

"CRIMINAL JURISPRUDENCE"

Meaning of "Criminal Jurisprudence"-

"Jurisprudence" : The Latin word "jurisprudence" means "the knowledge of the law" or "legal knowledge".

The break-up of the word "jurisprudence" is juris + prudencia = jurisprudence. Juris means 'law' or 'legal', and prudencia means 'knowledge' or 'skill'. Thus, 'jurisprudence' means "the knowledge of the law" or "legal knowledge".

Knowledge of law means, the philosophy of law. It is the study of certain fundamental principles of law, cardinal principles of law which are the basis of law.

"Criminal jurisprudence" : Criminal Jurisprudence is the knowledge of criminal law. It consists of the study of certain fundamental principles or cardinal principles which are the basis of criminal law.

If we are faced with a question – **What is the legal rule?** for instance, What is the punishment for the offence of murder? We can refer to the provision of law given in the legislative enactment (i.e. Section 302 I.P.C.) and get the answer, that is the punishment of death.

But, if the question before us is – **What it is for a rule to be a legal rule?** for instance, Whether the death punishment provided u/s.302 for the offence of murder is just or unjust/moral or immoral/legal or illegal/valid or invalid/humane or cruel/Constitutional or Unconstitutional?, then we ought to study the origin of punishment, the basis of punishment, the purpose or objects of punishment, the philosophy of punishment [i.e. the study of criminal jurisprudence].

Thus, the study of criminal jurisprudence may be philosophical, historical or sociological, etc.

The study of the criminal jurisprudence satisfies the urge for a theoretical or philosophical knowledge of the principles underlying law.

The study of criminal jurisprudence is the study of certain fundamental principles which have been accepted by almost all systems of law, therefore, these fundamental principles are the basis of law.

The law which is not based on such good principles or sound principles can be discarded as bad law or unjust law. Therefore, the study of criminal jurisprudence assumes importance for understanding the criminal law or the offences and their punishments in the Indian Penal Code.

"Criminal Jurisprudence" can be discussed under five Chapters, namely:

- ✓ (1) Administration of Justice;
- ✓ (2) Elements of Criminal Liability;
- ✓ (3) Stages of Crime;
- ✓ (4) Theories of Punishment;
- ✓ (5) Kinds of Punishment.

"ADMINISTRATION OF JUSTICE"

CHAPTER - I

This Chapter consists of following four topics. They are discussed as under :

[1] Administration of Justice – Its,

- What is administration of justice ? Definition, Meaning;
- Necessity;
- Origin, Growth or Development.

[2] Punishment – Its,

- Definition, Meaning, Origin and History';
- The Purpose of Criminal Justice or Theories of Punishments:

- 1-Deterrent;
- 2-Preventive;
- 3-Reformative;
- 4 Compensatory;
- 5- Retributive.

Conclusion: Inter-relation, Interdependence and Difference between different Theories of Punishments.

[4] Presumption of Innocence.

(The above four topics are discussed in detail as under):

[1]-a) DEFINITION/MEANING OF THE ADMINISTRATION OF JUSTICE:

i) What is Administration of Justice ?

"The administration of justice is the maintenance of right within a political community by means of the physical force of the State." – (Salmond).
It is the modern and civilised substitute for the primitive practice of 'private violence' and 'violent self-help'.

In olden times, might was the sole measure of right. Even today right has to be protected by might. Anti-social elements in society require to be coerced by the rigour of iron bars. Now, it is the State which maintains or protects the rights of the citizens by its' physical force i.e. with the help of police.

ii) Pre-declaration of rights and obligations of the citizens:

Administration of justice includes pre-declaration of the rights and obligations of the citizens by the State. It is the forcible defence of rights and suppression of wrongs by the State and its police i.e. physical force. Therefore, Administration of Justice includes essential function of the State to maintain rights and redress wrongs.

As we know that the Legislature, the Executive and the Judiciary these three are the organs of the State. For the maintenance of legal rights and for the prevention of wrongs and injustice, there must be efficient administration of justice according to pre-declared principles of law by the Legislature. It is

In the second category, considered as an end in itself, punishment becomes merely a retribution (*prayaśchitta*) to the wrong-doer, for the offence committed by him, with no aim behind the infliction of punishment.

Thus, in this second category we have the fifth theory of punishment,

5) ~~retributive theory~~

From the above theories, it can be seen that, the objects of punishment are,

- to bring about reformation of the offender;
- to prevent him from committing crime again;
- to prevent other persons (prospective offenders) from committing crimes; and
- to provide compensation to the victim or victim's family.

The main ends of punishment according to **Jeremy Bentham**, are prevention and compensation. ("The Rationale of Punishment", p. 19). **Holmes** has pointed out that, prevention is the chief purpose of punishment.

Thus, we have five theories of punishments. They are discussed in detail as under –

1) Deterrent Theory:

Characteristics of the deterrent theory –

a) According to this theory **offences are the result of conflict of interest**, between that of the wrong-doer and the society. A wrong-doer will certainly give precedence to his own interest, when he impinges upon the interest of the society. This conflict of interest will disappear if the misdeed of the wrong-doer which is harmful to the social interest in committing theft is met by punishment, say of three years for example, if the wrong-doer's interest in committing theft is met by punishment, say of three years imprisonment, the conflict between his interest and the interest of the owners of the property i.e. society disappears; Because, it may be to his supposed interest to commit theft, but it also, is in his interest to keep out of prison, where, he loses his freedom and is also subjected to certain harsh treatment. If that be so, the apparent clash between his own interest and that of the society disappears.

b) According to this theory, **punishment makes commission of an offence "an ill-bargain for the offender"** and **"deters the potential offenders from commission of crime"** (Locke).

Deterrence, therefore, acts on the motive of the offender.

c) The deterrent theory of punishment **aims at the punishment of the offender with a view that other prospective criminals (i.e. would be criminals) may be deterred** from committing the crime for which he was convicted. In order to accomplish this purpose, **the offender is punished so that he will be held up as an example** of what happens to those who violate the law.

Salmond considered the deterrent aspect of punishment to be the most important purpose of criminal justice. The chief aim of deterrent theory of punishment is to make the evil-doer an example and warning to all who are like-minded with him.

The object of deterrent punishment is not merely to prevent the evil-doer from doing any evil act by rewarding him severe punishment, but also, to set an example for others to learn a lesson from such a severe punishment awarded to him.

d) A punishment is primarily deterrent when its **object is to show the futility of the crime, and, thereby, teach a lesson to others**. The assumption being that, this will curb the criminal activities of the prospective offenders.

e) According to the exponents of this theory, punishment is meant to prevent the person concerned, and the other persons from committing similar offences. **The world at large would learn that crime is a costly way of achieving an end**. The advocates for the retention of capital punishment rely on this theory in support of capital punishment.

b) Another ground of punishment is instead of creating a fear of law in his mind, and once not deterred or not afraid of any punishment (see topic on 'Capital Punishment').

c) Nowadays, it has been argued strongly that, the rapist must be hanged. This type of punishment may not save the rape victim. Statistics have a way of depersonalising social reality. Numbers don't tell the whole human story. Take the rape statistics of India: a rape is recorded every 44 minutes; a case of molestation or sexual harassment happens every 33 minutes; 64 percent of rapes take place during the day. The magnitude of crime can only evoke outrage: "The punishment for rape should only be death"!. This is the reaction of moral extremism; still there is the age-old question: "Does severest of punishment like death prevent the heinous crime of rape? It does not. The socially compassionate person will argue that death penalty is a murder by the State, and crime is crime no matter who commits it unfortunately, these conflicting moral positions are not going to help the rape victim, who in this country is caught between two indifferent forces – the rapist and the legal system – and it is space where moral arguments provide little solace. In most cases, it is a double humiliation for the victim: it is for the rape victim to prove beyond reasonable doubt that she has indeed been raped. This process is not so easy - the Indian police are not a pleasant lot to deal with and their investigative skills are far from exemplary. Most of the rape cases result in acquittal. So, what can the State do in such a worst case scenario ? See that the victim gets fair deal and ensure that correct and complete investigation is made by the police without any pressure.

The whole truth is, it is not the severity of punishment but the certainty of punishment that can deter the prospective criminals.

2) Preventive Theory : विवरण रिगेंट

a) Object of the punishment:

According to this theory, the object of punishment is to prevent repetition of the crime by rendering the actual offender incapable of again committing the offence.

b) Forms of punishments for prevention of repetition of crime:

According to this theory, the offender should be disabled from committing that offence (similar offence) again. This disablement is brought in the following ways –

- i) Death is the extreme form of disablement, where, repetition is an impossibility.
- ii) Imprisonment temporarily disables the wrong-doer, and is also, therefore, preventive.
- iii) Disqualification orders, such as, disqualification from driving, disqualification from being a candidate for an election, forfeiting his entire property, or removing him from his office where he has misused his office, etc. can also, prevent the commission of an offence by that actual wrong-doer.

Preventive theory aims at physical restraint. Preventive punishment can be inflicted in number of ways. The offender who has committed a murder may be punished with death, thus, removing all possibility of any further crime by him. At one time, when the punishment of maiming was very common, offenders were disabled by removing of the offending limb. Thus, a thief could be made to loose his hand, or a sexual offender could be castrated (under some systems of criminal law).

George Ives has been of the opinion that, the incorrigible or hopeless criminal should be painlessly removed, rather than that, the State should have to maintain him unnecessarily.

Prevention can also be brought about by imprisoning the offender for a sufficient period of time, so as to immediately prevent him from committing crime, and bring about a change in his character or outlook.

and make him a fit person who would abstain from anti-social acts. In such cases, prevention is sought for, not by elimination, but by reformation, enabling the preventive and reformative ideas of punishment going hand-in-hand.

c) Criticism :

The preventive theory is also criticised on the ground that, it has got undesirable effect of making first-offenders or juvenile offenders as more hardened criminals in the event of imprisoning them for long or sufficient period of time.

Difference or Relation between Deterrent and Preventive Theory of Punishment:

- i) If the deterrent theory tries to put an end to the crime by *causing fear of punishment in the mind of prospective criminals*, the preventive theory aims at *preventing a crime by disabling the criminal*;
- ii) The deterrent theory aims at *giving a warning to society at large that crime does not pay*, whereas, preventive theory aims at *disabling the actual criminal from doing further harm*.
- iii) "*All deterrent is preventive, but all that is preventive is not necessarily deterrent*". Prevention may be effected even without a deterrent or severe sentence.

शिकायती विद्या

3) Reformative Theory or Corrective Theory :

- i) 'Reformation' is defined as, "an effort to restore a man to society as a better and wiser man and a good citizen"
- ii) The aim of the reformative theory is to reclaim the offender, to make him an useful member of society by bringing about change in his character.
- iii) The advocates of this theory maintain that, an endeavour should be made to make the criminal harmless, to supply him those things which he lacked and to cure him of those drawbacks which made him to commit his crimes. If criminal is morally regenerated, his criminal tendencies also become extinct or at any rate less active.
- iv) According to this theory, criminals are generally abnormal persons and the interest of society is subserved by turning these persons in to normal law abiding individuals.
- v) This theory treats crime as a disease, the criminal as a patient, and the punishment is like a medicine. Therefore, the punishment should be such as to cure that wrong-doer [the patient]. It is possible that, the crime must have been committed by him under certain circumstances which were created not by him but by the society, for which he alone cannot be blamed. That is why, an opportunity must be given to him to improve himself, and we to reform him.
- vi) Here, the more stress is given on the criminal, rather than the crime he has committed. Here, the treatment of the criminal should be humane, his case-history should be studied like any other medical case history, and appropriate measures taken to wean him away from the path of wrong-doing. Houses of correction, places for rehabilitation, for education and medical treatment, open-air prisons, etc. are advocated for carrying out punishment, which as such is not punishment in the sense of infliction of penalty. It is wisely said, "poets are born ... criminals are not born".
- vii) Philosophers believe in this theory:
By reformation we mean, the moral improvement, sharpening of intellect and developing the sense of honesty. It was in this sense that this theory was adopted by the philosophers from Plato down to our age. Victor Hugo once remarked : "To open a school, is to close the prison". By this he meant that, if persons of doubtful character are given a training and education in such manner as to make them competent to earn

their livelihood honestly, they would not commit a crime. Closing a prison, **Ancient Hindu law-givers** also stressed the reformative system of punishment. Throughout the present century increasing importance has been attached to reformation or rehabilitation of the criminal in almost all the civilized countries of the world.

viii) Reformative punishment may mean, either that the offender is reformed while being punished or that he is reformed by the punishment itself. Mere infliction of useless pain can lead to no results. The offender should be healed, made harmless, through sufficiently long term detention (under healthy conditions) and thus, society also should be protected.

ix) The reformative theory implies that, the offender should, while punished by detention, be put to educational and healthy or ameliorating (but never degrading) influences. Lamenting on conditions prevailing in jails in India, **Justice, Krishna Iyer** says, putting a poignant question : "Is a prison term in Tihar Jail a post-graduate course in crime?"

x) Reformative punishment is particularly enforced in the case of young offenders, and in their cases the theory has worked with comparative success also. In cases of youthful offenders, nothing is gained by sending them to the prison and making of them hardened criminals. The cases of **first offenders** fall under psychopathic disorder.

xi) The reformative theory admits only of those types of punishment which are educative and discipline the criminal, not those which inflict pain on the offender.

Criticism:

This theory is criticised on the ground that, it is impossible to reform the hardened criminals. But this criticism is not sustainable. Social reformers will certainly disagree with this ground of criticism. We too do not agree.

प्रौद्योगिकी विषय

4) Compensatory Theory :

- i) The object of this theory is to compensate the victim of the crime or his family, or dependents.
- ii) Compensation was resorted to even in primitive times, in the form of '**Wergild**' that is, a sum payable as and by way of **atonement** (compensation) by the wrong-doer, and in order to avoid **blood-feuds**.
- iii) According to this theory, greed is the main spring of criminality, and because of this greed, wrongs are committed. Therefore, if the robbers or thieves or cheaters are made to return the ill-gotten benefits they have received, the spring of criminality would be dried up.
- iv) Compensation should be concomitant with punishment, then it would have deterrent and reformatory value, and the springs of criminality would be dried up if the offender is made to return the ill-gotten benefits of the crime committed by him.

If thieves, robbers, cheats, and other wrongful acquirers or offenders are made to compensate the aggrieved party or **to return the benefit** wrongfully obtained from the victim, the very springs of criminality would be dried up.

v) Compensatory theory acts on the motive of the wrong-doer: Why does the offender steal? What makes A, a thief, or B, a robber or a defrauder or cheater? There is a deep **motive** behind their acts. The act of stealing or robbery may be a highly hazardous one; it may be deeply painful and extraordinarily troublesome; but he is prepared to undergo all the pains and trouble, even rigorous imprisonment for a long time, because he knows or believes that, after his release from

son he would be able to enjoy the fruits of his evil labours, i.e. he would be able to enjoy his ill-gotten gain. If that advantage to him is removed, there will be, by far, fewer robbers and thieves or cheats.

This is possible by associating the factor of compensation with the instrumentality of punishment. An amount of pain, no prospects of imprisonment, however severe, and hard labour could deter him, if he is sure of the ultimate gain that he can retain after his release.

Compensation then, should be made a main factor in dealing with the criminal. That would take away the only motive in crimes of dishonest acquisition. Even it would be useful to the victim or his family.

~~Retributive Theory~~ : अपनायी विद्या

The retributive theory of punishment is based on the fulfilment of moral justice. A good action deserves to be crowned with a good reward, and a bad action, on the other hand, meets its own fate. Retribution means basically that the wrong-doer pays for his wrong-doing.

This is the theory of revenge, theory of the private vengeance. It's a primitive theory of "tit for tat"— "an eye for an eye, a tooth for a tooth, and a life for a life". This theory satisfies the feeling of private vengeance. A person against whom wrong has been committed would like to avenge himself by punishing the wrong-doer in the same way. Therefore, in order to avoid private vengeance, the State considers it mandatory to inflict pain upon the wrong-doer. In other words, if a person has caused an injury to another, then he must be dealt with in the same manner only. The idea of this theory is that, the evil must be turned for evil, and the way or manner a person deals with other, he must be dealt with in the same manner.

Criticism :

Philosophers opinion:

The advocates of retributive theory agree that, punishment satisfies the feeling of revenge, is now outdated.

Dr. Sethna opines, "If the retributive theory means, merely the offender should be punished by 'revenge', then it has to be rejected".

Salmond observes, a conception of a retributive justice still retains a prominent place in popular thought. It flourishes also in the writings of the theologians and even among the philosophers.

Kant, for example, expresses the opinion that punishment cannot rightly be inflicted for the sake of any benefit to be derived from it, either by the criminal himself or by the society, and that the sole and sufficient reason and justification of it lies in the fact that evil has been done by him who suffers it.

Expiation :

Akin to the idea of retribution is that of expiation. Expiation means penance or '*prayaschitta*'. In modern times this theory has been accepted in a modified form by the modern jurists and philosophers and has been treated under the head of retributive theory.

Salmond favours this aspect of punishment, in as much as, it conceals or bolts out crime. "To suffer punishment," he observes, "is to pay a debt due to the law that has been violated. Guilt + Punishment is equal to innocence".

Conclusion – Inter-relation – Interdependence of different Theories of Punishment :

No theory can be said to be perfect or exhaustive to prove beneficial to criminal and society. Theories of punishment are also not mutually exclusive.

There has to be **judicious combination** of these various theories of punishment.

The **interdependence** prevailing with regard to the different theories of punishment, is perceivable upon an understanding of the true meaning of each theory.

(1) There can be no true retribution, unless there is true repentance or penance. Retribution is akin to the idea of Expiation.

- 2) Retribution is the bringing home to the mind of the offender the realization that his bad act deserves punishment. But unless the offender, by reformation and repentance, is given the sense of understanding that retribution will be sought in vain.
- 3) It is reformation then, that can really ensure prevention. Prevention of crime can best be achieved by elimination of the wrong-doer but by educating and reforming him.
- 4) The deterrent and preventive theories are interlinked with each other. All deterrence is preventive, but that is preventive may not be necessarily deterrent.
- 5) Prevention may be effected even by reformation or without a deterrence or sever sentence.
- 6) The idea of deterrence is linked with that of retribution also.
- 7) Compensation, if made concomitant with punishment, then it would have deterrent reformatory value.

Thus, these different theories of punishment are inter-related, interlinked and inter-dependent on each other. Therefore, Dr. M. J. Sethna suggests that, "Reformation must go with deterrence, deterrence should fully recognise reformation and compensation."

Thus, the theories of retribution, reformation, deterrence and prevention go hand-in-hand, and for preservation of the moral order, protection of society and rehabilitation of the offender himself".

[3]c) KINDS / TYPES OF PUNISHMENT :

Different kinds of punishment to which offenders are liable as enumerated under Sections 53 to 75 of Indian Penal Code. They are as under:

- 1) Death (Capital Punishment).
- 2) Imprisonment for life.
- 3) Imprisonment : i) Rigorous imprisonment, that is imprisonment with hard labour and Solitary confinement; ii) Simple imprisonment.
- 4) Forfeiture of property.
- 5) Fine.

Two more kinds of punishments i.e. i) Whipping and ii) Detention in reformatories, were added by subsequent enactments.

Whipping form of punishment is now abolished.

1) Death (Capital punishment):

The detail study of the Capital Punishment can be made under following topics:

- i) Capital Punishment awarded for the offences;
- ii) Objects of the Capital Punishment;
- iii) Abolition or retention of Capital Punishment;
- iv) Constitutionality;
- v) Philosophy;
- vi) Deterrent effect;
- vii) International Trend;
- viii) Nature of Death Penalty in its Indian perspective;
- ix) Sentencing Discretion;
- x) State and its Responsibility.

[abbreviations to remember above 10 points - c o a c, p d, i n s s J.]

i) Capital Punishment awarded for the offences:

Death is the punishment that must be awarded for a murder by a person under sentence of imprisonment for life (S. 303).

After examining —
ativism or Judicial impressionism dominates the
fers from the vice of arbitrariness and caprice.”

1) State and It's Responsibility :
The State, the society is half at
not "Merely to control" but the S
ability to provide food, shelter and

Bukchitah kim na karoti papam?" m

There have been many cases...
of prison or some injection to their near and dear ones to end their agony. Should such persons...
not be allowed to do so and not to the crime itself?"

If we really want to bring down the incidence of crime, we must think of methods other than numbers. We have to train the impulses and emotions of

We have to improve the social and material environment of people and reclaim them through proper education. The *survivors* of the disaster must be given priority.

Literatur, sozial, und soz.

? ***Imprisonment for life:*** “rigor [mariscommissum for life” in the Code means “rigor

imprisonment for life – (1964 (1) *Criminal Law Journal* 685).

The duration of imprisonment for life is not definitely fixed. It is only for the purpose of calculating fractions of terms of punishment. Under Section 57 a sentence of imprisonment for life shall be treated as equivalent to imprisonment for twenty years. Under Section 55 the Appropriate Government, i.e. may be either the Central Government or the State Government may commute this punishment for imprisonment for either description for a term not exceeding fourteen years. Recently, the Supreme Court had made it clear that the term imprisonment for life means the punishment for the whole period of life of the convict, and

3) Imprisonment:

(Ss. 55, 57, 60, 73-74)

under-

"A Bizarro Imprisonment"

Rigorous imprisonment.
In the case of rigorous imprisonment, the offender is put to hard labour such as cutting firewood, digging earth, grinding corn, etc. Though the prisoner with rigorous imprisonment cannot demand soft jobs, he may

reasonably be assigned congenial jobs. The offences which are punishable with rigorous imprisonment are,—
i) harbouring robbers or dacoits (S.216-A); **ii)** kidnapping or abducting in order to murder (S.364); **iii)** theft (S.382); **iv)** robbery (392); **v)** dacoity (S.395), after preparation made for causing death, hurt or restraint (S.382).

(B) Simple Imprisonment:

In the case of a simple imprisonment, the offender is confined to jail and is not put to any kind of work.

The offences which are punishable with simple imprisonment are,
i) being a member of an unlawful assembly (S.143); **ii)** public servant disobeying a direction of the law with intent to cause injury to any person (S.166); **iii)** omission to assist public servant when bound by law.

4) Forfeiture of Property :

Though, the forfeiture of property is one of the mode of punishment, it's main object is to recoup the loss to the Government in cases of rampant embezzlement of property by the accused. The authors of the Code proposed to inflict this punishment on persons guilty of high political offences, who disturb the public peace and make head-way against the Government. Therefore, it is necessary that, they should be deprived of such a dangerous power they gain through embezzlement of property.

The punishment of absolute forfeiture of all property of the offender is now abolished, by the Act, XVI of 1921. Now, there are only three offences in which the offender is liable to forfeiture of specific property, they are:

- i) Offence of committing depredation or making preparation to commit depredation on territories of power at peace the Government of India: (S.126 I.P.C.);
- ii) Offence of receiving any property obtained by waging war against the Government of any Asiatic Power in alliance with the Government of India: (S.125 I.P.C.); or offence of receiving any property obtained by committing an offence under S.126 mentioned above. Both these offences under S.125 and S.126 are offences against the State.
- iii) Offence of purchasing certain property by the Public Servant when he is legally prohibited from purchasing such property: (S.169 I.P.C.) This is the offence relating to Public Servants.

5) Fine :

(Sections 63 to 70).

Section 63 deals with amount of fine. It lays down that,

"Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited".

Rules relating to fine:

- i) Section 63 is subject to the rule that, while fixing the amount of fine, regard is to be had to a) the financial capacity of the accused, b) nature of the offence, c) loss suffered by the victim in the offence: *Sebastian v/s. State of Kerala*, 1992 Cr.L.J. 3642 (S.C.).
- ii) Section 64 prescribes a sentence of imprisonment for non-payment of fine:
When the offence is made punishable with a) imprisonment with fine, or b) imprisonment or fine, or c) fine only; and in these cases when offender is sentenced to fine with or without imprisonment, the Court awarding the sentence may direct the offender to suffer such certain term of imprisonment in default of payment of fine as per Rule No. (v) given below.
- iii) Such certain term of imprisonment shall not exceed one-fourth of the maximum term of imprisonment fixed for the offence, when offence is made punishable with imprisonment and with fine (S.65).
- iv) The Court may impose either rigorous imprisonment or simple imprisonment in default of payment of a fine (S.66).
- v) If the offence is punishable with fine only, then the Court can impose simple imprisonment only in default of payment of fine on the following scale :

Punishment in lieu of fine :

Fine	Imprisonment in default of fine
a) Amount of fine upto Rs.50	Imprisonment upto 2 months.
b) Amount of fine upto Rs.100	Imprisonment upto 4 months.
c) Amount of fine above Rs. 100	Imprisonment upto 6 months.

- vi) The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is paid or levied by the process of law (S.68).

CHAPTER - II

"ELEMENTS OF CRIMINAL LIABILITY"

Following topics are discussed under this Chapter :

Nature of Criminal Liability;

Doctrine of Mens Rea/Guilty Mind;

a) Intention and Motive – Motive irrelevant;

b) Overt act;

c) Application of the doctrine of Mens Rea under the I.P.C.;

d) Exceptions to the rule of Mens Rea under I.P.C.;

e) Transferred Malice.

Four Stages in the Commission of Crime;

Subjective and Objective Theories of Negligence;

Strict Liability in law of crimes;

Vicarious Liability in law of crimes;

Mistake of Fact and Mistake of Law;

Accident;

Jus Necessitatis.

W I K M
[will, Intentions, Knowledge, Motive]

/ NATURE OF CRIMINAL LIABILITY :

'ability' means and implies **responsibility** for an act or omission.

Criminal Liability may arise :

प्रति

out of a guilty mind or "**mens rea**" that is, out of a bad intention or "**dolus malus**", or

out of knowledge that an act prohibited by the law is going to be done or "**malitia**", or

out of negligence, or

out of the provisions of some Statutes even in the absence of any guilty intention, knowledge or negligence.

Criminal liability may arise also even in the absence of mens rea :

under the operation of the doctrine of "**strict liability**" or "**absolute liability**", or

under **Statutes** where it is, very difficult to prove **mens rea** and where the penalty is petty fine, or

under **ignorance of law**, or even

in cases of wrongs which are **mala prohibita** (not bad in themselves, but bad simply because of legal prohibition), which is, as a rule, no excuse.

Under the Indian Penal Code, as a rule, there is a **separate mens rea for each offence**.

According to **Professor Jerome Hall**, there are seven essential ingredients of crime, what he calls **seven pillars of crime**. They are –

i) Overt act;

ii) Guilty mind;

iii) Concurrence of the above two;

"The conditions of penal liability are two fold or there are two necessary elements of crime".

There must be,

i) **Some act or default contrary to the criminal law**, and

ii) **mens rea**.

[2]- a) "INTENTION" :

Definition of 'intention' :

Legal writers have often defined intention as consisting of foresight of consequences together with a desire of such consequences.

"When the act is done with the desire (and foresight) to produce a result, the act is an intended one" - Holmes.

"An intention is the purpose or design with which an act is done. It is the fore-knowledge of the act, coupled with desire of it, such fore-knowledge and desire being the cause of the act, inasmuch as, they fulfill themselves through the operation of the will" - *Salmond*.

An unintentional act is one lacking such purpose or design.

Consequences fore-seeable are tantamount to intention:

A person is responsible for *consequences fore-seen* as the certain or highly probable out-come of his act, regardless of whether he intended them. Thus, for example, if I do an act which I know is very likely to kill 'A' and he dies as a result, I, cannot be heard to say that I did not intend 'A's death.

Indeed the law has gone further and provided that, one may be liable for consequences *fore-seeable* by the reasonable man as certain or highly probable, whether or not the actor himself foresaw them: *D.P.P. v/s. Smith (1961) A.C. 290*.

There can be 'foresight' without 'intention'. For example, a motorist driving fast, fore-sees the likely consequences of his conduct though he does not desire (intend) their occurrence.

Definition of "intention" and "motive":

Stephen (in *History of English Criminal Law*) defines intention and motive as under:

"**Intention** is an operation of the will directing an overt act; **Motive** is the feeling which prompts the operation of the will, the ulterior object of the person willing".

For example - If a person kills another, the intention directs the act (nature of the act/injury) which causes death, the motive is the object which the person had in view, e.g. satisfaction of some desire, such as, to take revenge, etc.

Huda, (in "*The Principle of Law of Crimes in British India*") defines intention and motive as under:

"The longing for the object desired which sets the **volition** in motion (desire that impels the motion) is motive. The expectation that the desired motion will lead to certain consequences is the intention. Thus, the intention is not a desire whilst motive is".

For example, I may desire something with all my heart, but unless I do something by way of aiming at it, I cannot be said to intend it.

Thus, an intention refers to the consequence which directly follows an act, while motive corresponds to an ulterior end (i.e. **ulterior desire**) which is at the root of the intention.

Difference between 'intention' and 'motive':

Motive, though closely related and similar to intention, differs from intention in certain respects.

An intention relates to the immediate objectives of an act, while motive relates to the object or series of objects for the sake of which the act is done.

The terms "intention" and "motive" must be distinguished and will be understood by an illustration:

For instance, in beating our enemy we will be in the act striking **intend to cause him pain**. Causing pain may be - i) to satisfy our revenge, or ii) cripple him against combating with us in a race, or iii) merely to indicate the superior strength of our arms.

Each of these i), ii), iii), interests is called the motive. Therefore, motive means the **reason** behind doing an act. It is this reason why we do the act.

Intention shows the nature of the act which the man believes he is doing, motive is the reason, (interest or gain) for doing the act. This may well be illustrated by putting two questions:

(2)-b) 'OVERT ACT' or 'ACTUS REUS':

An 'act' is a happening or non-happening, controlled or controllable by human agency, particularly the human will. Swimming, riding, talking, writing, and other controllable activities of human life can be regarded as **human acts**. Lightning and thunder are acts of God (*Vis Major*) and not of men. These are not under human control, and so not human acts, but *Vis Major* (acts of God).

Act may be **positive** or **negative**. A positive act is an act of commission. A negative act involves an omission or default.

Actus reus or as Russell has termed it "**physical event**", which is necessary to constitute crime. It is the physical result of human conduct. It includes not only the result of active conduct (i.e. a deed), but also the result of inactivity.

"*Actus reus*" may be defined in the words of **Kenny** to be "such result of human conduct as the law seeks to prevent".

Such human conduct may consist of acts of commission, as well as, acts of omission.

Section 32 of the Indian Penal Code, 1860, lays down:

"Words which refer to **acts done**, extend also to **illegal omissions**".

Therefore, words referring to **acts** include **illegal omissions**.

In criminal law, there are two elements necessary to constitute a crime, namely,

- a) the physical element which is also known as **actus reus**, and
- b) the mental element, commonly known as **mens rea**.

The mental element **mens rea** or guilty intention is some state of mind, therefore, intention is something internal, invisible, the thought which comes to mind.

(Criminal law does not punish a mere guilty intention or criminal intention. The reasons was that the Courts were not possessed of facilities for investigating the working of a man's mind and were uncertain as to the possibility of ascertaining it accurately).

The physical element that constitutes a crime is obvious, because it is externally manifested (seen) by the wrongful act committed by the accused.

But the wrongful act committed by the accused in all cases is not punished. These are cases, where another maxim of an equal importance is applicable, namely, "**actus me invito factus non est mens actus**", which means, "an act which is done by me against my will is not my act". This maxim supports mens rea. If the act has been done by me against my will, it will not be my deliberate act or intended act, and therefore, I shall not be held liable or punishable for it.

For example, 'A' shoots at a jackal. 'X' is behind the bush and is hurt by accident. But it will be different, if 'A' shoots at 'X' deliberately. So also, we feel amused if an insane person or a child abuses us; but how shall we feel if an adult of mature understanding were to abuse us? Perhaps we shall feel inclined to knock him down then and there only. In the first case, we feel no injury, but in the latter case, we feel greatly injured. Why? The reason is obvious. In the first case, the act was not willed or intentional; in the other case, it was willed act or intentional act, and therefore, it provokes us to retaliate or to punish.

(2)- c) APPLICATION OF A DOCTRINE OF MENS REA UNDER THE INDIAN PENAL CODE :

The doctrine does not apply so much under the Indian Penal Code which defines each offence separately and gives the ingredients constituting each offence. Thus, to constitute the offence of theft, a **dishonest intention** is an essential fact to be proved. A **fraudulent intent** cannot be regarded as the requisite 'criminal intent' for constituting the offence of theft. On the other hand, a fraudulent intent is sufficiently a criminal intent for constituting the offence of forgery or the offence of cheating.

Justice Stephen said,

"mental element of different crimes differ widely. Mens rea (guilty mind) means, in the case of murder, malice afore-thought; in the case of theft, an intention to steal; in case of rape, an intention to have forcible connection with a woman without her consent; and in case of receiving stolen goods, knowledge

that the goods were stolen. In some cases, it denotes mere inattention e.g. case of negligence or forgetting to notice a signal". It appears confusing to call so many dissimilar states of mind by one name "mens rea" or "guilty mind". But we must not forget that it is the Common Law maxim. Generally speaking, it applies to Common Law crimes and not to crimes which are defined by Statutes.

The meaning of **mens rea** varies according to the nature of crime. And the meaning of mens rea can only be ascertained by reference to the particular definition of a particular crime. There is common factor in every case and that is **an intent to injure**.

The full definition of every crime contains expressly or by implication a proposition as to the state of mind. Therefore, if this mental element is absent in any given case, the crime so defined is not committed.

(2)-d) EXCEPTIONS TO THE RULE OF MENS REA :

To constitute an offence, **mens rea** is not essential in the following cases:

1) Statutes of strict Liability:

Where by Statute, strict liability is imposed, under the provisions of such Statute a person is held liable even in the absence of any **negligence** or **mens rea**.

In the cases involving matters of public health, food, drugs, etc. and in respect of public nuisances, there is a strict liability imposed by the Statute.

For example, Adulteration of Foods and Drugs Act, Arms Act, Licensing of Shops, Hotels Restaurants and Chemist Establishment Act, Road Traffic Act, Motor Vehicles Act are also some of the Statutes which impose strict liability. Because, these Statutes are passed in the interest of public safety and social welfare. Therefore, the law of strict liability under these Statutes is based on the principle: "**salus populi est suprema lex**", which means, "whatever is for the good of the population (public) is supreme law".

Therefore, in the interest of the public i.e. for the good of the community as a whole, it might become necessary to sacrifice the good of the individual.

2) Principle of vicarious liability:

Where, the principle of **vicarious liability** is recognised under law of crimes, the doctrine of **mens rea** is not applicable. For example,

a) according to the principle of vicarious liability, the law imposes upon the **owner of a property**, an obligation of managing that property in such a manner, that he shall not injure any one else or the public. In such a case, if owner delegates the management to someone else and that someone else commits the breach of the obligation, the owner can be held liable vicariously.

b) The owner of a newspaper can be held liable criminally, for a libel or defamatory article published in it, though it was published without his knowledge and though there was no guilty mind on his part.

3) Petty cases requiring speedy disposal:

In an offence, where it is difficult to prove **mens rea**, and the penalties provided for such an offence are petty fines under the Statute which has done away with the necessity for **mens rea**. Because, in such petty cases, where a **speedy disposal becomes necessary**, and where the **proving of mens rea is not an easy affair**, or where **expediency demands** the doing away with the necessity of proving **mens rea**, it is not necessary to prove mens rea. In such cases, the accused may be fined even without any proof of **mens rea**.

4) Wrongful act done out of ignorance of law:

Where a person who does a wrongful act out of ignorance of law, he is liable though he would never have done it if he had known that it was a wrongful act.

For example, a person who fails to take a licence for his dog, is liable to be fined, even though he did not know that the licence was required. Because, ignorance of law is no excuse. (See next topic of 'Ignorance of Law').

Licence for sale of certain goods :

In cases of licence for sale of liquor, narcotics, etc. a condition may be laid down by which the master may become responsible for the defaults of his servants or agents.

Offence of Public Nuisance :

The master can be held liable for the offence of "public nuisance" (as defined under S. 268 of the Indian Penal Code), committed by his servant.

5) Owner or occupier of land on which an unlawful assembly is held :

Owner or occupier of land on which an unlawful assembly is held can be held liable for punishment under Section 154 of the Indian Penal Code.

6) "Acts done by several persons in furtherance of common intention" or The Law Relating to Joint offenders – Vicarious Liability [See Sections 34 to 38].

[7] "MISTAKE" :

'Mistake', as the term used in jurisprudence is, "an erroneous mental condition, conception, or conviction induced by ignorance, misapprehension or misunderstanding of the truth, and resulting in some act or omission done or suffered erroneously by one or both of the parties to the transaction, but without its erroneous character being intended or known at the time".

Mistake may concern either the law or the facts involved.

"MISTAKE OF FACT" :

A mistake of fact consists in an unconscious, ignorance, or forgetfulness of a fact, past or present material to the transaction; or mistake of fact consists in the belief of the present existence of a thing material to the transaction which does not exist.

Where through a mistake, a man intending to do a lawful act, does that which is unlawful, in such a case, the deed and the will act separately; there is not that conjunction between the deed and the will which is necessary to form a criminal act. Therefore, when any wrongful act which is committed out of mistake as to the existence of fact (mistake of fact) there is absence of *mens rea*, and hence, there is no criminal liability. It is expressed through the maxim, "*Ignorantia facti excusat*", meaning, "Ignorance of fact can be excused".

Example :

A person takes somebody's umbrella from the umbrella stand (where many umbrellas were kept by different persons and are identical to his umbrella) **believing** it to be his own umbrella, he cannot be held liable for theft, as it is a mistake of fact. The fact which he believed to be true (i.e. it is his own umbrella), if true, would have justified the taking of that umbrella.

age is no defence; lie in the
is **mala in se** (bad in itself). Her consent
ent to be removed from the lawful guardianship of her parents
way from her parents or guardian, and even if she falsely represented her age, the
of or over the age of consent, the accused stands guilty of the offence of kidnapping, because he will
s with a minor does so at his own peril. Taking a young girl away from guardianship may have **serious
al consequences** with regard to the girl, and society itself. The act is **bad in itself**.

Mistake must relate to fact and not law :

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MISTAKE OF LAW" or "IGNORANCE OF LAW" :

'*Ignorantia juris non excusat*', that is to say, ignorance of law is not an excuse.

A mistake of law happens when a party having full knowledge of the facts comes to an erroneous
conclusion as to their legal effect.

There is a distinction between 'ignorance' of law and 'mistake' or 'misconception' of law. A person
said to be ignorant of a law when he does not even know of its existence. On the other hand, a person is
said to be under a mistake or misconception of law when he is aware of the existence of a law but
misunderstands or fails to understand the correct meaning of law.

Ignorance of the law of the State does not exclude any person of the age of discretion from the
penalty for the breach of it, because, every person of the age of discretion is bound to know the law, and is
resumed so to do.

If any individual should infringe the Statute law of the country through ignorance or carelessness, he must
abide by the consequences of his error; it is not competent to him to aver in a Court of Justice that he was
ignorant of the criminal law of the land, and Court of Justice is not at liberty to receive such a plea.

The maxim, '*ignorantia juris non excusat*' (ignorance of law excuses no one), in its application to
criminal offences, admits of no exception, not even in the case of a foreigner who cannot reasonably be
supposed to know the law of the land. This is so because, whoever stays in foreign territory submits himself
to the laws of that territory.