the common law principle that when an offence is committed by several acts, whoever intentionally cooperates in the commission of that act by doing any one of the series of those acts, commits that offence. Thus, in the case of a conspiracy to commit a *criminal act*, the measure of criminal liability of each conspirator is the cumulative effect of the act, and not according to the share of each conspirator in the *criminal act*.¹³⁵ Hence, when an offence is committed as a result of several acts or omissions, the doing of any one of such acts or omissions with an intention to cooperate in the offence would make the doer liable for the

[s 37] Co-operation by doing one of several acts constituting an offence.—

commissions of the offence. Thus, section 37 is a corollary to section 36, as is evident from the illustrations appended to the section. As stated in illustration (b), when and in whose duty *Z* died is immaterial, once the cooperation of both *A* and *B* is proved in the act, both *A* and *B* are equally guilty of the murder of *Z*.

But if *A* and *B* do not join and participate in the *criminal act*, the liability will differ according to the role played by each, as explained in illustration (c) appended to the section.

[s 37.2] Distinction between section 34 and section 37

Section 34 is attracted if it is established that the *criminal act* has been done by several persons in furtherance of the common intention of a group (i.e., a unity of criminal behaviour which results in a criminal offence), in which case each participant becomes liable as if that act were done by him alone. On the other hand, section 37 deals with those cases in which several persons intentionally co-operate in an offence committed by means of several acts, and punishes such cooperation (provided it consists in doing of any one of those acts, either singly or jointly with any other person) as if it constituted the offence itself. As pointed out by Lord Sumner in *Barendra Kumar Ghosh v Emperor*, AIR 1925 PC 1 [[LNIND 1924 BOM 206](#)] intentional co-operation may not be the same as a common intention. In other words, intentional co-operation must include action which contributes to the offence and is done with the consciousness, though without showing the intention, to commit that offence.¹³⁶

¹ Proceedings of the Legislative Council (1860), p 1261.

¹³⁵ See Hari Singh Gaur, *Penal Law of India*, vol I, 11th Edn, (2000), pp 359 to 361.

¹³⁶ *Emperor v Iswa Munda*, AIR 1938 Pat 258 (261-262).

[s 38] Persons concerned in criminal act may be guilty of different offences.—

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[s 38] Persons concerned in criminal act may be guilty of different offences.—

Where several persons are engaged or concerned in the commission of a *criminal act*, they may be guilty of different offences by means of that act.

ILLUSTRATION

A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B, having ill-will towards Z and intending to kill him, and not having been subject to the provocation, assists A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide.

[s 38.1] Persons, concerned in *criminal Act* may be guilty of different offences depending on Role Played by each of them – Principle

Section 38 is the converse to section 34. Section 34 deals with acts done with a common intention, and section 38 of acts done with different intentions. That is to say, in section 34 several persons act in furtherance of a common intention, so that their liability is joint irrespective of the nature and extent of their contribution to the crime, whereas under *section 38, IPC* several persons combine to commit a *criminal act*, but not in furtherance of a common intention to commit the offence as in the case of *section 34, IPC*.

Section 38 provides for different punishments for different offences as alternative to one punishment for one offence¹³⁷ as in the case of section 34. Thus, section 38 speaks of a situation wherein persons engaged in the commission of a *criminal act* might be guilty of different offences by reason of the act being done without a common intention. In other words, section 38 deals with those cases where an act is committed without a common intention. For example, two out of three accused assault a victim, attacking him with weapons, and the blows reveal their intention to kill. The third accused does not use his weapon. The two accused are held guilty of murder. Applying the principle of section 38, the third accused would be held guilty of culpable homicide only

[s 38] Persons concerned in criminal act may be guilty of different offences.—

under section 304, Pt II as he had joined the other two accused with the knowledge that the assault by them on the victim was likely to result in murder, and he had no intention to commit murder.¹³⁸

Likewise in the case where *A* attacks *Z* under such circumstances of grave and sudden provocation that his killing of *Z* would be only culpable homicide not amounting to murder, *B* having ill-will towards *Z* and intending to kill him and not having been subjected to provocation, assists *A* in killing *Z*. Here, though *A* and *B* are both engaged in causing *Z*'s death, *B* is guilty of murder under *section 302, IPC*, because he acted with the intention to kill *Z*; whereas *A* is guilty of culpable homicide not amounting to murder only under *section 304, IPC* since he killed *Z* under the influence of grave and sudden provocation (see *IPC, section 300, Exception 1*).

¹ Proceedings of the Legislative Council (1860), p 1261.

¹³⁷ *Re Mallappa Shivappa*, (1961) 1 Cr LJ 515 .

¹³⁸ *Nitya Sen v State of West Bengal*, AIR 1978 SC 383 : (1978) 2 SCC 382 : 1978 Cr LJ 481 .

[s 39] “Voluntarily”.—

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[s 39] “Voluntarily”.—

A person is said to cause an effect “voluntarily” when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

ILLUSTRATION

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating a robbery and thus causes the death of a person. Here, A may not have intended to cause death; and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death voluntarily.

[s 39.1] Natural and Probable Consequences of the Act

This section enunciates the well-known dictum of law that a man is presumed to intend and know the natural and probable consequences of his act and therefore in performing the act he voluntarily causes the consequences. The maxim that “everyone must be taken to intend the natural consequences of his acts” is incorporated in the definition of “voluntarily” in section 39 and thus made applicable in every section where the word is used.¹³⁹

[s 39.2] “Voluntarily” Defined

Section 39 of the Code has attempted to define the word “voluntarily” with reference to the causation of effect instead of with reference to volition. The section has given an artificial meaning to the word “voluntarily” and not the ordinary meaning, which signifies free will brought about by one’s own free choice. According to section 39 a person is said to cause an effect voluntarily, when he causes it (i) intentionally, or (ii) that he knew or had reason to believe, to be likely to cause it. The illustration appended to the section makes the point clear. For instance, when A sets fire, by night, to an inhabited house in a large town to facilitate the commission of robbery, and causes the death of a person, A is said to have caused death “voluntarily”, if he knew that he was likely to cause death by his act.

In other words, “voluntarily” involves causing of an effect by means whereby it is intended or known to be likely to be caused.

Shyam Lal: The Supreme Court of India in *Shyam Lal v State of Uttar Pradesh*, (1962) 2 SCWR 801, ¹⁴⁰ said that the intention and knowledge of the offender had to be determined from the nature of the injury, the weapon used, the part of the victim's body attacked, force used and other related circumstances of the case in question.

In general, the Code has made no differentiation between intention and knowledge of likelihood and uses them as convertible terms. For instance, the word “voluntarily” as used in section 321 (causing hurt) denotes the specific *mens rea* for the specific offence. However, at other places, such as sections 299 and 300, *IPC*, (culpable homicide and murder) the two are not synonymously used.

The definition of the word “voluntarily” has been borrowed from the definition of the word “wilfully”, used in English law. An injury is deemed to be wilfully caused whenever the person from whose act or omission such injury results, whether, he directly intended it to result from his act or omission, or believing that it was in any degree probable that such injury would result from his act or omission, incurred the risk of causing such injury. For instance, where A, a smith seized by a gang of dacoits is forced by threat of instant death, to take his tools and to open the door of a house to enter and plunder it, cannot be said to have acted “voluntarily”, and no act which is not voluntary can be said to have *mens rea* to make the accused liable for the offence.¹⁴¹

[s 39.3] Intention

The Code has nowhere defined the term “intention” although the word has been used at several places. In common usage, intention signifies purpose or desire to bring about a contemplated result, or foresight that a certain consequence will follow from the conduct of a man. A throws a child from the top of a high tower. It is obvious that A intended and foresaw the victim's death. The Code has used the word “voluntarily” to designate intentional acts. As stated by Morgan and Macpherson:

The Code makes no distinction between cases in which a man causes an effect designedly, and cases in which he causes it knowingly, or having reason to believe that he is likely to cause it. If the effect is a probable consequence of the means used by him, he causes it “voluntarily”, whether he really meant to cause it or not. He is not allowed to urge that he did not know, or was not sure that the consequence would follow; but he must answer for it just as if he had intended to cause it. The English law by means of an artificial presumption, viz., that a man is presumed to intend the natural or probable consequences of his own act, gives to the words which denote intention the meaning here annexed to “voluntarily”.¹⁴²

[s 39.4] Period of Strict and Absolute Liability

In the beginning of European civilisation, the notion of expiation was prominent and suffering was often imposed upon persons, who would be regarded by modern standards as innocent of any offence, in order to satisfy the supposed anger of some divinity. Some of the peculiarities of ancient criminal law are thought to have been engineered by the instinct of self-preservation that caused many creatures to fight back savagely when harmed or frightened. The Roman rules of noxal surrender were clearly based on the belief that the actual creature which did the harm was to be held primarily liable to pay the penalty for it.

English law went further and treated as tainted with guilt not merely animals, such as cattle, etc., but even inanimate objects, such as carts, wheels, boats and the like, which had been associated with the death of a man. Such an object, termed “deodand”, had to be handed over to the king to be dealt with under his direction for the appeasement of God's anger. Here a combination of three forces operated:

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- (i) a fear of an angry divinity,
- (ii) a primitive reaction to pain, and
- (iii) a somewhat more advanced, but childish ignorant, attribution, even to an inanimate object, not only of life but also of a conscious intention to hurt.

The ancient doctrine was that ‘a harm must be paid for by any man who had actually taken part in the chain of events that could be traced back from such harm.

In other words, a man should bear the consequences and therefore pay compensation to whom he had injured. In addition, in certain cases a fine had to be paid to the king, for breach of the king’s peace.

This was the period of “strict” or “absolute” liability. The mental attitude of the wrong-doer was legally irrelevant; a man paid for that which it could be proved he had done. Conversely, a man did not have to pay for anything which could not be traced to active conduct on his part.

By the 13th century, serious offences had come to be classed as felonies, e.g., robbery dacoity, kidnapping, murder, rape, etc., and the rule appeared that for such offences compensation could no longer be obtained. The law at this stage was excessively severe; the old rule of strict liability still existed while the punishment, instead of being pecuniary, had in many cases now become capital (death sentence).

[s 39.5] Emergence of distinction between tort and crime

The 13th century, however, saw the beginning of the modern distinction between crime and tort. The old compensatory payments disappeared and were replaced by “discretionary damages” awarded by the tribunal that heard an individual’s claim. On the criminal side, the idea of moral blame, as the basis of responsibility for harm done, was developed by the churchmen. Wickedness exists in a man’s mind and moral blame enshrined lies with one whose thoughts or intentions are evil.

Thus, attention was directed by several cultural aspects to the mental processes of the offender. This was the period of germination for many new legal principles, viz., (i) the origin of the rule in tort, that a defendant’s liability is normally limited to those consequences which a reasonable man would have foreseen; and (ii) the enunciation of the great principle of the common law, that a guilty mind is an essential element in criminal responsibility. The new concept envisages that merely to bring about a person’s act under prohibited harm is not sufficient to hold a man liable to punishment, unless in addition he could be regarded as morally blameworthy came to be enshrined in the well-known maxim *actus non facit res, nisi mens sit rea* (i.e., the act itself does not make a man guilty, unless his intentions were so).¹⁴³

[s 39.6] Development of Principle of *mens rea*

This ancient maxim *actus non facit reum, nisi mens sit rea* has remained unchallenged as a declaration of principle at common law throughout the centuries up to the present day which envisages that no man should be convicted of a crime unless the two requirements of (i) *actus reus*, physical, and (ii) *mens rea*, mental element are satisfied in every crime. It is the principle of natural justice says Lord Kenyon, in *Fowler v Padget*, (1898) 7 TLR 509 (514) : 101 ER 1103, that the intent and act must both concur to constitute the crime.

The noun “*actus*” is of full generic import in the maxim, which could be slightly enlarged and paraphrased as: “whatever deed a man may do, it cannot make him criminally punishable, unless his doing of it was actuated by a legally blameworthy attitude of mind”.

Criminal law is concerned with results emanating from human conduct (human deeds) and of the results. It is

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only concerned with the cases which the criminal policy of a given community has singled out as sufficiently harmful to it to prohibit them, with sanctions for disobedience to the prohibition.

Criminal law is interested with the behaviour of men; therefore the physical element indicated by the word *actus* (the act done), the deed, must consist of some manifestation of physical behaviour; the mental element indicated by the word *mens* (mind) must consist of some operation of man's mental process.

In the past, liability depended solely upon two objective facts stated below, i.e.,

- (a) That a thing had been done (deed), which the law prohibited being done; and
- (b) That the man accused had done it (this second fact being ascertained by following the chain of causation).

A further ingredient of liability was added later on, namely:—

- (c) That the accused should have been actuated by a legally reprehensible attitude of mind (*mens rea*).

In short, there are five main points in the totality of criminal responsibility, viz.

- (i) human action, or abstention from (conduct) action (which, for the purpose of the present discussion is termed "conduct"),
- (ii) such circumstances as are prohibited by the law,
- (iii) the result of the conduct in these specified circumstances,
- (iv) the conduct must be voluntary, and
- (v) the result must be foreseen.

[s 39.7] *Actus reus*

To constitute a crime at common law there must always be a result brought about by human conduct, a physical event, which the law prohibits, for example, killing of a man, raping a woman, etc. It has long been the custom to employ the term *actus reus* to denote a deed so prohibited. A result of human conduct is an event which, for the present purposes must be carefully distinguished from the line of conduct which produced that event.

No man can pursue a line of conduct without producing a continuing series of events, any one of which may, or may not, constitute an event forbidden by law. Thus, a man who intends to murder another may lawfully purchase a revolver for the purpose, or he may secretly take and carry away the revolver without the consent of the owner, thus performing the *actus reus* of theft. He may then break and enter victim's dwelling house during the night, thereby performing the *actus reus* of another crime, viz., burglary.

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However harmful or painful an event may be, it is not an *actus reus*, unless the law in the particular circumstances of the case has forbidden it to be brought about. For instance, the duly appointed executioner, who has put to death a convicted criminal in accordance with his sentence, has killed a man with deliberate intent so to do, but he has committed no crime, because the deed was not prohibited but was actually commanded by the law.

Again, the use in certain circumstances of even deadly force by any person in prevention of the commission of a crime by another person, or in the arrest of one who has committed a crime, does not give rise to criminal liability. Similarly, the law does neither prohibit limited chastisement of a child by a parent or a school teacher, nor the causing of hurt in the course of sports and games, or in the performance of a surgical operation by one duly qualified surgeon. That the deed was not prohibited by law is a complete defence for the man who had done that deed, for although the *actus* was his, yet in the special circumstances of the case, it was not *reus* on the other hand.

There is no “reasonable man” test of remoteness of damages for criminal liability as in the case of the law of torts, but this is not needed since the doctrine of *mens rea* has come to operate as a limitation, constituting as it does a subjective test in the rule that the prosecution must establish beyond reasonable doubt, that the accused foresaw that certain specified harmful consequences would or might result from his conduct.

[s 39.8] Mens rea

Mens rea is a technical term, generally taken to mean some blameworthy mental condition, whether constituted by intention or knowledge or otherwise, the absence of which on any particular occasion negatives the intention of a crime. No act is *per se* criminal, the act becomes criminal when the actor does it with a guilty mind. The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong. That intention may belong to one or the other of two classes. It may be to do a thing wrong in itself apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may co-exist with respect to the same deed. There are many things that are not prohibited by any statute, for instance fornication (sex between people not married to each other) or seduction, which is wrong; and the intention to do an act wrong in this sense at the least must, as a general rule, exist before the act done can be considered a crime. In *Brend v Wood*, (1946) 62 TLR 462, Lord Goddard CJ, said:

It is of utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.

In the common term (parlance), intention means purpose or desire to bring about a contemplated result or foresight that certain consequences will follow from the conduct of the person. Thus, as stated by Lord Atkin, “a man is presumed to intend the necessary or the natural and probable consequences of his act; and this presumption will prevail, unless from the consideration of all the evidence, the court entertains a reasonable doubt whether such intention existed or not.” For instance, if a man throws a boy from a high tower or cuts off his head, it is obvious that he desired the victim’s death and foresaw it.

Similarly, if a man abandons his two months old child in a forest, who ultimately dies, it is apparent that the consequences were known to him. In all such cases the man is said to have intended the desired act. Everything which is the natural and probable consequence of the act must be taken to be the intention of the prisoner.

On the other hand, if A, while in a fit of epilepsy strikes and hurts B, A is not liable for causing injury because at

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that that time he had no control over his actions. The movement of his arms and his legs were not voluntary. Similarly, if A, who was suffering from the mental disorder known as somnambulism, steps on B, who was sleeping on the floor and hurts him. A is not liable for causing hurt, because his actions were neither conscious nor voluntary. Likewise, if A, while shooting at a tiger hurts B, who was behind a bush and concealed from his view, he is not liable for injuring B, because he could not foresee his bullet hitting B, the act being purely an act of accident.

In the course of time two tests were evolved to determine *mens rea*, viz.,

First, whether the act in question was a voluntary act of the accused, and

Secondly, whether the accused had the foresight of the consequences of his conduct, i.e., whether the result was foreseen.¹⁴⁴

However, there is no single state of mind that must be present as a prerequisite for all crimes. *Mens rea* in fact, takes on different colours in different surroundings.¹⁴⁵ An evil intent for one kind of offence may not be so for another kind. For instance, in the case of murder, it is the intent to cause death; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible cohabitation with a woman without her consent; in the case of receiving stolen goods, knowledge that the goods were stolen; and in the case of homicide by negligence, recklessness or indifference to the consequences.¹⁴⁶

Some crimes require intention and nothing else will do, but most can be committed either intentionally or recklessly, while some require particular kind of intention or knowledge.¹⁴⁷ Outside the class of crimes requiring *mens rea*, there are some that require no particular state of mind but do require negligence. For instance causing death of a pedestrian by negligent driving a vehicle or causing death of a patient by gross negligence by a doctor is an offence punishable under section 304A, IPC.

[s 39.9] Negligence

Negligence in crimes, unlike in torts, is not the basis of liability in general. It is in a few cases that the *Penal Code* fixes criminal liability on the ground of negligence. For instance, a man is punishable for his negligent acts only if it affects the life, or personal safety of others, such as in the case of rash and negligent driving, medical negligence, rash navigation of a vessel, negligent conveying of persons by water for hire in an unsafe or overloaded vessel, etc.

[s 39.10] Intention and motive

Intention must be distinguished from motive. (i) Motive is the reason or ground of an action, whereas intention is the volition or active desire to do an act.

In other words, intention is an operation of the will directing an overt act; motive is the feeling which prompts the operation of the will—the ulterior object of the person willing.

For instance, if A kills B, the intention is the state of mind which directs the act which causes death, the motive is the object which the person had in view, namely, the satisfaction of some such desire as revenge, vengeance, hatred and the like.

Motive is not a basis for criminal liability. Criminal law takes into account only a man's intention and not his motive. A good motive will not render lawful what is in fact a crime. If a man steals food in order to feed his starving child, the act amounts to theft, in spite of the fact that the motive for the act was to save the life.

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Likewise, a bad motive will not make unlawful that which is lawful. An executioner may enjoy putting a convict to death because of spite against him, but this would not render his lawful act a crime. Thus, motive is not a *sine qua non* (an indispensable requisite or condition) for holding the accused liable.

Om Prakash: The Apex Court in *Om Prakash v State of Uttaranchal*,¹⁴⁸ (2003) has accordingly held that the motive of crime is not a necessary requirement for conviction. The court turned down the plea of absence of motive for the commission of the crime wherein the guilt of the accused is proved otherwise. The accused, a domestic servant mercilessly in a cruel manner murdered three out of four of the members of the family and grievously injured the fourth. Since the manner of the killing of the three deceased and injuring the survivor of the members of the house-hold, where the accused was working for a number of years was of such a ghastly and cruel nature that shocked the conscience of the society, the Supreme Court held death penalty is the appropriate sentence being a case of rarest of rare nature. The court rightly observed that failure to prove motive is irrelevant in a case wherein the guilt of the accused is proved beyond comprehension otherwise.

Yunis: In *Yunis v State of Madhya Pradesh*,¹⁴⁹ the Supreme Court held that where the oral evidence against the accused is sufficient to prove the guilt of the accused question of presence of motive is irrelevant.

On the other hand, and where the essential ingredients of the offence is not established, absence of proof of motive would be a ground for acquittal of the accused. However, the evidence of motive is relevant since it throws light on the question of intention and gives clue to a crime, and though the prosecution is not bound to prove motive for a crime, absence of motive may be a factor in consideration of the guilt of the accused. As stated by the Supreme Court in *Basdev v State of Pepsu*,¹⁵⁰ motive is something which prompts a man to form an intention.

[s 39.11] Intention and knowledge

Intention is distinguishable from knowledge. An intention to commit an offence may be inferred from knowledge, though at times intention and knowledge merge into each other. If A, sets a house on fire in an inhabited locality at night for the purpose of facilitating a theft, and thereby causes death of some persons, living in the house, A is liable for murder of the inhabitants. Intention to cause death will be inferred from the awareness of the risk involved in the act of setting fire.

Nonetheless, there is a distinction between intention and knowledge.¹⁵¹ Knowledge is the awareness of the consequences of an act. A man may be aware of the consequences of his act, though he may not intend of bring them about. A, attacked by a wild animal calls out B, to fire in order to save him, though with imminent hazard to himself. B, who, in response to A's request, fires which causes the death of A, is not liable for A's death. Here B's act was not the intentional killing of A, though B knew the act was likely to cause A's death.¹⁵² So also, if a patient gives his consent to take the risk of an operation, which in large proportion of cases has proved fatal, the surgeon who performed the operation would not be punished for murder, if the patient dies during the course of the operation. The death was not intentional though it was known that the operation might result in the death of the patient.

[s 39.12] Knowledge and reason to believe

Knowledge is again distinguishable from “reason to believe”.¹⁵³ A person is supposed to know a thing where there is a direct appeal to his senses, whereas “reason to believe” means sufficient cause to believe a thing but not otherwise. If A comes to B at night under suspicious circumstances and offers to sell a valuable watch for Rs. twenty only, B may not know that the watch is stolen, but he has sufficient reason to believe that the watch might be stolen, as is evident from the low price demanded.¹⁵⁴

Sherras: In *Sherras v De Rutzen*, (1895), a publican was charged with supplying liquor to a constable on duty, contrary to a section 16(2) of the Licensing Act, 1872.¹⁵⁵ No such word as “knowingly” was used in the sub-section. Nevertheless, the publican was held not to have been guilty of an offence as it appeared that he did not

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know that the constable, who was served liquor in his presence, was on duty; in fact, he had good grounds for believing him to be off duty.

There are three degrees of knowledge, viz.,

- (1) Actual knowledge, which may be inferred from the conduct of the accused;
- (2) Constructive knowledge: Knowledge of the second degree exists when a person deliberately refrains from making inquiries, the result of which he might not care to have, and it is actual knowledge in the eye of the law.
- (3) Knowledge of the third degree exists when someone unintentionally fails to make the inquiries which a reasonable and prudent person would make. It is constructive knowledge, a construction which, generally speaking, has no place in criminal law.

[s 39.13] Wilful Blindness Constitutes Actual Knowledge

Michael: In *Michael Erin Briscoe v The Queen, AG of Ontario*,¹⁵⁶ (2010), the Supreme Court of Canada held that wilful blindness constitute actual knowledge to make a person liable for *criminal act*.

C, a 13-year-old girl, and a young friend were lured into a car on the false promise of being taken to a party. *B* drove the group, which included *L* and three youths, to a secluded golf course unabashed (not ashamed) to *C* or her friend, *L* had said earlier in the day that he would like to find someone to kill. It would appear that the idea had been generally well received and *C* was chosen by *L* and some of the others as the victim. On their arrival, *B* opened the trunk and, at *L*'s request, handed him some pliers. *B* stayed behind at the car as the others went onto the golf course under the guise of seeking the party. *B* rejoined the group around the time that one of the youths hit *C* from behind with a wrench (spanner with jaws). For a moment, *B* held on to *C* and angrily told her to be quiet or shut up. *B* then stood by and watched as *C* was brutally raped and murdered.

All five persons involved were charged with kidnapping, aggravated assault and first degree murder and the two adults, *B* and *L*, were jointly tried by a judge alone. *B* was acquitted. The trial judge found that the *actus reus* for being a party to the offences was proven, but not the *mens rea* because *B* did not have the requisite knowledge that *L*'s intention to commit the crimes.

The Court of Appeal overturned the acquittals and ordered a new trial, holding that the trial judge erred in law by failing to consider wilful blindness.

Allowing the appeal the Supreme Court of Canada held that the doctrine of wilful blindness, correctly delineated, is distinct from recklessness and involves no departure from the subjective inquiry into the accused's state of mind which must be undertaken to establish an aider or abettor's knowledge. Wilful blindness does not define the *mens rea* required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the *mens rea*. Wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries.

[s 39.14] Mens rea under the Indian Penal Code

The doctrine of *mens rea* as such has no application to the offences in general under the *Indian Penal Code*, which is codified unlike its counterpart, the common law.¹⁵⁷ However, the doctrine has been incorporated in two ways:

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First, the provisions as to the state of mind required for a particular offence have been added in the sections itself by using such words as intentionally, knowingly, voluntarily, fraudulently and dishonestly, etc., depending on the gravity of the offence concerned. That is to say, every offence under the *Penal Code* virtually imports the ideas of *mens rea*.

Secondly, the concept of *mens rea* has been incorporated into the provisions relating to the “General Exceptions” contained in Chapter IV of the Code.

And where the legislature has omitted to lay down a particular state of mind as an essential ingredient of an offence under the Code, the presumption is that such an omission is deliberate and in such a case the doctrine of *mens rea* will not apply.¹⁵⁸ For instance, in offences like waging war against the Government of India, sedition, kidnapping, abduction, counterfeiting government stamps, coins and the like,¹⁵⁹ no element of *mens rea* is required for the commission of the offence. Nevertheless, the courts have applied the doctrine of *mens rea* in deciding cases even where the section does not speak of any state of mind, relying on English precedents.¹⁶⁰

[s 39.15] Some of the cases in which Doctrine of *Mens Rea* does not apply under the *Penal Code*

There is a presumption that the doctrine of *mens rea* applies to all statutory crime. But the presumption is liable to be displaced either.

- (i) by the express provision of law, i.e., words of the statute creating the offence or
- (ii) by necessary implication, i.e., by the subject matter with which it deals.

The Supreme Court on more than one occasions has reiterated that unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, a person should not be found guilty of an offence, if he has not a guilty mind. In *State of Gujarat v DP Pandey*, the Supreme Court has stated the rule of interpretation of penal statutes in the following words:

The broad principles accepted by courts in this country as well as in England are: Where an offence is created by a statute, however comprehensive and unqualified the language of the statute, it is usually understood as silently requiring that the element of *mens rea* should be imported into the definition of the crimes, unless a contrary intention is expressed or implied. In other words, the plain words of the statute are subject to a presumption, which may be rebutted, that the general rule of law that no crime can be committed unless there is *mens rea*, has not been ousted by the particular enactment.¹⁶¹

[s 39.15.1] Crimes of strict liability

Thus, in exceptional cases a person may be convicted of an offence independently of any wrongful intent or culpable negligence. Such offences are termed as offences of strict liability or absolute liability. In such a case it is no defence to an accused that he honestly believed on reasonable grounds and in good faith in the existence of facts which would have rendered his conduct innocent.¹⁶² Cases to which the doctrine of *mens rea* does not apply may be placed under four categories,¹⁶³ viz.:

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- (i) Statutory offences of abduction, kidnapping, rape and offences against the State and army, etc.;
- (ii) Cases of public nuisance, libel and contempt of court, etc.;
- (iii) Offences created by statutes that are regulatory in nature, in which although the proceedings are criminal, it is really a mode of enforcing a civil right, for example, cases of violation of municipal laws, town planning laws, and traffic regulations, etc.;
- (iv) Public welfare offences which include socio-economic offences relating to food, drugs, weights and measures, hoarding and black marketing, licensing, revenue, environment pollution and custom offences, etc. Such offences are basically *quasi*-criminal in nature.

[s 39.15.2] Offences Relating to Hazardous Establishments – Absolute liability

MC Mehta: In *MC Mehta v UOI*,¹⁶⁴ a five member Bench consisting of then PN Bhagwati, RN Mishra, Oza, MM and KN Singh CJ delivered the judgment on a writ petition under *Article 32 of the Constitution* by the Legal Aid and Advice Board and the Supreme Court Bar Association against the judgment of a three member Bench of the court on 17 February 1986,¹⁶⁵ permitting Shriram Fertiliser Industries to restart manufacture of soda and chlorine including its by-products and recovery plants like soap, glycerin and technical hard oil, etc.

Allowing the petition for closure of the plant, PN Bhagwati CJ while delivering the unanimous judgment of the court said:

An enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of activity it has undertaken. The enterprise.....must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.

The Supreme Court has authoritatively ruled that the operation of common law doctrine of strict liability enunciated in 1868 in *Ryland v Fletcher*, (1868) 19 LT 220, and subsequently developed has no application in India. As regards the measure of damages, the court said that the damages by way of compensation must have deterrent effect and must be correlated to the magnitude and capacity of the enterprise. The judgment is not confined only to enterprises which are engaged in industry for profit. It extends to all enterprises which are engaged in hazardous or inherently dangerous activities, viz., State enterprises, scientific research institutions, under or outside the auspices of State, etc.

[s 39.16] Civil Liability for Nuclear Damages Act, 2010: Union Carbide Corporation

Taking into consideration the inadequacy of law which resulted in settlement for a meager sum of US Dollar 470 million, in *Union Carbide Corp v UOI*,¹⁶⁶ against all claims of all victims of world's biggest industrial disaster on 2 December 1984 in which thousands of people lost lives and million became incapacitated, the Parliament has enacted the Civil Liability from Nuclear Damages Act, 2010 for operationalisation of India's civil nuclear deal with the United States and other nuclear supplier countries to India. The Bill has finally been given assent to by the President and has become the Act.

The Act envisages to provide for prompt compensation to the victims of a nuclear incident through a no-fault liability regime channelling liability to the operator, appointment of Claims Commissioner, establishment of Nuclear Damage Claims Commission and for matters connected therewith or incidental thereto.

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The Act consists of 49 sections divided into seven chapters. Chapter 1 is Preliminary, it consists of two sections. Section 1 extends the operation of the Act to whole of India and section 2 gives definition of various terms used in the Act, such as “nuclear damage”,¹⁶⁷ (h) “nuclear fuel”,¹⁶⁸ (i) “nuclear incident”,¹⁶⁹ (j) “nuclear installation”,¹⁷⁰ (k) “nuclear material”,¹⁷¹ (l) “nuclear reactor”,¹⁷² and (p) “Radioactive products or waste.”¹⁷³ Section (2)(g) defines “nuclear damages” in very wide terms to include:

(1) “Nuclear damages” includes—

- (i) loss of life or personal injury,
- (ii) loss of, or damage to, property,
- (iii) any economic loss;
- (iv) Costs of measure of reinstatement of impaired environment caused by a nuclear incident,
- (v) Loss of income,
- (vi) The costs of preventive measures,
- (vii) Any another economic loss.

Section 2(h) defines “nuclear fuel” means any material which is capable of producing energy by a self-sustaining chain process of nuclear fission.

Chapter II in sections 3 to 8 has fixed absolute liability for nuclear damages, section 6 provides liability in respect of each nuclear incident in rupee equivalent of three hundred million and Special Drawing Rights or such higher amount as the Central Government may specify by notification. Chapter III in sections 9 to 12 provide for establishment of claim commissioner, where a person can make redress in case of nuclear damage. Chapter IV in sections 13 to 18 provide provision for claims and awards.

Chapter V in sections 19 to 38 provide for *constitution* of Nuclear damage claim commission, if the Central Government having regard to the injury or damage caused by a nuclear incident consider appropriate to expedite the claim etc., in public interest.

The Act in Chapter VI in sections 39 to 42 fixes penal liability in case of contravention of the provision of the rule which may extend up to five years’ imprisonment. Section 40 fixes personal liability on the senior officers of the company, such as Director, Manager, Secretary or other officers for committing any offence.

Chapter VII which deals with miscellaneous provisions consists of seven sections 43 to 49.

[s 39.17] Indian Council for Enviro-Legal Action

In *Indian Council for Enviro-Legal Action*,¹⁷⁴ the Supreme Court held that the polluter is liable to pay the costs in removing the pollution caused due to the chemical industries producing “H” (Hydrochloric) and sulphuric acid.

[s 39] “Voluntarily”.—

MC Mehta: And in *MC Mehta*,¹⁷⁵ the court ordered for the closure of 292 coke-run industries operating in TTZ (Taj Trapezoidal), alternatively to change over to natural gas as an industrial fuel. The court rightly held that coke-based industries had a dangerous effect on the heritage monument and that in the case of Taj not even one percent chance can be taken. It is gratifying to note that in two of its judgments¹⁷⁶ the Gujarat High Court has ordered the “Maridia group of industries “and Reliance” to pay a huge amount of Rs 2.36 crore and rupees seventy lakh respectively as compensation to those affected by their polluting unites applying the principle of absolute liability enunciated by the Apex Court in its 1987 judgment of *Shriram Food and Fertilizer Industry*.¹⁷⁷

[s 39.17.1] Offences relating to sale of prohibited drugs

Warner: In *Warner v Metropolitan Police Commissioner*, ([1968](#)) [2 All ER 356](#), the House of Lords while dismissing the appeal, held that the offence created by section 1 of the Drugs (Prevention of Misuse) Act, 1964 (substituted by the Misuse of Drugs Act, 1971) is an absolute offence.

The gravity of the evil and the dangers, which are presented by the passing of the drugs through informal or unauthorised channels even where some of the unauthorised persons have no improper motives or are merely careless or indifferent indicate the importance of closing them altogether. The Act forbids them; and expressly excludes the requirement of *mens rea* as a necessary ingredient for conviction. The defendant accordingly is deemed to be in possession of a prohibited substance, but was never aware of its true nature.

The appellant, who was a floor-layer (porter) by occupation, sold scent as a side job. On 18 November 1966, he went to a cafe, where on inquiry whether anything had been left for him, the proprietor told him that there was something for him under the counter. The appellant found two boxes there, which he took, without looking inside the smaller box, assuming that it contained scent. A police officer stopped the appellant while he was driving his mini-van. In the smaller of two boxes were found twenty thousand tablets containing amphetamine sulphate, a prohibited drug specified in the schedule to the Drugs (Prevention of Misuse) Act, 1964. The appellant was charged with having in his possession drugs contrary to section 1¹⁷⁸ of the Act of 1964. The jury was directed that absence of knowledge on the part of the appellant what the smaller box contained went only to mitigation. The appellant was found guilty.

[s 39.17.2] Pharmaceutical Society

In *Pharmaceutical Society of Great Britain v Stockwain Ltd*, ([1986](#)) [2 All ER 635](#) (HL), the defendant-appellant supplied drugs on prescription purporting to be signed by Dr Irani. The prescription was forged. Accordingly, the accused were charged with an offence contrary to section 58(2) of the Medicines Act, 1968 which provides that:

No person shall sell by retail, or supply in circumstances corresponding to retail sale, a medical product of a description, or falling within a class, specified in an order under this section except in accordance with a prescription given by an appropriate practitioner...

There was no finding that the defendants acted dishonestly, improperly or even negligently. So far as it appeared, the forgery was sufficient to deceive the sellers without any shortcoming on their part. Yet the House of Lords held that the Divisional Court had rightly directed the magistrate to convict. The court cited the following summary of principles stated by Lord Scarman, giving the advice of Privy Council in *Gammon (Hong Kong) Ltd v AG of Hong Kong*, ([1984](#)) [2 All ER 503](#).¹⁷⁹

(1) There is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is “truly criminal” in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4)

[s 39] “Voluntarily”.—

the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern; public safety is such an issue; (5) even where the statute is concerned with such an issue, the presumption of *mens rea* stands unless it can be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of prohibited act.

The Divisional Court said that the statute applied to an issue of social concern and public safety; and strict liability would be effective to promote its objects. Stokwain of course knew that the medicine was “prescription only” but believed on reasonable grounds that the prescription was valid. The Act (Minister) had not provided an exemption for that.

[s 39.17.3] Offences relating to river pollution – Strict Liability.—Alphacell Ltd

In *Alphacell Ltd v Woodward*, [\(1972\) 2 All ER 475](#) (HL), the offence of causing poisonous, noxious or polluting matter to enter a stream contrary to section 2(1)(a) of the River (Prevention of Pollution) Act, 1951 is of strict liability. Alphacell Ltd. prepared manila fibres for paper on premises adjoining a river. The water in which the fibres were washed was polluted and, in order to prevent it from flowing into the river, Alphacell Ltd. installed pumps in the cleaning tank. On one occasion the pumps, designed to work automatically did not do so owing to the fact that hose (hose pipe) was blocked by brambles (with shrub).

Alphacell were charged with causing polluted matter to enter the river contrary to section 2(1)(a) of the Rivers (Prevention of Pollution) Act, 1951.¹⁸⁰ The Magistrate convicted them although there was no finding that they knew of the defect in the pumps or that they were negligent. Alphacell Ltd. unsuccessfully appealed to a Divisional Court and to the House of Lords.

The court said that it is of the utmost public importance that our rivers should not be polluted. The risk of pollution, particularly from the vast and increasing number of riparian industries, is very great. The offences created by the 1951 Act are prototypes of offences that “are not criminal in any real sense, but are acts which in the public interest are under a prohibited penalty”. There is no valid reason for reading the words, “intentionally”, “knowingly” or “negligently” into section 2(1)(a) of the Act and a number of cogent reasons for not doing so. Such offences are of strict liability.

If it were held to be law that no conviction could be obtained under the Rivers (Prevention of Pollution) Act, 1951, unless the prosecution could discharge the often impossible onus of proving that the pollution was caused intentionally or negligently, a great deal of pollution would go unpunished and undeterred to the relief of many riparian factory owners. As a result, many rivers, which are now filthy, would become filthier still and many rivers, which are now clean, would lose their cleanliness.

MC Mehta: In *MC Mehta*,¹⁸¹ the Apex Court upheld a citizen’s fundamental right to a clean and hygienic environment, which was being violated by the pollution of river Ganga at Kanpur. Taking note of the gravity of the matter, the court ordered for the closure of twenty-nine tanneries for failure to provide primary treatment plants, and turned down the respondent’s plea of financial incapacity to undertake such costly devices. The court said: ‘Just like industry which cannot pay minimum wages to its workers cannot be allowed to exist, a tannery, which cannot set up a treatment plant cannot be permitted to continue to be in existence.’

[s 39.17.4] Offences relating to analogues drug statutes

McFadden: In *McFadden v United States*, held that for conviction under the federal “Analogues” drug statute, defendant must “know” that he is dealing with an analogue controlled substance, meaning that he “knew the identity of the substance he was distributing.”

Facts: To combat the distribution of analogue drugs that mimic the effects of prohibited drugs but differ in chemical structure, Congress enacted the Controlled Substance Analogue Enforcement Act of 1986, which defines “controlled substance analogue” substance (21 USC § 802(32)(A)), and then directs that if an analogue is “intended for human consumption,” it should be “treated ... as a controlled substance in Schedule I” of the federal narcotics statute, 21 USC § 841. Thus, a defendant who “knowingly” possesses an analogue with the intent to distribute is guilty (§ 84(a)). The lengthy definition of “analogue” requires (1) a chemical structure “substantially similar” to a controlled substance; (2) an “effect on the central nervous system that is substantially similar to” a controlled substance, “or” (3) an intention or representation that it will have such a “substantially similar” effect. Needless to say (I hope), this lengthy definition is not a model of clarity.

McFadden produced and sold substances that he referred to as “bath salts” but also compared to cocaine and meth. A store in Charlottesville, Virginia came under investigation, and the owner made “controlled buys” from McFadden and recorded calls with him. At trial, McFadden requested that the jury be instructed that, to convict, they must find “that he ‘knew that the substances he was distributing possessed the characteristics of ... analogues,’ including their chemical structure.” But the District Court gave only a “compromise” instruction, and McFadden was convicted. The Fourth Circuit affirmed, and ruled that the only “knowledge” the government was required to prove was “that the defendant meant for the substance to be consumed for humans.”

Thomas (for 8): US Supreme Court by a majority of 8 speaking through Justice said an analogue defendant must know that he is “dealing with a controlled substance,” which we think can be proven regarding analogues “in two ways.” *First*, that the defendant actually knew the substance is “actually listed on the federal drug schedules or treated as such by ... the Analogue Act – regardless of whether he knew the particular identity of the substance.” Or *second*, that he “knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue.” That is, he “must know the identity of the substance he possessed.” Which (later) also means “knowledge of the physical characteristics that gives rise to ... treatment” as a controlled analogue. **[Ed. Note:** *Mens rea* is a particularly slippery subject – but even so, I do not find the court’s general language in this opinion particularly helpful.] (Importantly, the court notes twice (nn. 1 & 3) that knowledge may be proven by “circumstantial,” that is inferential, evidence.)

The Fourth Circuit’s instruction failed to include this “knowledge” aspect. Also, the federal statutes reach only *federally* controlled substances, not “all substances regulated by any law.” And the “canon of constitutional avoidance” [which sounds vaguely like the “rule of lenity” here] “has no application” for “an unambiguous statute such as this one.” [“unambiguous,” really?] As for harmless error, we decline to consider it in the first instance, and so we remand.

Roberts, concurring in part and in the judgment: “I join the court’s opinion, except for the part that says the government can prove the requisite knowledge “by showing that the defendant knew the identity of the substance he possessed.” This statement by the court is dictum, and “should therefore not be regarded as controlling if the issue arises in future cases **[Ed. note:** as it surely will.] Instead, as the statute says, the defendant “needs to know that the substance is *controlled*” (emphasis in original). “Identity” is not sufficient; and here is “a pop quiz for any reader who doubts the point: Two drugs—dextromethorphan and hydrocodone – are both used as cough suppressants. They are also both used as recreational drugs. Which one is a controlled substance?” (In a footnote: “the answer is hydrocodone.”) Just as in *Liparota* (1985), we ruled that a defendant must know something is “stolen” to be convicted of receipt of stolen property.¹⁸²

[s 39.17.5] Sale of lottery ticket to persons under 16 – Strict liability

Shah: The court of appeal in *Harrow London Borough Council v Shah*,¹⁸³ held that the offence of selling a National Lottery ticket to a person who has not attained the age of 16 years, contrary to section 13 of the National Lottery etc. Act, 1993 and regulation 3 of the National Lottery Regulations, 1994, is an offence of strict liability. Thus, all that the prosecution is required to prove is the sale of a National Lottery ticket to a particular person and that, at the time of the sale, that persons was under 16; the prosecution does not have to prove that the defendant or his agent was aware of the buyer’s age, or was reckless as to his age.

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- 1** Proceedings of the Legislative Council (1860), p 1261.
- 139** *Vallappa v Bheema Rao*, AIR 1918 Mad 136 (FB); See Nelson's *Pakistan Penal Code* (Edn by SA Halim 1975), Vol I, pp 148-150.
- 140** *State of Punjab v Meattle*, AIR 1967 Punj 74 .
- 141** See *IPC*, section 94 Explanation 2.
- 142** See *Ratan Lal and Dhirajlal, Law of Crimes*, vol I (24th Edn, 1997), p 142.
- 143** See KD Gaur, *Criminal Law: Cases and Materials* (5th Edn, 2008). Chapter 2. *Fowler v Padget*, (1789) 7 TR 509; Russell on *Crime*, vol I, 12th Edn, (1964), pp 22-60.
- 144** Hall Jerome, *General Principles of Criminal Law*, 2nd Edn, (1960), pp 70-77; Devlin, *Statutory Offences*, 4 J. Sec. Pub. Teachers of Law, 213 (1958). Devlin states: *Mens rea* consists of two elements. It consists first of the intent to do an act, and secondly, of the knowledge of the circumstances that makes that act a criminal offence.
- 145** Sayre, *Mens Rea*, (1932) Harvard LR, p 974.
- 146** *Salmond on Jurisprudence* (11th Edn, William G., 1957), pp 408, 409. "Intention is the foresight of a desired issue, however improbable..." Hall Jerome, *General, Principles of Criminal Law* (2nd Edn, 1960), pp 70. Hall defines, "Intention, as a foresight that certain consequences will follow from an act, and the wish for those consequences working as a motive which includes the act". Stephen says: "Intention is the direction of the conduct". According to Austin, "intention is the aim of the act, of which motive is the reason or ground of an action".
- 147** *Sheras v De Rutzen*, (1895) 1 QB 918 . A Publican (who runs a pub) held not guilty.
- 148** (2003) 1 SCC 648 [[LNIND 2002 SC 777](#)] : 2003 Cr LJ 493 : 2002 XAD (SC) 577.
- 149** (2003) 1 SCC 425 [[LNIND 2002 SC 784](#)] : AIR 2003 SC 539 [[LNIND 2002 SC 784](#)] : 2003 Cr LJ 817 : 2002 XAD (SC) 393.
- 150** AIR 1956 SC 488 [[LNIND 1956 SC 34](#)] : 1956 SCR 363 [[LNIND 1956 SC 34](#)] : 1956 SCJ 554 ; see Ratanlal and Dhirajlal, *Law of Crimes*, 23rd Edn, pp 212-221.
- 151** See RC Nigam, *Law of Crimes in India*, (Vol 1), pp 77-79.
- 152** See Draft *Penal Code*, Appendix Note B, p 108.
- 153** For definition of "reason to believe" see text of section 26, *IPC*.

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- 154** IPC, section 411 punishes dishonestly receiving of stolen property. See Chapter 17 for text of section.
- 155** Section 16(2) "If any person... supplies any liquor or refreshment whether by way of gift or sale to any constable on duty... he shall be guilty of an offence."
- 156** Journal of Supreme Court of Council, (2010) SCJ 13 .
- 157** The common law is that body of law and juristic theory which is administered in England. As distinguished from law created by the enactment, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the court recognising, affirming and enforcing such usages and customs. See *Black's Law Dictionary*, 1968, pp 345-346.
- 158** MC Setalvad, *The Common Law in India*, 2nd Edn, NM Tripathi (1970), p 139; Mayne, *Criminal Law in India* (4th Edn), p 9; Sir Hari Singh Gour, *Penal Law of India*, 11th Edn, vol 1 (2000), pp 371 to 377; Ratanlal, *The Law of Crimes*, (24th Edn) 1997, pp 141-144; "Diluting the Doctrine of Strict Liability," (1970) ASIL, pp 477-480.
- 159** See IPC sections 121, 124A, 259, 363, 232. The Supreme Court in *Ranjit D Udeshi v State of Maharashtra*, AIR 1965 SC 881 [[LNIND 1964 SC 205](#)] : (1965) 1 SCR 65 [[LNIND 1964 SC 205](#)] : (1965) 2 Cr LJ 8 , has ruled out the concept of *means rea* in cases of obscenity arising under sections 292, 293, IPC See *infra* Chapter 14, section 292 for the case.
- 160** See *Ravula Hariprasad Rao v State of Madras*, AIR 1951 SC 204 [[LNIND 1951 SC 22](#)] : (1951) 2 SCR 322 [[LNIND 1951 SC 22](#)] : 1951 SCJ 296 : 1951 Cr LJ 768 ; *Sadak Ali v Emperor*, AIR 1948 Cal 47 ; *Srinivas Mall v Emperor*, AIR 1947 PC 135 ; *J Amma v P Nair*, (1954) Ker LT 977 ; *Kasi Raja Re*, AIR 1953 Mad 156 ; *Pantam Venkayya Re*, AIR 1930 Mad 246 [[LNIND 1929 MAD 296](#)] ; *Kochu Muhammad Kunju Ismail v Mohammad Kadeja Ummo*, AIR 1959 Ker 151 [[LNIND 1958 KER 192](#)] ; *Daljit Singh v Emperor*, AIR 1973 Ngp 274 ; *Atul Chandra Pal v State*, 1970 Cr LJ 212 ; *Nathulal v State of Madhya Pradesh*, AIR 1966 SC 43 [[LNIND 1965 SC 97](#)] : 1966 Cr LJ 71 ; See also *Queen v Tolsor*, (1889) 23 QBD 168 ; *Pearks' Diaries Ltd v Torrenham Food Control Committee*, (1919) 88 LJ 623 (626); *Brend v Wood*, (1946) 62 TLR 462 ; *Harding v Price*, (1948) All ER 283 (KBD); *Lin Chin Aik v Queen*, ([1963 AC 160](#)) : (1965) 1 SCR 123 [[LNIND 1964 SC 415](#)] : (1965) 35 Comp Cas 557 : 1965 Cr LJ 64 .
- 161** AIR 1971 SC 866 [[LNIND 1970 SC 405](#)] (868) : (1970) 3 SCC 183 [[LNIND 1970 SC 405](#)] : (1971) 2 SCR 557 : (1971) 2 SCJ 311 : 1970 CAR 481 . The court ruled out the requirement of *mens rea* into section 35(1) of the Bombay Trust Act, 29 of 1950.
- 162** See *State of Maharashtra v MH George*, AIR 1965 SC 722 [[LNIND 1964 SC 208](#)] : (1965) 1 SCR 123 [[LNIND 1964 SC 415](#)] : (1965) 35 Comp Cas 557 : (1965) Cr LJ 600 ; *Warner v Metropolitan Police Commissioner*, ([1968 2 All ER 356](#)) ; *Indo-China Stream Navigation Co Ltd v Collector of Customs*, AIR 1964 SC 1140 [[LNIND 1964 SC 25](#)] : (1964) 6 SCR 594 [[LNIND 1964 SC 25](#)] : (1964) 2 Cr LJ 234 .
- 163** See *State of Maharashtra v MH George*, AIR 1965 SC 722 [[LNIND 1964 SC 208](#)] : (1965) 1 SCR 123 : (1965) 35 Comp Cas 557 : (1965) Cr LJ 600 ; *Warner v Metropolitan Police Commissioner*, ([1968 2 All ER 356](#)) ; *Indo-China Stream Navigation Co Ltd v Collector of Customs*, AIR 1964 SC 1140 [[LNIND 1964 SC 25](#)] : (1964) 6 SCR 594 [[LNIND 1964 SC 25](#)] : (1964) 2 Cr LJ 234 .
- 164** AIR 1987 SC 1086 [[LNIND 1986 SC 539](#)] : (1987) 1 SCC 395 [[LNIND 1986 SC 539](#)] : (1987) 1 SCR 819 [[LNIND 1986 SC 539](#)] . As a result of leakage of "oleum gas" from the caustic chlorine plant of Shriram Food and Fertilizer Industry, Delhi, one person died and several persons were affected. It was found that the company has taken all safety measures prescribed under the *Factories Act* and the possibility of risk or hazard has been reduced to nil.
- 165** AIR 1987 SC 965 [[LNIND 1986 SC 40](#)] : (1986) 1 Comp LJ 251 (SC) : (1986) 1 Scale 199 : (1986) 2 SCC 176 [[LNIND 1986 SC 40](#)] : 1987 Supp (1) SCC 131 : (1986) 1 SCR 312 [[LNIND 1986 SC 40](#)] .
- 166** AIR 1992 SC 248 : (1991) 4 SCC 584 : JT 1991 (6) SC 8 .
- 167** The *Civil Liability for Nuclear Damage Act, 2010*, section 2(g).

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168 The *Civil Liability for Nuclear Damage Act, 2010*, 2(h)

169 The *Civil Liability for Nuclear Damage Act, 2010*, 2(i).

170 The *Civil Liability for Nuclear Damage Act, 2010*, 2(j).

171 The *Civil Liability for Nuclear Damage Act, 2010*, 2(k).

172 The *Civil Liability for Nuclear Damage Act, 2010*, 2(l).

173 The *Civil Liability for Nuclear Damage Act, 2010*, 2(p).

174 *Indian Council for Enviro-Legal Action v UOI*, AIR 1996 SC 1446 [[LNIND 1996 SC 353](#)] : (1996) 3 CLR 272 : JT 1996 (2) SC 196 : (1996) 5 Scale 412 : (1996) 3 SCC 212 [[LNIND 1996 SC 353](#)] : (1996) 2 SCR 503 . See KD Gaur, *Criminal Law; Cases and Materials*, (5th Edn, 2008) pp 870-872 for facts of the cases.

175 *MC Mehta v UOI*, AIR 1997 SC 734 [LNIND 1996 SC 2207] .

176 Times of India, 16 December 1996 (Lucknow Edn.).

177 *MC Mehta v UOI*, AIR 1987 SC 1086 [[LNIND 1986 SC 539](#)] : (1987) 1 Comp LJ 99 : JT 1987 (1) SC 1 : (1986) 2 Scale 188 : (1987) 1 SCC 395 [[LNIND 1986 SC 539](#)] : 1986 Supp (1) SCC 562 : (1987) 1 SCR 819 [[LNIND 1986 SC 539](#)] .

178 It shall not be lawful for a person to have in his possession a substance specified in the Schedule to this Act unless it is in his possession by virtue of the issue of a prescription:

- (a) By a duly qualified medical practitioner or a registered dental practitioner for its administration by way of treatment to him or to a person under his care; or
- (b) By a registered veterinary surgeon or a registered veterinary practitioner for its administration by way of treatment to an animal under his care; or
- (c) He is registered as a manufacturer of, or a dealer.....’

179 See *R v McNamara*, (1988) 73 Cr App R 246 (Criminal Division).

180 Section 2(1)(a): A person commits an offence if he causes or knowingly permits to enter a stream any poisonous, noxious or polluting matter. *Section 277, IPC* makes fouling water of public spring or reservoir an offence. And section 2(k) of *Water (Prevention and Control of Pollution) Act, 1974*, requires factory owners to put up necessary treatment plants for treating trade effluents.

181 (1988) 3 SCC 471 : AIR 1988 SC 1115 [[LNIND 1988 SC 14](#)] : (1988) 2 SCR 530 [[LNIND 1988 SC 14](#)] . In a strong worded warning to the Kanpur Municipal Corporation, the Court said, that nuisance caused by pollution cannot be allowed to go unabated and directed the Corporation to take effective preventive and corrective measures to arrange for removal of waste, etc., accumulated in the city, to lay proper sewage line, to construct public latrines, urinals, to ensure that dead bodies, or half burnt bodies were not thrown into the river and to take action against industries responsible for pollution. See *Municipal Council, Ratlam v Vardichand*, (1980) Cr LJ 1075 (SC) : AIR 1980 SC 1622 [LNIND 1980 SC 287] : (1980) 4 SCC 162 [LNIND 1980 SC 287] : (1981) 1 SCR 97 [LNIND 1980 SC 287] : 1980 CAR 267 .

182 135 S.Ct. 2298 (18 June 2015), 9 (8-1) to 0 (**Thomas; Roberts** concurring in part and in the judgment).

183 [[1999](#)] 3 All ER 302 . The respondents were proprietors of woods Newsagents at Uxbridge Road, Harrow. They employed a Mr Hobday. On 25 April 1998, during the course of his employment, Mr Hobday sold a national lottery ticket to a young boy who was 13½ years old. At the time of the making of the sale, Mr Hobday reasonably, but mistakenly

[s 39] "Voluntarily".—

believed that the boy was at least 16 year old. At the time of the sale the respondent, Dilip Shah, was not in the shop but was working in the back room and the respondent, Bharti Shah, was not on the premises.

Neither respondent was therefore aware of the transaction. Mr Hobday was aware of the obligation not to sell lottery tickets to under age purchaser.

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[[s 40] “Offence”.—

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The Indian Penal Code

CHAPTER II GENERAL EXPLANATIONS

Chapter II of the *Penal Code*, which runs into 47 sections commencing from *sections* 6 to 52A, *IPC*, is for the most part an elaborate interpretation clause. The leading terms used in the text of the Code have been defined and explained. The purpose of this chapter is to offset ambiguity and to avert the possibility of misinterpretation of the different provisions in the Code.¹

¹⁸⁴[[s 40] “Offence”.—

Except in the ¹⁸⁵ [Chapters] and sections mentioned in clauses 2 and 3 of this section, the word “offence” denotes a thing made punishable by this Code.

In Chapter IV, ¹⁸⁶[Chapter VA] and in the following sections, namely, sections ¹⁸⁷[64, 65, 66, ¹⁸⁸[67], 71], 109, 110, 112, 114, 115, 116, 117, ¹⁸⁹[118, 119, 120,] 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word “offence” denotes a thing punishable under this Code, or under any special or local law as hereinafter defined.

And in sections 141, 176, 177, 201, 202, 212, 216 and 441, the word “offence” has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.]

[s 40.1] “Offence” Meaning and Definition

As regards the definition of the term “offence” is concerned there is no satisfactory definition acceptable to all and applicable in all situations. The *Indian Penal Code* which has codified the great bulk of the criminal law of the country, is silent on this issue. Section 40 of the Code simply states:

Except in the chapters and sections mentioned in clauses two and three of the section, the word “offence” denotes a thing made punishable by this Code.....or under any special or local law...¹⁹⁰

The provisions contained in the section are nothing but a statement of fact and cannot be regarded as a definition of an offence. In fact, criminal offences are basically the creation of the criminal policy adopted from time to time by those sections of the community who are powerful or astute enough to safeguard their own security and comfort (whether directly or indirectly). Even those who generally speak of morality, religion or humanity, have the aim of a good and peaceful life in which they themselves can participate by causing the sovereign power in the State (i.e., Parliament in a democracy) to repress a conduct which they feel might

endanger their position.¹⁹¹ Prevention of Terrorists Act, 2002 (POTA) is a good example of such a law, which has now been abolished.

An offence may be described, although not defined as a result of human conduct (active or passive), which it is the policy of the governing power in the State to prevent. Thus, prevention is now-a-days mostly sought through the deterrent effect of a threatened suffering, a punishment which is to be inflicted upon the transgressor, after the accusation against him has been investigated in legal proceedings of a special kind.¹⁹² Once a penal statute prescribes punishment for infringement of certain act or omission it becomes an offence.

This cannot be regarded as a definition of an offence. An act is criminal because it is in the interest of the ruling class to define it so. Persons are labelled as criminal) because so defining them serves the interests of the elite (rich). The lower classes are labelled criminal and the bourgeois (capitalist) is not, because the bourgeois control the means of the production, the State and the law enforcement as well.

[s 40.2] Characteristics of offence (crime)

The outstanding characteristics of an offence (a crime) in modern times, are that it normally results in punishment and that a special legal procedure is followed in deciding on the guilt of the accused person. One can understand as to what constitutes a crime by the following three essential attributes:

- (i) crime is an act of commission or an act of omission on the part of a human being which is considered harmful by the State;
- (ii) the transgression of such harmful acts is prevented by a threat or sanction of punishment administered by the State; and
- (iii) the guilt of the accused is determined after the accusation against him has been investigated in legal proceedings of a special kind in accordance with the provisions of law.¹⁹³

[s 40.3] Distinction between moral, civil and criminal wrongs

Since the very beginning of human civilisation man has recognised certain acts committed by an individual reprehensible to its social interests because they tend to reduce the human happiness. For instance, lying, gambling, cheating, stealing, killing, kidnapping, and so on. Such acts are called wrongs and are looked upon with disapprobation. The evil tendencies of these anti-social acts widely differ in degree and scope. Some of these wrongs, namely, lying, refusal to give a mouthful of rice to save a fellow creature, omission on the part of a swimmer to rescue a man from drowning, etc., are not considered sufficiently serious for the notice of law and are merely disapproved. These acts are considered as immoral or ethical wrongs and are checked to a great extent by social and religious norms (laws).

There are other categories of wrongs, viz., nuisance, deceit, libel, robbery, dacoity, murder, rape, kidnapping, etc., that are considered sufficiently serious for legal action. The state may respond to any such act in two ways, either at the instance of the injured individual or group, or by itself taking a direct action against the wrongdoer. In other words, where the magnitude of injury is supposed to be more concentrated on the individual, the wrong-doer is asked to compensate the injured in terms of money as in case of deceit, libel, nuisance, negligence, etc. This type of wrong is called "civil wrong" or "tort",¹⁹⁴ for which civil remedy by way of damages is awarded to the injured.

On the other hand, where the gravity of injury is comparatively more directed to the public at large, public condemnation or provision for compensation, as in case of moral and civil wrongs, is ineffective. Wrongs like robbery, dacoity, murder, kidnapping, rape, sedition, treason and the like, disturb the very fabric of social structure, create law and order problem and jeopardise the state's existence or create a widespread panic.

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Therefore, the state is not concerned with the question of payment of compensation to the injured by the wrong-doer, as is done in case of torts, but stresses punishing the wrong-doer. This category of wrong, therefore, is called "public wrong" or "crime", for which criminal proceedings are instituted by the State, and the culprit is punished by a court of law.

[s 40.4] Distinguishing Features of Tort and Crime

As crime had its origin in tort, both resemble each other in two respects:

First, both tort and crime are violations of *right in rem*, i.e., right is vested in some determinate person and is available against the world at large; and

Secondly, in case of both wrongs, the rights and duties are fixed by law irrespective of the consent of the parties, unlike contract.

However, there are some points of distinction between the two wrongs, namely:—

- (1) A tort is a private wrong. It is an infringement of the belongings of the individual, whereas crime is a public wrong and is an invasion on public rights and duties which affects the whole society.
- (2) In tort, the wrongdoer has to compensate the injured party, in crime he is punished by the State. The underlying principle of redress is, therefore, different in both the wrongs. In crime, the convicted person is made to undergo suffering of imprisonment and pay fine not only for the sake of redress but also for the sake of example.¹⁹⁵ In tort, it is the reparation or compensation to the person injured and nothing more.
- (3) In tort, the action is brought by the injured party himself and the wrong-doer is asked to compensate him. In crime, the proceedings are initiated by and in the name of the state and the guilty person is punished. Of course, in some cases complaint is to be made by the aggrieved party in order to bring the State machinery into motion.¹⁹⁶
- (4) In case of crimes, every civilised State maintains an elaborate staff of police to prevent offences from being committed, and if committed, a prosecution is launched and the culprit is punished. This is not so in the case of torts, where the injured person is left free to bring action against the wrong-doer in a court of law for damages.

[s 40.5] Felonious tort

There are certain wrongful acts that may fall both under the category of tort as well as crime, such as deceit, trespass, malicious prosecution, defamation, etc.¹⁹⁷ An assault is a tort when looked at from the point of view of an individual, as it is a violation of the right of every person to his personal safety being preserved unmolested. At the same time, such an act is looked upon as a menace to the safety of the society in general. It will, therefore, be punished by the State as a crime.¹⁹⁸ In all such cases, two different kinds of actions are open against the wrongdoer. The wrongdoer may be punished criminally and also compelled in a civil action to pay damages to the party aggrieved. Such kinds of wrongs are called "felonious tort".¹⁹⁹

At one time in England there could not be dual actions, i.e., both civil and criminal, in respect of the same wrongful act. If the act was a felony, it was said that it "drowned the particular and private wrong". This doctrine of the merger of tort in felony prevailed for a considerable period of time. But later on, the doctrine was modified and it was held that both civil and criminal actions could be brought against the inflictor of injury, but the former remedy could only be resorted to after the latter. In other words, the private wrong is not merged in felony, but only suspended until the injured party has performed his public duty of prosecuting the offender.

[[s 40] "Offence".—

In India, this artificial rule of "merger of tort into felony", has not been accepted. An injured person can maintain an action for damages for a tortuous act, even though it amounts to a crime, without, in the first instance, instituting criminal proceedings against the offender. The failure of an injured party to institute a criminal proceeding does not deprive him of his right to bring a suit in a civil court to recover damages for the wrong. This has been done in order to make Indians conscious of their rights and duties.

[s 40.6] Merger of Criminal Liability in Civil Liability is against Public Policy

Union Carbide Corporation: In *Union Carbide Corp v UOI*,²⁰⁰ the Apex Court held that the grant of blanket criminal immunity is a legislative function. There is no power or jurisdiction in a court to confer immunity for criminal prosecution and punishment. The grant of immunity to a particular person or persons may amount to a preferential treatment violative of equality clause under *Article 14* of the Indian *Constitution* that guarantees equality before law.

On the night of 2 December 1984, there was massive escape of lethal gas from the MIC storage tank at Bhopal plant of the Union Carbide (India) Ltd. (UCIL). As a result of which 4000 human lives were lost and tens of thousands of citizens of Bhopal were physically affected. Action was brought up by the Union of India as *parens patriae* before the District Court Bhopal pursuant to the statutory enablement in that behalf under the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 claiming 330 billion dollars as compensation against the company.

When an interlocutory matter pertaining to the interim compensation came up for hearing there was a court assisted settlement between the Union of India and the Union Carbide Corporation (UCC owning 50.99% shareholdings of UCIL). Under this settlement a sum of US Dollars 470 million was agreed to be paid by the UCC to the Union of India in full settlement of all claims of all victims of the gas leak against the UCC. The Union of India also agreed to withdraw certain prosecution that had been initiated against the officials of the UCC and UCIL in this connection.²⁰¹

Allowing the review petition challenging the legal validity, propriety, fairness and constitutionality of the settlement of the claims of the victims, in part, the court held that:

1. The Apex Court had no jurisdiction to withdraw to itself the original suits pending in the District Court at Bhopal and dispose of the same in terms of the settlement and the further contention that, similarly, the court had no jurisdiction to withdraw the criminal proceedings are rejected.
2. The contention that the court had no jurisdiction to quash the criminal proceeding in exercise of its power under *Article 142(1)*²⁰² is rejected. But, in the particular facts and circumstances of the case, it is held that the quashing of the criminal proceedings was not justified.
3. Grant of blanket criminal immunity is a legislative function. There is no power or jurisdiction in court to confer immunity from criminal prosecution and punishment. Grant of immunity to a particular person or persons may amount to a preferential treatment violative of the equality clause.
4. However, the court's direction that future criminal proceedings shall not be instituted or proceeded which must be understood as a concomitant and a logical consequence of the decision to withdraw the pending prosecutions. In that context, the stipulation that no future prosecutions shall be entertained may not amount to conferment of any immunity but only to a reiteration of the consequence of such termination of pending prosecutions. Thus understood any appeal to the principle as to the power to confer criminal immunity becomes inapposite in this case.

[s 40.7] Moral Turpitude – Meaning

[[s 40] "Offence".—

A person convicted of an offence involving "moral turpitude" (shameful wicked act) is disqualified from contesting election to various bodies, such as Lok Sabha, Legislative Assembly and local bodies including *Panchayats*, etc., and for appointment to government and private services in order to maintain sanctity in the system of governance. In other words, conviction of a person involving offences of moral turpitude is sufficient enough to earn disqualification to seek an election and to be appointed for services in government and private sectors. The difficulty arises to determine as to what types of offences could be designated as offences of 'moral turpitude'. Some of the cases in which the courts have tried to define the offence of "moral turpitude" are given below.

Risal Singh: In *Risal Singh v Chandgi Ram*,²⁰³ Divisional Bench of Delhi High Court laid down the three tests which should ordinarily be applied for judging whether a certain offence did or did not involve moral turpitude:

1. Whether the act leading to a conviction was such as could shock the moral conscience of society in general?
2. Whether the motive, which led to the act, was a base one?; and
3. Whether on account of the act having been committed the perpetrator could be considered to be of a depraved character or a person who was to be looked down upon by the society?

Rajendra Prasad Pandey: In *Rajendra Prasad Pandey v High Court of Judicature of Allahabad*, (1998) 2 UPLBEC 2068 : 1998 All LJ 2380, SR Singh J, of Allahabad High Court after reviewing the various decisions of the court, has held that involvement of an employee in an offence of dowry death is an act, against the dignity of woman and cruel treatment of women, etc., is with respect to the offence involving moral turpitude.

Pawan Kumar: The Apex Court in *Pawan Kumar v State of Haryana*²⁰⁴ has held that:

'Moral turpitude' is an expression which is used in legal as also societal parlance but described the conduct which is inherently base, vile, depraved, or having any connection showing depravity. Killing a person *per se* may not come within the periphery of 'moral turpitude' but subjecting a woman to cruelty and or killing her for or in connection with demand of dowry would certainly be an offence involving 'moral turpitude'. It was held that conviction of the appellant Pawan Kumar for obscene acts and songs under *section 294, IPC* on its own would not involve moral turpitude depriving him the opportunity to serve the State unless the facts and circumstances which led to conviction, met the requirement of the policy decision in the body of the judgment.

Mahak Singh: In *Mahak Singh v State of Uttar Pradesh*,²⁰⁵ the Allahabad High Court held that the expression "moral turpitude", is not a term of rigid connotation to be defined in any *strait-jacket* formulae, but regard being had to socio-ethical ethics, and mores (Moral customs) of people, at a given time and their cultural heritage, it would not be difficult for the courts to conclude that the offence committed by the petitioner in exterminating his own stepmother in an horrendous manner involves moral wickedness. The petitioner cannot escape from the finding that the offence of murder of Smt. Raj Kumari committed by him and for which he was ultimately convicted was an act of moral turpitude.

[s 40.8] Doctrine of Stifling (Stopping) of Prosecution

The essence of the doctrine of stifling (stopping) of prosecution is that no private person should be allowed to

[[s 40] "Offence".—

take the administration of criminal justice out of the hands of the Judges and place it in his own hands. The consequences of the doctrine of stifling of prosecution follow where a person sets the machinery of the criminal law into action on the allegation that the opponent has committed a non-compoundable offence and by the use of this coercive criminal process he compels the opponent to enter into an agreement, that agreement would be treated as invalid for the reason that its consideration is opposed to public policy.

The distinction between the "motive" for entering into an agreement and the "consideration" for agreement must be kept clearly distinguished. Where dropping of the criminal proceedings is a motive for entering into the agreement – and not its consideration – the doctrine of stifling of prosecution is not attracted, where there is also a pre-existing civil liability, the dropping of criminal proceedings need not necessarily be a consideration for the agreement to satisfy that liability.

Union Carbide Corporation: In *Union Carbide Corp v UOI*,²⁰⁶ the main thrust of petitioners' argument of unlawfulness of consideration is that the dropping of criminal charges and undertaking to abstain from bringing criminal charges in future were part of the consideration for the offer of 470 million US dollars by the UCC and as the offences involved in the charges were of public nature and non-compoundable, the consideration for the agreement was stifling of prosecution and, therefore, unlawful. But it is inconceivable that Union of India, under the threat of a prosecution, coerce UCC to pay 470 million US dollars or any part thereof as consideration for stifling of the prosecution. Thus, the doctrine of stifling of the prosecution is not attracted in the present case.

¹ Proceedings of the Legislative Council (1860), p 1261.

¹⁸⁴ Subs. by Act 27 of 1870, section 1, for section 40.

¹⁸⁵ Subs. by Act 8 of 1930, section 2 and Sch I, for "Chapter".

¹⁸⁶ Ins. by Act 8 of 1913, section 2.

¹⁸⁷ Ins. by Act 8 of 1882, section 1.

¹⁸⁸ Ins. by Act 10 of 1886, section 21(1).

¹⁸⁹ Ins. by Act 10 of 2009, section 51(b) (w.e.f. 27-10-2009).

¹⁹⁰ *General Clauses Act, 1897, section 3(38)* states: "Offences shall mean any act of omission made punishable by any law for the time being". Halsbury's Laws of England, has defined a crime as: "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", (vol 10, 1955), p 271.

¹⁹¹ Russell on *Crimes*, vol I (12th Edn, 1964), p 18.

¹⁹² 4 B1 Comm. 5; See KD Gaur, *Criminal Law Cases and Materials*, (2008) LexisNexis Butterworths, 5th Edn, pp 28-34 for various definitions of crime KD Gaur, *Personal Liberty and National Emergency under Indian Law: A Critical Appraisal*, Sao Paulo Conference on the Law of the World, 1981.

¹⁹³ See Kenny's *Outlines of Criminal Law*, (19th Edn, 1966) at pp 4, 5; See also Wingersky, Melvin, F., *A Treatise on the Law of Crimes*, (Callaghan & Company) Chicago, 1958, p 79.

[[s 40] "Offence".—

- 194** See Winfield and Jolowicz on *Torts*, 17th Edn, by WVH Rogers (2006), p 5. "Tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages".
- 195** Kenny's *Outlines of Criminal Law*, 19th Edn, (1966) p 536, f.n. 5. The conditional evil which persons will incur if they break a law, and which thus renders that law binding (*sancit*), is called by jurists its sanction. Hence they say, "Punishment is the sanction of Crimes".
- 196** See *IPC*, sections 493-98, Offences relating to marriage; sections 499 and 500, Defamation; sections 503-510, Criminal Intimidation, Insult and Annoyance. The aggrieved party has to initiate criminal action in a court of law against the accused in such cases.
- 197** See *IPC*, sections 120A, 211, 268, 351, 499.
- 198** Section 1(i) Criminal Law Act, 1967 has abolished all distinctions between felony and misdemeanour. In India there is no such distinction.
- 199** Section 1(i) Criminal Law Act, 1967 has abolished all distinctions between felony and misdemeanour. In India there is no such distinction.
- 200** (1991) 4 SCC 584 : AIR 1992 SC 248 : 1991 Supp (1) SCR 251 : (1991) 2 Scale 675 .
- 201** (1989) 3 SCC 38 [[LNIND 1989 SC 922](#)] : AIR 1990 SC 890 .
- 202** Article 142(1) states: "The Supreme Court in the exercise of its jurisdiction may pass such orders as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India..."
- 203** JT 1996 (5) SC 155 [[LNIND 1996 SC 2868](#)] : AIR 1996 SC 3300 [[LNIND 1996 SC 2868](#)] : (1996) 4 SCC 17 [[LNIND 1996 SC 2868](#)] : (1996) 2 SCJ 441 .
- 204** AIR 1998 SC 958 : (1998) 3 SCC 309 : (1998) Cr LJ 1144 (SC).
- 205** AIR 1999 All 274 [[LNIND 1999 ALL 674](#)] : 1999 AIHC 4178 : 1999 All LJ 1893.
- 206** (1991) 4 SCC 584 : AIR 1992 SC 248 : (1991) 3 Comp LJ 213 (SC) : JT 1991 (6) SC 8 : (1991) 2 Scale 675 .

[s 41] “Special law”.—

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[s 41] “Special law”.—

A “special law” is a law applicable to a particular subject.

[s 41.1] Special law

The term “special law” refers only to a law dealing with those matters which has not been dealt with within the *Penal Code*, viz., a law creating offences not contemplated by the Code. In other words, “special law” means a provision of law which is not applicable generally, but which applies to a particular or specific subject.²⁰⁷ For instance, the laws relating to Contempt of Court, *Cattle Trespass Act*, 1871, Excise and Opium Act, etc., making punishable certain things not already punishable under the Code, are special laws within the meaning of *section 41, IPC*.²⁰⁸

¹ Proceedings of the Legislative Council (1860), p 1261.

²⁰⁷ *Arunagirinatha Re*, AIR 1939 Mad 21 [[LNIND 1938 MAD 132](#)] ; *Hakam Khudayar*, AIR 1940 Lah 129 .

²⁰⁸ *Anjanabai v Yashwantrao*, AIR 1961 Bom 154 [[LNIND 1960 BOM 16](#)] .

[s 42] “Local law”.—

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[s 42] “Local law”.—

A “local law” is a law applicable only to a particular part of ²⁰⁹[²¹⁰***] ²¹¹[India]].

[s 42.1] Local law

Laws applicable to particular localities are termed as local laws. For instance, the Madras Maintenance of Public Order Act (1 of 1947) is a local law under section 42 applicable to the state of Madras²¹² now Tamil Nadu. Similarly, the Maharashtra Control of Organized Crime Act applicable in Maharashtra only is a local law. A local law does not necessarily include all the rules made thereunder. When a local law declares a breach of rules made under its authority to be punishable, then a breach of such rules might constitute an offence under *section 40, IPC*.²¹³

¹ Proceedings of the Legislative Council (1860), p 1261.

²⁰⁹ Subs. by the A.O. 1948, for “British India”.

²¹⁰ The words “the territories comprised in” omitted by Act 48 of 1952, section 3 and Sch II (w.e.f. 2-8-1952).

²¹¹ Subs. by Act 3 of 1951, section 3 and Schedule, for “the States” (w.e.f. 3-4-1951). Earlier the words “the States” were substituted by the A.O. 1950, for “the Provinces”.

²¹² *PP v Annamalai*, AIR 1954 Mad 321 [[LNIND 1952 MAD 176](#)] .

[s 42] “Local law”.—

213 *Bux Soo Meah Chowdry v The King*, AIR 1938 Rang 350 (351).

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[s 43] “Illegal”, “Legally bound to do”.—

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[s 43] “Illegal”, “Legally bound to do”.—

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.

[s 43.1] “Illegal”

Section 43 has defined the word “illegal” to include anything and everything which is punishable by law and is an offence and which furnishes the basis for a civil action resulting in claim for damages.²¹⁴ In other words, the word “illegal” has a very wide meaning. It is a synonym for unlawful, meaning what is not justified. For instance, as held by the Privy Council in a case from *West Africa Kwaku Mensah v King*, AIR 1946 PC 20, pointing a gun at a person without legal excuse is an unlawful act and so is illegal. The scope of section 43 is so wide that it covers not merely crimes (offences) and torts which furnish the basis for a criminal and civil action, but also a breach of contract which furnishes ground for an action for damages under section 73 of the *Indian Contract Act, 1872* or which could be enforced specifically.²¹⁵

Criminal law fastens criminal liability as discussed earlier on persons who omit to perform the duty required by law, such as to provide food, clothing, shelter or medical aid to minor children, wife, and aged parents,²¹⁶ and such an act would fall within the scope of the word “illegal”. But a refusal to perform acts of mere charity or mercy not coupled with a legal duty, does not entail legal punishment even if death ensues from such refusal or neglect.²¹⁷

¹ Proceedings of the Legislative Council (1860), p 1261.

[s 43] “Illegal”, “Legally bound to do”.—

214 *Bhagwan Din v Emperor*, AIR 1929 All 935 (936).

215 *Ganpat Subbarao v Emperor*, AIR 1934 Bom 202 .

216 See *CrPC*, 1973, section 125; *Om Prakash v State of Punjab*, AIR 1961 SC 1782 [\[LNIND 1961 SC 201\]](#) : (1962) 2 SCR 254 [\[LNIND 1961 SC 201\]](#) : (1961) 2 Cr LJ 848 : 1962 (1) SCJ 189 .

217 *Om Prakash v Tilak Chand*, (1959) Cr LJ 368 .

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[s 44] “Injury”.—

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[s 44] “Injury”.—

The word “injury” denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.

[s 44.1] Injury

In ordinary language “injury” means a wound or a hurt. But section 44 has defined injury in a much wider sense to include not only bodily harm, but also harm to one’s mind, reputation or property. In other words, the word “injury” in section 44 denotes any harm illegally caused and includes every tortuous act. Thus, an unlawful detention of a cart at a toll gate, caused as a result of illegal demand of toll, amounts to threat of injury. Similarly, a threat to employ the process of law with the object of obtaining more money than is actually due, is a threat of injury. The threat of a decree that cannot be executed by competent authority is a threat of harm or injury within the meaning of *section 44, IPC*.

The illegality of the harm is the gist of the offence. Thus, if the injury is not illegal, it is not injury within the meaning of this section. It implies an illegal act or omission.²¹⁸ An injury may be caused to a person through another as in the case of adultery, or it may be caused to property as in the case of mischief or theft. For instance, when *A* takes away *B*’s cattle and declines to release them until he is paid a sum of Rs 50 and only on receipt of that sum he releases them this amounts to an injury against *B* within the meaning of this section.

[s 44.2] Transmission of Grossly Offensive Messages Over Public Communication System is Crime—United Kingdom

Collins: In *DPP v Collins*, ([2006](#)) 4 All ER 602 (HL),²¹⁹ (2006) the respondent, a man aged 61, made a number of telephone calls over two years from January 2002 to January 2004 to the offices of Mr David Taylor, the Member of Parliament for North West Leicestershire, whose constituent the respondent was. In telephone calls and recorded messages the respondent who held strong views on immigration and asylum policy shouted and made reference to “wogs” (foreigners of a dark-skinned race) “Pakis”, “Black bastards” and “niggers” (Negros). Some of those who received the calls and heard the messages described themselves as shocked, alarmed and depressed by the respondent’s language.

The respondent was charged with sending, by means of a public telecommunications system, messages that

[s 44] “Injury”.—

were grossly offensive or of an indecent, obscene or menacing character, contrary to section 127(1) of the Communications Act, 2003.²²⁰

In the trial court, High Court and Queens Bench Division the charge was dismissed on the ground that, while his messages had been offensive, they were not grossly offensive and a reasonable person would not consider them so.

Allowing the prosecution appeal against the respondent's acquittal their Lordships of the House of Lords held that the test to fix liability under section 127(1) of the Communications Act, 2003 was whether a message was couched in terms liable to cause gross offence to those to whom it related,

- (1) The object of section 127(1)(a) was not to protect people against receipt of unsolicited messages which they might find seriously objectionable, but to prohibit the use of a service provided and funded by the public for the benefit of the public for the transmission of communications which contravened the basic standards of our society.
- (2) The Act prescribed by section 127(1)(a) was the sending of the message by the defined means; the offence was complete when the message was sent.

¹ Proceedings of the Legislative Council (1860), p 1261.

²¹⁸ *Habibul Razzak v King Emperor*, ILR 1923 426 All 81 .

²¹⁹ [\(2006\) 4 All ER 602](#) (HL): Lord Bingham of Cornhill, Lord Nicolls of Birkenhead, Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton-under-Haywood, 22 June, 19 July 2006.

²²⁰ Section 127 of the UK Communications Act, 2003, makes:

Improper use of public electronic communication network punishable.—(1) A person is guilty of an offence if he—(a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character, or (b) causes any such message or matter to be so sent. (2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he—(a) sends by means of a public electronic communications network, a message that he knows to be false, (b) causes such a message to be sent; or (c) persistently makes use of a public electronic communications network (3) A person guilty of an offence....shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine or to both.

[s 45] “Life”.—

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[s 45] “Life”.—

The word “life” denotes the life of a human being, unless the contrary appears from the context.

¹ Proceedings of the Legislative Council (1860), p 1261.

[s 46] “Death”.—

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[s 46] “Death”.—

The word “death” denotes the death of a human being, unless the contrary appears from the context.

¹ Proceedings of the Legislative Council (1860), p 1261.

[s 47] “Animal”.—

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[s 47] “Animal”.—

The word “animal” denotes any living creature, other than a human being.

¹ Proceedings of the Legislative Council (1860), p 1261.

[s 48] “Vessel”.—

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[s 48] “Vessel”.—

The word “vessel” denotes anything made for the conveyance by water of human beings or of property.

¹ Proceedings of the Legislative Council (1860), p 1261.

[s 49] “Year”, “Month”.—

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[s 49] “Year”, “Month”.—

Wherever the word “year” or the word “month” is used, it is to be understood that the year or the month is to be reckoned according to the British calendar.

[s 49.1] Year, month

Section 49 states that year or month is to be reckoned according to the British calendar. A year is the period during which the earth takes one complete revolution in its orbit around the sun. The period is also called the solar or tropical year. The average length of a year is 365 days, 5 hours, 48 minutes and 51.6 seconds. To facilitate the calculation and to do away with the odd hours, the average length of a year is taken to be 365 days and every fourth year it consists of 366 days, this year being termed “leap year”.

In computing the period of a sentence, a year means 12 calendar months according to the number of days comprised therein. Accordingly, in calculating the period of a sentence the day on which the sentence is passed is counted as a whole day. Hence, when a prisoner is sentenced to 1 month’s imprisonment, say on 22 July 1989, his sentence would be counted as from the day on which the sentence was passed and the person would be entitled to be discharged on the day in the succeeding month immediately preceding the day from which the sentence took effect; thus the prisoner would be entitled to be released in this particular case on 21 August 1989.²²¹

¹ Proceedings of the Legislative Council (1860), p 1261.

[s 49] “Year”, “Month”.—

221 *Migotti v Colvill*, [\(1879\) 4 CPD 233](#) .

End of Document

[s 50] “Section”.—

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CHAPTER II GENERAL EXPLANATIONS

Chapter II of the *Penal Code*, which runs into 47 sections commencing from *sections 6 to 52A, IPC*, is for the most part an elaborate interpretation clause. The leading terms used in the text of the Code have been defined and explained. The purpose of this chapter is to offset ambiguity and to avert the possibility of misinterpretation of the different provisions in the Code.¹

[s 50] “Section”.—

The word “section” denotes one of those portions of a Chapter of this Code which are distinguished by prefixed numeral figures.

[s 50.1] Section

Sub-sections, clauses and sub-clauses form parts of the main section. They are not independent and are to be construed in the context of section in question.

¹ Proceedings of the Legislative Council (1860), p 1261.

[s 51] “Oath”.—

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[s 51] “Oath”.—

The word “oath” includes a solemn affirmation substituted by law for an oath, and any declaration required or authorized by law to be made before a public servant or to be used for the purpose of proof, whether in a Court of Justice or not.

[s 51.1] Oath

An “oath” has been defined as a religious assertion, by which a person renounces the mercy and imprecates the vengeance of Heaven, if he does not speak the truth. The object of an oath is nothing but an invocation addressed to God as an avenger of perjury, or as a witness of truth. The form of oath differs according to the religious beliefs of the individual concerned. For instance, a Hindu may swear in the name of the sacred book of Gita, Muslims upon the Quran, a Christian on the Bible, a Jew upon the Pentateuch and so on.

The Indian *Oaths Act*, X of 1873 has substituted affirmation for an oath in the case of Hindu and Muslim witness, interpreters and jurors. Thus, if an oath is objected to, affirmation is admissible. The provision as to the form and administration of oath is not stringent and an omission to administer an oath or an affirmation cannot be a defence in prosecution for perjury by a witness.

¹ Proceedings of the Legislative Council (1860), p 1261.

[s 52] “Good faith”.—

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[s 52] “Good faith”.—

Nothing is said to be done or believed in “good faith” which is done or believed without due care and attention.

[s 52.1] Principle

“Good faith” plays an important role in the law of crimes, and its presence is ordinarily an answer to a charge of criminality and a decisive factor in many cases. The definition here given is, therefore, the keynote of all sections in which “good faith” occurs. Its precise significance must, therefore, be properly appreciated.²²²

The section defines “good faith” by exclusion. The definition of “good faith” is merely a negative one. It says that an act done without due care and attention is not presumed to have been done in good faith. The section makes no reference to the honesty and good motive which are involved in the general meaning of good faith and which are noticeable in the definition of good faith in other statutes, such as the *General Clauses Act, 1897*. Section 3(32) of the Act reads as follows:

A thing shall be deemed to be done in good faith when it is in fact done honestly, whether it is done negligently or not.

Thus while an honest act done stupidly may be excused as being done in good faith under the *General Clauses Act*, it may not fall within the definition of good faith under the *Indian Penal Code*. Because absence of good faith within the meaning of section 52 means simply carelessness or negligence, i.e., want of due care and caution. It does not carry an idea of dishonesty.²²³

[s 52.2] Elements of “good faith”.—Harbhajan Singh

The Supreme Court in *Harbhajan Singh v State of Punjab*,²²⁴ has observed that the element of honesty which is introduced by the definition prescribed by the *General Clauses Act* is not introduced by the definition of the Code. There is no doubt that the mere plea that the accused believed that what he stated was true, by itself will not sustain his case of good faith under the Ninth Exception to *section 449, IPC*.²²⁵ Simple belief or actual belief by itself is not enough. The appellant must show that the belief in his impugned statement had a rational basis and was not just a blind simple belief. That is why the element of due care and attention plays an important role. If it appears that before making the statement the accused did not show due care and attention, that would defeat his plea of good faith. But it must be remembered that good faith does not require logical infallibility.

Bux Chowdry.—In *Bux Chowdry v King*, AIR 1938 Rang 350 to 353, it was held that an accused who let his servant work outside the area covered by his licence without taking the precaution to ascertain whether that area was covered by his licence or not, cannot be said to have acted in good faith even though there may have been no element of dishonesty in his conduct.

Prag: Similarly, in *Prag v Emperor*, AIR 1942 Oudh 256 (257), the Collector had authorised a certain *amin* (revenue clerk) to attach a particular property. But the *amin* returned the warrant to the Tahsildar (Revenue Officer), his immediate superior, because the opposite party encountered resistance to the attachment. The Tahsildar, however, without returning the warrant to the Collector, on his own initiative ordered another *amin* to attach the property. This attempt to attach the property led to a fight between the resisters and the Tahsildar and the second *amin*. It was held that though the Tahsildar may have acted with the best of intentions, he had not acted in good faith, because had he considered the matter for a moment he would have realised that it was not within his power to authorise any other *kurk amin* to execute the warrant.

Raghubir.—Likewise, it was held in the case of *Raghubir v Emperor*, AIR 1942 Oudh 57 (58), that where an *amin* executing a warrant is aware of the fact that the date fixed for execution of the warrant is over, he cannot be said to have acted in “good faith” when he is found acting in the most illegal and reprehensible manner, and the person whose property is sought to be attached in execution of the warrant has the right to private defence of his property. Again, when a Sub-Inspector goes to a village dressed in his uniform to arrest an accused, he cannot be said to have acted in “good faith” if it is found that he acted in a most illegal and reprehensible manner.²²⁶

Similarly, if a homeopath prescribes allopathic medicine, without being qualified in that system is guilty of negligence *per se* and is liable for the consequences. He cannot be allowed to take the plea of good faith in case a person suffers on account of such a treatment.²²⁷

Thus, the Code regards honesty as immaterial and the presence of “care” and “intention” the sole criteria of “good faith”. The definition appears to correspond closely with the English notion of “reasonable and probable cause” or “reasonable and justifiable cause” as used in criminal jurisprudence.

Davis: Search of Jacket in good faith justified: Search of Jacket Leading to Discovery of Firearms: Held in *Davis v United States*,²²⁸ that search leading to discovery of firearm in the Defendant’s jacket by police acting with an objectively reasonable and good faith belief does not violate the Fourth Amendment to US Constitution²²⁹ under its new precedent, the Exclusionary Rule.

Facts: While conducting a routine vehicle stop, police arrested petitioner Willie Davis a passenger, for giving a false name. After handcuffing Davis and securing the scene, the police searched the vehicle and found Davis’s revolver. Davis was then indicted on charges of being a felon in possession of a firearm.

[s 52] “Good faith”.—

While affirming the defendant's conviction, the US Supreme Court by a majority of 7 to 2²³⁰ held that while the search violated the *Fourth Amendment*²³¹ under its new precedent, the exclusionary rule did not apply to require suppression of the firearm since the police conducted the search in objectively reasonable reliance on existing and binding judicial precedent.

Commil: In *Commil USA v Cisco Systems*,²³² held a good faith belief in the invalidity of a patent is no defense to induced infringement.

Facts: Commil sued Cisco, alleging that Cisco had infringed its patent on networking equipment and had also induced others to infringe Commil's patent, by selling infringing equipment to others to use. Cisco was found guilty for infringement; but offered as a defense to *induced* infringement at a second trial that it had a good faith belief that Commil's patent was invalid. The District Court, however, precluded evidence on that point, and Cisco was found liable. The Federal Circuit reversed, 2-1, ruling that because “one cannot infringe an invalid patent,” then a good faith belief in invalidity can “negate the requisite intent for induced infringement.”

Kennedy for 6: We have held that a defendant can be liable for infringement if he (1) knows of the patent, and (2) knows that the acts [he does] constitute infringement. But “infringement and validity are separate issues.” A patent is “presumed valid” and if a person knows of a patent and believes it is not valid – the correct course is to challenge its validity, not to commit acts one knows could be infringing. “Invalidity is an affirmative defense” when someone is sued; it “is not a defense to infringement, it is a defense to liability.” Our ruling is “no stranger” to general legal principles: “In the usual case, “I thought it was legal” is no defense”: “the general rule that ignorance of the law or mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system”. Federal courts have certain powers to convict frivolous or vexatious litigants. The court's response to the complaints that its ruling will encourage “patent trolls” (my words not the Justices'). But this response seems like weak solace to victims of the phenomenon.] The other [briefly mentioned] option is to pursue legislative solutions.

¹ Proceedings of the Legislative Council (1860), p 1261.

²²² Hari Singh Gaur, *Penal Law of India*, (11th Edn, Vol I, 2000), pp 388 to 397.

²²³ See section 90 of the English Bill of Exchange Act, 1862, *section 62(2) of the Sale of Goods Act*, 1893, reproduces the same definition of good faith.

²²⁴ AIR 1966 SC 97 [[LNIND 1965 SC 65](#)] : (1965) 3 SCR 235 [[LNIND 1965 SC 65](#)] : 1966 Cr LJ 82 .

²²⁵ See Chapter XXI, *infra* for text of Ninth Exception to *section 499, IPC*.

²²⁶ *Gaya Din*, AIR 1934 Oudh 124 .

[s 52] “Good faith”.—

227 *Poonam Verma v Dr Ashwani Patel*, (1996) 4 SCC 332 [[LNIND 1996 SC 2832](#)] : AIR 1996 SC 2111 [[LNIND 1996 SC 2832](#)] : 1996 (2) SCJ 623 : (1996) 2 CPJ 1 ; *State of Haryana v Santra*, 2000 (3) Supreme 520 : (2000) 2 LRI 690. See for medical negligence cases under *section 304A, IPC infra*.

228 131 S.Ct. 2419 (2011) : 180 L.Ed. 2d 285 : (2011) US Lexis 4560.

229 *Fourth Amendment* to US Constitution protects the right to be free from unreasonable searches and seizures, but it is silent about how this right is to be enforced. To supplement the bare text, the US Supreme Court has created the exclusionary rule, a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a *Fourth Amendment* violation.

230 Judges: Alito J, delivered the opinion of the Court, by 7 to 2 in which Roberts CJ, and Scalia, Kennedy, Thomas, and Kagan JJ, joined. Sotomayor J, filed an opinion concurring in the judgment. Breyer J, filed a dissenting opinion, in which Ginsburg J, joined.

231 *Fourth Amendment* to US Constitution protects the right to be free from unreasonable searches and seizures, but it is silent about how this right is to be enforced. To supplement the bare text, the US Supreme Court has created the exclusionary rule, a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a *Fourth Amendment* violation.

232 135 S.Ct. 1950 (26 May 2015), 6-2 (Breyer recused, (**Kennedy**; *Scalia* dissenting), *vacating* 720 F.3d 1361 (CAFC 2013).

[[s 52A] “Harbour”.—

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233[[s 52A] “Harbour”.—

Except in section 157, and in section 130 in the case in which the harbour is given by the wife or husband of the person harboured, the word “harbour” includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means or conveyance, or the assisting a person by any means, whether of the same kind as those enumerated in this section or not, to evade apprehension.]

Harbour.—Harbour²³⁴ in ordinary language means giving shelter, food, clothing etc., to evade arrest of a person charged of an offence. Harboursing of such persons is punishable as indicated in the impugned sections.

¹ Proceedings of the Legislative Council (1860), p 1261.

²³³ Ins. by Act 8 of 1942, section 2 (w.e.f. 14-2-1942).

²³⁴ Hari Singh Gaur, *Penal Law of India*, (11th Edn, 2000, vol I), pp 398-399.

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CHAPTER III OF PUNISHMENTS

[s 53] Punishments.—

The punishments to which offenders are liable under the provisions of this Code are—

First.—Death;

¹[Secondly.—Imprisonment for life;]

²[***]

Fourthly.—Imprisonment, which is of two descriptions, namely:—

(1) Rigorous, that is, with hard labour;

(2) Simple;

Fifthly.—Forfeiture of property;

Sixthly.—Fine

[s 53.1] Aims and Object of Punishment

Criminal law reflects those fundamental social values expressing the way people live and interact with each other in the society. It uses the “stick” for punishment as a means of reinforcing those values and securing compliance therewith. In this way criminal law seeks to protect not only the individual, but also the very structure and fabric of society from undesirable, nefarious and notorious activities and behaviour of such individuals and organizations who try to disrupt and disturb public peace, tranquility and harmony in the society.³ The object of criminal legislation is to prevent the perpetration of acts classified as criminal because they are regarded as being socially damaging. The transgression of such harmful acts in modern times is prevented by a threat or sanction of punishment administered by the State. In other words, punishment is the sanction imposed on an accused for the infringement of the established rules and norms of society.

The object of punishment is to protect society from mischievous and undesirable elements by deterring potential offenders, by preventing the actual offenders from committing further offences and by reforming and turning them into law-abiding citizens. It is also asserted that respect for law grows largely out of opposition to those who violate the law. The public dislikes a criminal and this dislike is expressed in the form of punishment. The object of punishment has been very well summarised by Manu, the Great Hindu law-giver, in the following words:

[s 53] Punishments.—

Punishment governs all mankind; punishment alone preserves them; punishment wakes while their guards are asleep; the wise considers the punishment (danda) as the perfection of justice.⁴

The protection of society and security of person's life, liberty and property is an essential function of the state. This could be achieved through instrumentality of criminal law by imposing appropriate sentence and stamping out criminal proclivity (tendency). Law as a cornerstone of the edifice of "order" should meet the challenges confronting the society.⁵ As stated by Friedman in his book "*Law in Changing Society*":

State of criminal law continues to be – as it should be – a decisive reflection of social consciousness of society.

In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on *factual matrix*; sentencing process being stern where it should be, and tempered with mercy where it warrants should be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. For instance a murder committed due to deep-seated mutual and personal rivalry may not call for penalty of death. But an organised crime or mass murders of innocent people would call for imposition of death sentence as deterrence.

The aim of protecting society is sought to be achieved by application of the principle of deterrence, prevention, retribution and reformation. Of these, deterrence is virtually regarded as the main function of punishment, the others being merely secondary.

[s 53.1.1] Deterrent theory

According to this theory, the object of punishment is not only to prevent the wrong-doer from doing a wrong a second time, but also to make him an example to others who have criminal tendencies. Salmond considers deterrent aspects of criminal justice to be the most important for control of crime.⁶ To quote a judge:

I do not punish you for stealing the ship, but so that the ship may not be stolen.

That is to say, the chief aim of the law of crime is to make the evil-doer an example and a warning to all that are like-minded. The commission of every offence should be made a bad bargain.

The deterrent theory was the basis of punishment in England in the medieval period. Severe and inhuman punishments were order of the day and inflicted even for minor offences like, pick pocketing and stealing etc. The culprits were subjected to the severe punishment of death by stoning and whipping. In India, the penalty of a death sentence or mutilation of the limbs was imposed even for the petty offences of forgery and stealing, etc., during the Mughal period.⁷ Even today in most of the Muslim countries, such as Pakistan, Iran, Iraq and Saudi Arabia, the deterrent theory is the basis of penal jurisprudence.

But this theory has been criticised on the grounds that it has proved ineffective in checking crimes and also that

[s 53] Punishments.—

excessive harshness of punishment tends to defeat its own purpose by arousing the sympathy of the public towards those who are given cruel and inhuman punishment. Deterrent punishment is likely to harden the criminal instead of creating in his mind a fear of law. Hardened criminals are not afraid of imprisonment.

[s 53.1.2] Preventive theory

Another object of punishment is prevention or disablement. Offenders are disabled from repeating the crime by awarding punishments, such as death, exile or forfeiture of an office. By putting the criminal in jail, he is prevented from committing another crime. According to Paton:

The preventive theory concentrates on the prisoner and seeks to prevent him from offending again in the future. The death penalty and exile serve the same purpose of disabling the offender.

Critics point out that preventive punishment has the undesirable effect of hardening first offenders, or juvenile offenders, when imprisonment is the punishment, by putting them in the association of hardened criminals.

[s 53.1.3] Retributive theory

In primitive society punishment was mainly retributive. The person wronged was allowed to have revenge against the wrong doer. The principle of “an eye for an eye”, “a tooth for a tooth”, “a nail for a nail”, “limb for limb” was the basis of criminal administration.⁸ According to Justice Holmes : *“It is commonly known that the early forms of legal procedure were grounded in vengeance.”*

The advocates of this theory plead that the criminal deserves to suffer. The suffering imposed by the State in its corporate capacity is considered the political counterpart of individual revenge. It is urged that unless the criminal receives the punishment he deserves, one or both of the following effects will result, namely, the victim will seek individual revenge, which may mean lynching (killing or punishing violently), or the victim will refuse to make a complaint or offer testimony and the State will therefore be handicapped in dealing with criminals.

Retributive punishment gratifies the instinct for revenge or retaliation, which exists not merely in the individual wronged, but also in society at large. In modern times the idea of private revenge has been forsaken and the State has come forward to effect revenge in place of the private individual. But critics of the retributive theory point out that punishment, *per se*; is not a remedy for the mischief committed by the offender. It merely aggravates the mischief. Punishment in itself is an evil and can be justified only on the ground that it yields better results. Revenge is justice gone wild.

[s 53.1.4] Reformatory theory

According to the reformatory theory, the object of punishment is the reformation of criminals. It is maintained that punishment tends to reform criminals and that it accomplishes this by instilling in them a fear of repetition of the punishment and a conviction that crime does not pay, or by breaking habits that the criminals have formed, especially if the penalty is a long period of imprisonment which gives the prisoner no opportunity for improvement. Even if an offender commits a crime under certain circumstances, he does not cease to be a human being. The circumstances under which he committed the crime may not occur again.

The object of the punishment should be to reform the offender. The criminal must be educated and taught some art or craft or industry during his term of imprisonment, so that he may be able to lead a good life and become a responsible and respectable citizen after release from jail. While awarding punishment, the judge should study the character and age of the offender, his early breeding, family background, his education and environment, the circumstances under which he or she committed the crime, the motive which prompted him or her to indulge

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in criminal activities, etc. The object of doing so is to acquaint the judge with the circumstances under which the offence was committed so that he could award punishment that could serve the ends of justice.

Critics of this theory state that if criminals are sent to prison to be transformed into good citizens, a prison will no longer be a “prison” but a dwelling house. The deterrent motive should not be abandoned altogether in favour of the reformatory approach since the permanent influence of criminal law contributes largely to the maintenance of ethical, moral and social habits that prevent any but the abnormal and subnormal persons⁹ from committing crime.

Explaining the purpose and object of criminal law,’ Perkin says that:

Its purpose is to define socially intolerable conduct, and to hold conduct within limits, which are reasonably acceptable from the social point of view. If the criminal law were hundred per cent effective and integrate it so that best of all could be achieved there would be no punishment,—because there would be no conduct which overstepped the boundaries it had established.¹⁰

[s 53.1.5] Multiple Approach Theory

In fact, a perfect system of criminal justice could never be based on any single theory of justice. It would have to be a combination of all. Every theory has its own merits and every effort should be made to extract the good points of each and integrate it so that best of all could be achieved. For instance, the reformatory aspect must be given its proper place. The offender is not only a criminal to be punished, but also a patient to be treated. Punishment should be proportionate to the nature and gravity of the crime. A first offender should be leniently treated. Special treatment should be given to a juvenile delinquent. Special courts constituted for the trial of children and those in charge of such courts should strive to find ways and means of reforming the child and not simply punishing him. A criminal should be able to secure his release by showing improvement in his conduct. The object of any concession given to an offender should be to convince him that normal and free life is better than life in jail. The establishment of open jails on the model of Dr Sampurna Nand Jail and improvement of living conditions in jail would better serve the purpose of rehabilitation.

Narotam Singh: The Supreme Court in *Narotam Singh v State of Punjab*,¹¹ has rightly said that reformatory approach to punishment should be the object of criminal law, in order to promote rehabilitation without offending community conscience and to secure social justice. However, as cautioned by Justice Krishna Iyer of the Supreme Court in *Madhav Hayawadanrao Hoskot v State of Maharashtra*:¹²

The Court should not confuse the correctional approach with prison treatment and nominal punishment verging on decriminalisation for serious social and economic offences. For instance, the award of sentence till the rising of the Court in case of an offence of counterfeiting University certificates by a highly educated professor is mockery on criminal justice system. The court which ignores the grave injury to society implicit in economic crimes by the upper berth mafia ill serves social justice. Soft-sentence justice is gross injustice when many innocents are the potential victims.

Raman.—The Kerala High Court in *Raman v Francis*, 1988 Cr LJ 1359 (Ker),¹³ has correctly asserted that the antecedent of the wrong-doer including his youthful age and family background, etc., may be valid considerations for prescribing leniency in certain cases, but without making them not appear to be a mockery in the scheme of criminal judicial administration. It must reflect that parties and the society ought to feel concerned that any rational legal system would not put premium on the wrongs of deviants and the law breakers so as to

disadvantage those who seek to abide by and rely on the norms of law, order and justice. A theory of reformation cannot have the effect of encouraging criminalisation on the basis of “misconceived liberalism”.

[s 53.2] Principle of Proportionality to Sentence: *Sandhu*

In *R v Sandhu(Manjit)*,¹⁴ it was held that the principle of proportionality of sentence between the time served for attempted murder and the minimum term which would have been served had the attempt been successful could be maintained by reducing a sentence of 18 years' imprisonment to 15 years where the attack resulted in serious damage but there were mitigating factors.

The applicant(s) applied for leave to appeal against a sentence of 18 years' imprisonment, imposed following his conviction for attempted murder.

S and the victim (V) had been married but had separated. V had returned to the matrimonial home to collect some belongings and to enable S to see their children. S ran towards V with a knife, slashed the knife around her head, neck and chest area, and tried to strangle her. V grabbed the knife and suffered lacerations (injuries) to her head, neck and hands. She required an operation to repair nerve damage in both hands. The attack resulted in permanent scarring and in emotional and psychological damage. The attack took place in the presence of their children.

S argued that the sentence was manifestly excessive as the Judge had failed to make sufficient allowance for the background of the offence and S's personal mitigation. S also argued that the judge wrongly applied the principle of having regard to the minimum term to be served in the event of the victim having died.

While allowing appeal the Court said that, with regard to a sentence for attempted murder, there had to be a proportionate relationship between the time served and the minimum term which would have been served had the attempt been successful.¹⁵ The matter could not be approached by means of a mathematical formula. The attack was a terrible one which was aggravated by the adverse effect it had on the children, but there were mitigating factors including the fact that the attack was not premeditated. The principle of proportionality could be maintained by substituting a sentence of 15 years' imprisonment for the 18 years that the sentencing judge had imposed.

[s 53.2.1] Sections 53, 279, 337 and 304A, IPC: Imposition of sentence must be commensurate with gravity of the offence: *Surendra Singh*

In *State of Madhya Pradesh v Surendra Singh*,¹⁶ Supreme Court speaking through Justice MY Eqbal said:

Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expressed to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The court must not only keep in view of the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment.

The accused dashed the jeep against a pulia first and then against a Babul tree. As a result of such accident Vijay Singh, who was travelling in the jeep got injured and died. The respondent-accused, who was driver of the jeep and the accident occurred due to his rash and negligent driving. The Judicial Magistrate convicted the respondent-accused for the offence punishable under sections 279, 337 and 304A of the *Indian Penal Code* and sentenced him to undergo six months and two years rigorous imprisonment, respectively with fine of Rs 2,500/-.

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The High Court partly allowed revision petition of the accused maintaining findings of conviction of the extent that the jail sentence awarded to the accused is reduced to the period already undergone subject to depositing further compensation of Rs 2,000/- payable to the widow/mother of the deceased Vijay Singh. Allowing the state appeal, Apex Court set aside.

The impugned order reducing sentence to the period already undergone and to avoid miscarriage of justice, this appeal is allowed restoring the sentence imposed by the trial court.

Meagre sentence imposed solely on account of lapse of time without considering the degree of the offence will be counter-productive in the long run and against the interest of the society. One of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which commensurate with gravity of offence.

[s 53.3] Sentencing Reform Act, United States

Freeman: In *Freeman v United States*, US Supreme Court held that the Sentencing Reform Act of 1984, aims to create a comprehensive sentencing scheme in which those who commit crimes of similar severity under similar conditions receive similar sentences.

Defendant pled guilty to, *inter alia*, possessing with intent to distribute cocaine base, pursuant to a plea agreement. The District Court imposed the recommended 106-month sentence and subsequently denied defendant's motion for a sentence reduction under 18 USC§3582(c)(2). The United States Court of Appeals for the Sixth Circuit affirmed.

In a plurality opinion, the Supreme Court determined that reversal was warranted because

- (1) a District Court had authority to entertain motions when sentences were imposed in light of the Guidelines, even if the defendant entered into an agreement, and
- (2) the District Court's decision was "based on" the applicable Guidelines range

US Supreme Court by a majority of 5 to 4 reversed the Appellate Courts' judgment and remanded the case for further proceedings.

Sykes: In *Sykes v United States*,¹⁷ US Supreme Court by a majority of 6 to 3 held that State crime of using vehicle to knowingly or intentionally flee from law enforcement officer after being ordered to stop held to be "violent felony" for purposes of sentencing under Federal Armed Career *Criminal Act* [18 USC section 924(e)].

Petitioner used a vehicle to flee after an officer ordered him to stop, which was, a class D felony. The Court determined that petitioner was properly sentenced because the vehicle flight that section 35-44-3-3 proscribed was a violent felony. Indiana's prohibition on flight from an officer by driving a vehicle fell within the residual clause.

[s 53.4] Punishment under the Code

The *Penal Code* in sections 53 to 75 has provided for a graded system of punishment to suit the different

[s 53] Punishments.—

categories of offences for which the offenders are accountable under it. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime: yet in practice sentences are determined largely by other considerations, sometimes, it is the correctional needs of the perpetrator that are offered to justify a sentence, sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime.

Section 53 prescribes five types of punishments¹⁸ to be meted out to a person convicted of a crime under the Code, depending on the nature and gravity of the offence, viz.

- (i) Death; (ii) Imprisonment for life; (iii) Imprisonment, rigorous with hard labour, or simple; (iv) Forfeiture of property; and (v) Fine.

Whipping: The corporal punishment of whipping, added in the *Penal Code* by the Whipping Act of 1864 as punishment for certain crimes, was abolished in 1955 in view of the inhuman and cruel nature of the sentence. Such a punishment was considered a barbarous act, a stain on civilization and a blot on the statute book. However, whipping continued to be a form of punishment in England, the United States, France and Germany until recently and in Saudi Arabia, Pakistan, Iran, Iraq, Malaysia and Singapore, etc. is still practised.

[s 53.5] New forms of Punishment Suggested

It is suggested to add five new forms of punishment to the existing ones in *section 53, IPC* with a view to deter particular types of criminals.¹⁹ Such punishments will have more psychological, social and moral impact on the criminals and will go a long way in curbing crimes. The proposed punishments are: (i) Externment, (ii) Compensation to victims of crime, (iii) Public censure, (iv) Community service, and (v) Disqualification from holding public office.

[s 53.5.1] Externment

Externment or banishment is a form of punishment in which an accused is sent out of the place of his abode (*i.e.*, residence) to another place for a specified period of time as mentioned in the order issued by the court. This is done to deprive the accused of the company of his family members, friends and associates so that he or she may not indulge in criminal activities. Externment is resorted to primarily in case of anti-social, hardened and habitual criminals. For instance, *Bombay Police Act, 1951*,²⁰ *Kerala Police Act, 1964*, *Delhi Police Act, 1964*, *Madhya Pradesh Security Act, 1959*, *CP Gonda Act, 1949* and some other states have provided for such type of punishment to deal with hardened criminals effectively in their jurisdiction.

It would be desirable to include “externment” as a form of punishment in *section 53, IPC* instead of leaving it to the states, so as to bring uniformity and consistency in law and ensure adequate procedural safeguard.²¹ One should not confuse “externment” with “transportation”²² or “exile”²³. In case of “exile”, the accused is deported out of the country for good as British used to deport hardened criminals, from England to America and Australia during 16th and 17th century; whereas, in case of “externment”, the accused is sent out of the place of his abode in the country itself.

[s 53.5.2] Compensation to Victims of Crime

Unfortunately, the victims of crime in our country do not attract the attention of law makers. Of late, *Criminal Procedure Code, 1973* in section 357 has empowered the court to award compensation to the victims of crime in very limited cases at the time of passing judgment. For instance, the power to award compensation under

sub-section (1) of *section 357 of CrPC* is confined to only those cases where the court imposes a fine and that the amount is limited to the fine only. And sub-section (3) of *section 357*²⁴ says compensation can be awarded only if a sentence of fine is not imposed. It is noticed with regret that even the limited power given in *Criminal Procedure Code 1973* has not been resorted to by the lower judiciary, in spite of the directions of the Apex Court from time to time in this regard. The Apex Court in *Sarwan Singh*²⁵ and *Sukhbir Singh*²⁶ recommended to all courts to exercise this power of grant of compensation under *section 357 of CrPC* liberally and said that, “*This power of court to award compensation is not ancillary to other sentences, but it is in addition thereto*”.

No doubt, the higher judiciary has on times provided compensation to the victims of crime of custodial violence, sexual assault, rape and illegal detention by invoking *Article 21 of the Constitution*, but such instance will not serve the plight of helpless victims.

Rini Johar: In *Rini Johar v State of Madhya Pradesh*,²⁷ Apex Court held petitioners as entitled to compensation for illegal arrest and detention under public law.

The Petitioner No. 1 is a doctor and she is presently pursuing higher studies in United States of America (USA). She runs an NGO meant to provide services for South Asian Abused Women in USA. Petitioner No. 2, a septuagenarian lady, is a practicing advocate in the District Court at Pune for last 36 years. Petitioner No. 1 is associated with M/s. Progen, a US company.

Informant, Respondent No. 8, had sent an e-mail to company for purchase of machine Aura Cam, 6000, which was an Aura Imaging Equipment, in India and concerned company sent an e-mail to Respondent making a reference to Petitioner No. 1. Informant visited Petitioner No. 1 at Pune and being satisfied decided to purchase a lesser price machine i.e., “Twinaura Pro” and paid a sum of Rs 2,50,000 for which a hand written receipt was given as proof of payment. During the course of said meeting, eighth Respondent expressed his desire to purchase a laptop of Progen of which Petitioner No. 1 was representative. In pursuance of discussion, laptop was given to him who acknowledged it by stating that he owed a sum of Rs 4,800 as balance consideration towards Aura Cam and an amount of USD 350 towards laptop. An assurance was given for remitting money within a short time. Respondent No. 8 had never raised any grievance relating either to machine or laptop. Respondent No. 8 filed a complaint before Inspector General of Police, alleging that Petitioner No. 1 and Mr Guy Coggin had committed fraud of USD 10,500. On basis of complaint made, FIR No. 24/2012 under *sections 420 and 34 of IPC* and *section 66-D of Information Technology Act, 2000*, was registered against the petitioners by Cyber Police Headquarters. Petitioners were arrested from their residence at Pune. After they were arrested, they were taken from Pune to Bhopal in an unreserved railway compartment marked- “viklang” (handicapped). Despite request, Petitioner No. 2, an old lady, was not taken to a doctor, and was compelled to lie on cold floor of train compartment without any food and water. Indignified treatment and humiliation faced by petitioners had been mentioned in great detail. They were produced before Magistrate at Bhopal and Petitioner No. 2 was released on bail after being in custody for about 17 days and Petitioner No. 1 was released after more than three weeks. Petitioners alleged that they were forced to pay Rs 5 lakhs to Respondent No. 3, Dy. SP Cyber Cell, Bhopal. Director General of Police had appointed Inspector General of Police, CID to enquire into allegations as regards violation of provisions enshrined under *sections 41A-41C of CrPC*. In pursuance of order passed by Director General, an enquiry had been conducted by Inspector General of Police Administration, CID, Bhopal. It had been styled as “preliminary enquiry”. Magistrate passed an order discharging petitioners in respect of offence punishable under *section 66-D of Information Technology Act, 2000*. However, Magistrate had opined that there was *prima facie* case for offence punishable under *section 66A(b) of Act*, read with *section 420 and 34 of IPC*.

While, disposing off the petitions, Apex Court said:

- (1) Court in *Arnesh Kumar v State of Bihar*, (2014) 8 SCC 273 [[LNIND 2014 SC 647](#)] : AIR 2014 SC 2756 [[LNIND 2014 SC 647](#)] , while dwelling upon concept of arrest, was compelled to observe that Arrest brings humiliation, curtails freedom and casts scars forever.

- (2) In said authority, it has been held that *section 41A of CrPC*, made it clear that where arrest of a person is not required under *section 41(1) of CrPC*, police officer is required to issue notice directing accused to appear before him at a specified place and time. Law obliged such an accused to appear before police officer and it further mandated that, if such an accused complied with terms of notice, he would not be arrested, unless for reasons to be recorded, police officer was of opinion that arrest was necessary. At this stage also, condition precedent for arrest as envisaged under *section 41 of CrPC*, has to be complied and would be subject to same scrutiny by Magistrate.
- (3) On a scrutiny of enquiry report, it was vivid that the arrest of petitioners was not made by following the procedure of arrest. *Section 41A of CrPC*, as had been interpreted by this court had not been followed. Report clearly showed that, there had been number of violations in arrest, and seizure. Circumstances in no case justified manner in which petitioners were treated.
- (4) Dignity of petitioners, a doctor and a practicing advocate had been seriously jeopardized. Liberty of petitioner was curtailed in violation of law. Freedom of an individual had its sanctity. When individual liberty was curtailed in an unlawful manner, then victim was likely to feel more anguished, agonized, shaken, perturbed, disillusioned and emotionally torn. It was an assault on his/her identity. Said identity was sacrosanct under *Constitution*. Therefore, for curtailment of liberty, requisite norms were to be followed. Two ladies had been arrested without following procedure and put in compartment of a train without being produced before local magistrate from Pune to Bhopal.
- (5) In present case, there had been violation of *Article 21 of Constitution*, and petitioners were compelled to face humiliation. They had been treated with an attitude of insensibility. Not only there were violation of guidelines issued in case of *DK Basu*, there were also flagrant violation of mandate of law enshrined under *sections 41 and 41A of CrPC*. In such a situation, public law remedy which had been postulated in *Nilabati Behera v State of Orissa*, *Sube Singh v State of Haryana*, *Hardeep Singh v State of Madhya Pradesh*, comes into play. Constitutional courts taking note of suffering and humiliation were entitled to grant compensation. In present case, in the facts and circumstances of case, petitioners were entitled to compensation.

In such a situation, we are inclined to think that the dignity of the petitioners, a doctor and a practicing advocate has been seriously jeopardised. Dignity, as has been held in *Charu Khurana v UOI*, (2015) 1 SCC 192 [[LNINDU 2014 SC 942](#)], is the quintessential quality of a personality, for it is a highly cherished value. It is also clear that liberty of the Petitioner was curtailed in violation of law. The freedom of an individual has its sanctity. When the individual liberty is curtailed in an unlawful manner, the victim is likely to feel more anguished, agonized, shaken, perturbed, disillusioned and emotionally torn. It is an assault on his/her identity. The said identity is sacrosanct under the *Constitution*. Therefore, for curtailment of liberty, requisite norms are to be followed. Fidelity to statutory safeguards instills faith of the collective in the system. It does not require wisdom of a seer to visualise that for some invisible reason, an attempt has been made to corrode the procedural safeguards which are meant to sustain the sanguinity of liberty. The investigating agency, as it seems, has put its sense of accountability to law on the ventilator. The two ladies have been arrested without following the procedure and put in the compartment of a train without being produced before the local Magistrate from Pune to Bhopal there has been violation of *Article 21* and the petitioners were compelled to face humiliation. They have been treated with an attitude of insensibility. Not only there is violation of guidelines issued in the case of *DK Basu (supra)*, there are also flagrant violation of mandate of law enshrined under *sections 41 and 41A of Code of Criminal Procedure, 1973*. The investigating officers in no circumstances can flout the law with brazen proclivity. In such a situation, the public law remedy which has been postulated in *Nilabati Behera (supra)*, *Sube Singh v State of Haryana*;²⁸ *Hardeep Singh v State of Madhya Pradesh*, (2012) 1 SCC 748 [[LNINDU 2011 SC 18](#)] : AIR 2012 SC 1751 [[LNINDU 2011 SC 18](#)], comes into play. The Constitutional Courts taking note of suffering and humiliation are entitled to grant compensation. That has been regarded as a redeeming feature. In the case at hand, taking into consideration the totality of facts and circumstances, we think it appropriate to grant a sum of Rs 5,00,000 (rupees five lakhs only) towards compensation to each of the petitioners to be paid by the State of Madhya Pradesh within three months hence. It will be open to the State to proceed against the erring officials, if so advised.

It is, therefore; suggested that compensation or reparation to the victims of crime be included as a form of punishment under *section 53, IPC*, instead of leaving it under *Criminal Procedure Code, 1973* so that victims of crime could get due justice. In fact, most of the European Countries such as Germany,²⁹ France,³⁰ Italy,³¹

United Kingdom,³² Northern Ireland,³³ New Zealand,³⁴ United States³⁵ and Canada³⁶ etc., have provided comprehensive scheme of compensation to victims of crime irrespective of conviction or acquittal of the accused as discussed at length in the Annexure III, Justice to victims of crime.³⁷

[s 53.5.2.1] Victim Compensation Scheme: Section 357A of CrPC

Of late, the *Code of Criminal Procedure* (Amendment) Act, 2008 (Act 5 of 2009) has provided for a comprehensive Victim Compensation Scheme in a new section 357A added *vide* section 28 clauses 2 to 5 in the *Code of Criminal Procedure, 1973*. Clause (1) of the section envisages that:

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

Clauses 2 to 6 of section 357A provide that the District and State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded on the recommendation of the court to the victim or his dependents who have suffered loss or injury as a result of crime. The District and State Legal Authority in order to alleviate the suffering to the victim may provide immediate first-aid facility or medical benefits and award adequate compensation.

Tekan: In *Tekan alias Tekram v State of Madhya Pradesh now Chhattisgarh*,³⁸ Apex Court held practice of giving different amount of compensation to rape victim ranging from Rs 20,000 to Rs 10,00,000 (rupees twenty thousand to ten lakhs) as compensation needs to be introspected by all States and Union Territories taking into consideration scheme framed by state of Goa. Scheme made by National Commission of Women (NCW), revised by NCW on 15 April 2010 shall apply in addition to any application that may be made under *sections 357 and 357A of Code of Criminal Procedure, 1973*.

The accused developed intimacy with the victim and assured her that he is in love with her and on the pretext of marriage committed sexual intercourse for almost a year knowing fully well that she was blind. In course of time, when the prosecutrix aged 18 years became pregnant, the prosecutrix told the accused to marry her. At that point of time, the accused stopped visiting the house of the prosecutrix. Subsequent to it, the incident was disclosed to the father of the prosecutrix who called the meeting of the panchayat in the village. In the panchayat, the accused was also called. It is the case of the prosecution that in the panchayat, the accused admitted the fact that he had committed sexual intercourse with the prosecutrix but refused to marry her and left the panchayat. It was the specific case of prosecution that though the prosecutrix was blind, she could recognize the accused person by his voice and by touch.

The trial court after appreciating the entire evidence including the evidence of the doctor and the persons who attended the panchayat and the medical reports, recorded a finding and held that the prosecution was able to prove the guilt of the accused-appellant. Accordingly, the accused was convicted under *section 376, IPC* and was sentenced to seven years' rigorous imprisonment, which was confirmed by the High Court and upheld by Apex Court in appeal.

Coming to the question that arises for consideration is as to, whether in the facts and circumstances of the case the prosecutrix is entitled to victim compensation and, if so, to what extent?

Apex Court *suo motu* went in depth to ascertain from the counsel of the State of Chhattisgarh plight of the victim who informed the Court as stated below.

Social status of the victim, her brothers and also of the accused-appellant. Pursuant to the aforesaid order, counsel for the State has filed an additional affidavit giving details of the inquiries made to ascertain the financial status of the victim and the accused and also has placed on record a copy of Notification/Compensation Scheme, stated below.

The victim, being in a vulnerable position and who is not being taken care of by anyone and having no family to support her either emotionally or economically, we are not ordering the respondent-State to give her any lump sum amount as compensation for rehabilitation as she is not in a position to keep and manage the lump sum amount. From the records, it is evident that no one is taking care of her and she is living alone in her village. Accordingly, we in the special facts of this case are directing the respondent-State to pay Rs 8,000 per month till her life time, treating the same to be an interest fetched on a fixed deposit of Rs 10,00,000. By this, the State will not be required to pay any lump sum amount to the victim and this will also be in the interest of the victim.

The Apex Court has provided in tabular form the scheme of compensation and rehabilitation to be provided to the victims of sexual assault in different States and Union territories as stated below:

SCHEDULE

S. No.	Details of Loss or Injury	Maximum Limit of Compensation	
1.	Rape of Minor	50,000	
2.	Rape	25,000	
3.	Rehabilitation	20,0000	
		Detail of Loss or Injury	Amount of Award
3.	Assam	Rape	75,000
		Rape of Minor/Gang Rape	1,00,000
5.	Bihar	Rape	50,000
6.	Delhi	Rape	3,00,000
		Rehabilitation	20,000
8.	Goa	In case of injury causing, severe mental agony to women and child (e.g. Rape cases etc.)	10,00,000 (Ten Lakh)
9.	Gujarat	Rape	1,00,000
		Rehabilitation	50,000
11.	Haryana	Rape	3,00,000
		Medical expenses on account of injury	15,000
13.	Himachal Pradesh	Rape	50,000

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14.	Jammu & Kashmir	Rape of minor or rape in police custody	1,00,000
		Rape	50,000
16.	Karnataka	Rape of minor	3,00,000
		Rape other than minor	1,50,000
18.	Kerala (50% extra if the victim is 14 years or less)	Rape	3,00,000
		Rehabilitation	1,00,000
20.	Maharashtra	No amount for the offence of rape	Nil
21.	Manipur	Rape of Minor	30,000
		Rape	20,000
		Rehabilitation	20,000
24.	Nagaland	Rape of Minor	1,00,000
		Rape	50,000
		Rehabilitation	50,000
27.	Odisha	Loss or injury causing severe mental agony to women and child victims in case like Human Trafficking	10,000
		Detail of Loss or Injury	Amount of Award
28.	Rajasthan	Rape of Minor	3,00,000
		Rape	2,00,000
		Rehabilitation	1,00,000
31.	Sikkim	Rape	50,000
		Rehabilitation	30,000
33.	Tripura	Rape	50,000 of which Rs 5,000 shall be paid after preliminary verification of the complaint and the balance amount shall be sanctioned on the filling of charge sheet.
34.	Uttar Pradesh	Rape	2,00,000
35:	Uttarakhand	Rape of Minor	2,50,000
		Rape	2,00,000
		Rehabilitation in case of rape victim	1,00,000
38.	West Bengal	Rape of Minor	30,000

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		Rape	20,000
		Rehabilitation	20,000
41.	UT of Chandigarh	Rape	3,00,000
		Rehabilitation	20,000
43.	UT of Dadra and Nagar Haveli	Rape	3,00,000
		Rehabilitation	20,000
45.	UT of Daman	Rape	3,00,000
		Rehabilitation	20,000
47.	UT of Puducherry	Rape	3,00,000
		Rehabilitation	20,000

While going through different schemes for relief and rehabilitation of victims of rape, Apex Court come across one scheme made by the National Commission of Women (NCW) revised on 15 April 2010. The application under this scheme will be in addition to any application that may be made under *sections 357 and 357A of the Code of Criminal Procedure, 1973* as provided in para 22 of the scheme. Under this scheme maximum of Rs 3,00,000 (Three lakhs) can be given to the victim of the rape for relief and rehabilitation in special cases like the present case where the offence is against a handicapped woman who required specialized treatment and care.

Coming to the present case in hand, victim being physically disadvantaged, she was already in a socially disadvantaged position which was exploited maliciously by the accused for his own ill intentions to commit fraud upon her and rape her in the garb of promised marriage which has put the victim in a doubly disadvantaged situation and after the waiting of many years it has worsened.

It is heartening to note that the counsel appearing for the respondent State, on instructions received from the Superintendent of Police, District Court, submitted that for the rehabilitation of the victim the Home Secretary, Department of Home has taken decision to keep the victim in Nari Niketan, to provide her food, clothes and shelter and the monthly pension of Rs 300 throughout her life. For the said rehabilitation programme, the state has to incur about Rs 8,000 to Rs 10,000/month.

While dismissing the appeal, the Court said indisputably, no amount of money can restore the dignity and confidence that the accused took away from the victim. No amount of money can erase the trauma and grief the victim suffers. This aid can be crucial with aftermath of crime. The Court directed that all the States and Union Territories shall make all endeavour to formulate a uniform scheme for providing victim compensation in respect of rape/sexual exploitation with the physically handicapped women as required under the law, taking into consideration, the scheme framed by the State of Goa for rape victim compensation.

After *section 357A of the Code of Criminal Procedure, 1973* the following sections have been inserted *vide Criminal Law (Amendment) Act 13 of 2013*, namely:—

357B. Compensation to be in addition to fine under section 326A³⁹ or section 376D⁴⁰ of Indian Penal Code.—

The compensation payable by the State Government under section 357A shall be in addition to the payment of fine to the victim under *section 326A or section 376D of the Indian Penal Code (45 of 1860)*."

“357C. Treatment of victims.—All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under sections 326A, 376, 376A, 376B, 376C, 376D or *section 376E of the Indian Penal Code (45 of 1860)*, and shall immediately inform the police of such incident.

[s 53.5.3] Public Censure

Public censure or social censure is one of the methods of punishment prescribed in some of the countries, such as Russia,⁴¹ Columbia⁴² etc., in respect of certain offences of anti-social nature, such as white collar crimes, tax crimes, food adulteration, etc. In ancient India, public censure was considered suitable punishment for certain class of criminals.⁴³ It is believed that such a punishment will have more deterrent effect on the individuals in view of social stigma attached due to publication of names of persons involved in such crimes. The Law Commission of India in its 42nd Report on *Indian Penal Code* has suggested “Public censure” as one of the modes of punishment in respect of certain class of offences prescribed under *Indian Penal Code*, in addition to “externment” and “compensation”.

[s 53.5.4] Community Service

Community service or corrective labour is a form of punishment in which the convict is not deprived of his liberty. A corrective sentence is served either at the place of accused’s ordinary work place, or in a special corrective labour institution in the locality where the accused is domiciled. Corrective labour is the standard penalty given in those cases where it is considered that the accused need not be isolated from the society. The accused is paid emoluments for the work after adjusting a part of the amount towards establishment and maintenance cost etc. The period ranges between one month and one year in such cases. This system is used in Soviet Russia with good results. An important feature of this type of punishment is that the accused is not deprived of his liberty and he may go home after the day’s work.

[s 53.5.5] Disqualification from Holding Public Office and Contest Elections

Disqualification to hold public office and to contest an election of legislature and local bodies as a form of punishment will have the adequate and desired deterrent sanction, if sincerely implemented. Sub-section (3) of *section 8 of the Representation of the People Act, 1951* disqualifies a person convicted for a period of two years or more to contest an election for a period of six years.⁴⁴ But the provisions are very limited in scope and are being abused with impunity. It is high time that “disqualification from holding office” as proposed under section 74D, IPC Amendment Bill, 1978 is added in *section 53A, IPC*.

In this context a three-judges Bench of the Apex Court on 13 March 2003 delivered a laudable verdict making it mandatory for the candidates seeking an election to disclose their criminal antecedents, assets and liabilities and educational qualifications in the nomination paper.⁴⁵ The judgment has affirmed the basic right of the people to know about their candidates and will go a long way in curbing criminalisation in politics and cleansing the democracy of unwanted elements and give the country a competent and enlightened people’s representatives in legislature.

[s 53.5.6] Death Penalty under the Penal Code

The sentence of death is the most extreme punishment provided under the Code in eight cases. Regarding “death” as a punishment, the authors of the Code have categorically stated that it ought to be very sparingly inflicted in exceptional cases where either murder or the highest offence against the State has been committed. Death sentence under the Code to which offenders may be sentenced are:

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- (i) Waging or attempting to wage war or abetting waging of war against the Government of India (section 121).
- (ii) Abetting mutiny actually committed (section 132).
- (iii) Giving or fabricating false evidence upon which an innocent person suffers death (section 194).
- (iv) Murder which may be punished with death or life imprisonment (section 302).
- (v) Abetment of suicide of a minor, or insane, or intoxicated person (section 305).
- (vi) Attempt to murder by a person under sentence of imprisonment for life, if hurt is caused (section 307).
- (vii) Kidnapping for ransom, etc. (section 364A).⁴⁶
- (viii) Dacoity accompanied with murder (section 396).

In addition to the above stated cases, *IPC* provides for death sentence in the following conditions, viz.

- (ix) Criminal conspiracy to commit any offence punishable with death, if committed in consequence thereof for which no punishment is prescribed (120B),
- (x) Joint liability extending the principle of constructive liability on all the persons who conjointly commit an offence punishable with death, if committed in furtherance of common intention or common object of all (sections 34 and 149),
- (xi) Abetment of offences punishable with death (section 109).

[s 53.5.6.1] Death Penalty under Laws other than the Penal Code

Besides the *Penal Code* death sentence may be awarded under the following seven statutes listed below:

- (i) The Indian *Air Force Act, 1950*;⁴⁷
- (ii) The *Army Act, 1950*;⁴⁸
- (iii) The *Navy Act, 1950*;⁴⁹
- (iv) The National Security Guards Act, 1986 and the *Indo-Tibetan Border Police Act, 1992* prescribe the death sentence as an alternative punishment for defined offences committed by members of the armed forces;⁵⁰
- (v) The *Commission of Sati (Prevention) Act, 1987*;⁵¹
- (vi) The *Narcotic Drugs and Psychotropic Substances Act, 1985*;⁵²
- (vii) The Scheduled Castes and Scheduled Tribes (Prevention) of Atrocities) Act, 1989.⁵³

[s 53.5.6.2] Death Penalty under Defence Laws

As a rule, the members of the Forces of the Union of India are subject to the provisions of military laws, but in certain situations an ordinary member of the public renders himself liable to be tried by the Court Martial for the violation of the provisions of the defence laws.

The General Court Martial constituted under the defence laws can pass a sentence of death on a person found guilty under sections 34⁵⁴ and 37⁵⁵ of the *Army Act, 1950*. The abetment of the offences punishable with death, if committed in consequence of abetment is also punishable with death under section 66⁵⁶ of the Act. Some of the offences punishable with death by the court martial are misconduct in action, delaying the service, disobedience in action, cowardice act and sleeping over duty. Spying by a member of the forces or by a public man, who is not otherwise subject to the defence laws, is also punishable with death.

In view of recent Supreme Court verdict, death sentence pronounced by court martial is subject to review by the Apex Court and appeal would lie against such judgments.

[s 53.5.7] Imprisonment—Meaning, Extent and Scope

The Code does not in general prescribe for imposition of minimum penalty for offences punishable under the *Penal Code* except in a few cases, such as murder, waging war against the government, dowry death, sexual offences, such as rape etc.⁵⁷ A wide discretion has been accorded to the courts, within the maximum limits of punishment prescribed for different offences, to award sentence in each case on its individual merit. The severity of punishment is not uniform in all cases. It varies according to the nature of the offence, the intention, age, mental condition of the accused, and the circumstances in which the offence is committed. For instance, a boy of 10 years of age committing a crime will be treated differently (*section 83, IPC*) from a grown-up man committing the same crime, because of the difference in the mental capacity of the two to distinguish between right and wrong. Likewise, a man committing murder under the influence of intoxication would be liable under section 300 Exception I punishable under section 304 for culpable homicide not amounting to murder, whereas, a man who kills intentionally a person will be liable under *section 300, IPC* punishable under *section 302, IPC* for murder.

- 1 .. Subs. by Act 26 of 1955, section 117 and Schedule, for “*Secondly—Transportation*” (w.e.f. 1-1-1956).
- 2 .. Clause “*Thirdly*” omitted by Act 17 of 1949, section 2 (w.e.f. 6-4-1949).
- 3 CMV Clarkson, *Understanding Criminal Law*, William Collins, 1987, by Sweet & Maxwell Ltd, pp 166-168.
- 4 *Institutes of Hindu Law* (translated by Haughton, GC 1835) Chapter 7, para 18, p 189.
- 5 *State of Madhya Pradesh v Munna Choubey*, AIR 2005 SC 682 [[LNIND 2005 SC 72](#)] : 2005 (1) BLRJ 330 : 2005 Cr LJ 913 : JT 2005 (2) SC 122 [[LNIND 2005 SC 72](#)] : (2005) 2 SCC 710 [[LNIND 2005 SC 72](#)] , Arijit Pasayat and SH Kapadia JJ.
- 6 *Salmond on Jurisprudence*, 12th Edn, (1966 by PJ Fitzgerald), pp 94-100.
- 7 See PK Sen, *Penology Old and New* (T L. L 1929) pp 90-91, for the concept of punishment in the Hindu Reign, Law Commission of India, 42nd Report on *IPC* (1971), pp 44-81.
- 8 *Shiv Ram v State of Uttar Pradesh*, AIR 1998 SC 49 : (1998) 1 SCC 149 : 1997 CLR 790 (SC) : 1998 Cr LJ 76 .
- 9 For causes of crime and pre-scientific theories, classical school theory, moral insanity, anthropological theories, psychological and multiple cause theory. See KD Gaur, *Criminal Law: Cases and Materials*, 5th Edn, 2008, pp 312-320.
- 10 *Rollin M Perkin*, *Criminal Law*, 2nd Edn, 1969, p 4; *Sauer v United States*, 241 F 2d 640 (648) (9th Cir. 1957).
- 11 AIR 1978 SC 1542 : (1979) 4 SCC 505 : 1979 UJ 369 : 1979 Cr LJ 1612 . The accused appellant businessman, charged of bigamy was directed to pay Rs 40,000 and cost of Rs 500 to the complainant wife in lieu of 2 years of

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rigorous imprisonment and the offence was compounded. Rs 5,000 compensation for sexual aberration and breaking up of the matrimonial home was also provided.

- 12** AIR 1978 SC 1548 [[LNIND 1978 SC 199](#)] : (1978) 3 SCC 544 [[LNIND 1978 SC 199](#)] : (1979) 1 SCR 192 [[LNIND 1978 SC 199](#)] : 1978 Cr LJ 1678 . The accused, Reader in the Saurashtra University, holding M.Sc. and Ph.D. degrees from Karnataka University, was convicted for offence of attempting to issue counterfeit University degrees. It was held that the award of sentence by the Sessions Court till the rising of the court was too lenient. Award of sentence by the High Court for 3 years was just and reasonable. See also *Mohammad Giasuddin*, AIR 1977 SC 1926 [[LNIND 1977 SC 211](#)] : (1973) 3 SCC 287 : (1978) 1 SCR 153 [[LNIND 1977 SC 211](#)] : 1977 CAR 259 : 1977 Cr LJ 1557 .
- 13** Held, that the punishment till the rising of the court, for the offence of grievous hurt and related offences, committed conjointly in a group by accused persons which had resulted in the hospitalisation of victim for four weeks, did not conform to any rational legal theory of behaviour, much less the reformatory theory of punishment.
- 14** 2008 WL 5044248 : (2008) (2009) 2 Cr App R (5) 10 : (2008) EW CA 2687.
- 15** *R v Ford (Kevin)*, (2005) EWCA Crimes 1358 : (2006) 1 Cr App R (S) 36 and *R v Clark (Paul)*, (2007) EWCA Crimes 2195 : (2008) 1 Cr App R (S) 105 applied.
- 16** *State of Madhya Pradesh v Surendra Singh*, AIR 2014 SC 398 , MY Eqbal and Shiva Kirti Singh JJ, delivered judgment.
- 17** 131 S Ct 2267 (2011) : US Lexis 4377 (2011). Kennedy J, delivered the opinion of the Court, in which Roberts CJ, and Breyer, Alito, and Sotomayor JJ, joined. Thomas J, filed an opinion concurring in the judgment. Scalia J, filed a dissenting opinion. Kagan J, filed a dissenting opinion, in which Ginsburg J, joined.
- 18** *Indian Penal Code (Amendment) Bill, 1978* suggested for substitution of section 53 with the following:
 - (i) death (ii) imprisonment for life, which shall be rigorous, that is with hard labour; (iii) imprisonment for a term which may be: (a) rigorous, that is with hard labour, (b) simple, that is with light labour; (iv) community service; (v) disqualification from holding office; (vi) order for payment of compensation; (vii) forfeiture of property; (viii) fine; and (ix) public censure.” However, the Bill could not be implemented.
- 19** The *Indian Penal Code (Amendment) Bill, 1978* proposed to add community service (section 74A), Compensation to victims of crime (section 74B), public censure (section 74C and disqualification from holding office (section 74D) in addition to the existing five categories of punishments.
- 20** *Bombay Police Act, 1951* (sections 55 to 63A) prescribe Externment in following cases:
 - (a) of an offence under *IPC* relating to coins and government stamps (Chapter 16) or offences against property (Chapter 17);
 - (b) of any offence under sections 65, 66A or 68 of the *Bombay Prohibition Act, 1949*;
 - (c) of offences under sections 3, 6 or 9 of the *Suppression of Immoral Traffic in Women and Girls Act, 1956*;
 - (d) of an offence under *section 135 of the Customs Act, 1962*;
 - (e) of an offence for accepting bets in any public street, thoroughfare, or race-course in contravention of section 12 or 13A of the *Bombay Prevention of Gambling Act*;
 - (f) twice or more of an offence under the *Bombay Prohibition Act, 1856*, being an offence not covered by clause (b) above;
 - (g) twice or more for being found under suspicious circumstances between sunset and sunrise;
 - (h) twice or more for possession of property which they are unable to give satisfactory account.
 See DC Pandey, *Habitual Offenders and the Law*, (Indian Law Institute, 1983), pp 28-36.
- 21** *NB Khare v State of Delhi*, AIR 1950 SC 211 [[LNIND 1950 SC 30](#)] : 1950 SCR 519 [[LNIND 1950 SC 30](#)] : 1950 SCJ 328 : 1951 Cr LJ 550 ; *Hari v Dy. Commissioner of Police*, AIR 1956 SC 559 [[LNIND 1956 SC 42](#)] : 1956 SCR 506 [[LNIND 1956 SC 42](#)] : 1956 SCJ 599 ; *Gurbachan Singh v State of Bombay*, AIR 1952 SC 221 [[LNIND 1952 SC 31](#)] : 1952 Cr LJ 1147 : (1952) 1 SCR 737 [[LNIND 1952 SC 31](#)] ; *Prem Chand v UOI*, AIR 1981 SC 613 [[LNIND 1980 SC 445](#)] : 1981 Cr LJ 5 : (1981) 1 SCC 639 [[LNIND 1980 SC 445](#)] .
- 22** Transportation was a form of punishment in *IPC* in which the convicts were sent beyond the sea in Andaman Islands. Abolished *vide* Criminal Procedure (Amendment) Act, 26 of 1955.
- 23** “Exile” or “banishment” was a recognized punishment in ancient and medieval times to be used particularly in respect of political offenders or enemies. Such a punishment was provided in the erstwhile USSR *vide Article 21* of the CL Fundamentals. See Bassiouni and Savitski, *The Criminal Justice System of USSR* (1979) pp 196-199.

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- 24 When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason for the act for which the accused person has been so sentenced. See Annexure III Justice to Victims of Crime.
- 25 *Sarwan Singh v State of Punjab*, AIR 1978 SC 1525 [[LNIND 1978 SC 214](#)] : (1978) 4 SCC 111 [[LNIND 1978 SC 214](#)] : (1979) 1 SCR 383 [[LNIND 1978 SC 214](#)] : 1978 CAR 323 .
- 26 *Harikishan and State of Haryana v Sukhbir Singh*, AIR 1988 SC 2131 : (1988) 4 SCC 551 [[LNIND 1988 SC 411](#)] : 1988 (3) Crimes 541 : (1989) Cr LJ 116 : 1988 SC (Cri) 984.
- 27 Writ Petition (Criminal) No. 30 of 2015 (Under *Article 32 of the Constitution of India*), decided on 3 June 2016. Dipak Misra and Shiva Kirti Singh JJ.
- 28 (2006) 3 SCC 178 [[LNIND 2006 SC 78](#)] : 2006 Cr LJ 1242 : AIR 2006 SC 1117 [[LNIND 2006 SC 78](#)] .
- 29 *German Code of Criminal Procedure*, 1877, sections 403-406A as amended on 12 September 1950, *Article 32*.
- 30 *France Criminal Procedure Code*, 1957, *Articles 2, 3, 85 to 91, 114 to 121; 371 to 375*.
- 31 *Codice Penal (Penal Code, Article 185; Codice Procedure Penal, Article 32*, 1988, section 104(1).
- 32 Powers of Criminal Courts Act, 1973, section 35(1)(4); Criminal Justice Act, 1988, section 104(1).
- 33 Northern Ireland Criminal Injuries to Person (Compensation) Act, 1968 (16 & 17 Eliz. 2 c 9).
- 34 New Zealand Public Act, 134 of 1963; Crimes Act, 1908, section 355, Criminal Justice Act, 1954, 8(1)(b) and (2).
- 35 United States Code, title 18 section 3651.
- 36 Criminal Injuries Compensation Act, 1957.
- 37 See KD Gaur, *Code of Criminal Procedure*, 1973 (1st Edn, 2016) pp 418 to 425 for provisions relating to compensation in different countries. See Annexure III Justice to victim of crime for detail provisions.
- 38 AIR 2016 SC 817 [[LNIND 2016 SC 67](#)], MY Eqbal and Arun Mishra JJ.
- 39 Section 326A, *IPC* provides punishment for causing grievous hurt by use of acid to the victim.
- 40 Section 376D, *IPC* provides punishment for gang rape.
- 41 Fundamentals of Criminal Legislation of USSR, 1969, *Article 28* “Social Censure”.
- 42 *Columbia Penal Code, Articles 42, 52, 54*.
- 43 *Sacred Books of the East*, vol 33, Chapter 14, Sloka 10, *Narada Smriti* says that a Brahmin guilty of violent crime be punished by shaving his head, banishing him from the town, branding him on the forehead with a mark of the crime of which he has been convicted and parading him on an ass. In some tribes such a practice is still followed.
- 44 *BR Kapur v State of Tamil Nadu*, 2001 (7) Supreme 1 : AIR 2001 SC 3435 [[LNIND 2001 SC 2120](#)] : JT 2001 (8) SC 40 [[LNIND 2001 SC 2120](#)] : (2001) 4 Scale 429 : (2001) 3 Mad LJ 165 : (2001) 7 SCC 231 [[LNIND 2001 SC 2120](#)] . Apex Court held that a person who is convicted of any offence (Ms J Jayalalitha in this case), and sentenced to imprisonment for more than two years cannot be appointed as Chief Minister of a State under *Article 164(1)* read with 164(4) of the *Constitution* and cannot continue as such. See KD Gaur, *Criminal Law: Criminology*, (2002), pp 658-663.
- 45 Times of India, 14 March 2003, p 1.
- 46 Ins. by Act 42 of 1993, section 2 (w.e.f. 22-5-1993).
- 47 *Indian Air Force Act, 1950, sections 34, 37*.
- 48 *Army Act, 1950, sections 34, 37, 38(1), 67*.
- 49 *Navy Act, 1957, sections 34-39, 43, 44, 49, 50 and 59*. section 38 provides that every person, not otherwise subject to naval law, who is or acts as a spy for the enemy, shall be punished under this Act with death or with such other punishment as is provided under the Act as if he were a person subject to naval law.
- 50 The *Prevention of Terrorism Act, 2002* and the Terrorist and Disruptive Activities (Prevention) Act, 1987 (Repealed) have provided for; death sentence under section 3(2).

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51 Commission of *Sati* (Prevention) Act, 1987 passed in the wake of Deorala (Rajasthan) incident of sati provides death sentence for abetment of sati, section 4(1)... Abetment of *Sati* "If any person commits *Sati*, whoever abets the commission of such *Sati*, either directly or indirectly, shall be punishable with death or imprisonment for life and shall also be liable to fine."

52 *Narcotic Drugs and Psychotropic Substances Act, 1985, section 31A.*

Death Penalty for certain offences after previous conviction.—(1) Notwithstanding anything contained in section 31, if any person who has been convicted of the commission of, or attempt to commit or abetment of, or criminal conspiracy to commit, any of the offences punishable under section 15 to section 25 (both inclusive) or section 27A, is subsequently convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence relating to:

(a) engaging in the production, manufacture, possession, transportation, import into India, export from India or trans-shipment, of the narcotic drugs or psychotropic substances specified under column (1) of the Table given in the sections and involving the quantity which is equal to or more than the quantity indicated against each such drug or substance, as specified in column (2) of the said Table;

(b) financing, directly or indirectly, any of the activities specified in clause (a), shall be punishable with death.

The mandatory provision of death sentence in clause (Q) by use of word "Shall" has been interpreted by the courts as "May".

53 Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, section 30, Punishment for offences of atrocities—

(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe (i) gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any member of the Scheduled Castes and Scheduled Tribes to be convicted of an offence which is capital by the law... and if an innocent member of a Scheduled Caste or Scheduled Tribe be convicted and executed in consequence of such false or fabricated evidence, the person who gives or fabricates such false evidence shall be punished with death.

54 *Army Act, 1950, section 34:* Offences in relation the enemy and punishable with death... 12 types of offences are noted under clauses (a) to (1) of section 34 where death sentence can be awarded.

55 *Army Act, 1950, section 37.* Mutiny for which death sentence may be awarded. *Army Act, 1950, section 66.*

56 The Court Martial is generally manned by the army officers of the rank of Captain or Major, whereas a Court of Session by an experienced judge who has an adequate knowledge of law.

57 *Section 304B, IPC* prescribes a minimum of seven years of imprisonment for dowry death; *section 302, IPC* life imprisonment for murder and *section 121, IPC* for waging or attempting to wage war or abetting waging of war against the government of India; section 397 imprisonment for seven years for robbery or dacoity with attempt to cause death or grievous hurt; and section 398 for attempt to commit robbery or dacoity when armed with deadly weapon; see *Jagmohan Singh v State of Uttar Pradesh*, AIR 1973 SC 947 [[LNIND 1972 SC 477](#)] .

[s 53A] [Construction of reference to transportation.—

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The Indian Penal Code

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⁵⁸[s 53A] [Construction of reference to transportation.—

- (1) Subject to the provisions of sub-section (2) and sub-section (3), any reference to “transportation for life” in any other law for the time being in force or in any instrument or order having effect by virtue of any such law or of any enactment repealed shall be construed as a reference to “imprisonment for life”.
 - (2) In every case in which a sentence of transportation for a term has been passed before the commencement of the *Code of Criminal Procedure (Amendment) Act*, ⁵⁹[1955] (26 of 1955), the offender shall be dealt with in the same manner as if sentenced to rigorous imprisonment for the same term.
 - (3) Any reference to transportation for a term or to transportation for any shorter term (by whatever name called) in any other law for the time being in force shall be deemed to have been omitted.
 - (4) Any reference to “transportation” in any other law for the time being in force shall,—
 - (a) if the expression means transportation for life, be construed as a reference to imprisonment for life;
 - (b) if the expression means transportation for any shorter term, be deemed to have been omitted.]
-

[s 53A.1] Imprisonment for Life Substituted for Transportation for Life

Section 53A was inserted in the *Penal Code* by the *Code of Criminal Procedure (Amendment) Act*, 26 of 1955 in order to abolish “transportation for life” as a form of punishment and substitute “imprisonment for life” in its place. The sentence next to death in gravity was transportation, which is another name for punishment by exile. When the *Penal Code* was enacted in 1860, transportation was meant transportation beyond the seas. The practice of transporting criminals was defended by some criminologists in the past because it eliminated the hopeless and non-reformable types of criminals from the population and served as a means of intimidating prospective criminals, thereby increasing the deterrent influence of punishment. It is undoubtedly one of the vestiges of an outmoded correctional philosophy and was one of the most repulsive phases of human activity in dealing with criminals. It was in practice in England to send hardened and so-called dangerous criminals to the United States and Australia in 18th and 19th centuries. It is an undeniable fact that transportation has proved a ghastly failure wherever it has been tried. In England, it was abolished as a punishment in 1854. In India, it remained a part of the penal system for a much longer time.

In *Kishori Lal v Emperor*, AIR 1945 PC 64, the Privy Council observed that a sentence of transportation did not necessarily mean a sentence of transportation beyond the sea. However, during the British rule such prisoners were generally sent to the Andaman Nicobar Islands.

[s 53A] [Construction of reference to transportation.—

The Supreme Court in *Gopal Vinayak Godse v State of Maharashtra*,⁶⁰ held that a person sentenced to transportation for life, or any other term before the enactment of the impugned section, was to be treated as a person sentenced to rigorous imprisonment for life or for a lesser period as the case might be.

58 Ins. by Act 26 of 1955, section 117 and Schedule (w.e.f. 1-1-1956).

59 Subs. by Act 36 of 1957, section 3 and Schedule II, for “1954” (w.e.f. 17-9-1957).

60 AIR 1961 SC 600 [[LNIND 1961 SC 11](#)] (602) : (1961) 3 SCR 440 [[LNIND 1961 SC 11](#)] : (1962) 2 SCJ 423 : (1961) 1 Cr LJ 736 .

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[s 54] Commutation of sentence of death.—

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[s 54] Commutation of sentence of death.—

In every case in which sentence of death shall have been passed, ⁶¹[the appropriate Government] may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.

[s 54.1] Death Sentence–Commutation by Appropriate Government

Section 54, IPC empowers the appropriate government, i.e., the Central Government in the case of an offence committed in the union territories, and State Governments in the case of an offence committed in the States, to commute (i.e., to substitute) the sentence of death to any other lesser punishment provided under the Code. The powers vested under section 55 can be exercised by the Government on its own initiative with no prayer to that effect by the accused in question on the ground of public expediency.⁶²

In fact, the provisions under sections 54 and 55, IPC have become redundant in view of the similar provisions contained under sections 433⁶³ and 433A⁶⁴ of the CrPC, 1973, which empower to the appropriate government (Central or State) to commute, suspend, or remit sentences passed by the courts.

The matter of commutation falls beyond the jurisdiction of courts since it is the prerogative of the executive to alter the sentence once it is accorded by the courts of law. Thus, it is only the government that is competent to commute the sentence of death under section 54, IPC read with sections 433 and 433A, CrPC. However, the government cannot reduce or commute sentence to less than 14 years for weighty reasons as the crime was serious.⁶⁵ However, there is an exception to this general rule under section 416 of the CrPC, 1973, that empowers the High Court in case of a pregnant woman to commute the sentence of death to imprisonment for life or postpone its execution until such time as it deems fit.⁶⁶

[s 54.2] Delay in Execution of Death Sentence does not by Itself Entitle Commutation to Life Imprisonment, Section 54, IPC: *Sher Singh*

In *Sher Singh v State of Punjab*,⁶⁷ the Apex Court held that delay in execution of death sentence, exceeding two years, by itself does not violate Article 21 of the Constitution to entitle a person under sentence of death to demand quashing of sentence and converting it into sentence of life imprisonment.

The Court did not agree with the decision in *TV Vatheeswaran v State of Tamil Nadu*,⁶⁸ that since more than two years have passed since the petitioners were sentenced to death by the trial court, they are entitled to demand substitutions death the sentence to life imprisonment.

[s 54] Commutation of sentence of death.—

Triveniben: In *Triveniben v State of Gujarat*,⁶⁹ in 1989, a five -judge⁷⁰ Constitutional Bench of the Apex Court finally set at rest the conflicting decisions in five cases⁷¹ by holding that the prolonged delay in execution of death sentence does not automatically entitle the accused to a lesser sentence of life imprisonment.

GB Singh: Again in *GB Singh*,⁷² 2005, the Apex Court reiterated its earlier view in its unanimous verdict and said that:

Undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under *Article 32* but this court will only examine the nature of delay caused and circumstances ensured after sentence was finally confirmed by the judicial process and will have no jurisdiction to re-open the conclusions reached by the Court while finally maintaining the sentence of death. This court, however, may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death in-executable and to this extent the decision in *Vatheeswaran's* case cannot be said to lay down the correct law and therefore, to that extent stands overruled.⁷³

[s 54.3] Power of Pardon, etc., Constitutional Provisions

The *Constitution of India* has invested the President of India and the Governors of the states under *Articles 72* and *161*⁷⁴ respectively with the power to grant pardon (absolute or conditional), reprieve (temporary suspension of punishment fixed by law), respite (postponement to a future date of the execution of a death sentence), remission (to reduce the amount of punishment without changing the character of the punishment), or to suspend, remit or commute the sentence of any person convicted of offences:⁷⁵ (i) against Union Laws, (ii) sentence by Court Martial, and (iii) in all cases of death of sentence.

A careful perusal of the provisions contained in the *Constitution* would reveal that there is no conflict between the powers of the President and the Governors of the States. The President of India has the exclusive power to grant pardon, reprieve and respite in all cases where the sentence is a sentence of death, and both the President and the Governors have concurrent powers in respect of suspension, remission and commutation of a sentence of death. However, the power must be executed in accordance with the aid and advice of the council of ministers.

[s 54.4] Pardon—Extent and Scope

The term “pardon” means remission of a punishment. It may be defined as an act of grace by which the accused is excused from the penalty. It cannot be demanded as a matter of right. Pardon wipes away the guilt of the accused and brings him to the original position of innocence, as though he had never committed the offence.⁷⁶ The prerogative of mercy is in essence an executive function to be exercised by the head of the State after taking into consideration a number of factors which may not be germane for consideration by a court of law.⁷⁷

The prerogative of mercy or pardon is an indispensable component of a well-balanced system of criminal jurisprudence and is considered humanitarian mitigation of severity. Accordingly, the executive has been invested with the power to grant pardon when the prescribed penalties are severe in individual cases. That is to say, pardon is nothing more than an exercise of discretion on the part of the crown to dispense with or to modify a punishment which a Common Law or Statute would require to be undergone.⁷⁸

As noted earlier, the power of pardon is purely discretionary and there is no obligation on the part of the President or Governor to hear the parties concerned before rejecting or granting a mercy petition. In *Kehar Singh v UOI*,⁷⁹ an important question was raised as to whether the President of India while exercising the power

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of pardon conferred under *Article 72* is guided by the rules of natural justice or not, and whether the Court has power of judicial review. Answering in the negative the Supreme Court held that the President's power is beyond the purview of the court.

In England the system of pardon seems to have grown out of the conflict between a king and the nobles who threatened his prerogative power. It was applied to the members of his own household when they committed offences and occasionally to those convicted of offences against the royal power. The pardon was formerly made under the great seal, but now a sign in an annual warrant countersigned by a principal Secretary of State is effective.

The power of pardon has been the subject of criticism throughout the world in recent years since the granting of pardon is nothing but the capricious exercise of executive superiority without taking into consideration any humanitarian aspect. The granting of pardon solely depends on the arbitrary exercise of the whim of the ruler and in no way reflects the under-lying philosophy behind the exercise of such power of pardon. This has been evidenced in the execution of Zulfikar Ali Bhutto, ex-Prime Minister of Pakistan and four others in the famous *Nawab Mohammad Ahmad* murder case. In spite of appeals for amnesty from the world community on the grounds that the death penalty is an inhuman and degrading punishment, and also because in a trial such as that of Mr Bhutto, which was conducted in a tense political atmosphere, there was risk of miscarriage of justice, President Zia-ul-Huq ignored the international appeal for clemency and all the accused were executed. Similarly, Saddam Hussein, who ruled Iraq for three decades was hanged to death on 30 December 2006 in Baghdad by United States without giving him adequate representation in spite of opposition by the world community.⁸⁰

[s 54.4.1] Court can Review Pardon – Supreme Court

The Supreme Court in a significant judgment delivered on 11 October 2006,⁸¹ in a review petition, set aside the decision of the then Andhra Pradesh Governor – Sushil Kumar Shinde in remitting the sentence of 10 years' imprisonment awarded to Congress activist Gowara Venkata Reddy in a murder case. While criticizing the decisions of remitting the sentence by the Governor, on the ground that the period of sentence of 5 years and 2 months already undergone by Reddy would be sufficient and directed his release, the Supreme Court ruled that pardon must be granted only after taking in consideration its potential impact on society.

This is an enumerated power. The power to grant pardon is a prerogative power and not an act of grace.

The Court made it clear that the powers of reprieve, pardon or remission of sentence cannot be done on irrelevant materials. The exercise of the powers must be for *bona fide* and valid reasons. Undue considerations of caste, religion and political loyalty are prohibited from being grounds for grant of clemency. Clemency is not only for the benefit of the accused; President and Governor have to take into account its effect on the family of the victim and the society as a whole. The exercise of executive clemency was not a privilege but based on several principles and the discretion has to be exercised in public consideration alone.

This is a welcome judgment and will go a long way in restricting the executive from taking into account extraneous considerations while exercising the power of pardon etc.

If the pardons are administered with care and to correct injustices, they certainly do not diminish respect for the law. On the contrary, they will infuse confidence in the administration of criminal justice and the people. Its retention in the penal system is essential. It may substantially help to save an innocent person from being sent to gallows due to erroneous justice, or in cases of doubtful conviction.

Moreover, the very hope of being pardoned serves as an incentive for convicts to behave well in prison, which considerably helps in solving the problem of prison discipline.

[s 54.4.2] Pardon in other Countries

In recent years Zimbabwe, Myanmar (Burma), South Korea and Cuba have pardoned prisoners and set them free on one ground or others as stated below:

1. **Zimbabwe:** President Robert Mogabe pardoned at least, 2,000 (two thousand) prisoners including juveniles and female prisoners on 23 May 2016 in order to create more room in its congested national prison system because the country could not feed the growing number of inmates.
2. **Myanmar (Burma):** President Thein Sein pardoned 6,916 people in July 2015 to free prisoners of conscience and others who had been purged by the country's military regime.
3. **South Korea:** Making the 70th anniversary of the end of World War-II, President Park Geun-hye pardoned 6,527 people in August 2015 including a handful of high profile business tycoons to boost economy and buoy national spirit.
4. **Cuba:** The council of state led by President Raul Castro pardoned 3,522 prisoners before Pope Frances' visit in September 2015 indicating proved relations with Catholic Church.⁸²

[s 54.4.3] Pardon with Parole

A pardon preconditioned by a system of parole would be an ideal policy, best suited to all those concerned in the administration of criminal law. It would further be appropriate to relieve the executive authority of the arduous task of administering pardons, as it is very technical. Such functions might be entrusted to a Parole Board or any such high-powered committee consisting of eminent jurists, retired law professors, judges, psychologists, and social scientists so constituted, as already in operation in many American states with good results.

[s 54.4.4] Mercy Petition Once Rejected by President cannot be Entertained again: *Yakub Abdul Razak Memon* :

In *Yakub Abdul Razak Memon v State of Maharashtra* (Bombay Blast case)⁸³ it was held that when a mercy petition is rejected, there has to be a minimum period of 14 days between its rejection being communicated to the petitioner and his family and the scheduled date of execution. That apart, minimum period of 14 days is stipulated between the communication of the death warrant to the petitioner and the scheduled date of execution.

The death warrant was issued on 30 April 2015 which was admittedly received by the petitioner on 13 July 2015 and the date of its execution is 30 July 2015. In brief, the facts may be stated thus, "After the judgment was pronounced on 21 March 2013, an application for review was filed, which was dismissed by circulation on 30 July 2013. After the rejection of the application for review, Suleman, the brother of the petitioner, represented under *Article 72 of the Constitution* to the President of India on 6 August 2013, claiming benefits under *Article 72(1) of the Constitution*. The petitioner on 7 August 2013 wrote to the Superintendent, Central Jail, Nagpur, informing him about receipt of petition by the office of the President of India. On 2 September 2013, the Government of India forwarded the mercy petition of the convict addressed to the President of India, to the Principal Secretary, Home Department, Maharashtra, as per the procedure. The Governor of Maharashtra rejected representation on 14 November 2013 and on 30 September 2013, the State Government informed the Central Government about rejection of the mercy petition by the Governor of Maharashtra. On receipt of the said communication from the State Government on 10 March 2014, the summary of the case/mercy petition prepared by the Ministry of Home Affairs under the signatures of Home Minister was forwarded to the Petitioner. The said rejection was communicated to the stipulation that the convict be informed

and, accordingly, on 26 May 2014, the petitioner was informed about the rejection of mercy petition by the President of India.”

The need of necessity of a minimum period of 14 days stipulated between the receipt of communication of the rejection of the mercy petition and the scheduled date of execution is required for the following reasons:

- (a) It allows the prisoner to prepare himself mentally for execution, to make his peace with God, prepare his will and settle other earthly affairs.
- (b) It allows the prisoner to have a last and final meeting with his family members. It also allows the prisoners' family members to make arrangements to travel to the prison which may be located at a distant place and meet the prisoner for the last time. Without sufficient notice of the scheduled date of execution, the prisoners' right to avail of judicial remedies will be thwarted and they will be prevented from having a last and final meeting with their families.

The first mercy petition was submitted by Suleman, brother of the petitioner, on 6 August 2013 which stood rejected on 11 April 2014 by the President of India and that was communicated to the petitioner on 26 May 2014, but the petitioner had not submitted any mercy petition.

The petitioner did not think it appropriate to challenge the rejection of the mercy petition by the President of India. He accepted his fate.

Since the petitioner had not filed a curative petition, he was entitled to seek reopening of the review petition as per the liberty granted to certain categories of cases in *Mohd Arif Alias Ashfaq*.⁸⁴ Accordingly, his review petition was heard by a three-Judge Bench in the open Court. After rejection of the said review petition on 9 April 2015, he filed a curative petition on 22 May 2015 which also got dismissed on 21 July 2015. At this stage, it is imperative to state that despite the *Constitution Bench*⁸⁵ saying that there shall be oral hearing of the application for review for a maximum period of 30 minutes, the review petition was heard by a three member bench for almost ten days.

The purpose of mentioning the same is that ample opportunity was afforded to the petitioner.

Dismissing the petition the court said there is no merit in the case.

⁶¹ Subs. by the A.O. 1950, for “*the Central Government or the Provincial Government of the Province* within which the offender shall have been sentenced”. The words in italics were substituted by the A.O. 1937, for “the Government of India or the Government of the place”.

⁶² Law Commission of India, 2nd Report, Note A, p 95.

⁶³ **CrPC, 1973, section 433. Power to commute sentence.**—The appropriate Government may, without the consent of the person sentenced commute—

- (a) a sentence of death, for any other punishment provided by the *Indian Penal Code (45 of 1860)*;
- (b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

[s 54] Commutation of sentence of death.—

- (c) a sentence of rigorous imprisonment for simple imprisonment for any term to which that person might have been sentenced, or for fine;
- (d) a sentence of simple imprisonment, for fine.

64 The *CrPC* (Amendment) Act, 1978 inserted section 433A in the *CrPC*, 1973 made 14-year term of imprisonment mandatory (i) for the prisoners sentenced to life imprisonment who could also be punished to death, and (ii) those who were sentenced to death but whose sentence was commuted to life imprisonment under section 433 of the *CrPC*, 1973.

65 *Shidagouda Nijligappa Ghandavar v State of Karnataka*, AIR 1981 SC 764 [[LNIND 1980 SC 443](#)] : 1981 Cr LJ 324 : (1981) 1 SCC 164 [[LNIND 1980 SC 443](#)] : (1981) 1 SCR 1269 .

66 *CrPC*, 1973, section 416. Postponement of Capital Sentence on pregnant woman: "If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to imprisonment for life."

67 AIR 1983 SC 465 [[LNIND 1983 SC 89](#)] : 1983 (1) Crimes 1017 (SC) : (1983) 1 Scale 283 [[LNIND 1983 SC 89](#)] : (1983) 2 SCC 344 [[LNIND 1983 SC 89](#)] : (1983) 2 SCR 582 [[LNIND 1983 SC 89](#)] .

68 AIR 1983 SC 361 : 1983 Cr LJ 481 : (1983) 1 Scale 115 [[LNIND 1983 SC 58](#)] : (1983) 2 SCC 68 [[LNIND 1983 SC 58](#)] : (1983) 2 SCR 348 .

69 AIR 1989 SC 142 [[LNIND 1989 GUJ 76](#)] : 1988 (3) Crimes 771 (SC) : JT 1988 (4) SC 112 : (1988) 2 Scale 907 [[LNIND 1989 GUJ 76](#)] : (1988) 4 SCC 574 . The Bench consisted of GL Oza, Murari Mohan Dutt, KN Singh, K Jaganath Shetty and LM Sharma JJ.

70 *GB Singh v Uttar Pradesh*, (2005) 6 Supreme 511 .

71 *TV Vaitheeswaran v State of Tamil Nadu*, AIR 1983 SC 361 (2) : (1983) 2 SCR 348 ; *Sher Singh v State of Punjab*, AIR 1983 SC 465 [[LNIND 1983 SC 89](#)] : (1983) 2 SCR 582 [[LNIND 1983 SC 89](#)] ; *Javed Ahmed Abdul Hamid Pawala v State of Maharashtra*, AIR 1985 SC 231 [[LNIND 1984 SC 310](#)] : (1985) 2 SCR 9 .

72 *GB Singh v State of Uttar Pradesh*, (2005) 6 Supreme 511 .

73 *Triveniben (Smt) v State of Gujarat*, AIR 1989 SC 142 [[LNIND 1989 GUJ 76](#)] (143) (para 9); See KD Gaur, *Criminal Law Cases and Materials*, (4th Edn, 2005 LexisNexis), pp 325 to 337.

74 Article 72. The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence—

- (a) in all cases where the punishment or sentence is by a Court Martial;
- (b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the Executive power of the Union extends;
- (c) in all cases where the sentence is a sentence of death, and

Article 161. The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the Executive power of the State extends.

75 Shukla VN *The Constitution of India*, 10th Edn, (2001), pp 335-339. Power of pardon in India can be traced back to Regulating Act, 1773 which vested the power with the Governor-General.

[s 54] Commutation of sentence of death.—

- 76** Sutherland and Cressy, *Principles of Criminology*, (6th Edn, 1965), p 544.
- 77** *Barnes and Teeters New Horizons in Criminology*, 3rd Edn, (1966), 345-348. In the case of (*Ex parte*) *Grossman*, 267 US 87 : 69 L Ed 527 Taft CJ, has explained the object of investing the power of pardon in the head of the State in the following words:
- Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some authority other than the court's power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the Executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full discretion to exercise it. Our *Constitution* confers this discretion on the highest officer in the nation in confidence that he will not abuse it.
- 78** See William R Anson, *The Law and Custom of the Constitution*, 4th Edn, (1935), vol II, Pt II, pp 21-31 (maintenance of Kings' Peace).
- 79** See *Kehar Singh v UOI*, AIR 1989 SC 653 [[LNIND 1988 SC 586](#)] : (1989) 1 SCC 204 [[LNIND 1988 SC 586](#)] : 1988 Supp (3) SCR 1102 : 1989 CLR 112 (*Indira Gandhi murder case*). The Full Bench of the Supreme Court speaking through Pathak CJ said, that President's power under *Article 72 of the Constitution* is not subject to the scrutiny of the court. *Tara Singh v State of Punjab*, AIR 1951 Punj 27 . In *TV Vaitheeswaran v State of Tamil Nadu*, AIR 1983 SC 361 (2) : (1983) 2 SCC 68 [[LNIND 1983 SC 58](#)] : (1983) 2 SCR 348 : 1983 Cr LJ 481 : (1983) 1 Scale 115 [[LNIND 1983 SC 58](#)] : (1983) 1 SCJ 289 , a seven members Bench of the Supreme Court unanimously held that President as well as the Governors act on the advice of the Council of Ministers in Executive actions. See *Indian Express*, 26 October 1988, p 2: *Kuljeet Singh v Governor of Delhi*, (1982) 1 SCC 11 : AIR 1981 SC 2239 : 1982 CAR 8 .
- 80** Times of India, 31 December 2006, p 1 (Lucknow Edition).
- 81** The Times of India, 12 October 2006, p 1 (Lucknow Edition). The Bench consisted of Arijit Pasayat and SH Kapadia JJ, Judgment assumes significance as Afzal's plea seeking clemency lies with President. Afzal has been convicted and sentenced to death for aiding five terrorists who stormed the Parliament building on 13 December 2001.
- 82** Time, 13 June 2010 p 10.
- 83** (2015) 9 SCC 552 [[LNIND 2015 SC 436](#)] : 2015 (7) SCJ 325 [[LNIND 2015 SC 436](#)] : 2015 (3) Bom CR (Cri) 605 : 2015 (4) JCC 2556 : 2015 (3) Ren CR (Criminal) 927 : 2015 (8) Scale 354 [[LNIND 2015 SC 436](#)] . Dipak Misra, Prafulla C Pant [Amitava Roy], JJ delivered the judgment.
- 84** *Mohd Arif alias Ashfaq v Registrar, Supreme Court of India*, (2014) 9 SCC 737 [[LNIND 2014 SC 769](#)] .
- 85** *Naib Singh v State of Punjab*, 1983 Cr LJ 1345 (SC) : AIR 1983 SC 855 [[LNIND 1983 SC 116](#)] : (1983) 2 SCC 454 [[LNIND 1983 SC 116](#)] : (1983) 2 SCR 770 [[LNIND 1983 SC 116](#)] .

[s 55] Commutation of sentence of imprisonment for life.—

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[s 55] Commutation of sentence of imprisonment for life.—

In every case in which sentence of ⁸⁶[imprisonment] for life shall have been passed, ⁸⁷[the appropriate Government] may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years.

[s 55.1] Imprisonment for Life

Technically this means a sentence of imprisonment running throughout the remaining period of a convict's natural life.⁸⁸ As regards the nature of imprisonment, the Supreme Court of India in the case of *KM Nanavati v State of Maharashtra*,⁸⁹ held that imprisonment in such a case meant rigorous imprisonment for life and not simple imprisonment. An accused convicted of imprisonment for life may be granted remission for good conduct. Further, as per *section 57, IPC*, for the purpose of calculating remission, it is treated as a sentence of 20 years.⁹⁰

Section 55, a supplement to *section 54 of the Penal Code*, empowers the appropriate governments to commute the sentence of imprisonment for life to imprisonment of either description for a term not exceeding fourteen years. The power under this section is executive in nature and is exercised by the government without consent of the accused.⁹¹

[s 55.2] “Commutation” and “Remission”

A distinction must be drawn between commutation and remission of sentence as provided under *section 55, IPC* and sections 433 and 433A⁹² of *CrPC, 1973*.

For instance, in the case of commutation the punishment is altered to one of a different sort from that originally proposed.

While in the case of remission the amount of punishment is reduced without changing the nature and character of the punishment.

Thus an accused, upon his release from jail after expiry of the period of imprisonment of 14 years, which was

[s 55] Commutation of sentence of imprisonment for life.—

commuted for the sentence of life imprisonment under *section 55, IPC*, will not be regarded as being under the sentence of imprisonment for life.

On the other hand, where the sentence of life imprisonment is remitted under *section 433, CrPC, 1973* the accused must be regarded as still being under sentence of imprisonment for life. Similarly, *section 433A, CrPC⁹³* puts restrictions on the powers of remission or commutation in cases where sentence of death is one of the alternative punishments for the offence or death sentence has been commuted as mentioned in the section given below.

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- 86** Subs. by Act 26 of 1955, section 117 and Schedule, for “transportation” (w.e.f. 1-1-1956).
- 87** Subs. by the A.O. 1950, for “*the Provincial Government of the Province* within which the offender shall have been sentenced”. The words in italics were substituted by the A.O. 1937, for “the Government of India or the Government of the place”.
- 88** *Naib Singh v State of Punjab*, 1983 Cr LJ 1345 (SC) : AIR 1983 SC 855 [[LNIND 1983 SC 116](#)] : (1983) 2 SCC 454 : (1983) 2 SCR 770 [[LNIND 1983 SC 116](#)] .
- 89** AIR 1962 SC 605 [[LNIND 1961 SC 362](#)] : (1962) 2 SCJ 347 [[LNIND 1961 SC 362](#)] : (1962) 1 Cr LJ 521 .
- 90** *State of Madhya Pradesh v Ratan Singh*, AIR 1976 SC 1552 [[LNIND 1976 SC 215](#)] : (1976) 3 SCC 470 [[LNIND 1976 SC 215](#)] : 1976 (Supp) SCR 552 : (1976) 2 SCJ 509 : 1976 CAR 260 : 1976 Cr LJ 1192 ; *Mahak Singh v State of Uttar Pradesh*, AIR 1999 All 274 [[LNIND 1999 ALL 674](#)] .
- 91** *SN Ghandvar v State of Karnataka*, AIR 1981 SC 764 [[LNIND 1980 SC 443](#)] . Supreme Court held Government cannot reduce or commute sentence to less than fourteen years, if the crime is serious even for weighty reasons.
- 92** *Ashok Kumar v UOI*, 1991 Cr LJ 2483 (SC).
- 93** Ins. by Act 43 of 1978, section 433A says: “.....Where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by laws or whose a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.”.

[s 55A] [Definition of “appropriate Government”.—

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⁹⁴[s 55A] [Definition of “appropriate Government”.—

In sections 54 and 55 the expression “appropriate Government” means,—

- (a) in cases where the sentence is a sentence of death or is for an offence against any law relating to a matter to which the executive power of the Union extends, the Central Government; and
- (b) in cases where the sentence (whether of death or not) is for an offence against any law relating to a matter to which the executive power of the State extends, the Government of the State within which the offender is sentenced.]

⁹⁴ Subs. by the A.O. 1950, for section 55A. Earlier section 55A was inserted by the A.O. 1937.

[s 56] Sentence of Europeans and Americans to penal servitude. Proviso as to sentence for term exceeding ten years but not for life.—

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[s 56] Sentence of Europeans and Americans to penal servitude. Proviso as to sentence for term exceeding ten years but not for life.—

[Rep. by the Criminal Law (Removal of Racial Discriminations) Act, 1949 (17 of 1949), sec. 2 (w.e.f. 6-4-1949).]

[s 57] Fractions of terms of punishment.—

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[s 57] Fractions of terms of punishment.—

In calculating fractions of terms of punishment, ⁹⁵[imprisonment] for life shall be reckoned as equivalent to ⁹⁶[imprisonment] for twenty years.

[s 57.1] Imprisonment for Life

Section 57 does not state that imprisonment for life shall be reckoned as imprisonment for 20 years. A prisoner's sentence of life imprisonment will not automatically come to an end by lapse of 20 years. It is only the government that can remit, suspend or commute the sentence. For instance, the Apex Court in *Munna v UOI*, (2005) 6 Supreme 461, held that life imprisonment could not be treated as 14 years or 20 years without there being a formal remission by appropriate government. As stated by the Apex Court in *Ratan Singh*⁹⁷ a sentence for imprisonment for life must *prima facie* be treated as imprisonment for the whole of the remaining period of the convicted person's natural life. If the state government rejects the request for remitting the sentence, the Apex Court held the order of the government cannot be interfered with by the High Court in its writ jurisdiction.

A sentence for life would endure for the lifetime of the accused, as it is not possible to fix a particular period of a prisoner's death, so any remission given under the rules cannot be regarded as a substitute for a sentence for life. The rules framed under the *Prisons Act, 1894* or under a jail manual do not affect the total period which the prisoner has to suffer, but merely amount to administrative instructions regarding the various remissions to be given to the prisoner from time to time in accordance with the rules.

The question of remission of the entire sentence or part of it lies within the exclusive domain of the government under *section 432 of the Code of Criminal Procedure, 1973* and neither *section 57 of the Penal Code*, nor any rules or local Acts can stultify the effect of the sentence of life imprisonment given by the court under the *Penal Code*. The prisoner cannot be released automatically on the expiry of 20 years. *Section 433(b) of the CrPC, 1973* empowers a government to commute the sentence of a life imprisonment after he had served 14 years in jail.⁹⁸

[s 57] Fractions of terms of punishment.—

- 95** Subs. by Act 26 of 1955, section 117 and Schedule, for “transportation” (w.e.f. 1-1-1956).
- 96** Subs. by Act 26 of 1955, section 117 and Schedule, for “transportation” (w.e.f. 1-1-1956).
- 97** *State of Madhya Pradesh v Ratan Singh*, AIR 1976 SC 1552 [[LNIND 1976 SC 215](#)] : 1976 Cr LJ 1192 . The respondent Ratan Singh was convicted under *section 302 IPC* for Life imprisonment. After serving for over twenty-five years, he moved the State Government for release which was rejected. Then he moved High Court which allowed his writ for release. Supreme Court allowing the State appeal held that High Court cannot interfere in the State's decision. See KD Gaur, *Criminal Law: Cases and Materials*, 4th Edn, 2005, pp 328-329
- 98** *Mahak Singh v State of Uttar Pradesh*, AIR 1999 All 274 [[LNIND 1999 ALL 674](#)] .

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[s 58] Offenders sentenced to transportation how dealt with until transported.—

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[s 58] Offenders sentenced to transportation how dealt with until transported.—

[Rep. by the Code of Criminal Procedure (Amendment) Act, 1955 (26 of 1955), sec. 117 and Sch. (w.e.f. 1-1-1956).]

[s 59] Transportation instead of imprisonment.—

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[s 59] Transportation instead of imprisonment.—

[Rep. by the Code of Criminal Procedure (Amendment) Act, 1955 (26 of 1955), sec. 117 and Sch. (w.e.f. 1-1-1956).]

[s 60] Sentence may be (in certain cases of imprisonment) wholly or partly rigorous or simple.—

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[s 60] Sentence may be (in certain cases of imprisonment) wholly or partly rigorous or simple.—

In every case in which an offender is punishable with imprisonment which may be of either description, it shall be competent to the Court which sentences such offender to direct in the sentence that such imprisonment shall be wholly rigorous, or that such imprisonment shall be wholly simple, or that any part of such imprisonment shall be rigorous and the rest simple.

[s 60.1] “Imprisonment for life”

Imprisonment for life in the Code, means “rigorous imprisonment for life” and not simple imprisonment. This section cannot be used to specify the nature of imprisonment in such a case. The nature of imprisonment in other cases must be specified in the judgment itself. It cannot be specified for the first time in a warrant.

[s 61] Sentence of forfeiture of property.—

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[s 61] Sentence of forfeiture of property.—

[Rep. by the *Indian Penal Code (Amendment) Act, 1921 (16 of 1921)*, sec. 4.]

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**[s 62] Forfeiture of property in respect of offenders punishable with death,
transportation or imprisonment.—**

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**[s 62] Forfeiture of property in respect of offenders punishable with death,
transportation or imprisonment.—**

[Rep. by the *Indian Penal Code (Amendment) Act, 1921* (16 of 1921) sec. 4.]

[s 63] Amount of fine.—

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[s 63] Amount of fine.—

Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

[s 63.1] Fine not to be Excessive

In imposing a fine, it is necessary to have as much regard for the pecuniary circumstances of the accused as for the character and magnitude of the offence, and where a substantial term of imprisonment is inflicted, an excessive fine should not accompany except in exceptional cases. For instances, the Apex Court on 15 March 2002 imposed a fine of Rs 10 lakh on former Union Minister of Environment Mr Kamalnath for damaging the environment by building a motel on the bank of river Beas near Kulu Manali in Himachal Pradesh applying the “polluter pays” principle. The court said, the object and purpose of such levy of exemplary damages was to serve as “a deterrent for others not to cause pollution in any manner.”⁹⁹

Offence and penalty must be proportionate to the nature of crime. However, a heavy fine that the accused is unable to pay should not be imposed. The paying capacity of the accused should be taken into account while awarding fine. The court should not ignore the youth of the offender since, without doubt, the fine imposed on a child will have to be paid by the parent. But parents, after all, may reasonably be expected to restrain the activities of their children when those activities conflict with the law. The effect of imposing a fine is to give the parent the option of keeping the child out of jail by paying a moderate fine. It should never be calculated in terms of the utmost possible limits of a term of imprisonment that could be awarded by the Magistrate trying a case.¹⁰⁰

⁹⁹ The Bench consisted of MB Shah and Doraiswamy Raju J lease was earlier cancelled on 13 December 1966. See Times of India, 18 December 1996.

¹⁰⁰ See KD Gaur, MKS Singh, *Criminal Law and Criminology (2002) Fine and Correctional Administrations*, pp 757 to 766.

[s 63] Amount of fine.—

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[s 64] Sentence of imprisonment for non-payment of fine.—

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[s 64] Sentence of imprisonment for non-payment of fine.—

¹⁰¹[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 ¹⁰²[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, in 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.

[s 64.1] Imprisonment for Non-payment of Fine

The section empowers the court to impose imprisonment, if it is not possible to execute the sentence of a fine, and if there is no alternative sentence to induce the offender to pay a fine. This section, in fact, confers upon the Court the powers of imprisonment in default of the payment of a fine, which often acts as a screw to make the offender choose the lesser of the two evils.

¹⁰¹ Subs. by Act 8 of 1882, section 2, for “In every case in which an offender is sentenced to a fine”.

¹⁰² Ins. by Act 10 of 1886, section 21(2).

[s 65] Limit to imprisonment for non-payment of fine, when imprisonment and fine awardable.—

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[s 65] Limit to imprisonment for non-payment of fine, when imprisonment and fine awardable.—

The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.

[s 65.1] Limit to Imprisonment for Non-payment of Fine

This section fixes a maximum period of one-fourth of the term of imprisonment which can be awarded by the court in a particular case, if the accused fails to pay the amount of fine levied by the court in addition to the imprisonment already awarded.¹⁰³

¹⁰³ *Ram Jas v State of Uttar Pradesh*, AIR 1974 SC 1811 [[LNIND 1970 SC 363](#)] : 1974 Cr LJ 121 .

[s 66] Description of imprisonment for non-payment of fine.—

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[s 66] Description of imprisonment for non-payment of fine.—

The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence.

The imprisonment for non-payment of fine may be either simple or rigorous as the Court considers appropriate in a particular case.

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[s 67] Imprisonment for non-payment of fine, when offence punishable with fine only.—

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[s 67] Imprisonment for non-payment of fine, when offence punishable with fine only.—

If the offence be punishable with fine only, ¹⁰⁴[the imprisonment which the Court imposes in default of payment of the fine shall be simple, and] the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case.

[s 67.1] Imprisonment for Offence Punishable with Fine

Imprisonment in default of payment of a fine can only be simple imprisonment. The scale in the section refers to fines actually imposed on a person by the Court and not to fines which the court might have imposed, had it so pleased. Even, where the Act creating the offence does not provide for imprisonment in default of fine, a sentence of simple imprisonment in default of payment of a fine is valid.

¹⁰⁴ Ins. by Act 8 of 1882, section 3.

[s 68] Imprisonment to terminate on payment of fine.—

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[s 68] Imprisonment to terminate on payment of fine.—

The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law.

The imprisonment awarded in lieu of fine will automatically terminate on payment of fine.

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[s 69] Termination of imprisonment on payment of proportional part of fine.—

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[s 69] Termination of imprisonment on payment of proportional part of fine.—

If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.

ILLUSTRATION

A is sentenced to a fine of one hundred rupees and to four months' imprisonment in default of payment. Here, if seventy-five rupees of the fine be paid or levied before the expiration of one month of the imprisonment, A will be discharged as soon as the first month has expired. If seventyfive rupees be paid or levied at the time of the expiration of the first month, or at any later time while A continues in imprisonment, A will be immediately discharged. If fifty rupees of the fine be paid or levied before the expiration of two months of the imprisonment, A will be discharged as soon as the two months are completed. If fifty rupees be paid or levied at the time of the expiration of those two months, or at any later time while A continues in imprisonment, A will be immediately discharged.

This section provides for proportionate remission of imprisonment on payment of proportionate part of fine.

[s 70] Fine leviable within six years, or during imprisonment—

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[s 70] Fine leviable within six years, or during imprisonment—

Death not to discharge property from liability.—The fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts.

[s 71] Limit of punishment of offence made up of several offences.—

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[s 71] Limit of punishment of offence made up of several offences.—

Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

¹⁰⁵[Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.]

ILLUSTRATIONS

(a) A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.

(b) But if, while A is beating Z, Y interferes, and A intentionally strikes Y, here, as the blow given to Y is no part of the act whereby A voluntarily causes hurt to Z, A is liable to one punishment for voluntarily causing hurt to Z, and to another for the blow given to Y.

¹⁰⁵ Added by Act 8 of 1882, section 4.

[s 72] Punishment of person guilty of one of several offences, the judgment stating that it is doubtful of which.—

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[s 72] Punishment of person guilty of one of several offences, the judgment stating that it is doubtful of which.—

In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences, he is guilty, the offender shall be punished for the offence for which the lowest punishment is provided if the same punishment is not provided for all.

[s 72.1] Rules for the Award of Punishment

Sections 71 and 72 of the Code provide rules for awarding punishment in cases where an offence is made up of several minor offences, and where it is doubtful as to which offence was committed by the accused. These rules are as follows:

1. Where an offence is made up of parts, each of which constitutes an offence, the offender shall not be punished for more than one offence unless expressly provided for separate punishment in such cases. A gives Z 20 strokes with a stick. The act of beating is made up of 20 strokes, each of which is by itself an offence of voluntarily causing hurt. If A were liable to punishment for every blow, he might be imprisoned for 20 years. However, A would be liable only to one punishment of causing hurt for the whole act of beating. The acts of beating being closely connected with each other, they form one transaction of beating Z and causing hurt thereby.

However, if the act is made up of parts, which are independent of each other, the person may be punished separately for such parts. If Y intervenes while A is beating Z, and A intentionally strikes Y, A is liable to one punishment for voluntarily causing hurt to Z and to another for voluntarily causing hurt to Y. A's act of beating Z and Y are independent of each other, for which A is separately liable.

2. Where a particular act falls within two or more separate definitions of offences, the offender shall not be punished with a more severe punishment than the one the court could award for any of such offences. For instance, in cases of an unlawful assembly (section 143) and rioting (section 146); assaulting or obstructing a public servant when suppressing riot (section 152) and assaulting or using criminal force to deter a public servant from discharge of his duty (section 353); false information with

[s 72] Punishment of person guilty of one of several offences, the judgment stating that it is doubtful of which.—

intent to cause a public servant to use his lawful power to the injury of another person (section 182) and false charge of offence made with intent to injure (section 211); cheating (section 417) and dishonestly inducing delivery of property (section 420); voluntarily causing hurt (section 323) and voluntarily causing hurt by dangerous weapons¹⁰⁶ (section 324); the accused will be punished for one offence only. This is based on the principle of double jeopardy enshrined in the *Constitution*, which means that a person shall not be prosecuted and punished more than once for the same offence.¹⁰⁷

3. Where several acts which (one or more than one) would by itself or themselves constitute an offence, and when combined, constitute a different offence, the accused shall not be punished with a more severe punishment than the one the court could award for any one of such offences.¹⁰⁸ For instance, where A commits house-breaking by night with intent to commit theft, and steals property, A has committed two distinct offences. House-breaking by night (section 457), and theft in a dwelling-house (section 380) are two distinct offences. Here, A may be charged for committing both the offences, but for inflicting punishment, he will be regarded as having committed only one offence. Similarly, where A, a mother leaves her two-month-old baby with the intention of wholly abandoning it, knowing that such act is likely to cause death, and the child dies in consequence, A may be convicted and punished for either culpable homicide (section 304) or abandoning of child (section 317), but not for both the offences.
4. Where it is doubtful as to which of the several offences a person is guilty of, he shall be punished for the offence for which the least punishment is provided.¹⁰⁹ In a case where the accused is found to have fraudulently misappropriated property, and it is not clear whether the act amounted to theft (section 380, 7 years), or criminal breach of trust (section 406, 3 years), he will be punished for the offence for which the punishment is less. Thus, he will be punished for 3 years for criminal breach of trust. The accused will not be set free for want of certainty as to the nature of the offence, once it is established that he committed one of the offences.

¹⁰⁶ See IPC, sections 325, 327, 395, 397, 435, 436 which are examples of such offences under the Code. See K D Gaur, *The Penal Law of India*, vol I, 10th Edn, pp 381-83.

¹⁰⁷ See *Constitution of India*, Article 20(2); MP Jain *Indian Constitutional Law*, 2nd Edn, 1970, pp 582-85.

¹⁰⁸ See CrPC, 1973, section 31 (Sentence in cases of conviction of several offences at one trial), and section 220 (Trial for more than one offence).

¹⁰⁹ The corresponding procedural provisions are to be found in sections 221(1) and 354(2) of the CrPC, 1973.

[s 73] Solitary confinement.—

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[s 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 ¹¹⁰[shall not exceed one] year;

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

[s 73.1] Solitary confinement meaning

Solitary confinement is an isolation of the prisoner from other co-prisoners and complete segregation from society. It is an extreme measure and is to be rarely invoked in exceptional cases, of unparalleled brutality and atrocity.¹¹¹

The Supreme Court has held in *Sunil Batra*¹¹² and *Charles Sobhraj*,¹¹³ that any harsh isolation of a prisoner from the society of fellow prisoners by cellular detention under the *Prisons Act, 1894 sections 29 and 30* is penal, and it must be inflicted only in accordance with fair procedure; and in the absence of which the confinement would be violative of *Article 21 of the Constitution*.

[s 73.2] Condemned Prisoner's Right to be interviewed by Press

In *M Hasan*,¹¹⁴ the Andhra Pradesh High Court held that the condemned prisoners sentenced to death like any other citizen, have right to freedom of speech and expression guaranteed under *Article 19(1)(a) of the Constitution of India* and right to propagate his or her ideas and views on any aspect through available media without any fear or favour as long as they stand the test of reasonable restrictions.

In the instant case, two petitioners filed the writ petition—one is an experienced documentary film-maker and the other freelance journalist whose request to interview two prisoners, in 1996¹¹⁵ was turned down by the jail authorities. Allowing the petition, the Apex Court said refusal by jail authorities to grant permission to be

[s 73] Solitary confinement.—

interviewed amounts to deprivation of citizens' fundamental right to freedom of speech and expression guaranteed under *Article 19(1)(a) of the Constitution*. It is a welcome judgment.

[s 73.3] Prisoner has Right of Confidentiality in Legal Correspondence

Ex parte Daly: In *R v Secretary of State for the Home Dept, Ex parte Daly*, [\(2001\) 3 All ER 433](#) (HL), the House of Lords held that the prisoner has common law right to confidentiality in legal correspondence and right to respect for correspondence under Human Rights Convention.

On 31 May 1995 a policy was introduced under which no prisoner was allowed to be present during a search of living accommodation and cell. Search staff was required, in the absence of the prisoner, to examine legal correspondence to ensure that it was *bona fide* correspondence between the prisoner and a legal adviser.

The lawfulness of that policy was challenged by Daly, a long-term prisoner, who contended that such a policy was not authorized by section 47(1) of the Prison Act, 1952, which empowered the Secretary of State to make rules for the regulation of prisons and for their discipline and control of prisoners.

Allowing the appeal, the Court said that the secretary of state's policy was unlawful and void in so far as it provided that prisoners always had to be absent when privileged legal correspondence, by them in their cells, was examined by prison officers. The Court held:

That the degree of intrusion into the privileged legal correspondence of prisoners violated their common law rights. Section 47(1) of the Prison Act, 1952 did not authorise such excessive intrusion, and the Secretary of State accordingly had no power to lay down or implement the policy in its present form.

110 Subs. by Act 8 of 1882, section 5, for "be less than a".

111 See KD Gaur, Commentary in *Indian Penal Code* (2nd Edn 2013) pp 192-195 for detail discussion. *Munuswamy*, (1947) 1 Mad LJ 336; *Kishore Singh Ravinder Dev v State of Rajasthan*, AIR 1981 SC 625 [\[LNIND 1980 SC 436\]](#) : (1981) 1 SCC 503 [\[LNIND 1980 SC 436\]](#) : (1981) 1 SCR 995 [\[LNIND 1980 SC 436\]](#) : 1981 Cr LJ 17 : 1981 CAR 41 .

112 *Sunil Batra v Delhi Administration*, AIR 1980 SC 1579 : (1980) 3 SCC 488 [\[LNIND 1978 SC 215\]](#) : (1980) 2 SCR 557 [\[LNIND 1978 SC 215\]](#) : 1980 Cr LJ 1099 .

113 *Charles Sobhraj v Superintendent, Central Jail*, AIR 1978 SC 1514 [\[LNIND 1978 SC 218\]](#) : (1978) 4 SCC 104 [\[LNIND 1978 SC 218\]](#) : (1979) 1 SCR 512 [\[LNIND 1978 SC 218\]](#) : 1979 SCJ 264 : 1978 Cr LJ 1534 .

114 *M Hassan v State of Andhra Pradesh*, AIR 1998 AP 35 : (1996) 6 SCC 241 [\[LNIND 1996 SC 1338\]](#) : 1996 Cr LJ 4151 .

115 *Gentela Vijjavardhan Rao v State of Andhra Pradesh*, AIR 1996 SC 2791 [\[LNIND 1996 SC 1338\]](#) . The accused sneaked into a passenger bus with a most inflammable liquid (petrol) and set it ablaze causing severe burn injuries to innocent passengers and killing 23 of them including some children. The fact that the accused were young, had no

[s 73] Solitary confinement.—

motive for murder and did not prevent the passengers from escaping did not constitute “mitigating circumstances”. Death sentence was confirmed by the Supreme Court.

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[s 74] Limit of solitary confinement.—

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[s 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.

[s 74.1] Limit of Solitary Confinement

In view of the gravity and harshness of solitary confinement, the framers of the Code have specifically provided in this section that in no case the sentence of solitary confinement be awarded more than 14 days at a time, and it must be imposed at intervals. It is medically and scientifically proved that solitary confinement, if continued for a long time, is bound to produce mental derangement and insanity.¹¹⁶ The Supreme Court in *Kishore Singh Ravinder Dev*,¹¹⁷ held that solitary confinement or putting fetters could be imposed only exceptional cases for security reasons. Flimsy grounds like “loitering in the prison”, “behaving insolently and in an uncivilized manner”, “tearing off his history ticket” cannot be the foundation for the torturous treatment of solitary confinement and crossbar fetters. Keeping prisoners in separate solitary rooms for long periods from eight months to eleven months (duration) spell are long enough to be regarded as barbarous and would amount to breach of fundamental law laid down by the Supreme Court in the *Sunil Batra*.¹¹⁸

Solitary confinement disguised as “keeping in separate cell” and imposition of fetters are not to be restored to, save in the rarest of rare cases and with strict adherence to the procedural safeguards solitary confinement would virtually mean that prisoners are not persons to be dealt with at the mercy of the prison authority. If special restrictions of a punitive or harsh character like solitary confinement or putting fetters have to be imposed for convincing security reasons, it is necessary to comply with natural justice.

¹¹⁶ *Nyan Suk Mether*, (1869) 3 Beng LR 49.

[s 74] Limit of solitary confinement.—

117 *Kishore Singh Ravinder Dev v State of Rajasthan*, AIR 1981 SC 625 [[LNIND 1980 SC 436](#)] : (1981) 1 SCC 503 [[LNIND 1980 SC 436](#)] : (1981) 1 SCR 995 [[LNIND 1980 SC 436](#)] : 1981 Cr LJ 17 : 1981 CAR 41 .

118 AIR 1980 SC 1579 : (1980) 3 SCC 488 [[LNIND 1978 SC 215](#)] : (1980) 2 SCR 557 [[LNIND 1978 SC 215](#)] : 1980 Cr LJ 1099 . In *Charles Shobraj v Superintendent, Central Jail, Delhi*, AIR 1978 SC 1514 [[LNIND 1978 SC 218](#)] : (1978) 4 SCC 104 [[LNIND 1978 SC 218](#)] : (1979) 1 SCR 512 [[LNIND 1978 SC 218](#)] : 1979 SCJ 264 : 1978 Cr LJ 1534 . Held, *Article 21* guarantees right against fetters (chain).

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[s 75] [Enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction.—

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¹¹⁹[s 75] [Enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction.—

Whoever, having been convicted,—

(a) by a Court in ¹²⁰[India], of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards, ¹²¹[***]

¹²²[***]

shall be guilty of any offence punishable under either of those Chapters with like imprisonment for the like term, shall be subject for every such subsequent offence to ¹²³[imprisonment for life], or to imprisonment of either description for a term which may extend to ten years.]

[s 75.1] Enhanced Punishment in Case of certain Offences

The section provides for enhanced punishment in case a person has already been convicted of an offence punishable under Chapter XII (offences relating to coin and government stamps) and Chapter XVII (offences against property) for a 3-year term of imprisonment or more, if found guilty of committing the offences again under the said Chapters, would be liable to punishment up to imprisonment for life or up to ten years.

Section 75 imposes liability to enhanced punishment where a person is guilty of repeatedly committing offence on the ground that the punishment undergone has had no effect in preventing a repetition of the crime.¹²⁴

¹¹⁹ Subs. by Act 3 of 1910, section 2, for section 75.

[s 75] [Enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction.—

- 120** The words “British India” have successively been subs. by the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Schedule (w.e.f. 1-4-1951), to read as above.
- 121** The word “or” omitted by Act 3 of 1951, section 3 and Schedule (w.e.f. 1-4-1951).
- 122** Clause (b) omitted by Act 3 of 1951, section 3 and Schedule (w.e.f. 1-4-1951).
- 123** Subs. by Act 26 of 1955, section 117 and Schedule, for “transportation for life” (w.e.f. 1-1-1956).
- 124** Ratanlal and *Dhirajlal*, *Law of Crimes*, 24th Edn, (1993), pp 229-235.

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