CIWP

CURRENT ISSUES WRITING PRACTICE

POST-TEST MATERIAL FOR CIWP – H

Q. 1. The uncodified parliamentary privileges often confront with the Right to freedom of speech and expression in Indian constitution. Elucidate. Do you think parliamentary privileges need a detailed codification? Justify your answer with suitable arguments.

(200 words, 10 marks)

Answer 1. Parliamentary privileges originated during the long struggle for democracy and citizen's rights in Britain, between a monarch and Parliament as kings used to get members who spoke or were likely to speak against the king arrested. Today this tool in somewhat similar manner is often used against certain citizens and journalists.

In our parliamentary democracy, where Parliament enjoys almost supreme powers, legislators face no threat from government. In fact, privileges have become a tool in the hands of the ruling party. The are several cases which revived the debate about the need for codifying privileges and giving primacy to a citizen's right to free speech over legislative privileges.

Breach of Privilege and Contempt of the House

"When any individual or authority disregards or attacks any of the privileges, rights and immunities, either of the member individually or of the House in its collective capacity, the offence is termed as breach of privilege and is punishable by the House."

Any act or omission which obstructs a House of Parliament, its member or its officer in the performance of their functions or which has a tendency, directly or indirectly to produce results against the dignity, authority and honour of the House is treated as a contempt of the House.

Though the two phrases, '*Breach of the Privilege*' and '*Contempt of the House*' are used interchangeably, they have different implications. 'Normally, a breach of privilege may amount to contempt of the House. Likewise, contempt of the House may include a breach of privilege also. Contempt of the House, however, has wider implications. There may be a contempt of the House without specifically committing a breach of privilege'. Similarly, 'actions which are not breaches of any specific privilege but are offences against the dignity and authority of the House amount to contempt of the House'. For example, disobedience to a legitimate order of the House is not a breach of privilege, but can be punished as contempt of the House.

Classification

Parliamentary privileges can be classified into two broad categories:

1. those that are enjoyed by each House of Parliament collectively, and
2. those that are enjoyed by the members individually.

Collective Privileges

The privileges belonging to each House of Parliament collectively are:

- It has the right to publish its reports, debates and proceedings and also the right to prohibit others from publishing the same. The 44th Amendment Act of 1978 restored the freedom of the press to publish true reports of parliamentary proceedings without prior permission of the House. But this is not applicable in the case of a secret sitting of the House.
- It can exclude strangers from its proceedings and hold secret sittings to discuss some important matters.

- It can make rules to regulate its own procedure and the conduct of its business and to adjudicate upon such matters.
- It can punish members as well as outsiders for breach of its privileges or its contempt by reprimand, admonition or imprisonment (also suspension or expulsion, in case of members).
- It has the right to receive immediate information of the arrest, detention, conviction, imprisonment and release of a member.
- It can institute inquiries and order the attendance of witnesses and send for relevant papers and records.
- The courts are prohibited to inquire into the proceedings of a House or its committees.
- No person (either a member or outsider) can be arrested, and no legal process (civil or criminal) can be served within the precincts of the House without the permission of the presiding officer.

Individual Privileges

- The privileges belonging to the members individually are:
- They cannot be arrested during the session of Parliament and 40 days before the beginning and 40 days after the end of a session. This privilege is available only in civil cases and not in criminal cases or preventive detention cases.
- They have freedom of speech in Parliament. No member is liable to any proceedings in any court for anything said or any vote given by him in Parliament or its committees. This freedom is subject to the provisions of the Constitution and to the rules and standing orders regulating the procedure of Parliament.
- They are exempted from jury service. They can refuse to give evidence and appear as a witness in a case pending in a court when Parliament is in session.

Copious Concession

Legislators have the power to be the sole judges to decide what their privileges are, what constitutes their breach, and what punishment is to be awarded in case of breach. Is this not too wide a power which clearly impinges on constitutionalism, i.e. the idea of limited government. The fault lies with the framers of the Constitution, who, while drafting the lengthiest constitution of the world, have left the vital area of legislative privileges undefined.

Articles 105 and 194 of the constitution, clearly lay down that the "power, privileges and immunities of the legislature shall be as may from time to time be defined by the legislature, and until so defined, shall be those of the House of Commons". The expression "until so defined" does not mean an absolute power not to define privileges at all. Legislators have been arguing that codification of privileges will harm the sovereignty of Parliament. Is Indian Parliament really sovereign? We want a uniform civil code but our parliamentarians do not want a codification of their privileges which will not require more than a couple of articles.

Moreover, the drafters of the Constitution also committed the mistake of putting Indian Parliament on a par with the British House of Commons. De Lolme's statement about the supremacy of British Parliament, that "Parliament can do everything but make a man a woman and a woman a man", is not applicable to India. British Parliament was also the highest court till 2009. Thus, Indian legislatures and British Parliament differ not merely as regards their general political status but also in the matter of legal powers. Unlike England, in India the Constitution is supreme, not Parliament. By sovereignty, we mean "popular

sovereignty" and not "parliamentary sovereignty". The opening words of the Constitution are "we the people" and not "we the legislators of India."

An Analysis

Why shouldn't our legislators' freedom of speech, like the freedom of speech of citizens, be subject to the sovereignty and integrity of the nation, public order, friendly relations with foreign states, incitement of an offence or defamation as mentioned in Article 19(2) of the constitution of India. The 'sovereign people of India' have a restricted right to speech and expression but 'their servants or representatives' have an absolute freedom of speech in the Houses. Even if one may reluctantly concede such a privilege to them in the interest of the smooth conduct of the House, why should there be the power to send people to jail for the breach of privileges. The Supreme Court's decision in M.S.M. Sharma (1958), giving primacy to the privileges over free speech, was made in the first decade of the Republic during which the court had a lot of respect for legislators as most of them were freedom fighters. However, by 1967, the apex court was convinced that Parliament should not have absolute powers.

A Comparison with the international practices

- The codification of privileges is basically resisted because it would make the privileges subject to fundamental rights and hence to judicial scrutiny and evolution of new privileges would not be possible.
- In fact, the British House has itself broken from the past. Acts and utterances defamatory of Parliament or its members are no more treated as privilege questions.
- The U.S. House of Representatives has been working smoothly without any penal powers for well over two centuries.
- Australia has also codified privileges in 1987.

Liable to the public or not

- It is strange that our legislators, to cover up corruption, not only took cover behind privileges but also pleaded in courts that they were not even 'public servants'.
- In the Hardwari Lal and A.R. Antulay cases, the court did accept their contention and held that MLAs are not 'public servants'.
- In the P.V. Narasimha Rao case, though they were held as public servants, the Supreme Court, in a controversial judgment, held that they can legally take bribes and vote as per the desire of the bribe-giver and they will not be liable for corruption because, under legislative privileges, they cannot be questioned "in respect of any vote" given by them.
- Our legislators also have protection from arrest in civil cases 40 days before the session, during the session and 40 days after the session. The exemption from arrest is also available for meetings. If we count the days of three parliamentary sessions and meetings then our MPs have protection from arrest for more than 365 days in a year.

Conclusion

The Constitution Review Commission headed by Justice M.N. Venkatachaliah had recommended that privileges should be defined and delimited for the free and independent functioning of the legislatures.

The restrictive interpretation of the Supreme Court holding freedom of speech subject to legislative privileges is not in tune with modern notions of human rights and there is an urgent need to have a fresh look at the vexed question of freedom of press vis-à-vis legislative privileges.

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Q. 2. Hate speeches endangers the Freedom of speech. In the light of the statement, critically examine the efficacy of institutional set up in India to curb the Hate speech.

(200 words, 10 marks)

Answer 2. Rights are the cornerstone of individual autonomy. They are guaranteed as limits on the power of State. In democratic societies they have been granted to protect individual from undue State interference. Freedom of expression has been enshrined in Article 19 of the Universal Declaration on Human Rights. It is considered to be one of the most significant rights as it allows a person to attain self-fulfilment and strengthen the capacity to fully enjoy freedom.

The Constituent Assembly, conscious of the burdens of history placed utmost emphasis on 'freedom of speech and expression' as a hard-earned right of the new democracy. The discussion on limitations on this freedom therefore, centred on whether the proviso to the fundamental right to freedom of speech and expression should cover speech that is 'likely to promote class hatred'. The discussion was brought up on multiple occasions, not just limited to debates on fundamental freedoms but also on 'public order' or 'morality'.

Hate speech is a controversial idea, particularly when juxtaposed with free speech. Libertarians have worried that its indiscriminate evocation can curtail free speech. Religious groups have objected to progressive uses of hate speech as an unfair and too-frequent ploy to restrict their genuine concerns from being raised. But even these critics did not challenge the meaning of the term – as texts and speeches emanating from dominant sections that target vulnerable groups (based on race, caste, religion, nationality, gender, sexuality).

A close scrutiny of everyday language will reveal how oppressors masquerading as victims appropriate the language of justice and how propaganda establishes this as common sense.

Blacklaw's Dictionary defines hate speech as, **"Speech that carries no meaning other than the expression of hatred for some group, such as a particular race, especially in circumstances in which the communication is likely to provoke violence."**

How the Hate Speech is Regulated in India?

- The Constitution of India, under Article 19(1)(a) provides the right to freedom of speech and expression. However, under article 19(2), the constitution also provides for the reasonable restrictions against free speech in the interests of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.
- Hate speech constitutes a criminal charge under Section 153A of the IPC, which is the offence of promoting communal disharmony or feelings of hatred between different religious, racial, language or regional groups or castes or communities.
- Sec. 153B of the IPC categorises the offence of promoting religious, racist, linguistic, community or caste hatred or incites any religious, caste or any other disharmony or enmity within India, through any speech either in written form or spoken.
- Section 298 of the IPC, similarly, classifies the offence of uttering words with the deliberate intent to wound the religious feelings of any person.
- Section 505 of the IPC, criminalises the act of delivering speeches that incite violence. Sections 295A and 509A also have similar provisions.

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- The 123(3A) of the Representation of the People Act, 1951, also criminalises hate speech by election candidates.
- In 2014, while addressing a Public interest Litigation seeking guidelines for regulating Hate Speech, the Supreme Court made certain observations.
    - The apex court observed that hate speech attempts to marginalise individuals on the basis of their membership in a group.
    - This impacts such people socially by diminishing their social standing and acceptance within society.
    - Hate speech, lays the groundwork for aggravated attacks on the vulnerable communities in the future.
    - This weakens the ability of people to participate fully in a democracy.
    - The Court also observed that existing laws in India were sufficient to tackle hate speeches. The root of the problem is not the absence of laws but rather a lack of their effective execution.

Can these laws be misused?

These laws have often been misused to victimise artists, journalists, and activists by communal forces, on the pretext of causing communal disharmony. For instance, activists like Harsh Mander have been accused of delivering hate speech, despite the written text of his speech being available in which he advocates peace and love among religious communities.

What is the International Law Regime Around Hate Speech?

There is no internationally agreed definition for hate speech. According to the United Nations, **hate speech is defined as any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factors.**

International human rights law has set standards by which states are supposed to adhere to strong directives against hate speech in their respective jurisdictions. Even though the essential right to free speech is a fundamental right, it also has certain reasonable restrictions that go with it.

- As per Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR), the right to freedom of speech can be regulated in order to honour the rights of others and in the interest of public order, public health or morals.
- Article 20(2) of the ICCPR also declares that any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prevented by law.
- Similarly, Article 10(2) of the European Convention on Human Rights, provides reasonable duties and restrictions during the exercise of one's fundamental right to free speech.
- The United Nations Strategy and Plan of Action on Hate Speech provides that member states must identify and support actors who challenge hate speech. They are also mandated to build capacity and develop policies to address hate speech.
- The Rabat Plan of Action, that was adopted by experts after a series of consultations that were convened by the United Nations Office of High Commissioner for Human Rights (OHCHR) derived authoritative conclusions and strong recommendations for the implementation of Article 20(2) of the ICCPR.

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What are the Laws in Different Countries Regarding Hate Speech?

- In Europe, the Constitutions of Austria, Germany, Hungary, Italy, alongside the provisions of the right to free speech, also prescribe reasonable restrictions for the same. These restrictions follow the standards provided under Article 19(3) of the ICCPR. These countries, further break down the constitutional provisions through other legal instruments regulating media laws, laws on equality and non-discrimination, laws to protect national, ethnic, linguistic or religious minorities etc. There are also specific laws to suit the regional requirements within countries like Germany and Italy.
- In 2017, Germany passed a law by which social media was bound to pay a fine if they did not take down hateful content in time.
- The Supreme Court of Canada opined that hate speech laws are indeed a part of the global commitment to eradicate racism and communal disharmony.
- In 2018, Switzerland passed a law against hate speech and discrimination of the LGBTQ+ community.
- In the United Kingdom, Article 10 of the Human Rights Act,1998, provides that everyone has the right to free speech. However, this free speech is regulated with the reasonable restrictions clause that includes formalities, conditions, restrictions or penalties as prescribed by law and is necessary for a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
- Section 4 of Public Order Act, 1986 in the UK makes it an offence for any person to use threatening, abusive or insulting words or indulge in behaviour, or distribute or display to another person any writing, sign or other visible representation which is threatening, abusive or insulting.
- Interestingly, the United States of America does not have a law against hate speech which is protected under the First Amendment Act.

What Regulates Freedom of Speech in the Media?

Through the Press Council of India Act, 1978, the Press Council of India (PCI) was constituted. The PCI is the regulating body that ensures that the press functions in a tasteful manner, in accordance with journalistic standards. The PCI has a code of conduct for journalists that aims to foster the maintenance of high professional standards, public taste and respect for the rights and responsibilities of citizenship. On the basis of these codes of conduct, the PCI can also censor newspapers or news agencies. In fact, the PCI has the power of a civil court that can summon and examine people and evidence in the same nature of a judicial proceeding.

Television news, on the other hand, is regulated by the Cable Television Network (Regulation) Act, 1995. This act governs the code of conduct of the operation of cable television networks in India. This code also prohibits the broadcast of news that violates decency or attacks community or religious sentiments. These guidelines are called the programme code.

Any violation of the program code is investigated and taken cognisance of by the Inter-Ministerial Committee.

Is the Ban on Hate Speech a "reasonable restriction" of the Freedom of Speech and Expression?

Hate speech is considered a reasonable restriction on freedom of speech and expression. This issue was considered in the case of Canada v Taylor, 1990 where the constitutional validity of hate speech laws was challenged on the ground that it violated the right to freedom of speech and expression. It was held that hate and propaganda contribute little to the aspirations of Canadians or Canada in the quest for truth, the promotion of individual self-development, or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged.

The Court also observed that it undermines the dignity and self-worth of target group members and, more generally, contributes to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality. The Supreme Court of Canada opined that hate speech laws are indeed a part of the global commitment to eradicate racism and communal disharmony.

The Indian Supreme Court had also referred to this judgement in 2014. The Court had also observed the holding of another observation by the Supreme Court by which they said that the effect of the words must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view.

In the case of Rangarajan and others vs. P. Jagjivan Ram, 1989, it was held by the Supreme Court that in order to restrict free speech, a proximate and direct nexus must be found with any imminent danger to the community. This nexus cannot be far-fetched, remote, or conjectural. The Court held that our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural, or far-fetched. It should have a proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to public interests.

Conclusion

Hate speech has always been a live debate in India. The issue has been raised time and again before the legislature, court as well as the public. In *Pravasi Bhalai Sangathan v. Union of India*, the Supreme Court dealt with a case where the petitioners prayed that the State should take peremptory action against makers of hate speech. The Court did not go beyond the purview of existing laws to penalise hate speech as that would amount to 'judicial overreach'. The Court observed that the implementation of existing laws would solve the problem of hate speech to a great extent. The matter was referred to the Law Commission to examine if it 'deems proper to define hate speech and make recommendations to the Parliament to strengthen the Election Commission to curb the menace of "hate speeches" irrespective of, whenever made.'

While recognising the adverse and discriminatory impact of hate speech on individuals, the Court in *Pravasi Bhalai Sangathan case* also expressed the difficulty of 'confining the prohibition to a manageable standard'. The apprehension that laying down a definite standard might lead to curtailment of free speech has prevented the judiciary from defining hate speech in India and elsewhere.

Q. 3. National Crime Record Bureau report of 2019 reveals increase of approximately 60 percent in cybercrime cases in the year 2019. What is Cybercrime? Do you think

existing infrastructures are inadequate to deal with the new age cybercrimes? Justify your answer with suitable arguments.

(200 words, 10 marks)

Answer 3. The term "cyber-crimes" is not defined in any statute or rulebook. The word "cyber" is slang for anything relating to computers, information technology, internet and virtual reality. Therefore, it stands to reason that "cyber-crimes" are offences relating to computers, information technology, internet and virtual reality. One finds laws that penalise cyber-crimes in a number of statutes and even in regulations framed by various regulators. The Information Technology Act, 2000 ("IT Act") and the Indian Penal Code, 1860 penalise a number of cyber-crimes and unsurprisingly, there are many provisions in the IPC and the IT Act that overlap with each other.

Over the last few years, cybercrimes have become more intense, sophisticated and potentially debilitating for individuals, organizations and nations. Law enforcement agencies are finding it difficult to check and prevent the crimes in the cyber space because the perpetrators of these crimes are faceless and incur very low cost to execute a cybercrime whereas the cost of prevention is extremely high. Targets have increased exponentially due to the increasing reliance of people on the internet. Cybercrimes which were restricted to computer hacking till some time ago, have diversified into data theft, ransomware, child pornography, attacks on Critical Information Infrastructure (CII) and so on. India is becoming increasingly vulnerable to this menace because of rapid digitization and proliferation of mobile data without matching pace of cyber security and cyber hygiene. At present, India is ranked third in terms of cybercrime incidents behind the United States and China as per data shared by a leading security vendor, which compiled data of bot-infected systems controlled by cyber criminals in different countries. As per CERT-IN, one cybercrime was reported every 10 minutes in India during 2017. These statistics are quite alarming and therefore, merit focused and collective attention from Law Enforcement Agencies (LEA's).

Parallel Provisions in the IPC and IT Act

Many of the cyber-crimes penalised by the IPC and the IT Act have the same ingredients and even nomenclature. Here are a few examples:

Hacking and Data Theft:

- Sections 43 and 66 of the IT Act penalise a number of activities ranging from hacking into a computer network, data theft, introducing and spreading viruses through computer networks, damaging computers or computer networks or computer programmes, disrupting any computer or computer system or computer network, denying an authorised person access to a computer or computer network, damaging or destroying information residing in a computer etc.
- Section 378 of the IPC relating to "theft" of movable property will apply to the theft of any data, online or otherwise, since section 22 of the IPC states that the words "movable property" is intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.
- Section 424 of the IPC states that "whoever dishonestly or fraudulently conceals or removes any property of himself or any other person, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled. It will also apply to data theft.

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- Section 425 of the IPC deals with mischief and states that "whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits mischief". Needless to say, damaging computer systems and even denying access to a computer system will fall within the aforesaid section 425 of the IPC.

Identity theft and cheating by personation:

- Section 66C of the IT Act prescribes punishment for identity theft and provides that anyone who fraudulently or dishonestly makes use of the electronic signature, password or any other unique identification feature of any other person.
- Section 66D of the IT Act prescribes punishment for 'cheating by personation by using computer resource' and provides that any person who by means of any communication device or computer resource cheats by personation.
- Section 419 of the IPC also prescribes punishment for 'cheating by personation'. A person is said to be guilty of 'cheating by personation' if such person cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.
- The provisions of sections 463, 465 and 468 of the IPC dealing with forgery and "forgery for the purpose of cheating", may also be applicable in a case of identity theft.
- In this context, reference may also be made to section 420 of the IPC that provides that any person who cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security.
- The only difference between the punishments prescribed under sections 66C and 66D of the IT Act and section 419 of the IPC is that there is no maximum cap on the fine prescribed under the IPC.

Obscenity:

- Sections 67, 67A and 67B of the IT Act prescribe punishment for publishing or transmitting, in electronic form: (i) obscene material; (ii) material containing sexually explicit act, etc.; and (iii) material depicting children in sexually explicit act, etc. respectively.
- The provisions of sections 292 and 294 of the IPC would also be applicable for offences of the nature described under sections 67, 67A and 67B of the IT Act. Section 292 of the IPC provides that any person who, inter alia, sells, distributes, publicly exhibits or in any manner puts into circulation or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object.
- Section 294 of the IPC provides that any person who, to the annoyance of others, does any obscene act in any public place, or sings, recites or utters any obscene song, ballad or words, in or near any public place.

IPC's treatment of stalking

The legislature's treatment of the offence of "stalking", accomplished through the insertion of new section 354D in the IPC through the Criminal Law (Amendment) Act, 2013, is a case in point. Section 354D penalises the offence of "stalking" whether it has a cyber component or not. If a man follows a woman and contacts, or attempts to contact, such woman to foster

personal interaction repeatedly despite a clear indication of disinterest by such woman, it amounts to stalking. If a man monitors the use by a woman of the internet, email or any other form of electronic communication, it will also result in the offence of stalking. There are a few exemptions to this offence of stalking, and all the defences apply irrespective of whether the stalking is cyber stalking or not. The punishment prescribed for stalking by Section 354D of the IPC does not discriminate on the basis of the presence or absence of the "cyber" component.

Cyber-crimes not provided for in the IPC: The following cyber-crimes penalised by the IT Act do not have an equivalent in the IPC.

- **Section 43(h) of the IT Act:** Section 43(h) read with section 66 of the IT Act penalises an individual who charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network.
- **Section 65 of the IT Act:** Section 65 of the IT Act prescribes punishment for tampering with computer source documents and provides that any person who knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy, or alter any computer source code.
- **Violation of privacy:** Section 66E of the IT Act prescribes punishment for violation of privacy and provides that any person who intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person.
- **Section 67C of the IT Act:** Section 67C of the IT Act requires an 'intermediary' to preserve and retain such information as may be specified for such duration and in such manner and format as the Central Government may prescribe.
- **Cyber terrorism:** Section 66F of the IT Act prescribes punishment for cyber terrorism.

Amendments to the IPC to cover cyber-crimes

The Indian legislature has from time to time, made a number of amendments to the IPC, to specifically cover cyber-crimes. Some of the important amendments are as follows:

- a new section 29A was created to define "electronic record" by linking it with the definition given in the IT Act;
- a new sub-section (3) was inserted in section 4 of the IPC, relating to the extension of the IPC to extra territorial offences that states that the provisions of the IPC shall be applicable to any person in any place "without and beyond India", committing an offence targeting a computer resource located in India;
- in sections 118 and 119 of the IPC, that deal with the concealment of a design to commit an offence punishable with death or imprisonment for life and a public servant concealing a design to commit an offence which it is his duty to prevent, respectively;
- in section 464 of the IPC, which penalises the making of a false document, the phrase "digital signature" was replaced with the phrase "electronic signature" in all places. The section was also amended to include the making of false electronic records and affixing electronic signatures under its ambit and the phrase "affixing electronic signature" was given the same meaning as it has under the IT Act9;
- "electronic record" was included within the ambit of sections 164, 172, 173, 175, 192, 204, 463, 466, 468, 469, 470, 471, 474 and 476 of the IPC that earlier only provided for "documents", "books", "paper", "writing" or "records", as the case may be;

- in section 466 of the IPC, which deals with forgery of court records or of public registers, the term "register" was defined to include any list, data or record of any entries maintained in an "electronic form", as defined in section 2(1) (r) of the IT Act10; and
- a new section 354D was inserted in the IPC that introduces the offence of cyber stalking.

Conflict between the IPC and the IT Act: Case Law

In the case of *Sharat Babu Digumarti v. Government of NCT of Delhi*, the conflict between provisions of the IPC and the IT Act came to the fore. In this case, on November 27, 2004, an obscene video had been listed for sale on a website. The listing was intentionally made under the category 'Books and Magazines' and sub-category 'ebooks' in order to avoid its detection by the filters. A few copies were sold before the listing was deactivated. Later Delhi police's crime branch charge-sheeted Avinash Bajaj, Bazee's managing director and Sharat Digumarti, Bazee's manager. The company Bazee was not arraigned as an accused and this helped Avinash Bajaj get off the hook since it was held that, vicarious liability could not be fastened on Avinash Bajaj under either section 292 of the IPC or section 67 of the IT Act when Avinash's employer Bazee itself was not an accused. Later changes under section 67 of the IT Act and section 294 of IPC against Sharat Digumarti were also dropped, but the charges under section 292 of the IPC were retained. The Supreme Court then considered if, after the charges under section 67 of the IT Act was dropped, a charge under section 292 of the IPC could be sustained. The Supreme Court quashed the proceedings against Sarat Digumarti and ruled that if an offence involves an electronic record, the IT Act alone would apply since such was the legislative intent. **It is a settled principle of interpretation that special laws would prevail over general laws and latter laws would prevail over prior legislation.** Further, section 81 of the IT Act states that the provisions of the IT Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

In *Gagan Harsh Sharma v. State of Maharashtra*, certain individuals were accused of theft of data and software from their employer and charged under sections 408 and 420 of the IPC and also under sections 43, 65 and 66 of the IT Act. Section 408 of the IPC deals with criminal breach of trust by clerk or servant and states that "whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine".

Offences under sections 408 and 420 of the IPC are non-bailable and cannot be compounded other than with the permission of the court. Offences under sections 43, 65 and 66 of the IT Act are bailable and compoundable. Therefore, the petitioners pleaded that the charges against them under the IPC be dropped and the charges against them under the IT Act be investigated and pursued. It was further argued that if the Supreme Court's ruling in Sharat Babu Digumarti were to be followed, the petitioners could only be charged under the IT Act and not under the IPC, for offences arising out of the same actions. Bombay High Court upheld the contentions of the petitioners and ruled that the charges against them under the IPC be dropped.

Conclusion

We currently have a situation where a number of offences are penalised by both the IPC and the IT Act, even though the ingredients of both offences are the same. There are subtle differences in punishments under these statutes, especially in aspects like whether the offence is bailable or compoundable or cognizable. An offence such as obscenity may take

place through different types of media, both online or offline. However, it could result in unfairness if two different statutes apply to the same offence on the basis of the media used.

It is submitted that all cyber offences in the IT Act ought to be repealed and the IPC be suitably modified, to cover all of the cyber-crimes, including those currently covered under the IT Act, at the earliest possible convenience of the legislature.