CRIMINAL LAW

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Introductory

Under the Indian legal system the criminal liability for an act or omission arises out of a statute proscribing an act or omission. A breach of the statutorily proscribed act or the prescribed duty by a person is to be visited with punishment as sanctioned by the law. Thus, the "criminal law connotes only the quality of such acts or omissions as are prohibited under the appropriate penal provisions by the authority of the state."[1]

The general law of crimes is contained in the statute law, *viz.*, The Indian Penal Code, 1861 as amended from time to time. Various other statutes enacted by the Union and the state legislatures also make an act or omission punishable under the law which may be general,[2] special[3] or local[4] in nature. The general law on substantive crimes is contained in the Indian Penal Code ,1861. The Indian Penal Code is the basic governing statute for determining the criminal liability for offences stated in it, and also for declaring exceptions to the questions of criminal liability for the offences covered under the special or local laws.

The special law is applicable to the particular subject[5] while the local law makes the law applicable to a particular part of India.[6] Any wrongful act which is thus prohibited under the general, special or local law and visited with punishment is deemed an "offence"[7] even though a civil liability may

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1. *Proprietory Articles Trade Association* v. *Attorney General of Canada* AIR 1931 P.C. 94 at 99.
2. The General Clauses Act 1897, s. 8 (38) reads:
   "Offence" shall mean any act or omission made punishable by any law for the time being in force.
   S. 40. Indian Penal Code 1861 ; see also s. 2 (a) of the Code of Criminal Procedure, 1973.
3. Indian Penal Code 1861, s. 41.
4. *Id.*, s. 42.
5. *Supra* n. 3.
6. *Supra* n. 4.
7. S. 2 (n), Code of Criminal Procedure 1973 states:
   "Offence" means any act or omission made punishable by any law for the time being

also arise out of the wrongful conduct. Thus, if a landlord had disconnected the sub-meter of his tenant it made him liable for the offence under section 426, Indian Penal Code, notwithstanding the fact that the tenant could sue the landlord for damages.[8]

Mental element in crimes

The character of an act, penal or otherwise, is adjudged in accordance with the established principles of common law jurisprudence. An act assumes the character of a penal offence it if is impelled with a mental design to achieve the resulf which the law otherwise seeks to prevent. This mental state is generally designated *mens rea.* The elasticity of the term covers a variety of mental states which lend a colour of criminality to the wrongful act. According to Beg, J.,

> Sometimes it is used to refer to a foresight of the consequences of the act and at other times, to the act *per se* irrespective of its consequences. In some cases, it stands for a criminal intention of the deepest dye, such as is visible in a designed and premeditated murder committed with a full foresight of its fatal consequences. In other cases, it connotes mental conditions of a weaker shade such as are indicated by words like knowledge, belief, criminal negligence or even rashness in disregard of consequences. At other times, it is used to indicate a colourless consciousness of the act itself irrespective of the consequences of the act, or, in other words, a bare capacity to know what one is doing as contrasted, for example, with condition of insanity or intoxication in which a man is unable to know the nature of the act.[9]

The various forms and shades of guilty mind have been legislatively crystallized under the Indian Penal code and other criminal laws. Thus a guilty intention on the part of the wrongdoer is assessed with reference to that particular type of mental state as is required for the specified offence. As has been stated by Mayne:

> 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. It must have been done knowingly, voluntarily, fraudulently, dishonestly or the like. And when it is stated that act must be done with a particular

in force and includes any act in respect of which a complaint may be made under s. 20 of the Cattle Trespass Act, 1871."

8. *Kishori Lal* v. *Shyam Kumar* 1966 All. W.R. 703.
9. *Girja Nath* v. *State* (1954) ILR 2 All 215 at 219-220.

knowledge or intention, the definition goes on to state what he must have known, or what he must have intended.[10]

The kind of mental element required for the adjudication of criminal guilt is indicated in the penal laws. The statutory description of the guilty mind thus limits the application of the doctrine of *mens rea* only to the required kind of guilt. Accordingly, the wider scope of the maxim *"actus reus non facit reum, nisi mens sit rea"* has no application to the offence under the Code.[11]

Notwithstanding the fact that the necessary guilty mind is indicated in statutory definitions of the crimes, it has been noticed that the doctrine of *mens rea* has been imported in the criminal law through judicial decisions,[12] which however is "inconsistent with the scheme of the Code which purports to be itself the general penal law of the country laying down general principles."[13]

However, there is a view that the general doctrine of *mens rea* has been given full effect by the Code. It has been done negatively through chapter IV of the Indian Penal Code dealing with general exceptions, which controls all the offences and thus excludes criminal responsibility.Positively, it can be found through the use of all such connotations indicating the guilty mind as are comprehended within the expression *mens rea.*[14]

Doctrine of strict or vicarious liability

The growing complexities of today have demanded increased social regulation. Accordingly, a large number of penal laws are in currency through various regulations, orders and enactments passed by the central or the state legislatures. These laws are directed towards regulating conduct in the field of public health, the sale of foods and drugs, public nuisance, weights and measures, licensing, revenues, *etc.* These offences characterize an essentially civil kind of wrongs which are sanctioned through criminal proceedings. A notable feature of these quasi-criminal or public welfare offences is that the fundamental maxim of criminal liability is ignored by the

10. Mayne: *Criminal Law of India,* 1904, p. 243.
11. Mayne, *Criminal Law of India* II, 4th ed., p. 9; H.S. Gaur, I *Penal Law of India,* 1955, p. 207; Ratanlal, *Law of Crimes,* 19th ed., p. 148. See also Setalvad, *Common Law in India,* p.139.
12. *In re Panthan Venkayya* 53 Mad. 444; *Kochu Mohammed Ismail* v. *Kadya Amma* 1959 Ker. 151; *C.T. Prim* v. *The State* AIR 1961 Cal. 177, Dissenting opinion of Justice K. Subbarao in *George S.* case AIR 1965 SC 722; *Nathulal* v. *State of MP*AIR 1966 SC 43 and *Kartar Singh* v. *State of Punjab* 1994 SCC (Cri) 899. For a critical discussion see V. Balasubrahmanyam, "The Guilty Mind" in *Essays on the Indian Penal Code,* p. 56 at 58-60.
13. V.Balasubrahmanyam, *supra* n. 12 at 60.
14. R.C. Nigam, I *Law of Crimes in India,* p. 95.

legislature with a view to fastening the liability either strictly or vicariously.[15] The dispensation of the doctrine of *mens rea* form any statute is within the powers of the legislature. But the judicial trend has been to look into the statute and read the element of guilty mind before an act is punished. The rationale for such attitude is that:

> It is.... of utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of crimes, the court should not find a man guilty of the offence against the criminal law unless he had a guilty mind.[16]

The foregoing observation found approval in the Supreme Court decision in *R. Hari Prasad Rao* v. *State*[17] where master and servant had been prosecuted under clause (20) and (27) of the Motor Spirit Rationing Order, 1941 for violation of the rules. The Order strictly prohibited the supply of petrol without coupons which the servant had infringed in the absence of the master. Earlier, the Privy Council had set pace for the above trend in *Srinival Mall* v. *Emperor*[18] *and Emperor* v. *I.S. Mc Mull*[19] and allowed the courts to read into the statute the element of guilty mind in order to fasten liability. The legislative intent to dispense with the guilty mind was not read in the case where the breach of the control order involved punishment extending to three years rigorous imprisonment.[20]

> Thus, it is not suggested that... the legislature cannot introduce the principle of vicarious liability and make the master responsible for the acts of the servant although the master had not *mens rea* and was morally innocent. But the courts must be reluctant to come to such a conclusion unless the clear words of the statute compel them to do so or they are driven to that conclusion by necessary implication.[21]

The judicial interpretation of statutes fastening strict liability inferentially makes the application of general doctrine of *mens rea* possible,

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15. *E.g.*, Rule 96 (1) (f), U.P. Sugarcane (Regulation of Supply and Purchase) Rules, s. 6(3) Madras Prevention of Adulteration Act, 1918, s. 42 (1) Motor Vehicles Act 1939, clause 12 (1) Cotton Cloth and Yarn (Control) Order 1943, s. 154, Indian Penal Code 1861.
16. *Brend* v. *Wood* 62 I.L.R. 462 (1945) followed in *Srinivas Mall* v. *Emperor* AIR 1947 P.C. 135; *R. Hari Prasad Rao* v. *State* AIR 1951 SC 204 and *State* v. *Shiv Prasad Jaiswal* AIR 1956 All. 610.
17. AIR 1951 SC 204.
18. AIR 1947 SC 135.
19. AIR 1948 SC 364.
20. *Mohammed Azam Khan* v. *The King* AIR 1948 Cal. 287 to 288.
21. *I.S. MacMull* v. *Emperor* AIR 1948 Bom. 364 and 367.

but it also concedes the right of the legislature to enact laws giving effect to the doctrine of strict or vicarious liability. Perhaps the doctrine would be validated in public welfare offences where the penalty is small. It may also be upheld in cases of severe penalty where the burden of proof of guilt is shifted to the accused. The newer trend can noticeably be seen in section 59 of the Foreign Exchange Regulation Act, 1969.

Group liability

The general rule of criminal liability is that an individual is responsible for his *actus reus* and guilty mind. However, there are variations in the rule. The vicarious and imputed liabilities of persons as well as the liability of corporate bodies are an instance in point. The vicarious nature of liability has been discussed above. Therefore, the present discussion would confine to expound the basis of imputed liability under Indian criminal law.

Liability is imputed to an individual for his contribution in a group action. Group liability under Indian criminal law arises mainly under sections 34 and 149 of the Indian Penal Code.[22] The principle enunciated under these provisions is to hold liable such persons who may be acting as a party in concert with other persons to accomplish an unlawful objective. The liability arising under these two provisions is of different nature.[23]

Section 34 of the Indian Penal Code merely discloses a principle which becomes applicable only if there is a meeting of minds of the persons pursuing a criminal act, and such an act, is committed in deference to the common intent of all.[24] It is essentially, requires under this section that persons participating in the criminal act must be physically present or that

22. S. 34 of the Indian Penal Code reads: When a criminal act is done by several persons in furtherance of common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.
S. 149 of the Indian Penal Code reads:
If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

23. The leading case on the distinctive features of ss. 34 and 149, I.P.C. is *Barendra Kumar Ghosh* v. *State of Punjab* AIR 1956 SC 274. Also, *Sukha* v. *State of Rajasthan* AIR 1956 SC 513; *Chikkradge Gowda* v. *State of Mysore* AIR 1956 SC 731; *Kartar Singh* v. *State of Punjab* AIR 1961 SC 1787 and *Sunder Singh* v. *State of Punjab* AIR 1962 SC 1211.

24. *Mahboob Shah* v. *King Emperor* 71 I.A. 148; *Kirpal* v. *State of U.P.* 1954 S C 706, *Pandurang Tukia and Bhilia* v. *State of Hyderabad* AIR 1955 SC 26; *Rishideo Pande* v. *State of U.P.* AIR 1955 SC 331; *Khachern Singh* v. *State of U.P.* AIR SC 546; *Zabar Singh* v. *State of U.P.* AIR 1957 SC 465; *B.N. Shrikantiah* v. *State of Mysore* AIR 1958 SC 672; *Bharwad M. Dana* v. *State of Bombay* AIR 1960 SC 289; *Baleshwar* v. *State of West Bengal* AIR 1964 SC 1263 and *Matullah Sheikh* v. *State of West Bengal* AIR 1965 SC 132.

they may be constructively present to facilitate the commission of the crime.[25]

In a leading case *Mahboob Shah* v. *King Emperor*,[26] the judicial Committee of the Privy Council expounded that:

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

Section 149 of the Indian Penal Code, however, lays down the principle of group liability in cases where five or more persons are held criminally liable in the prosecution of a common object. The responsibility is fastened on each member only if every member is participating in the unlawful assembly.[27] The individual acts of participating members is not of much significance. In such cases the liability is determined on the basis of the resultant action. In other words, the cumulative effect of the wrongs of each individual which culminate into the commission of an offence is the criterion to test the culpability of the group. However, the constructive liability under section 149 is fixed only in respect of such offences as are

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25. *Cf. Mubarik Ali Ahmed* v. *State of Bombay* AIR 1957 SC 857 and *Jaikrishnadas Manohardas Desai* v. *State of Bombay* AIR 1960 SC 889.
26. 75 I.A. 148.
27. "Unlawful Assembly" is defined in the I. P.C. as under:
    141. An Assembly of five or more persons is designed an "unlawful assembly", if the common object of the persons composing that assembly is:
    First- To overawe by criminal force, or show of criminal force (the Central or any State Government or Parliament or the Legislative of any State), or any public servant in the exercise of the lawful power of such public servant; or
    Second- To resist the execution of any law, or of any legal process; or
    Third- To commit an mischief or criminal trespass, or other offence; or
    Fourth-By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment or to enforce any right or supposed right; or
    Fifth- By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.
    Explanation- An assembly which was not unlawful when it assembled may subsequently become an unlawful assembly.

known to be likely to be committed. No liability can be fastened on the group for any such offence as might have been committed but could not foreseeably be within the knowledge of the participants.[28]

The clearest instance where the doctrine of joint liability can be invoked without difficulty is when the number of persons charged is five and evidence is adduced by the prosecution to prove the charge against all. However, in order to bring home a charge under section 149 it is not necessary that five or more persons must necessarily be brought before the court and convicted.[29] It would be necessary in such cases to prove that the accused persons brought for trial did constitute an unlawful assembly along with other named persons who, for certain reasons, could not be made available to face the charge. Another factual situation where the group liability would validly be operative is when the number of charged and convicted persons is less than five and the remaining ones are not identified. One may believe that in such situations the court would insistently demand a stricter proof regarding the fact that the likelihood of the offence being committed was within the knowledge of the unidentified members of the unlawful assembly.[30]

In *Dhanna* v. *State of M.P.*[31] five persons were tried for murder of a person. The trial judge found that though the accused were charged under sections 302 and 148 read with 149, there was no unlawful assembly. On appeal the High Court convicted one more accused, *i.e.*, the third accused, under section 302 read with section 34 IPC. The accused appealed to the Supreme Court which ruled that the court could register a conviction under section 34 even if there is no evidence of unlawful assembly to book the accused with the help of Section 149. The Court explained that Sections 34 and 149 resemble and overlap with each other.

The assertion of a right followed by the pursuit of such a right through an unlawful assembly does not absolve the participant from liability even though the assertion of right may be valid one. The attainment of an objective must be within the four corners of the law. In *Gurudutta Mall* v. *State of U.P.*,[32] the accused persons could not avail themselves of the plea of right to self-defence, simply because they had exceeded that right.

An assembly of persons which tries to protect lawful rights, even though it becomes unlawful, is not held liable for the offence under section 149. But it can also be implied from the decision on *Kanbi Nanji Virji* v. *State*

28. *Gajanand* v. *State of Travancore, Cochin* AIR 1956 SC 241 and *Hukam Singh* v. *State of U.P.* AIR 1961 SC 1541.
29. *Mohan Singh* v. *The State* AIR 1963 SC 174.
30. *Jit Singh* v. *State* AIR 1257 Punk. 278 and *Hukum Singh* v. *State* AIR 1959 All. 690.
31. 1990 SCC (Cri) 1192.
32. (1965) Cr. L.J. 242.

of Gujarat,[33] that besides the lawful claims, the *bona fide* assertion of right can also save a group of persons from liability. In this case, the accused persons were trying to assert their right to an uncultivated portion of private land which had merged with the road and the uncultivated portions and the land could not be ascertained. It is also not known whether the accused persons had acquired a prescriptive right of way over that land. The finding of the court, however, was that the accused persons had a *bona fide* right of way through the road, which on account of its being merged in the uncultivated portion of land authorized them to force their way through the uncultivated portion. And in the above circumstances the court thought not to hold the accused persons liable. Accordingly, it can be said that *Virji's* case[34] lays down a principle that a group liability cannot arise under section 149 if the common object achieved is merely of the nature of a *bona fide* assertion of a right through it may not strictly be justifiable under the law.

The fastening of constructive liability on individuals for unlawful group behaviour can be explained as a policy of discouraging the securing of strength and resources from amongst one's own corps. Each member of the corps makes himself liable if he presents himself in an assembly of five or more persons with the common object of exercising any criminal force.[35] An assembly of persons need not initially be unlawful to pursue a common object. In *Chandrika Prasad and others* v. *State*[36] the accused persons were members of an assembly in which the unlawful object developed on the spot of occurrence. Each member of the assembly got engaged in committing one or the other overt act. None of them could be said to be a passive innocent spectator, hence the liability of each was held to be equal. It is likely that an innocent onlooker may get mixed up in an unlawful crowd, but he can escape from liability if he remains passive and neutral through his conduct in the course of the prosecution of the common object of those who have been unlawfully pursuing it. This, however, is a question of fact.[37] Innocent presence of a person in the unlawful assembly does absolve him of liability because of absence of the knowledge of the acts which are likely to be committed.[38] But if the accused joined the group in prosecution of a common object, and even if he did not inflict any injury, the liability would be the same as that of other accused persons.[39]

Attempt, abetment and conspiracy

Criminal liability arises on the consummation of an overt act. An overt act

33. (1970) Cr. L.J. 363.
34. (1970) Cr. L.J. 363.
35. Ss. 148, 149 I. P.C. *State of Bihar* v. *Nathu Pande* (1970) Cr. L.J. 5.
36. AIR 1972 SC 109.
37. *Gokul* v. *State of Rajasthan* AIR 1972 SC 209.
38. *Niazi* v. *State of U.P.* AIR 1972 SC 860.
39. *Balwant Singh* v. *State of Haryana* AIR 1972 SC 860.

may not necessarily be an accomplished act; it may well be an attempted one. Thus, the criminal law takes note of the liability of those persons, who may not be directly related to the doing of acts, or may have done the same without success. These can be grouped under three heads, *viz.*, (i) attempt, (ii) abetment, and (iii) conspiracy and are made punishable under the penal law.

Attempt: Generally an act has to undergo the stages of contemplation, preparation and attempt before it is consummated. Mere contemplation of criminality is outside the purview of criminal law; and so is the case with preparatory actions tending towards the commission of crime. However, preparation as an overt act is made punishable in certain cases.[40] In these cases the policy of the law is to destroy the wrongfulness of the potentially dangerous anti-social acts from the very beginning.

An intentional attempt to commit an offence crosses the boundary of non-criminality. It is, therefore, imperative for the criminal law to take note of the series of acts which cumulatively tend to result in the accomplishing of an overt act in order to make the penultimate act punishable as an offence. In other words, an attempt is an intentional act to achieve the fulfillment of a desired criminal thing, in which the final act falls short of committing the crime.[41] The line of distinction between preparation and attempt is difficult to draw because it has to be drawn from the facts and circumstances of the relative proximity between the act or acts done and the evil consequences sought to be achieved.This generally becomes the mode of distinguishing the acts of preparation from those categorized as acts of attempt.

Attempt has come to be defined in *State of Maharashtra* v. *Mohd. Yakub.*[42] Justice Sarkaria said that a person commits the offence of 'attempt to commit a particular offence when (I) he intends to commit that particular offence, and (II) he having made preparations and with the intention to commit the offence, does an act towards its commission; such act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence. Justice Chinnappareddy in the same decision opined:

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40. Collecting arms *etc.* with intention of waging war against the Government of India (s. 122, I.P.C.) committing depredation on territories of power at peace with the government (s. 126, I.P.C.); Making preparation to commit dacoity (s. 399, I.P.C.); Making of selling instrument for counterfeiting coin or possession thereof (s. 233-235 also s. 236, I.P.C.); Possession of counterfeit coin or Indian coin, (s. 242, 243, I.P.C.) Possession of false weights or measures (s. 266, I.P.C.).
41. *Om Prakash* v. *State of Punjab* AIR 1961 SC 1712 and *Abhayanand Misra* v. *State of Bihar* AIR 1961 SC 1698.
42. (1980) 3 SCC 57.

> "In order to constitute an attempt, first, there must be an intention to commit a particular offence, second, some act must have been done which would necessarily have to be done towards the commission of the offence and, third, such act must be proximate to the intended result. The measure of proximity is not in relation to time and action but in relation to intention."

Three specific modes of punishing attempt are to be found under the Indian Penal Code. In the first category are to be found those attempted offences which are treated at par with the actual commission of offences for purposes of punishment. These relate to offences against the state,[43] offences relating to army, navy and air force,[44] offences against public tranquility[45] and relating to public servants.[46] Attempts made relating to offences against public justice[47] as well as relating to coins[48] come within the above category. Extortions,[49] dacoity,[50] robbery[51] and certain kinds or trespass[52] whether attempted or committed are punishable likewise. Attempted murder,[53] culpable homicide,[54] suicide[55] and robbery[56] constitute the second category. The intentional attempt of the foregoing four offences is viewed with lesser degree of severity for inflicting punishment. The actual commission of any of the foregoing offences (except suicide which cannot be punished) and the attempts thereof are mentioned under separate sections and punishments are provided accordingly.

The residual cases of attempt are dealt with under section 511 of the Indian Penal Code which reads:

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43. Attempting to wage war against government of India (s. 121, I.P.C.), attempt to wrongfully restrain the President or the Governor from exercise of lawful power (s. 124, I.P.C.), sedition (s. 124, I.P.C.), attempt to wage war against any Asiatic power in alliance with the government (s. 125 I.P.C.) and attempt to rescue or harbour an escaped prisoner (s. 130, I.P.C.).
44. Attempt to seduce a soldier, sailor or airman from duty (s. 131, I.P.C.).
45. Attempt to assault or obstruct public servant when suppressing riot (s. 152, I.P.C.). See also s. 153 I.P.C.; attempt enmity between different groups on grounds of religion, race, language etc. (s. 153, I.P.C.).
46. Attempt to obtain illegal gratification by public servant (ss. 161-163 and 165, I.P.C.).
47. Attempt to use false evidence, certificate, declaration (ss. 196, 198 and 200, I.P.C.); attempt to obtain gratification to screen an offender from punishment (s. 213, I.P.C.)
48. Attempt to induce person to receive counterfeit coin (ss. 240, 241, I.P.C.) Also s. 251 I.P.C.
49. The Indian Penal Code, ss. 385, 387, 389.
50. *Id.*, ss. 391, 397, 398.
51. *Id.*, ss. 397, 398.
52. *Id.*, s. 460.
53. *Id.*, s. 307.
54. *Id.*, s. 308.
55. *Id.*, s. 309.

> Whoever attempts to commit an offence punishable by this Code with imprisonment for life or [other] imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life, or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both.

Abetment: Participation in the actual commission of crime may either be voluntary or it may be at the instance of another person who prompts the doer to perform the act. In the latter case the person becomes an abettor.[57] The liability of the abettor continues to remain even without the abetted act being committed.[58] Abetment may assume the form or (a) instigation (b) intentional aiding, or (c) conspiracy.[59]

When an act is abetted and a different act is done the liability of the abettor is for the act done provided it was the probable consequence of the abetment.[60] Abetting the commission of an offence by the public generally

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56. *Id.*, s. 393.
57. S. 108, Indian Penal Code, reads:
A person abets an offence, who abets either the commission of an offence, or the commission or an act which would be an offence, if committed by a person capable by law of committing on offence with the same intention or knowledge as that of the abettor.
58. Expl. 92 to s. 108, Indian Penal Code, states:
To constitute the offence of abetment it is not necessary that the act should be committed, or that the effect requisite to constitute the offence should be caused.
59. S. 107 provides:
A person abets the doing of a thing, who
First- Instigates any person to do that thing; or
Secondly- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing;
Thirdly- Intentionally aids, by any act or illegal omission, the doing of that thing.
Explanation- A person who, by willful misrepresentation, or by willful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate of that thing.
Also see *Kartar Singh* v. *State of Punjab* 1994 SCC (Cri.) 899.
60. S. 111, I. P.C., reads:
When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it:
Provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.

or by any number or class of person exceeding ten is viewed seriously and carries a punishment of upto three years imprisonment or fine or both.[61] The law of abetment also makes it punishable to abet in India for the commission of offences abroad.[62]

For abetment by conspiracy an overt act or illegal omission in pursuance of that conspiracy must be done even though the agreement is to commit an offence. No person can be convicted for abetment by conspiracy if the charge against all other conspirators have failed.[63]

Conspiracy: Besides attempt and abetment, the other form of inchoate crime which is made punishable by the Code is called "criminal conspiracy". In order to constitute the offence of conspiracy it is necessary that two or more persons agree to do an illegal act or to do a legal act by illegal means and engage themselves in doing some act in pursuance of the conspiracy.[64] This definition of conspiracy also comprehends the abetment by conspiracy falling under section 107 of the Indian Penal Code.

A mere agreement to do an illegal act or a lawful act by unlawful means by the parties to an agreement may remain a mental concept of a design; but once it is carried even a step further through some action it becomes an offence of conspiracy under the Indian law. As has been stated:

> The offence of criminal conspiracy is of a technical nature and the essential ingredient of the offence is the agreement to commit the offence. In the leading case of *Mulcahy* v. *Queen*[65] it was stated that "a conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. So long as such a design rests in the intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act itself.[66]

S. 113, I.P.C., reads:
When an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment, causes a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect.

61. Indian Penal Code 1861, s. 117.
62. *Id.*, s. 108A.
63. *Harachan Chakrabarty* v. *Union of India* 1990 SCC (Cri) 280.
64. Indian Penal Code, s. 120A.
65. 1868 LR 3 H.L. 306, 317.
66. *B.N. Mukerjee* v. *Emperor* AIR 1945 Nag. 163 and *F. N. Roy* v. *Collector of Customs* AIR 1957 SC 684.

The Indian law of conspiracy is much wider in scope.[67] In *Ajay Aggarwal* v. *Union of India*[68] the Supreme Court explained thus:

> "An agreement between two or more persons to do an illegal act or legal acts by illegal means is criminal conspiracy. If the agreement is not an agreement to commit an offence, it does not amount to conspiracy unless it is followed up by an overt act done by one or more persons in furtherance of the agreement. The offence is complete as soon as there is meeting of minds and unity of purpose between the conspirators to do that illegal act or legal act by illegal means."

It is a continuing offence and continues to subsist and committed whenever one of the conspirators does an act or series of acts.

The kinds of conspiracies made punishable under the Code are abetment by conspiracy,[69] criminal conspiracy as defined in section 120A and, specific conspiracies such a conspiracy to wage or attempt to wage war against the government[70] or *thuggee*[71] or belonging to a gang of thieves[72] and dacoits.[73]

Exceptions to criminal liability

Mistake of fact: Sections 76 to 79 of the Indian Penal Code cover situations wherein exemptions from criminal liability can be had if the person has acted in good faith but mistakenly. This group of sections, however, rules out the defence of mistake of law in accordance with the accepted maxim *ignorantia leges non excusat.* Thus it would be no excuse to offer that the person was unaware of the laws, rules or regulations; although in case of subordinate legislation imposing penal liability it is necessary that it be publicized and made known to the public through established and accessible media.

The foregoing provisions comprehend that the liability is negatived if,

(1) the actor was ascertainably led to understand the existence of facts in the manner he took them. Thus a police officer arresting a wrong person under a warrant under a *bona fide* mistake of fact would be protected.[74]

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67. Gour, I *Penal Law of India*, 4th ed.
68. 1993 SCC (Cri) 961.
69. The Indian Penal Code 1861, s. 107. Also see *Hardyan Chakrabarty* v. *Union of India* 1990 SCC (Cri.) 280.
70. *Id.*, s. 121A.
71. *Id.*, s. 310, 311.
72. *Id.*, s. 401.
73. *Id.*, s. 402.
74. *Emperor* v. *Gopali Kallaya* 26 Bom. L.R. 138. Also see *Ram Bahadur Thapa* case AIR 1960 Ori. 161.

(2) there be absolute ignorance of the real circumstances which constitute the act of offence, then the act believed by the actor can justifiably be pleaded as defence.[75] Thus, where the accused shoots and kills another person in a jungle under circumstances which led him to mistake the deceased as a wild animal, he can avail the protection because at the time of the performance of the act, he believed in the legal justification of his act.[76]

(3) the person acted under the belief that he was bound by law to act in the way he did. Thus compliance of a superior order which is in conformity with law would not entail responsibility.[77]

(4) the acts pertain to judicial acts exercised in the belief of lawful exercise of power. The provision purports to grant immunity from criminal liability for acts of the judges.[78]

(5) the act is done by a person other than the judge pursuant to the judgment or the order of the court.

A common feature of all the situations, warranting the plea of mistake of fact to negative criminal liability, is that the element of "good faith" has necessarily to be present in the actions of the doer.[79] The expression "good faith" in the context of criminal law is understood to mean as much "due care and attention" as can reasonably be expected of the actor in the circumstances. The standard of "due care and attention" is not to be that of a reasonable or a prudent man, but that of the actor.

Pleas against liability for harm caused by:

Accident: Fortuitous and unexpected events are unintentional. Hence, culpability ought not be attached to a wrong which was not contemplated as a resulting situation. The law admits that a harm caused by a person to others may be exempted from liability in cases of accident and necessity. In the case of accident the defence is permissible if the party was engaged in doing a lawful act without having criminal intention or knowledge.[80] It is also imperative that the means and manner opted for doing the work are also lawful. The lawfulness of the matter, manner and means are further to

75. *King* v. *Tulsipada Mandal* AIR 1951 Ori 284.
76. See *Emperor* v. *Jagmoha* AIR 1947 All 99.
77. For protection against prosecution for acts done in pursuance of *respondent superior* see s. 132, Criminal Procedure Code, 1973.
78. The protection against civil liability to the officers acting judicially is governed by the Judicial Officers Protection Act, 1850.
79. S. 52 of the Indian Penal Code 1961, defines "good faith" as below:
Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention. *State of Orissa* v. *Ram Bahadur Thapa* AIR 1960 Ori. 161.
80. S. 80, Indian Penal Code, 1861.

be streamlined with that degree of care and caution which properly insure that in no form or measure the element of negligence or rashness creeps into the transaction. Thus, the amount of care and circumspection must be such as prudent and reasonable man would consider to be adequate in all circumstances of the case.[81]

Necessity: In case of an accident the causing of harm is neither intended nor foreseen in the ordinary course of things. But the doctrine of necessity impels to cause harm to prevent a greater harm, and if it is done without criminal intent the action is free from any liability in criminal law. Section 81 which provides exemption from criminal liability in such situations states that:

> Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

The intentional causing of harm, which relates to the causing of physical injury, in the circumstances of necessity ought to have a purpose and direction.[82] In other words, the consequences of the harm are known to the doer but his actions are directed in good faith to achieving a somewhat larger objective of preventing the loss of human life or property so imminently threatened, that but for the lesser harm inflicted the greater loss could not be prevented.

Through an antique illustration[83] the proposition has been explained by stating that in a great fire if the contiguous houses are not pulled down to check the conflagration from spreading, it would ultimately engulf other lives and property too. In such circumstances the intended harm is not engineered by any malice so as to incur liability, but has been inflicted purposely with the avowed objective of saving the imminently threatened life or property, which furnishes a lawful excuse for the acts done. The harm sought to be avoided is to be an immediate and physical one.

The precise formulation of the rules relating to the doctrine of necessity is difficult, because it is a question of fact to be determined whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.[84] However, "we may treat a case of necessity as one in

81. *State* v. *Rangaswami* AIR 1952 Nag. 268. Also read *Atmendra* v. *State of Karnataka* (1998) 4 SCC 256.
82. *Veeda Menezes* v. *Yusufkhan* AIR 1966 SC 1773.
83. *Maliverer* v. *Spinke* (1537) 73 E.R. at 81 and *Governor etc. of Cast Plate Manufacturers* v. *Meredith* (1792) 100 E.R. at 1307.
84. Explanation to s. 81 of the Indian Penal Code, 1861.

which a valuable common interest which is endangered is preserved by the sacrifice of some less valuable interest. In such cases the gratitude of the community is due to the person who acts."[85]

Consent: In addition to the situations of harm caused by accident or necessity, a plea for negativing criminal liability can validly be put forth in cases where a person willingly and voluntarily concedes to undergo pains, deprivations or sufferings at the hands of other person either explicitly or impliedly. The consequences arising out of such conduct and the liability arising there from in criminal law comparably correspond to those factual situations in which the liability is answered through the maxim *volenti non fit injuria.* In other words, the maxim is extendable to protect a person against penal action in such matters as are governed by the rules of law relating to consent.

The consent in criminal law is understood to mean, "a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents."[86] Mistake, misrepresentation, force, fraud and the like vitiate the qualitative effect of consent.

Consent by a person who has attained the age of majority (i.e. eighteen years), cannot stand as guarantee against the criminal liability of the person whose actions result in death or grievous hurt to the person consenting. It may have the effect of reducing the gravity of the offence.[87] However, the foregoing limitation gets diluted and a justification may arise for even causing death or grievous hurt in case of lawful games, sports or surgical operations and the like.

The element of fairness as well as the requisite skill in the performance of the act must not be in question. In the infliction of injuries on one's person what is consented to is the readiness to risk the harm under known circumstances, with an implicit understanding that the matter would be conducted without abuse and with due prudence. Section 88 which primarily gives protection to the members of medical profession provides:

> Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or take the risk of that harm.

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85. Radbruch, "*Jurisprudence in the Criminal Law*", 18 J. Comp. Leg. And Int. Law, 1936, pp. 212 and 220.
86. Stephen, *Digest of Criminal Law*, article 244.
87. See s. 300, exception v of the Indian Penal Code, 1861.

Illustration

A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if A while playing fairly, hurts Z, A commits no offence.

The law recognizes that a parent or guardian can exercise power over his young child or ward, and inflict reasonable punishment for the benefit of the child. This power can be properly delegated to school authorities for the exercise of discipline over children below twelve years of age, and it implies consent on the part of the parent. The person in *loco parentis* is thus exempted from the penal consequences for chastising the ward for his benefit. A moderate and reasonable corporal punishment by a school teacher with a view to disciplining and correcting a child from an erring behaviour is thus within the exercise of this power.[88] The disciplining power is not strictly confined to the children within the age group of twelve years, but is also applicable to the children over that age and can also be used for the benefit of unsound persons as well.[89]

The Indian Penal code deals with the cases of injury caused with the consent of the victim or his guardian.[90] The cumulative effect of these sections has been summed up by Nigam thus:

> ...*first,* a person may not consent to any intentional causing of death under any circumstance. *Secondly,* he may not consent to the intentional causing of grievious hurt or to an act likely to cause death, unless the harm caused is for his benefit. Such a benefit may not be a pecuniary benefit nor a benefit to be derived by any person other than the person harmed. *Thirdly,* a guardian may not consent to an act intended to cause death or which is an attempt to cause death under any circumstances except for the benefit of the minor, unless the harm caused is for the purpose of "preventing death or grievous hurt, or the curing of any grievous disease or infirmity." *Fourthly,* when the consent

88. *King Emperor* v. *Haung Ba Thaung* 27 Cr. LJ (1898).
89. *G. B. Ghatge* v. *Emperor* 50 Cr. LJ 789. Also see S. 89 of the Indian Penal Code, 1861.
90. The Indian Penal Code, ss. 87, 88 and 89, cover cases of consented injuries.
S. 87 reads:
Nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason or any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

of the guardian cannot justify the act itself, it will also not justify the abetment of such an act.[91]

A consent is not a freely given consent by a sober and rational person, if it is procured under circumstances of misconception, mis-representation, force, fraud, coercion, and the like; or is obtained from a person of imperfect understanding due to infancy, intoxication or lunacy.[92] In order to be valid a consent ought to commensurate with the full understanding of the nature and consequence of the act consented to. It may also not arise as a result of mere submission or passivity but with all mental alertness.[93] The operation of consent in condonation of crime will not extend beyond the harm caused and the offence that the causing of that harm may constitute.[94] Thus, in cases of affray and riot consent of the individuals harmed thereby is no answer to the crime because these affect the public at large. However, harms not affecting the public interests may be wiped out with the party consenting to it in cases of compoundable offences.[95]

The absence of consent to cause harm may also negative the liability. The law takes into account circumstances where harm could be caused without the person consenting to it and also without any liability being fastened on the actor.[96] The Indian Penal Code aims at dispensing with the requirement of consent absolutely "where the circumstances are such as to render consent impossible or where, in the case of a person incapable of assenting, there is no one at hand whose consent can be substituted."[97] The harm to be caused to the person should be with a view to benefiting him, and the act is to be done only in good faith.

The exceptions to the causing of harm are laid down in section 92 which provides that the harm caused should be such as "does... not extend to (1) intentional causing of death or attempt to cause death (2) anything which he knows to be likely to cause death for any purpose other than (a) preventing of death or grievous hurt or (b) the curing of any grievous disease or infirmity; (3) voluntarily causing of hurt or attempt to cause hurt for any purpose other than the preventing of death or hurt; (4) abetment of (1), (2) and (3)."[98]

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91. R. C. Nigam, *supra* note 14 at 407.
92. Sir James Stephen, *Digest of Criminal Law*, Article 224.
93. See *Maharashtra* v. *Tukaram* AIR 1977 SC 278. Also see *Dalip Singh* v. *State of Bihar* (2005) SCC 88.
94. See Indian Penal Code 1861, s. 91 and H. S. Gour I *Penal Law of India*, 9th ed., 1972, p. 696.
95. The Code of Criminal Procedure 1973 S. 320.
96. The Indian Penal Code 1861 S. 92.
97. Mayne, *supra* n. 10 at 197.
98. V.B. Raju, *Commentaries on Penal Code*, 261.

Compulsion: Compulsive participation in a criminal act may not fasten penal liability on a person if he acts on the fear of instant death. The threat of instant death must be such as may inevitably result in death which could in no way be averted except by participating in the crime.[99] The fact depending on the circumstances of each case would determine whether the act was promoted by such fear.

Three essential requirements are to co-exist in order to avail the defence of compulsion to criminality. These are:

(1) that the person did not voluntarily expose himself to a situation which subjected him to the constraint of acting under the compelling circumstances. Thus, a person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.[100]

(2) that the fear of instant death was present at the time of action, and the action was prompted by it;

(3) that there was no option for the actor but to do or die.

The foregoing factors do signify the principle that in the dire consequences of death it is enacted that "self preservation shall be a defence, but a defence only when it was a case of self-preservation."[101]

The case of self-preservation where in compulsion becomes a defence, is even denied if the act tends to be murder or offences against the state punishable with death. A mere compulsion to save one's life by taking another man's life has no justification.[102] It cannot even be sustained as a plea of extenuating circumstances.[103] The rationale of denying compulsion as defence in offences against the state punishable with death is that the state has a right to insure its self-preservation by enacting deterrent pains and penalties.[104] Unlike the English law[105] the state in India demands that it shall be preserved at the expense of its citizens.

Trifles: The law does not take not of trifles (*de minimis non curat les*) even though the trivialities may fall within the letter of penal law. According to the Law Commission "there are innumerable acts without performing which men cannot live together in society, acts which all men constantly do and

99. S. 94 I. P.C.
100. Expl. 1 to s. 94 Indian Penal Code, 1861.
101. H. S. Gour, I *Penal Law of India*, 1972, p. 704.
102. *Dudley & Stephen* 14 Q.B.D. 273; *Umar Din* 671 C. 340.
103. *Emperor* v. *Hima Munda* 39 Cr. L. 554.
104. S. 121, I.P.C., is the only capital offence which falls in this category.
105. *McGrowther* (1746) 18 St. Tr. 301, 393, 394, followed in *Aung Hla* v. *Emperor* AIR (1931) Rang. 235 at p. 241.

suffer in turn, and which it is desirable that they should do and suffer in turn, yet which differ only in degree from crimes".[106] Such transgressions and inconveniences need not be the matter of a complaint to be taken note of by the law.

The principle of *de minimis non curat lex* is applicable to all kinds of trivialities affecting one's person, reputation or property, but the triviality of the offence must not be judged solely by the measure of harm; it depends equally upon other considerations. Triviality would thus depend on the relative position of parties, how one party stood to another, and this will then determine the nature and degree of the crime.[107]

Right of private defence: In formulating the law of self-defence, the Law Commission designedly sought to give wider latitude, primarily to the Indian people in order "to rouse and encourage a manly spirit" as they were "too little disposed of to help themselves." The above thesis apart, it may be stated that self-preservation, which is implicit in the right of private defence, has universally been a strongly embedded instinct in the individual self. It is for this reason that every civilized society has accorded recognition to the right of private defence, and thus the Indian Penal Code specifically states that "nothing is an offence which is done in the exercise of the right of private defence.[108]

The exercise of the right of private defence is permitted to defend one's own self. It also extends to protect any other person against any offence affecting the human body. It would also be valid to exercise the right against acts which may not constitute an offence in certain circumstances.[109]

The defence of the person may even demand the taking away of the life of the person against whom the right is exercised. The law concedes this demand in situations where an assault may reasonably cause the apprehension of death or grievous hurt or the assault may intentionally be directed either to commit rape, sodomy, abduction, kidnapping or to wrongfully confine a person so as to deprive him of recourse to public authorities for release.[110] An assault which reasonably causes the apprehension of death may extend the right of the defender even to cause

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106. Law Commission's *Report on the draft Indian Penal Code*, Note B.
107. See *Veeda Meneges* v. *Yusuf Khan* AIR 1966 SC 1773.
108. S. 96, Indian Penal Code 1861.
109. S. 98, I.P.C. provides:
When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind or the intoxication of the person doing that act, or by person of 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. See *Viswanath* v. *State of UP* AIR 1960 SC 67.
110. The Indian Penal Code, s. 100.

the death of an innocent person.[111] Except for the above cases, the right of private defence merely permits to cause harm other than death.

The defence of property also comes within the purview of the doctrine of self-defence, provided the property for which right of private defence is exercised is subjected to acts of theft, robbery, mischief or criminal trespass or attempts thereof.[112] In the aggravated situations where the offending acts are directed against the person or property the law does validly permit the taking away of the life of the wrongdoer;[113] otherwise only necessary harm can be inflicted.

Although the right of private defence permits the defence of person and property even to the extent of causing the death of another person. Nonetheless its exercise is fettered by section 99 of the Code. The law imposes restrictions on the exercise of the right of private defence in the following ways:

1. the quantum of force to be applied in self-defence cases must be commensurate with the exigencies of the situation demanding the exercise of the right of private defence. Thus, in *Dominic Varkey* v. *State,*[114] the appellant had a scuffle with the deceased. In the course of the scuffle the appellant drew out a dagger from his waist and the deceased bent down to pick up a stone of dangerous size. This led the appellant to rush towards the deceased to stab him with a knife but the attack was warded off. The appellant stabbed the deceased again on the right thigh with a gaping wound which resulted in death. The court held that the happening in the instant case showed in an overwhelming manner that the appellant acted in self-defence and the manner and the moment of the incident both indicated that he did not use more force than was necessary for mere defence against the real and imminent danger of grievous hurt. All these circumstances constituted a situation wherein the exercise of the right of private defence was not held to be in excess of the limit.
2. the right gets negated if there is a possibility of having recourse to the protection of public authorities.
3. the irregular acts of a public servant, if done in good faith and under colour of office, do not provide ground for invoking the right of private

111. *Id.*, s. 106.
112. *Id.*, s. 97.
113. S. 103, Indian Penal Code 1861 reads:
The right of private defence of property extends, under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm to the wrongdoer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated.... Also see *Amjad Khan* v. *State* AIR 1952 SC 165.
114. AIR 1971 SC 1208.

defence except when the act may reasonably cause the apprehension of death or grievous hurt.

4. Acts or attempted acts based on the direction of a public servant given in good faith and under colour of office though not strictly justifiable in law, would not furnish an adequate plea for the exercise of right of private defence, if the acts or the attempted acts do not present reasonable apprehension of causing death or grievous hurt.

The foregoing restrictions mentioned in (iii) and (iv) above, are valid only if there be knowledge that the acts or directions are those of the public servant.

Acts or directions, which are inherently devoid of legality, do not fall in the category of irregular acts of a public servant, even though the act or direction may have been the outcome of good faith and has been exercised under "colour of office" by the public servant. Thus, *Mithukhan* v. *State of Rajasthan*[115] is illustrative of the law relating to private defence *vis-à-vis* the public officials who are endowed with a public duty which they are to discharge in accordance with the law. In this case a search party consisting of narcotics inspector, an informer and policemen attempted to enter the house of the accused for the recovery of contraband opium. The inspector did not specify the grounds which led him to believe that the contraband was stored at that place. The petitioner resisted the entry and struck the members of the party when they attempted to enter the house. It was contended and upheld by the Court that as the search was in violation of the mandatory provision of section 165 of the Criminal Procedure Code, it was an illegal search, hence, the resistance was consistent with the petitioner's right of private defence. The plea that the officers acted in good faith was also not sustained, and the court emphasized that:

> The public servants who are empowered to make search are presumed to know the law and if the act is done in contravention of the mandatory provisions of law it must be held to have been done without due care and attention and cannot be said to be done in good faith.[116]

Antecedents and circumstances relating to a case also play notable part in determining the justifiability of self-defence. The right to defend the person or property is dependent on such facts and circumstances as may genuinely require the affected party to exercise the right in his own interest. Generally, it is the state which undertakes to protect the person and property against unlawful attacks; but where its aid cannot be obtained the individual can legitimately resort to the use of proportionate violence to ward off impending danger. It has been aptly remarked that "detached

115. AIR 1969 Raj. 121.
116. *Id.*, at 123.

reflection cannot be demanded in the presence of an uplifted knife".[117]

Imperfect understanding as defence

Doli incapax: Immunity from criminal liability can be claimed for the wrongs done by a person who is under seven years of age.[118] This rule is in consonance with the universally accepted view that "infancy is a defect of the understanding, and infants under the age of discretion ought not to be punished by any criminal prosecution whatsoever."[119] An infant below seven years of age is considered *doli incapax* who lacks the capacity to distinguish between right and wrong. The exemption made in favour of an infant under section 82 of the Indian Penal Code extends to all offences including the ones under special or local law.[120]

Children above the age of seven years but below twelve can claim qualified immunity. Section 83 of the Penal Code reads:

> Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

Thus young urchins who threw stones at a railway train could not be held liable for punishment under section 127 of the Railways Act or under any other provision of the Indian Penal Code.[121] Likewise, in *Uttamchand's* case,[122] the minor members of a joint Hindu family firm were entitled to protection, on the principle of *doli incapax,* against wrongful acts committed under the Profiteering Prevention Ordinance 1943.

The qualified immunity extended to protect children between the ages of eight and twelve years does not, however, preclude all acts of omissions. The test is whether the accused had the capacity to understand the nature of his act. In other words, if the child had the knowledge of the consequences of his act he cannot claim exemption from liability. The inference of maturity of understanding can be deduced from preceeding and following conduct of the person. The nature of the act complained of may fairly indicate the capacity and intelligence of the accused. A child may conceivably commit arson, murder[123] or theft.[124] The mental capacity to understand the consequences of an act must also have a bearing upon the

117. Per Holmes, J., in *Brown* v. *U.S.* 256 U.S. 335 (1921).
118. S. 82, Indian Penal Code 1861.
119. Blackstone IV, *Commentaries*, pp. 20-22; also Coke I, Institutes 247b.
120. S. 40, Indian Penal Code.
121. *Wali Mohammed* 38 Cr. L.J. 83.
122. AIR 1945 Lah. 238.
123. *Ulla Mahapatra* v. *The King* I.L.R. (1950) Cut. 293.
124. *Bagranraji* (1883) 6 Mad. 373.

physical capacity to accomplish the offence. Thus, for the offence of rape the common law presumption is that a boy under the age of fourteen is under a physical incapacity to commit the offence,[125] though the rule has no application in this country and a boy below fourteen years of age can be convicted of the offence of attempt to commit rape.[126]

Drunkenness: Imperfect understanding of the nature and consequences of the act may arise as a result of mental incapacity caused by drunkenness or insanity. Exemption from liability may be claimed in certain circumstances if the ability to understand the nature and consequences of the act is affected by either.

Drunkenness can be pleaded as defence in mitigation of criminal offence only if the person at the time of committing the act, was incapable of knowing the nature of the act, or that he did not know what he was doing was either wrong or contrary to law, under the influence of some such toxic thing as was administered to him without his knowledge or against his will.[127]

Involuntary drunkenness is thus a complete defence against criminal liability. But voluntary drunkenness does not have the same effect. Although the liability is not negatived in case of voluntary drunkenness and it does not constitute a self-sufficient defence, yet it is an element which cannot be overlooked in determining the culpability of an act involving intention. The limits of liability imposed are stated in section 86 of the Indian Penal Code:

> In cases where an act is done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

Thus the section reiterates that involuntary intoxication precludes liability but voluntary drunkenness may impose the same liability upon a person as could be imposed upon a sober person who may have the knowledge or intent to foresee the consequences of his act. The section has caused an element of doubt in interpretation by referring to "knowledge or intention" in the first part of the section but omitting a reference to "intention" in the second part of the section. The anomaly was explained by the Supreme Court in *Basudev* v. *State ot Pepsu*[128] wherein the Court observed:

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125. Hale, *Pleas of the Crown*, p. 631.
126. *Emperor* v. *Paras Ram Dube* 37 All. 187and *Emperor* v. *Nga Tun Kaing 18* Cr. L. J. 943 (1918).
127. S. 85, Indian Penal Code.
128. 1956 SCR 363.

> ...If in voluntary drunkenness knowledge is to be presumed in the same manner as if there was no drunkenness, what about those cases where *mens rea* is required. Are we at liberty to place intent on the same footing, and if so, why has the section omitted intent in its latter part? It has been discussed at length in many decisions and the result may be briefly summarized as follows:
>
> So far as knowledge is concerned, we must attribute to the intoxicated man the same knowledge as if he was quite sober. But so far as intent or intention is concerned, we must gather it from the attending general circumstances of the case paying due regard to the degree of intoxication. Was the man beside his mind altogether for the time being? If so it would not be possible to fix him with the requisite intention. But if he had not gone so deep in drinking, and from the facts it could be found that he knew what he was about, we can apply the rule that a man is presumed to intend the natural consequences of his act or acts.[129]

The court explained further:

> Of course, we have to distinguish between motive, intention and knowledge. Motive is something which prompts a man to form an intention and knowledge is an awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin but it is not difficult to perceive that they connote different things...

The result of an act committed by a person who voluntarily opted to be in a state of drunkenness is to be attributed to him as if he had the knowledge of a sober person. He is presumed to intend the consequences of his act unless he proves incapacity to form the intent necessary to constitute the crime.

The cumulative effect of sections 85 and 86 of the Penal Code dealing with the excusable limits of drunkenness with regard to crimes affecting mental responsibility has been thus stated:[130]

1. Drunkenness caused without one's knowledge or against one's will excuses the crime.
2. Voluntary drunkenness is an excuse only as regards "intention", so that it is a complete excuse in crimes requiring the presence of an "intention" to complete a crime.

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129. *Id.* at 393.
130. H.S. Gour, I *Penal Law of India*, 1972, p. 661.

3. But voluntary drunkenness is no excuse for a crime which requires the presence merely of "knowledge" as distinct from "intention."
4. In any case though voluntary drunkenness is no excuse for knowledge it does not imply actual knowledge giving rise to the inference of presumed intention.

Insanity: Insanity comprehends the imperfection or absence of understanding the foreseeability of a conduct, hence it constitutes an excusable defence for liability. The law does not afford a defence on the basis of mental disorders recognized by medical sciences. The tests prescribed for determining legal insanity are to be found in section 84 of the Indian Penal Code which reads as:

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

Thus the defence as to general insanity presumes the accused to be sane, until the contrary is proved by the accused. The burden lies on the accused to adduce evidence of insanity only to the extent of tilting the balance of probabilities in his favour by injecting a reasonable doubt in the mind of the court about his suffering from a defect of such reason as made him unable to know the nature and quality of his act; or to know that what he was doing was wrong.

The essentials required to give benefit to a person for inability to understand the culpability of his act by reason of insanity are: (i) that he must be suffering from a defect of reason at the time of doing the act (ii) that the defect of reason was related to his incapacity to know the nature of the act; (iii) and, even if the person did know the nature of the act he could not perceive owing to the defect of reason the wrongfulness of his act or its being contrary to law.[131]

The term legal insanity is different from the one used to denote medical insanity. The defence of insanity is available only when the unsoundness of mind has produced a certain type of incapacity which renders the accused unable to understand the nature and consequences of his act or that his cognitive faculties had got deranged to the extent that he did not know that what he was doing was either contrary to law or was morally wrong. Thus, an accused person who is aware of the nature of the act may be unaware of its moral quality or may not form a correct estimate as to its legal consequences. The determination of legal insanity is thus largely dependent on the facts and circumstances of the case. Section 84 of the Penal Code would cover only such kind of insanity as may be affecting the cognitive

131. *Dayabhai* v. *State of Gujarat* AIR 1964 SC 1563.

faculty of the man; and the acts yielded as a result of the affecting of will or emotion are outside the purview of the defence contemplated under the law.

Classification of offences and punishment in the Code

The enumeration of specific wrongs punishable as offences are too many to be discussed here. The central and the state legislature have concurrent legislative powers on the subject of criminal law. Furthermore, the legislatures have reflected a policy to regulate conduct on other matters through the use of criminal sanctions. To catalogue such wrongs is a cumbersome task and it would hardly disclose a coherent and cogent scheme of classifying the offences.

The Indian Penal Code remains the basic statute of substantive offences. The specific offences are arranged in separate chapters, which for convenience can be further grouped under a few broad heads. One of such category is:

(a) Offences against the state: The offences in this group relate to the waging of war, conspiring or attempting to wage war against the government or the collection of arms for any of the above purposes. These are treasonable acts. The lawfully established government is also protected against such seditious acts as may cause hatred, contempt or disaffection towards it.

The punitive sanctions are also to be imposed for acts of persons who seek to engage in war against any Asiatic power in alliance with the Indian government or who commit depredations on the territories of such powers which are in peace with the Indian government. The receiving of property by such war or depredations constitute an offence. A public servant is held liable if he voluntarily or negligently allows a prisoner of state or war to escape. The persons who aid or facilitate the escape, rescue or harbour a prisoner are held liable.

The offences against the state can also be committed if a person assaults the President or a State Governor with the intention or compelling or restraining the exercise of any lawful power.

Another offence that may be included in this category is abetment of mutiny, among the personnel of armed forces. Incitement of their desertion, abetment of such acts as may undermine discipline amongst them; and the use of garb or token of the armed personnel by anyone are acts made punishable in the interest of the state.

As the power to issue money or to raise the revenues is within the exclusive authority of the state, the penal law forbids the issuance of these items by any one. Any one engaged in counterfeiting coins or stamps or is in possession of counterfeit coins or stamps is to suffer penal liability.

There is another category wherein some of the offences in the Penal Code which concern the state can be designated as:

(b) Offences against the state apparatus: The law aims at the prohibition of giving or taking illegal gratification to or by public servants. An abuse of law by a public servant with intent to cause injury or to frame an incorrect document with the same intent is made punishable. The use of bribery, undue influence and impersonation at election are also punishable wrongs.

Acts which tend to cause contempt of lawful authority of the public servants are punished under chapter X of the Code. The wrongs include absconding to avoid summons, non-attendance in defiance or disregard of the order of the public servant, furnishing false information, making a false statement on oath, and obstruction or threat to public servant in the discharge of his duties and functions.

The wrongs which affect the processes of justice such as giving or fabricating false evidence, issuing a false certificate, and such acts that are likely to influence the course of judicial action are comprehended as penal offences and are viewed with gravity.

The theme of the foregoing offences is to preserve the security of the social order itself.

Next to this is the theme of protecting the public. The Code envisages the securing of the interests of the public by regulating conduct of individuals in a manner which maintains public tranquility, public health and public morals. These can be grouped as:

(c) Offences against the public: The sections dealing with the offences against public tranquility prohibit membership of an unlawful assembly consisting of five or more persons assembled with the common object of the exercise or use of criminal force, criminal mischief or criminal trespass. The idea is rooted in the historical concept of kings peace in England which was protected through the form of action of *trespass vi et armis.* The requirement of tranquility in the public necessitates the prohibition of acts leading to rioting, affray, promoting disharmony between differing racial or religious groups or committing sacrilege which is against the interests of public order.

Another class of wrongs in the interest of the public are those offences which tend to go against the public health by spread of infectious and dangerous diseases. The disobedience of quarantine rule comes within this category. The prohibition of the sale of adulterated food, drinks or drug preparations is aimed at protecting public health.

The issue of public morality has well been within the view of the legislature. The enactment of penal provision relating to sale, publication or distribution of obscene books and materials with a view to corrupting the morals of the persons susceptible to such influence bespeaks the legislative

policy in this regard.

It may also be mentioned that the protection of public interests has led the Indian legislature to use penal provisions for prohibition of civil wrongs of the nature of public nuisance or negligent conduct with respect to combustible matter or explosive substance, animal, machinery *etc.*

The criminal law is generally understood as part of the public law where the interest and safety of the public at large are at stake. The nature and kind of offences discussed above specifically point out the need for preserving the public interest and public safety generally. But the Code also enumerates the offences where the protection of the person, property and related interests of individuals assume significance. The nature of wrongs which can be committed against human life or human body may conveniently be placed in the category of:

(d) Offences against persons: The life of a human being is given protection under the law which forbids culpable homicide. Culpable homicide may amount to murder which is punishable with death or imprisonment for life. The intention of causing death with attendant circumstances may fasten liability on the person for the offence of murder, so will knowledge of causing death, the offence of culpable homicide not amounting to exhibited in the fact that the Code makes euthanasia and attempt to commit suicide penal offences.

An intentional causing of pain, disease or infirmity to the body of a person is punished as hurt, and if such hurt causes permanent privation of vital limbs, or disfiguration of the head or face or endangers life or puts the person in suffering for a period of twenty days, such hurt is designated grievous.

Acts done rashly or negligently so as to endanger human life or personal safety of other are offences within this category. Personal liberty is secured against wrongful confinement.

Assault on the person, the use of criminal force, kidnapping, abduction, slavery and forced labour are the offences affecting the human body. The law prohibits sexual intercourse with a woman against her will without her consent. The consent is invalid if the woman is under sixteen years of age. Carnal intercourse against the order of the nature is a serious offence.

Besides the offences affecting life and body the Penal Code prescribes:

(e) Offences against property: which include dishonest removal of property from the possession of any person without his consent. The aggravated form of such act is punishable as extortion or robbery. Other offences against property include dishonest misappropriation of property, criminal breach of trust, receiving of stolen property, cheating, fraudulent deeds and dispositions of property as well as causing intentionally or knowingly wrongful loss or damage to the public or to any person by

destroying the value or utility of property. Entering into the property in the possession of another with intent to commit an offence or to annoy, insult or intimidate any person of possession of such property constitutes criminal trespass. Offences relating to documents and property marks can broadly be brought in the category of offences against property.

The framers of the Indian Penal Code thought to incorporate some such wrongs as offences in the Code, which in other countries are treated as civil wrongs. Such wrongs along with other are classified here as:

(f) Other offences: In this category we can place the offences relating to marriage. Adultery and bigamy are the main offences against marriage. Defamation is another wrong that is punishable under the Code. Criminal intimidation, insult and annoyance are offences which can be grouped herein.

Punishments: It would be appropriate to mention here about the nature of punishment provided under the law for the offences committed. The Indian Penal Code sanctions five principal forms of punishments. These are death, life imprisonment (which may be with hard labour or may be simple) forfeiture of property and fine.

Besides the above the criminal law recognizes the need to subject an offender non-punitive treatment. In such cases the punishment is not imposed but the offender is kept on probation. The Probation of Offenders Act, 1958 and similar State laws provide for such a measure by allowing the first offender to be released on probation or letting him off after admonition. The Act chiefly focuses attention on offenders below the age of twenty-one. The court has absolute discretion to apply the probation law to offender above the age of twenty-one.

It is interesting to note that it is now obligatory for the sentencing judicial officer to consider the possibility of releasing first offenders for good conduct. If he decides not to release the offender special reasons shall have to be recorded. This has been provided for in section 360 of Criminal Procedure Code coupled with the provisions such as 235 (2), 255 (2), *etc.*, making it obligatory to hear the offender before awarding punishment. The power to release the offender for non-institutional treatment under section 360 may help the Court to avoid punishing and thus achieving reformation of the offender.

An order for non-punitive treatment of the offender is dependent on (i) the finding of the court that the person is not guilty of an offence punishable with death or life imprisonment; (ii) that it is expedient to release the offender on probation of good conduct on the basis of the circumstances of the case, the nature of the offence and the character of the offender; (iii) the offender's entering into a bond with or without sureties that he will appear to receive the sentence within the period of three years;

(iv) the report of the probation officer, if any, in relation to the case. The foregoing factors are the prerequisites for invoking the courts to exercise probation jurisdiction for the release of the offender.

Suggested Readings

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4. R. A. Nelson, *The Indian Penal Code*, 3 vols., 6th ed. by S. S. Sastry and S. D. Singh, 1970.
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6. Ratanlal Ranchhoddas and D.K. Thakore, *The Law of Crimes*, 21st ed. by B. J. Divan and M. R. Vakil, 1966.
7. T. K. Banerjee, *Background to Indian Criminal Law*, 1963.
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9. V. B. Raju, *Commentaries on the Penal Code*, 2 vols., 3rd ed., 1965.