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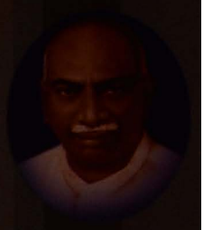

M.A.,

(First Year)

Paper - 3

CRIMINAL LAWS AND PROCEDURE

CRIMINOLOGY AND POLICE ADMINISTRATION

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S 1072 / S 2091

MADURAI KAMARAJ UNIVERSITY

(University with Potential for Excellence)

Distance Education

M.A FIRST YEAR

CRIMINOLOGY AND POLICE ADMINISTRATION

Paper – III

Criminal Laws and Procedure

(Common to PG Diploma in Criminology and Police Administration – Paper II)

Recognised by D.E.C

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S1072/S2091

Dear Student,

The objective of the code of criminal Procedure is to provide punishment for the offenders. The code of criminal procedure is not a pure adjective law but it should partake of the nature of the substantive law. The code of criminal procedure, 1973 that has come into effect from April 1974, was enacted for the whole of India except the state of Jammu and Kashmir. As a student apart from this lesson material, you read the prescribed textbooks and some other additional books to strengthen your knowledge in the subject and completing the course with high record.

Wishing you Success

Co-ordinator

Dept. of Criminology & Police Administration

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CRIMINAL LAWS AND PROCEDURE
SYLLABUS

UNIT – I

Legislative Process

a. Social Contract Theory as the basic of Criminal Justice System.
b. Basis of Criminal Justice System in India – Constitution, IPC,Cr. P.C., & I.E.A.
c. Rule of Law – Concept and practice – Concept of Fair Trial.

Criminal Law

a. Social norms, Values and Criminal Law.
b. Sources and the content of Criminal Law in India.
c. Criminal Law: substantive,Procedural and Case Law.
d. Criminal Law in the Welfare State.

UNIT – II

Criminal Responsibility

a. Forms of social control
b. Criminal Law as a means of social control
c. Vice, Sin, Tort and Crime – Meaning and differentiation
d. Concept of Criminal Responsibility, Actus Reus Non Facit Reum Nisi Mens Sit Rea – Strict liability – exemptions from criminal responsibility – General Exceptions – private defence.

Legal Provisions relating to traditional Crimes (I.P.C)

a. Offences against human body: Murder, hurt and rape.
b. Offences against Property: Theft, Extortion, Robbery and Dacoity, Criminal Breach of Trust, Cheating.
c. Offences against Public Tranquility, Riot, Unlawful Assembly.

UNIT –III

Criminal Procedure (Cr.P.C.)

a. Constitutional guarantees and protection of human rights in criminal cases rule of law.
b. Investigation in criminal cases-arrest, bail proceedings, search, interrogation, identification – statements to police judicial control of abuse of power.
c. Preventive provisions under the Cr. P.C.
d. Prosecution – Organisation, working and withdrawal.
e. Criminal Courts, District, State and Union , Jurisdictions and Powers.
f. Types of Trials: Summary, Summons and Warrant trials.
g. Appeal, Revision and Review.

UNIT - IV

Evidence in Criminal Cases

a. Inquisitional and accusational approaches.
b. Evidence: Meaning, Principles, Concepts of Relevancy and Admissibility.
c. Presumption of innocence – the concept of fair trial – burden of proof.
d. Types of Evidence: Declarations, Confessions etc.
e. Expert Evidence: Medico-legal opinion. Forensic Science Expert etc.
f. Legal Aid.

UNIT – V

Social Legislations

a. Protection of Civil Rights Act
b. Prevention of Atrocities Act, 1989
c. Juvenile Justice Act
d. Immoral Traffic (Prevenition) Act
e. Probation of Offenders Act

Familiarization of the objectives of Economic Legislations such as FERA, COFEPOSA, Prevention of Corruption Act,Prevention of Food and adulteration Act, Dowry Prohibition Act and Narcotic and Psyshotropic Substances Act, Terrorist and Disruptive Act (TADA)

UNIT – VA

Judiciary

a. Organisation and functions of judiciary in India.

b. Role of Nyaya Panchayat and Lok Adalat at Village level and district level and other Diversion procedures.

c. Delay in Criminal Justice Administration.

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SCHEME OF LESSONS

Unit I

Lesson - 1

LEGISLATIVE PROCESS

Introduction

A number of theories have been put forward to explain the opinion of society. The divine origin theory tells that the mother society is the creation of God. Just God created all the animals and inanimate objects of this world, so he created the society as . In course of time, this theory took the form of divine right theory. The Force Theory makes society the result of superior physical force. According to this theory, the society originated in the subjugation of the weaker by the stronger.

Lesson Objectives

- To understand the criminal justice system in India
- To know the concept and practice of fair trial
- To learn the concept of 'Rule of law'

Lesson Structure

Introduction

Lesson objectives

Lesson structure

1.1 Social contract Theory

1.2 Basis of Criminal justice System in India

Functionaries under the code

1.4 Concept of Fair Trial

1.5 Summary

1.6 Key words

1.7 Answer to check your progress

1.8 Model Questions

1.1 Social Contract Theory or the basis of Criminal Justice System

The social contract theory reviews society as a contrivance deliberately set up by men for certain ends. According to this theory, all men were born free and equals.

Individuals form the society. They made a mutual agreement and created society. According to Hobbes, man in the state of nature was impepetual conflict with his neighbours on account of his essentially selfish nature. There was absence of law and justice in the state of nature. Men experienced total insecurity. Life in Hobbes's classic phrase, was 'solitary, poor, nasty, brutish, and short.

To protect himself against the evil consequences, man came out of the state of nature through a contract of each with all and of the all with each, and set up the civil society. By such contract, every man gave up his natural rights and powers to a common power who could govern them and give them security. Only the right of self reservations was retained by every individual. The repository of all these individual rights is conceived of as a new individual person endowed with supreme power. The new individual person becomes sovereign and everyone besides, his subjects.

According to John Locke, the state of nature was not a state of war. It was a state of peace; goodwill mutual assistance and preservation. But eventually, men experienced some movements in the state of nature. First there was no clear definition of the law of nature; secondly, there was no common and independent arbiter having authority to decide disputers in agreement with the law of nature; thirdly there was no sufficient authority to enforce those decisions. To tide over these inconveniences, men were led to establish a civil society through contract. Each individual contracted with other in the civil society. Each individual abandoned his right of interpreting and enforcing the law of nature. Only this right was surrendered and not all the natural rights as in Hobbe's theory.

The right was given to the community as a whole. Then the majority having the whole power of the community naturally in them, decide to set up a government for carrying out the provisions of the contract. The Government was empowered by the community to legislate in agreement with the law of nature, decide dispute and enforce laws. Sovereign belonged to the community. The community had an inalienable right to dismiss the Government if it proved false to the trust reposed in it. Thus Locke made the consent of the people, the source of all government authority.

Rousseau held that men in the state of nature were equal, self-sufficient and contented. They lived life of idyllic happiness and primitive simplicity. The rise of population and the consequent economic progress introduced tension in the state of nature and brought about social disintegration. The growing economic advancement gave rise to the system of property. The sense of property emerged, and men began to think in terms of 'mine' and 'thine'. This marked the down of reason. Human nature which was previously simple, became with the down of reason, increasingly complex. Hostility and conflict appeared in the state of nature, and in consequence the sense of security was lost.

The need of self-preservation impelled men to form a civil society through contract. By contract man "puts his person and all his power in common under the supreme direction of the general will". The general will is the sovereign will of which the civil society is the repository. Hence, the establishment of civil society resulted in the complete submission of each member with all his rights to the whole community.

The concept of penology steams from the social contract theory. Laws are the conditions whereby free and independent men unite to form society. We are of living in a state of war and enjoys freedom which led men to sacrifice, a part of their freedom in order to enjoy that. The sum of all the portions of the freedom surrendered by each individual constitute the sovereignty of a nation. Punishment was established to defend the sovereignty and also to deal with those who violate laws. The basis of punishment is to restrain men from encroaching upon the freedom of one another.

The above reasons of punishment led to the following principles

1. Right to punish should be exercised only by the sovereign when it is necessary to defend the liberty and rights of all people.
2. Punishment for crime is established by law and power to enact law can only be vested in the legislator.
3. No magistrate can inflict upon another any penalty not ordained by law.
4. Laws of a society apply equally to all members of society regardless of their status.
5. If severe punishment is useless in the prevention of crime, such punishment is contrary to reason and justice.

1.2 Basis of Criminal Justice System in India

The ultimate aim of criminal law is protection of right to personal liberty against invasion by others protection of the wealth against the strong, law abiding against lawless, peaceful against the violent. To protect the rights of the citizens the state prescribed the rules of conduct, sanction for their violation, machinery to enforce sanctions and procedure to protect that machinery.

The primary responsibility of the state is to maintain law and order so that citizens can enjoy peace and security. Life and personal liberty being very precious rights, their protection is guaranteed to the citizen as a fundamental right under Article 21 of our constitution. This right is internationally recognized as a Human Right. Right to property, which once had the status of a fundamental right in our constitution, is now relegated to a constitutional right under Article 300A of the constitution.

The state discharges the obligation to protect life, liberty and property of the citizen by taking suitable preventive and punitive measures which also serve the object of preventing private retribution so essential for maintenance of peace and law and order in the society. Substantive penal power is enacted prescribing punishment for the invasion of these rights. When there is an invasion of these rights of the citizens, it becomes the duty of the state to apprehend the person guilty of such invasion, subject him to fair trial and if found guilty to punish him. Substantive penal laws can be effective only when the procedural laws for enforcing them are sufficient. This in essence is the function of the criminal justice system.

The system followed in India for dispensation of criminal justice is the Adversarial System of common law inherited from the British Colonial rules. The accused is presumed to be innocent and it is on the prosecution to prove beyond reasonable doubt that he is guilty. The accused also enjoys the right to silence and cannot be compelled to reply. The aim of the criminal justice system is to punish the guilty and protect the innocent. In the Adversarial systems, truth is supposed to emerge from the respective versions of the facts presented by the prosecution and the defense before a neutral judge. The judge acts to be an umpire to see whether the prosecution has been able to prove the case beyond reasonable doubt and gives the benefit of doubt to the accused. It is the parties that determine the scope of dispute and decide largely, autonomously and in a selective manner on the evidence that they

decide to present to the court. The trial is oral, continuous and confrontational. The parties use cross-examination of witnesses to undermine the opposing case and to discover information the other side has not brought out.

The judge in his anxiety to maintain his position of neutrality never takes any initiative to discover the truth. He does not correct the aberrations in the investigation in the matter of production of evidence before court. As the Adversarial System does not impose a positive duty on the judge to discover the truth, he plays the passive role. The system is heavily loaded in favour of the accused and is insensitive to the intensive plight and rights.

In India, the administration of criminal justice system follows the Anglo-Saxon Adversarial Pattern. It has four vital units, namely the police, prosecution judiciary and correctional institutions. These components are supposed to work in a harmonious and cohesive manner with close co-ordination and cooperation in order to achieve desired results more effectively, fairly and quickly. Moreover, the success or failure of the administration of criminal justice depends upon the efficiency of these allied units.

A former chief justice of India warned about a decade ago that the criminal justice system in India was about to collapse. It is common knowledge that the two major problems besieging the criminal justice system are huge tendency of criminal cases and the inordinate delay in disposal of criminal cases on the one hand and the very low rate of conviction in cases involving serious crimes on the other. This has encouraged crime.

Violent and organized crimes have become the order of the day. As chances of conviction are remote, crime has become a profitable business. Law has become unsafe and people live in constant fear. Law and order situation has deteriorated and the citizens have lost confidence in the criminal justice system. It is therefore, repeatedly felt that there is an urgent need to review the entire criminal justice system especially the investigation of crime by the police and the prosecuting machinery due to which conviction rates are declining at a very rapid pace.

1.3 Functionaries under the Code

1. The Police

The Police force is an instrument for the prevention and detection of crime and is established and enrolled by every state Government under the Police Act 1861 or under a State enactment replacing the Act of 1861. In each state the Inspector - General of Police or Director General of Police is in charge of the overall administration of the State Police force. However the administration of police in every district vests in the District Superintendent of Police under the general control and direction of the District Magistrate who is usually the Collector of the District.

The Code confers specific powers e.g. power to make arrest, search, etc., on the members of the police force who are enrolled as police officers. The police officers who are in charge of police station have been given wider powers as they are required by the code to play a pivotal role in the investigation and prevention of crime. Police officers, superior in rank, powers throughout the local area to which they are appointed, as may be exercised by such a station house officer within the limits of his station.

2. The Prosecutors

A crime is a wrong not only against the individual victim but also against the state. Therefore, the state takes upon itself, at least in case of serious offence, the responsibilities of prosecuting the accused persons. The Central government and each State Government in India have power to appoint prosecutors for conducting prosecutions and other criminal proceedings on their behalf in the High Court, Sessions Court or the Court of a magistrate.

It has been specifically provided that in every trial before a court of Sessions the prosecution shall be conducted by a Public Prosecutor. However no specific provisions has been made in the Code in respect of the conduct of prosecution in the Courts of Magistrates. According to the prosecutions is conducted by the Assistant Public Prosecutor and in cases initiated on a private complaint, the prosecution is either conducted by the complainant himself or by his duly authorized counsel. In such cases also state can appoint prosecutors if the cause has public interest.

The Public Prosecutor or the Assistant Public Prosecutor in-charge of a case may appear and plead without any written authority before any court in which that is dealt with. Further it has been provided that the Advocate General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor shall have right to conduct prosecution and that in such a case no permission of the magistrate for conducting the prosecution would be necessary. The effect of these provisions seems to be that the Public or Assistant Public Prosecutor can intervene and assume the charge of the prosecution even in a case initiated on a private complaint.

The code does not mention, about the sprit in which the duties of the ecutor are to be discharged. However the principles in this regard are well settled. The Supreme Court highlighted the importance and nature of the office of the Public Prosecutor in Srilekha Vidyarthi Vs. State of UP. It has been ruled that this is a public office of much importance and that the present system of appointments to the office of Public Prosecutors followed by the political parties should be done away with. Still, there have been cases where the Prosecutors or Assistant Public Prosecutors appeared for the accused. This practice has rightly been disapproved by the courts.

The appointment of a senior police officer as head of the prosecution agency in the state came to be severely criticized by the judiciary. Likewise the practice of appointing police prosecutors as Assistant Public Prosecutors has also been disapproved by the Supreme Court. The duty of the Prosecutor in a criminal trial is not merely to secure conviction at all costs, but to place before the court whatever evidence is in his possession whether it be in favour or against the accused, and to leave it to the court to decide upon all such evidence whether the accused was or was not obtain conviction by hook or by crook.

3. The Defence Counsel

The adversary system of criminal trial, which we have adopted assumes that the state using its investigation resources and employing a competent prosecutor would prosecute the accused, who in turn, will employ and equally competent defense counsel to challenge the evidence of the prosecution. Therefore both the Constitution of India and the code confer on the accused person a right to consult and to be defended by a legal practitioner of his choice.

The right to counsel would however remain empty if the accused due to his poverty of indigent conditions has no means to engage a counsel for his defense. The indigent accused obviously stands the risk of denial of a fair trial when he does not have equal access to the legal services available to the opposite side. It has been provided that where in a trial before the Court of Sessions, the accused is not represented by a pleader, the court that the accused has not sufficient means to engage a pleader the court shall assign a pleader for his defense at the expense of the state. Further the code has empowered the state government to extend the application of the above provisions to any class of trials before other courts in the State.

It may also be noted that the Supreme Court has held that article 21 of the Constitution implicitly requires the State to make provisions for grant of free legal services to an accused who is unable to engage a lawyer on account of reason such as poverty, indigence or incommunicado situation. The only qualification would be that the offense charged against the accused is such that on conviction it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. This goes far beyond Section 304 of the Code.

4. The Courts

(a) Supreme Court : The Constitution establishes the Supreme Court and defines its jurisdiction and powers. The code further makes provision of appeal to the Supreme Court under certain circumstances and also enables the Supreme Court to transfer cases and appeals in the interest of justice. The Supreme Court also exercise appellate jurisdiction in criminal cases under the provisions of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act 1970.

(b) High Court : The Constitution provides for the establishment of a High Court for each State and generally defines the jurisdiction of such High Court. The Court has got superintendence over all courts, throughout the concerned State. The Code also provides that the superintendence over the courts of judicial magistrates is to be so exercised as to ensure an expeditious and proper disposal of cases in such courts. The code gives to the High Court various powers including those relating to reference, appeal, revision, and transfer of cases. It also recognizes specifically the inherent

power of the High Court to prevent the abuse of the process of any court or to secure the ends of justice.

5. Prison Authorities and Correctional Services Personnel

At the conclusion of the trial, if the accused is found guilty, the court is required (i) to pass sentence on him, or (ii) to deal with him under the prohibition laws or other special laws for the reformation and rehabilitation of the offenders. If the court passes a sentence on the offender, the sentence shall be executed in accordance with the provisions of the code. The code however does not make specific provisions for the creation, working, and control of any machinery needed for this purpose and depends only weapon the laws like the Prison Act, 1894, Prisoners Act 1900, the Borstal School Act etc.,

Even regarding the machinery needed for correctional services, the code entirely depends upon laws likely Probation of Offenders Act 1958, Borstal School Act, Reformatory School Act 1897 etc. It might be noted here that the need for such services would considerably increase in the coming years in view of the greater emphasis laid by the code on the use of Probation of Offenders Act 1958 and of other laws meant for the treatment, training and rehabilitation of young offenders.

Rule of Law - Concept and practice - concept of fair trial

The term `Rule of Law' is derived from the French phrase `be principle de legality' (the principle of legality) which refers to a government based on principles of law and not men. The concept of rule of law is of old origin. Edward Cohe is said of said to be the origination of this concept when he said that the king must be under god and law and thus vindicated the Supremacy of law over the pretensions of the executives.

The term Rule of law is used in contradistinction to `rule of men' and 'rule according to law'. Even in most autocratic forms of government, there is some law according to which the powers of the government are exercised but it does not mean that there is the rule of law. Therefore, Rule of law means that the law rules. In history man has always appealed to something higher than that which is his own creation. In jurisprudence Romans, called it *jus naturale medioenolists* i.e. `Levy God'. Hobbes

Loch and Roussueoce called it 'social contract on the natural law' and the modern man calls it the 'rule of Law'.

Dicey's formations of the concept of `Rule of Law' contains three principles:

(i) Absence of discretionary power in the hands of the government officials. Dicey implies that justice must be done through known principles. Discretion implies absence of rules, hence in every exercise of discretion there is room for arbitrariness.

(ii) No person should be made to suffer in body or property except for a breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense, Rule of Law implies.

a) absence of special privileges for a government official or any other person.

b) all the persons irrespective of status must be subjected to the ordinary courts of the land;

c) everyone should be governed by the law passed by the ordinary legislative organs of the state.

(iii) The rights of the people must flow from the customs and traditions of the people recognized by the courts in the administration of justice.

During the last few years, the Supreme Court in India has developed some fine principles of Third World Jurisprudence. The Apex Court in Veena Seth Vs. State of Bihar (AIR 1983 Sc 339) extended the reach of the Rule of Law to the poor and the downtrodden.

The ignorant and the illiterate who constitute the large bulk of humanity in India when it ruled that Rule of Law does not exist merely for those who have the means to fight for their rights and very often for perpetuation of the status quo which protects and preserves their dominance and permits them to exploit a large section of the community. The opportunity for this ruling was provided by a letter written by the free legal aid committee, Hazariboy, Bihar, drawing its attention to the unjustified and illegal detention of certain prisoners in jail for almost two or three decades. The commission divided itself into certain working groups which tried to give content to the concept in relation to an individual's area of activity in a society.

1) Committee on individual liberty and the Rule of Law.
   (i) that the state should not pass discretionary laws.
   (ii) State should not interfere with religious beliefs.
   (iii) State should not place undue restriction on freedoms

2) Committee on Government and the Rule of Law
   Rule of Law means not only the adequate safeguards against abuse of power but effective government capable of maintaining law and order.

3) Committee on Criminal Administration and the Rule of law
   (i) due criminal process
   (ii) no arrest without the authority of law
   (iii) presumption of innocence
   (iv) legal aid
   (v) public trial and fair hearing

4) Committee on Judicial Process and the Rule of Law
   (i) Independent judiciary
   (ii) Independent legal profession
   (iii) Standard of professional ethics

It is heart ending to see that the courts are making all concerted efforts to stablish a rule of law society in India by insisting on `fairness' in every aspect of the exe: e of power by the State. Some of the recent decisions of the Supreme Court are clear indicators of their trend. In Sheela Borse Vs. State of Maharashtra (AIR 1983 Sc 378), the Court insisted on `fairness' to women in police lock-up and drafted a Code of guidelines for the protection of prisoners in police custody especially female prisoners. In State of M.P Vs. Romoshanker (AIR 1983 SC 374). The Court secured `fairness' in public employment by holding that reliance on police report is entirely misplaced in a democratic republic. Then the efforts of the courts in legitimizing 'due' dministrative powers and illegitimating 'undue' powers by operational zing subs. tive and procedural norms and standards can be seen as high benchmark of judicial activism for firmly establishing the concept of the Rule of Law in India.

1.4 Concept of Fair Trial

The primary object of criminal procedure is to ensure a fair trial to every person accused of any crime. The question whether a criminal trial is fair or not will have to be examined in relation to the gravity of the accusation, the time and resources which the society can reasonably afford to spend the quality of the available resources the prevailing social values etc. The common attributes of fair criminal trial are:

1. Adversary system

We have adopted adversary system of criminal trial based on accusatorial method. According to this system, any dispute as to the criminal responsibility of a person is to be resolved by the criminal court after giving fair and adequate opportunity to the disputants to place before the court their respective cases.

The court is more or less like an umpire and is not to take sides or to show any favour or disfavour to any party. It has only to decide as to which party has succeeded in proving its case acceding to law. The adversary system of trial enables an impartial and competent count it have a proper perspective of the case, and it is believed that on the whole this system is a better device to discover the truth in a fair manner. In our system of criminal trials, generally speaking, the prosecutor representing the state accuses the defendant (accused person) of the commission of the alleged crime; and the law requires him to prove his case beyond reasonable doubt. The adversary system as such recognizes equal rights and opportunities to both the parties. i.e. the state and the accused person, to present their cases before the court.

2. Independent, impartial and competent judges

The most indispensable condition for a fair trial is to have an independent, impartial and competent judge to conduct the trial. In this respect the code has made the following provisions:

(a) Separation of judiciary from the executive: In order to ensure independent functioning of the judiciary in criminal matters, the code has brought about the separation of the judiciary from the executive by requiring the appointment of judicial magistrates (as distinct from executive magistrates) and bringing them, for all practical purposes, under the direct supervision and control of the High Court in each State. Because of the separation, no judge or judicial magistrate would be in any way

connected with the prosecution, nor would be held in direct administrative subordination to anyone connected with the prosecution. In a criminal trial as the state is the prosecution party, it is of special significance and importance that the judiciary is freed of all suspicion of executive influence or control direct or indirect.

(b) Courts to be open: Public trial in open court acts as a check against judicial caprice or vagaries and serves as a powerful instrument for creating confidence of public in fairness, objectivity and impartiality of the administration of criminal justice. The code therefore provides that subject reasonable restrictions as the court may consider necessary, the place in which the court is held shall be an open court to which the public generally may have access.

(c) Judge or magistrate not to be personally interested in the case: "Nemo debet esse judex in propria causa" - No man ought to be a judge in his own cause. The essence of the maxim has been incorporated in section 479 of the code. According to this section

(i) No judge or magistrate shall, except with the permission of the higher appellate court, try or commit for trial any case to or in which he is a party, or personally interested, and

(ii) No judge or magistrate shall hear an appeal from any judgment or order passed or made by himself.

(d) Transfer of cases to secure impartial trial: According to section 190 (1) (c), a magistrate empowered to take cognizance of an offence may do so upon his own knowledge about the commission of any such offence. However in such a case the accused must be told before any evidence is taken that he is entitled to have the case tried by another magistrate.

Check Your Progress

1. Explain the Hobbes's classic phrase.

2. Describe the essence of criminal justice system.

Secondly, whenever it is made to appear to the High Court that a fair and impartial inquiry retrial cannot be held in any criminal court subordinate to it, may subject to the conditions laid down in section 407, order that (i) any offence be inquired into or tried by any other competent court or (ii) that any particular case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction.

Similarly the powers of transfer of cases given to the supreme court and the Sessions Court by Sections 406 and 408 can very well be used in appropriate cases as a means for securing a fair and impartial trial.

(e) Competent judges made available through hierarchy of courts: An overview of the provisions regarding the constitution of criminal courts will show their hierarchical structure. The hierarchy is desirable and necessary for marshalling of the limited resources available for the administration of criminal justice. Complicated cases of heinous offence would attract severe punishments and therefore these cases should be handled with great care by better qualified and experienced judges. On the other hand more case of petty offence initiating only light punishments, it may be more expedient to have quick trials and speedy disposals and such cases can be conveniently handled by the subordinate judiciary.

(f) *Qualification of judges and magistrates:* For fair trial it is of prime importance that the judges and magistrates should be persons of integrity and character with the necessary ability and sound knowledge of law. Though the code does not make any specific provisions in this respect, except the provisions contained in Sections 13 and 18 in respect, of the appointment of special magistrates, all reasonable efforts are made by the State Governments and the High Courts to recruit competent and qualified persons for t posts of judges and magistrates.

3. Parties to be represented by competent lawyers

Adversary system as a means of securing fair trial would necessarily require no only competent and independent judges and magistrates, but also competent and able lawyers adequately representing the parties before the court.

(a) Prosecutor representing the State: Crime is a wrong done more to the society than to the individual victim of the crime. Therefore in a criminal trial the state representing the society comes before the criminal courts and seeks punishments to the accuse person suspected of having committed the crime. The Public Prosecutor or the Assistant Public Prosecutor represents the State in such trials. Provisions regarding the qualification and appointments of Public Prosecutors and Assistant Public Prosecutors and contained in Sections 24 and 25.

In the case of non-cognizable, the offence being the nature of a private wrong; the aggrieved party or the complaint, and not the state, is the prosecuting party. Even in such case, the state, through its Public Prosecutors or Assistant Public Prosecutors, can step in and take charge of the prosecution.

The Public Prosecutors or Assistant Public Prosecutors in charge of a case may appear and plead without any written authority before any court in which that is under inquiry, trial or appeal. If in any such case any private person instructs a pleader to produce any person in any court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the Prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutors or Assistant Public Prosecutors and may with the permission of the court, submit written arguments after the evidence is closed in the case (S.301). When the Prosecutors appointed by the State is not available, a magistrate inquiring into or trying a case may permit the prosecutions to be conducted by any person who is not a police officer below the rank of inspector and who has not taken part in the investigation into the offence with respect to which the accused is being persecuted (S. 302).

(b) Representation of the accused by a lawyer: The adversary system of criminal trial assumes that the State using its investigative resources and employing competent Prosecutors will prosecute the accused, who, in turn, will employ competent legal services to challenges the evidence of the prosecution. However considering that most of the accused persons in India are uneducated and poor and are often unable to engage lawyers for their defense, it is highly important and necessary that proper arrangements are made for making the legal services available to them.

Article 22(1) of the Constitution, inter alias provides that no person who is arrested shall be denied the right to consult and to be defended by a legal practitioner of his choice. Similarly Section 303, of the code provides that any person accused of an offence before a criminal court, or against whom proceedings are instituted, may of right be defended by a pleader of his choice. It has been held that the right to consult a lawyer for the purpose of defence beings from the time of arrest of the accused person and even before the actual beginning of the trail.

The right to counsel is recognized because of the obvious fact that ordinarily an accused person does not have the knowledge of law and the professional skill to defend himself before a court of law wherein the prosecution is conducted by a competent and experienced prosecutor. The Supreme Court has therefore observed that a court of appeal or revision is not powerless to interfere, if it is found that the accused was not handicapped for want of legal aid that the proceedings against him may be said to amount to negation of a fair trial.

If the right to counsel is essential to fair trial, it is equally important to see that the accused has the necessary means to engage a lawyer for his defence. The Code has therefore made provisions to provide a lawyer to the indigent accused persons in a trial before a Court of Sessions; the code also enables a State Government to extend this right to any class of trials before other courts in the State.

It has now been laid down by the Supreme Court that the trial court is under an obligation to inform the accused that if he is unable to engage a lawyer on account of poverty, he is entitled to obtain free legal services at the cost of the State.

4. Venue of the trial

The provisions regarding venues i.e. the place of inquiry or trial, are contained in Sections 177-189. If the place of trial is highly inconvenient to the accused person and cause various impediments in the preparation of his defence, the trial at such a place cannot be considered as a fair trial. These provisions are essentially meant to facilitate fair trial.

5. Presumption of innocent and burden of proof

The adversary system of trial that we have adopted is based on the accusation method. And the burden of proving the guilt of the accused is upon the prosecution and unless it relives itself of that burden, the court cannot record a finding of the guilt of the accused. Every criminal trial beings with the presumptions of innocent in favour of the accused; and the provisions of the code are so framed that a criminal trial should being with and be throughout governed by this essential presumption.

6. Rights of accused persons at the trial

A fair trial implies that it should be fair both to the prosecution as well as the accused person. Therefore the following rights in favour of the accused have been recognized by the Code with a view to make the trial fair to the accused person.

(a) Right to know of the accusation: In order to enable the accused to make preparation for his defence, it is essential that he be informed of the accusation against him. The Code therefore provides in unambiguous terms that when an accused person is brought before the court for trial the particulars of the offence of which he is accused all be stated to him (Ss. 228,240,246,251). In case of serious offence, the court is required to frame in writing a formal charge and then to read explain the charge to the accused person (see. Ss. 228,240,246). Detailed provisions have been made in the code in Sections 211-224 regarding the form of charge and joinder of charges.

(b) Right of accused to be tried in his presence: The personal presence of the accused throughout his trial would enable him to understand properly the prosecution case as it is unfolded in the court. A trial and a decision behind the back of the accused person is not contemplated by the code, though no specific provisions to that effect is found therein.

The requirement of the presence of the accused during his trial can be implied from the provisions which allow the court to dispense with the personal attendance of the accused under certain circumstances (see Ss. 205,273).

Section 317 however makes an exception to the above rule and empowers the court to dispense with the personal attendance of the accused person at his trial under certain circumstances. At any stage of an enquiry or trial, if the Court is satisfy that the personal attendance of the accused before it is not necessary in the interests of justice, or that the accused persistently disturb the proceedings in court, the court may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings direct the personal attendance of such accused.

(c) Evidence to be taken in presence of accuse: Except as otherwise expressly provided by any such section like Sections 205,293,299 317), all evidence taken in the course of the trial or other proceedings shall be taken in the presence of the accused, or when his personal attendance is disposed with, in the presence of his pleader (S. 273). However it should not be understood that the above rule is applicable even where the accused by his own conduct makes recording of evidence in his presence an impossibility. Otherwise it would not only mean negation of a fair trial but also mean an end of all-trial at the choice of the accused. Further, whenever any evidence is given in a language not understood by the accused, and he is present in court in person it shall be interpreted in open court in a language understood by him (S. 279).

An accused person may be of unsound mind and thus unable to understand the proceedings. In such a case special provisions have been made in Sections 328-339 to deal with such a situation. An accused person though not of unsound mind may be deaf and dump; may be foreigner not knowing the language of the court and no interpreter is available; and if such accused is unable to understand or cannot be understand the proceedings, there may be a real difficulty. In such a case it has been provided that the case of a court other than a High Court, if such proceedings result in a conviction, the proceedings shall be forwarded to High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit (S. 318).

(d) Right to cross-examine prosecution witness: It is an important right for the purposes of defence. A criminal trial which denies the accused person the right to cross - examine prosecutors witness is based on weak foundation and cannot be considered as a fair trial.

(e) Right to produce evidence in defence: Though the burden of proving the guilt is entirely on the prosecution and though the law does not require the accused to lead evidence to prove his innocence, yet a criminal trial in which the accused is not permitted to give evidence to disprove the prosecution case cannot be considered as just and fair. The refusal without any legal justification by a magistrate to issue process to the witness named by the accused person has been held enough to vitiate the trial.

(f) Right to have reasoned decision: On the plainest requirement of justice and fair trial the least that is expected of the trial court is to notice, consider and discuss however briefly the evidence of various witnesses as well as the arguments addressed at the bar. This requirement is also appealable to the decisions of the appellate courts.

(g) Doctrine of 'autrefois acquit' and *'autrefois convict'*: According to this doctrine if a person is tried and acquitted or convicted of an offence he cannot be tried again for the same offence or on the same fact for any other offence. This doctrine has been substantially incorporated in article 20(2) of the Constitution and is also embodied in Section 300 of the code, the second or subsequent trial in violation of the above doctrine. Would mean unjust harassment of the accused person and can be considered as anything but fair and has been prohibited both by the Code and the Constitution.

7. Expeditious trial

In every inquiry or trial the proceedings shall be held as expeditiously as possible, and in particular when the examination of witness has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded [S. 309(1)].

A criminal trial which drags on far unreasonably long time id not a fair trial. This particularly so in a case where the accused is not released on bail during the tendency of the trial and the trial is inordinately delayed.

Speedy trial is an essential ingredient old 'reasonable' fair and just; procedure guaranteed by Article 21 and it is the constitutional obligation of the state to devise such a procedure as would ensure speedy trial to the accused.

Check Your Progress

3. Define 'Rule of Law'

4. What is meant by 'Adversary System'?

1.5 Summary

To project man against the evil consequences, there is a stage of contract through which every man has natural rights and powers. The Government was empowered by the community to Legislative in agreement with the law of nature. Punishment was establishment restrain men from encroaching upon the freedom

of one another. The police Act confers specific powers to make arrest, search, etc on the members of the police force. Rule of Law is a 'social contract' on the natural Law. A magistrate has empowered to take cognizance of an offence upon his own knowledge.

1.6 Key words

contract	-	an official written agreement
sovereign	-	having complete power
protection	-	the act of protecting somebody
confrontational	-	tending to deal with people in as aggressive way that is likely to cause arguments, rather than discussing the things with them
provision	-	a condition or an arrangement in a legal document
prosecution	-	the process of trying to prove in court that somebody is guilty of a crime

1.7 Answer to check your progress

1. Refer 1.1
2. Refer 1.2
3. Refer 1.3
4. Refer 1.4

1.8 Model Questions

1. Describe the salient features of social contract theory.
2. Write an essay about the criminal justice system in India
3. Who are called Functionaries? Describe
4. Explain the objectives of the Fair Trial.
5. Illustrate the Rights of the Accused Person

Lesson - 2

CRIMINAL LAW

Introduction

The society at times appears to be chaotic, as when a mob riots, or when there is a hysterical rush from an impending crisis. But soon order is restored and the society gets going, Indeed, order rather than disorder is the rule of the world. Social order as it is called is obtained through regulation of human behaviour according to certain standards. All, societies provide for these standards specifying appropriate and in appropriate behaviour. The standards which regulate behaviour have been termed social norms. The concept of norms is a central one in sociology. The purpose of this lesson is to discuss the concept of norms, their formation and importance.

Lesson Objectives

- To know the values of criminal law
- To understand the norms of criminal Law
- To know the concept of 'Precedent'

Lesson Structure

Introduction

Lesson objectives

Lesson structure

2.1 Values

2.2 Norms

2.3 Sources and the content of criminal law in India

2.4 Criminal Law: Substantive Procedural and case Law

2.5 Precedent

2.6 Ratio Decidendi

2.7 Criminal Law in the Welfare State

2.8 Summary

2.9 Key words

2.10 Answer to check your Progress

2.11 Model Questions

2.1 Values

In sociology our concern is with social values. Social values are cultural standards that indicates the general goods deemed desirable for organized social life. These are assumption of what is right and important for society. They provide the ultimate meaning and legitimacy for social arrangements of an important social behaviour. They are the abstract sentiments or ideals. An example of an important social value is, `equality of opportunity" It is widely considered to be a desirable end in itself. The importance of such a value in social life can hardly be exaggerated or sought by the individual values which man seeks for himself. Even though these values are commonly shared, they do not become social values.

A distinct from individual values, a social value contains a concern for others' welfare. Social values are organized within the personality of the individuals. They regulate his thinking and behaving. The process of socialization aims to include these values in his personality, the ethos or fundamental characteristics, of any culture are reflection of its basic values. Thus if the American culture is dominated by a belief in material progress, the Indian culture is marked by spiritualism, the forgetting of self abandonment of personal desire and elimination of the ambition. The "Indian way" is different from the "America Way".

The differences in social values result in divergent social structures and patterns of expected behaviour.

2.2 Norms

1. Norms are standards of group behaviour: An essential characteristics of group life that it-is possessed of a set of values which regulate the behaviours of individual members. As we have seen already, groups do not drop out of the blue with established relationship among members. Groups are the products of interaction among individuals.

When a number of 'individuals interact, a set of standards develop that regulate their relationship and modes of behaviour. These standards of group behaviour are called social terms. That brothers and sisters should not have sexual relations, a child should defer to his parents and an uncle should joke with his nephews and nice are the illustrations of norms which govern relationship among kinsmen.

2. Norms incorporate value judgments: Secord and Buckman say "A norm is a standard of behavioural exceptions shared by group members against which the validity of perceptions is judged and the appropriateness of feeling and behaviour is evaluated. Members of a group exhibit certain regularities in their behaviour. This behaviour is considered desirable by the Group. Such regularities in behaviour have been explained in terms of social norms. Norm, in popular usage, means a standard. In sociology our concern in with social norms, that is norms accepted in a group. They represent "standardized generalization" concerning excepted modes of behaviour.

As standardized generalization they are concepts which have been evaluated by the group and incorporate value judgments. Thus it may be said that norms are based on social values which are justified by moral standards or aesthetic judgment. A norm is a pattern setting limits in individual behaviour. As defined by Broom and Selznick, "The norms are blueprints for behaviour settings limits within which individuals may seek alternate ways to achieve their goals. Norms do not refer to an average or central tendency of human beings. They denote expected behaviour, or even ideal behaviour. Moral values are attached to them. They are model practices. They set out the normative order of the group.

3. Norms are related to factual world: It may not however, be presumed that norms are abstract representing imaginary construct. Sociologists are interested mainly in "operative" norms, that is norms that are sanctioned in such way that violators suffer penalties in the group. For example, most of the norms of the Sermon on the Mount, although often referred to as norms, are not sanctioned one is not punished socially for refusing to "Turn the other cheek". Norms in order to be effective must represent correctly the relations between real events. They must take into account the factual situation. A rule requiring all men to have two wives would be valueless if the sex ratio did not permit. Therefore, the normative system, since it is meant to achieve results in the factual world, should be related to the events in the real world.

2.2.1 Importance of Norms

A normless society is a impossibility. Norms are of great importance to society. It is impossible to imagine a normless society, because without norms behaviour would be unpredictable. The standards of behaviour contained in the norms give order to social relations. Interaction go smooth if the individuals follow the group

norms. The normative order makes the factual order of human society because human society. Man needs a normative order to live in society because human organism is not sufficient comprehensive or integrated to give automatic responses that are functionally adequate for society. Man is incapable of existing alone. His dependence on society is not derived from fixed innate response to mechanical social stimuli but rather from learned responses to meaningful stimuli. Hence his dependence on society is ultimately a dependence upon a normative order.

1. Norms give cohesion to society: We can hardly think of a human group apart from norms. A group without norms would be to use the words of Hobbes, is "solitary, poor nasty, brutish and short. The human organism in order to maintain itself must live in a normatively regulated social system. The normative system gives to society a cohesion without which social life is not possible. These groups which cannot evolve a normative order and maintain normative control over their members fail to survive because of the lack of internal co-operation.

2. Norms influence individual's attitudes: Norms influence an individual's attitudes and his motives. They impinge directly upon a person's self-conception. They are specific demands to act made by group. They are much more stable. They have the power to silence any previously accepted abstract sentiments. Becoming a member of a group implies forming attitudes in relation to group norms. The individual becomes a good member to the extent he abides by the norms. The norms determine and guide his initiative judgment of others and his initiative judgment of others and his initiative judgments of himself. They lead to the phenomena of consciousness. Becoming a member of a group consists of internationalizing the norms of the group. Through internalization they become part of himself automatically expressed in his behaviour.

2.2.2 Conformity of Norms

Norms are not formed by all groups in relation to every kind of behaviour and every possible situation. They are formed in matters of consequence to a particular group. What matters are not consequence to a group depends upon the main purposed goals of the group, the relationship of that group to other groups, and other conditions in which it operates. Like wise, the scope of behaviour regulated by norms varies

considerably in different groups. For example, the norms of some groups may pertain chiefly to ethical matters, while the norms of other groups may cover a broader area of life including dress, forms of entertainment, education and so on.

Further, a social norm operative in one social system may not be operative in another. Thus, Mohammedan societies permit polygamy, but Christian ones do not. Likewise norms do not apply equally to all members of a society or to all situation. They are adjusted to the position people hold in the society and to the occupations they practices. Thus what is proper for a woman is not always proper for a man, or what is proper for a doctor may not be proper for a teacher. Thus conformity to norms is always qualified in view of the socially defined situations.

A norm by definition implies a sense of obligation. It lays down a standard of behaviour which one ought to follow. Many of the problems of personality as well as society are mostly the problems of non-conformity to norms. Conformity to norms is normal. The individual having internalities the norms, feels something like a need to conform. His conscience would bother him if he did not. Further people would disapprove his action if he violates the norm. Thus both internalized need and external sanctioned play an effective role in bringing about conformity to norms.

The violators of norms suffer the following kinds of sanctions:

(i) Violators of norms suffer loss of prestige;

(ii) Violations are subjected to ridicule, fines, imprisonment.

By contrast, those who conform to norms enjoy the expected co-operation from others, maintain good prestige in the group and receive positive rewards such as praise bonuses and promotions.

Three questions have been posed in regard to conformity of norms;

I. Why are some behaviours and attitudes subjected to normative controls and other are not?

II. Why is much conformity to norms found in some groups than in others?

III. Why some members of a group conform more closely to norms than others?

These three questions deal respectively with focus, extent and distribution of conformity to norms.

Why are some behaviours and attitudes subjected to normative control and others are not ? As we have already seen people from group to satisfy a variety of needs. Normative controls arise in the behaviour where members have become more dependent for the satisfaction of their needs. These norms encourage behaviour that ensures maximum satisfaction of these needs and discourage behaviour that might interfere with satisfaction. As remarked earlier, it is only in relation to matters of consequence that norms are formed. Matters of consequence are generally those that contributes to accomplishment of the group purposes. Thus norms develop in relation to those matters which are relevant to group goals. It is the necessity for successfully achieving group goals which leads to the formation of norms.

Secondly, the needs whose satisfaction is necessary for socio-emotional satisfaction also lead to the formation of norms. These needs are for example, the needs for friendship and love, for opportunity to share one's triumphs and defeats and for belonging, acceptances and support. In the family norms arise to ensure fair treatment and to prohibit competition and aggression. Thus there are norms regarding the behaviour of the children towards their parents, the relations of brothers and sisters, wife and husband, father and son.

It may also be referred that one's public behaviour is compelled by norms to a greater extent than one's private behaviour or beliefs because while public acts are open to surveillance, private behaviour is not. Where sanctions cannot be applied, norms generally do not arise.

Why is much conformity to norms found in some groups than in others? According to Festinager, Schachter and Back, the extent to which a group can secure conformity to it's norms depends upon the cohesiveness of the group - the forces which hold a member to stay on in the group. Members are attracted to the group because (i) high reward-cost outcomes stem directly form the interaction between members, (ii) group activities are rewarding for their sake (iii) membership in the group serves as a means to attaining other ends. The cohesiveness of a group also depends on the alternatives available outside the group. Some groups are able to impose severe sanctions upon its members because

the members have alternatives, or because they can command little respect in alternatives. Thus forced they continue to be the members of the group and confirm to its norms. Members of a caste, because they are often not accepted in other castes have low alternative source of satisfaction. Consequently the caste may very effectively control its members through techniques as ostracism should they deviate from caste attitudes behaviour of its members and the more their conformity to the norms.

Further in groups where satisfaction of social emotional needs is dominant or where the tasks themselves are enjoyable, conformity is likely to be high. Thus when the tasks to be performed are bring fatiguing or dangerous, conformity will below, unless the costs of non - conformity are correspondingly high. In situations where sanctioned for non - conformity are weak the level of conformity also may be low.

Conformity to norms also depends upon surveillance and sanctioned. Unless behaviour is monitored and sanctions are imposed for failure to confirm, the behaviour is unlikely to occur. Supervisions of examinations and disqualification of an examinee is necessary to check cheating in the examination. Under conditions of low supervision there is more cheating. In a factory the foreman maintains surveillance over the workers to ensure a minimum interruption of work. In a group where members feel that they had the possibility of becoming completely accepted, a high degree of conformity to the norms is to occur. Likewise the members who feel that they degree of acceptance and are likely to be rejected by the group will clearly conform to the norms.

Why some members of a group conform more closely to norms than others? It is seen that members of the same group conform to norms in varying degrees. Many a factor explain this phenomenon. Firstly, those members who have important satisfactions outside the group will frequently devise from the norms than those who do not have such satisfactions. Similarly members who do not find much satisfaction in the group will also device from the norms. Secondly conformity to norms will differ according to the varying pressure exerted upon different person in the group.

Pressure is exercised because the deviant behaviour has reduced the rewards and increased the costs of other members. Thirdly, conformity to norms differs

according to the member's susceptibility to pressures. It has been seen that in a group where members are more submissive, low in self confident less inclined to nervous tension, more authoritarian, less intelligent less original low in need achievements, high in need for social approval and conventional invalues there is more conformity to norms than in group whose members vary markedly in these characteristics. Fourthly the higher the status of a person the more likely he is to conform to norms. The leaders conform to norms more closely than others because of their central role in the group. As leaders they are supposed to represent group norms, Though it may involve deviation from group norms, on the part if the leader, it is at the same time conformity to the expectations the group has towards his role.

A leader is often both a conformist and a deviate. Fifthly, some members conform to the norms not only because it leads to the accomplishments of group goals but also because it satisfies certain of their needs for example, the needs of friendship and recognition. Lastly, the degree of conformity to norms on the part of an individual is determined by the extent to which he exposes himself to public view. Persons with high status positions are more exposed to public view and hence feel strong pressures to conform to norms. Fear of lowered prestige is, for most people, a stronger motive than desire for higher prestige.

Regarding conformity to norms three more points may also be seen. Firstly, a norm need not be carried out to the letter in order to influence behaviour. It is a mistake to suppose that absolute fidelity to norms is essential to society. Compete adherence would not only be impossible in the case of many norms but would be disadvantageous for the society. Of course, it is a duty of an individual to conform to norms but in some particular situations a moderate rather than a maximum level of performance may achieve what the society needs

Secondly some norms may set such a high level for desirable conduct that average behaviour of members could approach it only at exceptional levels. Many norms do not become internalized. Thirdly, in modern differentiated groups, the degree for conformity to norms is affected by the fact that members frequently belong to a number of groups. Those various groups may have conflicting norms. Therefore, the degree of conformity to norms may be in part a function of the extent to which norms of the other groups are congruous with them.

2.2.3 Conflict in Norms

Conformity to norms depends largely upon agreement as to just what the norm demands. Without this agreement there would be a wide a range behaviour. As already seen norms are agreed upon standards of behaviour. Without such agreement, norms have a weaker force. Further we have seen that norms differ from society to society and from group to group in the same society. It is obvious that norms do not apply equally to all members of all societies or to all members of a society. There are adjusted to the needs of a society and to the position people hold in particular social orders or to the occupations they practice, etc., since there are different norms for different groups, a conflict among them is inevitable.

While norms set limits to individual behaviour, variation in conformity is often permitted and exceptions also are provided for. Some norms are more specifically state than others. Some have wide range of application than others; some permit individual interpretation to a greater extent than others. There are reasons why norms are not followed without deviation.

(i) Some norms are provided less important than others and so the less important ones are violated when one has to make a choice between two norms. In this case it may be said that strictly speaking there is another conflict because the relative importance of the norms is clear.

(ii) Norms may so conflict with each other that an individual must disobey one if he is to conform to the other. A student who sees a friend cheating in an examination must choose between conflicting norms, norm .... struts him to be loyal to his friend while another instructs him to see that honesty is upheld.

(iii) An individual may deviate from a norm because he knows it is weakly enforced. Using college stationery for personal use, letter writing is rarely punished.

(iv) Some norms are not learned by all persons even in the same society. For example, there are wide differences in life styles, food habits and etiquette.

In spite of the fact that there are conflicts between norms and there are deviations from norms, they have nevertheless, evolved as part of human society because they helped to satisfy the fundamental social and individual needs thus enabling societies and human species to survive.

Sanctions: To enforce norms, society takes recourse to sanctions. Sanctions are thus the means of controlling human behaviour. They may take the form of both rewards and punishments. They are used to persuade or force an individual or group to conform to social expectations.

Sanctions can be formal or informal. The informal sanctions are customs, mores and public opinion. The formal sanctions are death imprisonment or fire. When informal sanctions fail, sanction of force is resorted to. For violation of criminal laws, pain or suffering in the form of death, imprisonment or fine is imposed on the offender. The purpose of punishment may be deterrence, reformation or prevention of crime. The punishments are applied by legitimate, vested authority in the name of a group or the total society.

2.3 Sources and the content of Criminal Law in India

2.3.1 Sources

If we analyze the earlier codes, we first find the extraordinary importance given to criminal law when comparing it with the place occupied by civil law. It was perhaps, necessary for earlier legal systems to deal more elaborately with crime and the administrative of justice, because the society that it was called to rule over was a primitive society when violence and self help were the order of the day, an the idea that a person could look to the legal-system when he was wronged was totally foreign to primitive people. Maine cities early Anglo-Saxon codes, Germanic codes and other codes to justify his point that the earlier codes devote more space to the Law of Crimes.

But the story of the origin and development of criminal law is different from what we think of as crimes today. Maine says, "The penal law of ancient communities is not the law of crimes; it is the law of wrongs, or to use the English technical word of 'Torts' ". If a person was hit by another person causing physical harm, the injured person could proceed against the wrong doer by way of civil action and claim compensation for the wrong he had suffered. In the commentaries of Gaius, a celebrated Roman jurist, theft, assault, robbery were associated with trespass, libel and slander. The consolidated laws of German tribes also treat most of the crimes as civil wrongs. Under Anglo-Saxon law, a sum was placed under the head of every citizen, according to his rank in the society, and that sum must be paid by the person who caused any bodily harm to citizen. It was thought in primitive

jurisdiction that whenever a harm was done to an individual, it was that individual who must take action against the wrong doer and the State was not concerned with it. This explains the position in primitive society where the citizen depended for protection against violence or fraud, not on the Law of Crime but in the Law of Tort.

But offence committed against the security of the State were treated in an entirely different way and it is there we can find the origin of the modern law of crimes. Whenever the state realized that an extraordinary act of violence threatening the security of the State had been committed the legislature itself proceeded against the wrong doer with a proceeding totally independent of settled rules and fixed local concepts.

The State interfered with the offence committee against private individuals in the first instance only with the ulterior motive of earning money. The most ancient judicial proceedings, *Legis Actio Sacramenti* of the Romans, explains the economic interest which the State entertained in deciding criminal disputes. Whenever two people were in dispute they were brought into Court and the Praetor as a judge intervened. The parties gave some money as *sacramentum* to the Court and this deposit of money finally went to State for the services it rendered through the Praetor.

The next important development in the field of Criminal Law was the appointment of Commissioners by the State to enquire into a particular crime that had happened. These commissioners were appointed after the crime has been committed and they were bound to give a report about the crime to the legislative body which appointed them. These commissioners were not permanent and they never enjoyed the jurisdiction to try other offence that were not mentioned in their commission.

Finding that particular types of offence were common during a particular season of the year, the Roman senate started appointing temporary commissions for a particular period to try various categories of offences.

But in the year 149 B.C. a statute known as *Lex calpurania de Repetundis* was passed in Rome establishing a permanent commission to try all criminal offence. The special features of this commission were : it was permanent; it could try all criminal offence and it functioned more like a modern Criminal Court.

Check your progress

1.Define Social value

2.'Norms are standards group behaviour' – Comment.

3. Describe Anglo-Saxon Law?

From this permanent commission modern criminal law developed as a separate branch of study and a separate system of administration of justice.

2.3.2 Content of Criminal Law

The Indian Penal Code (I.P.C) is a comprehensive piece of legislation. In 1834 the First Law Commission of India was constituted with Lord Macauley as its President and Macleod, Anderson and Millet as commissioners to prepare the Penal Code for India. It originally consisted of 23 chapters and 511 sections.

Three chapters, viz. V-A, IX-A, XX-A and some sections have been inserted and a few deleted from the code. The code embodies the general penal law of the country and is the sole authority in respect to the general conditions of liability, the definition of specific offences in the Code, and the conditions of exemptions from criminal liability. Some crimes are cognizable and some are not. Traditional and conventional crimes are rooted in time and customs and the Indian Penal code represents its core. The Code punishes such acts against persons and their property as are universally accepted as injurious to all civilized societies and acts which offended against the fundamental principles on which the existence of human beings as a society rests. These fundamentals are more or less of a permanent nature, and will endure for a long time to come.

The Code covers a vast range of anti- social behaviour in relation to the state of society as it existed more than a hundred year ago. For instance, it provides punishment for offence against the State, offences affecting society (common well being), offences affecting human body, property, reputation and the like besides providing punishment for each. of these offences it codifies social offences like those relating to public tranquility, election, offences against public justice, religion, etc., which are capable of an all time definition. It is supplemented by local and special status to punish certain categories of behaviour or acts which are prejudicial to the interest of the citizen and the State.

It is important to note that the provisions relating to the Indian Penal Code have been adopted and implemented in most of the countries of the Commonwealth (previously subject to British) in South East Asia and Africa and are followed with slight variations to suit the local

conditions and requirements. For instance the penal codes of Malaysia, Singapore, Myanmar, (Burma). Srilanka. Bangladesh, Pakistan, West Africa, Nigeria, Somali, Sudan, Kenya, Tanzania, Uganda, Zanzibar, etc., have been modelled on the pattern of the Indian Penal Code.

The Code, no doubt, is an admirable complications of substantive criminal law and most of its provisions are as suitable today as they ,were when enacted. But many new offences have emerged in the flux of socio-economic and political changes and the Code requires a thorough revision to make it progressive and pragmatic. For instance, offences known as white collar and socio- economic crimes, hitherto unknown, have emerged and are multiplying at an alarming pace. These cries have become a dominant features of a powerful section of modern Indian society, which either aids and abets criminal activity or engages in it directly.

The Santhanam Committee while examining the various administrative, legal and social problems of corruption focused the attention of the Government and the people on white collar and economic crimes prevalent in India. the committee broadly classified the socio economic offences into eight categories and recommended for addition of a new chapter to the Indian Penal Code incorporating all such offences and supplementing them with new provisions, so that these offences could find a prominent place in the general penal law of the country. But eventually the Law Commission rejected the proposal on the flimsy ground that such offences are better left to be dealt with by special and self- contained enactments which supplement the basic criminal law.

It is significant to note that even the revision of the penal code, which was suggested by the Law Commission of India after a thorough and comprehensive study, has not been carried out and the Indian Penal Code (Amendment) Bill 1972, introduced in the **Rajya Sabha** and could not see the light of day.

The provisions under the code can broadly be classified into two categories, viz., (i) General principles and (ii) Specific offences. General principles relate to the jurisdiction, basic principles of criminal law, criminal liability and the provisions relating to general exceptions from liability. These are:

i Introduction (Chapter I)

ii General Explanations (Chapter II)

iii Punishments (Chapter III)

iv General Exception (Chapter IV)

v Abetment (Chapter V)

vi Criminal Conspiracy (Chapter V - A)

vii Attempts to Commit Offences (Chapter XXIII)

The specific offences discussed in the Code may be classified into six major categories viz.,

1. Offences against the state (Chapter VI, VI I)
2. Offences affecting the Common well-being (Chapter VIII, IX, IX-A, X, XI, XII, XIII, XIV, XV, XIX, and XX).
3. Offences affecting the human body (Chapter XVI)
4. Offences against property (corporeal and incorporeal) (Chapter XVII, XVIII).
5. Offences affecting reputation (Chapter XXI, XXII)
6. Offences relating to Marriage (Chapter XX and XX- A)

The adjective law of procedure is contained in the criminal procedure code, 1973, (Act 2 of 1974) which consolidates the law relating to the establishments of criminal courts and the procedure to be followed in the investigations, inquiry and trial of the offence under the penal code.

2.4 Criminal Law : Substantive Procedural and Case Law

2.4.1 Substantive Law and Procedural Law

Substantive law determines the facts that constitute wrong. Procedural law determines what facts constitute proof of a wrong. Glanville Williams says, substantive law lays down people's rights, duties, liberties and powers. Procedural law relates to the enforcement of rights, duties, particularly it concerns with procedure and evidence. The Indian penal code, the Indian contract Act, Hindu Marriage Act etc are substantive laws. The code of criminal procedure, the code of civil procedure, the Indian Evidence Act etc. are procedural laws.

Salmond says 'substantive law' is that which defines the rights, while procedural law determines remedies. The yardstick Solmond devised to distinguish the substantive law from the procedural law is not unfailing because sometimes the

litigants get a legal right under procedural law. For example, right of appeal is conferred on litigants not by substantive law but by procedural law. Similarly, substantial part of criminal law not only deals with crimes but with punishments too. This made Solmond to narrow down the earlier definition in the following manner; Law of procedure may be defined as that branch of law which governs the process of litigation, civil or criminal. All the residue substantive law. Thus substantive law is concerned with the ends which the administration of justice seeks, whereas procedural laws deals with the means and instruments by which those ends are to be attained.

Criminal law is embodied in criminal words and statutes. The major substantive criminal law is in the Indian penal code 1861 and procedural criminal law is in the code of criminal procedure, 1973. The I.P.C embodies the general penal law of the country and in the role of authority in respect to the general conditions of liability the definitions of specific offences and the conditions of exceptions from criminal liability.

The code represents the traditional and conventional crimes. The code covers a vast range of anti - social behaviour in relation to the state of society as it existed more than a hundred years ago. For instance, it provides punishment for offences against state, offences affecting human body, property, reputation and the libel.

The code of Criminal Procedure contains the rules that provide for the application of substantive criminal law. The Cr. P.C. consolidates the law relating to the establishment of criminal courts and the procedure to be followed in the investigation, inquiry and trial of offence under the penal codes. While the general purpose of criminal procedure is to provide a mechanism for the administration of criminal law, its core object is to ensure for the accused a full and fair trial in accordance with the principles of natural justice.

Therefore the trial procedure becomes the pivotal part of any scheme of criminal procedure. Another important segment of criminal procedure is investigation which is the precursor of trial procedure. It includes information as to the commission of any crime, detection and arrest of the suspected offender, collection of evidence relating to the commission of the offence etc. Investigation also includes the process whereby the case is brought before the court for trial.

When the trial is concluded and the accused if found guilty or innocent the trial procedure comes to an end. However the code envisages the review of the decisions of the trial court by higher courts for correcting errors, if any, and in sense to a real review to the procedure is an extended trial procedure. The code has made provisions for release on bail of person under arrest or detention pending the pre-trial or review proceedings. These are the man segments of criminal procedure. However the code also deals with prevention of offence, maintenance of wives, children and parents and public nuisance.

The Indian evidence act was passed in 1872. It is concerned with the mode of proving whether a particular person has committed the offence or not. The law or evidence is a part of the law of procedure i.e. the procedure which a court has to follow and as such has retrospective effect. The rules of evidence are in general the same in civil and criminal proceedings and are considered binding on all courts, but some provisions in the act are peculiar to criminal case, and others peculiar to civil cases. But there is a marked difference as to the effect of evidence in civil and criminal proceedings. In civil cases, mere preponderance of probability is sufficient, whereas in criminal cases, the prosecution has to prove the guilt of the accused beyond reasonable doubt. This rule is nowhere enacted in IEA, but is a rule of prudence founded on public policy. This rule is based upon the maxim of English law. It is better that ten guilty men should escape, rather than one innocent should suffer.

2.4.2 Case Law

Legal rules are normally drawn from legal materials stocked in the law library. These materials may be authoritative or unauthoritative, a source from which authoritative rule is drawn, is otherwise called primary source. The rest of them are secondary sources. The primary sources are two-fold: legislation (statutory materials) and precedent (case laws)

2.5 Precedent

2.5.1 Meaning of Precedent

One of the basic principles of the administration of justice is that 'like cases should be decided alike'. The principle voiced in the maxim `*stare decisis et non quieta movere*' (to stand by precedents and not to disturb what is settled) has been known to

all systems of judicature. The doctrine of precedent is founded on the principle that stability and certainty in the law are of first importance. When a point of law is once clearly decided by a court of final jurisdiction, it becomes a fixed rule of law to govern future action.

A precedent is primarily a case law which serves as an authority for deciding a similar case. Some branches of our law (e.g. Law of Torts and Administrative Law) are almost entirely the product of the decisions of the judges. In many instances, case-laws have played an important part in the interpretation of status. Case-law, consists of the rules and principles stated and acted upon by judges in giving decisions.

In a system based on case-law, a judge in a subsequent case has to decide the case before him in the same way as that in which the previous case decided unless he can give a good reason for not doing so. That means, cases must be decided the same way when their material facts are the same. Of course, it does not require that all the facts should be the same. For the facts of the case may never recur. Yet, the legally material facts may recur.

Every Court is bound to follow any case decided by a Court above it in the hierarchy. According to Article 141 of the Constitution of India, the decisions of the Supreme Court and High Courts are binding on all other subordinate courts. Not everything said by a judge makes law. Decisions on pure questions of fact do not create precedents. The doctrine of precedent is largely concerned with pure questions of law. A decision on a point of law constitutes precedent which can in principle bind other courts to follow it.

Before a decision constitutes a binding precedent, two things are essential; (1) it must indeed be a decision and not merely an *obiter dictum* and (2) the binding-feature of the doctrine depends on the relative status of the courts concerned.

To apply the doctrine of precedent, the Court has three questions to answer. First, is the earlier case essentially similar in its significant facts to the later one? Second, if it is found to be similar what legal rule is inherent in the earlier case? Third, how does that rule apply to the later case?

A precedent however becomes null and void and loses its authority when overruled and a new principle is authoritatively substituted for the old one. Overruling of a precedent is an act as superior jurisdiction and can only be done by a Court of higher authority.

Following precedents is often much easier and less time consuming than working out all over again solutions to problems that have already been faced. It is a curb to arbitrariness and a prop to weakness and inexperience. The practice of following precedents enables citizens to plan their conduct in the expectation that past decisions will be honoured in the future.

2.5.2 Kinds of Precedent

Authoritative and persuasive precedent: Salmond divides precedent into authority and persuasive. An authoritative precedent is one which judges must follow whether they approve it or not. In India a judicial precedent of the Supreme Courts and other inferior courts in India. A judicial precedents of the High Court of a state is authoritative in relation to other subordinate Courts in that State. A persuasive precedent is one which the judges are under no obligation to follow, but which they will take into consideration. A judicial precedents of the High Court of a State is persuasive in relation to High Courts in other States. The decisions of English Courts, though treated with respect in India, have only persuasive value.

a. Declaratory and original precedents: A declaratory precedents is one which is merely the application of an already existing rule of law. An original precedent is one which creates and applies a new rule.

2.6 Ratio Decidendi

A decision has two aspects (1) what the case decides between the parties and (2) what principle does it lay down, *ratio decidendi* is the binding part of the decisions. It is not everything said by a judge when giving judgments that constitutes a precedent. Among the propositions of law enunciated by a judge in the course of his judgment, only those which he appears to consider necessary for his decision are said to form part of the *ratio decidendi.* The only thing in a judge binding as an authority upon a subsequent judge is the principle upon which the case was decide. That which binds is called its *`ratio decidenti'* which means literally the 'reason of decision or reason for deciding'.

Ratio decidendi is the principle which is to be distinguished from *obiter dicta ratio decidendi* is the binding part of the decision whereas an obiter dictum is a statement made by a judge in the course of his judgment which may not be preciously relevant to the issue before him. Ratio decided is the rule acted upon by the Court whereas an *obiter dictum* is suggestive of the trend of Court is thinking. Obiter dicta are observations by the way and are not binding. But nonetheless they are important. They do help to rationalize the law and suggest tentative solutions to problems not yet decided by the Courts.

2.7 Criminal Law in the Welfare State

State is a complex of rules and ruled seeking by the conferment of powers on the rulers, the effective maximization of the individual and social welfare of the ruled. According to Laski, the state is an organisation for enabling the mass of men to realize social good on the longest possible scale.

The state thus has a two fold function: first it must secure itself from destruction, so that it can function for the protection of the society which has created it, and secondly it must secure protection to the individual in that society.

Apart from the above law main functions, the other functions of the state are:

1.To secure peace and happiness
2. To maintain law and order
3. To ensure safely and security of its member
4. To promote the material and moral welfare of its subjects.
5. To provide health, education and other essentials of good life.
6. To protect the subjects from anti - social individuals.
7. To procure full employment and freedom from worst.
8. To maintain the rule of law as one of the fundamental elements for the development of human society.

To perform the above said functions the state enacts and promulgates laws and it enforces obedience to the laws by the exercise of sovereign power. When the individual at some points break the rule of law, the power of the state comes in to uphold it. Breach of the rule of law would weak the society. Therefore the state uses its power of compulsion and force.

Check your progress

4.What is called 'Substantive Law'?

5. Explain about 'Prevent aggression'

The present society is no more a primitive society and the state is not a mere police force to protect its citizen. The state is a potent force for enabling its citizens to attain a fuller and happier life. The state should not only protect its citizen from aggression and crime but it must prevent aggression and crime. In relation to criminal justice the state has the following additional functions.

1. To support the crime
2. To control the threat to society by the offender by way of punishment
3. To provide just compensation for the victims of crime.

In performing the above functions, the state must aim to maximize the benefits and minimize the harm to all parties concerned - the victim the offender and the community.

The modern state, being a welfare state has assumed the role of patres families (head of the family) to bring about socio-economic development and well-being of the people. Thus has resulted an enormous increase in the social welfare activities of the state. For instance the state gives public assistance for the disabled the sick the poor the unemployed and the aged.

It also helps victims who suffer on account of natural calamity such as riots, mass murder, communal violence etc. These social welfare assistance of the state represents a part of the state's role in modern age. Such public assistance should also be awarded to the suffering victims of crime. Arthur J. Gocolberg emphasized that crime is a sociological and economic problem, and victims of crime should be treated or victims of floods or hurricanes.

The penal code laws of India such as criminal procedure code and Indian penal code generally neglect the victims of crime. The society increasingly emphasizes the, reformative aspects of punishment to be accorded criminals. The state levies taxes on citizens and spends a huge amount on food, shelter, recreation, training etc of the offenders during their detention in jail end on their rehabilitation after release.

But the state hardly takes note of the victims of crime and their flight especially when the head of the family and earning member is either killed or incapacitated. The poverty of the accused does not exonerate the state from its duty of protecting the interests of the law-abiding citizens. A welfare state owes its responsibility to the rehabilitation of the victims of crime also and it is its duty to discharge the same honesty and efficiently.

Rehabilitating the offender and compensating the victim of crime both depends on, the sources of the state. The financial difficulty of the state cannot justify the neglect of victims. As the state has taken the full responsibility in prosecuting and rehabilitating the offenders it has the accept the responsibility to rehabilitate the unfortunate victims of crime by paying compensation to them.

2.8 Summary

Social values are cultural standards that are desirable for organized social life. These values includes personality, the ethos or fundamental characteristics. Man needs a normative order to live in a society. The norms determine the initiative judgement of others. These norms successfully achieve group goals which leads to the formation of social norms. The penal code punishes the persons who offended against the fundamental principles of human beings. The code covers punishment for offences against state and offences affecting human body, property reputation and the libel.

2.9 Key Words

Culture	-	Way of life, the customs and beliefs, art, etc.
Behaviour	-	The way that somebody behaves, especially towards other people.
Conformity	-	Behaviour or actions that follow the accepted rules of society.
Susceptibility	-	Easily influenced by feelings and emotions.
Conflicting	-	A situation in which there are opposing ideas, opinions, feelings or wishes
Offence	-	An illegal act
Pace	-	Used before a person's name to express polite disagreement with what they have said

2.10 Answer to check your progress

1. Refer - 2.1
2. Refer - 2.2
3. Refer - 2.3.1
4. Refer - 2.4.1
5. Refer - 2.7

2.11 Model Questions

1. 'Norms incorporate value judgements' – Discuss
2. What is value? Explain
3. Why are some behaviours and attitudes subjected to normative controls? Discuss.
4. Write briefly about the conformity of norms
5. Explain the 'doctrine of precedent'.

Lesson - 3

Criminal Responsibility

Introduction

Any society must have harmony and order. Where there is no harmony or order, the society actually does not exist because society is a harmonious organisation of human relationship. Unless the individuals live upto the prescribed norms of conduct and unless their self seeking impulses are subjugated to the welfare of the whole, it would be quite difficult to maintain effectively the social organisation. Society, therefore in order to exist and progress has to exercise a certain control over its members since any marked deviation from the established ways is considered a threat to its welfare. Such control has been termed as `social control'.

Lesson Objectives

- To understand the concept of social control
- To distinguish the tort and crime
- To know the Right of Private defense

Lesson Structure

3.1 Social Control

When we use the term `control' the idea which generally comes to our mind in one of policeman, law courts, prison and laws; of force and coercion. While these elements have a relevance in control, the term social control is used in a broad sense. Some definitions of social control are:

Monnkeim defines social control as 'the sum of those methods by which society tries to influence human behaviour to maintain a given order'.

According to Ross, social control is the system of devices whereby society brings its members into conformity with the accepted standards of behaviour.

As per Gillin and Gillin, "Social control is the system of measures, suggestions persuasions, restraint and concern by whatever means including physical force by which a society brings into conformity to the approved pattern of behaviour or by which group moulds into conformity its members."

In the definition of social control, the following three things are to be noted. Firstly social control is an influence. Secondly the influence is exercised by society. Thirdly, the influence is exercised for promoting the welfare of the groups as a whole. Some sociologists have classified the social control into informal means or formal means.

Sympathy, sociability, resentment, the sense of justice, public opinion, folkways and mores are some of the informal means of social control. They are very powerful in primary social groups where interaction is on a personal basis. The effectiveness of the informal devices of control, though somewhat lessened in modern large communities wherein contacts tend to be impersonal, may still be observed in small villages. Ross cites instances of such informal social control in "frontier" societies, where order is effectively preserved without the help of constituted authority. In modern times the informal methods have given place to formal ones such as laws, education, coercion and codes.

3.1.1 Informal Means

The informal means of social control grow themselves in society. No special agency is required to create them. The Brahamans do not take meat. They take meals only after bath. The Jains do not take curd. They take their dinner before sunset.

The Hindu women do not smoke. One can marry only in one's own caste. The children should respect their parents. All this is due to informal social control. It is exercised through customs, traditions, folkways, mores, religion, ridicule etc. Informal control prevails over all the aspects of man's life. Though it is said that people are not afraid of informal social control, yet informal means of social control are very powerful particularly in primary groups.

No man wants to suffer loss of prestige. He does not want to become the target of ridicule. He does not want to be laughed at by the people. He does not want to be socially boycotted. On the other hand, he wants praise, appreciation, honour and recognition by the society. Thus informal means like praise, ridicule, boycott etc. effectively control his behaviour. Moreover, the child through the process of socialization learns to conform to the norms of the group. A person with specialized attitudes would not do any work which is socially harmful. Thus socialization also exercises an influence over him.

Now we may describe briefly the important means of informal control :

(i) **Belief:** Belief is a conviction that a particular thing is true. It is primarily of five kinds:

a) The belief in the existence of an unseen power;
b) The belief in the theory of re-incarnation,
c) The belief in Nemesis, the Goddess of vengeance,
d) The belief in existence of hell and heaven and,
e) The belief in the immortality of soul.

All these different beliefs influence man's behaviour in society. The first belief in the existence of an unseen power leads a man to right action because he believes that his actions are being watched by an unseen power. The second belief in the theory of reincarnation keeps the man away from wrongful acts because he believes that in order to have a good birth in next life he must do good acts in this life.

The third belief in the Goddess of vengeance also regulates man's behaviour because he believes that he will be punished by the goddess of vengeance for his sins. A sinner is punished here and now. The fourth belief in the existence of hell and heaven influences a man to virtuous acts and avoid sins in order to go to heaven or avoid going to hell after

death. Heaven is a place full of luxuries, fairies and romance. Hell is a place of terror, miseries and tortures. The fifth belief in the immortality of soul leads man to avoid such actions as will cause pain to the souls of the deceased ancestors.

In this way beliefs are powerful influences on human actions. They are vital for human relations. They define the purposes and interests for the individual and control his choice of means so that the purposes of the groups may be advanced or at least not hindered. No aspect of social relationship escapes them. Beliefs may be true or false. They may be founded on factual or faulty evidence. But the question of their validity does not necessarily determine their effectiveness as social controls. We act with as much determination from false beliefs as from factually sound ones.

***(ii)*Social suggestions:** Social suggestions also are powerful means of social control. Suggestion is the indirect communication of ideas, feeling and other mental states. Such communication may be made through various methods. The first method is putting the life examples of great men. We celebrate the anniversaries of Mahatma Gandhi and Lal Bahadur Sastri. We build monuments in the memory of great men. We place their life ideals before the people and exhort them to follow these ideals. The second method of making suggestion is through literature, books, journals, newspapers etc may inspire people to heroic deeds and develop in them national feelings. The literature may also make people narrow minded, communal, conservative and superstitious. The type of literature one reads will indirectly influence his mind and consequently his behaviour. The third methods is through education.

The educational curriculum may communicate certain ideas to the students and make them disciplined citizens. The fourth method is through advertisement. Many magazines carry beautiful advertisements depicting the advantages of visiting certain places and suggesting the prestige attached to traveling to these places. The advertisements from Radio Sri Lanka may attract the people to purchase a particular brand of tooth paste. Many of our business enterprises employ advertising to influence attitudes and, therefore, action. Suggestions may be conscious or unconscious. It may also be intentional or unintentional.

(iii) Ideologies: Ideology is a theory of social life which interprets social realities from the point of view of ideals to prove the correctness of the analysis and to justify these ideals. It is the projection of a certain ideal. Leninism, Gandhism and Fascism are ideologies which have analyzed social life to a very deep extent. Leninism has influenced the social life of Russians. Hitler's theory of socialism influence the Germans to the extent that they began to regard themselves as the supreme race of the world.

Gandhism has influenced social life in India. In the world we today find a conflict of ideologies. The conflict between U.S.A. and U.S.S.R. is a conflict of capitalism and communism. The history of man has been one of struggle among conflicting ideologies. Ideologies are powerful dynamic forces of contemporary social life. They satisfy needs of all men to believe in a system of thought that is rigorous. They express the vital interests of social groups and satisfy their desire for a scheme of social betterment. They stimulate action. They provide a set of values. They are motivators of social action. They make life meaningful. The success of any ideology, as an effective means of social control depends on many factors. Some of these factors are its completeness and coherence, its vision of the future, its ability to hold men's imaginations, its consistency and its ability to meet criticism.

(iv) Folkways: Folkways are the recognized modes of behaviour which arise automatically within a group. They are the behaviour patterns of everyday life which arise spontaneously and unconsciously in a group. They are in general the habits of the individual and are common to a group. They are socially approved. They have some degree of traditional sanction.

It is not easy for the members of a group to violate the folkways. They are the foundation of group culture. If an individual does not follow them he may be socially boycotted by his group. A particular dress must be worn at a particular function. The Brahamans shall not take meat. The Jains should not take curd. The Hindu women should not smoke. Since folkways become a matter of habit, therefore, these are followed unconsciously and exercise powerful influence over man's behaviour in society to a very great extent.

(v) Mores: Mores are those folkways which are considered by the group to be of great significance, rather indispensable to its welfare. The mores relate to the fundamental

needs of society more directly than do the folkways. They express the group sense of what is right and conducive to social welfare. They imply a value judgement about the folkways. Mores are always moulding human behaviour. They restrain an individual from doing acts considered as wrong by his group.

They are the instruments of control. In society there are innumerable mores like monogamy, prohibition, endogamy, anti-slavery etc. Conformity to mores is regarded necessary. It is essential for the members of the group to conform to them. Behaviour contrary to them is not permitted by society. Certain mores may even be harmful for the physical well being of an individual, yet these must be obeyed. Thus, mores control man's behaviour in society to a very great extent.

***(vi)* Customs:** Customs are the long established habits and usages of the people. They are those folkways and mores which have persisted for a very long time and have passed down from one generation to another. They arise spontaneously and gradually. There is no constituted authority to declare them, to apply them or to safeguard them. They are accepted by society. They are followed because they have been followed in the past. The importance of customs as a means of social control cannot be minimized. They are so powerful that no one can escape their range.

They regulate social life to a great extent. They bind men together. They control the purely selfish impulses. They compel the individual to conform to the accepted standards. They are held so sacred that any violation of them is regarded not only a crime but also a sacrilege. In primitive societies customs were powerful means of social control but in modern times their force has loosened.

(vii) Religion: Religion also exercises a powerful influence upon man's behaviour in society. The term religion has numerous definitions. Religion is an attitude towards superhuman powers. It is a belief in powers superior to man. It expresses itself in several forms like superstition, animism, totemism, magic, ritualism and fetishism. Religion pervades practically in all the societies, though there may be different forms of religious beliefs and practices. The Hindu religion assigns great importance to ceremonies. At the time of birth, marriage and death a number of ceremonies are performed. 'Mantras' are recited even if one does not understand their meaning.

Religion is a powerful agency in society. It influences man's behaviour. Children should obey their parents, should not tell a lie or cheat, women should be faithful to men, people should be honest and virtuous, one should limit one's desires, man should renounce unsocial activities, are some of the teachings or religion which influence man's behaviour. Men should do good acts is a common teaching of all the religions. Religion makes people benevolent, charitable, forbearing and truthful. It may also be noted that religion may easily be distorted into superstition and dogmatism. Instead of being an incentive to brotherhood, social justice and ethical idealism, religion may be used as a tool to make people content with their lot, obedient to their rulers and defenders of status quo. It may deny freedom of thought. It may favour poverty, exploitation and idleness and encourage practices like cannibalism, slavery, untouchability, communalism and even incest.

(viii) Art and Literature: Art in its narrow sense includes painting, sculpture, architecture, music and dance. Literature includes poetry, drama and fiction. Both art and literature influence the imagination and exert control on human behaviour. The martial music of the military band arouses feelings of determination and strength. A classical dance creates in us an appreciation of our culture. The statute of Mahatma Gandhi teaches us the virtue of simple living and high thinking. A painting may arouse in us a feeling of sympathy, affection and hatred. There is always a close relationship between the art of a period and the national life. The civilization of any specified time can be judged by an examination of its art. An artist has been called an agent of civilization.

Literature also influences human behaviour in society. We have good literature and 'bad' literature. A good literature possesses an indefinable quality which makes it live through the ages. Ramayana, Bhagvadgita and Mahabharat are classical works of great social value. On the other hand, detective literature may have its effect on crime. Romantic literature may make the readers passionate while religious literature may make them virtuous or superstitious. Rousseau in France hastened the French Revolution. Dickens changed the entire school system in Britain by writing David Copper field and others of his books. In this way both art and literature exert control through their influence on the imagination.

(ix) Humour and Satire: Humour is also a means of social control. It assumes various forms, depending upon the situation and purpose. It often serves to relieve a tense situation. Sometimes it is used with a bad intention to deflate others without a reason. It is also used to gain a favourable response. Humour controls by supporting the sanctioned values of the society. Through cartoons, comics and repartees it can support the values of the society in a form that is light in spirit but effective in control. Satire employs wit and scorn as indirect criticism of actions felt to be vicious and socially harmful. It exposes by ridicule the falsity and danger of behaviour. Thereby it causes the people to give up their vicious and harmful action.

(x) Public Opinion: The influence of public opinion as a means of social control is greater in simple societies. In a village the people are known to one another personally. It is difficult for a villager to act contrary to the public opinion of the village. Public opinion greatly influences our actions. For fear of public ridicule and criticism we do not indulge in immoral or anti-social activities.

Every individual wants to win public praise and avoid public ridicule or criticism. The desire for recognition is a natural desire. We want to count for something in the eyes of our fellowmen. Human praise is the sweetest music. The greatest efforts of the human race are directly norms to win public recognition or at least to avoid public ridicule. Thus, public opinion is one of the strongest forces influencing the behaviour of people.

3.1.2 Formal means

1. Among the formal means of **social control** the important ones are law, education and coercion. A brief explanation of these means follows.

(i) Law: Law is the most important formal means of social control. Early societies depended upon informal means of social control but when societies grew in size and complexity they were compelled to formulate rules and regulations which define the required types of behaviour and specify the penalties to be imposed upon those who violate them. Law is a body of rules enacted by legally authorised bodies and enforced by authorized agencies. It defines clearly rights, duties as well as the punishments for their violation. The modern societies are large in size. Their structure is complex

consisting of a number of groups, organizations, institutions and vested interests. Informal means of social control are no longer sufficient to maintain social order and harmony. Perforce modern societies had to resort to formal means of social control.

In modern society relationships are of a secondary nature. Security of life and property, as well as the systematic ordering of relationships make formalization of rules necessary. Law prescribes uniform norms and penalties throughout a social system. The body of law in every state is being increased. What was in mores and customs earlier, has now been formalized into a body of law.

The Hindu Marriage Act, 1955 has laid down the rules regulating the marriage among Hindus. It has recognized the right of a Hindu woman to divorce her husband. A number of laws have been enacted governing food handling, fire protection, sewage disposal, traffic etc. Law prohibits certain actions, for example, Anti-untouchability Act prohibits untouchability in any form and a person practicing untouchability is liable to punishment. Prohibition Act forbids drinking at public places. Smoking in cinema halls and other public places is prohibited under law. In this way, law exercises a powerful influence upon the behaviour of people in modern societies. Today law takes an ever larger part in total social control.

(ii) Education: Along with law, the importance of education as a means of social control is being growingly realized. Education is a process of socialization. It prepares the child for social living. It reforms the attitudes wrongly formed by the children already. Thus, a family may make the child superstitious, education will correct his beliefs and remove his prejudices. It teaches him value of discipline, social cooperation, tolerance and sacrifice. It instills in him the qualities of honesty, fair play and a sense of right and wrong. The importance of education for creating right social attitudes among the youth cannot be minimized. It is sad to note that education in India has miserably failed to create right social attitudes among the youth of the country and act as an effective means of social control.

(iii) Coercion: Coercion is the use of force to achieve a desired end. It may be physical or non-violent. It is the ultimate means of social control when all other means failed. Physical coercion may take the form of bodily injury, imprisonment and death penalty.

Physical coercion is without doubt the lowest form of social control. Societies would least desire to use it. It may have immediate effects upon the offender but it does not have enduring effects. If a society has to depend on external force, it shows its weakness rather than strength in social control. Society's best protection lies in the development of `fit' citizens.

Non-violent coercion consists of the strike, the boycott and non-cooperation. A person who threatens to withdraw his support from a friend if he does not give up smoking, is using non-violent coercion to change his action. The students may go on strike to force the Principal to ensure them adequate library facilities. Boycott is the withholding of social or economic intercourse with others to express disapproval and to force acceptance of demands.

A student who teases the girls may be socially boycotted by the other students of the college.. Non-cooperation is refusal to cooperate. The teachers may refuse to cooperate with the Principal for his insulting behaviour. Non-violent coercion can be a successful way of effecting social control. Mahatma Gandhi used it to force the British Government to grant political independence to India.

2. Criminal Law as a means of social control

The purpose and ultimate end of criminal law is protection of primary personal right, and that legal protection for these rights usually takes the indirect form of imposition of duty on others not to invade. Criminal law does not directly act to protect rights of persons, nor does it directly restrain invaders in the way is lioness protects her cubs from harm.

Instead it acts through a complicated train of indirection whereby it employs threats as prosecutors to factual inquires, denunciations and sanctions; carried out to deter incapacitate and reform criminals and potential criminals; in order to prevent suppress and reduce crime; and thereby achieve its ultimate end of protection of primary personal rights. Elements within this train serve as both means and mediate ends. We diagram them schematically;

Means ____ **End**			
	Means ____ **End**		
		Means ____ **End**	
			Means ____ **End**
Legal Threats	Factual inquiry	Deterrence	Crime prevention
	Denunciation	Incapacitation	Crime Protection Suppression of primary Rights
	Sanction	Reformation	Crime Reduction

Deterrence and incapacitation for example, function as both means and mediate ends within this criminal law scheme. We can illustrate the dual function and mediate ends by reference to some specific crime, for example, child molestation.

Here the ultimate end of criminal law is to protect the child's primary right to inviolability of its body against another sexual abuse, a protection urgently needed because the child is unable to protect itself. Criminal law does not directly protect and supervise the child by regulating its activities, nor does it warn the child about potential dangers in consorting with strangers. These safeguards are responsibilities of parents. What criminal law does if furnish a protective shield that accompanies the child at play, in the streets, in public parks, and to and from school-shield whose existence deters actual and potential child molesters from invading the child's primary rights. Criminal laws goes about attaining its ultimate and indirectly by means of threats addressed to potential child molesters and sanctions applied to convicted child molesters.

These in turn serve as means to achieve mediate ends of deterrence and incapacitation of potential criminals and actual criminals which in turn acts as means to prevent or reduce the crime of child molestation, and thereby achieve the ultimate end of potential of the child's right. In this instance deterrence appears in the criminal law schemes as both mediate end and means. In analyzing function in criminal law,

we must not confuse mediate ends with ultimate end, for to do so cause to lose sight of criminal's law's basic purpose. Incapacitation of criminals, reformation of criminals, suppression of crime, come to seem ends in themselves rather than means to protect primary personal rights.

Not all elements in the train of means and ends will be necessary in each instance. Threats for example may achieve the end of deterrence without resort to intermediate elements of factual inquiry, denunciation and sanction. Denunciation may suppress crime without need for incapacitation or reformation. Economy of force suggests that in a given instance criminal law employ the least amount of force needed to attain its end of protection.

3. Concept of Vice, Sin, Tort and Crime

Much theoretical writing on crime assumes the existence of a given, unified reality called crime. These writings envisage crime as the commission of acts prohibited by penal law and criminals as persons who commit such acts. On these assumptions a vast literature has developed about the volume of crime motivation for crime, prevention of crime suppression of crime and methodology for apprehensive, adjudication and reformation of criminals.

4. *Concept of Criminal Responsibility* (Refer 3.5)

3.2 Natural Law Vs. Positive Law

If we start by considering crime philosophy, we find the fundamental issue is whether to define crime naturally by the laws of God or positively by the laws of man. In essence is crime God made or man-made?

In the course of development of Western civilization God's law evolved into natural law. Crime became a breach of natures order. Nature being the ideal state of affairs ordained by God. As the concept of natural law evolved from the work of such mediaeval believers as Aquinas into its later expressions by such eighteen century skeptics as Rousseau, God's connection with natural law became progressively attenuated and nature came into receive primary emphasis. Crime as sin receded to a theological concept, and crime as an affront to the natural order became the dominant view. Under this theory the love and respect we owe our neighbour

makes his killing or multilation or seduction a violation of natural law, hence a crime. Under natural law theory certain conduct is inherently and immutably criminal whether or not any enactment of man has so declared. Conversely acts that do not violate the natural order are not criminal, no matter what classification the legal order may give them.

This latter point of view enjoys continuing vitality in the field of constitutional law, under whose auspices courts declare particular acts have been explicitly condemned as crimes by legislatures. Natural law relies heavily on feelings, on moral sense and on individual instinct for the fitness of things. Under natural law theory an act that violates the basic moral code is a crime and by implication an act that does not violate the moral code is no true crime.

The great difficult here lies in determining what is basic moral code. In whose feeling whose moral sense whose individual instinct, do we put our trust when God has become remote and dispensable even some say, dead his guidance disappears and the voices of his vicars on earth come to us as confused and contradictory recommendations.

Natural law today leaves us with the amorphous guidance that the basic moral code is what we feel is right and its violation what we feel is wrong. But to translate moral feeling into a specific code of conduct is a task worthy of the greatest theologian and specific beyond the strength of most judges and legislators. In such state of affairs, crime and with criminal law, becomes plagued with vagueness, uncertainly mutability, and lack of definition.

The alternative concept of crime considers to be as a man- made creation. Under this view, crime is a violation of a man-made, command of a sovereign, a violation identified as a pubic wrong. This view of crimes as conduct formally prescribed by sovereign authority carries the name positive law. The killing or mutilation or seduction of our neighbours is a crime only if sovereign authority has so declared. Positive law's virtue lies in its precision, its know ability its predictability qualities that enable positive law to escape the theoretic tyranny of natural law's vagueness, uncertainty, and reliance on subjective moral feelings. Positive law possess

the added virtue of practicable application to communities of diverse races, religions, classes and cultures for it appears to dispense with the need for commonly held beliefs about right and wrong. Crime under positive law consists of those acts, and only those acts, specifically prohibited by criminal law under threat of punishment. Both crime and punishment are explicitly defined and specified in advance.

Positive-law theory is particularly troubled by the problem of the unjust law, exemplified by the Nuremberg laws of Hitler's Germany that withdrew certain basic rights and legal protections from laws. If law is the command of the sovereign, what of the sovereign who is corrupt and inhumane? Does he create genuine law? Need such law be obeyed? The usual positive answer is that a regularly as opted law, even one ill advised or immoral, remains law until repeated. If the unjust criminal law oppresses beyond endurance resort may be had to right of revolution. That is overturn of the entire legal order and with it the unjust law. In short, bad law may be replaced or overturned but in the meantime it remains law.

Between these two theories of crime, one based on natural law, the other on positive law, each with its strengths and weaknesses, the struggle has continued in western civilization for 500 years, with now one, the other theory in ascendancy. Neither theory of crime has been used to the total exclusion of the other. England, the birth place of due process and law of the land continues to recognize common law crimes, that is acts not prescribed by any enactment but nevertheless considered crimes because of their flagrant immorality. As recently as 1961 the House of Lords found contrary to good morals, and hence criminal, distribution of a commercial directory listing and advertising the services of prostitutes.

While the specific ruling probably represents no more than a historical curiosity comprising a rear-guard action of Victorian morality against encroaching inroads of adult threats, massage parlors and hard-core pornography the decision under scores the profound and tenacious influence of natural law theory on criminal on the other hand, in the United States and India through natural law theories strongly influenced the penal legislations, it does not recognize natural law or common law crimes as in England. However natural law serves as conscience of positive law. And courts

on time import the concept of common law and natural law principles in order to interpret the provisions of law and give relief to the victim of crime and accused.

In Soviet Union every act thought to endanger the state's interest is a crime and every offender against the public interest becomes liable to criminal prosecution. Soviet law has steadily moved in the direction of positive law it is definition of crime.

To our idea of crime we must add the idea of penalty, or punishment and limit our definition of crime to acts formally prescribed by the sovereign under thread of punishment. We thus arrive at the distinctive feature of crime which is punishment. A crime is an act made punishable by the sovereign, and crimes are identifiable by punishment. For clarity of thought we can reverse the definition and say that punishment identifies crime, that is the existence of penalty makes the act criminal. Under positivist theory any act punishable by sovereign authority is a crime.

3.3 Definition of Crime

Of all the branches of law, the branch that closely touches and concerns man in his day-to-day affairs is the criminal law. Crime differs in societies as finger prints differ from every human beings. An act which is a crime today may not be crime tomorrow, if the legislature so decides. For example, polygamy, dowry, untouchability are now crimes which were not so a few years ago. The word crime comes from crime which means fault, sinning, an act against morality. To understand the meaning and concept of crime the following definition may be studied.

(i) Crime is a public wrong

Blackstone : 'An act committed or omitted in violation of a public law forbidding or commanding it'.

(ii) Crime is a conventional wrong

E. Sutherland: 'Criminal behaviour is behaviour in violation of criminal law'. The criminal law is defined conventionally as a body of specific rules regarding human conduct which have been promulgated by political authority, which apply uniformly to all members of the class and which enforced by punishment administered by the state.

(iii) Crime is a social wrong

John Gillin :`Crime is an act that has been shown to be actually harmful to society, or that is believed to be socially harmful by a group of people that has the power to enforce its beliefs, and that places such act under the ban of positive penalties'.

(iv) Crime is a procedural wrong

Austin: `A wrong which is pursued by the sovereign is a crime; a wrong which is pursued at the discretion of the injured party and his representatives is a civil injury'.

Kenny modified Austin's definitions and stated : 'Crimes are wrongs whose sanction is punitive and is in no way remissible by any private person, but is remissible by the Crown alone, if remissible at all.'

(v) Crime is a Legal Wrong

Criminal behaviour is defined by statute. Thus once a penal statue prescribed punishment for some act or omission it becomes a crime. S. 40 of the Indian penal code states.

..... the word offence denotes a thing made punishable by this code'.

As regards the definition of the term `crime' is concerned, there is no satisfactory definition acceptable to all and applicable in all situations. However, one can understand as to what constitutes a crime by the following three essential attributes:

1. 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.
2. The transgression of such harmful acts is prevented by a threat or sanction of punishment administered by the State.
3. 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 provision of law.

3.3.1 Distinction between moral, civil and criminal wrongs

Since the very beginning of human civilization man has recognized certain acts committed by an individual reprehensible to its social interest 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 moral or ethical wrongs and are checked to a greater extent by social and religious laws.

There are other categories of wrongs, viz., nuisance, deceit, libel, robbery, dacoit, 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. In other words, where the magnitude of injury is supposed to be more concentrated in 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 for which civil remedy is open to the injured.

On the other hand, where the gravity of injured is comparatively more directed to the pubic at large, public condemnation or provision for compensation, as in case of moral and civil wrongs, is an effective. Wrongs like dacoity, murder, kidnapping, sedition treason and the like, disturb the very fabric of law and order and jeopardize the State's existence or create a widespread panic. Therefore the state is not concerned with the question of payment of compensation to the injured by the wrong doer as it 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.

3.4 Tort and Crime

As crime had its origin in tort, both resemble each other in two respects. Firstly, 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 belonging of the individual, whereas crime is a public wrong and is an invasion in public rights and duties which affects the whole society.

(2) In tort, the wrong - doer 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 under go suffering of imprisonment and fine not only for the sake of redress but also for the sake of example. 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 - does it asked to compensate him. In crime the proceedings are initiated by and in the name if 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.

(4) In case of crimes, every civilized State maintains an elaborate staff of police to prevent offence 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.

3.4.1 Merger of tort in Crime

There are certain wrongful acts that may fall both under the category of torts as crime, such as deceit trespass, malicious prosecution, defamation etc. 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. In all such cases two different kinds of actions are open against the wrong-doer. The wrong-doer 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'.

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 person 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 has performed his public duty of prosecuting the offender.

In India this artificial rule if `merger of tort into felony' has not been accepted. An injured person can maintain an action for damages for a tortures act even though it amounts to a crime without in the first instance institution criminal proceedings against the offender. The deprive of an injured party to institute a criminal proceedings 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.

3.5 Concept of Criminal Responsibility

Actus Non Facit Reum Nisi Mens Sit Rea

The fundamental principle of penal liability is embodied in the maxim- *"Actus non facit reum nisi mens sit rea".* It means "the act does not constitute guilt unless done with a guilty mind". Whatever a deed a man might have done it cannot make him criminally punishable unless the doing of it was actuated by a legally blameworthy attitude of mind. Analyzing the concept there are two elements in it. The intent and the act must both concur to constitute the crime.

1. Physically - *actus reus* and
2. Mental - *mens rea*

3.5.1 *Actus Reus*

The word *actus* connotes a deed, a physical result of conduct. *Actus reus* may be defined as such result of human conduct as the law seeks to 'prevent.' It is important to note *that actus reus* which is the result of conduct and therefore an event, must be distinguished from the conduct which produced the result. For example, in the case of a murder it is the victim's death brought about by the conduct of the murder which is the *actus reus* and the *mens rea* is the murderer's intention is the

actus reus and the *mens rea* is the murderer's intention to cause death. In other words, the crime is constituted by the event and not by the activity which caused the event.

The act must be *reus*. In other words the act must be one that is prescribed by law. If I carry off my own umbrella thinking that I am stealing somebody else's; there are the *mens rea* of theft and an act; but not the *actus reus* of theft.

According to Prof. Glanville Williams, *actus reus* means the whole definition of the crime with the exception of the mental element and it even includes a mental element in sofar as that is contained in the definition of an act.

Actus reus includes act or omission as well. A parent will be held liable for murder if he or she causes the death of the child by starvation by not feeding it.

3.5.2 *Mens Rea*

The second essential ingredient in crime is *mens rea* - guilty mind an evil intention or a knowledge of the wrongfulness of the act. A mere act does not constitute a crime. It requires guilty mind or *mens rea* behind it. *Mens rea* is a subjective matter and the prosecution must establish that it was the *mens* of the accused person which was *rea*. It means nothing more than that the person has intentionally done the prohibited act.

In the IPC, every offence is defined and the definition states not only what the accused must have done but the state of his mind with regard to the act when he was doing it. For example theft must be committed dishonestly, cheating must be committed fraudulently, murder must be committed intentionally or knowingly. According to J. Stephens every offence has been well-defined and there is no room for the general doctrine of *mens rea* in IPC. All that the prosecution has to do in India is to prove that a particular act committed by the accused answers the various ingredience of the offence in the particular sections of the IPC.

(a) Exception to the Doctrine of *Mens Rea*

In modern criminal law, there are some special circumstances under which law imposes a strict liability. Under certain circumstances the State prohibits the doing of certain acts irrespective of consideration of *mens rea*.

The Supreme Court examined the Doctrine of *Mens Rea* and held that *Mens Rea* is an essential ingredient of a criminal offence unless the status expressly or by necessary implication excluded *Mens Rea* is an essential ingredient of a statutory offence, but this may be rebutted by the express words of a statute creating the offence or by necessary implication. The nature of *mens rea* that it will be implied in a statute depends upon the object of the Act and the provisions thereof.

The following are some of the exceptional cases were *Mens Rea* is not required in criminal law.

1. Where a statute imposes strict liability, the presence or absence of guilty is irrelevant. Statutes in the interests of public safety and social welfare impose such strict liability e.g. The Motor Vehicles Act the Arms Act etc.

2. When it is difficult to prove *Mens Rea* and the penalties are petty fines strict liability may be imposed. The accused may be fined even without any proof of *Mens Rea.*

3. *Mens Rea* is not necessary in case of public nuisances in the interest of public safety, the offender is punishable if he causes nuisance without or with mens rea.

4. *Mens Rea* is not found in those cases which are criminal in form but are in fact only a summary made of enforcing a civil right.

5. Another exception is related to the maxim, ignorance of law is not an excuse. In cases in which a person who violates the law without the knowledge of the law the fact that the was not aware of the rule of law or that he did not intend to violate it, is no defence.

(b) Strict Liability

The general rule *Mens Rea* applies to all criminal offences is subject to certain exceptions. In other words, in some exceptional situations the law breaks through the rule as to *Mens Rea* holds a person responsible for his criminal act, independently altogether of any wrongful state of minds or culpable negligence. Such offences are termed as offences of strict liability or absolute liability.

Crimes, not requiring legal fault on the part of the accused may be classified into three categories. First acts that are not criminal in any real sense but are of a

quasi-criminal nature and are prohibited in public interest under a penalty. This category includes cases of public welfare offence, for instance social and economic offences relating to foods and drugs weight and measures licensing road traffic revenue offences etc. Secondly cases of public nuisance libel and contempt of court etc. Thirdly cases in which although the proceedings is criminal, it is really a mode of enforcing a civil right for example cases of violations of municipal laws and regulations etc.

The Doctrine of strict liability is a departure from the common law principle of *actus non facit reum nisi mens sit rea* and so is vehemently criticized. The jurists have gone to the extent of saying that strict liability offences are not criminal offences. Professor Jerome Hall has preferred to call strict liability as `economic law' or 'administrative regulations' instead of criminal liability or penal law.

On the other hand, the exclusion of *mens rea* from such type of offence is justified in the ground that such regulations are enacted by the legislative to preserve and protect social and economic interest of the community which require strict adherence to such laws. Moreover punishment provided in such cases is generally a nominal fine. In fact object of such regulation is not punish the vicious but to put pressure upon the persons to discharge their duties properly in the interest of public health, and safety of the community and preserve the moral.

(c) Exemptions from Criminal Responsibility

A person is presumed to know the nature and consequence of his act, and is therefore responsible for it in law. However there are some exceptions to this. A man may be excused from punishment, either on the ground of the absence of the requisite *mens rea* for the commissions of a crime or on some other recognized by law. Such revisions have been dealt with in chapter IV of the penal code from sections 76 to 106

The framers of the code chose to put all general exception in a single chapter instead of repeating them in connection with each offence. The provisions are applicable not only to offences under the penal code but also offences under special or local laws.

Section 6 of the Penal Code makes it clear in the following words.

"Throughout this Code every definition of an offence every penal provisions and every illustration of every such definition or Penal Code

provision shall be understood subject to the exceptions contained in the chapter entitled 'general Exception' though exceptions are not ripened in such definition penal provisions or illustrations".

(d) 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."

Broadly speaking the provisions relating to general exceptions deal with two classes of exceptions viz., excusable and justified exceptions. In the first category those cases of exception may be grouped where there is a lack of *mens rea* on the part of the person committing the offence either by reason of mistake as to the existence of fact, opt by reason of the act being done accidentally, or by reason of infancy, insanity and so on. In the second category, those cases of exception may be placed where the circumstances under which the acts is committed furnish legal justification either by reason of the act being done by a judge, when acting judicially or in pursuance of the orders of a court or to prevent harm to a person or property, with or without consent of the person for whose benefit the act is done, or when communication is made in good faith; or when a person is compelled by threat to do an offence; or the act is of a trivial nature; or the act is done in the exercise of the right of private defence.

Check your progress

1. What is meant by 'informal control'?

2.Define 'security'

3.'Crime considers to be as a man-made creation' – Explain

(e) General exceptions

The general principle of law is that a person is presumed to know the nature and consequence of his act and is therefore, held responsible-for it. However there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a

sovereign state or being representative of such a state or of the United Nations Organizations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their high status. Constitution of India, Article 361, guarantees immunity to the President of India and Governors of the States from criminal prosecution. Other persons may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the particular offence. This is based on the principle of the Latin Maxim the *actus non facit reum, nisi mens sit rea* i.e. act itself does not make a man guilty, unless his intentions are so.

The framers of the Penal Code decided to put all cases of exception in one chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence every penal provisions, and every illustration of a definition or penal provisions shall be constructed subject to the provisions contained in this chapter.

The scope of the general exception provided in this chapter is not only limited to the offences under the Penal Code but also to the offences under the special or local laws.

Chapter IV of the Code consists of 32 sections. But the main principle which they illustrate may be grouped into seven heads, viz.,

I. Mistake of Fact (Ss. 76, 79);
II. Privileged Acts (Ss. 77, 78);
III. Accidental Acts (S. 80);
IV. Absence of Criminal Intent (Ss.81-86 and 92-94);
V. Acts Done with Consent (Ss. 87-90);
VI. Triviality (S.95); and
VII. (vii) Right of Private Defence (Ss. 96-106).

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

(i) Excusable exceptions, and
(ii) Justifiable exceptions.

In the former category, may be placed those cases wherein the necessary *mens rea* for the offence would be lacking either by reason of a bona fide mistake as to the existence of a fact (Ss. 76, 79), or by reason of the act being done accidentally (S. 80), or by reason of infancy (Ss. 82, 83), or insanity (S. 84), or intoxication (Ss. 85-86) and so the actor is not responsible for what he has done.

In the latter category, might be placed those cases wherein the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done under the direction of law (S. 77), or in pursuance of the orders of a court (S. 78), or to prevent a greater harm to a person or property (S. 81), or an act done with the consent of the party harmed (Ss. 87-89, 92), or done under coercion (S. 94), or in the exercise of the right of private defence (Ss. 96-106), or the act being of a trivial nature (S. 95), and hence the law would not take notice of it.

3.6 Right of private defence (Ss. 96 to 106)

The right of private defence is recognized in every civilized system of law. It is based on the principle that every man or woman is expected to be endowed with a certain amount of self-reliance, courage and capacity to defend himself and his property. It may not be possible for the state to give protection to all individuals in the State at all times and at all places. Therefore the State confers on the individual the right of private Defence.

The right of private defence in a prized gift granted to the citizens to protect their own persons and properties by effective self-resistance against unlawful aggressions. It is a right inherent in man and is based on the cardinal principle that it is the first duty of man to help himself.

In India, the right of private defence in dealt with in Ss. 96 to 106 of the IPC. The right of Private Defence is either of body or property. Ss. 96, 98 and 99 are common to both. Let us first see these provisions.

S.96: Nothing is an offence which is done in the exercise of the right of Private Defence.

This section clearly says that any act done in the exercise of the right of private defence will not amount to an offence under the Code provided it is done under the circumstances mentioned in Ss. 97 to 106. In other words, these acts are

exempted from the category of offences under the IPC. The burden is on the accused to prove these circumstances which entitle him to exemption.

S.98 (1): When an act, which would otherwise be a certain offence, is not that offence.
(2) By reason of (a) the youth, (b) the want of maturity of understanding, (c) unsoundness of mind, (d) the intoxication of the person doing that act, or (a) any misconception on the part of that person. Every person has the same right of Private Defence against that act which he would have if the act were that offence.

This section lays down that for the purpose exercising the right of private defence, the physical or mental capacity of the person against whom the right is exercised is no bar. In other words, the right of the defence of the body exists against all attackers whether with or without *mens area.*

Illus (a) : Z under the influence of madness, attempts to kill **A. Z** is guilty of no offence. But A has the same right of private defence which he would have if Z were sane.

Illus (b) : Z enters by night a house which he legally entitled to enter. Z, in good faith taking A for a house breaker attacks A. Here Z, by attacking A under this misconception, commits no offence. But A has the same right of private defence against Z, which he would have if Z were not acting under this misconception.

S. 99: There is no right of Private Defence

1. Against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done by a public servant, in good faith, under colour of office, though that act may not be strictly justified by law.

2. Against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done by the direction of a public servant, acting in good faith, under colour of his office, though that direction may not be strictly justified by law.

3. In cases in which there is time to have recourse to the protection of public authorities.

4. The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

S. 99 enumerates the limitations put on the exercise of the right of Private Defence. There are three clauses stated in S. 99 against which there is no right of private defence.

First Clause

This clause protects a public servant and applies to those cases in which the public servant is acting in good faith under colour of his office though the particular act being done by him may not be justifiable by law. Thus if a police officer, acting bonofide under colour of his office, arrests a person without authority, the person so arrested has no right of self-defence against the police officer.

`However, if the act of a public servant is ultra virus, the right of private defence may be exercised against him. The law negatives the right of self-defence where a public servant acts irregularly in the exercise of his powers, brit no where he acts outside the scope of his powers, but no where he acts outside the scope of his powers. The word 'Colour of office' refer to irregular and not illegal honesty in the legitimate discharge of powers conferred upon him.

Whether a public servant is acting in good faith in a given case is always a question of fact. Thus, an officer of the court who acts under a warrant which has expired and attaches the property cannot be said to have acted in good faith. The words `not strictly justifiable by law' are not intended to cure the want of jurisdiction but only an erroneous exercise of it, When the error affects the procedure rather than the principle it would be covered by the clause.

Explanation I to S 99 says, "A person is not deprived of the right of private defence against an act of the pubic servant unless he knows or has reason to believe that the person doing the act is a public servant. For example, the right of private defence is available if the person exercising the right had no reason to believe that the person arresting him was a police officer. It is their duty to take some steps to make it clear to the person to whom they intend to arrest that they are officers of law".

Second clause

"While first clause speaks of acts done by a public servant, the second clause speaks of acts done under the direction of the public servant. So there is no right of private defence against an act done by the direction of the pubic servant, acting in good faith under colour of his office though that direction is not strictly justifiable by law".

Explanation II to S.99 says, "A person is not deprived of the right of private defence against an act done by the direction of a public servant.

Unless (a) he knows or has reason to believe that the person doing the act is acting by such direction.

(b) Such person states the authority under which he acts

(c) He produces such authority",

The right of private defence can be exercised against a public servant or any person acting under the direction of the public servant when the act done by them reasonably causes apprehension of death or of grievous hurt.

Third Clause

This clause places an important restriction on the exercise of the right of private defence. It says that there is no right or private defence in which there is time to have resource to the protection of public authorities. No man has a right to take the law into his own hands for the protection of his person or property, if there is reasonable opportunity of redress by recourse to public authorities

Fourth clause

This clause lays down the extent to which the right may be exercised. It provides that the right of private defence does not extend the inflicting more harm then it is necessary to inflict for the purpose of the defence. In other words the measure of self defence must always the proportionate to the quantum of force used by the attack and which it is necessary to repel. The right if private defence is only a right of protection and not of aggression such a right cannot extend to the infliction more harm than is necessary to inflict for the purpose of defence.

The extent of force which would be justifiable depends upon the circumstance of each case. The nature of attack, the danger apprehended the imminence of danger and real necessity of inflicting harm by retaliation for the purpose of self-defence are: some of the important matters to be taken into consideration in deciding whether the right of self defence has been exceeded or not.

In the following cases, the infliction of harm is more than necessary

1. Where a person killed a weak old woman found stealing at night
2. Where a person caught a thief in his house at night and deliberately killed him to prevent his escaping.

3.6.1 Right of private defence of body

The right of private defence may be of body or property. S. 97 I.P.C (Part - I) speaks of private defence of body

Every person has a right to defend

1. his own body and the body of any other person.
2. against any offence affecting the human body

This section says what was the extent of the right of private defence. This section is much wider than English law. Under Indian law a stranger may defend the person or property of another person, whereas under the English law, there must be some kind of existing relationship, such as that of master and servant or husband and wife before this right can be exercised on behalf of another.

The right is a right of defence not only of the person and property of a person himself but also the person and property of others. S. 97 also clearly points out that the right of private defence of body can be exercised against any offence affecting human body.

S. 100: Wherever the right exists it extends to the causing of any injury short of death, necessary for the purpose of defence but in certain special cases even the causing of death is justified. These special case are enumerated in S. 100 of IPC as follows.

The right of private defence of the body extends to causing even the death of the offender in case of

First: An assault as may reasonable cause the apprehension that grievous hurt will otherwise be the consequence of such assault.

Secondly: An assault as may be apprehension that hurt will otherwise be the consequence of such assault.

Thirdly: An assault it the intention of committing rape

Fourthly: An assault with the intention of kidnapping or abducting

Sixthly: An assault with the intention of wrongly confining a person under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release

In short **S. 100** lays down that the right of private defence of body extends to causing death of the assailant in case of: An assault causing reasonable apprehension of (1) death (2) grievous hurt, (3) rape, (4) unnatural offence, (5) kidnapping or abduction, (6) wrongful confinement.

S. 101: The right of private defence of body does extend to voluntary causing to the assailant of any harm other than death if the offence does not fall under S. 100.

Under this section any harm short of death can be inflicted in exercising the right of private defence in any case which does not fall within the provisions of S. 100.

S.102: This section indicates when the right of private defence of the body commences and till what time it continues.

"The right of private defence of body."

1. Commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed, and

2. continues as long as such apprehensive of danger continues.

The right commences only on a reasonable apprehension of danger to the body and it continues as long as danger to body lasts. Thus X cannot shoot his enemy Y who is at a great distance, even if Y is armed with a sword. Here it cannot be said that X has a present and reasonable apprehension of being attacked by Y's sword. Similarly there could hardly be a reasonable apprehension if the threat proceeds from a woman or a child and is addressed to a strong man. Present and imminent danger should be present.

S.106: If (1) In the exercise of the right of private defence against an assault which reasonable causes the apprehension of death.

2. The offender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, right of private defence extends to the running of that risk.

Illus : A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence if by so firing, he harms any of the children.

3.6.2 Right of Private Defence of Property

S. 97: Every person has a right to defend

1. the property whether movable or immovable,
2. of himself or of any other person
3. against any act which is an offence falling under the definition of
   a) theft, robbery, mischief or criminal trespass or
   b) attempts to commit those offences

Under S. 97 the right of private defence of property extends not only to the property of himself but also of others. The property may be movable. The right of private defence of body extends to any offence affecting human body; where as the right of private defence specified in the section namely theft, robbery, mischief and criminal trespass and attempt to commit those offences. These offences includes their aggravated forms also. For example theft includes extortion-robbery includes dacoity and criminal trespass includes house trespass and house-breaking.

S. 103: S. 100 indicates when a person cab be killed in defence of body. This section indicates when a person can be killed in defence of property. But both the section are subject to the provisions of S 99. The right of private defense of property extends to the causing of death to the offender in the following cases only.

First - Robbery

Secondly - House-breaking by night

Thirdly - Mischief by fire committed on any building, tent or vessel used as a human dwelling or as a place for the custody of property.

Check your progress

4.What is called 'conventional wrong'?

5.Define '*mens Rea*'

Fourthly - Theft, mischief, house - trespass under such circumstances as may reasonably cause an apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

S. 104: Where the defence which occasions the right of private defence property is theft mischief or criminal trespass, the right of defence extends only to the voluntary causing to the wrongdoers some harm other than death.

Ss. 101 and 104 restrict the right of, private defence in certain cases to voluntarily causing hurt or grievous hurt.
S. 104 is connected with S. 103 just as S. 101 is with 100.

S. 105: This section defines the commencement and continuance of the right of private defence of property just as S. 102 does in the case of defence of body. In both the cases, the right commence with the reasonable apprehension of danger.

The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

It continues against theft till

a. the offender has effected his retreat with the property; or
b. the assistance of the public authorities is obtained;
c. the property has been recovered

2. Robbery as long as

a. the offence causing or attempt to cause to any person death, hurt or wrongful restraint or
b. the fear of instant death, instant hurt or instant personal restraint continues .

3. Criminal Trespass and **Mischief** as long as the offender continues in the commission of such offence

4.House breaking by night as long as the house trespass which has been begun by such house-breaking continues.

It is to be noted that the right of private defence against house - breaking continues as long as the house trespass continues. Hence where a person followed 4 thief and killed him in the open after house trespass had ceased, he could not plead the, right of private defence.

3.7 Summary

Social control is a system by which society brings into conformity to the approved pattern of behaviour. Sympathy, Sociability, Public opinion, folkways and so on are some of the informal means of social control. Informal means like praise, ridicule, boycott, etc are effectively control the behaviour. Social suggestions are ideas, feeling and other mental states which are powerful means of social control. Customs compel the individual to conform to the accepted standards. Religion is a powerful agency which influences man's behaviour in the sense of benevolent, charitable, forbearing and truthful. Formal means of social control are law, education and coercion. The right of private defence protect one's own persons and properties by effective self-resistance against unlawful aggressions.

3.8 Key words

coercion - the action of making somebody do something that they do not want to do

resentment - a feeling of anger or unhappiness about something unfair

immortality - the state of being immortal

conservative - opposed to great or sudden social change

endogamy - the custom of marrying only people from the local community

monogamy - the practice or custom of having a sexual relationship with only one partner at a time

animism - belief in a power that organizes and controls the universe

totemism - object that chosen and respected as a special symbol of community

repartee - clever and amusing comments and replies that are made quickly

denunciation - an act of criticizing somebody strongly in public

culpable - responsible and deserving blame for having done something wrong apprehension

3.9 Answer to check your progress

1. Refer 3.1.1
2. Refer 3.1.2
3. Refer 3.2
4. Refer 3.3
5. Refer 3.5.2

3.10 Model Questions

1. What is social control? Describe
2. Write an essay about the formal means of social control.
3. Give an account of positive Law.
4. What is crime? Explain
5. Write a short note on
   (a) Actus Reus
   (b) Criminal Responsibility
   (c) Right of Private defence of property

Lesson - 4

LEGAL PROVISIONS RELATING TO TRADITIONAL CRIMES

Introduction

The Indian Penal Code was drafted by the first Indian Law commission of which Lord Macaulay was the chairman. It came into force on the 1st day of January 1862. The code extends to the whole of India except the state of Jammu and Kashmir. The Indian penal code deals specially with traditional offences and also provides punishment for those offences. This unit deals with important offences against human body, property and public tranquility.

Lesson Objectives

- To understand the offences affecting the human body
- To know the causes for the murders
- To know the reasons for the hurt, rape, extortion etc.

Lesson Structure

Introduction

Lesson objectives

Lesson structure

4.0 Offences affecting the Human body

4.1 Culpable Homicide

4.2 Murder

4.3 Culpable Homicide not amounting to murder

4.4. Hurt and Grievous Hurt

4.5 Rape

4.6 Offences against Property

4.7 Offences against public Tranquility

4.8 Summary

4.9 Key Words

4.10 Answer to check your progress

4.11 Model Questions

4.0 Offences affecting the Human Body

Chapter XVI (Ses.299 to 377) of the Indian Penal Code deals with a number of offences relating to human body. The important offences are –

1.	Culpable Homicide	S.299
2.	Murder	S.300
3.	Culpable Homicide not amounting to murder -	S.300-Exceptions.
4.	A) Hurt	S.319
	B) Grievous Hurt	S.329
5.	A) Wrongful Restraint	S.339
	B) Wrongful Confinement	S.340
6.	Kidnapping	S.359,360,361
7.	Abduction	S.362
8.	Rape	S.375

4.1 Culpable homicide

The word 'Homicide' means the killing of a human being by another human being. It is the most important of all the offences since it brings to an end the very existence of a human being on earth. Ss.45 & 46 of IPC has defined `life' and `death' as the life and death of a human being. Hence causing the death of an animal is not murder.

The *Actus Reus* in Homicide is the deed of having caused the death of a human being. But every death of a human being is not criminal. Homicides are divided into two divisions - Lawful Homicides are not punished. Homicides are lawful when they are justifiable (Ss.76 to 79, 81 and 100 to 103) or excusable (80,82 to 85,87,88 & 92). Culpable Homicide and Murder are unlawful Homicides. Culpable homicide is the first kind of unlawful homicide. S.299 defines culpable homicide as follows:

Whoever (1) causes death by doing an act

(2) with the intention of causing (a) death or b) such bodily injury as is likely to cause death or (c) with knowledge that he is likely, by such act, to cause death commits 'culpable homicide'

A. Ingredients

1. Causing death by doing an act: The *actus reus* is the death of a human being. In order to constitute the offence of culpable homicide, there must be a being in existence. A person must have taken birth before he meets with death. Hence there cannot be killing of a child in the womb. The principle is that birth must precede death.

In English Law, a child should have completely emerged out of the mothers womb. But according to Indian Law, partial extrusion is sufficient. Explanation 3 to Scs.299 says that, "The causing of the death of the child in the mother's womb is not a homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of the child has been brought forth, though the child may not have breathed or been completely born". Thus complete birth is not necessary. If any part of the child comes out of the womb, then the child is considered as a living human being.

Death must be caused by doing an act which may be by poisoning, starving, striking, drowning or by a hundred different ways. By S.32, words which refer to acts done extend also to illegal omissions. Hence death may be caused by commission or omission.

Illustration: A, having sufficient means, refused to feed his child of tender years with the result that the child dies. A committed the offence by illegal omission.

The mental elements in S.299 are intention and knowledge. The intension refers to either the death itself or bodily injury which is likely to cause death, whilst the knowledge refers to the death itself. Thus there are three aspects of men era in culpable homicide: -

a) an intention to cause death.

b) an intention to cause bodily injury likely to cause death.

c) Knowledge that death is likely to happen.

Unless one or other of the three species is present, there can be no culpable homicide.

a)Intention to cause death

Death is necessary to constitute the offence of culpable homicide. By intention is meant expectation of the consequences in question viz. death. A man expects the

natural and probable consequences of his acts and therefore in law he is presumed to intend them. The offence is complete, as soon as any person is killed. It is immaterial if the person whose death has been caused is not the very person whom the accused intended to kill. This is clear from this illustration.

Illustration: A lays sticks and turf over a pit with the intention of thereby causing death or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it falls, and is killed. A has committed the offence of culpable homicide.

All that the section requires is, that there should be an intention to cause death or knowledge that death is likely to be the result.

b) Intention of causing such bodily injury as is likely to cause death

Here the intention is to cause a dangerous hurt and not death. `Intention to cause such bodily injury as is likely to cause death' merely means an intension to cause a particular injury, which injury is likely to cause death.

An effect is likely to take place, when there is a likelihood of its being caused, and likelihood is distinct from mere possibility. A thing is possible when it may happen; likely when the chances are in favour of its happening and probable when the chances are strongly in its favour.

The bodily injury which is likely to cause death may consist of a severe blow on the head or on other vital part of the body.

Illustration: A intentionally wounds B by striking him on the head with a bottle of full of liquid or with a heavy chopper. B dies. Here A intends bodily injury likely to cause death and hence he is guilty of culpable homicide.

The difference between intention of causing death and intention of causing such bodily injury as is likely to cause death is a difference of degrees in criminality. The latter is a degree lower in criminality than the former. But in both cases the object is the same.

c) With the knowledge that he is likely by such act to cause death

Intention is the purpose or design with an act is done: It is the foresight of a desired issue however, improbable. Knowledge is the awareness of the consequences of an act; whereas intention is such foresight coupled with desire.

The main difference between intention and knowledge is that in the case of intention, the consequence is desired, whereas in the case of knowledge referred to in this section, the consequence, is not desired.

The third mental element is S.299 is the knowledge of the act likely to cause death. Knowledge imports a certainty and not merely a probability. The knowledge imports a certainty and not merely a probability. The knowledge referred to in this section is the personal knowledge of the person who does the act.

The phrase, `with the knowledge that he is likely by such act to cause death' includes all cases of rash acts by which death is caused, for rashness imports a knowledge of the likely result of an act which the actor does in spite of the risk.

Illustration: A, in order to rescue a prisoner, exploded a barrel of gunpowder in a crowded street. B, a passerby is killed there by. A commits culpable homicide, since he does an act which he knew was likely to cause death.

The difference between intention and knowledge is expressed in the punishment provided for in S.304.

If death is caused with intention to cause death or intention to cause such bodily injury likely to cause death: - life or 10 years imprisonment and fine. If death is caused with knowledge that he is likely, by such act, to cause death - 10 years imprisonment or fine or both.

Explanation(l) to S.299 deals with cases of acceleration of death. A person causing bodily injury to another who is labouring under a disorder, diseases or bodily infirmity and thereby accelerating the death of that other, is deemed to have `caused his death'. But one of the elements of culpable homicide must be present.

Illustration: A is suffering from aneurism of the heart. B, his heir, rushes into his room and shouts in his ear, "your wife is dead." Intending thereby to kill A. A dies of the shock. B has committed culpable homicide.

Illustration: A is very ill with high fever. B intending his death administers large doses of opium which accelerates A's death. Here B kills A.

Explanation II to S.299 says that if a person who received injury, refused the medical treatment as the result of which he dies, even then the man who caused the injury will be liable.

Illustration: A intentionally inflicts an injury on B, likely to result in death. B refuses to allow a surgeon to perform an operation to prevent this A has killed B.

The principle of this Explanation is that a man is responsible for the natural consequences of his conduct and, the fatal consequences may have been avoided by restoring to proper medical treatment, will not absolve the accused from liability. The connection between the act and the death caused by it should be direct and distinct, but it must not be too remote.

4.2 Murder(S.300)

S.299 defines the offence of culpable homicide. S.300 says when culpable homicide amounts to murder. In the Indian Penal Code, culpable homicide is used as a generic term and is exhaustively sub-divided into two species, namely culpable homicide amounting to murder, and culpable homicide not amounting to murder.

(a) Culpable Homicide amounting to murder

Murder is defined inS.300asfollows: Culpable homicide is murder, if

1. The act by which death is caused is done with the intention of causing death (or)
2. The act is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused (or)
3. The act is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death,(or)

The person committing the act knows that it is so imminently dangerous that it must, in all probability cause death, or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Culpable homicide is the genus of which murder is a species. An offence cannot amount to murder unless it falls within the definition of culpable homicide. S.300 merely points out the cases in which culpable homicide amounts to murder. But an offence may amount to culpable homicide and yet may not amount to murder. Thus all murders are culpable homicides but all culpable homicides are not murders.

4.2.1 Ingredients of murder

1. Causing Death by doing an act: See also notes S.299

Clause (1) with the intention of causing death: This ingredient is common to both culpable homicide and murder. Therefore where there is an intention to kill, the offence is always murder. (.....) for example, causing of a serious injury on a vital part of the body of the diseased with a dangerous weapon, like an axe, must necessarily lead to the inference that the offender intended to kill the deceased. This act would therefore amount to murder.

Clause (2) with the intention of causing such bodily injury as the offender knows to be likely to cause death:

This clause applies in special cases where the person injured is in such a condition or state of health that his death would be likely to be caused by an injury which would not ordinarily cause the death of a person in sound health. In order to convict a person of the offence of murder under this clause, two facts must be proved, namely:

1) The offender had the intention of causing the injury and
2) He had the knowledge that the injury which he intended to inflict was likely to cause death.

Illustration: A knowing that Z is labouring under such disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies. A is guilty of murder.

Illustration: B is suffering from disease of the heart. A gives him a sudden push. B died from the shock. Here if A knew nothing of the existence of the disease or did not know that such a push was likely to cause death, he is not guilty of murder. But if A knew both these facts, he is guilty under this clause.

Clause (3) with the intention of causing such bodily injury sufficient in the ordinary cause of nature to cause Death

Where bodily injuries, intended to be inflicted are sufficient in the ordinary course of nature to cause death, the defence falls under this clause. The offence is culpable homicide if the bodily injury intended to be inflicted is likely to cause death. It is murder if such injury is sufficient in the ordinary course of nature to cause death. For example a blow from a first or stick on a vital part may be likely to cause death; a wound from a sword on a vital part is sufficient in the ordinary course of nature to cause death.

Illustration: A intentionally gives a sword-cut sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.

The emphasis in this clause is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature. When this sufficiency exists and death follows and the causing of such injury is intended, the offence is murder.

Clause(4) With the knowledge that the act is so imminently dangerous that in all probability it must cause death without any excuse for incurring the risk of causing death

This clause appears to be designed to provide for that class of cases where acts resulting in death are calculated to put the lives of many persons in jeopardy without being aimed at any one in particular, and are perpetrated with a full consciousness of the probable consequences.

Illustration: A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder although he may not have had a premeditated design to kill any particular individual.

This clause is designed to provide for a rare class of cases like putting in jeopardy the lives of many persons. For example poisoning a well from which people are accustomed to draw water. This clause speaks nothing about intention. To convict a person under this clause for murder, the prosecution has to prove two things.

1. Causing death with the knowledge that the act is so imminently dangerous that it must in all probability cause death, and
2. The act should be committed without any excuse for incurring the risk of causing death.

The second condition in this clause, "without any excuse", cannot refer to the excuses dealt with under General Exceptions and Private Defence nor refer to the given Exceptions to S.300 Hence the excuse referred to must be something other than extenuating circumstances dealt with in the exceptions.

Case Law: A village woman, being threatened by her husband to kill, left the house with a six month old baby. On seeing her husband pursuing her, she got into a panic and jumped down a well with the baby. The result was that the baby died and the woman escaped. She was charged with the murder of the child.

Held: Though she. did the act with the knowledge that such an imminently dangerous act as jumping down the well was likely to cause the child's death, it is not murder because considering the state of panic she was in, there was excuse for incurring the risk of causing death within the purview of this clause.

4.3 Culpable Homicide not amounting to murder

S.300, after generally laying down the normal cases in with which the presence of certain elements would convert culpable homicide into murder, states five different circumstances under which the offence of murder is reduced to that of culpable homicide not amounting to murder. These exceptions are not exactly defences, but they are in the nature of mitigating circumstances which

will reduce the offence of murder to that of culpable homicide not amounting to murder. An offence may amount to culpable homicide but not murder even though none of the exceptions in S.300 are applicable to the case.

These exceptions are the following:

1. Provocation
2. Private Defence
3. Exercise of Legal Powers
4. Sudden Fight and
5. Consent.

Exception 1. Grave and Sudden Provocation:

(S.300Exc.1)

Culpable Homicide is not murder, if the offender

1. Whilst deprived of the power of self control by grave and sudden provocation.
2. Cause the death of a) the person who gave the provocation or b) any other person by mistake or accident.

'Provocation' means to make anger. Provocation is an act done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him for the moment not master of his mind. The underlying principle of this Exception is that anger is a passion to which good and bad men are both subject and law views with leniency the man who was provoked to do the greatest harm to another.

The provocation must be grave and sudden and of such a nature as to deprive the accused of the power of self-control. The gravity of the provocation will be measured by the deprivation of self-control and its suddenness by the fact that the accused acts on the spur of the moment. The test of grave and sudden provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control.

It has been held in several cases that commission of adultery by wife within the sight of her husband is a sufficient grave provocation to bring the

husband within this exception if he kills her. The offender can claim the benefit of this exception when the act was committed while the accused was deprived of the power of self-control and not after the passion had cooled down by lapse of time or otherwise giving room and scope for, remediation and calculation. For example it is murder where the accused, suspecting infidelity in his wife, followed her with a hatchet one night and finding her talking with her paramour, killed her. Even words and gestures may cause grave and sudden provocation to the accused to bring his act within this exception.

Explanation to the Exception says, "The question whether an act of provocation is grave and sudden is always a question of fact and not of law".

The first exception only applies when the death of the person giving provocation has been caused. It also covers a person killed by mistake or accident.

Illustration: A, under the influence of passion excited by provocation given by Z, intentionally kills Y, **Z's** child. This is murder, in as much as the provocation was not given by the child and the death was not caused by accident.

Illustration: Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z. Here A has not committed murder but only culpable homicide not amounting to murder since he killed Z by accident.

The first exception of provocation itself is subject to three provisions:

First: The provocation is not sought or voluntarily provoked as an excuse for killing or doing harm.

Illustration: A, in order to kill B, called B a coward. B then struck him. A drew a revolver from his pocket and shot B dead. A is guilty of murder since he provoked B to strike him in order that he may have a colourable pretext for killing him.

Second: The provocation is not given by anything done (a) in obedience to law or (b) by a public servant in the lawful exercise of the powers of such public servant.

Illustration: A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest and kills Z. This is murder of a public servant in the exercise of his powers. According to this proviso, where the act is legal, opposition to it is necessarily illegal.

Third: The provocation is not given by anything done in the lawful exercise of the **right of private defence.**

Illustration: A attempts to pull Z's nose. Z, in exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion and kills Z. This is murder, in as much as the provocation was given by a thing done in the exercise of, the right of private defence.

Exception 2 Exceeding Right of Private Defence (S.300 Exc.2)

Culpable homicide is not murder, if the offender

1. **in the exercise in good faith,** of the right of private defence of person or property.
2. **exceeds the power given to him by law**
3. **causes the death of the person against whom he is exercising such right of defence.**
4. **without pre-meditation and without any intention of doing more harm than is necessary for the purpose of such defence.**

Private Defence of body or property is a good defence to any charge. It is only when the right conferred by Ss 96 to 105 dealing with the right of private defence under General Exception Chapter is exceeded that there is room for the operation of this exception. The right under the General Exception entitles the accused for acquittal. This Exception only entitles the accused for acquittal. This Exception only entitles the accused for **the mitigation of his offence from murder to culpable homicide not amounting to murder.**

Under this exception, the act must have been done in good faith, and the excessive harm caused must be unintentional and the intention of the accused must have been to cause the minimum injury which is necessary for the defence of his person or his property.

Illustration: Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws a pistol. Z persists in the assault, A believing in good faith that he can, by no other means, prevent himself from being horsewhipped, shoots Z dead. A has not committed murder but only culpable homicide.

In the following cases, the accused was held guilty of murder.

1. The accused pursued a thief and killed him after the house trespass had ceased.
2. The accused finding a feeble old woman stealing his crop, beat her so violently that she died from the effect of the attacks.

Exception 3: Public servant exceeding his, powers (S.300 Exc.3)

Culpable homicide is not murder, if the offender

1. being a public servant or aiding a public servant acting for the advancement of pub lic justice
2. exceeds the powers given to him by law,
3. causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant,
4. without ill-will towards the person whose death is caused.

This exception protects a public servant or a person aiding a public servant if either of them exceed the powers given to them by law and cause death. It gives protection so long as the public servant acts in good faith but if his act is illegal and unauthorized by law, the exception will not protect him.

Case Law: A suspected thief who has been arrested by police constables escaped from a running train. To re-arrest him one of the constables fired at him but in the process the fireman of the engine was killed. Hold that the act of the constable was covered by this exception.

Exception 4: Sudden Fight (S.300 Exc.4)

Culpable homicide is not murder if -

1. it is committed without pre-meditation
2. in a sudden fight
3. in the heat of passion upon a sudden quarrel
4. without the offender's having taken undue advantage or acted in a cruel or unusual manner.

The Fourth Exception deals with cases in which there is a sudden -fight. The word fight means more than a mere verbal quarrel. Such a fight must be with the person who is killed and not with some other person. A sudden fight implies mutual provocation and blows an each side. A fight suddenly takes place for which both parties are more or less to blame. Under this exception there is the heat a passion which particularly affects one's mind and urges him to do things which he ought not to do.

Case Law: A person, under heat of passion in a sudden quarrel hit on a vital part and caused instantaneous death. Held: The offence is culpable homicide not amounting to murder.

Explanation to this exception says, "It is immaterial which party offers provocation or commits the first assault"

Exception 5 Death caused by consent (S.300 Exc.5)

Culpable homicide is not murder when the person whose death is caused

1. being above the age of eighteen years
2. suffers death or takes the risk of death with his own consent.

The last exception deals with consent. If the victim consents to his death being caused, then the offence is not that of murder but of culpable homicide not amounting to murder.

Illustration: A wounded soldier requests his comrade to shoot him and thereby relieve him of his agonizing pain. The latter shoots him to death. Here the offence is only culpable homicide not amounting to murder.

Illustration: B, who was suffering from cancer, from which she had no hope of recovery, repeatedly requested her husband A to take pity on her in order to relieve her of her agonies. A, therefore, killed her one night while she was asleep. A is guilty of culpable homicide not amounting to murder since the killing was with B's consent.

Thus S.300 deals with two types of homicides; one is murder and the other is culpable homicide not amounting to murder. When the act of the accused comes under any one of the four clauses mentioned in S.300, then, the offence is murder for

which the act of the punishment is death or life imprisonment (S.302). when the accused proves that his act comes under any one of the five exceptions to S.300, then the offence is only culpable homicide not amounting to murder for which the punishment is life imprisonment or imprisonment which may extend to 10 years.

Thus the five exceptions to S.300 are not defences in the sense that the accused will be entitled to an acquittal; it only goes to minimize the guilty and to reduce the punishment.

4.4 Hurt and Grievous Hurt

Many of the offences which fall under the head of hurt will also fall under the head of assault. The slightest injury or pain caused to a person is assault under section 351. But the bodily injury under section 319 is more aggravated than assault. There is no great difference between assault and hurt. A blow which fractures a limb and the flinging of boiling water over a person are assaults and are also acts which cause bodily hurt. But bodily hurt may be caused by many acts which are not assaults. For example, a person who digs a pit in a public path, intending that another may fall into it, may cause hurt, and may be justly punished for causing such hurt. Certain kinds of hurt are designated as grievous hurt under section 320.

4.4.1 Hurt (S.319)

"Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt."

The actual infliction of bodily injury is called battery in English Law. Hurt is equivalent to battery in English Law. The definition of hurt in S.319 appears to contemplate the causing of pain, disease or infirmity by one person to another. Harm so slight, that the person of ordinary sense and tempter would complain of it, is excluded by S.95. severe bodily pain will fall within the definition, no matter whatever may be the duration of such pain. The pain in hurt is bodily pain and not mental pain. In hurt direct application of force to the body is essential. The pulling of a woman by hair is held to be a hurt. The term infirmity is used to denote the inability of an organ to perform its normal function which may be either temporary or permanent. A state of temporary impairment or hysteria or terror would constitute infirmity.

For any act to amount to an offence, it must be committed voluntarily, not accidentally. S.321 lays down that a person voluntarily causes hurt if –

1.he does any act

2.(a) with the intention of thereby causing hurt to any person or

(b) with the knowledge that he is likely thereby to cause hurt and

3.thereby causes hurt.

S.323 provides punishment for voluntarily causing hurt imprisonment for one year or one thousand rupees fine or both.

Where there is no intention to cause death or no knowledge that death is likely to be caused, the accused would be guilty of hurt only if the injury caused was not serious.

Illustration: A, on a grave and sudden provocation given by B, gave B a kick on the abdomen. B had an enlarged spleen which got punctured by the blow and B died in consequence.

Held: Death caused without intention or knowledge is not culpable. A's act was that of a person who intended to cause hurt within the mearing of S.319 and S.321.

4.4.2 Grievous Hurt (320)

Section 320 The following kinds of hurt only are designated 'aggrieves'.

First Emasculation

The term emasculation means depriving a person of masculine vigour, castration i.e. unsexing the man by depriving him of his virility. The injury to scrotum often leads not only to emasculation, but even to death. Thus grievous hurt by emasculation applies only against men.

Secondly: Permanent privation of the sight of either eye

Such injury must have the effect of permanently depriving the injured of the use of one or both of his eyes.

Thirdly: Permanent privation of the hearing of either ear

Such injury may be caused by a stunning blow given on the head or the ear having connection with the tympanum or auditory nerves.

Fourthly: Privation of any member or joint

Impairing of limb strictly refer to the old English offence of mayhem. Cutting off a man's hand or finger thereby depriving him of those parts are grievous hurt under this clause.

Fifthly: Destruction or permanent impairing of the powers of any member or joint:

Injuries (like injury to man's hand or finger) which is able or weaken or diminish the value of any member or joint are designated as grievous hurt under this clause.

Sixthly: Permanent disfiguration of the head or face

The word `disfigure' in this section means to do some external injury which detracts from his personal appearance but does not weaken him. Cutting of an ear or nose is disfiguration. Disfiguration of face by pouring acid is a common instance of grievous hurt.

Case Law: A girl's cheeks were branded with a red-hot iron which left scars of a permanent character.

Held: It was grievous hurt by disfigurement.

Seventhly: Fracture or dislocation of a bone or tooth. Fracture means breaking. Dislocation means displacement as applied to a bone moved out of its socket. The fracture or dislocation of a bone is considered grievous because bone fracture may be re-joined or the bone dislocated may be reset but this is immaterial so far as the offence is concerned.

Eighthly: Any hurt which

a) endangers life (or)

b) causes the sufferer to be, during the space of 20 days

(i) in severe bodily pain (or) (ii) unable to follow his ordinary pursuits.

This clause refers to 3 classes of injuries namely

(a) those which endanger life

(b) those which cause severe bodily pain for 20 days

(c) those which disable the victim to follow his ordinary pursuits for 20 days.

Illus.: A caused hurt to B, who in consequence had to remain in hospital for 17 days out of which B was in danger for 3 days. Here A was guilty of grievous hurt since B was in danger for 3 days.

Illus.: A assaults B very severely as the result of which B remains in hospital for treatment for 20 days. Here the offence is grievous hurt as the blow causes B to be in severe bodily pain for 20 days.

A disability of 20 days constitutes grievous hurt but if it is for a lesser period, then the offence is hurt. But the mere fact that a man has been in hospital for 20 days is not sufficient, it must be proved that during the time he was suffering from severe bodily pain or he was unable to follow his ordinary pursuits.

Mere causing grievous hurt is not an offence under the Code. It is only voluntarily causing of grievous hurt that is made punishable under S.325 (Imprisonment and fine).

Section 322: A person is said voluntarily to cause grievous hurt if he

1) intends to cause or knows himself to be likely to cause grievous hurt of any kind and
2) causes grievous hurt of the same or any other kind.

Illus.: A intending or knowing himself to be likely permanently disfigure Z's face, gives Z a blow which does not permanently disfigure Z's face but which causes Z to suffer severe bodily pain for the space of 20 days. A has voluntarily caused grievous hurt.

4.5 Rape (S 375)

Law regards sexual intercourse as the normal exercise of physical body. It is indeed necessary for the welfare and perpetuation of society. Marriage is the legally recognized method for sexual satisfaction between man and woman. Marriage is the contract by which a woman consents to have continued cohabitation with her husband.

Laterally rape means forcible seizure. It is the forcible ravishment of a woman. It destroys a woman's supreme honour. The simple definition of rape is one man having sexual intercourse with a woman against her consent

(a). S.375 I.P.C. Defines rape as follows

A man is said to commit rape who except in the case herein after excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions

First : Against her will.

Secondly : without her consent.

Thirdly : with her consent, when her consent has been obtained by putting her in fear of death or of hurt.

Fourthly : with her consent, when the man known that he is not her husband and that her consent is given because she believes that he is lawfully married.

Fifthly : with or without her consent, when she is under 16 years of age.

In the definition of rape, the first clause operates, where the woman is in possession of her senses and therefore capable of consenting; the second where she is insensible whether from drink or of any other cause or so imbecile that she is incapable of any rational consent: the third and the fourth where there is consent but it is not such a consent as excuses the offender because it is obtained by putting the women in fear or by deception; and the fifth where the intercourse is with a girl so young that consent is immaterial.

The *actus reus* of rape consists in having unlawful sexual intercourse by a man with a woman without her consent; want of consent of the victim is the essence of the crime. The prohibited act in rape is non-consensual sexual intercourse and the guilty state of mind is an intention to commit.

Ingredients

1) Sexual intercourse by a man with a woman.
2) The sexual intercourse must have been done under any of the circumstances falling under, the five clauses in the section.

Ing.: 1) Sexual intercourse by man with a woman

The sexual intercourse must be with a woman, whether married or not. S.10 defines a man as a male human being of any age and a woman as female human being

of any age. So a man of any age may commit the offence. Under the English Law, a boy under 14 year of age, owing to physical immaturity is presumed to be incapable of committing this offence. But this presumption has no application in India.

The explanation says that penetration is sufficient to constitute rape. The degree of penetration is immaterial. The only thing to be ascertained is whether the private parts of the accused did enter the person of the woman, it is not necessary to decide how far they entered. It is not essential that the hymen should be ruptured and that there should be omission of semen.

Ing.: 2) The five clauses of the section denote the circumstances which render the sexual intercourse an offence under this section.

First clause: Against her will: An act is done against a woman's will when she is in full possession of her senses and reason, is aware of what is being done and objects or resists. Inspite of the resistance given by the woman, if a man has sexual intercourse with her, then the act is said to be done against her will. The usual marks of resistance by a woman to rape are, tearing of clothes, infliction of personal injuries particularly injuries on her private parts. -

Second clause: *Without her consent: Consent means an active assent in the mind of* a person to a particular act done by another. Consent must be free as defined in S.90 I.P.C.(refer theft). Consent given by a woman of unsound mind or an intoxicated woman is of no avail. This clause protects a woman who is incapable of knowing the nature of the act and thus legally unable to give a rational consent or being aware of its nature, think that it is being done under circumstances which make it an innocent act.

Case Law: The accused was engaged to give lessons in singing and voice production to a girl of sixteen. He engaged in sexual intercourse with her under the pretence that her breathing was not quite normal, and that he had to perform an operation to enable her to produce her voice properly.

a. Held that the accused was guilty of rape

But consent obtained by misrepresentation, will not invalidate the consent. For example, if a man says to a woman, "I will marry you, but now I must have sexual connection with you" and she agrees, the man's act is not rape, even if he breaks his promise later.

Third Clause: consent obtained by putting the woman in fear of death or hurt

Under this clause, the woman's consent is obtained by putting her in fear of death or hurt. This means fear of death of herself or of any other person whom she is interested. Thus if a person obtains consent of a woman by putting her in fear of death of her infant, such consent is not valid.

Fourth clause: consent by deception

This clause speaks of consent of a particular kind. Under this clause, the consent given by a woman is not valid if she believes that the offender is lawfully married to her and the offender knows that he is not her husband.

For Example: If a man says to a woman, "I am your long lost husband., now returning to you after the lapse of seven years and must have sexual intercourse with you" and the woman agrees, the man will be liable for rape, if in fact he is not her long lost husband.

Fifth clause: when the woman is under 16 years of age

The policy of the law is to protect a girl of immature age against sexual intercourse. Hence sexual intercourse with a girl of under 16 would be rape, even though she consents to the act.

The Exception to S 375 says

"Sexual intercourse by a man with his own wife is not rape if the wife is above 15 years".

Under this exception, a man cannot be guilty of rape on his own wife when she is over the age of 15 years on account of the matrimonial consent she has given which she cannot retract. If the woman is under 15 years of age, any man who has sexual intercourse with her, be he her husband or not, and be it with her consent or not would be guilty of the offence of rape.

Under the fifth clause, subject to this exception, a man is guilty of rape if he has sexual intercourse with a woman who is under 16 years of age, even though the act be done with her consent, or even at the invitation of woman herself.

4.6 Offences against Property

Human society requires protection 'not only of persons but also, of their property. Originally the violation of property rights was dealt in civil law. Later, violation of

property rights became so violent that the state utilized the machinery of its criminal law. Chapter 27 of the I.P.C. deals with offences against property.

a.Classification of offences

1. Theft 378 - The offender takes away the property without the consent of th possessor.

2. Extortion 383 - The offender takes away the property with consent by show of fear..

3. Robbery 390 - When there is an element of force or violence either in theft or extortion, it is Robbery.

4. Dacoity 391 - When Robbery is committed by 5 or more persons it is Dacoity.

5. Criminal Misappropriation 403 - The offender misappropriates the property which comes into his possession innocently.

6. Criminal Breach of trust 405 - The offender misappropriates the property which comes into his possession by way of trust.

7. Cheating 415 - The offender obtains property by deception.

8. Mischief 425 - The offender causes unauthorized destruction the property

9. Criminal Trespass 441 - The offender violates certain rights of property with a view to commit some other offences.

The above said offence are committed either dishonesty, fraudulently on intentionally. In 1 to 7, there is deprivation of property. In 8, there is damage to property and in 9, there is violation of rights to property.

4.6.1 Theft (S.378)

Theft is defined in the I.P.C. thus:

Whoever (1) intending to take dishonestly

(2) any moveable property

(3) out of the possession of any person

(4) without that person's consent

(5) moves that property in order to such taking

is said to commit theft.

The equivalent offence of theft under the common law of England is larceny. The *Actus reus* of theft consists of the taking of property belonging to another and the *Mens Rea* is the dishonest intention. The subject matter of theft is movable property. Ingredients: There are five ingredients in the offence of theft. They are

(1) Dishonest intention to take property: Intention is the gist of the offence. It is the intention of the taker at the time when he removes the article that determines whether the act is theft or not. In theft the intention of the offender is dishonest. The word dishonestly is defined in **S.24.**

Dishonestly means intentionally causing wrongful gain to one person or wrongful loss to another person. S.23 defines the terms wrongful loss. Wrongful gain is gain by unlawful means of property to which the person gaining is not legally entitled. Wrongful loss is loss by unlawful means of property to which the person losing is legally entitled. Both wrongful gain and wrongful loss need not be caused; either is sufficient. When there is no intention to take dishonestly, there is no theft.

Illustration (a): A takes an article belonging to Z out of Z's possession without Z's consent; with the intention of keeping it until he obtains money from Z as a reward for its restoration. Here A takes dishonestly and hence committed theft.

(b) A delivers his watch to Z, a jeweler to be regulated. Z carries it to his shop. A, not owing to the jeweler, any debt enters the shop, takes his watch by force out of Z's hand and carries it way. Here A has not committed theft since what he did was not done dishonestly.

The intention to take dishonestly must exist at the time of moving of the property in order to such taking. If the act done is not animo-furandi, it will not amount to theft. Thus a person keeping concealed for a time valuable thing belonging to a friend, who is a careless man, in order to teach him a lesson, is not guilty of theft.

A man can be convicted of stealing his own property if he takes it dishonestly from another. Thus in Illus. (b) if A owes any debt to Z and takes his watch out of Z hand, then A has committed theft even though the property belongs to him.

(2) The property must be moveable: The subject matter of theft is moveable property and not immovable property. Movable property is defined in S.22 as including corporeal property of every description except land and things attached to the earth, or permanently fastened to any thing which is attached to the earth. It is expressly stated by Explanations 1 and 2 of S.378 that things attached to the land may become movable property by severance from the earth and that the act of severance itself will be theft.

Illus.: A cuts a tree on Z's ground with the intention of dishonestly taking the tree out of Z's possession without his consent. Here as soon as A has severed the tree in order to such taking, he has committed theft.

Any part of the earth whether it be stones, or clay or sand when severed from the earth is movable property. A house cannot be the subject of theft, but there may be theft of its materials. Animals can become the subject of theft because they are classed as movable.

(3) The property should be taken out of possession of another person: The property stolen must have been in the possession of some one from whom it is taken. There is no theft when the property is in nobody's possession. An ownerless thing cannot form the subject matter of theft. The word possession is not defined in the I.P.C. possession exists in one whenever he has physical control, whether rightful or wrongful over a corporeal thing. It is entirely distinct from property. Thus when an article is stolen, though the thief has possession the owner retains the property. Possession is also different from custody. A man is said to be in possession of thing when he can deal with it as owner to the exclusion of other. A man is said to be in custody of a thing when he cannot deal with it as owner, but he merely keeps it for the sake of another.

Illus.: A finds a ring lying on the high road not in the possession of any person. A, by taking it, does not commit theft.

The principle, mere custody will not amount to possession, is expressly recognized in S.27 I.P.C.

Ownership of goods is immaterial in India. Thus if X steals the goods of A and the Z steals them again from X, both X and Z have committed theft. Law protects even the vicious possession of X as against Z.

(4) The property should be taken without the consent of the owner : The taking of the property must be without the consent of person in possession. There can be no theft where the owner actually consents to authorizes the taking.

According to S.90 I.P.C., consent is not a consent if it is given underfear of injury or under a misconception of a fact or if it is given by a person who is unsound or intoxicated or below 12 years. Explanation 5 of 378 of I.P.C. says that consent may be express or implied whether given by a person in possession or by any person having to do so.

Illus.: A being on friendly terms with Z, goes Z's library in Z's absence, and takes away a book without Z's express consent for the purpose of reading it and with the intention of returning it. Here A has not committed theft.

Since A may have conceived that he had Z's implied consent to use Z's book.

5) There must be some movement of the property in order to accomplish the taking of it: Finally, in addition to all the other ingredients, there must be moving of the property with a view to taking of it. It is not necessary that the taking should be of a permanent character or that the accused should have derived any benefit. Explanation 3 and 4 of 378 IPC state how moving could be effected in certain cases.

Explanation 3 says: A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing.

Explanation 4 says: A person, who by any means cause any animal to move, is said to move by that animal.

Illus.: A meets a bullock carrying a box of treasure. A drives the bullock in a certain direction in order to take the treasure dishonestly. As soon as the bullock begins to move, A has committed theft of treasure.

4.6.2 Extortion (S 383)

S.383 of IPC defines extortion thus:

Whoever (1) internationally puts any person in fear of any injury (a) to that person or (b) to any other and thereby

(2) dishonestly includes the person so put in fear

(3) to deliver to any person so put in fear (b) any valuable security (or) anything signed or sealed which may be converted into a valuable security commits extortion.

The offence of Extortion is carried out by over powering the will of the owner and thus consent is obtained by show of fear. Thus extortion takes an intermediate place between theft and robbery and it is more akin to robbery than to theft.

The essential ingredients of extortion are as follows:

(1) Intentionally putting any person in fear of injury to himself or another: In extortion, a person must be threatened with injury and the injury need not necessarily to be himself but to any person. The word injury is defined in S.44 as denoting "any harm whatever illegally caused to any person in body, mind, reputation or property."

Illus. (a) : A threatens to publish a defamatory libel concerning Z, unless Z gives him money. He thus induced Z to give him money. A has committed extortion. Here Z is put in fear of injury to his reputation.

Illus. (b) : A threatens Z that he will kill Z's child unless Z gives some property. A has committed the offence. Here Z is put in fear of injury not to himself but to his child.

The fear in extortion must be such as to unsettle the mind of the person so put in fear and to take away from his act that element of free voluntary action. Fear must precede the delivery of property. The question for the court will be what is the degree of fear which would justify a person of ordinary strength of mind in giving up his property in order to escape from the injury with which he was threatened.

(2) Dishonest inducement of the person so put in fear: After putting a person in fear of injury, there must be a dishonest inducement of the person so put in fear. At the time of inducement, the intension of the offender must be dishonest.

Dishonestly means (see 'theft')

Illus.: A threatens to send club-men to plough up Z's field unless Z will sign and deliver to B a bond binding Z under a penalty to deliver certain produce to B, and thereby induces Z to sign and deliver the bond. A has committed extortion.

(3).There must be delivery of any property or valuable security: After inducement, the delivery of property must take place. Without this the offence may amount to an attempt. The property delivered may be any property - moveable or immoveable, valuable security or anything convertible into such. The person threatened may deliver the property to the offender, or to another person.

The word `valuable security' is defined in 30 which runs thus: The words valuable security denote a document whereby any legal right is created, extended, transferred, restricted, extinguished or released or whereby any person acknowledge that he lies under legal liability or has not a certain legal right.

Illus.:

A by putting Z in fear of grievous hurt, dishonestly includes Z to signs and delivers the paper to A. Here as the paper so signed may be converted into a valuable security, A has committed extortion.

4.6.3 Robbery (S. 390)

S.390 of IPC defines robbery thus:

In all robbery there is either theft or extortion.

a. When theft is robbery

Theft is Robbery if

1. (a) in order to the committing of theft or (b) in committing theft or (c) in carrying away or attempting to carry away property obtained by theft.
2. the offender, for that end, voluntarily causes or attempts to cause to any person (a)

death, hurt of wrongful restraint or (b) fear of instant death, instant hurt or instant wrongful restraint.

b. When extortion is robbery

Extortion is robbery if the offender at the time of committing extortion is

1. in the presence of person put in fear,
2. commits the extortion by putting that person in fear of instant death, or of instant hurt or of instant wrongful restraint to that person or to some other person, and
3. induces the person so put in fear then and there to deliver up the thing so extorted.

S.390, IPC enacts, that in all robbery there is either theft or extortion. In short it is either aggravated theft or aggravated extortion. Thus all the elements of either theft or extortion must be present in robbery. The section then goes on to explain the circumstances under which theft will amount to robbery and extortion will amount to robbery.

c. Ingredients of Robbery based on Theft

Firstly: Since Robbery is a special and aggravated form of theft, all the ingredients of theft must be present.

Ingredients of robbery ..... (see theft)

Secondly: The use of violence must be for one of the purposes mentioned in S.390 viz.(i) It must be in order to commit the theft; or (ii) in committing the theft; or (iii) in carrying away or in attempting to carry away stolen property. If force is used for any other purpose, it will not convert that into robbery.

Illus(a): A holds Z down, and dishonestly takes Z's money and jewels from Z's clothes, without consent. Here A in order to the committing of theft, has voluntarily caused wrongful restraint to Z. A has therefore committed robbery.

Illus(b): A stole a hand bag from a house and while carrying it away, was seen by B. A threw away the bag and wounded B with a knife. Here A was guilty of theft and causing hurt to B and not of robbery since he wounded B to avoid capture and not to

take away stolen property. He would have been guilty of robbery if he had not thrown away the bag.

In robbery based on theft the use of violence will not ipso facto convert the offence of theft into robbery unless the violence is committed for one of the ends specified in S.390.

Thirdly: There must be violence caused by the offender voluntarily. The violence should be in the form of causing or attempting to cause (i) death, hurt or wrongful restraint; or (ii) fear of instant death, hurt or wrongful restraint. Thus the violence should be of the nature specified in the section and accidental injury will not convert theft into robbery.

Illus: A snatches away by force a packet from B who is carrying the packet under his arm. Here although he uses violence but since he does not cause hurt or wrongful restraint or fear of instant hurt or wrongful restraint, his act is simple theft and not robbery. The essence of the offence is that violence is done or threatened to the person in order to take the property. Thus the offence against the person and the property are committed. In short we can say that:

Robbery = Theft +Violence or fear of instant violence.

4.6.4 Ingredients of Robbery based on Extortion

Firstly: Since robbery is a special and aggravated form of extortion all the ingredients of extortion must be present.

Ingredients of Extortion ... see Extortion.

Secondly, the offender at the time of committing extortion must be in the presence of the person put in fear. The explanation to S.390 says: The offender is said to be present if he sufficiently near to put the other person in fear of instant death, hurt or wrongful restraint.

Illus.: A meets Z on the high road, shows a pistol and demands Z's purse. Z in consequence surrenders his purse. Here A has extorted the purse from Z by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence. A has therefore committed Robbery.

Thirdly: There must be fear of instant violence and the violence should be of the nature specified in the section i.e., instant death, instant hurt or instant wrongful restraint.

Illus.: A obtains property from Z by saying "Your child is in the hands of my gang and will be put to death unless you send us ten thousand rupees". This is extortion as such, but it is not robbery since there is no fear of instant death of the child.

Fourthly, the person so put in fear must be induced to deliver up the thing so extorted. In short we can say that

Robbery = Extortion + presence of the offender + fear of instant violence + immediate delivery.

There is however an important difference between robbery based on theft and that based on extortion. In robbery based on extortion, the entire menace must have preceded the act of delivery of property. In the case of robbery based on theft the use of violence may be before or after acquiring the possession of the property.

The subject matter of robbery based on theft in moveable property but in the case of robbery based on extortion, it may be moveable or immovable.

4.6.5 Dacoity (Sec. 391)

S.391 of IPC defines dacoity as:

When (1) five or more persons conjointly commit or attempt to commit robbery, (or)

(2) where the whole number of persons conjointly committing or attempting to commit robbery and persons present and aiding such commission or attempt, amount to five or more every person so committing or aiding is said to commit dacoity.

Dacoity is an aggravated form of robbery. Dacoity is robbery committed by five or more persons conjointly. The definition includes attempt to commit dacoity is dacoity itself. A dacioty begins as soon as there is an attempt to commit robbery.

Ingredients

1. **There must be robbery committed or attempted and**
2. **(a) It was done by five or more persons conjointly (or) (b) The total number of persons committing or attempt to commit robbery and persons present and aiding is five or more.**

The word conjointly is the most important word bearing on the liability of person accused of an offence of dacoity. Although the word common intention is not used in the section, the word conjointly undoubtedly refers to united or concerted action of the persons participating in the transaction.

Just like in robbery, in dacoity also there must be either theft or extortion. It is the number of persons committing, attempting to commit or present and aiding that converts robber into dacoity.

Illus (a): Five persons conjointly commit theft. While the offenders are carrying away the property obtained by theft, caused, hurt to a person. Hence each of the offenders is said to commit dacoity.

The essential element of the offence of dacoity is that five or more person must be concerned in the commission of robbery or in the attempt to commit it.

Illus (b) : A,B,C,D, and E go to house of X for committing theft. A watches outside and others go inside. When resistance is offered by X,B stabs him to death.

Illus(c): A finds a valuable ring on the highroad, not knowing to whom it belongs. A sells it immediately without attempting to discover the owner. A is guilty of criminal misappropriation.

The guilt of the accused is determined by the state of his mind at the time when he appropriates the property to his own use.

Illus (d): A meaning to lend B a shilling, put into his hand a coin which at the time both A and B believe to be a shilling. An hour later, B found that the coin was a sovereign and kept it. B committed criminal misappropriation of the sovereign.

The rule laid down in India Law is different from that of English Law. Under English Law the intention of the accused at the time the property is taken by him is along taken into account. His subsequent dishonesty is not sufficient to make him guilty of this offence. According to English Law, innocent taking followed by conversion owning to subsequent change of intention is civil wrong but not an offence.

4.6.6 Criminal Breach of Trust (Sec. 405)

Criminal Breach of Trust is defined in S.405 IPC:

Whoever (1) being in any manner (a) entrusted with property or (b) with an dominion over property

(2) dishonestly misappropriates or converts to his own use that property.

(3) in violation of (a) any direction of law prescribing the mode in which such trust is to be discharged or (b) any legal contract (express or implied) which he has made, touching the discharge of trust. Commits criminal breach of trust.

In Criminal Breach of Trust there must be an original trust and a dishonest misappropriation of the trust property. The section is strictly constructed and is applicable only in cases where some sort of trust relationship subsisted between the parties. In this offence, the original taking is with honesty and with consent and only subsequently there is misappropriation.

Ingredients S.405, requires the following ingredients:

1. A person must be entrusted with property or dominion over it.
2. The person entrusted dishonestly (a) misappropriated or (b) converted to his own use or (c) used it or (d) disposed of it.
3. He did so (or willfully suffering any other person so to do) in violation of (a) any direction of law prescribing the mode in which such trust is to be discharged, (or) (b) any legal contract made touching the discharge of such trust.

Ingredient (1): There must be entrustment of property. Therefore before a person can be said to have committed criminal breach of trust, it must be established that he is said to have converted or disposed of in violation of any direction of law, etc.

Illus. (1): A, a carrier is entrusted by Z with property to be carried by land. A dishonestly appropriates the property. A has committed criminal breach of trust.

The word trust is used not in its strict legal sense as defined in the Trust Act but in its widest sense as covering any arrangement by which one person is authoring to deal with property for the benefit of another. Entrustment carries with it the implication

that the person handling over any property continues to be its owner. Further, the person handling over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them.

The word property covers both moveable and immoveable property.

Ingredient (2): To constitute an offence of criminal breach of trust, there must be *dishonest misappropriation* by a person in whom confidence is placed. Dishonesty is the most important element in this offence. Breach of trust committed with dishonest intention is called criminal breach of trust and is an offence. In civil breach of trust, the element of dishonesty is absent and is not an offence.

Meaning of dishonestly .....see theft.

Illus (b): A residing in Calcutta, is agent for Z residing at Delhi. There is a contract between A and Z that all sums remitted by Z to A shall be invested by A in company's paper. A dishonesty disobey the directions and employs the money in his own business. A has committed Criminal Breach of Trust.

But if A, not dishonestly but in good faith, believing that it will be more for Z's advantage to hold shares in a bank, disobey Z in direction and buys shares in the Bank of Bengal for Z, instead of buying company's paper. Here A has not committed criminal breach of trust since he has not acted dishonestly. If Z suffers any loss, he can bring only a civil action against A.

If any person entrusted with property allows any one else to use or dispose of the property, he will be guilty of criminal breach of trust.

Ingredient (3): The property misappropriated or disposed of must be in violation of any direction of law or of any legal contract.

Ingredient (a): A, being the executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

thus (b): A is a warehouse keeper. Z, going on a journey entrusts his furniture to A under a contract that it shall be returned on payment of a stipulated sum for warehouse room. A dishonestly sells the goods. A has committed criminal breach of trust.

Illus (c): A hired a car from Z under the hire purchase system which provided that until the car was fully paid by A, that car was to remain the absolute property of A. A without making full payments to Z, sells the car. Here A has committed criminal breach of trust since selling of the car is a violation to the legal contract and that violation was dishonest on the part of A.

Illus (d): A pledged a pair of earrings with B. B pledged the same property to C without A's consent. Here B is guilty of this offence since he has no right to pledge A's property.

4.6.7 Cheating (S.415)

Cheating is defined in S.415 of IPC thus:

Whoever by deceiving any person

(1) fraudulently or dishonestly includes the person so deceived

a) To deliver any property to any person (or)

b) To consent that any person shall retain any property (or)

(2) Intentionally included the person so deceived:

(a) To do or omit to do anything which he would not do or omit if he were not so deceived and

(b) Which act or omission causes or likely to cause damage or harm to that person in body, mind, reputation or property, is said to cheat.

In cheating there should be first of all deception. By means of this deception a man in deceived or cheated in two ways as in (1) and (2) shown above. In (1) the victim is induced to deliver property by the accused either fraudulently or dishonesty and the punishment is imprisonment for 7 years and fine. In (2) there is no delivery of property but the victim is intentionally induced to do something to his own prejudice and the punishment is imprisonment for 1 year or fine or both.

Ingredients

(1) Deception.

(2) By deception, there must be fraudulent or dishonest inducement so as to make the person deceived to deliver any property.

(3) By deception, there must be intentional inducement so as to make the person deceived to do or omit to do anything thereby causing damage or harm to that person in body, etc.

Ingredients (1) The most important element in cheating is deception. A person is deceived when he is led to believe that which is untrue. In this offence, the accused must have made a false pretence or representation as to existing facts which

1. The accused deceived some person.
2. By deception he induced that person.
3 .The above inducement was intentional.
4. The person so induced deliver any property to or consented to the retention of some property by any person.

The first part of the definition of cheating says that after deception, the deceived person must be induced fraudulently or dishonestly to deliver any property to any person.

The word fraudulently is defined in S.25 thus:

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

The word defraud involves two concepts namely deceit and injury to the person deceived. When a person obtains an advantage by means of deceit, there is fraud. A deceit which does not deceive is no fraud.

Check your Progress

1.Define culpable Homicide

2.Explain the offence under the section 300

3.What is mean by Extortion

Meaning of dishonestly ..... see theft. In this section, both moveable and . immoveable property can become the subject matter of cheating.

Illus (F): A, by pledging as diamond articles which he knows are not diamonds, intentionally deceived Z, and thereby dishonestly induces Z to give money. A cheats.

Ingredient 3: In order to convict a person under the second part of S.415, the following ingredients have to be established.

1. The accused deceived some person.
2. By deception he induced that person.
3. The above inducement was intentional.
4. The person so induced did or omitted to do something.
5. Such act or omission caused, or was likely to cause damage or harm to the person induced in body, mind, reputation or property.

The second part of the definition of cheating says that after deception, the deceived person must be induced intentionally to do or omit to do something thereby causing damage or harm to that person. In the first part of the definition the inducement must be fraudulent or dishonest whereas in the second part the inducement must be intentional are false to his knowledge. A person may deceive by words or by conduct.

Illus (a): A purchases goods from B, giving him a cheque on a Bank in which he has no account, there by representing that he has an account at the bank and that the cheque will be paid. This is deceit by conduct.

Illus (b): A, married man tells B a woman that he is unmarried and proposes marriage to her, whereby he obtains money from her promising to furnish a house. This is deceit by words.

The offence of cheating will be complete even if the person deceived is other than the one on whom the deception is practiced. Similarly, it is not necessary that there should be an intent to deceive any particular individual.

Illus (c): A company issued false prospectus to the public imitating them to buy shares in the company. Based on the prospectus, Z purchased shares. Here the persons issuing the prospectus will be guilty of cheating although there was no intent to deceive any one in particular. In cheating, it is necessary that a person should be deceived. If a person knows that what the deception is and acts on it, the person practicing deception will by guilty of attempt to cheat, but not of cheating.

Case Law: A person was purposely sent by the complainant to the accused (a milk vendor) to buy milk knowing that the milk was mixed with water, in order to prosecute the seller. The milk vendor sold the milk as pure milk which he knew to be half milk and half water.

Held that the milk vendor was liable for an attempt to cheat since the person sent by the complainant was not deceived.

Explanation: To S. 415 says: A dishonest concealment of fact is a deception.

Illus (d): A sells and conveys an estate to B. A knowing that in consequence of such sale, he has no right to property, sells the same to Z, without disclosing the fact of the previous sale to B and receives money from Z. A cheats by dishonestly concealing the previous sale to B.

Ingredient: In order to convict a person under the first part of S.415, the following ingredients have to be established.

4.7 Offences against Public Tranquility

1. Unlawful Assembly

S.141 defines an unlawful assembly as follows:

An unlawful assembly is an assembly of five or more person if their common object is

First: To overawe by criminal force or show of criminal force

a. The Central or any State Government or Parliament or any Legislature of any State, or any public servant in the lawful exercise of such public servant.

Second: To resist the execution of any law or legal process

Third: To commit any mischief or criminal force to any person (a) to take or obtain possession of any property, or right of way or of the use of water or other incorporeal right of which he is in possession or enjoyment or (c) to enforce any right or suppose right.

Fifth: By means of criminal force or show of criminal force to compel any person.

a. To do what he is not legally bound to do, or

b. To omit to do what he is legally entitled to do.

It is to be noted that under English Law, an assembling of three or more persons for purposes forbidden by law is sufficient to constitute an unlawful assembly. The essentials of an unlawful assembly are:

1. An assembly of 5 or more persons
2. They must have a common object
3. The common object must be one of the five specified objects in the section.

Ing.(1) : 5 or more Persons: The first and foremost essential condition of an unlawful assembly is that it should consist of at least 5 or more persons, who should meet for a common object. All need not have the same object to begin with, it is enough if the common object is developed subsequently.

Ing. (2): They must have a common object: The word object means purpose or design and it must be possessed by all. If four only out of five persons assembled have the common object and not the fifth, it is not unlawful assembly. But mere assemblage will not make their meetings unlawful. Person may meet in a theatre to amuse themselves. In such a case they meet, but do not assemble within the meaning of the clause. The word implies the meeting of persons animated by the same purpose with the intention of furthering it.

The essence of the offence is the common object of the person forming the assembly. Whether the object is in their minds when they come together, or whether it occurs to them afterwards, is not material. But it is necessary that the object should be common to the persons who compose the assembly, that is, they should all be aware of it and concur in it.

The Explanation appended to the section, makes it clear that pre-concert is not necessary. It says,

An assembly which is lawful when it assembled, may subsequently become an unlawful assembly.

Thus an assembly which is lawful when it assembled, may become unlawful, by the subsequent acts of its members. It may turn unlawful all of a sudden and without previous concert among its members.

Ing. (3): Objects must be those specified in the section

The common object must be of the following referred to in the section:

1. Overawing the Government or its officers.
2. Resistance to legal process.
3. Commission of any offence.
4. Forcible possession and dispossession of property.
5. Illegal compulsion.

1. Overawing the Government: The gist of the offence consists in overawing, by show of criminal force the Government, or a public servant in the lawful discharge of his duty. A person is said to overawe another when he restrained him by awe, fear or superior influence. But from mere presence of a crowd, intention to overawe will not be presumed. Thus a crowd of persons, assembling to see what the police officers were doing in arresting a person who had escaped from lawful arrest, who do not use force or show of force, does not form an unlawful assembly.

2. Resistance to legal process: Resistance to some law or legal process connotes some overt act and mere words are not sufficient. For example, when A an Amin goes to a house to arrest a debtor B and take possession of properties in execution of a decree and order passed by a court, if five or more persons resist the court Amin in the execution of his duties, all of them will be guilty under S.141.

3. Commission of any offence: This clause says that an assembly is unlawful in its common object is to commit any mischief or criminal trespass or other offence. The words 'other offence' cover all offences both against person and property and not only mischief or criminal trespass.

4. Forcible possession or Dispossession of property: The act falling within this clause is made punishable owing to the injurious consequences which it is likely to cause to the public peace. The acts are

1) to take or obtain possession of any property
2) to enforce any right
3) to enforce any supposed right.

5.Illegal compulsion: This clause is, too generally, worded. All it means, however, is that no one can use criminal force to illegally compel another to do or forbear from doing any act connected or unconnected with property.

a. Rioting (S.146): Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

Section 146 defines the offence of rioting and section 147 prescribes the punishment for rioting. The basis of the law as to rioting is the definition of an unlawful assembly, a riot being simply an unlawful assembly' in a particular state of activity being accompanied by the use of force or violence. It is only the use of force that distinguishes rioting from an unlawful assembly.

A riot has been defined by Hawkins, as a tumultuous disturbance of the peace by three or more persons assembling together of their own accord with an intent mutually to assist one another against anyone who shall oppose them, in the execution of some enterprises of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful.

English law distinguishes between a riot and rout. The unlawful assembly becomes a rout as soon as some act has been done "moving towards" the execution of the common purpose; and the rout becomes riot when some act is done in part execution of this common purpose; a rout being a disturbance of the peace by persons assembled together with an intention to do a thing which, if executed, would make them rioters, and

actually making a movement towards the execution thereof but not executing it. The Indian Penal Code has made no such distinction between the two.

b. Ingredients of rioting: To constitute rioting under Section 146 the following ingredients must be established, viz.,

1. There must be an unlawful assembly (section 141);
2. The accused must be a member of such an unlawful assembly (section 142);
3. Force or violent must be used by the said unlawful assembly or any member thereof;
4. The said force or violence must be used in prosecution of the common object of the said unlawful assembly.

Use of force is a necessary condition to attract this section, as mere intention to use force does not suffice to hold a person liable for rioting.

The use of any force, even though it be of the slightest possible character, by any one member of the assembly once established would constitute rioting. For instance, where a member of an unlawful assembly in prosecution of the common object of the assembly throws down a man and causes him bodily hurt, the offence of rioting under section 146 is complete as soon as the man is thrown down by using force and the hurt subsequently caused would come under section 323 or 325 Indian Penal Code.

Section 141 illustrates what objects are deemed unlawful. If the common object of an assembly is not illegal, it is not rioting, even if force is used by any member of the assembly. Acts done by some members outside the common objects are only chargeable against the actual perpetrator of those acts.

Resistance to the execution of an illegal warrant within reasonable bounds, does not amount to rioting, but when the right of resistance is executed and a severe injury, not called for, is inflicted, the person who inflicts the injury may be convicted of causing such injury.

Mere use of force by persons assembled does not render all of them liable for rioting. The essence of the offence lies in the use of force to achieve a

Check your Progress

4.Explain about criminal Breach of Trust

5.Give a account of offences against public Tranquility

common design. This implies some degree of previous concert and deliberation. If a group of persons assembled for any lawful purpose suddenly quarrel with no previous design or intention, it is not a riot in the technical sense of the term. Similarly, it is not a riot when members of an audience in a public theatre applaud or hiss in a performance, but if a number of men come prepared to interrupt the performance by causing a disturbance, this would be rioting, though they may not resort to personal violence or cause any injury to the house.

There can be no right to private defence when a riot is premeditated on both sides. When both parties are armed and prepared to fight, it is immaterial who is the first to attack, unless it is shown that the party was acting within the legal limits of the right of private defence.

c. S147 Punishment for rioting: Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comment

Section 147 prescribes punishment for rioting, which extend to two years of imprisonment, or fine, or both.

4.8 Summary

Death may be caused by poisoning, starving, striking, drowning or by a different ways. The difference between intention of causing death or bodily injury is a difference of degrees in criminality. The latter criminality is lower in degree than the former. If death is caused with intention or bodily injury cause to death – life or 10 years imprisonment and fine. Dacoity is a form of robbery Committed by five or more persons conjointly. Cheating is deception where the accused made a false pretence or representation. A riot is a tumultuous disturbance of the peace whether it is lawful or unlawful.

4.9 Key words

disfiguration	-	to spoil the appearance of a person
imminently	-	not effective
acceleration	-	an increase in how fast something happens
emasculation	-	to make a man feel that he has lost his male role or qualities
tumultuous	-	involving a lot of change or confusion and or violence
trespass	-	to enter land or building that you do not have permission or the right to enter

4.10 Answer to check your Progress

1. Refer 4.1
2. Refer 4.2
3. Refer 4.6.2
4. Refer 4.6.6
5. Refer 4.7

4.11 Model Questions

1. Give an account of offences affecting the human body
2. Describe the different types of Homicide
3. Discuss the causes for the murder
4. Explain the offences fall under Hurt and Grievous hurt
5. Define Rape under I.P.C, S.375

Lesson - 5

Criminal procedure

Introduction

Before World War II, States enjoyed complete sovereign powers over all persons living in their respective territories. During the war period there was a strong conviction amongst world statesmen that the promotion and protection of certain rights of individuals was essential for maintenance of international peace and security.

Provisions have been made in the UN Charter for the promotion of human rights and fundamental freedom. Later on the world organization adopted the Universal Declaration of Human Rights and several international Covenants for the promotion and protection of human rights, especially the International Covenant on Civil Political Rights (1966), the International Covenant on Civil Political Rights (1966), the Optional Protocol to the International Covenant on Civil and Political Rights (1966). It has also adopted the Declaration on the Protection of All Persons from being subjected to Torture and other Cruel Inhuman or Degrading Treatment or Punishment (1975) and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1987). Promotion and protection of human rights of individuals has not remained exclusively with the national States but it has become the concern of the international community.

Lesson Objectives

- To understand the Rights of the Accused Persons
- To know the procedure of the investigating conducted by a police officer
- To explain the criminal courts Jurisdictions and their powers.

Lesson Structure

Introduction

Lesson objectives

Lesson structure

5.1 Right of the Accused – some Reflections

5.2 Investigation in criminal cases

5.0 Constitutional Guarantees and protection of human rights in criminal cases - rule of law

The Constitution of India, in its Part III, guarantees a set of Fundamental Rights to citizens. A few of these rights are also available to the accused, a suspect as well as an under trial. These rights are guaranteed under Articles 14, 19, 20, 21 and 22. Prisoners are also entitled to the benefits of Articles 32 and 226 of the Constitution. In addition to the fundamental rights, the accused, suspects and under trial prisoners enjoy certain other legal rights provided under the Indian Penal Code, 1860(IPC); the Criminal Procedure Code, 1973 (Cr. PC), and the Indian Evidence Act, 1872 (IEA). The Supreme Court of India and High Courts have not only played a vital role in attaching constitutional significance to these rights but, through humane judicial interpretation and acumen, also expanded their contents.

5.1 Rights of the Accused - Some Reflections

(A) Right to Life

Right to life is a natural right. It has been guaranteed as one of the fundamental rights under Part III of the Indian Constitution. The constitutional guarantee under Article 21 is that `No person shall be deprived of his life or personal liberty except according to procedure established by law'.

One of the important rights of the accused (suspects and undertrial prisoners) is the right of life. In the Gopalan case (A.K. Gopalan Vs. State of Madras, AIR 1950 SC 27) the Supreme Court has given a literal interpretation to the provisions of Article 21. It was held, by the Court that `law meant a law made by the State and the courts were not competent to enquire the reasonableness or otherwise of that law'.

The issue of interpretation of `procedure established by law' was again raised in Maneka Gandhi case [Maneka Gandhi Vs. Union of India, (1978) 1 SCC 248]. The Supreme Court overruled the ruling given in Gopalan case and held that the procedure established by law means the 'right, just and fair' procedure that embodies the principles of natural justice and not an arbitrary, forceful or oppressive procedure. The procedure laid down must satisfy the test of reasonableness as envisaged under Article 19 of the Constitution. The court sowed the seeds for future development of the law enlarging this most fundamental of the fundamental rights.

The Supreme Court through the process of judicial activism has widened the scope of the `right of life'. Rights to life does not mean animal existence. It means something much more than physical existence of the individual. It means `the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and co-mingling with fellow beings'.

The question of 'solitary confinement' imposed upon prisoners was considered to be violative of Articles 14, 19, 20 and 21 of the Constitution in Sunil Batra (I) Vs, Delhi Administration ((1978) 4 SCC 494). The court held that the Prison Act did not empower the prison authorities to impose solitary confinement upon a prisoner, who is in jail under sentence of death. Petitioner's plea before the court was that Section 30 of the Prison Act did not-permit the prison authorities to impose solitary confinement upon a prisoner. Solitary confinement is in itself a substantive punishment which can be imposed by a court of law under Sections 73 and 74 of the IPC. Hence, exercise of such power cannot be left to the whim and caprice of prison authorities. Further the court considered the place of petitioners and held that the

liberty to move, mix, mingle, talk, share company with co-prisoners if substantially curtailed would be violative of Article 21 unless the curtailment has the backing of law.

Thus, the apex court has made significant contributions in the field of prison justice and prisoners' rights.

(B) Right to Speedy Trial

Speedy trial in criminal cases is considered and essential ingredient of the right to fair trial. Unnecessarily prolonged detention of undertrial prisoners would be considered by the Court as violation of fundamental right to life and personal liberty implicit in Article 21 and it would also be considered as 'an affront to all civilized norms of human liberty'.

The Supreme Court in Hussainara Khatoon (I) Vs. State of Bihar ((1980) 1 SCC 81) has held that speedy trial is a part of fundamental right to life and personal liberty guaranteed under Article 21 of the Indian Constitution. Continuous incarceration of undertrial prisoners without even commencement of trial would amount to violation of their fundamental right implicit in Article 21 of the Constitution. After the dynamic interpretation placed on Article 21 in the Maneka Gandhi case the Apex Court observed that a procedure which keeps people behind bars without trial for so long cannot possibly be regarded as reasonable, just or fair so as to be in conformity with the requirement of that Article.

Speedy trial is one of the cardinal principles of a fair judicial system. It is not to be neglected. Delayed trials of the under trial prisoners means denial of justice to them.

The court in *Hussainara Khatoon (I!) Vs. Home Secy. State of Bihar* (AIR 1979 SC 1369) has highlighted the plight of undertrial prisoners who were languishing in jail for a long period without trial. The court directed the State Government to release forthwith the undertrial prisoners on their personal bonds as an exceptional measure in view of the fact that all undertrial prisoners were in jail without trial for several years and in some cases .for offences for which the punishment would be less than the period of their detention.

Though the right to speedy trial is not specifically enumerated as a fundamental right it is implicit in the broad sweep of Article 21 and is also available to an accused at all stages, i.e. stages of investigation, inquiry, trial, appeal and revision.

(C) Right to Counsel

It is the right of an accused to defend himself by a counsel. The International Commission of Jurists met in Delhi in 1959, stressing the importance of legal representation on behalf of the accused, suspect or under trial prisoners, observed:

"Equal access to law for rich and poor alike is essential to the maintenance of the Rule of Law. It is, therefore, essential to provide adequate legal advice and representation to all those threatened as to their life, liberty, property or reputation who are not able to pay for it."

It is essential that an accused person must be given an opportunity to call and examine witnesses in his defence. He should be permitted to exercise this right in person or through his counsel. Denial of counsel to the accused is tantamount to compel him to face unfair trial.

(D) Right to Free Legal Aid

Accused persons do not have a fundamental right to free legal aid. Those accused persons who are charged with offences, which are bailable, do not apply for bail on account of their poverty and financial disability. They are also unaware of their right to obtain their release on bail. In such cases the State has a constitutional mandate under Article 39-A to provide legal aid to protect poor accused persons or undertrial prisoners against injustice and to secure to them their constitutional and statutory rights.

Denial of free legal services to the poor accused persons or undertrial prisoners would vitiate the principle of `reasonable, fair and just' procedure which is implied in the right to life and personal liberty under Article 21 of the Constitution.

The court under Article 142 read with Articles 21 and 39-A of the Constitution can exercise its implied powers to assign counsel to the accused person

provided he does not take objection to an appointment of a lawyer for his defence. In *Suk Das Vs. Union Territory of Arunachal Pradesh* (1986) 2SCC 401) the Apex Court held that failure to provide free legal aid to an accused at the State's cost would vitiate the trial. The court had set aside the conviction of an accused on the ground that he was not provided with legal aid at the time of his trial and thus there was violation of Article 21 of the Constitution.

The right to free legal aid is a fundamental right of an accused person on account of liberal judicial interpretation given to Article 21.

(E) The Right to a Fair Trial

The right to a fair trial is a basic human right. The right is invariably enshrined in all democratic Constitutions which contain a Bill of Rights.

A noteworthy feature of the judicial system of a democratic country is the universal recognition of the presumption of the accused person's innocence until he is proved guilty. An accused person is in a much better position to prepare his defence if he is out on bail rather than when he is in custody. Bail is usually granted to the accused person while considering the gravity of bailable offences.

In matters of human rights the relevant laws are to be justly administered. "It is no use having just laws if they are administered unfairly a country can put up with laws that are harsh or unjust so long as they are administered by just judges -- but a country cannot long tolerate a legal system which does not give a fair trial. The right to a fair trial is an inherent right in the administration of criminal justice. In order to vindicate thoroughly the right of the accused courts must prepare to challenge the actions of the government if they come in the way of fair trial process.

(F) Right against Double Jeopardy

It is a common law principle that a person who has been convicted and punished for an offence shall not be punished again for the same offence. This right against double jeopardy has been guaranteed under Article 20(2) of the Indian Constitution. This Constitutional guarantee is essential to the fair trial process.

There are other rights of the accused and of arrested persons. Right to be informed of the grounds for arrest is one of them. This right is provided to the accused under the provisions of Article 22(1) of the Constitution. Grounds for arrest are to be communicated to the accused person as soon as possible. Due to this provision the arrested persons are able to file a writ of habeas corpus or apply for bail. Another valuable right of the arrested person is that he should be produced before a Magistrate within twenty-four hours of his arrest under Article 22(2) of the Constitution.

(G) Right against Self-incrimination

No accused person shall be compelled to give evidence against himself. The motive behind compulsion brought by the police on an accused person is to extract a confessional statement. The accused person is presumed to be innocent until proved guilty according to law. This presumption of innocence is considered under the provisions of the Indian Evidence Act, 1872. It is a recognized principle that let a hundred guilty men go free rather than one innocent person be found guilty, that too without proof. According to the apex court of India self-incrimination is less than 'relevant' and more than confessional. The accused person cannot be compelled by the police to give answers to their questions. Thus, there is a right to refuse to give answers to self-incriminatory questions.

(H) Right against Third degree Methods

Police authorities strongly feel that handcuffing of accused persons and suspects and parading them on the roads on the way to court or jail will minimize the crime rate. But such a kind of inhuman treatment given to accused persons is not fair and permissible. Accused/suspected persons when paraded are humiliated and punished by the police authorities without waiting for the court's verdict.

In Prem Shankar Shukla Vs. Delhi Administration (AIR 1980 SC 1535) - the Supreme Court examined the validity of handcuffing in the light of provisions of the right to personal liberty under Article 21, the Court held:

"Handcuffing is prima facie inhuman and, therefore, unreasonable, is over-harsh and at the first flush, arbitrary. Absent fair procedure and objective monitoring, to inflict `crons' is to resort to zoological strategies repugnant to Article 21".

(I) Right to Fair Treatment

Cases of death in police custody and deaths in fake encounters have posed a serious problem to State Governments. It has also been reported that the number of killings by extremists has decreased but the cases of deaths resulting in police custody or torture inflicted on the accused or suspects are increasing. The reason behind it is the unlimited powers that the police enjoy under the existing legal system of the country. Being custodians of law, they are themselves in possession of police records. Hence it is very difficult to establish their guilt in cases of police custodial deaths: Consequently they easily escape from criminal liability in such cases.

The police or jail authorities do not have unlimited powers to protect the society from gangsters, habitual criminals, arsonists, terrorists and armed robbers. There is a strong feeling in society that the tendency of the police to act in a casual manner in matters of arrest of suspects and accused persons is growing. Thus, the result is horrifying.

Administrative and judicial actions are taken against the police in cases of custodial death of accused if the police are found guilty of committing unlawful acts.

In *D. K. Basu Vs. State of West Bengal (*D. K. Basu Vs. State of West Bengal, (1997) 1 SC 416) the Supreme Court has dealt with the issue of `custodial death', custodial violence and protection of fundamental rights and human rights of the criminal vis-à-vis duties of the police. The court held that 'any form of torture or cruelty, inhuman or degrading treatment given to the detenu, convicts, undertrials and other prisoners would fall within the inhibition of Article 21 of the Constitution whether it occurs during investigation or interrogation or otherwise.

Using any form of torture for extracting any kind of information would neither be right nor just nor fair and therefore the court declared that it would be offensive to the fundamental right to life and personal liberty'. The court further stated that 'the precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by laws'.

Commenting upon custodial deaths, the Apex Court stated:

"Custodial torture is a naked violation of human dignity and degradation, which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilization takes a step backward-flag of humanity must on each occasion fly half-mast."

By virtue of being suspects, accused and undertrial prisoners they do not cease to be human beings. Hence, the rights of these human beings are to be respected. They are entitled to enjoy the rights which are provided to them under the Indian Constitution as well as the existing laws of the land. Rights of the accused, suspects, and undertrial prisoners whether they are in police custody or prison are so fundamental that no one can violate them.

It is a fundamental principle in the field of criminal justice that there should be transparency of the police action and accountability to the people. Those persons who have been found guilty for their unlawful acts and for adoption of techniques of torture and third-degree methods must be given exemplary punishment otherwise the cult of torture will be perpetrated in India at the cost of State and the Rule of Law will appear to be a teasing illusion to the victims.

The first and foremost thing is that education in human rights be given to policemen and prison officials. Special training should also be given to the police force for adopting scientific aids and techniques in the matter of investigation of crimes. Monetary compensation will have to be provided in cases of custodial deaths or torture inflicted upon the accused. Unlimited powers conferred upon the police under the Cr.PC have to be curtailed.

5.2 Investigation Criminal Cases

(A) Investigation

Investigation is a proceeding conducted by a police officer or by any other person authorized by a Magistrate. The object of investigation is collection of evidence [s 2(h)]. Ingredients of an investigation:

1. It must be a proceeding under this Code.

2. The purpose of the proceeding must be the collection of evidence.
3. Such proceeding must be conducted either (or) by a police officer, or (b) by any person (other than a Magistrate) authorized by a Magistrate.

(a) Purpose of Investigation

The purpose of investigation is to find out whether a crime has been committed, and if so, who committed the crime and to collect evidence. Investigation generally consists of the following steps:

1. Proceeding to the spot.
2. Ascertainment of facts and circumstances of the case.
3. Discovery and arrest of the suspected offender
4. Collection of evidence relating to the commission of offence.
5. Formation of the opinion as to whether there is a case to place the accused for trial and if so, taking the necessary steps for filling a charge-sheet u/s 173.

(b)Power of police to investigate

The Code does not confer the power to investigate on every police officer. u/s 156, only an officer-in-charge of a police station (or any other officer of a higher rank) is empowered to investigate. Such an officer may depute his subordinate officers (not below the rank specified by State Govt.) to investigate the facts and circumstances of any particular case [S 157 (1)].

(c) Investigation of cognizable and non-cognizable offences

From the point of a police officer's power to arrest with or without a warrant, offences are classified as cognizable and non-cognizable. S 2(c) defines cognizable offence as an offence for which a police officer may arrest without a warrant. S 2(1) defines non-cognizable offence as an offence for which a police officer has no authority to arrest without warrant.

S 2(I) of the Code specifies certain offences for which the police may arrest without warrant. Generally offences of a more serious nature in which the interests of the public as a whole are involved and which call for a speedy investigation (e.g. murder, kidnapping) are classified as cognizable offences. Non-cognizable offences are more or less considered as private criminal wrongs.

The classification of offences into cognizable and non-cognizable offences is of vital importance to the police officers because while S 155 (2) of Cr.PC lays down that the police cannot start investigation of a non-cognizable offence without the order of a Magistrate having jurisdiction over the case. S 156 grants a statutory power to the police to start investigation of a cognizable offence without any order from the Magistrate.

If a police officer does investigate a non- cognizable case without the order of a Magistrate, then, his report becomes a complaint u/s 2(d). But where during investigation into a cognizable offence, a non-cognizable offence is also disclosed, S 155(4) permits the police to investigate into the latter offence without the order of a Magistrate.

(d) First Information Report

Any one can set the criminal law in motion by giving information to the police. If the information relates to a cognizable offence, the police may at once start investigation, without the order of a Magistrate. The information so received shall be recorded in such a form as required by S 154. The information as recorded u/s 154 is usually known as first information report or simply as FIR.

(e) Characteristics of FIR

The important characteristic requirements of an FIR are:

(1) *The information should be the first in point of time:* The first and the most important feature of FIR is that it must be the first information in point of time. It must be the earliest report relating to the commission of a cognizable offence made to a police officer with a view to taking action in the matter. Sometimes it may happen that more than one person go at or about the same time and make statements to the police about the same cognizable offence. In such a situation, the police officer has to use common sense and record one of the statements as FIR.

(2) *The information must relate to the commission of a cognizable offence*: The word information means something in the nature of a complaint or accusation with a view to start investigation by police. S 154 requires that information must be

in relation to the commission of a cognizable offence. When the information relates to the commission of a non-cognizable offence, then, the police officer has to record the substance of the information in a book and refer the informant to the Magistrate. A message sent by telephone to the police officer which discloses an information regarding a cognizable offence is FIR. An anonymous telephone message which did not clearly specify cognizable offence cannot be treated as FIR.

(3) *Information may be given by anybody*: In order to constitute FIR, S 154 does not say that the information must be given by a person having personal knowledge of the incident. Information may be given by anybody who may have heard about the incident.

(4) *Information to officer-in-charge of a police station*: The information must be given to the officer-in-charge of the police station or some other police officer who is given the status of an officer-in-charge of a police station or the Superintendent of Police. The officer-in-charge of a police station can only be the person above the rank of a constable.

(5) *Information to be definite*: The information must not be vague or indefinite, but must give sufficient materials to the police to start investigation on it. S154 does not require that the information must give details of all elements of the offence, or the weapon used or the names of witnesses or even of the accused.

(6) *Information may be oral or in writing*: If the information is given orally to the police officer, it shall be reduced to writing by the officer himself or under his direction.

The above characteristics are substantive in nature while the following are procedural in nature.

(1) The information as recorded shall be read over to the informant

(2) After it is read over, the writing shall be signed by the informant. Refusal to sign is punishable u/s 180 IPC

(3) The police officer shall enter the substance of the information in a book kept for the purpose. This book is called Station Diary or General Diary.

(4) A copy of the information as recorded shall be given forthwith, free of cost to the informant.

(f) FIR by Accused

An information by the accused himself which results in the launching of the investigation, is admissible against him as FIR. If, however, the accused makes any statement to the police after the investigation has already started on the basis of some earlier information, such statement of the accused cannot be treated as FIR.

If the FIR is given to the police by the accused himself, it cannot be used either for corroboration or contradiction because the accused cannot be a prosecution witness, and he would very rarely offer himself to be a defence witness u/s 315 of Cr.PC.

If the FIR is of a confessional nature, it cannot be proved against the accused informant, because S 25 of IEA says that no confession made to a police officer can be proved as against a person accused of any offence. But if the FIR given by the accused person is non-confessional, it may be admissible in evidence against the accused as an admission u/s 21 of IEA or as showing his conduct u/s 8 of IEA. Where the accused in examined as a witness, FIR can be used either to contradict him u/s 145 or to corroborate him u/s 157 of IEA.

(g) Significance of FIR

The object of recording the FIR is to put into writing the statement of the informant before his memory fails or before he gets time and opportunity to embellish it. The principal object of FIR from the point of view of the informant is to set the criminal law in motion, and from the point of view of the investigating authorities is to obtain information about the alleged criminal activity.

As the FIR is the earliest version of a crime, the courts attach great value to it. Its importance lies in the fact that it is presumed to be an untutored, unplanned and unthought out version of the incident. The shorter the interval between the occurrence and the report, the greater is its claim to genuineness and also to correctness. Any statement recorded several days after the commencement of the investigation has very little value.

FIR is not a substantive piece of evidence. It is only used to contradict or corroborate the maker thereof. Before relying on the FIR, the court should satisfy itself that there has been no chance to embellish it in any manner.

(h) Evidentiary Value of FIR

FIR is a document and had to be proved like any other document. If proved according to law, FIR forms part of the documentary evidence in a case. FIR is not a substantive evidence of the facts stated and cannot be made the basis for conviction or acquittal. It can be used for certain limited purposes only, namely:

a. To corroborate the informant u/s 157 of IEA
b. To contradict the informant u/s 145 of IEA
c. To impeach the credit of the maker u/s 155 of IEA
d. To show that the implication of the accused was not after thought.
e. To use it as evidence as to the informer's conduct u/s 8 of IEA
f. When the information is given by the accused himself, *FIR* can be used against him as evidence of his conduct (S 8 of IEA): or as an admission (S 21 of IEA), provided it is a non-confessional statement.
g. If the informant dies, and the *FIR* contains a statement as to the cause of his death, or the circumstances resulting in his death, it may be used as substantive evidence as to the cause of his death u/s 32(1) of IEA

B. Recording of Statements of Witness u/s 161

For effective investigation, the police must be able to obtain information from persons acquainted with the facts and circumstances of the case. S 160 authorises a police officer making an investigation to require the attendance before himself of any person who appears to be acquainted with the facts and circumstances of the case. But no male under 15 years or woman shall be required to attend at any place other than the place in which such male or woman resides. The order requiring the attendance of a person must be in writing. A person who fails to comply with the order of the police is liable u/s 174 of IPC.

When a person acquainted with the facts and circumstances of the case appears before a police officer, S 161 empowers the police to examine him orally and reduce the statement into writing. No oath is required in an examination of a person under this section. Such a person is bound to answer truly all questions put to him other than questions the answers to which would have a tendency to expose him to a criminal charge or penalty. If a person, legally bound to answer, refuses to answer such question, then, he is liable u/s 174 of IPC. A person who gives false information can be prosecuted u/s 203 of IPC.

A police officer is not bound to record the statements of witnesses in every case. If he does record, then, he must make a separate and true record of the statement of each such person. He should not have it signed by the witness. The copies of statements recorded u/s 161, must be delivered to accused at the trial as per S 173(5) of Cr.PC. S 162 puts restrictions on the use of statements made to an investigating officer during the course of investigation. Statements recorded u/s 161 can be used only for the following purposes:

(1) The statement can be used in a trial if the person making the statement is examined as a prosecution witness, i.e. such a statement cannot be used for any purpose if the person making the statement is examined as a defence witness.

(2) When the maker of the statement is examined by the prosecution as a witness, the accused shall have the right to contradict such witness as provided u/s 145 of IEA.

(3) When the accused uses the statement for the purpose of contradiction as aforesaid, the prosecution shall have the right to use any part of such statement in the reexamination of the witness but only to explain any matter referred to by the witness in his cross-examination.

(4) With the permission of the court, the prosecution shall also be entitled to contradict the witness u/s 145 of IEA.

(5) The statement will be admissible if it contains information loading to the discovery of a fact u/s 27 of IEA

(6) It is also admissible u/s 32(1) of IEA, if the person making the statement dies.

5.3 Search and Seizure

The power of search and seizure is a very important power for the police during investigation.

The purpose of search is to seize incriminatory articles concerned in an offence.. The power to seize is inherent to the power to search.

(A) Power to Search

Power to search can be exercised only by a police officer authorized by law or by a Magistrate. The power of arrest may be exercised by private persons, but power of search can never be exercised by private persons. Search has to be conducted by the police only under the authority of a warrant issued by a Magistrate. In emergency cases, after recording reasons, he can conduct search without warrant from a Magistrate

The power to search can be invoked for a general search. It can be for a person named or for one or more specific articles.

Search under a warrant: A search warrant is a written authority given to a police officer or other person by a competent Magistrate for the search of persons, place or things. A search warrant is executed in the same way as a warrant for arrest of a person.

Search for persons may be ordered by the District Magistrate, Sub-divisional Magistrate or Magistrate of first class u/s 97 and 98 is an emergency provision empowering the Magistrate to issue a search warrant if the Magistrate has reason to believe that any person has been wrongfully confined. S 98 authorizes the Magistrate to make an order for restoration of a woman or a female child under 18 years who has been abducted or unlawfully detained for any unlawful purpose.

Ss 93 and 94 lay down the procedure for issue of search warrants for search of things in any place. S 93 contemplates the production of some specified thing or object *which* is essential to the conduct of any inquiry and to the conviction of the accused person (e.g. A bloody knife or a forged document). A search warrant may be issued by a court only in 3 cases:

i. when the court has reason to believe that the person summoned to produce a document or thing will not produce it.

ii. when the document or thing is not known to be in possession of any person.

iv. where a general inspection of search is necessary.

S 94 empowers a Magistrate to issue a search warrant if the Magistrate has reason, to believe that any place is used for deposit or sale of stolen property or for the manufacture of any objectionable articles which includes counterfeit coin, forged documents, false seals and obscene objects. The police officer authorized to execute the warrant must be above the rank of a constable.

(B) Search without a warrant

S 165 authorizes the officer in charge of a police station or a police officer making an investigation to make a search without a warrant from a Magistrate. The conditions precedent for a search u/s 165 are:

a) The police officer must have reasonable ground for believing that anything necessary for the purposes of an investigation of an offence may be found within his jurisdiction but cannot be obtained otherwise than by making a search.
b) He must be of the opinion that such thing cannot be otherwise got without undue delay.
c) He must record in writing the grounds of his belief.
d) He must specify, in such writing as far as possible, the things for which the search is to be made.
e) As far as practicable, he must conduct the search in person. If he is unable to do so, he must record in writing the reasons for his inability and shall authorize a subordinate officer to make the search.

(C) Search of an arrested person

S 51 empowers a police officer to make a search of an arrested person. U/s 51, a police officer making the arrest may search the arrested person and place all the

articles seized, except his necessary wearing apparel, in safe custody. A list of articles seized must be given to the arrested person. Search of a female must be made by another female with strict regard to decency. S 52 empowers the police to seize any offensive weapons and deliver to the court u/s 53, when a police officer in charge of a police station has reason to believe that weights, measures of instruments for weighing, which are false, are used or kept in any place, he can inspect and search the place and may seize such weights and measures.

D) General provisions relating to searches

The following provisions would apply in case of every search whether it is with or without a warrant.

1. If the place to be searched is closed, the police officer must demand from the person occupying it, to open it for his access.
2. The police officer must produce the warrant with his demand for ingress.
3. If ingress cannot be obtained, the police officer may break open any door or window for the purpose.
4. The search should be made in the presence of two or more independent and respectable witnesses.
5. The occupant of the place of search, or his nominee, shall in every case be permitted to attend during the search.
6. A list of things seized (search-list) in the course of the search should be pre pared by the police and signed by the witnesses
7. A copy of the search list should be delivered to the occupant or his nominee.
8. The search of a woman must be made by another woman with due regard to decency.
9. The police officer may search a person who is reasonably suspected of con ceiling any article for which search should be made under the warrant.

(E) Power to seize property

The power to seize is inherent to the power to search. The word 'size' implies the power to take physical possession of the property. A police officer lawfully making a search whether with or without warrant, has power to seize all the specified articles for which the search is made. u/s 102 a police officer of any rank has wider powers

to seize anything suspected to have been stolen or involved in the commission any offence. The seizure may be made at any time and irrespective of any investigation offence.

The police officer seizing the property shall forthwith report the seizure to the Magistrate having jurisdiction and if such a officer is a subordinate officer, he must report the seizure to the officer in charge of his police station.

5.4 Police Report (Charge-sheet)

As soon as investigation is completed, the officer in charge of a police station has to submit a report which may be a final report or charge sheet. Upon investigation, if the police finds no sufficient evidence to send the accused for trial, the police submits a report u/s 169 of Cr.PC which is called `final report'. On receipt of the final report, the Magistrate may accept the final report and close the proceedings. If he disagrees, he may give directions to the police for further investigation. The police after such further investigation may submit a charge sheet or again submit a final report.

If the police officer finds that there is sufficient ground for trying the accused, then he has to submit a report u/s 173. This report is called 'charge-sheet'. The police charge-sheet corresponds to the complaint of a private person on which criminal proceedings are initiated. Upon the receipt of charge sheet, the Magistrate can take cognizance of the offence u/s 190(1)(b).

The police report u/s 173 is to be in the form prescribed by the State Goverment with the following particulars:

(i) The names of the parties.

(ii) The nature of the information

(iii) The names of persons who appear to be acquainted with the circumstances of the case

(iv) Whether any offence appears to have been committed and if so, by whom.

(v) Whether the accused has been arrested.

(vi) Whether he has been released on his bond

(vii) Whether he has been forwarded in custody

Ordinarily the investigation is deemed to have been completed on the submission of police report u/s 173(2). Even after filing of the charge sheet, S 173(8) gives power to the police officer to reopen the investigation when fresh facts come to light and submit a further report. No permission of the Magistrate is necessary for the police to make such further investigation.

In framing the charge, the court is not bound by the conclusions of the police report as to the offence involved; the court is at liberty to frame a charge according to law upon the facts and circumstances disclosed before it.

5.5 Arrest

Definition

The word 'arrest' when used in its ordinary and natural sense means the deprivation of one's personal liberty. When used in the legal sense in the procedure connected with criminal offences, an arrest consists of taking into custody of another person under authority empowered by law, for the purpose of-holding or detaining him to answer a criminal charge and preventing the commission of a criminal offence.

The words 'custody and arrest' are not synonymous. It is true that in every arrest there is custody but vice versa is not true.

(i) Types of Arrest

The Code contemplates two types of arrest: (a) arrest with a warrant and (b) arrest without a warrant.

(a) Arrest with a warrant: All offences are divided into two categories - cognizable and non-cognizable offences. Where a person has been concerned in a non-cognizable offence, he cannot (except in a few cases), be arrested without a warrant.

A warrant of arrest is a written order signed, sealed and issued by a Magistrate and addressed to a police officer or some other person specially named and commanding him to arrest the body of the accused person named in it.

A warrant of arrest may be issued by a Magistrate after taking cognizance of any offence, whether it is cognizable or non-cognizable. If the case in which the

cognizance has been taken in a summons case, a summons shall be issued to the accused person in the first instance for his attendance in court; and if the case is a warrant case, a warrant of arrest of the accused may normally be issued for causing the accused to be brought before the court (S. 204). The Code, however, gives discretion to the Magistrate to depart from the general rule if the circumstances so demand in particular case (S. 87).

(b) Arrest without a warrant : In case of a cognizable offence, the accused person may be arrested without any warrant or authority issued by a Magistrate. Cognizable offences are serious offences and there is every chance for the person to abscond unless immediately arrested, and it would be certainly unwise to insist on the arrest being made only after obtaining a warrant from a Magistrate.

(i) Who May Arrest

Under the Code of Criminal Procedure, a police officer, any magistrate and any private person are empowered to arrest without warrant.

(ii) Arrest by police

The police are empowered by Ss. 41, 42, 151 and 432(3) Cr. P.C. to arrest without a warrant. S41 of Cr.PC enumerates nine categories of cases in which a police officer may arrest a person without a warrant.

(A) u/s 41, a police officer may arrest without a warrant

1) any person actually concerned or reasonably suspected to be concerned in a cognizable offence.
2) any person found in possession of any implement of house breaking.
3) any person proclaimed as an offender.
4) Any person found in possession of property reasonably suspected to be stolen, and who may be reasonably suspected of having committed an offence.
5) Any person who obstructs a police officer in the discharge of his duties or who has escaped from lawful custody.
6) Any person reasonably suspected of being a deserter from any of the Armed Forces of the Union.
7) Any person reasonably suspected to have committed an act at a place outside India which if committed in India would be punishable as an offence for which he would be liable to be apprehended or detained in custody in India.

8) Any released convict committing a breach of any rule u/s 356(5)
9) Any person for whose arrest any requisition is received from another police officer competent to arrest that person without a warrant.

(B) u/s 42, a police officer may arrest without warrant a person who

(i) commits a non-cognizable offence in his presence or who has been accused of committing a non- cognizable offence and

(ii) refuses to give his name and residence, or gives his name and residence which the police officer believes to be false. If the name and residence are ascertained, the person is to be released on his executing a bond to appear before a Magistrate.

(C) u/s 151, a police officer may arrest a person without a warrant any person designing to commit a cognizable offence which cannot be prevented other than by the arrest of such a person.

(D) u/s 432(3), when a sentence has been suspended or remitted by the appropriate Govt. upon certain conditions and such conditions are not fulfilled, then, the Government may cancel the suspension or remission. There upon the person may be arrested by any police officer without warrant and remanded to undergo the unexpired portion of the sentence.

In addition, u/s 41(2), an officer-in-charge of a police station may, as a preventive measure, arrest without warrant any person belonging to one or more of the categories of persons specified in S 109 or S 110 e.g. Persons taking precautions to conceal their presence with a view to committing a cognizable offence; habitual offenders, house-breakers, thieves, etc; persons habitually indulging in the commission of certain social and economic offences.

(iii) Arrest by Magistrate

u/s 44 Cr.PC, a Magistrate is empowered to arrest without a warrant. The power of arrest is given to both executive and judicial magistrates. A Magistrate may arrest without warrant.

(1) any person committing any offence in his presence and within his local jurisdiction, or

(2) any person within his local jurisdiction for whose arrest he is competent to issue a warrant.

The Magistrate may himself or with the help of others, arrest the offender. When a Magistrate arrests a person who commits an offence in his presence, he can also commit him to custody.

(iv) Arrest by Private person: Private persons too are empowered to arrest under certain circumstances. This power is to be exercised only when police officers are not available on the scene or while assisting the police or the Magistrate in effecting arrest.

u/s 43, private person is entitled to arrest or cause to be arrested any person

(1) who in his presence commits a non-bailable and cognizable offence

or

(2) who is a proclaimed offender.

Such a private person after arrest, must without unnecessary delay make over the arrested person to a police officer, or if necessary take the arrested person in custody to the nearest police station. If such person is liable to be arrested u/s 41, the police officer may then rear rest the person so handed over to him. If the arrested person is believed to have committed a non-cognizable offence, his name and residence are to be ascertained. If there is no sufficient reason to believe that he has committed any offence, he is to be set at liberty.

5.5.1 Mode of Arrest

S 46 describes the mode in which arrests are to be made. In making the arrest, whether with or without a warrant, the police officer or another person making the same, shall actually touch or confine the body of the person to be arrested unless there be a submission to custody by word or action [S 46(1)]. Touching or confining the body of the person is the symbolic act of arrest, unless the arrested person submits to custody. Mere pronouncing the words of arrest is not an arrest, unless the person sought to be arrested submits to the process and goes with the arresting officer.

u/s 46(2), the person making an arrest may use all means necessary to effect arrest if the person to be arrested evades or forcibly resists the arrest. However, the power to use necessary force for making an arrest shall not extend to causing the death of a person who is not accused of an offence punishable until death or imprisonment for life [S 46(3)].

Legally, this implies that the arresting person can do everything short of causing death to effect the arrest of the person he is authorized to arrest; in cases where the offence with which the person to be arrested is punishable with death or imprisonment for life, it is permissible, if no other course is open, to cause even the death of the person to be arrested in order to effect the arrest of such a person.

The words `may use all means' u/s 46(2) is to be read with S 49 which lays down that an arrested person shall not be subjected to more restraint than is necessary to prevent his escape. Thus the action of an arresting officer is justified only to the extent that it is proved to be necessary to effect the arrest of the person to be arrested.

Apart from S 42 Cr.PC other powers that are granted to the police officer or other person while effecting arrest are:

(1) Power to pursue: A police officer may, for the purpose of arresting without warrant any person whom he is authorized to arrest, pursue such a person into any place in India (S 48). This power can be exercised only by police officer who may go to any place in the Indian Union for the purpose of effecting the arrest.

(2) Power to obtain assistance: A police officer can reasonably demand any person to assist him in the taking or preventing the escape of an offender (S 37). The person asked to assist is under a legal obligation to give assistance.

(3) Power to require subordinate officer to arrest: Any officer in charge of a police station can require any subordinate officer to arrest without a warrant any person (S 55).

(4) Power to rearrest escapee: If a person in lawful custody escapes, then, the person from whose custody he escaped may immediately pursue and arrest him in any place in India (S60).

(5) Power to search premises: A police officer has power to search premises when the persons sought to be arrested are believed to have taken refuge in such premises [S 47(1)]. If ingress cannot be obtained, then the police officer may break open any premises [S 47(2)].

5.5.2 Procedure after Arrest

Procedure after arrest under a warrant: Whenever a person is arrested by a police officer under a warrant, the police officer should notify the substance of the warrant to the person arrested and if so required, show him the warrant (S 75).

Warrants are of the kinds - bailable and non-bailable. A bailable warrant bears an endorsement on the face of it that the police may release the person arrested, the number of sureties to be taken by the police and the amount for which each surety should be bound over. A police officer effecting arrest under a bailable warrant should release the arrested person from custody if he offers the sureties according to the terms of the warrant (S 71).

A police officer effecting arrest under a non-bailable warrant should without unnecessary delay, take the arrested person to the court which issued the warrant (S 76).

(i)Procedure after arrest without a warrant

When a person is arrested without a warrant, the police officer shall take the arrested person before a Magistrate having jurisdiction in the case or before the officer in charge of a police station. (S 56). The police officer can keep the arrested person in custody for a period not exceeding 24 hours (S 57).

Whether a person is arrested with or without a warrant, the following steps must be taken by a police officer:

(1)**Search of arrested person:** Whenever a person who is arrested cannot legally be admitted to bail or is unable to furnish bail, the police officer making the arrest may search such a person, and place in safe custody all articles, other than necessary wearing apparel, found upon him. A receipt showing the articles so seized shall be given to the arrested person. Where the arrested person is a woman, the search shall be made by another woman with strict regard to decency (S 51).

(2) Seizure of offensive weapons: The police officer making the arrest may take from the arrested person any offensive weapons which he has about his person, and shall deliver all weapons so taken to the court or officer before whom the arrested person is to be produced (S 52).

(3) Medical examination of accused : When there is reasonable ground that an examination of the arrested person will afford evidence as to the commission of the offence, then, at the request of a police officer not below the rank of a sub-inspector, such examination could be made by a registered medical practitioner. For the purpose of such medical examination, such force as is reasonably necessary could also be used. If the person to be so examined is a woman, the examination shall be made only by or under the supervision of a registered lady medical practitioner (S 53).

Medical examination of a person cannot be confined only to external examinations of the body of the person. It includes examinations of blood, sputum, semen, urine, etc. The obtaining of such evidence is not violative of Art 20(3) of the Constitution which gives protection against self-incrimination.

(4) Reports of arrest: u/s 58, it is the responsibility of the officer-in-charge of police station to send a report to District Magistrate about all the persons arrested without a warrant, whether they were admitted to bail or not. (S 58).

(5) Person arrested not to be discharged: A person who has been arrested by a police officer shall not be discharged except on his own bond or on bail or under the special order of a Magistrate.

(6) Arrested person should be forwarded to the Magistrate: S 56 lays down that the person arrested shall be taken to the Magistrate without any unnecessary delay. u/s 57, arrested person should not be kept in custody for more than 24 hours without being forwarded to a Magistrate.

5.6 Bail

a. Definition

There is no definition of bail in the Code, although the terms `bailable offence' and non-bailable offence have been defined.

According to S 2(a), 'bailable offence' means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and 'non-bailable offence' means any other offence.

New Oxford Dictionary defines bail as 'release from prison'. Bail means releasing the accused from custody or prison and delivering him into the hands of sureties. The effect of granting bail is not to set the accused free but to release him from the custody of law and to entrust him to the custody of his sureties, who are bound to produce him at the time of trial.

5.6.1 Principles to be followed while Granting Bail

Granting of bail in respect of bailable offence is mandatory, ie, if a person accused of a bailable offence is arrested or detained without warrant, he has a right to be released on bail.

Granting of bail is essentially discretionary in all cases of non-bailable offences. Here bail is not a matter of right, but only a privilege to be granted at the discretion of the court.

The discretion to grant bail in cases of non-bailable offences has to be exercised according to certain rules and principles as laid down by the Code and judicial decisions. The main principles governing grant of bail to an accused person are:

a. The extreme youth age, old age, the severity of punishment he is likely to be awarded, the character and behaviour and state of health of the arrested person are to the considered to see whether he is likely to abscond arrest. The aim of law is to see that its purpose is served and not that, any individual should

be harassed. Where there is no possibility of the arrested person absconding, it is a case for releasing the accused on bail.

b. Danger of the accused person tampering with witnesses is an important consideration in deciding whether the arrested person could be admitted to bail or not.

c. Circumstances in which the accused was arrested have also to be taken into account when deciding whether or not to grant bail to the accused. Where the accused - evaded arrest for a long time, or was caught red-handed while committing grave crimes, it is better not to release such person on bail.

d. Danger of the accused repeating the offence militates against his being released on bail. This is specially the case where the arrested person is a habitual criminal. If the record of the arrested person shows that he has a number of convictions, such a person should not be released on bail.

e. Possibility of revenge by the opposite side, and possibility of breach of the peace on a large scale should all be weighed up carefully before releasing a person on bail.

5.6.2 Bail by Police

Whereas any police officer may exercise the power of arrest, the power to grant bail can be exercised only by an officer-in-charge of a police station or any higher police officer. Ss 436 and 437 of the Code do not make any distinction between the court and an officer-in-charge of a police station in the matter of granting bail.

The police have a duty to grant bail in the following cases:

(a) In respect of bailable offences u/s 436, the police officer is under a duty to release a person arrested for a bailable offence as soon as he is prepared to produce sureties. It is his duty u/s 50(2) of Cr.PC to inform the person arrested that he is entitled to be released on bail.

In the case of a bailable offence, bail is a matter of right and not a favour by the police officer., When a person is arrested in connection with a bailable

offence, the only discretion vested with the police officer is to decide on the number and value of sureties, on the production of which he will release him. The police officer is even authorized to release an arrested person accused of a bailable offence, on his personal bond without sureties.

The intention of the law is that the arrested person accused of a bailable offence should ordinarily be set at liberty, and it is only when he is unable to furnish surety, that he should remain in detention.

(b) In respect of non-bailable offences: u/s 437(2), Cr.PC when a police officer has arrested a person in respect of a non-bailable offence, but if during investigation, it appears that there are no sufficient grounds for believing that the arrested person has committed a non bailable offence, but there are sufficient grounds for further inquiry into his guilt, then, the accused shall be released on bail or at the discretion of such officer, on the execution of personal bond without sureties for his appearance.

(c) Where evidence found is insufficient: At the completion of investigation, the police officer has to forward the arrested person with the charge-sheet and other papers as per S.173. u/s 169, where the investigation does not reveal sufficient evidence to justify the arrested person being forwarded to the Magistrate, then, the police officer shall release the accused on his executing a bond with or without sureties.

(d) Persons arrested under a bailable warrant: S. 71 lays down that while affecting arrest under a bailable warrant the police officer should release the person arrested if he produces sureties as specified in the warrant.

(e) Persons arrested for not giving his true name and address: When a person is arrested for not giving his true name and address or for giving false name and address, he should be released u/s 42(2) immediately on his correct name and address being ascertained by the police.

In all the above mentioned cases, the release of the accused on bail by the police officer is mandatory. The right of the police to refuse bail is thus limited to cases where there are definite grounds for them to believe that the arrested person has

committed a non-bailable offence. Further, they have to exercise their power of granting bail within 24 hours of their taking any person into custody.

5.6.3 Mandatory Release on Bail

The circumstances in which the release on bail is mandatory are as follows:

(a) Where the offence is bailable Where a person who is not accused of a non-bailable offence, is arrested or detained without warrant, and he is prepared to give bail, the police officer or the court is required to release him on bail [S 43(1)]. Instead of taking bail, the accused may even be released on executing a bond without sureties. The above rule covers all cases of persons accused of bailable offences.

The right to be released on bail u/s 436(1) cannot be nullified indirectly by fixing too high the amount of bond or bail bond to be furnished by the person seeking release. S 440(1) specifically provides that the amount of every such bond shall be fixed with due regard to the circumstances of the case and shall not be excessive. Further, S 440(2) empowers the High Court and the Court of Session to direct that the bail required by the police or Magistrate be reduced.

(b) Where the investigation is not completed within the time prescribed A person arrested without a warrant cannot be detained by the police for more that 24 hours (S 57). If the police officer considers it necessary to detain such person for a longer period for the purpose of investigation, he can do so only after obtaining a special order of a Magistrate u/s 167. The total period of detention of the accused which a Magistrate can authorize shall not exceed.

(i) 90 days, in respect of offences punishable with death, life imprisonment or imprisonment for a term not less than 10 years and
(ii) 60 days, in respect of any other offence.

On the expiry of the said period of 90 and 60 days, the accused person shall be released on bail if he is prepared to furnish bail [S 167(2)]. The object of this provision is to put pressure on the investigating agency so that the investigations are completed expeditiously and within reasonable time.

(c) Where no reasonable grounds exist for believing the accused guilty of non-bailable offence: Where any person who is accused of a non-bailable offence, is rested or detained without warrant, and if it appears that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his guilt, then, according to S 437(2), the accused shall be released on bail pending such inquiry.

(d) Where trial before Magistrate is not concluded within 60 days If in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence, is not concluded within a period of 60 days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate [S 437(6)].

(e) Where no reasonable grounds for believing the accused guilty after conclusion of trial but before judgment: If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties, for his appearance to hear judgment delivered [S 437(7)].

5.6.4 Discretion in granting Bail

(a) Bail in case of non-bailable offences

Granting of bail is essentially discretionary in all cases of non-bailable offences. When any person accused of the commission of any non-bailable offence is arrested or detained, then, he may be released on bail [S 437 (1)]. The word `may' clearly indicates the discretion in granting bail in non-bailable cases. The police officer or the court releasing any person in a case of non-bailable offence, is required to record reasons for doing so [S 437(4)].

(b) No bail in case of offence punishable with death or life imprisonment

u/s 437(1), no person who is arrested or detained, shall be released on bail

(i) if there appears reasonable grounds for believing that he has been guilty

of an offence punishable with death or life imprisonment or

(ii) if the offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for 7 years or more or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence.

However, the court may release on bail the following persons:

(i) any person under 16 years,

(ii) any woman,

(iii) any sick or infirm person.

(C) Bail with conditions

While granting bail, the court may impose any condition which it considers necessary

(i) in order to ensure that such person shall attend in accordance with the conditions of the bond, or

(ii) in order to ensure that such person shall not commit **an** offence similar to the offence of which he is accused of, or

(iii) otherwise in the interests of justice.

The above power to impose conditions can only be exercised

1. Where the offence is punishable with imprisonment which may extend to 7 years or more, or
2. Where the offence is one under offences against state, offences affecting human body or offences against property of IPC.
3. Where the offence is one of abetment, conspiracy or attempt in relation to any such offence as mentioned in (1) or (2) above [S 437(3)].

In the case of bailable offences, no condition in the bail bond can be imposed, since this is in direct contravention of S 436 of Cr.PC. Permitting imposition of any condition in the bail bond would amount to granting a discretion to the police or court.

Courts may impose conditions while granting bail only in respect of offences discussed above or in the interests of justice [S 437(3)]. Courts have imposed conditions like the following while granting bail:

1. Accused must stay in a particular town and further attend the Magistrate's court every day.
2. Accused shall report once in every day at the police station and shall not leave the municipal limits except with the permission of the court or officer-in - charge of the police station.

3. Restriction on movement of the accused.

5.6.5 Cancellation of Bail

If an accused person who has been released on bail, attempts to obstruct the smooth progress of a fair trial, tries to jump bail and abscond or to run away to a foreign country, it would be just and reasonable to cancel his bail.

Where a person who is released on bail in respect of a bailable offence, fails to comply with the condition's of the bail bonds as regards the time and place of attendance, the court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the court [S 436(2)]. Such refusal will not affect the powers of the court to forfeit the bond and recover penalty from the surety as laid down by S 446.

In case of an non-bailable offence, any court which has released a person on bail may, if it considers it necessary so to do, cancel the bail and direct that such person be arrested and commit him to custody [S 437(5)].

Irrespective of the question whether the offence is bailable or non-bailable, a High Court or Court of Session may direct that any person who has been released on bail be arrested, and commit him to custody [S 439(2)].

The above provisions give discretionary powers to the courts for cancellation of bail, but they do not give any guidance as to when and how that discretion is to be exercised. In Public Prosecutor V Williams (AIR 1951 Mad 1042), the Madras High Court pointed out five cases where a person granted bail may have the bail cancelled:

i. where the person on bail, during the period of the bail, commits the very same offence for which he is being tried or has been convicted, and thereby proves his utter unfitness to be on bail:

ii. if he hampers the investigation;

iii. if he tampers with the evidence;

iv. if he runs away to a foreign country, or goes underground, or beyond the control of his sureties; and

v. if he commits acts of violence, in revenge, against the police and the prosecution witnesses and those who have booked him.

5.6.6 Bail to a convicted Person

A convicted person may be released on bail either by the Appellate Court or by the Convicting Court

When any appeal against conviction is pending, the Appellate Court may suspend the execution of the sentence, and if the convicted person is in confinement, the Appellate court may release him on bail or on is own bond [S 389(1)]

According to the above rule, the Appellate Court can have the power to grant bail to the convicted person only after the appeal is actually filed. - S 389(3) confers a restricted power to the convicting court to suspend a sentence and grant bail. This is to afford the convicted person an opportunity to present an appeal and obtain orders from the Appellate Court. The circumstances in which the convicted person who intends to file an appeal against his conviction is to be released on bail by the trial court are:

where the convicted person, being on bail, is sentenced to imprisonment for a term not exceeding three years; or

(i) where the offence of which such person has been convicted is a bailable one, and he is on bail [S 389(3)].

The power given to an Appellate Court u/s 389(1) to release a convicted person on bail is a discretionary power and the discretion is to be exercised judicially. But S 389(3) makes it obligatory upon the trial court to grant bail to the convicted person pending presentation of an appeal, provided he satisfies the conditions laid down in the section. If such conditions are fulfilled, the trial court has no option but to grant bail.

5.6.7 Special Powers of High Court/Sessions Court

S 439 gives an unfettered discretion to the High Court or Court of Session to admit an accused person to bail, to cancel the bail or to set aside or modify the bail conditions. u/ s 439, Cr.PC, a High Court or Court of Session has the following special powers:

(i) to release any person on bail who is accused of an offence and in custody;

(ii) to impose any conditions in the bail bond which it considers necessary.

(iii) to set aside or modify any condition imposed by a Magistrate when releasing any person on bail.

(iv) to direct that any person who has been released on bail be arrested and commit him to custody.

Provided that the High Court or Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by a Court of Session or which is punishable with life imprisonment, give notice of the application for bail to the Public Prosecutor. If no such notice is given, reasons for not giving the notice are to be recorded in writing. The reason for making this provision is that in sessions cases, the court should not grant bail to the accessed person without hearing the Public Prosecutor who represents the State.

5.6.8 Anticipatory Bail

Definition: There can be no question of bail unless a person is under a restraint, i.e, in legal custody. Anticipatory bail is a direction to release a person on bail issued even before the person is arrested. The term `anticipatory bail' is really a misnomer, because it is merely an order releasing the accused on bail in the event of his arrest.

Object: Anticipatory bail (S 438) is a new provision made on the recommendation of the Law Commission of India. The object of this new provision is set out by the Law Commission (41 S' Report) as:

"The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days.. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty

while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail."

a. Courts empowered to grant anticipatory bail

S 438 empowers the High Court and Court of Session (the higher echelons of judicial service) to grant anticipatory bail. Thus, the section clearly contemplates two concurrent jurisdictions, namely the High Court and Court of Session. It is left to the person to choose either of them. The provision does not create any bar against moving the High Court without first moving the Sessions Court.

b. Circumstances under which anticipatory bail can be granted

A person may apply to the High Court/Court of Session for a direction that he shall be released on bail in the event of arrest, if he satisfies the following two conditions:

(1) There exists a reasonable ground to believe that he may be arrested, and

(2) The arrest may be in respect of a non-bailable offence.

Mere apprehension of arrest based on imaginary accusations was not sufficient to invoke the anticipatory bail provision. There must be a 'reasonable apprehension' based on facts.

The court may, in its discretion, direct that, in the event of arrest, the persori shall be released on bail [S 438(1)]. While making such a direction, the court may impose certain conditions including

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not make any indecent threat or promise to any person for dissuading him from disclosing the facts of the case to the court or to the police;

(iii) a condition that the person shall not leave India without the previous permission of the court;

(iv) such other conditions as may be imposed as if the bail were granted u/s 437(3) [s 438(2)].

After getting the direction by the Court, if such person is arrested without warrant by a police officer and he is prepared to give bail, he shall be released on bail. If a Magistrate taking cognizance of such offence decides to issue a warrant of arrest against that person, he shall issue a bailable warrant.

5.7 Preventive Provisions Under Cr.PC

5.7.1 Preventive Action of Police

Preventive jurisdiction, under the code, is classified under two heads- magisterial action and police action. Chap. XI (Ss 149-153) of the Code deals with preventive jurisdiction of the police. Chap VIII and X deal with the preventive jurisdiction is quasi-judicial and quasi-executive, the preventive jurisdiction of the. police is purely executive. The powers given are very wide and their jurisdiction is ordinarily of a summary nature.

The preventive jurisdiction of police fall into 3 categories:

(1) Prevention of cognizable offences
(2) Prevention of injury to public property and
(3) Inspection of weights and measures.

(1) Prevention of cognizable offence (Ss 149-151): Police officers have been armed with extensive powers to prevent commission of cognizable offences, i.e. offences for which they could arrest without a warrant. S 149 authorises a police officer to prevent the commission of cognizable offences, but it does not specify what definite acts can be done by a police officer for this purpose.

If the police officer receives information of a design to commit any cognizable offence, he can either pass on the information to his superior police officer or to any other officer (S 150).

S 151 authorises a police officer to arrest a person without warrant or order from the Magistrate if the police officer knew that such person had a design to commit a cognizable offence and it appeared to such officer that the commission of the offence would not be prevented otherwise than by arresting such person. A person so arrested shall not be detained in custody for a period exceeding 24 hours from the time of his arrest unless his further detention is authorized by law.

(2) Prevention of injury to public property: S 152 enables a police officer to prevent injury to public property (moveable or immoveable). A police officer may interpose to prevent any injury to any public property provided the offence should be attempted in the view of the police officer. The word `interpose' denotes some active steps to prevent the commission of offence and not merely an oral order. A police officer may also interpose to prevent injury of any public landmark or buoy, etc used for navigation.

(3) Inspection of weights and measures: S.153 enjoins the officer-in-charge of a police station to check up weights and measures and to see whether false measures and weights are used by businessmen. A police officer may enter and search any place without a warrant, provided the place searched should be within the limits of that station. All he can do is to seize false weights and measures if they are found and to report the seizure to the magistrate having jurisdiction.

5.7.2 Preventive action of court

(a) Security Proceedings (Ss 106-110)

Chapter VIII (Ss 106 to 110) provides for preventive magisterial jurisdiction. The object is the prevention, and not the punishment of a crime. The gist of this Chapter is prevention of crimes and disturbance of public tranquility and breaches of the peace.

The provisions in this Chapter which empower Courts and Magistrates to obtain security from a person to prevent him from committing offences in-the future are of two kinds;

(1) Security for keeping the peace (Ss 106-107)

(2) Security for good behaviour (Ss 108 to 110)

(1) Security for keeping the peace (Ss 106-107): A security for- keeping the peace may be demanded in two classes of cases - (a) From an accused, on conviction (S 106) and (b) in other cases i.e. cases otherwise than on conviction (S 107)

(a) S 106 comes into operation when a person is convicted of offences such as: offences under Chapter VIII of IPC (of offences against the Public Tranquility) other than those punishable u/s 153 A, 153 B or 154; assault, criminal force, mischief or criminal intimidation or any offence involving a breach of the peace.

When a Court of Session or Court of Judicial Magistrate of First Class convicts a person of an offence involving breach of the peace, the Court may, in addition to the sentence that it may award for the offence, order the offender to give security for keeping the peace for a specified period not exceeding 3 years, S106 is aimed at persons who are a danger to the public by reason of commission of offences involving breach of peace and is intended to prevent them from committing such offences in future.

(b) The procedure for demanding security for keeping the peace otherwise than on conviction is laid down in S 107. Only Executive Magistrates are competent to exercise this power. S107 deals with cases where there is likelihood of a breach of the peace.

When an Executive Magistrate receives information that any person is likely to commit a breach of the peace, or disturb the public tranquility and the Magistrate is of the opinion that there is sufficient ground for proceeding u/s 107, he may require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for a period not exceeding 1 year.

In his order requiring such person to show cause, the Magistrate shall set forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be enforced and the number, character and the class of sureties, if any, required (S111).

When such person appears before the court, the Magistrate shall proceed to inquire the truth of the information. If, upon such inquiry, it is proved that it is necessary for keeping the peace that the person should execute a bond, the Magistrate shall make an order accordingly. On the contrary, if it is proved that it is not necessary to require a bond from such person, the Magistrate shall discharge such person.

(2) Security for good behaviour: Ss 108-110 specify three classes of persons from whom security can be demanded for good behaviour - (a) from persons disseminating seditious matters (b) from suspected criminal and (c) from habitual offenders. The powers under these sections can be exercised only by Executive Magistrate.

(a) Security from persons disseminating seditious matter's (S 108): Proceedings u/s 108 can be taken against a person who commits or about to commit an offence punishable under S 124A (sedition), or S 153A (promoting enmity between classes, etc) or s 295A (insulting the religious beliefs of any class); or criminal intimidation or defamation of a Judge; or an offence punishable u/s 292 (publishing an obscene matter).

When an Executive Magistrate receives information that any person is involved in any of the offences specified above and is of the opinion that there is sufficient ground for proceeding, such Magistrate may require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for a period not exceeding 1 year.

(b) Security from suspected criminals (S 109)

u/s 109, similar order for showing cause may be made by an Executive Magistrate when he receives information that any person is taking precautions to conceal his presence and that there is reason to believe that such person is taking such precautions with a view to committing a cognizable offence.

(c) Security from habitual offenders (S 110)

The third category of persons from whom security can be taken for good behaviour is habitual offenders and desperate characters. Habitual offender means:

(1) habitual robber, house-breaker, thief or forger.

(2) habitual receiver of stolen property

(3) habitual harbourer of thieves or habitual abettor in concealment or disposal of stolen property.

(4) Habitual kidnapper, abductor, extortioner, cheat or a person habitually committing mischief, or offences relating to coin, stamps and currency notes.

(5) A person habitually committing offences involving a breach of the peace.

(6) Habitually committing offences falling under Acts like Drugs and Cosmetics Act, Foreign Exchange Regulation Act, Customs Act, etc

(7) Offences of hoarding, profiteering or adulteration of food or drug or of corruption under any law.

In each of the three classes (Ss 108-110), the order to show cause will be followed by an inquiry and a final order requiring the bond or discharging the person as in the case u/ s107.

5.7.3 Dispersal of unlawful Assembly (Ss 129-148)

Chapter X (Ss 129-148) of Cr.PC is another branch of the preventive provisions of the Code. The object of this Chapter is the maintenance of public order and tranquility.

Ss 129-131 empower any Execution Magistrate or an officer-in-charge, any police officer not below the rank of a sub-inspector, to disperse any unlawful assembly. Such officers may command to disperse an assembly which is unlawful (S 141 of IPC) or an assembly of 5 or more persons which is likely to cause a breach of the peace.

Upon being so commanded, if the assembly shows no disposition to disperse quietly, such officers may use civil force to effect the dispersal. They may also require the assistance of any male person for the purpose of dispersing the assembly or for arresting any members thereof.

Before any force can be used for the dispersal of unlawful assembly, three conditions are to be satisfied:

1. There should be an unlawful assembly or an assembly of 5 or more persons likely to cause disturbance of public peace.
2. Such assembly is ordered to be dispersed.
3. In spite of such order, the assembly does not disperse.

U/s 130 Executive Magistrate is also authorized to use armed forces, if the unlawful assembly cannot otherwise be dispersed. This power may be exercised only by the Executive Magistrate of the highest rank who is present on the spot. The military must use minimum force and cause minimum injury to person and property.

In cases of emergency when no Executive Magistrate is present, a Commissioned or gazetted Army officer may proceed to disperse an unlawful assembly, with the help of the forces under his command (S 131). Such officer has also power to take into custody any offender. But such officer should communicate with the nearest Executive Magistrate at the earliest time and obey his instructions in the matter of continuing or discontinuing the action of dispersal of the unlawful assembly.

S 132 gives protection against prosecution for acts done u/s 129-131. S 132 provides that where a Magistrate or Police or Military officer is sought to be prosecuted for an offence alleged to have been committed by him while acting u/s 129-131, the prosecution shall not be maintainable without the sanction of the State or Central Government.

5.7.4 Removal of Public Nuisance (Ss 133-140)

Another branch of preventive jurisdiction is the power of Magistrate to deal with public nuisance. S 133 provides for a speedy remedy to prevent public nuisance: or danger. Though a civil suit may be brought for the removal of public nuisance, S 133 can be invoked for the removal of public nuisance, but it cannot be used as a substitute for litigation in civil courts.

S 133 empowers a District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate authorized by State Government to make a conditional order for the removal of a public nuisance, if the Magistrate is satisfied that such order should be made, on the report of a police officer or other information.

In order to invoke S 133 the nuisance must be public nuisance. According to S 268 of IPC, in order to constitute a public nuisance, the injury, danger, or annoyance must be caused to the public or to the people in the vicinity or to persons who may have occasion to exercise any public right. An order u/s 133 can be issued in any of the following kinds of public nuisance:

1. The unlawful obstruction or nuisance to (a) any way, river or channel which is or may be lawfully used by the public; (b) any public place.

2. The conduct of any trade or keeping of any goods which is injurious to the health of the community.

3. The construction of any building or disposal of any substance likely to cause conflagration or explosion.

4. Any building, tent or structure being in such condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood.

5. Any tank, well or excavation adjacent to any public way remaining unfenced.

6. Any dangerous animal requiring destruction or disposal

Once the Magistrate is satisfied as to the existence of such nuisance (any of the six kinds of nuisance mentioned above) he is competent to make a conditional order u/s 133, requiring the person causing such nuisance to remove the nuisance within a time fixed in the order or to show cause why the conditional order should be made absolute.

If the person carries out the order, the proceedings will come to an end. If the person does not comply with the order and fails to appear before the Magistrate, the order is made absolute. If, however, the person appears and denies the existence of any public right as alleged, Magistrate shall make an inquiry.

If upon making such inquiry, the Magistrate is satisfied that the conditional order is proper, he shall make the order absolute. If he is not satisfied that the conditional order is reasonable the proceedings will come to an end.

When an order is made absolute, the person will be called upon to carry it out within a specified time. If he fails to carry it out, he may be prosecuted u/s 188 of IPC. It is also open to the Magistrate to carry out the order and recover costs from the defaulter. In case of imminent danger or injury of a serious kind to the public, the Magistrate will forthwith issue an injunction to the person. The Magistrate has also power to order any person not to repeat or continue a public nuisance.

5.7.5 Preventive Measures in Urgent Cases of Nuisance (S 144)

Cases of ordinary public nuisance can be dealt u/s 133 but S 144 confers power on Magistrates to issue orders absolute at once in urgent cases of nuisance or apprehended danger. S 144 confers powers on the District Magistrate, Sub-divisional Magistrate or any Executive Magistrate authorized by State Government.

Whenever it appears to a Magistrate that an action u/s 144 is necessary in order to effect an immediate prevention of danger to public, he may issue a written order setting forth the material facts of the case. Any order u/s 144 can be made to prevent the following three categories of dangers:

(a) Obstruction, annoyance or injury to any person lawfully employed. (b) Danger to human life, health or safety. (c) A disturbance of public tranquility, or riot or affray.

In case of emergency, an order u/s 144 can be passed exparte, but they are always temporary in their duration. An order will remain in force only for 2 months, and only in exceptional cases, the State Govt. can enhance the duration upto a further, period of 6 months.

The order may either be directed to person individually, or to persons residing in a particular area, or to the public generally, within a particular place. The Magistrate of State Government may rescind or alter the order either suo moto or on the application of the person aggrieve

5.7.6 Preventive Measures in Respect of Disputes as to Immovable Property (Ss 145 to 147)

Disputes over land and water often result in breach of the peace, violence and blood-shed. S 145 is intended to provide a speedy remedy for the prevention of a breach of peace arising out of a dispute relating to possession of immovable property. The object is to maintain the public peace and not to decide disputes between parties. A proceeding u/s 145 is not for eviction of a person from any land but for the prevention of breach of the peace by declaring the party found in possession to be entitled to remain in possession until evicted there from in due course of law.

Dispute relating to possession of immovable property (S 145): Upon a report of a police officer or upon other information, if an Executive Magistrate is satisfied that a dispute concerning any land or water exists within his jurisdiction and such dispute is likely to cause a breach of the peace, the Magistrate shall make an order in writing calling upon the parties to put in written statements in support of their claim to actual possession. A copy of the order shall be served as a summons.

If any party shows that no such dispute exists, and the Magistrate is satisfied as to the absence of any such dispute, he shall cancel his earlier order and all further proceedings will come to an end. If possession has been wrongfully taken within 2 months of police report or other information, or after that date and before the date of his order, the person so dispossessed is to be taken as the person in possession.

When the subject matter is liable to speedy and natural decay, it may be sold, and the sale proceeds can be dealt with as the magistrate thinks fit. If the Magistrate declares that one party is in possession, that party can be evicted only by a decree of the civil court on titleS.146 empowers the Magistrate to attach subject of dispute and to appoint receiver. An order of attachment u/s 146 can be made if the Magistrate

(1) considers the case to be one of emergency, or
(2) decides that none of the parties was in possession, or
(3) cannot decide which of them was in possession.

When the property is attached u/s 146, the party in possession is deprived of his possession and the property is brought under the custody of the court. The order of attachment remain in force until a competent court decides the rights of the parties or until the Magistrate withdraws it.

Dispute relating to user of immovable property: S 147 is an amplification of S 145 applies where the apprehension of breach of the peace arises out of a dispute relating to possession of immovable property, while S 147 applies if such dispute relates to user of immovable property. S 147 refers to any right of user of land or water, whether such right be claimed as an easement or otherwise. The word `user'

connotes user of a legal right relating to a land as distinct from the user of the land as owner.

Before a Magistrate can make an order u/s 147, the following conditions must be satisfied:

(1) The Magistrate must be satisfied that there is a dispute likely to cause a breach of the peace

(2) Such dispute must relate to an alleged right of user of any land or water within his local jurisdiction

The procedure at the inquiry is the same as that provided by S 145. If the inquiry shows that the right exists, the magistrate may make an order prohibiting any interference with the exercise of the right. If it appears that the right does not exist, an order may be made prohibiting the exercise of the right.

S147 comes into operation only if the right is exercised within 3 months of the receipt of police report in cases of rights exercisable at all times of the year or if the right is exercised at the last particular season of periodically recurring rights. A crime is a wrong not only against the victim but also against the State. Therefore the State takes upon itself the responsibility of prosecuting the accused. The Public Prosecutor or Assistant Public Prosecutor represents the State.

According to S 2(u), a person is a public Prosecutor only if he is appointed as such u/s 24 or is acting under the directions of a Public Prosecutor. S 24 provides the following categories of Public' Prosecutors:

(1) A Public Prosecutor for the High Court, appointed by Central or State Govt., after consultation with High Court

(2) A Public Prosecutor appointed by Central Govt. for conducting any case or classes of cases in any area.

(3) A Public Prosecutor for each district, appointed by State Government, after consultation with Sessions Judge.

(4) Additional Public Prosecutor for High Court or district.

(5) A Special Public Prosecutor

(6) Any person authorised by the Public Prosecutor to act on his behalf.

A person to be appointed as Public Prosecutor or Additional Public Prosecutor must have been in practice as an advocate for not less than 7 years. A Special Public Prosecutor must have been in practice for not less than 10 years.

Role of Public Prosecutor - In theory, the Public Prosecutor stands for the State in whose name all prosecutions are conducted. In conducting a prosecution, the Public Prosecutor represents the State and not the police. No Public Prosecutor can appear against the State in any criminal proceedings. He must conduct the prosecution for the purpose of determining the innocence or guilt of the accused and not to secure a conviction at any cost. He must therefore, discharge his duty fairly and fearlessly and place the testimony of all available witnesses before the court. In a larger sense, Public Prosecutor is an officer of the court and is bound to assist the court.
The functions of the Public Prosecutor are:

(1) Public Prosecutor conducts every trial before a Court of Session (S 225).
(2) He may appear and conduct prosecution in any case before a Magistrate trying a case, without any written authority of the Magistrate (S 302).
(3) A complaint in writing by the Public Prosecutor is necessary for taking cognizance for the offence of defamation against high dignitaries (S 199):
(4) A certificate of the Public Prosecutor is necessary for trial of an approver who has not complied with the conditions of tender of pardon (S 308)
(5) With the consent of the court, the Public Prosecutor who is in charge of a case can withdraw prosecution against one or all the accused (S 321).
(6) Public Prosecutor can appeal against acquittal, if directed by State Government (S378)
(7) For transfer of case, notice must be given to be Public Prosecutor by the accused person (S 407)

Assistant Public Prosecutor

S 25 empowers the State Govt. to appoint Assistant Public Prosecutor for conducting prosecution in every district before courts of Magistrates. The Central Government is also empowered to appoint Assistant Public Prosecutor for conducting any case or classes of cases in the courts of Magistrates.

S 25 prescribes no qualification for a person being appointed as Assistant Public Prosecutor. Hence any one may be appointed as Assistant Public Prosecutor. He need not be a practicing advocate.

A police officer

(i) Who is not below the rank of Inspector or

(ii) Who has not taken any part in the investigation of the offenceis also eligible for being appointed as Assistant Public Prosecutor where no Assistant Public Prosecutor is available. This power can be exercised by the District Magistrate and the appointments only for the purpose of a particular case.

Withdrawal from Prosecution: Once a prosecution is launched, its relentless course cannot be halted except on sound considerations germane to public justice. S 321 implicitly makes room for such considerations by enabling to Public Prosecutor to withdraw from the prosecution of any person with the consent of the court.

The withdrawal from prosecution may be justified on broader consideration of public peace, larger consideration of public justice, and even deeper considerations of promotion of long lasting security in a locality, of order in a disorderly situation or harmony in a faction mildew or for halting a false and vexatious prosecution.

Withdrawal from a prosecution means withdrawal from proceeding with the prosecution. Only the Public Prosecutor or the Assistant Public Prosecutor, or the case may be, who is in charge of a particular case and is actually conducting the prosecution can alone file an application seeking permission to withdraw from the prosecution. If the prosecution is being conducted by the complainant on a private complaint, the Public Prosecutor is not entitled to apply for withdrawal.

The Public Prosecutor may withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he in charged. Withdrawal from the prosecution can be sought at any time before the judgment is pronounced' by the trial court. Therefore the Public Prosecutor has no right at the appellate stage of a case to present any petition for withdrawal. When the court consents to

such withdrawal from the prosecution, the accused person shall be discharged if withdrawal is made before a charge has been formed; or acquitted if withdrawal is made after a charge has been framed.

5.9 Criminal Courts' Jurisdictions and their Powers

1. Classification of Criminal Courts (Ss 6-25)

The Constitution of India establishes the Supreme Court which is the head of the judiciary of all courts in India. It also establishes a High Court for each State which stands as the head of the judiciary in the State

In each State, the criminal courts are classified into 4 groups:

(1) Sessions Courts, (2) Judicial Magistrates, (3) Metropolitan Magistrates and (4) Executive Magistrates.

(1) Sessions Courts (Ss 9-10): Each State is divided into one or more sessions divisions and there is a Court of Session for each division presided over by a Sessions Judge appointed by the High Court. The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in the Court of Session. A Sessions Court has got appellate and revisional jurisdiction over the inferior criminal courts. An Assistant Sessions Judge is subordinate to the Sessions Judge.

(2) Judicial Magistrates (Ss 11-15): In each district, outside the metropolitan area, there shall be Judicial Magistrates of first class and second class. These courts are established by the State Govt. after consultation with the High Court. The presiding officers of these courts are appointed by the High Court.

One of the Judicial Magistrates of the first class is appointed as the Chief Judicial Magistrate(CJM), who shall be subordinate to the Sessions Judge. Every other Judicial Magistrates shall, subject to the general control of the Sessions Judge, be subordinate to the CJM.

The State Govt. may also establish, after consultation with the High Court, one or more Special Courts of Judicial Magistrates to try any particular case or classes of cases.

The High Court may also appoint any Judicial Magistrate of the first class to be an Additional Chief Judicial Magistrate. For any sub-division of a district, the High Court may appoint any Judicial Magistrate of the first class as the sub-divisional Judicial Magistrate in charge of a sub-division.

(3) Metropolitan Magistrates (Ss 16-19): The Metropolitan Magistrates are the Judicial Magistrate in a metropolitan area. As per S 8, the presidency towns of Bombay, Calcutta, Madras and the city of Ahmedabad are declared as metropolitan areas. Any area comprising a city or town and having a population exceeding one million may be declared by the State Govt. as a metropolitan area.

The State Government may, after consultation with the High Court, establish Courts of Metropolitan Magistrates at such places and in such numbers as it thinks necessary. The presiding officers of such courts are appointed by the High Court.

Following the pattern of Judicial Magistrates in the district, the Metropolitan Magistrates are sub-divided into the following categories: (a) Chief Metropolitan Magistrates, (b) Additional Chief Metropolitan Magistrates and (c) Special Metropolitan Magistrate.

The Chief Metropolitan Magistrate and every Additional Chief Metropolitan Magistrate shall be subordinate to the Sessions 'Judge. Every other Metropolitan Magistrates shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Metropolitan Magistrate.

(4) Executive Magistrates (Ss 20-25): The code has adopted the policy of separation of the Judiciary from the Executive. As a consequence of the separation, there are now two categories of Magistrates, namely the Judicial Magistrates and the Executive Magistrates; the former being under the control of the High Court and the latter under the control of the State Govt. Broadly speaking, functions which are essentially judicial in nature are the concern of the Judicial Magistrates while functions which are police or administrative in nature are the concern of the Executive Magistrates.

There are five classes of Executive Magistrates:

(1) District Magistrate, (2) Additional District Magistrate, (3) Sub-Divisional Magistrate, (4) Executive Magistrate and (5) Special Executive Magistrate.

Besides these, in a metropolitan are, the State Government may confer all or any of the powers of the Executive Magistrate on the Commissioner of Police.

All Executive Magistrates other than Additional District Magistrate, shall be subordinate to the District Magistrate. Every Executive Magistrate exercising powers in a subdivision shall also be subordinate to the sub-divisional Magistrate, subject to the general control of the District Magistrate.

(5) Powers of Criminal Courts (Ss 26-35)

The Supreme Court and High courts can pass any sentence authorized by law. The maximum limits of sentences which can be passed by other criminal courts are:

(1) A Sessions Judge or Additional Sessions Judge can pass any sentence authorized by law, but any sentence of death passed by such judge is subject to confirmation by the High Court (S 28).

(2) An Assistant Sessions Judge can pass any sentence authorized by law other than a sentence of death, imprisonment for life, or imprisonment for a term exceeding 10 years (S 28).

(3) A Chief Judicial Magistrate or a Chief Metropolitan Magistrate can pass any sentence authorized by law other than a sentence of death, imprisonment for life or imprisonment for a term exceeding 7 years (S 29).

(4) A Judicial Magistrate of first class or a Metropolitan Magistrate can pass a sentence of imprisonment for a term not exceeding 3 years or of fine not exceeding Rs. 5,000 or both (S 29).

(5) A Magistrate of the second class or a Special Judicial Magistrate can pass a sentence of imprisonment for a term not exceeding 1 year or of fine not exceeding Rs. 1,000 or both (S 29).

5.10 Types of Trial

(A) Summary Trial

Summary trial implies speedy disposal of petty cases. It is not intended for a complicated case which necessitates a lengthy inquiry. In respect of certain petty cases including mostly summons cases and a few warrant cases, courts have been empowered to use summary procedure which is essentially an abridged from of summons case procedure.

(a) Characteristics of Summary Trial

1. A summary trial can be held only by Magistrates empowered u/s 260 and 261.
2. It can be held only in respect of offences enumerated in S 260.
3. Procedure prescribed for trial of summons cases should be followed. No formal charge is framed.
4. At the conclusion of the trial, the Magistrate enters the accused plea and the finding in a form prescribed by the Government.
5. In case of conviction, the sentence of imprisonment shall not exceed three months. But there is no limit as to the amount of fine.
6. There is no appeal if a sentence of fine only not exceeding Rs. 200 has been awarded.

(b) Magistrates empowered to try cases summarily (Ss 260-261)

u/s 260, the following Magistrates are empowered to try cases summarily:

(1) Chief Judicial Magistrate

(2) Metropolitan Magistrate

(3) Magistrate of first class specially empowered by High Court. ,

u/s 261, a Magistrate of second class specially empowered by High Court may also try summarily any offence which is punishable with fine only or with imprisonment for a term not exceeding 6 months with or without fine.

1. Offences triable summarily (S 260): The following offences are triable summarily

1. Offences not punishable with death, imprisonment for life or imprisonment for a term exceeding 2 years.

2. u/s 379-81 (theft), where the value of the property stolen does not exceed Rs. 200.
3. u/s 411 (stolen property), where the value of such property does not exceed Rs. 200.
4. u/s 414 assisting in concealment or disposal of stolen property, where the value of such property does not exceed Rs. 200.
5. u/s 454 and 456 (linking to use-trespass)
6. u/s 504 (insult intended to provoke breach of the peace).
7. u/s 506 (criminal intimidation).
8. Abetment of any of the foregoing offences and attempt to commit any of them when such attempt itself is an offence under the law.
9. Offences u/s 20, Cattle-Trespass Act, 1871.

It is in the discretion of the Magistrate to try any of the offences specified in S 260 in a summary way. The Magistrate should use his discretion according to the circumstances and should avoid summary trial where the facts are complicated. Even after proceeding to some extent, if the Magistrate considers it undesirable to try the case under the summary procedure, he may resort to the regular procedure *de novo*.

Record in Summary Trial (S 263) : In every summary trial, the Magistrate shall record the following particulars in the prescribed form:

(1) the serial number of the case
(2) the date of commission of the offence
(3) the date of the report or complaint
(4) the name of the complainant (if any)
(5) the name, parentage and residence of the accused
(6) the offence complained of and the offence proved
(7) the plea of the accused and his examination
(8) the finding
(9) the sentence or other final order
(10) the date on which proceedings terminated.

In cases where the accused pleads guilty, nothing more than the particulars mentioned in S 263 need be recorded. Where the accused does not plead guilty, the Magistrate shall, apart from entering the particulars specified in S 263 in his summary register, record the substance of the evidence; and the judgment must contain the reasons for his order of acquittal or conviction.

(B) Summons Trial

The division of cases into summons and warrant cases is based on the punishment which can be awarded. It is a warrant case if the offence is punishable with death or imprisonment for life or imprisonment for a term exceeding 2 years [S 2(x)]. All other cases are summons cases, i.e. cases which are punishable with imprisonment for 2 years and under. This division marks off ordinary cases from serious ones, and determine the mode of trials. The Code prescribes different procedures for the trial of warrant and summons cases. The procedure for a summons case aims at a speedier disposal of cases.

Chapter XX(Ss 251-259) deals with the procedure for trial in a summons case:

(1) Explaining the substance of accusation to the accused - In a summons case, where the accused appears before the Magistrate, the particulars of the offence of which he is charged, are to be stated to him. In a summary case, no charge need be framed. After explaining the particulars of the offence, the court shall then ask the accused person whether he pleads guilty or has any defence to make (S 251).

(2) Conviction on plea of guilty - If the accused pleads guilty, the Magistrate shall record the plea as nearly as possible in the words used by the accused. Then the Magistrate has the discretion to convict him. Where the Magistrate uses the discretion not to convict him on the plea of guilty, he must proceed to take evidence on both sides and hear them (S 252). S253 enables the accused to plead guilty through post or messenger or pleader. The Magistrate is given discretion to convict the accused on such plea. This will save the tire of the court and result in speedy disposal of such cases.

(3) Hearing of the prosecution case - If the Magistrate does not convict the accused on his plea of guilty or the accused does not plead guilty, the Magistrate shall proceed to hear the prosecution (S 254).

The Magistrate shall then take all such evidence as may be produced in support of the prosecution. He may issue a summons, on the application of the prosecution, to any witness directing him to attend (S 254)

As the examination of each witness proceeds, the Magistrate shall make a memorandum of the substance of his evidence in the language of the court. Each memorandum shall be signed by the Magistrate and shall form part of the record (S 274).

The prosecutor then submits his arguments after the conclusion of the prosecution evidence (S 314).

(4) Personal examination of the accused - After taking of the prosecution evidence, the court is required to examine the accused (S 313). The object of this examination is to give the accused an opportunity of explaining the circumstances that appear against him in the evidence.

(5) Hearing of the defence case - The Magistrate shall then hear the accused and take all such evidence as he produces in his defence. Then the Magistrate shall make a memorandum of the substance of the evidence. After the conclusion of the defence evidence, the accused is allowed to submit his arguments.

(6)Acquittal or conviction - After taking the entire evidence, if the Magistrate finds the accused not guilty, he shall record an order of acquittal.

If the Magistrate find the accused guilty, he is required to pass sentence on him. However, u/s 360, instead of passing the sentence, the Magistrate may release the offender after admonition or on probation considering the character of the offender, the nature of the offence and the circumstances of the case.

(C) Warrant Trial

Chapter XIX of the Code (Ss 238-250) is concerned with procedure in respect of trial of warrant cases wither instituted on a police - report (Ss 238-243) or instituted otherwise than on a police report (Ss 244-247). Ss 248-250 deal with the conclusion of the trial.

In a warrant case instituted on a police report, the record made during investigation by the police is available both to the court and the accused for the purposes of trial. Such record is non-existent in warrant cases instituted otherwise than on police report. In such case, some special provisions become necessary to enable the accused to acquaint himself with the facts of the case on which the prosecution is relying before he is called upon to defend himself.

(a)Warrant Trial instituted on a Police Report

(1) Supply of copies to the accused - When the accused appears before a Magistrate at the commencement of the trial, the Magistrate shall satisfy himself that he has supplied to the accused copies of FIR, police report, statements recorded by police during investigation, etc, (S 238)

(2) Discharge of the accused - After perusing the police report and other documents and examining the accused if necessary and having the prosecution and the accused, if the Magistrate considers the accusation to be groundless, he shall discharge the accused and record his reasons for so doing (S 239).

(3) Framing of charge - If the Magistrate is of the opinion that there is ground for presuming that the accused has committed an offence, he shall frame in writing a charge against the accused [S 240(1)].

(4) Explaining the charge to the accused - After the framing of charge, it shall be read and explained to the accused. The accused shall then be asked whether he pleads guilty or claims to be tried [S 24(2)].

(5) Conviction on plea of guilty - If the accused pleads guilty, the Magistrate shall record the plea, and may convict him. It is not obligatory on the part of the Magistrate to convict him even if the accused pleads guilty. The conviction solely upon the plea of guilty is discretionary with the Magistrate (S 241).

(6) Fixing date for examination of witness - If the accused does not plead or claims to be tried or the Magistrate does not convict the accused, then the Magistrate shall fix a date for the examination of witnesses. On the application of the

prosecution, the Magistrate may issue a summons to any of its witness directing him to attend or produce any document **(S 242).**

(7) Evidence for prosecution - On the date fixed for hearing, the Magistrate shall take evidence produced by the prosecution. After the completion of the prosecution evidence, two important steps are to follow:

(i) Oral arguments and submission of memorandum of arguments on behalf of the prosecution.

(ii) Examination of accused u/s 313.

(8) Evidence for defence - After the prosecution evidence is over, the accused shall be called upon to enter his defence and produce his evidence. If the accused puts in any written statement, the Magistrate shall file it with the record (S 243)

(9) Acquittal or conviction - After the close of the evidence for defence, and upon hearing the arguments, the Magistrate shall give a judgment. If the Magistrate finds the accused not guilty, he shall record on order of acquittal. If he finds the accused guilty, he shall hear the accused on the question of sentence and then pass a sentence according to law **(S248)**

(b) Warrant Trial instituted otherwise than on a Police Report

(1) Preliminary hearing of the Prosecution case - In warrant cases instituted otherwise than on a police report, when the accused appears before the court, the Magistrate shall take all such evidence as may be produced in support of the prosecution. (S244).

(2)Discharge of accused - Upon taking all such prosecution evidence, if the Magistrate considers that no case against the accused has been made out, then, the Magistrate shall discharge the accused after recording his reasons.

Even at any previous age of the case, the Magistrate can discharge the accused if he considers the charge to be groundless (S 245).

(3) Framing of charge - Upon taking all the prosecution evidence, if the Magistrate considers that there is ground for presuming that the accused has committed an offence, the Magistrate shall frame in writing a charge against the accused

(S 246).

(4) Explaining the charge to the accused - After the framing of the charge, it shall be read and explained to the accused, and he shall be asked whether he pleads guilty or claims to be tried (S 246).

(5) Conviction on plea of guilty - If the accused pleads guilty, the Magistrate shall record the plea and may convict him (S 246)

(6) Evidence for prosecution - As some of the prosecution witnesses are already examined before the framing of the charge, the magistrate shall require the accused to state whether he wishes to cross - examine any of the prosecution witnesses whose evidence has been taken. If he indicates his desire to cross-examine, the witnesses named by him shall be recalled. Then the evidence of the remaining witnesses for the prosecution shall be taken (S 246). After the completion of the prosecution evidence, arguments will be submitted on behalf of the prosecution and the accused will be examined u/s 313.

(7) Evidence for defence - After the prosecution evidence is over, the accused shall be called upon to enter his defence and produce his evidence (S 247)

(8) Acquittal or conviction - After the close of the evidence for defence, and upon hearing the arguments, the Magistrate shall give a judgment. If the Magistrate finds the accused not guilty, he shall record an order of acquittal. If he finds the accused guilty, he shall hear the accused on the question of sentence and then pass a sentence according to law (S 248).

Check Your Progress

1.What is meant by 'Solitary Confinement'?

2.Describe the characteristics of FIR

3.Explain ' Charge sheet'

5.11 Appeal, Revision and Review

5.11.1 Appeal

1. Definition

According to Black's law Dictionary, an appeal is a complaint to a superior court of an injustice done or error committed by inferior one, whose judgment or decision the court above is called upon to correct or reverse.

An appeal is a creature of statute and only exists where expressly given. Thus there is no inherent right or appeal. According to S 372, no appeal shall lie from any judgment or order of a criminal court except as provided, Code or by any other law.

(a) Cases Where There is no Appeal

Based on the general rule, `no right of appeal unless specifically provided by law', the Code has made definite provisions regarding the circumstances in which an appeal shall lie. Ss375 and 376 specify the cases in which there are no appeal.

No appeal from conviction on plea of guilty: (S 375) Where an accused person has pleaded guilty and has been convicted on such plea, there shall be no appeal

(a) if the conviction is by a High Court or

(b) if the conviction is by a Court of Session, Metropolitan Magistrate, Magistrate of first or second class, except as to the extent or legality of the sentence.

The plea of guilty is regarded as a waiver of the right to appeal. The rationale behind S 375 is that a person who deliberately pleads guilty cannot be aggrieved by being convicted, and hence he is not entitled to appeal from such a conviction. But he is not denied the right to challenge the extent or legality of the sentence. But if a High Court convicts and sentences a person on a plea of guilty, there is no appeal even as regards the extent or legality of the sentence.

No appeal in petty cases: S 376 provides that there shall be no appeal by a convicted person in any of the following cases, namely

a) where a High Court passes only a sentence of imprisonment upto 6 months or of fine upto Rs. 1000 or both;
b) where a Court of Session or a Metropolitan magistrate passes only a sentence of imprisonment upto 3 months or fine up to Rs. 200 or both:
c) where a Magistrate of first class passes only a sentence of fine upto Rs. 100
d) where a Magistrate, in a summary trial, passes only a sentence of fine upto Rs. 200.

However, an appeal may be brought against the above mentioned non-appealate sentence if any other punishment is combined with it. But such sentence shall not be appealable merely on the ground-

i. that the person convicted is ordered to furnish security to keep the peace; or
ii. that imprisonment in default of payment of fine is included in the sentence; or
iii. that more than one sentence of fine is passed in the case.

(b) Appeal against Inadequacy of Sentence

S 377 empowers the Government (State and Central) to file appeal through their respective Public Prosecutors to High Court against the sentence on the ground of inadequacy of such sentence.

An appeal for enhancement of a sentence on the ground of its inadequacy can be entertained only by the High Court. This would help to maintain certain uniform standards in the matter of inflicting adequate and proper sentence.

The right to appeal against inadequacy of the sentence has been given only to the State and not to the complainant or any other person. But the complainant or any other *person can move the High Court or Court of Session in revision for enhancement of the* sentence.

When an appeal is filled against inadequacy of sentence, the High Court shall not enhance the sentence unless the accused is given reasonable opportunity of showing cause against enhancement. Whilst showing cause, the accused has the right to challenge the conviction itself and plead for his acquittal or for reduction of the sentence.

(A) Appeal Against conviction

(a) Appeal to Supreme Court

a. Any person convicted by a High Court in the exercise of its extra - ordinary original criminal jurisdiction may appeal to Supreme Court [S 374(1)].
b. Where the High Court has, an appeal, reversed on order of acquittal and sentenced an accused person to death, life imprisonment to imprisonment for a term of 10 years or more, the accused may appeal to Supreme Court [S 379).

c. An appeal shall lie to the Supreme Court against the decision of the High Court if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution [Art.'132(1) of the Constitution]

d. Where the High Court has refused to give a certificate under Art 132(1) of the Constitution, the supreme Court may, in a fit case, grant special leave to appeal from such decision [Art 132(2) of the Constitution].

e. According to Art. 134(1) of the Constitution, an appeal shall lie to the Supreme Court from any decision of the High Court, if the High Court

i. has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death, or

ii. certifies that the case is a fit one for appeal to the Supreme Court.

f. Article 136(1) of the Constitution provides that the Supreme Court, may, grant special leave to appeal from any judgment, decree, sentence or order passed by any court in the territory of India.

(b) Appeal to the High Court

Any person may appeal to the High Court if he is convicted on a trial held by –

(i) a Sessions Judge or an Additional Sessions Judge, or

(ii) any other court in which a sentence of imprisonment for a term exceeding 7 years has been passed against him or against any other person convicted at the same trial. [S 374(2)].

(c) Appeal to the Court of Sessions

Any person may appeal to the Court of Sessions if he is

i. convicted on a trial held by a metropolitan Magistrate or Assistant Sessions Judge, or Magistrate of the first class or second class; or

ii. sentenced u/s 325 (S 325 deals with the procedure when Magistrate cannot pass sentence sufficiently severe); or

iii. convicted but released on probation of good conduct or after admonition u/s 360 Cr.PC.

(d) Appeal against Acquittal

Appeal against an order of acquittal is an extra-ordinary remedy. u/s 378 Cr.PC an appeal against an order of acquittal can be preferred either by the Government or by the complainant.

(e) Appeal by Government

The state Government has the same right of appeal against an acquittal as a person convicted has against his conviction and sentence. An appeal u/s 378(1) can only be presented to the High Court from an original or appellate order of acquittal passed by any court or from an order or acquittal passed by a Session Court in revision.

An appeal by the State is to be presented by the Public Prosecutor upon the direction of the State government. The public prosecutor has no power to suo motto file such an appeal.

The right of such appeal can be exercised only after obtaining the leave of the High Court Under Art. 114 of Limitation Act. In an appeal from an order of acquittal by the State, the period of limitation is 90 date of the order appealed from

(f) Appeal by the complainant

u/s 378(4). in a case instituted upon a complaint (where a complaint is filed and cognizance of the offence is taken by the Magistrate upon such complaint) the complainant can challenge the order of acquittal by way of appeal to the High Court.

The right of appeal can be exercised only after obtaining special leave of the High Court. If the complainant is a public servant. An application for the grant of such special leave must be presented to the High Court within 6 months from the date of the order of acquittal. If the complainant is any other person, such an application must be presented within 60 days [S 378(5)].

Under Art 114. of Limitation Act. an order of acquittal in a case instituted upon a complaint must be presented within 30 days form the date of grant of special leave to appeal.

According to S 378(6) , an appeal by the Government is barred in case the application of the complainant for grant of special leave is refused by the High Court.

(g) Jail Appeal

An appeal presented to jail authorities u/s 383 is usually called 'jail appeal'. When the applicant is in jail, he may present his petition of appeal and the copies accompanying the same to the officer-in-charger of the jail, who shall thereupon forward such petition and copies to the proper appellate court.

Generally jail appeals are not considered with particulars care and in many cases, the grounds of appeal drafted in jail do not attract sufficient attention, and even if there may be any point in the appeal, it is liable to be dismissed.. The proviso to S 384(1) ensures that no jail appeal shall be dismissed except after giving the appellant a reasonable opportunity of being heard in support of his appeal.

Further, proviso(c) to S 384(1) provides that the jail appeal is not to be dismissed summarily until the period for preferring an appeal has expired.

u/s 384(4), even where a jail appeal is summarily dismissed and the appellate court finds that another petition of appeal duly presented u/s 382 has riot been considered by it, instead of considering itself to be funcutus officio, will hear and dispose of that appeal.

(B)Powers of Appellate Court

S386 Cr.PC enumerates the powers of the appellate courts in dealing with appeals. The powers enumerated are vested in all courts, whether High Court or subordinate courts. When once an appeal is admitted and a notice is issued u/s 3g5, the appellate court should dispose of the appeal on merits and there is no provision in the Code to permit withdrawal of an appeal.

S 386 makes it clear that the appellate courts have to exercise the powers only after satisfying two essential conditions:

(1) Before deciding to exercise any of the powers, the court must pursue the record of the case. S 385(2) requires that after the admission of any appeal, the appellate court shall send for the record of the case.

(2) The appellate court must hear the parties. It is a basic rule of natural justice that before a case is decided by the court, the parties to the case must be given a reasonable opportunity of being heard.

After complying with the above mentioned conditions, the appellate court may exercise any of the following powers u/s 386:

(1) In an appeal deserving dismissal - If the court considers that there is no sufficient client ground for interfering, it may dismiss the appeal.

(2) In an appeal from an order of acquittal - The appellate court may reverse the order of acquittal and may

(i) direct that further inquiry be made or

(ii) direct that the accused be retried or committed for trial or

(iii)find him guilty and pass sentence on him.

(3) In an appeal from conviction - The appellate court may choose any one of the following three courses:

i. the appellate court may reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by a court of competent jurisdiction or

ii. the appellate court may alter the finding (alter the conviction from one section to another) maintaining the sentence or

iii. the appellate court may with or without altering the finding, alter the nature and/ or extent of the sentence, but cannot enhance the sentence.

(4) In an appeal for enhancement of sentence - Here also the appellate court may choose any one of the following 3 courses:

1. the appellate court may reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a competent court; (or)

2. The appellate court may alter the finding, but maintain th sentence; (or)
3. The appellate court may with or without altering the finding, alter the nature and or extent of the sentence, so as to enhance or reduce the same.

(5) In an appeal from any other order - here the appellate court may alter or reverse such order

(6) Consequential or incidental order - In addition to the above mentioned powers, the appellate-court has jurisdiction to make any amendment or any consequential or incidental order that may be just or proper.

5.11.2 Reference

Under the Indian constitution, the Supreme Court of India and the High Courts have power to declare a l" unconstitutional. Subordinate courts have no power to declare a law to be unconstitutional and they have to make a reference to High Court. u/s 395(1) of Cr.PC, reference has been made obligatory where any case before a subordinate court involves a question as to the validity of any law.

For a reference u/s 395(1) by the subordinate court to the High Court, the following conditions must be fulfilled:

1. The court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation.
2. The court is also satisfied that the determination of the question of the validity of the law is necessary for the disposal of the case.
3. The court is of the opinion that the question of the validity of the law has not been decided by High Court or Supreme Court.

S 395(2) provides for a reference to the High Court on any question of law and not on a question of fact, arising in a pending case. This reference can be made only by a Court of Session or a Metropolitan Magistrate and it is discretionary.

When a reference is made to High Court, the High Court shall pass such order as it thinks fit and the subordinate court shall then dispose of the case (S 396).

5.11.3 Revision

The right of appeal is not available in each and every case and is confined to such cases that are specifically provided by law. In order to avoid the possibility of any miscarriage of justice where no right of appeal is available, the code has devised another review procedure, namely revision. Sections 397 to 405 relate to powers of revision. Under revisional jurisdiction, the High Court or the Sessions Court is empowered to call for and examine the record of any proceedings before any inferior court and satisfy itself or to the correctness, legality or propriety or any order passed by any inferior court. If any defect, irregularity or illegality justifying corrective action is found on the examination of the record the court may pass suitable orders to remove the miscarriage of justice. The object of revisional jurisdiction is to confer upon superior criminal courts, a kind of paternal or supervisory jurisdiction.

The powers of revision conferred on the Higher Courts are very wide and are purely discretionary in nature. Therefore no party has any right as such to be heard before such courts. The revisional power have certain limitations such as:

a. In cases where an appeal lies but no appeal is brought, ordinarily no proceeding by way of revision shall be entertained at the instance of the party who could ,has appealed.
b. The provisional power are not exercisable in relation to any interlocutory order passed in any appeal, inquiry or trial.
c. The court exercising revisional powers is not authorized to convert a finding of acquittal into one of conviction.
d. A person is allowed to file only one application for revision either to the court of Sessions or to the High Court; if once such an application is made to one court, no further application by the some person shall be entertained by the other court.

Check Your Progress

4.Define the 'Anticipatory Bail'

5.Explain the functions of the Public Prosecutor

5.12 Summary

The issue of interpretation of procedure established by law and the procedure laid down must satisfy the test of reasonableness. Denial of free legal services to the poor accused persons or undertrial prisoners would vitiate the right to life. Investigation must help to collect the evidence relating to the commission of offence. The power of search can be exercised by

authorized law or a magistrate. Bail is not a matter of right, but only a privilege to be granted at the discretion of the court. The constitution of India establishes the supreme court as the head of the judiciary of all courts of India. The magistrate has discharge the accused after perusing the police report and other documents.

5.13 Key words

Judicial	-	legal judgement
confinement	-	the state of being forced to stay in a prison
tantamount	-	having the same bad effect as something else
vitiate	-	reduce the effect of something
extract	-	substance that has been obtained from something else using a particular process
acquaint	-	to make familiar with
jurisdiction	-	an area in which a particular system of laws has authority
abscond	-	escape from a place to leave without permission
accusation	-	committing a crime
decay	-	the gradual destruction of a society

5.14 Answer to check your progress

1. Refer 5.1
2. Refer 5.2
3. Refer 5.4
4. Refer 5.6.8
5. Refer 5.8.1

5.15 Model Questions

1. Give an account of 'Right to life'
2. Discuss the importance of Investigation
3. Explain the types of Arrest
4. Write an essay about Bail
5. Describe the jurisdictions and the powers of criminal courts

Lesson - 6

EVIDENCE IN CRIMINAL CASES

Introduction

These are the two systems followed in different parts of the world in the administration of criminal justice. Accusatorial system is followed in common law countries like England, Sri Lanka, Burma, Australia, America etc. Inquisitorial system is followed in continental countries like France. In this system of administration of criminal justice it is for the accused person to prove that he is not guilty of the crime allegedly committed by him.

Lesson objectives

- To know the meaning of the Evidence
- To understand the hearsay rule
- To know about the Legal Aid

Lesson Structure

Introduction

Lesson objectives

Lesson structure

6.1 Inquisitional and accusatorial Approaches

6.2 Oral Evidence

6.3 Presumption of Innocence

6.4 Evidence in criminal Law

6.5 Corroboration of evidence

6.6 Hearsay Rule

6.7 Expęrt Evidence

6.8 Legal Aid

6.9 Summary

6.10 Key words

6.11 Model Questions

6.1 Inquisitorial and accusatorial approaches

In India generally accusatorial system if followed. In cases like rape, it is for the girl is to make a complaint. The entire burden is throw on the accused person to prove that he is not guilty of the crime alleged by committed by him here it is only inquisitorial system is followed. Hence in India mixed system exists. (Section 113 -A Indian Evidence Act)

In the accusatorial system, the burden of proving that an accused person violated some-law is on the prosecution. In India there is a presumption, as in England, in favour of, the accused that the offence has not been committed by him, and the presumption continue to be operative until the prosecution is able to prove its case according to the rules of procedure and evidence prescribed by law. The position in some special laws like the prevention of Corruption Act may be different due to public policy and burden is on the accused to free himself from the criminal charges.

So the presumption of innocence still continue in Evidence Act. The same principle has been incorporated in the Evidence Act, under section 101. "Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exists".

6.2 Law of Evidence

i) Meaning
ii) Principles
iii) Concepts of Relevancy and
iv) Admissibility.

"Evidence" Means and includes:

i) All statement which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry such statements are called oral evidence; (parole evidence)

ii) All documents produced for the inspection of the court; such documents are called documentary evidence.

According to Stephen, an evidence is "that part of the law of procedure which, with a view to, ascertain individual rights and liabilities in particular cases", decides,

i) What facts may, and what may be not proved in such cases;

ii) What sort of evidence must be given of a fact which may proved.

iii) By whom and in what manner the evidence must be produced by any fact which is to be proved.

According to Section 3, the "evidence" also means and includes:

6.2.1. Oral Evidence

All statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry. The juristic concept is the party against whom it is used has had the right and opportunity of cross - examination, without cross - examination, the statement given by a witness cannot be called as complete evidence. For example, personal knowledge of the judge cannot be used as evidence. This fact is evident from the decision of supreme court in Pritram Singh Vs State of Punjab (AIR 1956 SC 415).

But the statement of accused (confession) co-accused, tape recorder etc. could be used by way of corroborating the statement of a person and are known as a weaker type of evidence. Oral evidence not given by human being carries no weight. For example, evidence given by birds, animals, deg and so on, is not admissible. This is evident from the judgment of the Supreme Court in Abdul Razak Vs the, State of Maharashtra (AIR 1969 S.C.P). In this case the acceptance through parrot is not admissible.

6.2.2. Documentary Evidence

A document is evidence only when it is produced for the inspection of the court in_ support of the case of the party producing it. Thus, "a writing" obtained by the court for comparison is not evidence, because it is not a document for the inspection but for the comparison before the court.

6.2.3. Definition of the "Evidence" is not exhaustive

The definition of "Evidence" given in the Indian Evidence Act is incomplete and defective. Further, it excludes the admissions of the parties, their conduct before the court, circumstances and material objects like blood stained cloth,

weapon etc. So the definition given in the Act is not exhaustive. The following classification of evidence is possible:

i) Direct Evidence

It proves the fact in dispute, directly without any inference or presumption. It established conclusively the facts. For example, the testimony of a witness as to the existence or non-existence of a fact in issue.

ii) Indirect Evidence

It tends to establish the fact in dispute by proving another fact which affords an inference or presumption of its existence. For example, character of a person.

iii) Real or Personal Evidence

Any matter which the court perceives itself. For example, a witness before a judge has got a scar or sign of fear etc, on his face and such type of evidence is not admissible in the act.

iv) Original and Hearsay Evidence

The original is that when a witness reports himself to have SEEN or HEARD through the medium of his own senses. Hearsay is that when a witness has learnt through a third person.

v) Primary and Secondary Evidence

Sections 62 and 63 of the Indian Evidence Act deal with this aspect.

vi) Oral and Documentary Evidence

It has been defined in section 5(a) and (b) of the Act.

vii) Circumstantial Evidence

Specifically, it has not been defined in the act. In every case, direct evidence of facts is not available and court is bound to take help of the surrounding circumstances which speak of forcefully as does the direct evidence. For example road accident, rape cases etc. the-accused does not leave behind much direct evidence but the facts

tell the story beyond a shadow of doubt as the criminals execute the crime ruthlessly under the cover of darkness and secrecy. Thus, circumstantial evidence is that which relates to a services of facts. But it ought to be direct and primary.

"A was tried under section 376 and 302 I.P.C. i.e.. Murder after Rape of a girl. No evidence was available except the circumstantial evidence like that the accused was seen with the girl going towards the place where the dead body was found. After the probable time of murder (according to post mortem report) he was seen without the girl near the place of crime. Dead body was recovered in consequence of his pointing out. The accused was warned previously on eve-teasing with the girl etc.

The supreme court in Bakshish Singh - Vs - State of Punjab (AIR 1971 S.C. 2016) held that the accused had committed crime because the circumstances have been established the chain of evidence (Res gestae).

But any important missing link may be fatal to the prosecution story. Further, circumstances must be such as to show that within all human probability the act might have been committed by the accused.

6.2.4. Relevancy

Section 3: Evidence may be given of **"facts in issue"** and **"relevant facts".**

Evidence may be given in any suit or proceedings of the existence or non-existence of every fact in issue and of such other facts as are here in after declared to be relevant, and of no others.

Explanation

This section not enables any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to the civil procedure.

Illustration

A is tried for the murder of B by beating him with a club with the intention of causing hit, death.. .... at A's trial the following facts are in issue:

A's beating B with the club;

A's causing B's death of such beating

A's intention to cause B's death.

A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of . The proceedings, otherwise than in accordance with the conditions prescribed by the code of civil procedure.

In any case, the evidence may be given of two sets of facts namely:

i) of facts in issue (generally direct) and

ii) of facts relevant to the issue (circumstantial)

Distinction between **"Relevancy"** and **"admissibility"**

Relevancy and admissibility are not the same thing. They have distinction as under.

1. Relevant mean, what is logically probative. Admissibility is not based on logic but strictly on law.
2. In the Evidence Act, the question of relevancy has been dealt with under sections 5 to 55 and that of admissibility under section 56 and onwards.
3. Under the "relevancy" facts declared are relevant. Under the "admissibility" the relevant facts may be allowed or excluded.
4. All the relevant facts are not admissible but all the admissible facts are relevant.
5. The relevancy determines as to what fact may be proved in a judicial proceeding by a party. Irrelevant facts will waste the time of the court and/will cause the harassment of the parties. So the first thing is to decide the point of relevancy.

After, relevancy, the question of admissibility will come and will be decided as per law. In other words, the admissibility is a question standing between

relevancy or probative value on one hand, and proof or weight of evidence on the other hand.

6. In relevancy, the court has discretion but in admissibility the court has tip discretion. In both the cases, the opposite party has every right to raise the objection.
7. Statements are not admissible in evidence and cannot be rendered admissible by consent.
8. All questions should be decided as they arise and should not be reversed.

Thus, the relevancy means, the facts proved before the court under any section of chapter II of the Act. The fact that a document was obtained by illegal means, but relevant and genuine, then there will not be any bar to its admissibility. For the similar reason, if a party has filed a document and opposite party seeks to use it against the depositor, then it cannot be urged to be inadmissible by the depositor.

6.3. Presumption of Innocence

The life and liberty of the individual would be in jeopardy if the rule was other wise. The principal is sometimes expressed by saying that to be on the safer side, acquittal of ten guilty persons is to be preferred to the convictions of a single innocent person.

A very high standard of proof is therefore, required to establish the capability of an accused person. The distinction between the standards of proof in civil and criminal proceedings has been brought about in the following words.

Prof. Kenny says, "A higher minimum of proof is necessary to support an accusation of crime than will suffice when the charge is only of a civil nature. For in latter it is sufficient that there be a preponderance of evidence in favour of the successful, whereas in criminal cases the burden as upon the prosecution to prove that the accused is guilty beyond reasonable doubt."

The proof beyond reasonable doubt does not, however imply that the prosecution, must eliminate even the fanciful and fantastic doubts regarding the criminality of the accused person.

In Miller - Vs. - Minister of pension (1947) 2. All. E.R 372 Lord Denning observed:

"The degree of cogency need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to defect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible but not in the least probable the case is proved beyond reasonable doubt, but nothing short of that will suffice.

Once the prosecution has proved its case, the burden is on the accused, through his burden of proof is not an exacting as that of the prosecution, to disprove the prosecution case or to prove that the act committed by him is covered by one of the "General Exceptions" provided in the Indian Penal Code.

Section 105 of the Indian Evidence Act provides

"When a person is accused of any offence the burden of providing the existence of circumstances bringing the case with in any of the general exception in Indian Penal Code, or within any special exception or provision. Contained in any other part of the same code or in any law defining the offence is upon him and the court shall presume the absence of such circumstances."

There are three types of presumptions that have defined in section 4 of the Indian Evidence Act. What we mean by presumptions? Presumption means things taken for granted. Presumption may be positive or negative. Facts which can be presumed do not need to be proved by calling the proof.

Presumption may be drawn from the course of nature, the course of human affairs, norms of society, or from the transactions of business. Presumptions is a connection between two facts. For example might follows the day, summer follows the winter; a child born during the wedlock is legitimate child; a purse was lost and soon after it has been recovered from the custody of B which means that either B

had stolen it or received it knowingly. Other examples are : a letter has been posted must be reached to the addressee if nothing has been heard about a person for 7 years the presumption is that he is dead (Section 107 to 108 and 112).

Presumption may be

1. Presumption of fact i.e. Section 86 to 90 and 118 if contrary has been proved it is rebuttable may presume
2. Presumption may be of law if conclusive it is irrefutable - Example Section 82 I.P.C It is shall presume.

What is "may presume"? Answer is section 4 of the Indian Evidence Act.

"Whenever it is provided by this act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved or may call for proof of it."

What is "shall presume"?

Whenever it is directed by this Act that the court shall presume a fact it shall regard such fact as proved unless and until it is disproved.

6.3.1.Conclusive Proof

When one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of one fact regard the other as proved and shall not allow evidence to be given for the purpose of disproving it.

Presumption of innocence is a reputable presumption.

6.3.2.Burden of proof

Under the law of England burden of proof is always in the prosecution.

The fundamental principle underlying the whole edifice of criminal law in the matter of the "burden of proof", is laid down by the House of Lords in the famous case of Woolmington- Vs.- Director of public prosecutions [1935 Ac 462]. This principle has really become part of the substantive law in all countries throughout the world where English system of enlightened criminal trial is followed.

Facts and decision of Woolmington's Case: Woolmington was charged with the murder of his wife. He admitted that he shot her but his defence was that the gun had been accidentally discharged. The judge directed the jury that once the prosecution had shown that the death had been caused by the accused the law presumed malice which has to be rebutted by the prisoner proving that the killing was a pure accident. Woolmington was convicted and his conviction was upheld by the court of appeal. He was allowed to appeal to the House of Lords.

In the House of Lords, Viscount Sankey L.C., "Throughout the web of English Criminal Law One Golden Thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as the defence of insanity and subject also to any statutory exception. If at the end on the whole of the case, there is a reasonable doubt created by the evidence given by either the prosecution or the prisoner as to whether the prisoner killed the deceased a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial the principle that the prosecution must prove the guilt of the prisoner is part of the Common Law of England, and no attempt to whittle it down can be entertained.

When dealing with the murder case, Crown must prove

a) Death as the result of a voluntary act of the accused; and

b) Malice of the accused

The Crown may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked. When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show by evidence or by examination of the circumstances addressed by the Crown that the act on his part which-caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether even if his explanation be not accepted the act was unintentional or provoked the prisoner is entitled to be acquitted. Appeal allowed and conviction quashed."

In Ramadas Vs. State of Maharastra (1977) 2. S.C.C 124, the Supreme Court of India also applied the same principle in acquitting the accused who was charged with the offence of murdering his wife by forcible administration of rat-poison to her. The husband and wife were living alone in a house and there was the evidence that the husband wanted to divorce the wife on account of her suspected fidelity to him. The defence of the accused was that his wife has committed suicide by taking rat-poison. The supreme court acquitted the accused holding so long as there was the possibility of such a suicide by the deceased the accused could not be convicted of the offence of murder.

The Court said thus "It is a settled rule of circumstantial evidence that where circumstances are susceptible of two equally possible inference the courts should accept that interference which favours the accused rather than an interference which goes in favour of the prosecution." The rule of appreciation of circumstantial evidence is that the circumstances must be of a conclusive nature and tendency so as to be totally in consistent with his innocent and are not explainable on any other hypothesis except the guilt of the accused.

6.4. Evidence in Criminal Law

6.4.1 The Concept of Fair Trial

It has been universally accepted as a human value that a person accused of any offence should not be punished unless he has been given a fair trial and his guilt has been proved in such trial. The Notion of fair trial cannot be explained in absolute terms. Fairness in criminal trial could be measured only in relation to the gravity of the accusation the time and resources which the society can reasonably afford to spend, the quality of available resources, the prevailing social values etc. However leaving aside the question of the degree of fairness in the criminal trial.

The major attributes of fair criminal trial are enshrined in article to 10 and 11 of the universal declaration of Human Rights.

Art. 10: Everyone is entitled in full equality to a fair in public hearing by an independent and impartial tribunal in the determination of his rights and obligations of any criminal charge against him.

Art. 11: Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

Our Courts have recognized that the primary object of criminal procedure is to ensure a fair trial of accused persons and the law commission has accepted the view that the requirements of a fair trial speaking broadly relate to the character of the court the venue, the mode of conducting the trial, rights of the accused in relation to defence and other rights.

6.4.2 Adversary system

The system of criminal trial envisaged by the code is the adversary system based the accusatorial method. In this system the prosecutor representing the state (of the people) accuses a person (the accused person) of the commission of some crime and the law requires him to prove his case beyond reasonable doubt. The law also provides fair opportunity to the accused person to defend himself. The judge more or less is to work as an umpire between the two contestants.

Challenges constitutes the essence of adversary trial and truth is supposed to emerge from the controverter facts through effective and constant challenges. Experience has shown that adversary system is by and large dependable for the proper reconciliation of public and private interests i.e. public interest in punishing the criminals and private interest in preventing wrongful convictions. This system of criminal trial assumes that the state using the investigative resources and employing competent counsel will prosecute the accused who in turn, will employ equally competent legal services to challenge the evidence of the prosecution.

The above assumption has been found to be in correct in one respect, particularly under the existing conditions in India. Most of the accused persons here are uneducated and poor. They do not afford to engage lawyers for their defence neither have they any legal knowledge and professional skill to safeguard their interests themselves. Therefore though the adversary system envisages equal legal rights and opportunities to the parties to present their respective cases before the court such legal rights and opportunities would in practice operate unequally and harshly, affecting adversely the poor indigent accused persons who are unable to engage .competent lawyers for their defence.

The system therefore departs from its strict theoretical passive stance and confers on the accused not only a right to be defended by a lawyer of his choice but also confers on the indigent accused person a right to get legal aid for his defence at state costs. Section 303 of the Criminal Procedure Code and Art 22(1) of the Constitution provides the game.

Further apart from attempting to give legal aid to the indigent accused person the code has suitably altered the notions of judge-umpire. The judge is not to remain passive as an umpire but he has to play a more positive and active role for protecting the public interest as well as the individual interests of the accused person.

What is the proper function of the judge in an adversary system of trial?

The Supreme court has answered this question in Ram Chander - Vs. - State of Haryana (1981) 3. S.C.C.191 - The adversary system trial being what it is there is an unfortunate tendency for judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defense with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a criminal court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest.

6.4.3. Presumption of innocence

The principle that the accused is presumed to be innocent unless his guilt is proved beyond reasonable doubt is of cardinal importance in the administration of a criminal justice.

"The cherished principle or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men go out but one innocent martyr shall not suffer is a false dilemma". Said Supreme Court in Sivaji S.B Vs. State of Maharastra (1973) 2. Sec 793.

6.4.4. Independent Impartial and competent judges

The most indispensable condition for a fair criminal trial is to have an independent impartial and competent judge to conduct the trial. The code, has provided for the separation of the judiciary from the executive. This separation would ensure the independent functioning of the judiciary free of all suspicion of executive influence and control.

The appointment of the Sessions Judge and Judicial magistrates are made by the State Government in consultation with the High court. The rules in this connection provide that only persons with sound knowledge of law and with requisite experience and qualification are to be appointed to these posts. It may however be noted that appointment of judges and magistrates are made by the Government. The works of judges and magistrates are under the direct control and supervision of the High Court and not of the Government.

In order to have a Fair Trial, it is necessary that the judges and magistrates must not be in any manner connected with the prosecution or interested in the prosecution. This principle has been recognised and given effect to by **Sec. 479.**

Fair Trial also requires public hearing in an open court. **Section 327** makes a provision for open court generally accessible to the members of the public . These and other matters pertaining to the independence, impartiality and competence of the criminal courts have been discussed in detail in the Criminal Procedure Code.

6.4.5.Venue of the Trial

The provisions regarding venue i.e. the place of inquiry or trial, are contained in Section 177 to 189 of Criminal Procedure Code. If the place of trial is highly inconvenient to the accused and causes various impediments in the defense preparation, the trial at such a place cannot be considered as Fair Trial. Apart from exceptional circumstances it would be convenient both to the prosecution and to the defence if the trial is conducted by a Court with in whose local jurisdiction the crime was committed.. Trial at any other distant place would generally mean hardship to the parties in the production of various evidences.

6.4.6.Right of accused to know of the accusation

Fair Trial requires that the accused is given adequate opportunity to defend himself. Such opportunity will have little meaning or such an opportunity will in substances be the very negation of it, if the accused is not informed of the accusation

against him. The Code therefore provides before the Court for trial the particulars of the offence of which he is accused of shall be stated to him. That is stated in Sections 228, 240, 246 and 251 of the Criminal Procedure Code.

In case of serious offence, the Court is required to frame in writing a formal charge and then to read and explain the charge to the accused person. Detailed provisions have been made in the Criminal Procedure Code in Section 211 to 224 regarding the form of charge and the jointer of charges.

a. The accused to be tried in his presence

The personal presence of the accused throughout his trial would enable him to the understand properly the prosecution case as it is unfolded in the Court. This would facilitate in the making of the preparation of his defence. A criminal trial without the presence of the accused is not imaginable. A trial and decision behind the back of the accused is not contemplated by the Criminal Procedure Code. But there is no specific provision to that effect is found there in.

In Santa Singh's case (a double murder case) Sessions Court pronounced the judgment when the counsel for the accused was not able to come to the Court. The Supreme Court sent back the case for retrial, because under Section 235(2) the accused should be questioned about the sentence and then only judgement should be pronounced. As the Sessions Court bye passed this procedure which was mandatory. The Supreme Court sent the case back for retrial. Thus at every stage the right of the accused is protected.

The requirement of the presence of the accused during his trial can be implied from the provisions which allow the Court to dispense with the personal attendance of the accused, under certain circumstances. For example, a magistrate issuing a summons may dispense with the personal attendance of the accused and permit him to appear by his pleader (Section 205). Similarly Section 273 requires that the evidence is to be taken in the presence of the accused person; however the Section allows the same to be taken in the presence of the accused person's pleader if the personal attendance of the accused is dispensed with.

Section 317 makes an exception to the above rule and empowers the Court to dispense with personal attendance of the accused person at his trial under certain circumstances.

The general rule in criminal cases is that all inquires and trials should be conducted in the presence of the accused, the underlying principle being that in a criminal trial the court should not pronounced exparte against the accused person. Although this rule is for the protection of the interests of the accused, this does not mean that the accused has a right to absent himself from Court and that the Court should necessarily grant his prayer for exemption from personal attendance.

According to Section 317, the Court before dispensing with the personal attendance of the accused must be satisfied that (1) such attendance is not necessary in the interest of justice (or) (2) that the accused persistently disturbs the proceedings in Court.

This power can be exercised only if the accused is represented by a lawyer. The Court is also required to record its reason for such order. Evidence to be taken in the presence of the accused.

Fair Trial requires that the particulars of the offence have to be explained to the accused person and that the trial is to take place in his presence. Therefore as a logical corollary such a trial should also required the evidence in the trial to be taken in the presence of the accused. Section 273 attempts to achieve this purpose.

The right created by the Section is further supplemented 278. It interalia provides that wherever the law requires the evidence of a witness to be read over to him after its competition, the reading shall be done in the presence of the accused or of his pleader.

b. Right of accused to cross examine the prosecution witness and to produce evidence in defence.

Evidence given by witnesses may become more reliable if given on both and tested by cross examination. A criminal trial which denies the accused person the right to cross-examine prosecution witnesses is based on weak foundation and cannot be considered as a fair trial.

Though the burden of proving the guilt is entirely on the prosecution and though the law does not requires the accused to lead evidence to prove his innocent yet a criminal trial in which the accused is not permitted to give evidence to disprove the prosecution case or to

prove any special defense available to him, cannot by any standard be considered as just and fair. The refusal without any legal jurisdiction by a magistrate to issue process to witnesses named by the accused was held enough to vitiate the trial.

c. Right of the accused to have an expeditious trial

Justice delayed is justice denied. This is all the more true in a criminal trial where the accused is not released on bail during the tendency of the trial and the trial is inordinately delayed. However the Code does not in so many words confer any such right on the accused to have his case decided expeditiously. If the accused is in detention and the trial is not completed within 60 days from the first date fixed for hearing he shall be released on bail, according to Section 437 (6).

But this only mitigates the hardship of the accused person but does not give him speedily trial and secondly this rule is applicable only in case of proceedings before a magistrate. The code has given a more positive direction to courts. Section 309 (1) says in trial the proceedings shall be held as expeditiously as possible. The right of the accused has been recognized but the real problem is how to make it a reality in actual practice.

6.5.Corroboration of evidence

Since the stakes are very high in criminal trials, Corroboration of evidence given by a witness is of utmost importance in certain situations. DNA evidence serves to corroborate, in a powerful manner. In Smt. Kamti Devi and another - Vs. - Poshi Ram (AIR 2001 SC 2226), the Supreme Court has held that the result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Indian Evidence Act. Example if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband the conclusiveness in law would remain unrebuttable.

This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception".

1. Evidence of Accomplices

The conviction of an accused is possible on the testimony of an accomplice. This is the position both in England and in India. The Indian Evidence Act provides that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

But generally the courts do not convict on the basis of uncorroborated evidence of an accomplice. This attitude is particularly justified in view of another provision of the Evidence Act which provides that the Court may presume that an accomplice is unworthy of credit, unless he is corroborated (Sec. 114).

2. Child Witnesses

The position of a child witness may be appreciated in the light of the following provisions in the Evidence Act.

All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions put to them, or from giving rational answers to those questions, by tender years extreme old age, disease, whether of body or mind or any other cause of the same kind.

It is obvious therefore that a child is a competent witness unless he suffers from any one of the handicaps enumerated above. The courts are generally reluctant to place absolute reliance on the evidence tendered by a child witness and corroboration is required as a rule of prudence.

In the words of Prof. Kenny "Out lines of Criminal Law", the prosecution is wise: for a trial of adults may place undue reliance upon such evidence forgetting that, though children are less fraudulent than adults, they are often more imaginative. Hence the judge should caution the Jury.

(i) Sexual offences

In England, corroboration of evidence is essential in certain sexual offences against women and children, and conviction, therefore, is not possible upon the evidence of a single witness. In India, though it is possible to convict an accused on the uncorroborated evidence of a victim of rape, the courts have nevertheless insisted on corroboration in some cases.

6.6. Hearsay Rule

6.6.1. Exception "Dying Declarations"

Some exceptions have been recognized to the general rule that hearsay evidence is not admissible. These exceptions are based on necessity since the person making a statement cannot be made to testify in a Court of Law in certain situations. Out of the various exceptions to the hearsay, the one which is of special importance in the administration of Criminal Justice is as follows: "When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question."

Such statements are relevant whether the persons who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

The second part of the above provision makes the Indian law different from English law, where the rule will not apply unless the deceased thought his death to be quite imminent.

This exception to the hearsay rule is usually justified on the ground that the religious awe inspired by the approach of death is deemed fully equal to the sanction of any judicial oath.

Check you Progress

1.Explain 'Documentary Evidence'

2.'Evidence is not exhaustive' – Describe

3.Whar is 'may presume'?

6.6.2.Evidence of the accused's character

In criminal proceedings, evidence of the fact that the accused is of good character is relevant and can be admitted by the Court. But the fact that the accused is of bad character is by and large irrelevant.

The Evidence Act provides "In criminal proceedings the fact that the accused has a bad character is irrelevant unless evidence has been given that he has a good character, in which case it becomes relevant."

The Explanations are to the effect that evidence of bad character is relevant in a case where bad character is itself a fact in issue and evidence of a previous convictions of the accused is relevant to establish bad character.

This safeguard is to eliminate the possibility of the court getting biased against the accused on account of his past criminality.

6.6.3.Confessions

A confession is a statement made by an accused by which he either admits having committed an offence or at any rate substantially all the facts which constitute the offence. The confession made by an accused is relevant since the presumption is that a man of sound mind and full age will not make a statement against himself. Obviously a confession by a person is the safest kind of evidence provided that it has been made in a voluntary manner. A confession is said to be voluntary when it is made without any inducement, threat or promise. The principle is enacted in Sec. 23.

Confessions made to a police officer or made while in police custody are regarded as untrustworthy and hence they are inadmissible. This rule is made to curb the tendency of the police personnel to use third degree methods against persons suspected of committing a crime. Not only are the confessions made to a police officer inadmissible but confessions are also inadmissible when made to any person while the accused is in police custody, unless it is done in the immediate presence of a Magistrate (Sec.25).

For example, an accused in police custody makes the confession: "After committing murder of X with a knife I threw it on the terrace of X's house". The knife was subsequently recovered from the place indicated by the accused. The admissible part of the confession is "I threw it on the terrace of X's house". Since the fact that he knew the knife having been thrown on the terrace of X's house was discovered as a result of this part of the confession. The other part of the confession **"after committing murder"** is not admissible.

6.7. Expert Evidence

Here we have to deal with,

i) Medico-legal opinion

ii) Forensic science expert opinion.

Generally expert opinion is not binding on the Court. Likewise medico legal opinion is also not binding on the Court. The Judge has to think judicially and decide accordingly. Some opinion like Finger Print Expert's opinion is a perfect science and the Court is bound to accept.

No opinion of an expert is admissible unless he has been examined as witness. The adverse party has a right and an opportunity of cross-examining the expert. In special cases, another expert may be allowed, under a special power of attorney, to cross - examine the first expert witness for the opposite party.

Sec. 45 Opinions of Experts

When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identify of hand writing or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identify of handwriting or finger impressions are relevant facts. Such persons are called experts.

6.7.1. Illustrations

a) The question is whether the death of A was caused by poison. The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died are relevant.

b) The question is whether A at he time of doing a certain act was by reason of unsoundness of mind in capable of knowing the nature of the act or that he was doing what was either wrong or contrary to law.

The Opinion of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind and whether such unsoundness' of mind unusually renders persons in capable of knowing the nature of the acts which they do or of knowing that what they do is either wrong or contrary to law are relevant.

c) The question is whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A. The opinions of experts on the question whether the two documents were written by the same person or by different persons are relevant.

When the subject - matter of inquiry is such that ordinary persons are incapable to prove facts informing a correct judgment upon it. For Court also it will be very difficult to form a correct opinion on a matter of a special kind, without the assistances of such persons.

Experts duty is it furnish the Court with the necessary scientific criteria for testing the accuracy of his conclusions so as to enable the courts to form its own independent judgment by the application of these criteria to the facts proved in evidence.

The Trichy Samiyar, Sri Lanka based Bremananda, experts opinion - D.N.A test was allowed. Opinion was formed. Double life imprisonment awarded.

Naga - Triple Murder Case: Hari was charged for Triple Murder "Neurogenetic" disorder. DNA test ordered. Capital punishment awarded. Hari murdered his brother Naga and his wife Kiran and their only girl child 10 years.

In M.R. Radha Vs. State of Tamil Nadu, Cine Actor Radha attempted to kill M.G. Ramachandran and also attempted to kill himself by a revolver. At that time the then Professor of Forensic Medicine of Madras Medical college Dr. G.P. Gopalakrishnan appeared before the High Court of Madras gave his opinion as to the bullets and the range, of shooting. It was an expert opinion on Forensic Medicine and Forensic Science the Honourable High Court of Madras accepted the expert opinion.

A medical officer is required to provide assistance to the cause of justice by furnishing certificates and reports consequents upon examination of a living and a dead.

1. In civil cases

The opinion of a medical experts is relevant to prove

1. Age - minority - major
2. Death - Natural – unnatural
3. Illness - leave - exemption
4. Fitness - For jobs - Government services
5. Pregnancy - Birth - disputed paternity
6. Mental condition - at the time of making a will etc.
7. Mental capacity
8. Pension liabilities : Compensation for accidents - in roads and factories

2. In Criminal Matters

Medical experts may be required to prove

i)Types of hurt	-	Severity
ii)Post mortem	-	Report regarding the cause of death, time since death, manner of death, type of weapon
iii)Insanity	-	Type of Mental Disorder
iv) Age	-	Minority - majority in sexual assault cases, validity of marriage and cases of kidnapping.
v) Drunkenness	-	Delirium Trauma - etc
vi) Virginity	-	Women hood
vii) Impotency	-	Sterility of a man
viii) Pregnancy	-	Child birth - Gestation Period
ix) Medico	-	Legal facts in sexual offence

x) Identities of the living and the dead person .

xi) Contents of stomach wash

xii) Dying declaration

3. Other Duties of an Officer of medicine

1. Examination the accused at the request of the police officer u/s 53 Cr. PC because such an examination forms part of investigation under Sec. 2(4) of the Cr.PC

2. Examination of an arrested person at the request of the arrested person u/s 54 Criminal Procedure Code - the examination of his body will afford evidence which will disprove the commission by him of any offence or which will establish the commission by any other person of any offence. Against his body - the Magistrate before the whom the arrested person is produced - will direct the examination.

The first chair for the teaching of the subject "Forensic Medicine" was established in England that is of Duncan at Edinborough.

6.8. Legal Aid

An Accused facing trial must have a counsel in order to be defended effectively. The constitution provides that no person who is arrested shall be detained in custody without being informed, as soon as may be of the grounds for such arrest nor shall he be denied the right to consult and to be defended by a legal practitioner of his own choice.

Similarly it has been provided in the code of criminal procedure that any person accused of an offence before a criminal court or against whom proceedings are instituted under the code, may of right be defended by a pleader of his choice. But the right to engage a counsel is meaningful only if the accused has the means to engage the same.

An accused person too poor to afford: a lawyer to defend himself is much handicapped during his trial. It is in this context therefore that the importance of legal aid to the indigent is to be appreciated in a poor country like India.

Before the enactment of the new criminal procedure code in 1973, there was no right given to an accused to be provided with a lawyer if he could not engage one himself. The courts did however, generally provide the services of a lawyer "Amicus Curiae° to the accused facing trial for more serious offences.

The problem has been taken care of, at least to some extent by inserting a provision in the new criminal procedure code which inter alia provides as follows:

Where in a trial before the Court of Sessions the accused Is not represented, by a pleader and where it appears to the Court that the accused has not sufficient means to engage a pleader for his defence at the expense of the State. The State Government may also extend the application of the provisions to trials conducted in Courts other than Sessions Courts. Plainly it should be extended to lower Magistrate Courts also.

In U.S.A and England much useful work is done by the legal aid and advice societies. In India a beginning is now being made to provide legal aid to the poor through the legal aid organisations.

The responsibility of the State Governments in this area of legal aid has been high lighted by the Supreme Court in Hussainara Khatoon (iv) -Vs- Home Secretary (1980) I.S.C.C. 180.

"It is the constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of such reasons as poverty or inefficient communication situation, to have a free legal services provided to him by the State and the State is under a constitutional mandate to provide a lawyer to such accused person if the needs of justice so requires."

"Let it not be forgotten that if law is not only to speak justice but also deliver justice, legal aid is an absolute imperative If free legal services are not provided to such as accused (suffering from poverty or indigence) the trial itself may run the risk of being vitiated as contravening Art.21 and we have no doubt that every State Government would try to avoid such a possible eventuality."

6.8.1. Legal aid in appeal cases

An indigent accused may be involved in an appeal case as a respondent in an appeal against his acquittal or as an appellant seeking redress against the mistakes and error in the order of conviction passed against him by the trial court. In either case the liberty of indigent accused person may be in jeopardy and hence Art 21 of the Constitution would require the appeal procedure to be reasonable fair and just procedure.

As an essential ingredient of such a procedure as has been held by the Supreme Court in Hussainara Khatoon (IV) - Vs. - Home Secretary State of Bihar

(1980) I.C.C. 98 it will be necessary to provide at State expense a lawyer to an indigent accused be he the respondent or the appellant if he is unable to engage one due to this poverty or indigence.

If legal aid to an indigent accused is an essential component of `reasonable' fair and just procedure in trial proceedings it is equally so in appellate proceedings.

First, it is not easy for a layman to understand all the implications of the judgments of the trial court in the context of the appellate proceedings.

Secondly, in such proceedings guide often intricate questions of law and fact are involved. They would require the skillful and careful handling by a competent lawyer.

Thirdly, the state is represented in appeals by well qualified and experienced public prosecutors. Therefore for the proper and just working of the adversary system at the appellate stage it is necessary that the indigent accused is represented by a competent lawyer.

Though justice and fair play do require adequate provisions for legal aid at the appellate stage, it has not so far attracted as much attention as it is has in case of trial procedure. The code does not make any specific provisions for giving legal aid to indigent accused in appeal proceedings.

If in any such trial the accused is acquitted and the state prefers and appeal against the order of acquittal even in such situation the code surprisingly fails to make any specific provisions for providing a lawyer to the indigent accused to defend his case.

The code does make any provisions for legal aid even in such cases where the order or convictions is **"Prima facie"** wrong and invoking the appellate jurisdiction is necessary to avoid miscarriage if justice.

In this context the exiting provisions regarding "Jail appeals" are far from a adequate and can hardly be considered as a proper substitute for able representation of the indigent convicted accused person by a competent lawyer.

Here it may be pertinent to note the observation of the Supreme Court in M.H. Hoskot - Vs. - State of Maharastra (1978) 3. SCC 544.

Maneka Gandhi's case has laid down that personal liberty cannot be cut out or cut down without fair legal procedure. Enough has been set out to establish that a prisoner, deprived of his freedom by court sentence but entitled to appeal against such verdict. Can claim as part of his protection under art 21 and as implied in his statutory right to appeal the necessary concommitant of right to counsel to prepare and argue his appeal.

"If a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory right of appeal inclusive of special leave to **appeal** for want of legal assistance there is implicit in the court under Art 142 read with Art. 21 and 39 A of the constitution power to assign counsel for such imprisoned individual "for doing complete justice." This is necessary incident of the right of **appeal** conferred by the Code and allowed by Art 136 of the Constitution. The reference is inevitable that this is a States duty and not Government Charity.

It is to be hoped that adequate administrative and legislative measures are taken soon to give sufficient legal aid to indigent accused in appeal cases.

Check you Progress

4.Illustrate 'Fair Trial'

5.Write a short note on 'Legal Aid'

6.9 Summary

Oral evidence other than human being carries no weight. Direct evidence proves the fact in dispute without any inference or presumption. Indirect evidence establishes the fact in dispute by proving another fact which affords an inference or presumption. Relevancy is logically probative but admissibility is not based on logic but strictly on law. Presumption of innocence means the accused is presumed to be innocent unless his guilt is proved beyond reasonable doubt. The Evidence Act provides that the court may presume that an accomplice is unworthy of credit, unless he is corroborated.

6.10 Key words

presumption	-	act of supposing true
admissibility	-	can be allowed
sentence	-	the punishment given by court
malicious	-	showing hatred
examination	-	to find the cause of a problem

jeopardy	-	in a dangerous position
conviction	-	found guilty
unsoundness	-	weak and likely to fall down

6.11 Answer to check your progress

1. Refer 6.2.2
2. Refer 6.2.3
3. Refer 6.3
4. Refer 6.4.4
5. Refer 6.8

6.12 Model Questions

1. Write an essay about law of Evidence
2. Give an account of Burden of proof
3. What is meant by Adversary System?
4. Discuss the concept of Hearsay Rule
5. Write briefly about Expert Evidence

Unit V

Lesson - 7

SOCIAL LEGISLATIONS

Introduction

In this unit we have to see

a) Protection of Civil Rights Act 1955

b) Prevention of Atrocities Act 1989

c) Juvenile Justice Act 2000

d) Immoral Traffic (Prevention) Act 1956

e) Probation of Offenders Act 1957

Lesson objectives

- To understand the civil Rights
- To know the prevention of Atrocities
- To learn about statutory Bodies "Homes"

Lesson Structure

Introduction

Lesson objectives

Lesson Structure

7.1 Protection of civil Rights Act

7.2 The Scheduled castes and Scheduled Tribes Act

7.3 Juvenile Justice (Care and Protection) Act 2000

7.4 Immoral Traffic (prevention) Act

7.5 Probation of offenders Act

7.6 Summary

7.7 key words

7.8 Answer to check your Progress

7.9 Model Questions

7.1 Protection of Civil Rights Act

This act was passed in the year 1955. It has got 16 sections.

(a) What do you mean by civil rights?

The definition Section 2 says "Civil rights means any right accruing to a person by reason of the abolition of "Untouchability" by Art. 17 of the Constitution.

(b) Religious Disabilities

Whoever on the grounds of "Untouchability" prevents any person from entering any place of public worship which is open to other persons professing the same religion shall be punishable with imprisonment for a term not less than one month.

Where a function was a private one and it was not a place of public worship and the complainant a Harijan was not on the basis of his being untouchable as people of his caste were allowed to participate in the function the accused could not be convicted under section 3 of the Act. Kandra Sethi - Vs. - Metra Sahu I.L.R (1965) Cut. 465.

In State Vs. Venkiteshwara Prabhu (1961) 1 Cri. L.J. 265 it was established that ever since the temple came into existence only the member of Gowda Saraswath Brahmin Community who wear the scared thread have entered the "Nalambalam" no offence under this clause (clause (6) of section 3] is committed by preventing persons belonging to a different community or denomination from entering the "Nalambalam".

(c) Social Disabilities

Whoever on the ground of "untouchability" enforces against any person any disability with regard to access to any shop public restaurant, hotel or places of public entertainment or the enjoyment of any benefit under a charitable trust created for the benefit of the general public or the use of any public conveyance or the use of any Dharmasala sarai or Musafiskhana which is open to the general public shall be punishable.

Section 5 Section 5 deals with punishment for refusing to admit person to hospitals etc. Section 5 (b) does not speak of *Mens Rea* with which the act should be committed. Ramachandran Pillai vs State of Kerala 1965 M.L.J. Cr. 32.Segregation of Harijan students into a separate division :

Under Section 5 of the Act even if the discrimination is not solely on the ground of untouchability and if untouchability is only one of the grounds of discrimination the person practicing such discrimination would be guilty of offence. So if one of the reasons for the segregation of the Harijan students is one of the ground of untouchability the offence is made out (See: Ramachandran Pillai - case above)

Sec - 6 Punishment for refusing to sell goods or render services shall be punishable.
Sec - 7 Punishment for other offences arising out of "untouchability" shall be punishable.

Obstruction to take water from public water tap: When S want to take water from the public water tap she was prevented from doing so by B on the ground that she happened to be the daughter of a scheduled caste. It was held that B's action amounted to an annoyance and obstruction within the meaning of Sec 7 (1 (b). Beharilal Vs **State** (1967) Cri. C.J. 307.

(d) Maltreatment for giving water to a Thakur

The complainant a Harijan gave water to a high caste Thakur which was disliked by the accused person with the result a panchayat was held and the complainant was asked to pay fine. On his failure to so he was beaten by the accused person and was kept under wrongful confinement. It was held that the accused was guilty under section 7(1) (c) of the act. Bisheshwar Prasad Vs. State of U.P. (1967 Cri. L. J. 1102)

Sec 7. A Unlawful compulsory labour when to be deemed to be a practice of untouchability.
(1) Whoever compels any person on the ground of "untouchability" to do any scavenging or sweeping or to remove any carcass or do any other job of similar nature shall be deemed to have enforced a disability arising out of "untouchability". For the purpose of this section "Compulsion includes a threat of social or economic boycott".

Section 8 - Cancellation or suspension of licenses in certain cases when a person who is convicted of an offence under Section 6 holds any license under any law for the time being in force in respect of any profession, trade in relation to which the offence is

committed the court trying the offence may direct that the license shall stand cancelled or be suspended.

Sec. 10 Abetment of offence Whoever abets any offence under this act shall be punishable with the punishment provided for the offence.

Explanation : A Public servant who willfully neglects the investigation of any offence punishable under this act shall be deemed to have abetted an offence punishable under this act.

7.2 The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989.

The term "scheduled" which has its genesis in the British legacy dates back to 1935 when the lowest ranking castes in the de-humanizing social stratification were listed India in a schedule appended to the Government of India Act 1935. The word "Scheduled" connotes the meaning of being listed for purpose of special safeguards and merits. These scheduled caste are the so-called untouchables of the inhuman social division of India's divided compart mentalised and pluralistic society that were related to the lowest rungs of social hierarchy. This label of "Scheduled castes" is described as the most recent of a long line of official' euphemisms for the untouchables "Mahatma Gandhi chose to christen them as "Harijans" the children of God, intended to be a less disparaging appellation than the word "untouchable" but strongly resented and rejected by the younger section of scheduled castes, who preferred to be called "Dalits" a manifestation of militant and aggressive assertion of equality (H.A Jayaram - Vs - State of Karnataka. LL. R 1989 Kar 2277)

The accursed practice of untouchability is a "historic social stigma" which has persisted for more than two millennia with the Hindu social order. The most disturbing and infernal experience is that it is an existing social order and that it has not atrophied despite the passage of time notwithstanding the fact that time has ushered industrial, technological and scientific in the country.

Even a cultural renaissance has not made a dent on this social evil. Its existence is a diabolical contraction in democratic country professing justice social political economic equality of status fraternity and dignity of the individual.

The graded in equality in the social order is a brazen antithesis of the Universal declaration of human rights to which charter. India is an early signatory. The scheduled castes and scheduled tribes are constitutionally recognized as the weaker sections statistics confirm that they consist of not less than 21% of the nations population.

The constitution of India is more social document than a political one, is heart being the directive principles of state policy enshrined in part IV of the constitution. The problem of the weaker sections is not just a sociologic problem. It is a human problem of the multitudes social revolution and the thinking is one of the preferential treatment to the less fortunate and weaker sections who are the victims of neglect and various atrocities through centuries.

Parliament enacted the scheduled castes and scheduled tribes (Prevention of Atrocities) Act, 1989 in order to prevent the commission of offence of atrocities against the members of the scheduled castes and the scheduled tribes to provide for special court for the trial of such offence and for the belief and rehabilitation of victims of such offence and for matters connected there with or incidental there to.

The act is therefore one of these legislative programmes intended to do justice to the "dalits" and the weaker sections of society by affirmative action it is against the back drop of the story of inhuman suffering and miseries of these unfortunate victims of social prejudice; and measures provided in the act are calculated to safeguard against exploitation of social down graded class which are the scheduled castes and scheduled tribes at the hands of their more sophisticated and socially upgraded predatory neighbors.

The concern of the court is bring in harmony the rule of law with the enlightened common sense of the nation as articulated trough the process of legislation. To pay homage to the nations father Mahatma Gandhi the Central government brought the act into force on January 30th,1990.

7.2.1.Statement of objects and reasons

This act is a "Special law" within the meaning of section 41 of the Indian Penal Code, 1860 and is penal in character.

Though Parliament deferred operation of the Act. It itself came on the statute book on September 11, 1989 when the President of India assented to it. Circumstances which led Parliament to enact the Act have been enumerated in the statement of object and reasons appended to the bill, which reads as follows:

Despite various measures to improve the 'socio - economic conditions of the scheduled caste and scheduled tribes they remain vulnerable. They are denied number of civil rights. They are subjected to various offences indignities, humiliations and harassment. They have in several brutal incidents been deprived of their life and property. Serious crimes are committed against them for various historical social and economic reasons.

Because of the awareness created amongst the Scheduled Castes and Scheduled Tribes through spread of education etc they are trying to assert their rights and this is not being taken very kindly by others. When they assert their rights and resist practices of untouchables against them or demand statutory minimum wages or refuse to do any bonded and forced labour the vested interest try to cow them down, and terrorize them.

When the scheduled castes and the scheduled tribes try to preserve their self-respect of honour of their women they become irritant for the dominant and the mighty occupation and cultivation of even the government allotted land by the scheduled castes and scheduled tribes is resented and more often these people become victim of attacks by the vested interests. Of late there has been an increase in the disturbing trend of commission of certain atrocities like making the scheduled caste person eat non edible substances like human excretes and attacks on and mass killing of helpless scheduled castes and scheduled tribes and rape of women belonging to the scheduled castes and scheduled tribes. Under the circumstances, the existing laws like Protection of Civil Rights Act 1955 and the normal provisions of the Indian Penal Code have been found to be inadequate to check these crimes. A special legislation to check and deter crimes against them committed by non-scheduled castes and non-scheduled tribes, has therefore become necessary.

The term "atrocity" has not been defined so far. It is considered necessary that not only the term "atrocity" should be defined but stringent measures should be introduced to provide for higher punishments for committing such atrocities. It is also proposed to enjoining on the states and the union territories to take specific preventive and punitive measures to protect the scheduled caste and scheduled tribes from being victimized and where atrocities are committed to provide relief and assistance to rehabilitate them. The bill seeks to achieve the above object.

7.3 Juvenile Justice (Care and Protection) Act 2000

1. The juvenile justice boards are to be constituted by the State Government to deal with cases against juveniles in conflict with law.

2. The special homes are to be established by the State Government for the purpose of reception and rehabilitation of juvenile in conflict with law.

3. The Juveniles in conflict with law are to be placed under the charge of special juvenile police unit. They shall report the apprehension of juvenile in conflict with law to a member of the Board (U/s. 10)

4. An inquiry before the Board regarding juvenile in conflict with law shall be completed within four months from the date of its commencement. The time limit may be extended after recording reasons in writing (under Section 14)

5. The child welfare committee has to be constituted (under Section 29) by the State Government for the welfare of the child in need of care and protection. It shall be headed by a chair person and four other members. One a such members shall be a woman and another shall be an expert in matters concerning children.

The child welfare committee shall have all powers of a metropolitan magistrate and function as a bench of magistrates. It is stated to be the final authority for the disposal of cases relating to the care and protection of children (under Section 31).

A child in need of care and protection has to be produced before Child Welfare Committee by any police officer or special juvenile police unit. A public servant, a registered voluntary organisation or a social worker or a public spirited citizen may produce the child before child welfare committee (under Section 32) The Child Welfare Committee shall hold an inquiry regarding the child (under Section 33)

The State Government establishes "Children Homes" and maintains it through voluntary organisation (under Section 34). These homes are liable to be checked by inspection committee appointed by the State Government (under Section 35). The shelter homes are set up by the State Government for the restoration of protection to a child or juvenile. Under Section 40, the process of rehabilitation and social integration of a child shall be carried out alternatively by adoption foster care sponsorship and sending the child to an after care organisation.

Section 41 authorises the Juvenile Justice Board to give children in adoption in accordance with guidelines issued by the State Government from time to time. Orphaned abandoned, neglected children are fit for adoption.

Section 42 relates to foster care. It is resorted to or used for temporary placement of infants who are to be given for adoption.

Section 43 provides for sponsorship programme. It enables providing supplementary support to families to children and special homes to meet medical nutritional and educational needs of children housed there in. The State Government is empowered to form "After care" organisation.

Under Section 45, the State Government has to frame rules to ensure effective linkage between various governmental, non-governmental, corporate and other community agencies facilitating rehabilitation and social integration of the child.

Under Section 59, the competent authority is to order release of such juvenile or permit him to live with his parents or guardian. It shall permit leave of absence to any juvenile to allow him on special occasions like examination, marriage of relation, death of kith and kin or serious illness of parent.

Section 63 relates to the establishment of special juvenile police unit which requires special instructions and training.

7.3.1 Statutory Bodies "Homes"

The Juvenile Justice Board is constituted under Section 4 of the Act. It shall exercise the powers and discharge its duties in relation to juveniles in conflict with law.

The Board shall be headed by a Metropolitan Magistrate. He shall be assisted by two social workers. One of the social worker shall be a woman. They form a bench of magistrates having powers of a metropolitan magistrate. The magistrate shall be designed as the Principal Magistrate.

The magistrate shall possess special knowledge or training in child psychology or child welfare. The social worker member should have been actively involved in health, education or welfare activities pertaining to children for seven years.

The social worker member will be selected by the selection committee comprising of Principal District Sessions Judge, District Collector, Commissioner of Police or Superintendent of Police. The tenure of office of the members of Board is three years from the date of their appointment. The appointment of any member of the Board may be terminated after holding an inquiry if found guilty of misuse of power or convicted of an offence involving moral turpitude or fails to attend the proceedings of the Board for consecutive three months without any valid reason or if he fails to attend less than three fourth of the sittings in a year.

The Juveniles Justice Board shall meet in the premises of the `Observation Home' or at any specified place 3 days in a week i.e. Monday, Wednesday and Friday between 10 A.M. and 1.00 P.M. A child in conflict with law shall be produced before the Juvenile Justice Board. There shall be atleast two members including the Principal Magistrate present at the time of final disposal of the case. In case of any disagreement among members of the Juvenile Justice Board, the opinion of the Majority shall prevail. Where there is no such majority, the opinion of the Principal Magistrate shall prevail. When the Juvenile Justice Board is not sitting a child in conflict with law may be produced before the Principal Magistrate or social worker member even in his house.

What is the Procedure to be observed when a child is produced before the Juvenile Justice Board?

1. The age of the child shall be determined on the opinion of medical expert within three days.

Check Your Progress

1.Explain civil Rights

2.Define the term 'scheduled'

3.Illustrate 'special law'

2. The Juvenile Justice Board must satisfy itself that the child was not kept in police lock up or jail prior to its production before the Juvenile Justice Board. Views of the child shall be recorded after private enquiry of the child.

3. The Juvenile Justice Board shall satisfy itself that the police has intimated the probation officer concerned and parents and guardian of the juvenile and that the child has not been subjected to ill-treatment and harassment by the police.

4. The Juvenile Justice Board to release the child on bail to the parents or legal guardian or fit person or fit institution on the interim report of the probation officer.

5. The Juvenile Justice Board shall refuse bail to the child for the reasons to be recorded in writing that the release is against best interest of the child. Such child is to be kept in observation home or in a place of safety.

6. The Juvenile Justice Board should ensure the safety of the girl child by not allowing police to take charge of the child between sunset and sunrise. She must be kept under a female fit person.

7. The Juvenile Justice Board must consider the report of the Probation Officer before adjudicating the proceedings.

8. The Juvenile Justice Board must direct the probation officer to monitor the child and submit a report whenever a child is released on probation of good conduct. The atmosphere of the Juvenile Justice Board shall be child friendly.

Under Section 15, the Juvenile Justice Board may pass any of the following orders after completion of inquiry and being satisfied of the commission of offence by a juvenile:

1. Allow the Juvenile to go home after advice and admonition,
2. Allow the Juvenile to participate in group counseling.
3. Allow the Juvenile to perform community service.
4. Ask the Juvenile to pay fine if he earns money.
5. Juvenile may be released on probation of good conduct.
6. Juvenile may be sent to special home.

Under Section 16, The Juvenile Justice Board shall not pass any of the following orders against a Juvenile:

1. Not to be sentenced to death or life imprisonment
2. Shall not be committed to prison in default of payment of fine or furnishing security.

The Juvenile Justice Board shall send him to special home or to be kept in place of safety and report the matter to State Government.

The Juvenile Justice Board shall keep the Juvenile under protective custody. Such period of detention shall not exceed the maximum period of imprisonment prescribed for the offence.

Various Homes

1. Observation Homes
2. Special Homes
3. Children's Home
4. Shelter Home

(a) Observation Home

Observation Homes are established by the State Government for the temporary reception of any Juvenile in conflict with law during the pendency of inquiry against him. Separate enclosures shall be maintained for girls and boys. The study and observation of a child during his stay form the basis for planning in the best interest of the child. The observation home shall make arrangement for the child to be heard and enquired by social worker or probation officer.

Observation Home should help the child to receive functional literacy and help it to build self confidence. It should provide proper health care and education. It shall be maintained by superintendent.

Admission of child shall be made round the clock. Only child in conflict with law shall be kept in the observation home. Admission of child shall be made by Juvenile Justice Board by issuing "Placement Order".

Rule 26 enjoys the home to send information to parents and verify the identification marks and the order of the Juvenile Justice Board. A medical chart for the Juvenile shall be maintained. Juvenile has to be produced before the juvenile justice board through police in mufti or a staff of the observation home.

Juvenile committed to a special home shall be sent to observation home, pending transport by escort. Before 5th of every month, the observation home shall send a report to the Juvenile Justice Board and to the District and Sessions Judge furnishing the information about the list of children kept in the home in respect of whom the Juvenile Justice Board has passed orders of committal to the special Home but not transported for want of escort.

7.3.2. Special Home

The State Government shall establish and maintain Special Homes. It may establish with the help of voluntary organisation also.

These special homes are meant for reception and rehabilitation of juvenile in conflict with law. The State Government has to frame rules for the management of these homes.

The Tamil Nadu has established Special Homes for boys and girls exclusively for their reception care treatment and rehabilitation. The juvenile in conflict with law will undergo institutional training. These house shall have facilities for non-formal education, education, professional assistance by psychologist social worker or counselors for behaviour modification for creative learning and cultural programmes. These homes provide for sports and other extra-curricular activities to the inmates. The object of such homes is to prepare the Juvenile in conflict with law for reintegration within the community as a changed person.

(a) Children's Home

The State Government has to establish and maintain Children's Home for the reception of child in need of care and protection during the pendency of an inquiry against it. These homes should give care treatment, education training and rehabilitation to such children. Children of both sexes below 10 years shall be admitted in it. Separate children's homes are set up for boys and girls in the age group of 10 to 18 years.

The children shall be provided with nutritional diet as prescribed by nutritional expert. Juvenile are admitted in the Children's Homes by the orders of Child Welfare Committee. These Homes shall orient the Juveniles on their rights and to facilitate them to receive vocational training. These homes impart behaviour modification programmes for personal growth and develops positive attitude towards family. Juveniles in conflict with law cannot be admitted to these **"Children's Home"** under any circumstance.

(b) Shelter Homes

Shelter Homes established by the State Government shall function as drop-in-centres for the children in need of urgent support. These homes care and protect destitute street children; runaway children. It shall have all facilities of boarding and lodging besides health care and nutrition. Children in crisis situation live in these **Shelter Homes.** The Child Welfare Committee Special Juveniles Police units and social workers may send such children to these homes. It shall take such steps for the restoration and protection of such child to his parent guardian, fit person of fit institution.

7.4. Immoral Traffic (Prevention) Act

Formerly it was known as SITA (Suppression of Immoral Traffic Act). Now it is PITA (Prevention of Immoral Traffic Act) 1956.

It has always a link with Indian Penal Code. Specific offences such as Kidnapping and Abduction (Section 366, 372 of 373)

Bilmoria Rani had dealt with Female criminality very extensively. How and why a woman falls into the pit of sin was fully described in her book.

Through Justice S. Rathinavel Pandian, The Supreme Court in Vishal Jeet - Vs.- Union of India (1990) 3 SCC 318 ; said, "Prostitution always remains as a running sore in the body of civilisation and destroys all moral values. The causes and evil effects of prostitution maligning the society are so notorious and frightful that none can gainsay it. This malignity is daily and hourly threatening the community at large slowly but steadily making its way onwards leaving a track marked with broken hopes.

Therefore the necessity for appropriate and drastic action to eradicate this evil has become apparent". It has been realised that prostitution is not confined only to the **"females"** and **"Children"** but also covers the "Males". Now both **Males** and **Females** are treated as **"Persons".**

The prostitution and exploitation of women and children for sexual purposes has acquired monstrous proportions throughout the world. In order to eradicate this evil several International Agreements and covenants have been signed in this country.

They include

1) The International Agreement for the Suppression of White Slave Traffic dated 18th May 1904 as amended by the protocol approved by the General Assembly of the United Nations on 3rd December, 1948.

ii) International Convention for the Suppression of the Traffic in Women and Children dated 30th September, 1921 as amended by the Protocol approved by the General Assembly of the U.N. on 20th October, 1949.

iii) International Convention for the Suppression of the Traffic in persons and of the exploitation of the prostitution of others dated 9th May, 1950 signed at New York. India was a signatory of this convention.

7.4.1. Scheme of Legislation (of PITA)

This contains 25 Sections. The Act underwent two Major Amendments in 1978 and 1986, which introduced radical changes in the scope of the legislations. The persons covered there under and the definition of "prostitution" etc. The Act also contains number of penal provisions which aim to punish those who keep or manage a brother, who procure induce or take a person for prostitution and who carry on prostitution in the vicinity of a public place etc.

7.4.2.Purpose of Legislation

The purpose of the enactment was to inhibit or to abolish commercial vice namely traffic in women and men and children for the purpose of prostitution as an organised means of livings. The aim was not to render prostitution "perse" a

criminal offence or punish a women merely because she prostitutes herself. A careful scrutiny of the act clearly reveals that it was aimed at the suppression of commercialised vice (Ratnamala, in re AIR 1962, Madras 31 (33)]

What is punishable under the Act is sexual exploitation for commercial purpose or to make a living thereon. The provisions formed in Section 7 and 8 of the Act however make the practice of prostitution in or in vicinity of certain places such as places of Public Religious worships, educational institutions, hospitals, etc. punishable. The Act deals with not only a social but also a socio-economic problem; therefore the provisions of the legislation are more preventive than punitive.

7.4.3.Essentials of Prostitution

i) A female must offer her body to an indiscriminate intercourse with men. It must be promiscuous intercourse.

ii) There must be sexual intercourse.

iii) It must be for "hire". The consideration may be in cash or kind.

In order to establish prostitution, evidence of more than on customer is not always necessary. All that is essential is to prove that a girl should be a person offering her body for promiscuous sexual intercourse for hire. Sexual intercourse is not an essential ingredient according to Gaurav Jain - Vs.- Union of India (1997) 8.S.C.C. 114 as per Ramasamy. J.

Check Your Progress

4.Write about on 'Essentials of prostitution'

5.Who is called Probation officer ?

7.4.5.Rescue and Rehabilitation of Prostitutes

The summary of the guidelines laid sown by the Supreme Court in Gaurav.Jain's Case.

1. Counselling, Cajoling and coercion are necessary to effectively enforce the provisions of the act.

2. It is the duty of the state and all voluntary non-government organisation and public spirited persons to come to the aid of the prostitutes to retrieve them from prostitution, rehabilitate them by lending them a helping hand to lead life with dignity of person, self employment through provisions of education and financial support.

3. Women found in the flesh trade should be viewed more as victims of adverse socio circumstances rather than as offender in our society. The commercial exploitation of sex may be regarded as a crime but those trapped in custom-oriented prostitution and gender-oriented prostitution should be viewed as victims of gender-oriented vulnerability.

4. The customary initiation of women in the practice of Devadasi prevalent in Tamil Nadu and the resultant practice of prostitution is a crime against humanity violation of human rights and obnoxious to the Constitution and the Human Rights. These prostitutes should be rescued and rehabilitated.

7.5 Probation of offenders act

The question of release of offenders on probation of good Conduct instead of sentencing them to imprisonment has been under consideration for some time. In 1931, the Government of India prepared a draft of Probation of Offenders Bill and circulated it to the then local government for their views.

However owing to pre- occupation with other more important matters, the Bill could not be proceeded with. Later in 1934, the Government of India informed provincial government that there was no prospect of central legislation being undertaken at the time and there would be no objection to the provinces undertaking such legislation themselves. A few provinces accordingly enacted their own probation laws.

In several states, however there are no separate probation laws at all. Even in states. where there are probation laws they are not uniform nor are they a adequate to meet the present requirements. In the meantime, there has been an increasing emphasis on the reformation and rehabilitation of the offender as a useful and self-reliant member of society without subjecting him to the deleterious effects of jail life.

In view of the wide-spread interest in the probation system in the country, this question has been, re-examined and it is proposed to have a central law on the subject which should be uniformly applicable to all the states.

It is proposed to empower the courts to release an offender after admonition in respect of certain specified offences. It is also proposed to empower courts to release on probation in all suitable cases, an offender found guilty of having committed an offence not punishable with death or imprisonment for life.

In respect of offenders under 21 years of age, special provisions has been made putting restriction on their Illustrate the provisionment. During the period of probation offenders will remain under the supervision of probation officers in order that they may be reformed and become useful members of society. The act achieves these objects (Gazette of India 11-11-1957).

J.K. Prasad - Vs. - State of Bihar (A. I.R 1972 S.C. 2522): Purpose of the Act as per modern jurisprudence is based on theory that nobody is a born criminal. Efforts should be made to correct an offenders provided he is below twenty one years of age and he is not convicted for an offence which is punishable for life imprisonment.

What is the criteria to release a person on Probation?

(a) The answer lies in Sec 12

Many offenders are not dangerous criminals but are weak characters, or who have surrendered to temptation or provocation. In placing such type of offenders on probation the court encourages their own sense of responsibilities of their possible contamination of prison.

In Harikrishanan - Vs. - State of Haryana 1989 L:W. (cri.) S.C.I the High Court has observed that there was no previous history of enmity between them of a sudden flare - up. These are not shown to be incorrect. We have already said that the accused had no intention to commit murder of any person. Therefore the extension of benefit of the beneficial applicable to first offender cannot be said to be inappropriate

7.6 Summary

Untouchability which prevents any person from entering any place of public worship shall be punishable with imprisonment for a term not Less than one month. Punishment is also for not allowing in any shop, public restaurant or places of public entertainment or obstruction to take water from public well or water tap. The child

welfare committee has all powers of a metropolitan magistrate and function as a bench of magistrates. The Juvenile Justice Board refuses the bail to the child for the reasons that the reasons that the release is against best interest of the child.

7.7 Key words

disabilities	-	cannot use completely
annoyance	-	make slightly angry
legislative	-	have the power to make and change laws
vulnerable	-	weak and easily hurt physically or emotionally
juvenile	-	connected with young people who are not get adults
ingredient	-	qualities which are necessary to make successful
rehabilitation	-	to help normal life after in prison long time
probation officer	-	a person whose job is to check on people who are on probation and help them
empower	-	power to something

7.8 Answer to check your progress

1. Refer 7.1
2. Refer 7.2
3. Refer 7.2.1
4. Refer 7.4.3
5. Refer 7.5

7.9 Model Questions

1. Write briefly about Religious Disabilities
2. Explain about prevention of Atrocities Act 1989
3. Give an account of statutory Bodies "Homes"
4. Describe briefly about Immoral Traffic (Prevention) Act
5. Write about Probation of offenders Act

Lesson - 8

Familiarization of the objectives of Economic Legislation

Introduction

In this unit we have to discuss Foreign Exchange Regulation Act (FERA), COFEPOSA, Prevention of Corruption Act, Prevention of Food and Adulteration Act, Dowry Prohibition Act, Narcotic and Psychotropic Substances Act, and Terrorist and Disruptive Act (TADA).

Lesson Objectives

- To understand the FERA Act
- To know the Narcotic and Psychotropic substances Act
- To Learn the Dowry and other related Act

Lesson Structure

8.1 Foreign Exchange Regulation Act (FERA)

Foreign Exchange Regulation Act is designed for safeguarding and conserving foreign exchange which is essential to the economic life of a developing country. The provisions have therefore to be stringent and so framed as to prevent unauthorized and unregulated transactions which might upset the scheme underlying the controls and in larger context the penal provisions are aimed at eliminating struggling which is concomitant of controls over the free movement of goods or currencies.

State of Maharashtra - Vs. – M.H. George (A.I.R. 1965 S.C. 722). In this case George was a passenger from Zurich to Manila in a Swiss plane which left Zurich on 27-11-62. When the plane landed at the airport in Bombay on 28th, it was found on search that the respondent who was still sitting in the plane carried 34 kilos of gold bars on his person and that he had not declared in the 'Manifest' for transact. The respondent was prosecuted for importing gold into India in contravention of Section 8 (1) of the Foreign Exchange Regulation Act 1947.

The Presidency Magistrate sentenced him to rigorous imprisonment for one year. On appeal the High Court of Bombay held that the *Mens Rea* being a necessary ingredient of the offence, the respondent who brought gold into India for mere transit to Manila did not know that during the crucial period such a condition has been imposed and therefore he did not commit any offence. The conviction made by the Presidency Magistrate was set aside. The State of Bombay appealed before the Supreme Court. The majority of Judges held that "*mens rea*" is not an essential offence under Section 8(1) read with **23 (I-A)** of the Foreign

- Exchange Regulation Act 1947.

8.2 Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA)

The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 - This is an act to provide for preventive detention in certain cases for the purpose of conservation and argumentation of foreign exchange and prevention of smuggling activities and for matters connected therewith.

Whereas violations of foreign exchange regulations and smuggling activities are having an increasingly deleterious effect on the national economy and thereby a serious adverse effect on the security of the state.

And where as having regard to the persons by whom and the manner in which such activities or violations are organised and carried on, and having regard to the fact that in certain cases which are highly vulnerable to smuggling activities of a considerable magnitude are clandestinely organised and carried on, it is necessary for the effective prevention of such activities and violations to provide for detention of person concerned in any manner therewith. Be it enacted by Parliament in the Twenty Fifth year of the Republic of India.

The Act has got only 14 Sections. Sections 3 says about powers of the government to make orders detaining certain persons engaged in smuggling and Section 5 deals with power to regulate place and conditions of detention. Section 8 deals with advisory board which deals with period of detention.

8.3 Prevention of Corruption Act (1947)

This is an act for more effective provision for the prevention of bribery land corruption. This act has only 8 sections only.

a. What amounts to a Bribe?

Three things are essential

1.The receiver must be present or prospective public servant.

2.He must receive or solicit an illegal gratification.

3.It must have been received as a motive or reward for doing any official act he was empowered to do otherwise it is extortion.

Sections 161-171 of Indian Penal Code deal with two classes of offences namely,

1. Those committed by public servant
2. Which relate to public servants but not actually committed by them.

A judge buys of Z who has a case pending in A's court. Government promissory notes at a discount, when they are selling in the market at a premium. A has obtained a valuable thing from Z without adequate consideration.

b. Dalpatsingh - Vs - State of Rajasthan (AIR 1969 S.C. 17)

The Supreme court has held that before the offence is held to fall under Sec. 161. I.P.C the following requirements have to be satisfied.

1. The accused at the time of the offence was or expected to be a public servant.
2. That he accepted or obtained or agreed to accept or attempted to obtain from some person a gratification.
3. That such gratification was not a legal remuneration due to him and
4. that he accepted the gratification in question as a motive or reward for
   (a) Doing or for bearing to do an official act or
   (b) Showing or for bearing to show favour or disfavour to some one in the exercise of his official functions or
   (c) Rendering or attempting to render any service or disservice to someone with the central or any state government or parliament or the legislature of any state or with any public servant.

The accused one Haveldar and another Subedhar in Rajasthan Armed Constabulary stationed at a border outpost, extorted money from the villages saying that in case hey did not pay the sums demanded they would be reported to higher authorities as visiting Pakistan for some illegal purposes as smuggling of goods and selling goats to residents of Pakistan and such other activities.

The Supreme Court over ruling Shivji Lal's case (AIR 1959 S.C 847) held that the acts complained of did constitute offence under Sec 5(2) of the Prevention of Corruption Act but they will not constitute offence under Sec 161. The accused extorted amounts from the villagers not for the purpose of showing any officials favour from the accused. The payments were made solely with a view to avoid being ill - treated or harassed. Hence in the absence of the element of motive of the particular kind mentioned in the Section the acts complained of did not fall under Sec 161 I.P.C

8.4 Prevention of Food and Adulteration Act (1954)

The main object of the act is to give the citizen of India pure quality food. The accused will be punished even when there is no *mens rea.*

a. State of Kerala - Vs - Kunchu (1959 K.L.J. 588)

Four prosecutions were launched charging in each case both the master and the servant carrying adulterated milk for sale. Under Section 7, and 16 of the Prevention of Food Adulteration Act. The master in each case pleaded guilty to the charge while the servant in each case pleaded not guilty. The Trial Court convicted the master and acquitted the servants on the ground that in the circumstances of each case the master alone was liable for the offence of selling adulterated milk on the terms of Sections 7 and 16 of the act.

The state filed appeals against the orders acquitting the servants.

Held

On plain reading it is clear that it is only the person who can be deemed to sell himself or by another on his behalf who is interdicted from selling by Section 7 who is made punishable by Section 16(1) of the Act: in other words it is only he who has the choice of selling himself or by any other person on his behalf who is within the contemplation of the legislature.

The expression "himself or by any person on his behalf" in Section 7 and 16(1) of the Act must imply that the "person" contemplated is the master or the principle and not the servant. As such it has to be held that no absolute liability can be fastened on the servant under Section 16(1) read with Section 7 of the Act.

The servant would of course, be liable under the provisions of the Act if in a given case on the facts and circumstances could be deemed to sell not on behalf of the master but on his own behalf or by himself.

Held

The general rule is that unless *Mens Rea* is excluded either by express words in the statute or by necessary intendment as an element of the offence, a person ought not to be found guilty under the penal law. There may be cases in which the

Check Your Progress

1.What is foreign Exchange ?

2.Expand 'COFEPOSA'

legislature in its wisdom has thought it fit to declare offences without an element of *Mens Rea* in them, but they are by way of exception to the general rule. On the provisions of Act which are now in question, it cannot be held that such an intention to dispense with this elements in the case of a servant can be attributed to the legislature.

8.5 Dowry Prohibition Act (1961)

"Nature gave women too much power
The Law gives them too little ."

- Will Henry

a. Statement of objects and reasons

The object of this bill is to prohibit the evil practice of giving and taking of dowry. This question has been engaging the attention of the government for some time past and one of the methods by which this problem, which is, essentially a social one was sought to be tackled was by the conferment of improved property rights in women by the Hindu Succession Act 1956. It is however felt that a law which makes the practice that any dowry if given does ensure for the benefit of the wife will go a long way to educating public opinion and to the eradication of this evil. There has also been a persistent demand for such a law both in and outside Parliament.

b. Statement of objects and reasons to Act 63 of 1984

The evil of dowry system has been a matter of serious concern to everyone in view of its ever-increasing and disturbing proposition. The legislation on the subject enacted by Parliament in the Dowry Prohibition Act 1961 and the far reaching amended which have been made to eradicate the evil. As pointed out by the committee on "the status of women in India", the educated youth is grossly insensitive to the evil of dowry and unashamedly contributes to it its perpetuation. Government has been making Various efforts to deal with the problem.

In addition to issuing instructions to the State Governments and the Union Territory Administrations with regard to the making of thorough and compulsory investigations into cases of dowry deaths and stepping up anti-dowry publicity, government referred the whole matter for consideration by a joint committee of both the houses of Parliament. The committee went into the whole matter in great depth and its proceedings have helped in no small measure in

focusing, the attention of the public and rousing the consciousness of the public against this evil.

The joint committee has recommended that the definition of dowry should be modified by omitting the expression "as consideration for the marriage".

Sataya Rani Chaddha - Vs - State of Delhi Administration (1994) 2. SCC 40, where the complaint failed to prove that the accused demanded to prior the marriage, a scooter and the demand for scooter arose subsequent to the marriage which was not in continuation of the first demand, the accused was not guilty of demanding dowry.

In Ashok Kumar - Vs - State of Rajasthan (1991) ISCC 166, Justice R.M. Sahai said, Bride burning is a shame of our society. Poor never resort to it. Rich do not need it. Obviously because it is basically an economic problem of a class which suffers both from Ego and Complex social Organisation is needed to curtail malady of "Bride Burning".

In the case of Shoba Rani - Vs - Madhukar Reddi (AIR 1988 S.C. 121), the Court has an occasion to pronounce on the concept of cruelty. A new dimension has been given to the concept of cruelty while granting a divorce to the women in the grounds of demand for dowry. In brief, the persistent demands for dowry is considered tantamount a ground for the purpose of granting matrimonial relief including divorce.

Check Your Progress

3.Describe the objectives of Food and Adulteration Act

4.What is Narcotic? Explain

8.6 Narcotic and Psychotropic substances Act

Even possession of the substances is made punishable. Beni Prasad - Vs - State of U.P. 2003 Cri. C.J. 3185.

In this case "charges" in charge-sheet found to be indefinite, uncertain, vague and ambiguous. There was "no evidence" as to which police officer caught hold of the accused. FIR did not disclose that there was compliance with mandatory provisions of Section 50. The statement of witness on point of weighment of charges on spot was contradictory sealed packets of samples did not bear the signature of accused persons. Thus prosecution case suffers from various factual and legal infirmities. The conviction was set aside (Sec 8 and 20B).

Section 15

Megh Singh - Vs - State of Punjab (AIR 2003 S.C. 3184):

In this case accused was apprehended while he was sitting atop gunny bags containing poppy husk. Accused was not able to establish that possession was not conscious. Supreme Court held the convictions was proper.

Section 17: Illegal possession

Ram Bilas Babu - Vs - The State of M.P. (2003 Cri. C.J. 3372): The investigating officer stated that sample of 10 grams of opium was taken from each accused. It was supported by documents on record and evidence of constable who had accompanied the investigating officer. Therefore accused persons could be convicted on the basis of evidence which was found fully reliable.

Section 18

Manjoor -Vs- The State of U.P. (2003 Cri. C.J. 4644): The accused was arrested within 10 minutes after receipt of information. Therefore Non-Compliance of requirement of taking down information was not fatal. Evidence of arrest search and seizure was consistent and convincing evidence that the sample of article seized from possession of the appellant was sent to chemical examiner who found it to be opium. Poppy was trust worthy. Conviction of the accused was proper.

8.7 Terrorist and Disruptive Act (TADA) 1987

Possession of Arms-explosives are punishable under Section 3,5 and 18, 19 Karamjit Singh - Vs - State of Delhi Administration (2003 Cri. C.J. 2021).

Section 3

Search and seizure recovery of explosive material from the house of the accused - Direct testimony of police witness that it was accused who opened the lock of his residential quarters and thereafter opened lock of his box which contained explosive material. No reason for them to falsely implicate the accused. House also shown to be in exclusive possession of accused - search undertaken at time when terrorism was at its peak in Punjab and neighbouring areas and members of public were reluctant to accompany police during search or arrest. Hence Non-Examination of public witness was not fatal to prosecution. Offence is proved beyond doubt.

8.8 Summary

Foreign Exchange Regulation Act is for safeguarding and conserving foreign exchange. It is framed to prevent unauthorized and unregulated transactions. Bribery Act Prevents corruption that for receiving as a motive or reward for doing any official act. Food and Adulteration Act assures citizen of Indic pure quality food. Dowry Act prohibits evil practice of giving and taking of dowry. Narcotic and Psychotropic Act prohibits illegal possession of narcotic and psychotropic substances. Terrorist and Disruptive Act prevents the possession of Arms and Explosives.

8.9 Key words

conserving	-	prevent it from being changed or destroyed
detention	-	place kept in prison
smuggling	-	the crime of bringing goods secretly and illegally
foreign exchange	-	the system of exchanging the money of one country for that of another country
public servant	-	employees of the public services
promissory note	-	a signed document containing a promise to pay a straws amount of money before a particular date
extort	-	to make give by threatening
eradication	-	get ride of completely
compliance	-	the practice of obeying rules

8.10 Answer to check your Progress

1. Refer 8.1
2. Refer 8.2
3. Refer 8.4
4. Refer 8.6

8.11 Model Questions

1. Write briefly about Foreign Exchange Regulation Act
2. Describe the features of Prevention of corruption Act
3. Discuss some case Laws of prevention of Food and Adulteration Act
4. How to prevent dowry system in India? Explain
5. Give an account of Narcotic and Psychotropic Substances Act

Lesson - 9

JUDICIARY

Introduction

In this unit we have to see the organisation and functions of Judiciary in India, and Role of Nyaya Panchayat and Lok Adalat at village level and District level.

Lesson objectives

- To know the judiciary system of India
- To understand the different classes of criminal courts
- To view the powers of Executive magistrate

Lesson Structure

9.1 Organisation and functions of judiciary in India

The Supreme Court of India and a High Court for each State have been created by the Constitution (Art 124)

An appeal shall lie to the Supreme Court from any judgment final order or sentence in a criminal proceedings of a High Court in the territory of India if the High Court.

a) has an appeal reversed an order of acquittal of an a accused person and sentenced him to death or

b) has withdrawn for trial before itself any case from any court sub-ordinate to its authority and has in such trial convicted the accused person and sentenced him to death: or

c) Certifies under Art 134 A that the case is a fit one for appeal to the Supreme Court; provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of Art 145 and to such conditions as the High court may establish or require.

(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeal from any judgement, final order or sentence in a criminal proceedings of a High Court in the territory of India subject to such conditions and, limitations as may be specified in such law.

Under Art 132 clause (1) the newly added Art 134 A inserted by the Constitution 44th Amendment Act 1978. by which every High Court is empowered to issue a certificate for appeal to the Supreme Court after passing a judgment, decree, final order or sentence referred to in clause (1) of Art 132 or clause (1) of Art 133 or clause (1) of Art 134, a certificate of fitness that the case is one which deserves to be considered and determined by the Supreme Court in appeal: This Article 134 A does cover both civil and criminal cases in the larger sense. Whenever a High Court has passed an adverse order, judgement or sentence it is open to the aggrieved party to make an oral application then and there to the High Court and the High Court may or may not give permission to appeal. The High Court may also *Suo moto* issue a certificate of fitness for appeal.

It has been the established practice during the time of the British rule that as a rule the Privy Council will not entertain criminal appeal on behalf of the Crown or will entertain them only in certain limited classes of cases against the decisions of the chartered High Courts of Calcutta, Bombay and Madras or in certain other cases where the High Court certified that case was a fit one for appeal to Privy Council. But under the new provision of the Constitution as embodied in Art 134, in cases falling under sub-clauses (a) and (b) of clause (1) an appeal is provided for the accused

and under clause (c) of Art 134 (1) a certificate of fitness as a matter of right. But except in these two classes of cases, the Constitution intends in all other criminal matters that the High Court of the respective States should normally and ordinarily be the final Court of criminal appeal.

Now a criminal appeal can be filed before the Supreme Court from judgement, final order or sentence of a High Court,

1) Without a certificate of the concerned High Court, or
2) With certificate of the High Court.

i) Without a Certificate

a) An appeal lies if the High Court reverses the decision of acquittal of an accused person and sentence him to death: for example if the Sessions Judge of Madurai acquits, the accused of a charge of murder, and the government files an appeal against judgment of the Sessions Court to the High Court of Madras and the High Court sets aside the order of acquittal and sentence him to death, an appeal shall lie under sub clause (a).

It should be noted in this connection that appeal lies only when a death sentence or a sentence of life imprisonment or imprisonment for a period of not less than ten years (inserted by the Supreme Court Enlargement of Criminal Appellate Jurisdiction Act 1972) is passed by the High Court in reversal of a judgemnet of acquittal. But no appeal lies under this clause (a) where the High Court has confirmed in appeal a conviction of the accused and the sentence of death, life imprisonment or 10 years imprisonment passed upon the person.

It has also to be noted that there is no right of appeal before the Supreme Court, from a death sentence, life imprisonment or 10 years imprisonment imposed by a High Court over the accused by way of enhancement of punishment.

b) If the High Court has withdrawn for trial before itself any case from any court sub-ordinate to its authority and has in such trial convicted the accused and sentenced him to death, life imprisonment or 10 years imprisonment an appeal shall lie to the supreme court from the order of the High Court.

ii) With Certificate

An appeal lies to the supreme court from any judgment in a criminal proceeding of a High Court if the latter certifies that the case is a fit one for appeal to the Supreme Court (Clause (c) 134). But the appeal under this sub-clause will be subject to the rules made by the Supreme Court under Art 145 and such conditions laid down by the High Court.

Clause (2) of Art. 134 authorizes Parliament by law to enlarge the appellate Jurisdiction of the Supreme Court in regard to the criminal matters. This is only an enabling provisions introduced with a view to meet possible future requirements.

The Parliament has enlarged the appellate jurisdiction of the Supreme Court in regard to criminal matters by an enactment known as "The Supreme Court, (Enlargement of Criminal Appellate Jurisdiction) Act 1972 which reads as follows:

Section: 2, "Without prejudice to the powers conferred on the Supreme Court -by clause (1) of Art 134 of the Constitution, an appeal shall lie to the Supreme Court from any judgment final order or sentence in a criminal proceedings of a High Court in the territory of India if the High Court.

a) has on appeal reversed an order of acquittal of an accused person and sentenced to him to imprisonment for life or to imprisonment for a period of not less than ten years.

b) has withdrawn for trial before itself any case from any court subordinate to its' authority and has in such trial convicted the accused person and sentenced him to imprisonment for, life or to imprisonment for a period of not less than ten years.

Under the newly enacted Act clause (2) an appeal would lie to the Supreme Court even in cases where the High Court on appeal reversed the order of acquittal of an accused person and sentenced him to imprisonment for life or to imprisonment for a period of not less than 10 years or imposed the above punishments by withdrawing the case from any subordinate court.

Check Your Progress

1. Explain 'Appeal'

2.Enlargement of criminal Appellate Jurisdiction Act 1972 – Describe

3.Describe the powers of session judge

Before this Act, appeal to Supreme Court was possible only in cases where death sentence was imposed by the High Court reversing an order of acquittal by the lower court or withdrawing a case from the lower court and deciding it by itself imposing death sentence. This enlargement of jurisdiction of the Supreme Court was made by Parliament in exercise of powers vested in it under clause (2) of Art 134 of the Constitution.

In criminal cases the power of the Supreme Court under Art 136 has more frequently been involved. In criminal cases the court will not grant Special Leave to appeal unless it is shown that special and exceptional circumstances exist, or it is established that grave injustice has been done and that the case in question is sufficiently important to warrant a review of the decision by the Supreme Court.

In Haripada Day -Vs - State of W.B. (AIR 1956 S.C. 757) the Supreme Court held that it will grant special leave only if there has been gross miscarriage of justice or departure from legal procedure, such as which vitiates the whole trial or if the finding of fact were such as shocking to the Judicial conscience of the court. Art 136 does not confer a right of appeal on the party Matru -Vs - State of U.P. (AIR 1971 SC 1050).

In an appeal under Art 136, the Supreme Court does not interfere with the concurrent findings of fact unless it is established; -

1) that the finding is based on no evidence, or
2) that the finding is perverse, it being such as no reasonable person could arrive at even if the evidence was taken at its face value or
3) the finding is based and built on in admissible evidence which evidence, excluded from vision would negate the prosecution case or substantially discredit or impair it, or
4) some vital piece of evidence which would tilt the balance in favour of the convict has been over looked, disregarded or wrongly discarded.

The Supreme Court does not function as a regular court of appeal in every criminal case. Normally; the High Court is a final court of appeal and the Supreme Court is only a court of special juris8iction. The Supreme Court would not

therefore re-appraise the evidence to determine the correctness of findings unless there are exceptional circumstances where there is manifest illegality or grave and serious miscarriage of justice, for example, the forms of legal process are disregarded or principles of natural justice are violated or substantial grave injustice has otherwise resulted.

Sadanandan - Vs - State of Madras (A.1.R. 1979 SC) In this case the accused was convicted by the Sessions Court, Thirunelveli to life imprisonment. The accused murdered the brother of the appellant at mid night inside the house. On appeal to the High Court of Madras the accused was acquitted. On the ground that the Sessions Court did not examine any independent witness. The brother of the murdered person filed a special leave petition before the Supreme Court. It was allowed. Then regular appeal was heard and the Supreme Court convicted the accused, because there cannot be a independent witness at dead of night inside the house.

In addition, the Criminal Procedure Code makes provision of appeal to the Supreme Court under Sections 374 and 379. The Criminal Procedure Code also enables the Supreme Court to transfer in the interest of justice cases and appeals from one High Court to another High Court or from one criminal court subordinate to one High Court to another High court.

The Indian Constitution by Art. 227 provides that every High Court shall have superintendence over all courts and tribunals through out the territories in relation to which It exercises jurisdiction. The Criminal Procedure Code further provides that every 'High Court shall so superintendent over the Courts of Judicial Magistrates subordinate to it as to ensure an expeditious and proper disposal of cases by such Magistrates (by Section 406). The Code has also entrusted every High Court with numerous powers and duties including those relating to appeals and revisions.

Apart from the Supreme Court and the High Court the following classes of Criminal Courts have been described by Section 6 which is as follows.

a. Classes of criminal courts

Besides the High Court and the Courts constituted under any law other than this Code, there shall be in every state the following classes of Criminal Courts, namely:

i) Court of Sessions

ii) Judicial Magistrates of the First Class and in any Metropolitan area Metropolitan

iii) Judicial Magistrate of the Second Class and

iv) Executive Magistrate

The words "and the courts constituted under any law, other than this Code" would include courts like "Juvenile Court" under Juvenile Justice (Care and Protection) Act or the Courts called as "Nyaya Panchayat" or "Panchayati Adalats" constituted under the Criminal Law Amendment Acts.

Though an Executive Magistrate is one of the classes of Courts that does not mean that where he functions administratively and not judicially he functions as a court (Mammon - Vs - State of Kerala 1980 Cri C. J. Noc, 75)

9.2 Courts of Sessions

For every Sessions division the State shall establish a Court of Sessions which shall be presided over by a judge to be appointed by the High Court (Sec 9 (1) (2) and the High Court may also appoint additional Sessions Judges. The High Court may also appoint Assistant Sessions Judges to exercise jurisdiction in a court of Sessions Sec. 9(3). Now we have "fast Track" Sessions Court with the object of speedy trial of Sessions cases.

Additional Sessions Judge or Assistant Session Judge, would be exercise jurisdiction in the Court of Sessions and his judgment and orders would be those of the Courts *of Sessions. The Additional Session Judge exercise the powers of a Court of Sessions, subject to the limitations prescribed by law; but is not an independent Court of Sessions. Rahul - Vs- State of Rajasthan (1978 Cri - L - J 1276).

All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose court they exercise jurisdiction [Sec 10(1)]

9.3 Courts of judicial magistrates

In every district there shall be established as many courts of Judicial Magistrate of the First class and of the Second Class, and at such places, as the state Government may after consultations with the High Court, by notification specify (Sec 11(1)]. The State Government may also after consultation with the High Court establish for any local area, Magistrates one or more special Courts of Judicial Magistrates of the First class or of the Second Class to try any particular case or particular class of cases and where any such special court is established no other Court of Magistrate in the local area shall have jurisdiction to try any such case or class of cases for the trial of which such Special Court of Judicial Magistrate has been established [Proviso to Sec 11(1].

The power to determine the number of Courts of Judicial Magistrates of either class and their location is left to the State Government, since it will have to take into account various administrative and financial considerations. The State Government however is required to exercise this power in consultations with the High Court in order that Magistrate Courts are established in adequate number in all districts and at suitable places.

In order to make the separation of judiciary effective, the conferment of magisterial power is kept with the High Court, and it has been provided that the presiding officer of such courts shall be appointed by the High Court [Sec. 11(2)]. And it is further provided that the High Court may whenever it appears to it be expedient or necessary confer the powers of a judicial magistrate of the First Class or of the Second Class on any member of the judicial service of the State, functioning as a Judge in a Civil Court [Sec 11(3). This would enable the High court to provide for situations where it might not be necessary or possible to appoint full time Judicial Magistrate.

(a) Chief Judicial Magistrate

In every district, the High Court shall appoint a Judicial Magistrate of the First class to be the Chief Judicial Magistrate. [Sec 12(1] His main function would be to guide, supervise and control other Judicial Magistrates in the district. He would also try important cases.

(b) Additional Chief Judicial Magistrate

The High Court may appoint any Judicial Magistrate of the First Class to be an Additional Chief Judicial Magistrate and such Magistrate shall have all or any of the powers of a Chief Judicial Magistrate as the High Court may direct (Sec 12 (2).

(c) Sub-Divisional Judicial Magistrate

The High Court may designate any Judicial Magistrate of the First class in any sub -division as the Sub-Divisional Judicial Magistrate. Subject to the general control of the Chief Judicial Magistrate, such, Sub-Divisional Magistrates shall also have and exercise such powers of supervision and control over the work of the Judicial Magistrates in the sub-division as the High Court may specify [Sec. 12(3)] in the sub-division as the High Court may specify. [Sec 12 (3)].

9.4 Courts of metropolitan Magistrates

As in a district, every metropolitan area will have almost a parallel set up of judicial magistrates. In every metropolitan area the State Government may, after consultation with the High Court establish courts of Metropolitan Magistrates at such places and, in such number as it may specify (Sec 16(1)].

The Presiding Officers of such courts shall be appointed by the High Court, and the jurisdiction and powers of every such Magistrate shall extend throughout the metropolitan area [Sec 16(2)(3)j. Likewise in every metropolitan area, the High Court appoint a Metropolitan Magistrate as Chief Metropolitan Magistrate.._ It may similarly appoint and Additional Chief Metropolitan Magistrate and such magistrate shall have all or any of the powers of a Chief Metropolitan Magistrate as the High Court may direct. (Sec 17)

It may be noted that though the Code makes a specific special provisions in relation to a district for the establishment of Special Courts of the Judicial Magistrate to try any particular case or class of cases, it does not likewise provide for the establishment of Special Courts of Metropolitan Magistrates.

1. Special Judicial Magistrates and Special Metropolitan Magistrates:

a) The High Court may, if required by the Central or State Government so to do confer upon any person who holds or has held any post under the Government, all or any of the powers Code on a judicial magistrate of the powers conferred' or conferrable by or under the Code on a Judicial Magistrate of the First Class or of the Second Class or an a Metropolitan Magistrate as the case may be in respect of particular cases or to particular classes of cases in any district or metropolitan area as the case may be. It may however, be noted that no such power shall be conferred on a person unless he possesses such qualification or experience in relation to legal affairs as the High Court may, by rules, specify (Sec. 13&18). The person's on whom the powers of a Judicial Magistrates or of a Metropolitan Magistrate have been conferred are to be called as Special Judicial Magistrates or Special Metropolitan Magistrates as the case may be.

c) Special Magistrates could be appointed by the State Government.

These Magistrates are not stipendiary and were called as Honourary Magistrates. It was often alleged that the appointments of such Magistrates were made •by Government on Extraneous considerations and not on the basis of merit. The practice of appointing retired Government officers as special magistrates to dispose of petty cases has been adopted with advantages. **The law commission Wits 14th Report** has observed in favour of the system as such, that "The honourary Magistrates are intended to give relief to the stipendiary Magistrates in their works: Most of the work entrusted to them is of a petty nature which does not require to be dealt with by a trained judicial officers and which would needlessly clog the files of stipendiary Magistrates. The institution of honourary Magistrate is also helpful as a method of associating the public with criminal judicial administration.

It has been pointed out by the joint committee report that "in remote in accessible localities or areas with thin population the available work may not justify the appointment of a full-time Magistrate. In such situations there is a practice in some States to confer the powers a Magistrates on a local officer of the powers a Magistrates on a local officer of the Government, like the sub - registrar to dispose of the few criminal cases arising in such areas. This will be a facility to the local inhabitants who otherwise would have to travel a long distance to reach a Magistrates Courts.

For these reasons the enabling provisions constrained in Section 13 and 18, have been enacted and the system of Honourary Magistrates has been continued in a modified form. It may be noted that according to Sections 13 and 18

i) the persons to be appointed as special magistrates must be either persons in Government service or those who have retired from Government service.

ii) the persons to be appointed as a special Magistrates must have the qualifications and experience as prescribed by the High Court:

iii) the appointment is to be made by the High Court and not by the State Government.

iv) the appointment is to be for a period not exceeding one year at a time.

v) According to Section 13(3) the High Court may empower a Special Judicial Magistrate to exercise the powers of a Metropolitan Magistrate in relation to Metropolitan area.

vi) Similarly, according to Sec 18(3) the High Court or the State Government as the case may be may empower any Special Metropolitan Magistrate to exercise in any local area out side the metropolitan area, the powers of Judicial Magistrate of First Class. It is rather difficult to understand why the State Government has been authorised along with the High Court under this section. This is unlike the above said Section 13(3) and appears to be some what inconsistent with the scheme of separation of judiciary from the executive.

9.5 Executive Magistrate

(a) Executive Magistrates are appointed for performing magisterial functions allotted to the executive. This becomes essential while implementing the policy of separation of judiciary from the executive. In every district and in every metropolitan area, the State Government may appoint as many persons as it thinks fit to be executive Magistrates and shall appoint one of them to the District Magistrate. S 20 (1).

The State Government may also appoint any Executive Magistrate to be an Additional District Magistrate who shall have such of the powers of a District Magistrates as many be directed by the State Government [S 20(2)]. Further the State Government may "Place an Executive Magistrate in charge of a sub-division and such Magistrate shall be called as the Sub - Divisional Magistrate [Sec 20(4)].

(b) In some states particularly in some metropolitan areas the practices of conferring on a Commissioner of Police some magisterial powers of an **Executive Nature** has been already in vogue. This well established and smoothly operating arrangements if authorized by any local law, has been allowed to continue by Sub-Sec (3) of S.20. But where this not done and also for discharging other functions of the **Executive District Magistrates** and each Metropolitan area shall have an Executive District Magistrate as provided by Sub-Sec. (1) of S.20.

9.6 Special Executive Magistrate

The state Government may appoint Executive Magistrate to be know as special Executive Magistrate for particular area or for the performance of particular functions (Sec 21).

(A) Role of Nyaya Panchayat and Lok Adalat at Village Level and District Level and other diversion procedures.

"Life – It goes on": Conceived by Honourable justice **A.K.Sikri, Judge, Delhi Court**

In three words I can sum up everything I have learned about life. It goes on. In all the confusions of today with all our troubles with politicians and people slinging the word "fear" around, all of us become discouraged tempted to say this is the end, the finish. But Life – it goes on. It always will. Do not forget that".

- Frost Robert

That is life. Some people encounter happiness and property. Peace of mind and solace. While some other may experience fear and anxiety. Poverty and unsure mountable challenges in life. Deprivation and social stigma. Many may go through one or the other experience at different stages of their life. But life it goes on. We have to make an attempt to alleviate sufferings of the unprivileged and enhance happiness and prosperity of the common man. Law, lawyers judges and judicial system can play important role in this regard.

We shall narrate stories - some real life stories and some fiction giving meaningful messages.

(B)Tale of "Gudia" (a Woman)

Many people know about the sordid Tale of Gudia who is branded as `Goongi Gudiya" Flate played cruel joke to her destiny. She was married to Aarif an army official. On 24th February 1999 Aarif disappeared. Every body thought that he had died in war with Pakistan. Gudiya was married again to Taufiq.

However it turned out later that Aarif was made P.O.W in Pakistan. With the intervention of Indian Government, he was released recently. He came back to find that Gudiya was **pregnant** from her **second husband** Taufiq.

The village Panchayat applying Shariat Law decided that Gudiya should return to her **First Husband** Aarif. What would happen to her still born child. Aarif did not want the child but his wife back only. Now he has agreed to keep the child also.

In the entire episode, how Guidya is traumatized? Whether anybody thought about it? How her life would go on? Raviya sister of Gudiya narrated the tale.

Kismet can change everything. Guduyas back with Aarif her first Husband. I don't believe this happened to her. It was not her decision. They made it for her what is the fate of a woman whose first husband returns after she's mourned for him? She was happily married to Taufiq. She has started laughing again.

And then Aarif returned. It nullified her marriage. Her marriage to Taufiq was illegal without Talaq from Aarif. Taufiq and Gudiya could not live together. If they did, it would be "Sin". What is the fate of a sinful relationship? My sister kept quite. She Let them decide. That's my sister. Anyway in our society, men decide our fate.

A Good woman was torn between herself, society and her Two husbands
The media is making a **Tamasha,** of her personal life. They wake us up at 3 AM in the morning for sound bytes and more bytes. Will she fight for herself Nahh, she's

never been told to fight for herself. My self-sacrificing sister will accept the decision of destiny. I wonder if her heart will live with all this".

When would media realize its obligations and duties it owes to the society by not overplaying and not interfering-With private lives of the people?

(C) Another Tale

A rickshaw puller's wife who has three children was raped by her husband's father (i.e. by her father - -in - law). She told this to her husband. He advised her not to tell this matter to any one. But she told this - inspite of her husband's advise. The Panchayat told her to live with her father-in-law (and not to live with her husband any more).

(D) Another next Tale

A and B was happily married. After sometime found out that A and B belonged to th6` same **"Godhraa".** Because of this they become brother and sister. Therefore the Panchayat told them that are according to their custom should have their **"Divorce".**

When women will get the right to decide their own destiny?

We have already seen "Munna Bhai MBBS." We may shortly see Munna Bai LLB.

How simple it is to make a difference in the lives of others. And we can do so by whatever little contribution we can give. By rendering free legal Aid to poor by dispensing quick justices.

Check Your Progress

4.What is meant by 'fast track sessions court' ?

5.Explain the duties of the Special Judicial Magistrates

a. Tamil Nadu State

1031 Legal Literacy camps were organised in different districts and Taluks in the State during the period April 2004 and 24157 beneficiaries were provided Legal Aid. 1337 Lok Adalats pertaining to Motor Accident Claims Tribunal Civil cases, Family Disputes, Bank Loans, Petty Criminal Cases etc were organized in different Districts and Taluks. 4511 cases were settled in Lok Adalats and a sum of Rupees 19,20,21,344/- was awarded as compensation in 288 MACT cases during April 2004 to June 2004.

On 20.06.2004 Hon'ble Chief Justice inaugurated "Satta Udhavi Maiyam" (6LL sLpja Gm LoWLb) building for the District Legal Services Authority at Vellore.

During 2004 August, 381 Legal and Awareness campus were conducted at District and Taluk Levels in the State and 4325 applications were received for providing Legal Aid. 3278 cases were in Lok Adalats organized during the month 2004 August at Pre-litigative stage 411 cases were settled in the cases pertaining to MACT. Transport Corporation Civil Matrimonial Family Disputes, NI Act Electricity Board, Municipal Taxation cases. Land Acquisation labour cases. Bank casesn and DRT cases and a sum of Rs. 79,81,100/- was awarded as compensation in 77 MACT cases during the month of August 2004.

b) News

"Nyaya Deep" is the official news letter of the National Legal Services Authority (NALSA). The Editorial ? Board consists of Sri K.G. Balakrishanan. Judge, Supreme Court of India. Its Executive Chairman is Sri N.Santosh Hegde Judge, Supreme Court of India, its patron in chief Sri R.C. Lahoti Chief Justice of India.

Honourable Justice Balakrishnan says, " We feel that it is our supreme function to be sleepless sentinels on the ramparts of human liberty and there to sound the alarm whenever an enemy appears".

The Executive Chairman gives the following opinion:

Our National goal it is to achieve justice "Social economic and political through the process of Rule of Law. Equal Access to law for the rich and the poor alike is essential for the maintenance of Rule of Law.

Hence it is necessary to provide effective legal aid to all whose rights are violated Legal aid is not a charity but an obligation of the State which is enshrined in Act 39 a of the constitution. NALSA has set up a vibrant nation wide network of legal services authorities and committees to ensure that free and competent legal services are provided to the eligible persons.

NALSA and state legal services authorities are doing their best to ensure availability of equal and speedy justice to all but we still have miles to go and now the time has come to get into the lane to achieve these objectives. At present there is an acute lack of awareness of legal services provided by legal aid institution and the benefit flowing from it at all levels of our target beneficiaries. Aggressive publicity is the need of the hour for mass awareness of our legal aid programmes.

Under the changing socio - legal scenario, it has been felt the world over the ideal for of dispute resolution is mediation and conciliation. In India also mediation and conciliation must be adopted as the preferred modes of Dispute Resolution to reduce the mounting arrears of cases in regular Courts of Law. Recent Amendments to the Civil Procedure Code, for instance the insertion of Section 89 has made it obligatory for the courts to refer the disputes for settlement after the completion of pleadings and settlement of issues by way of arbitration, conciliation; judicial settlement including the settlement through Lok Adalat or Mediation.

The Legal Services Authorities Act 1987 has institutionalized the concept of settlement of disputes through mediation and conciliation. The Act not only provides for holding of Lok Adalats where disputes are pending in Courts of Law but also at the pre - litigation stage. Permanent Lok Adalats must be set up in all the Districts of the country for amicable settlement of different types of disputes viz Lobour Disputes, Bank cases, Pension cases and Housing Finance cases etc at pre - litigation stages itself.

The State Legal Services Authorities should make effort to enlist the support of reputed non Governmental organisations and utilize the energy of law students who are full of enthusiasm for legal aid activities. Efforts must also be made to set up legal aid clinic in colleges and schools where the students may participate in legal aid programme under the guidance of their teachers.

Sri. R.C. Lohoti Honourable Chief Justice of India gave the following opinions:

A key element for success of any legal aid programme or scheme is sensitization of judicial officer. All the State Legal Services Authorities need to take requisite steps for formulating proper programmes without losing anytime. Judicial Officers need to be impressed upon that legal aid and is not only "Karma" but "Dharma"

Lok Adalats have gained acceptability and now is the time to expand its arena. Efforts should be made to organize Lok Adalats for Bank and Financial institutions recovery matters family dispute matters and commercial matters also.

Lok Adalats, Legal literacy and Legal aid are the tools with which the spurt in litigation can be resolved and the hands of weaker section strengthened enabling them to defend with equality against mightier forces of society which cause oppression and injustice. The goals are achieved by belief, determination and dedication, motivation and compassion enable human problems being solved. Let **NALSA** carry forward its march towards "Access to Justice to All".

A recent jurisprudential contribution of the Supreme Court has been to evolve a via media whereby the workman is paid compensation in lieu of reinstatement. Another area where the Supreme Court has chartered a new course is with regard to contract labour. In Steel Authority of India – Vs – National Union Water Front Workers (2001) 7.SCC.1.Third area where the Supreme Court has had to intervene and it as done so rather strongly is in its opposition to strikes in T.K. Rangarajan – Vs – Govt. of Tamil Nadu (AIR 2003 S. C. 3032)

In Kapila Hingorani – Vs – State of Bihar J.T. 2003 (5) S.C.I. – the Supreme Court has to decide to what extent the Government of a State is vicariously liable for payment of arrears of salaries to the employees of the State owned corporations, public sector undertaking. The Supreme Court directed the State Government to deposit a sum of Rs.50 crores.

9.7 Summary

Parliament has by Law confer on the Supreme court any further power to entertain and hear appeal from any judgement, final order or sentence in a criminal proceedings of a High court in the territory of India subject to certain conditions. A criminal appeal can be filled before the supreme court from judgement of a High court with or without the certificate of the High Court. In an appeal under Art 136, the Supreme court does not interfere with the concurrent findings of fact unless the finding is based on no evidence or some vital piece of evidence has been overlooked, disregarded or wrongly discarded. The state Government or wrongly discarded. The state Government

exercises power in consultation with the High court in order that magistrate courts are established in adequate number in all districts and suitable places.

9.8 Key words

amendment	-	improvement that is made to law
decree	-	an official order from a ruler or a government that becomes the law
appeal	-	a formal request to a court to in authority for a judgement
convict	-	decide and state officially in court that somebody is a guilty of crime
imprisonment	-	put somebody in prison
trial	-	formal examination of evidence in court by a judge
exercise	-	the use of power
dispose	-	to deal with a problem
inhabitant	-	hives in a particular place

9.9 Answer to check your Progress

1.Refer 9.1

2.Refer 9.1

3.Refer 9.2

4.Refer 9.2

5.Refer 9.4

9.10 Model Questions

1. What is trial? Explain
2. Give on account of privy Council
3. Explain the power of supreme court
4. Write briefly about the powers of Assistant session judges
5. Describe the responsibilities of courts of metropolitan magistrates

Lesson - 10

Delay in Criminal Justice Administration

Introduction

Crimes are ranging in different forms like extortion, abduction, drug trafficking, arms trade and brutal killing and massive attack on common people. The main areas which are connected to delay of criminal justice system which to be concentrated are improving compliance and case administration. Further it is to be improved by the way of dynamics of witnesses with reference, dynamics of advocates in obtaining adjournments, time delay in leading the witness and in judicial processes. " Speedy trial" is one among the right of the accused.

Lesson Objectives

- To know the reasons for delay of criminal justice
- To understand the purpose of speedy trial
- To utilize the technology for the more efficient justice system

Lesson Structure

10.1 Problems for delaying Criminal Justice

Generally there is a delay in filing the petitions and in many cases the delay is long. The question before us is whether this delay is unavoidable? People with inadequate means resort to Legal Aid. They deserve sympathy and support. There is a chain of

Legal Aid authorities under the Legal Services Authorities Act 1987. The Central Authority has the power to co-ordinate and Monitor the functioning of the State Authorities, Supreme Court Legal Services Committee, High Court Legal Services Committee and the Taluk Legal Services Committee.

A provision could be made in the rules requiring the Legal Service Committee of the High Court to immediately forward one set of High Court papers as soon as the judgment of the High Court is pronounced in a case conducted by the said committee for further action, if the judgment of the High Court goes against the person represented by that committee.

This requires-keeping One extra set of record ready at the time of final hearing of the case in the High Court so that as soon as the judgment is delivered, the record including a copy of the Habeas Corpus Writ Petition or Memorandum of Appeal filed in the High Court can be forwarded first to the Supreme Court Legal Services Committee.

As soon as a copy of the judgment is available the same could be forwarded to the Supreme Court Legal Services Committee to enable the committee to scrutinize the case and file a Special Leave Petition (SLP) in the Supreme Court without delay as in the case Sadanandan - Vs - The State of Tamil Nadu - even if it is by a third party, other than the accused or the State Government.

A provision could also be made in the rules of each High Court requiring the Registry of the High Court to send a copy of the judgment pronounced in a Legal Aid case, not only in the High Court Legal -Services Committee but also to the Supreme Court Legal w Services Committee forthwith. Such a provision would go a long way in avoiding delay in PIfiling the special leave petitions in legal aid matters in the Supreme Court.

Delay also occurs at the stage of scrutiny of papers before filing the S.L.P., After of receiving the record, the Supreme Court Legal Services Committee sends it to one of the panel lawyers to advise whether it is a fit case for filing a Special Leave Petition.

Sometimes a Second Opinion is sought from a senior Advocate. It is necessary to avoid delay in scrutiny. Lawyers on the panel are usually busy with their own work. They attend to the Legal Aid work at their leisure. This attitude needs change. This is a professional obligation to be discharged by the Advocates by Rule 46 in Chapter II under the Advocates Act 1961. Therefore, Lawyers on the Legal Aid Panels have to bear in mind his highest obligation they owe to society and give top priority to Legal Aid Briefs.

In some legal aid cases the junior counsel who is engaged to instruct the senior counsel instead of meeting the senior advocate prior to the hearing and assisting him in the preparation of the case prefers to come and sit by the side of the senior counsel when the matter is called out in the court. This again shows lack of commitment to legal aid.

It is therefore necessary to organize workshops for lawyers connected with legal aid now and then for discussing the problems with a view to improving the quality of services. With proper motivation implementation of the legal services authorities act will be easy.

In All India Judges' Association – Vs - Union of India (2002) 4 SCC 247, 272 paragrah 32, the Supreme Court accepted the recommendation of Justice Jagannatha Shetty Commission to do away with the requirement of the three years practice at the Bar for appointment to judicial service.

Before independence recruits to the **Indian Civil Service** had the option to join judicial services. After a period of in- service training they were posted as judicial officers and in due course they rose to become judges of High Courts and even the Supreme Court e.g. Chief Justice K.N. Wanchoo, Justice Vs. Ramasami (Former Chief Justice of Patna High Court and Justice V. Bhargava)

The rules of recruitment governing entry at the lowest level of judiciary could be amended to facilitate recruitments of fresh graduates of "high caliber and giving them intense in service training before posting them as civil judges and magistrates.

"Speedy Trial" is one among the right of the accused. It is one of the objectives also of the criminal producers to have a speedy trial. Justics delayed is justice denied This is all the more true in a criminal trial and the trial is in ordinately delayed.

However the code does not in so many words confer any such right on the accused to have his case decided expeditiously. But if the accused is in detention and the trial is not completed within 60 days from the first date fixed for hearing he shall be released on bail. This is the order of the Supreme Court in Habeeb Mohammad - Vs - State of Hydrabad (AIR 1954 Sc 51).

But this only mitigates the hardship of the accused person but does not give him speedy trial and secondly this rule is applicable only in case of proceedings before a magistrates.

The Criminal Procedure Code has given a more positive direction to 1pourt when it Says:

"In every inquiry or trial the proceedings shall be held as expeditiously as possible and in particular when the examination of witness has once begun the same shall be continued from day to .day until all the witness in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded. [Sec 309 (1)]

A criminal trial which drags on for unreasonably long time is not a fair trial. Section 309 (1) of the Criminal Procedure Code gives directions to the courts with a view to have speedy trials and quick disposals. The right of the accused in this context has been recognised but the real problem is how to make it a reality in actual practice.

In Hussainara Khatoon (iv) - vs - State of Bihar (1980) SCC 98 the Supreme Court considered the problem in all its seriousness and declared that speedy trial is an essential ingredient of "Reasonable" "fair and just" procedure guaranteed by Article 21 and that it is the constitutional obligation of the State to device such a procedure as would ensure speedy trial to the accused.

a. The Supreme Court observed

"The State cannot avoid its constitutional obligation to *provide speedy trial ID* the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of their Court as the Guardian of the Fundamental Rights of the people as a sentinel on the quiver to enforce the fundamental right of the accused to speedy trial by issuing necessary directions to the state which may include taking positive action, such as augmenting and strengthening the investigative machinery settings up new courts building new Court house providing more staff and equipment to the courts appointment of additional judges and other measures calculated to ensure speedy trial.

10.2 Making the criminal justice system more efficient

- Issue
- Actions
- Background

10.2.1 Issue

The progression of criminal cases through the court system relies heavily on papers being passed between the criminal justice agencies and the defence counsel. Transferring papers in this way can be slow and is often costly.

There is also significant duplication of information and administrative work. The physical movement of people for court appearances and meetings can cost a significant amount of time and money.

To better meet the needs of victims and the public and save public money, we need a system that is less bureaucratic and costs less to run.

10.2.2 Actions

The main areas that are addressing to:

- reducing unacceptable delays in the criminal justice system
- reducing rework and duplication
- improving compliance and case administration

These will make the criminal justice system more efficient and cost-effective by taking the following actions.

It is introducing digital technology to enable:

- criminal justice agencies to create and manage case files more efficiently
- the Police and Crown Prosecution Service to transfer information electronically with each other and with the courts and probation services
- parties in court to work from a laptop or other portable computer in court instead of using the paper file

It is necessary for using the video technology to enable:

- prisoners on remand to use video links rather than having to be transported to the court
- 'virtual courts' where the defendant appears at the first hearings using a video link from the police station
- 'live links', where the police give evidence in summary trials by video link from a police station instead of in person at court
- offenders, managers and supervisors to meet using video conferencing instead of in person.

The criminal justice system can respond better to crimes such as rape, domestic violence and other violence against women and girls.

10.2.3 Background

The government's comprehensive spending review set out budget cuts across the criminal justice system. To achieve this, it is to take a new approach to delivering services.

1. In July 2012 it is published a White Paper **'Swift and sure Justice: The government's plans for reform of the criminal justice system'**. The paper set out the government's programme of reforms to the criminal justice system in England and

Wales. It forms part of the government's much wider programme of reform of crime and justice.

2. **'Punishment and reform: effective probation services'** set out proposals to reform probation to protect the public, to reduce reoffending and to ensure that offenders are properly punished. A response was published on 9 January 2013.

3. **'Punishment and reform: effective community sentences'** sought views on proposals for reform to make community sentences a more effective and credible means of reducing reoffending. A response was published in October 2012.

4. A book which which is published a consultation **'Getting it right for victims and witnesses'** in January 2012 and published response in July 2012.

5. In March 2013 the book which is published a consultation, **Improving the code of practice for victims of crime** that set out the government's plans to reform the victims' code to better tailor services to individual victims, adding for the first time restorative justice and the victim person.

10.3 Delay in Administration of criminal justice

- by **Dr. A.P.J. Abdul Kalam** - www.presidentofindia.nic.in - **Dimensions of Criminal Justice Delivery System, Address at the National Seminar on Delay in Administration of Criminal Justice,** Indian Law Institute, New Delhi, March 2007.

I am extremely happy to be with you all on the occasion of the National Seminar on 'Delay in Administration of Criminal Justice' marking the conclusion of the golden jubilee celebrations of the Indian Law Institute. I am particularly happy that the subject "Delay in Administration of Criminal Justice" has been chosen to be the topic of the seminar.

The theme is so topical and I sincerely hope that the deliberations during the seminar would throw up practical solutions to the extremely serious problem of delay in administration of criminal justice that is plaguing our nation.

I am reminded of what our great legal luminary Justice Shri V.R. Krishna Iyer once said, "Man lives in the short run, but litigation lives in the long run". How true! I would say that it literally crawls in the long run. Dispensation of justice becomes a mockery if it gets delayed and becomes long-drawn-out, making it patently unjust and unfair to all concerned.

I have visited all the states and union territories of our country. During the discussions with many citizens from various walks of life, they have expressed a very important point about criminal justice, which I would like to share with you.

"If real criminals in our society are left without punishment for many years, because of delay in criminal justice for various reasons, it will indeed result in multiplication of number of people taking to criminal act". Now I would like to discuss on the topic "Dimensions of Criminal Justice Delivery system".

10.3.1 Research - Teaching Research

Since this seminar is conducted as part of Golden Jubilee celebrations of Indian Law Institute, I would like to stress on the importance of research. Good teaching emanates from Research. The teachers' love for research and their experience in research are vital for the growth of any institution. Any Institutions is judged by the level and extent of the research work it accomplishes. This sets in a regenerative cycle of excellence. Experience of research leads to quality teaching and quality teaching imparted to the young in turn enriches the research.

(1) Suggestions: The Indian Law institute can take up 20 criminal cases decided by Supreme Court, 40 cases decided by High Courts and 100 cases decided by district courts for research. They can go into the case from the time of the crime committed till the final judgement and study with reference to following aspects.

a. Identify the time of reporting of the crime from the site and the gaps if any between the occurrence and reporting.
b. The time when the FIR was filed and delay in filing of FIR if any, with causes for the delay.
c. Dynamics of witnesses with reference to time delay in court proceedings.

d. Dynamics of advocates in obtaining adjournments and the impact of public interest litigations.

e. Time delay in leading the witnesses and the arguments by the prosecution and defence.

f. Time delay in judicial process leading to final delivery of judgements. Research findings of these cases, I am sure will definitely provide an insight into multiple causes of delay and suggest methods for procedural and legal provisions needed to be modified in our criminal justice system. Now let me discuss how a crime gets manifested.

10.3.2 for Research by Indian Law Institute

The Indian Law institute can take up 20 criminal cases decided by Supreme Court, 40 cases decided by High Courts and 100 cases decided by district courts for research. They can go into the case from the time of the crime committed till the final judgement and study with reference to following aspects.

Over a period of time these activities develops a nexus between business world and criminal world. Fourthly, political competition for electoral or various other forms alliances to seek power uses the money power and criminal elements.

They resort to financial and other forms of servicing by the criminal elements. Over the period all the four elements develop various forms of linkages and societal unrest due to the invisible nexus between and among them. In this process all forms of administrative machinery also drawn into these problems knowingly or unknowingly. It is against this complex background we need to address the subject of criminal justice in India today.

(1) Suggested solution

I have thought about it several times. Some people suggest that the solutions are in creating good governance. Many children asks me, when I can see a corruption free, peaceful and safe India? I have been telling them that they should transform themselves and to a certain extend attempt to transform their parents and families if they are deviant through their love and affection. But how long they can wait? Will the

situation survive till they grow up? There fore I was thinking and thinking, I found what appear to be some basic facts:

a. Those who are in power and are enjoying power in the above context, by themselves do not have any reason to change the system. They will even resist changes.
b. Coming to ordinary powerless citizens by their very nature of lives, they cannot do much, because the very power system will punish them if they raise their voice. Therefore generally citizens are resigned to their fate. When occasionally few young whistle blowers who are keen to correct the system bring out the facts, the powerful nexus of criminal elements systematically eliminates them. Therefore what is the solution?

Those who are in the powerful system and have power but think that it is wrongly used should now come out and be ready to face the wrath of others. They have to assert that the system has to be changed in the interest of one billion people of the nation. It is not enough to have one or two like this, we have to mobilize hundreds and thousands of them at various levels as genuine societal reformers.

a. Identify the time of reporting of the crime from the site and the gaps if any between the occurrence and reporting.
b. The time when the FIR was filed and delay in filing of FIR if any, with causes for the delay.
c. Dynamics of witnesses with reference to time delay in court proceedings.
d. Dynamics of advocates in obtaining adjournments and the impact of public interest litigations.
e. Time delay in leading the witnesses and the arguments by the prosecution and defence.
f. Time delay in judicial process leading to final delivery of judgements.

Research findings of these cases, I am sure will definitely provide an insight into multiple causes of delay and suggest methods for procedural and legal provisions needed to be modified in our criminal justice system. Now let me discuss how a crime gets manifested.

10.3.3 Manifestation of crime

Firstly, historically conditioned political problems simmers for a long time and are remaining unresolved. At this stage, certain foreign elements are also enter into the fray and encourage violence to take advantage of the situation.

Over a period of time, many of these activities transform into various forms of crimes ranging from extortion, abduction, drug trafficking, arms trade and brutal killing and massive attack on innocent people. Second type starts with economic and socially conditioned crimes such as smuggling, illicit liquour, land grabbing which over a period of time becomes an organized activities by major groups.

These powerful groups enter into various economic activities such as real estate, film and various other financial investments and business. Over a period of time, they are also able to obtain political patronage through their money power and muscle power. Thirdly, business rivalries between competitors also lead to obtaining the services of criminal elements.

Inter-state gangs launch themselves and conduct daylight robbery and mercenary action. Problem of alienation has led to terrorism, and naxalism has spread to certain regions. Several methods are found by individuals and groups to create large scale scam and frauds in different parts of the country. Even educational institutions and medical institutions are not spared like leakage of question papers.

Every election witnesses episodes of criminal attacks on candidates, booth capturing, tampering with ballot boxes and methods to disturb the democratic election process.

Of course, the situation is gradually improving. No one wants to be a witness due to the sense of insecurity and lack of confidence in the system. The jurisdiction issue many times results in not filing the FIR in time and gives the opportunity to the criminal to destroy all the evidence in the interim period. For ensuring timely filing of FIR and urgent action for apprehending the criminal, I would suggest the following action by the police.

10.3.4 Police Station is the place of action

First of all every Station House Officer (SHO) of the police station should be instructed that he or she is bound to register the complaint immediately. Every police station should be provided with a computer for registration of complaints and e-mail address of the SHO should be published.

In case nobody is registering the complaint, the complainant should have the option to send the complaint by e-mail to the concerned officer endorsing a copy of the complaint to the higher authorities whose e-mail id should also be widely published. Every complainant should get a receipt for the complaint launched with intimation to higher authorities.

Procedures for registering of complaints should be widely publicized in leading newspapers and electronic media. The higher authorities should be apprised of the progress of the case by entering the status report in the police network.

It has to come from political system, beauracratic system, judicial system, police system and various other government and non government agencies that wield power should be ready to expose the criminal process in power and ready to fight it and bring out a fundamental difference to the common man by effecting systemic changes at all levels. It may need lot of sacrifice and I am sure the people who sacrifice today will be remembered by the posterity for centuries to come. This is the new satyagraha which is required for the 21st century India for the sake of our youth, who rightly deserve a prosperous, peaceful and safe India well before 2020. I am sure we can definitely achieve this if all of us collectively work together. Now let me discuss some details of justice delivery process.

Check your Progress

1.'Speed Trial' – Explain

2. Define 'Virtual courts'

3.'Brutal killing and massive attack on innocent people' – why?

10.3.5 Justice delivery process

When I think of justice delivery system following event comes to my mind. The criminal justice system has the following components - the affected person, the accused, police, witnesses, lawyers and multi-levels of judiciary apart from the influence of the society.

Many times, the affected person himself or herself is the cause of the delay in reporting of the crime. If the reporting is with malafide intentions in the first place, the affected person cannot expect sympathy for not getting justice in time. However, in

certain cases particularly in respect of women the reporting takes place much after the occurrence of the crime.

This is probably due to the fear of defamation of the aggrieved party. In such cases, there is a need for sympathetic treatment and the complaint cannot be ignored because of the delay. It should be acted upon immediately even though accused might have taken many actions to destroy the evidence. In view of this, police may have to act faster to prevent further destruction of evidence. Let us discuss the crime situation prevalent in the country.

10.3.6 Dynamics of crime

I would like to share with you some of the immediate concerns which I have been getting through the interaction with the people, e-mails and from other sources. The women in the country generally feel that they are not safe in certain localities in certain States. In addition, there are a number of incidences of violence against women in many forms. Kidnapping, abduction and extortion have become a frequently occurring serious problem in certain States.

10.3.7 Time bound justice delivery system

Another element which contributes to the delay in criminal justice is the seeking of never ending adjournments by both side lawyers and courts acceding to such requests. To deliver speedy criminal justice, it is essential to have a time bound mechanism for hearing, arguing, deciding including appeals of the cases.

A law can be enacted prescribing an upper limit of time by which a criminal case has to be finally decided. This could be a maximum of six months or one year depending upon the complexity of the crime.

All the stakeholders namely the accused, police, lawyers, witnesses, judges at various levels have all got to become accountable for finalizing the case before the prescribed time limit. Any deviation from the limit, they must assign reasons for non-compliance in writing.

10.3.8 Hostile witnesses

One more issue which crops up frequently is the witnesses turning hostile. They declare the truth at the commencement of the case and later give opposite evidence in the court or they refuse to attend the court. This arises either due to the fear from the accused and the police or due to inducement of different types.

A strict mechanism has to be evolved for preventing the witness turning hostile. Also, such action should attract exemplary punishment as a crime against society.

10.3.9 Protecting the rule of law

The rule of law is protected only when there is a predictable legal system that is readily accessible and responds to the needs and problems of the citizens in a fair and non-discriminatory manner. The police, the prosecution, the prisons department and the judiciary need to introspect and review their own processes to rectify ills in the system caused by their own malfunctioning. It would be a good idea to engage young law students to identify factors which impede efficient and effective administration of criminal justice.

They could examine good practices of other countries and assess the feasibility, appropriateness and suitability of their application to Indian conditions. Use of modern technology to improve upon the efficiency of the investigative and prosecution wing needs to be given special attention.

It must be made mandatory to all the police officers charged with filing of complaints to give an action taken report periodically within ten days to the superior officers.

All police officers should abstain from pressurizing the complainant to withdraw or compromise the complaint. If such circumstances are found, the higher authorities should listen to the complainant and take action against the erring police officers.

10.3.10 Technology for transparency

Now, with the use of technology, we have to ensure that the investigation carried out by the police is fair and transparent. To ensure manipulation of evidence by some of the erring officials, it is necessary to bring all aspects of the crime as a visual

data on a computer file so that continuous traceability of the person involved in the investigation process is available, so that any abnormal action can be traced to an individual.

This will act as a deterrent for biased individuals to take wrong action. Also, the police have to be given a clear time frame for filing of the charge sheet. In spite of all these actions, if it is detected that the police had colluded with the criminal and had attempted to manipulate the evidence against the accused, three pronged action is necessary to deal with the offence of the police.

Firstly, there should be an impartial departmental enquiry with exemplary punishment if the manipulation is established. Secondly, there should be a parallel criminal court action against the erring officials and thirdly, the affected person who had suffered due to the collusion of the police should be compensated for inflicted additional suffering.

Such exemplary actions against the erring individuals will be an important deterrent for other officials while dealing with similar situations. As an additional precaution and to create societal pressure, there should be a bar on the recruitment of even the relatives of the erring officials in the police force for a specific period.

A competent team of prosecutors and specialized investigation can vastly improve the performance of our criminal justice machinery. Equally significant is the fact that there is little hope for justice when people who witness a crime do not cooperate with the investigation.

Lawyers should also remember that while it is natural on their part to work towards winning their case, litigation should not be reduced to a mere trade at the cost of basic principles of ethics. This is an obligation that they owe to the society and they must live up to it.

10.3.11 Conclusion: Righteousness and Peace

Now I would like to share with you a beautiful divine hymn about righteousness. It reads as follows: Where there is righteousness in the heart,

There is beauty in the character.

When there is beauty in the character,

there is harmony in the home.

When there is harmony in the home,

There is order in the nation.

When there is order in the nation,

There is peace in the world.

It is a beautiful connectivity between heart, character, nation and the world. In a society we have to build righteousness among all its constituents.

For the society as a whole to be righteous we need creation of righteousness in family, righteousness in education, righteousness in service, righteousness in career, righteousness in business & industry, righteousness in civil administration, righteousness in politics, righteousness in government, righteousness in law and order, righteousness in justice.

A righteousness society will eventually become a crime free society. While we are working out several methods for administering speedy criminal justice, we have to eventually work for a crime free peaceful, harmonious and happy society.

With these words, I inaugurate the National Seminar on Delay in Administration of Criminal Justice and my best wishes to all the participants of this seminar success in their mission of reducing the delay in administration of criminal justice to the needy.

May God bless you.

Check your Progress

4.'e-mail complaint' – Explain

5.'Hostile witness' - comment

10.4 Summary

The criminal justice system is mostly based on issue, actions and related problems. Because of various reasons, many read criminals in the society are left without punishment. Due to financial and other forms of servicing by the criminal elements develop various forms of linkages and socially conditioned crimes such as smuggling, illicit liquor, land grabbing are an organized activities by major groups. These powerful groups enter in the other activities like real estate, film and various other financial investments and business. The police, the prosecution, the prisons department and the judiciary need to introspect and review their own processes to rectify the ills in their own malfunctioning.

10.5 Key words

duplication - make an exact copy
efficient - quality of doing something well
remand - send away from a court to wait for the trial
offenders - persons who commits a crime
credible - that can be believed or trusted
restorative - making you feel stong and healthy again has been
victim - a person has been attacked, injured or lilled as a result of victm
deliberation - the process of carefully considering
multiplication - the act or process of multiplying
deviant - different from what most people consident to be normal and acceptable
malfunctioning - fail to work correctly
constituent - one of the parts that combine to form the whole
introspect - careful examination of thoughts, feelings and reasons for behaving a particular way

10.6 Answer to check your progress

1. Refer 10.1
2. Refer 10.2.2
3. Refer 10.3.3
4. Refer 10.3.4
5. Refer 10.3.8

10.7 Model Questions

1. Discuss the remedies of for the delaying of criminal justice.
2. Give an account of manifestation of crime
3. 'Police station is the place of action' – Comment your views
4. 'Justice delayed is justice denied' – Give your views
5. Explain about 'Justice delivery process'

Model Question

CRIMINAL LAWS AND PROCEDURE

Time : Three hours **Maximum : 100 marks**

Answer any FIVE questions.

1. Social contract theory is the basis of criminal justice system. Explain.

2. Write short notes on

(a) Concept of fair trial

(b) L.E.A

3. "Criminal law provides the ultimate means to the Society for the protection of individuals and its institutions". Discuse.

4. Trade the sources and contents of Criminal Law in India.

5. Explain the scope of criminal liability of a child.

6. Define "Crime" and distinguish it from Tort. Can the same act constitue a crime as well as a Tort? Give illustrations.

7. Define and distinguish between Culpable homicide and Murder, referring to decided cases.

8. Explain the role of Nyaya panchayat and Lok adalat at village level and district level

9. Write short notes on

(a) Strict liability

(b) Private defence

10. Explain the salient features of

(a) Juvenile Justice Act

(b) Probation of offenders act
