



KLE LAW ACADEMY BELAGAVI

(Constituent Colleges: KLE Society's Law College, Bengaluru, Gurusiddappa Kotambri Law College, Hubballi, S.A. Manvi Law College, Gadag, KLE Society's B.V. Bellad Law College, Belagavi, KLE Law College, Chikodi, and KLE College of Law, Kalamboli, Navi Mumbai)

STUDY MATERIAL

for

WHITE COLLAR CRIMES

Prepared as per the syllabus prescribed by Karnataka State Law University (KSLU), Hubballi

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Course-III**Optional -V****White Collar Crimes (Privileged Class Deviance)****Objectives**

This course focuses on criminality of the privileged classes- wielders of all forms of state and social power. The course focuses on the relation between privilege, power and deviant behaviour. The traditional approaches which highlight white collar crime, Socio-economic offences or crimes of powerful deal mainly deal with the deviance of the economically resourceful. The dimension of deviance associated with the bureaucracy, the new rich religious leaders and organizations, professional classes are to be addressed. In teaching this course, current developments in deviants reflected in press and media, law reports and legislative proceedings are to be focused.

Unit- I**Introduction****Concept of White Collar Crime**

Almost all societies have certain norms, beliefs, customs and traditions which are implicitly accepted by its members as conducive to their wellbeing and healthy development. Infringement of these cherished norms and customs condemned as anti-social behavior.

Thus, many writers have defined 'crime' as anti-social, immoral or sinful behavior. However, according to the legal definition crime is any form of conduct which is declared to be socially harmful in a state and as such forbidden by law under pain of some punishment. Crime can be defined as an act or omission, which is unlawful, illegal or infringes provisions of law and which is punishable by law.

The most significant recent development in criminology, especially since World War II, has been the emergence of the concept "white-collar" crime as an area of scientific inquiry and theoretical speculation. It is true, of course that this crime itself is not wholly new; robber barons have been

exposed in the past, and muckrakers have long decried corruption and venality in high places.

The generalization of such phenomena and the incorporation of facts concerning illegal behavior of the higher classes into theories of crime causation is a product of recent effort. The speeches and publications of Edwin Sutherland culminating in his 1949 study not only gave the name "white-collar" to this new area, but stimulated widespread research and, not incidentally, caused a furor in criminological circles concerning the appropriateness of this concept as a legitimate focus of research and theory.

White-collar criminality has become a global phenomenon with the advance of commerce and technology. Like any other country, India is equally in grip of white-collar criminality. The reason for an enormous increase in white-collar crime in recent decades is to be found in the fast-developing economy and industrial growth of this developing country.

White-collar crime is markedly different both legally and sociologically from more conventional crime, and the controversy over its criminological appropriateness centers around three major issues:

1. Are the law violations in question really crimes?
2. Can the behavior of the offenders involved be equated with conceptual meanings of criminal behavior, particularly since violators neither think of themselves nor are commonly thought of as criminals?
3. What is to be gained, other than confusion and imprecision, by the reformulation of definitions of crime to include behavior customarily "punished" civilly or by administrative action rather than by the conventional, and probably more precise, criminal procedures?

Definition

The concept of white-collar crime found its place in criminology for the first time in 1941 when Sutherland first published his research paper on white-collar criminality in the American sociological review. He defined white-collar crime as a crime committed by persons of high social status in

course of their occupation. e.g. -misrepresentation through fraudulent advertisement, infringement of patents, copyrights, and trade-marks, a publication of fabricated balance sheets and profit and loss account of business,etc.

“White-collar crimes are committed by persons of status, not for need but for greed” sir Walter reckless

Sutherland further pointed out that white-collar crime is more harmful to society than ordinary crimes because the financial loss to the society from white-collar crime is far greater than the financial loss from burglaries, robberies, larcenies, etc.

James Cameron, an eminent journalist in the following words:- “it is denied by nobody indeed, the totality and persuasiveness of India, corruption is almost a matter of National pride”. It is described as wholly widespread and spectacular. *State v Bharat Chandra Raul*, 1975 CR, L.J. 2417 (ORISSA)

Difference between white collar crime and blue-collar crime

The term ‘blue collar crime’ came into existence sometime in the 1920s. The term was then used to refer to Americans who performed manual labor. They often preferred clothes of darker shade so as to stains less visible. Some used to wear clothes with a blue collar. These worked for a low wage on an hourly basis. White collar crimes have been prevalent since centuries and it is not new to all types of businesses, professions and industries.

The difference between ‘blue collar crimes’, which are crime of a general nature, and ‘white collar crimes’ was laid down by the Supreme Court of India in the case of ***State of Gujarat v. Mohanlal Jitmalji Porwal and Anr. Justice Thakker*** elucidated that one person can murder another person in the heat of the moment, but causing financial loss or say committing economic offences requires planning. It involves calculations and strategy making in order to derive personal profits.

Here are the characteristics of white collar crimes which distinguish it from other crimes of general nature:

Meaning

Blue-collar crimes refer to people who work physically, using their hands, whereas white collar crimes refer to knowledgeable works, who use their knowledge to commit crimes.

New v/s Traditional

Where blue-collar crimes refer to traditional crimes that have been committed since ages, the concept of white collar crimes has recently developed. It's a new species of crime.

Mens rea

To constitute a crime element of *mens rea* and *actus reus* is must. Where *mens rea* is an essential element of blue collar crimes, its involvement in white collar crimes is not necessary.

Independent of social and personal conditions

White collar crimes have no relation with the social conditions, like poverty, or personal conditions of the offender *albeit* it matters in the conventional nature of crimes.

Direct access to the targets

Since the offenders who commit white collar crimes are people at a higher position in a company they have easy, direct and valid access to their targets. The case is different with blue-collar crimes. For example, if Jhethalal decides to commit theft in the house of Babitaji, he will first have to break the door or make a passage of entrance to get inside Babitaji's house and thereafter commit theft.

So, before actually committing theft, Jhethalal will first have to get access to Babitaji's house. Whereas in white collar crimes, one can have direct access to their target making use of one's higher position and power.

Veiled offenders

In the case of white collar crimes, one does not have to come face to face with the victim and so their identity remains veiled. Whereas in case of

blue collar crimes, one has to come face to face in order to inflict injury upon others.

Involvement of politicians

In many cases it has been found that the offenders have strong connections with politicians and sometimes, politicians are also involved in committing the crime thus making it difficult for the victims to take action against such offenders.

Greater harm

The harm caused by white collar crimes are much more difficult to bear than those inflicted by blue collar crimes. Also, the harm caused by white collar crimes could cause great harm, not only to the public, but to the other institutions and organizations as well.

Historical Background

The concept of white-collar crime is usually associated with E.H. Sutherland whose penetrating work in this area focused the attention of criminologists on its demoralizing effects on the total crime picture. Sutherland pointed out that besides the traditional crimes such as assault, robbery, dacoity, murder, rape, kidnapping, and other acts involving violence, there are certain anti-social activities which the persons of upper strata carry on in course of their occupation of business.

In 1934 Morris drew attention to the necessity of a change in emphasis regarding crime he asserted that anti-social activities of persons of high status committed in course of their profession must be brought within the category of crime and should be made punishable. *Finally*, E.H.sutherland emphasized that these 'upper world' crimes which are committed by persons of upper socio-economic groups in course of their occupation violating the trust should be termed as white-collar crimes, so as to be distinguished from traditional crimes which he called "blue-collar crimes.

The Nature of White - Collar Crime

The chief criterion for a crime to be "white-collar" is that it occurs as a part of or a deviation from, the violator's occupational role. Technically, this is more crucial than the type of law violated or the relative prestige of the violator, although these factors have necessarily come to be major issues in the white-collar controversy,

First, because most of the laws involved are not part of the traditional criminal code, and

Second, because most of the violators are a cut above the ordinary criminal in social standing.

Such crimes as embezzlement, larceny by bailee, certain forgeries, and the like, however, are essentially occupational and thus white-collar crimes, and yet are tried under the penal code. Likewise farmers, repairmen, and others in essentially non white-collar occupations could, through such illegalities as watering milk for public consumption, making unnecessary "repairs" on television sets, and so forth, be classified as white-collar violators.

However, members of high-status white-collar occupations who commit ordinary penal law violations, such as murder, robbery, rape, non occupationally-connected thefts, and the like, would not be white-collar criminals.

These crimes are usually violations of trust, either "duplicities" or "misrepresentations," placed in the person (or the corporation, for that matter) by virtue of his occupational norms and high position in the society.

These violations of trust must also be violations of law, and not merely unethical practices or noncriminal deviations from informal conduct norms within a business or profession. And around the legal status of such violations has arisen a theoretical conflict that continues to the present day.

The terms “white-collar crime” is a “organized crime,” reflect a half-century-old movement to remake the very definition of crime. Professor Edwin Sutherland, a sociologist who coined the term “white-collar crime,” disagreed with certain basic substantive and procedural principles of criminal law. In his landmark book, *White Collar Crime, first published in 1949, Sutherland dismisses the traditional mens rea (criminal intent) requirement and the presumption of innocence.*

He suggests that the “rules of criminal intent and presumption of innocence ... are not required in all prosecution in criminal courts and the number of exceptions authorized by statutes is increasing.”

Professor Sutherland’s supporters have stated:

The term white-collar crime served to focus attention on the social position of the perpetrators and added a bite to commentaries about the illegal acts of businessmen, professionals, and politicians that is notably absent in the blander designations, such as “occupational crime” and “economic crime,” that sometimes are employed to refer to the same kinds of lawbreaking.

Sutherland’s influence is clearly evident in federal criminal law today. Many federal offenses prosecuted under the label of “white-collar crime” are regulatory, rather than true crimes, requiring no proof of criminal intent. Under this conception of “crime,” white-collar offenders may be sent to prison for harmless mistakes or accidents.

The result can be the criminalization of productive social and economic conduct, not because of its wrongful nature but because of fidelity to a long-is credited class-based view of society.

Classification of White Collar Crimes

Theoretically, various white-collar crimes may broadly be classified into four major categories as follows:-

1. Ad hoc crimes: they are also known as personal crimes because in this category of white-collar crimes, the offender pursues his own individual objective having no face to face contact with the victim. Hacking on computers, credit card frauds tax evasion, etc. are common forms of ad hoc white-collar crimes.
2. White-collar crimes involving a breach of trust or breach of faith bestowed by an individual or institution on the perpetrator. insider trading, financial embezzlements, misuse of funds fictitious payrolls, etc. are common illustrations of this type of white-collar crimes.
3. Individuals occupying high positions or status who commit crime incidental to, and in furtherance of their organizational operations constitute this category of white-collar crimes. people occupying high position commit such crime, not because it is their central purpose, but because they individually find an opportunity in the course of their employment to earn quick money or gain undue advantages by using their power or influence. Example of such crimes is fraudulent medical bill claims, fake educational institutions, issuance of fake mark sheet/certificates, etc.
4. White-collar crimes may also be committed as a part of the business itself. Violation of trademarks or copyrights, patent law or competition law, etc. the violation of domain name and other corporate crimes are also white-collar crimes of this type.

Types of White Collar Crime in India

Following are some of the types of White Collar Crime

Bank Fraud: To engage in an act or pattern of activity where the purpose is to defraud a bank of funds.

Blackmail: A demand for money or other consideration under threat to do bodily harm, to injure property, to accuse of a crime, or to

expose secrets.

Bribery: When money, goods, services, information or anything else of value is offered with intent to influence the actions, opinions, or decisions of the taker. You may be charged with bribery whether you offer the bribe or accept it.

Cellular Phone Fraud: The unauthorized use, tampering, or manipulation of a cellular phone or service. This can be accomplished by either use of a stolen phone, or where an actor signs up for service under false identification or where the actor clones a valid electronic serial number (ESN) by using an ESN reader and reprograms another cellular phone with a valid ESN number.

Computer fraud: Where computer hackers steal information sources contained on computers such as: bank information, credit cards, and proprietary information.

Counterfeiting: Occurs when someone copies or imitates an item without having been authorized to do so and passes the copy off for the genuine or original item. Counterfeiting is most often associated with money however can also be associated with designer clothing, handbags and watches.

Credit Card Fraud: The unauthorized use of a credit card to obtain goods of value.

Currency Schemes: The practice of speculating on the future value of currencies.

Educational Institutions: Yet another field where collar criminals operate with impunity are the privately run educational institutions in this country. The governing bodies of those institutions manage to secure large sums by way of government grants of financial aid by submitting fictitious and fake details about their institutions. The teachers and other staff working in these institutions receive a meager salary far less than what they actually sign for, thus allowing a big margin for the management to grab huge amount in this illegal manner.

Embezzlement: When a person who has been entrusted with money or property appropriates it for his or her own use and benefit.

Environmental Schemes: The overbilling and fraudulent practices exercised by corporations which purport to clean up the environment.

Extortion: Occurs when one person illegally obtains property from another by actual or threatened force, fear, or violence, or under cover of official right.

Engineering: In the engineering profession underhand dealing with contractors and suppliers, passing of sub-standard works and materials and maintenance of bogus records of work-charged labour are some of the common examples of white collar crime. Scandals of this kind are reported in newspapers and magazines almost every day in our country.

Fake Employment Placement Rackets: A number of cheating cases are reported in various parts of the country by the so called manpower consultancies and employment placement agencies which deceive the youth with false promises of providing them white collar jobs on payment of huge amount ranging from 50 thousands to two lakhs of rupees.

Forgery: When a person passes a false or worthless instrument such as a check or counterfeit security with the intent to defraud or injure the recipient.

Health Care Fraud: Where an unlicensed health care provider provides services under the guise of being licensed and obtains monetary benefit for the service.

The white collar crimes which are common to Indian trade and business world are hoardings, profiteering and black marketing. Violation of foreign exchange regulations and import and export laws are frequently resorted to for the sake of huge profits. That apart, adulteration of foodstuffs, edibles and drugs which causes irreparable danger to public health is yet another white collar crime common in India.

Insider Trading: When a person uses inside, confidential, or advance information to trade in shares of publicly held corporations.

Insurance Fraud: To engage in an act or pattern of activity wherein one obtains proceeds from an insurance company through deception.

Investment Schemes: Where an unsuspecting victim is contacted by the actor who promises to provide a large return on a small investment.

Kickback: Occurs when a person who sells an item pays back a portion of the purchase price to the buyer.

Larceny/Theft: When a person wrongfully takes another person's money or property with the intent to appropriate, convert or steal it.

Legal Profession: The instances of fabricating false evidence, engaging professional witness, violating ethical standards of legal profession and dilatory tactics in collusion with the ministerial staff of the courts are some of the common practices which are, truly speaking, the white collar crimes quite often practiced by the legal practitioners.

Money Laundering: The investment or transfer of money from racketeering, drug transactions or other embezzlement schemes so that it appears that its original source either cannot be traced or is legitimate.

Medical profession: White collar crimes which are commonly committed by persons belonging to medical profession include issuance of false medical certificates, helping illegal abortions, secret service to dacoits by giving expert opinion leading to their acquittal and selling sample-drug and medicines to patients or chemists in India

Racketeering: The operation of an illegal business for personal profit.

Securities Fraud: The act of artificially inflating the price of stocks by brokers so that buyers can purchase a stock on the rise.

Tax Evasion: When a person commits fraud in filing or paying taxes. The complexity of tax laws in India has provided sufficient scope for

the tax-payers to evade taxes. The evasion is more common with influential categories of persons such as traders, businessmen, lawyers, doctors, engineers, contractors etc. The main difficulty posed before the Income Tax Department is to know the real and exact income of these

Professionals. It is often alleged that the actual tax paid by these persons is only a fraction of their income and rest of the money goes into circulation as 'black money.

Telemarketing Fraud: Actors operate out of boiler rooms and place telephone calls to residences and corporations where the actor requests a donation to an alleged charitable organization or where the actor requests money up front or a credit card number up front, and does not use the donation for the stated purpose.

Welfare Fraud: To engage in an act or acts where the purpose is to obtain benefits (i.e. Public Assistance, Food Stamps, or Medicaid) from the State or Federal Government.

Weights and Measures: The act of placing an item for sale at one price yet charges a higher price at the time of sale or short weighing an item when the label reflects a higher weight.

White Collar Crime in India

White collar criminality has become a global phenomenon with the advance of commerce and technology. Like any other country, India is equally in the grip of white collar criminality. The recent developments in information technology, particularly during the closing years of the twentieth century, have added new dimensions to white collar criminality. There has been unprecedented growth of a new variety of computer dominated white collar crimes which are commonly called as cybercrimes. These crimes have become a matter of global concern and a challenge for the law enforcement agencies in the new millennium. Because of the specific nature of these crimes, they can be committed anonymously and far away from the victims without physical presence.

Further, cyber-criminals have a major advantage: they can use computer technology to inflict damage without the risk of being apprehended or caught. It has been predicted that there would be simultaneous increase in cyber-crimes with the increase in new internet web sites. The areas affected by cyber-crimes are banking and financial institutions, energy and telecommunication services, transportation, business; industries etc. in India.

Causes of white collar crime in India

India is a country that is faced with various problems on a serious level, like that of starvation, illiteracy and health issues on a large scale. Moreover, India is the second largest populated country in the world, and administration of the mass becomes a problem. Despite having stringent laws, the administration often fails in implementing them, as keeping control such a large number of people becomes difficult. In such circumstances it is very likely for white collar crimes to flourish. The various other causes for the growth of white collar crimes in India are as follows:

1. The white collar crimes are committed by people who are financially secure and perform such illegal acts for satisfying their wants. These crimes are generally moved by the greed of the people.
2. Poverty is considered as a major cause for underdevelopment in India. Poverty is a cause for financial and physical duress among the major chunk of population. Since people are so much in need of money, they easily get attracted by the false representations made to them. They forget to look into the veracity of the representations being made to them.
3. The gravity of white collar crimes are more intense than other traditional crimes. White collar crimes causes one great loss at all levels, i.e. financial, emotional, etc. Corporate mishaps, like false pharmaceutical tests, costs more lives than the crime of murder.

4. With the advancement in technology, faster growth rate of industries and business, and political pressure have introduced the offenders to newer, easier and swifter methods of committing such crimes.
5. With the introduction of the people to the internet and digital world, where big transactions takes place within seconds and where reaching out people from all over the world is a matter of few minutes, criminals have got an incentive to commit more crimes and hide anywhere in the world.
6. Our law enforcement agency also becomes reluctant to deal with such crimes as these cases are very complicated and tracing a suspect is a difficult job. The investigation in case of white collar crimes is much more consuming than that in traditional crimes.
7. Even when the offender of the white collar crime has been caught, the judiciary fails to punish them. The major reasons behind the failure to hold these criminals accountable for their wrongful acts are:
 - The legislators and the ones implementing the laws belongs to the same group or class to which the offender belongs and therefore land up assisting these criminals instead of taking actions against them.
 - The investigating officers put in less effort in doing their job as they are not able to connect the small evidences that they get. And despite efforts they don't get major evidences in such cases as everything is done online and tracing things or person becomes difficult.
 - We don't have laws on such types of crime and therefore offenders are left free. In many cases due to loopholes in law, it becomes favorable to the offenders.
 - The existing laws do not provide stringent punishment that would prevent people from being involved in such types of crimes. The suspects do not have any incentive to not participate in these types of crime.

Reasons for the growth of white collar crimes in India

Greed, competition and lack of proper laws to prevent such crimes are the major reasons behind the growth of white collar crimes in India.

Greed

The father of modern political philosophy, Machiavelli, strongly believed that men by nature are greedy. He said that a man can sooner and easily forget the death of his father than the loss of his inheritance. The same is true in the case of commission of white collar crimes. Why will a man of high social status and importance, who is financially secure, commit such crimes if not out of greed?

Easy, swift and prolong effect

The rapid growing technology, business, and political pressure has introduced the criminals to newer ways of committing white collar crimes. Technology has also made it easier and swifter to inflict harm or cause loss to the other person. Also, the cost of such crimes is much more than other crimes like murder, robbery or burglary, and so the victim would take time to recover from it. This would cut down the competition.

Competition

Herbert Spencer after reading 'On the Origin of Species' by Darwin, coined a phrase that evolution means 'survival of the fittest'. This implies that there will always be a competition between the species, and the best person to adapt himself to the circumstances and conditions should survive.

Lack of stringent laws

Since most of these crimes are facilitated by the internet and digital methods of transfer payments, laws seem reluctant to pursue these cases as investigating and tracking becomes a difficult and complicated job. Why it becomes difficult to track it is because they are usually committed in the privacy of a home or office thereby providing no eyewitness for it.

Lack of awareness

The nature of white collar crimes is different from the conventional nature of crimes. Most people are not aware of it and fail to understand that they are the worst victims of crime.

Necessity

People also commit white collar crimes to meet their own needs and the needs of their family. But the most important thing that the people of high social status want to feed their ego.

The reasons behind white collar criminals going unpunished are:

- Legislators and the people implementing the laws belong to the same class to which these occupational criminals belong.
- The police put in less effort in the investigation as they find the process exhausting and hard, and often these baffling searches fail to promise favorable results.
- Laws are such that it only favours occupational criminals.
- The judiciary has always been criticized for its delayed judgment. Sometimes it so happens that by the time court delivers the judgment, the accused has already expired. This makes criminals loose in committing crimes. While white collar crimes are increasing at a faster rate, the judiciary must increase its pace of delivering judgments.

Effects of white collar crime

1. Effect on the company

White collar crimes cause huge loss to companies. In order to recover the loss, these companies eventually raise the cost of their product which decreases the number of customers for that product. This works according to the law of demand states that, other things being equal, when the price of a commodity rises, its demand would fall and when the price lowers, its demand would increase.

In short, the price of the commodity is inversely proportional to its demand. Since the company is in loss, the salaries of the employees are lessened. Sometimes the company cut down the jobs of several employees.

The investors of that company and its employees find it difficult to repay their loans. Also, it becomes hard for people to obtain their credits.

For example, a US-based IT cognizant landed up paying 178 crore rupees to settle the charges levied on it under the Foreign Corrupt Practices Act by the Securities and Exchange Commission. The company had bribed an Indian Government Official from Tamil Nadu to allow the building of a 2.7 million square feet campus in Chennai. Apart from loss in paying 2 million dollar bribery amount, the company also had to bear extra charges of 25 million dollars to get free from the charges.

2. Effect on the employees

White collar crimes endanger employees. They become conscious of their working conditions, whether it is safe anymore or not. They start doubting if they are safe and that they can still be given in their trust to the company.

3. Effect on customers

The most important concern of the customers is whether the products which they are using is safe or not. This doubt rise to see the rate at which white collar crimes have been increasing.

4. Effect on society

White collar crimes are harmful to the society for those people who should be cited as a moral example and who must behave responsibly are one committing such crimes. The society thus becomes polluted.

When the former director of Andhra Bank and the directors of a Gujarat based pharma company, Sterling Biotech, were arrested for their involvement in 5000 Crore fraud case. They used to withdraw money from bank accounts of several Benami companies. This was one big scam which put the people in fear.

Also in 2018 the Punjab National Bank (PNB) found that fraudulent transactions of value 11, 346 crore rupees have been taking place in its Mumbai branch. *“The Staff there used to fake LoU (Letter of Understanding) for the buyer’s credit to the company of Nirav modi and Gitanjali Group”*, as published in the Business World.

5. Loss of confidence

Stock fraud or trading scandals, like that happened in the U.S. in the 1980s makes people lose faith in the stock market. Barry Minkow, a teenager and the owner of the business of carpet cleaning built a million dollar corporation in the 1980s. But, he was able to achieve this only through forgery and theft.

He managed to create more than 10,000 counterfeiting documents and sales receipts without coming to someone's notice. His company although created through fraud was able to make market capitalization of 200 million dollars and leased 4 million dollars of land. Later, he was sentenced to 25 years of imprisonment.

Enron was the seventh largest energy trading company, based on revenue, in U.S. Forgery made them waive off hundreds of millions of debts out of their book. The investors thought that the performance of the company was really good and stable. But later on it has been found that the incredible numbers on revenue records were fictitious. The famous Enron scandal where all the retirement accounts were wiped out it was found that people had loss their normality, their power and public confidence.

6. Effect on offenders

The authorities have shown no consensus on the definition of white collar crimes. There are no accurate statistics available to analyse the causes and effects of such crimes and therefore government fails to take exact measures to prevent them. Also, though these crimes are on the rise, they are generally not reported.

These crimes have no eyewitnesses as they are committed *in camera*, which means that the offenders commit these crimes while sitting in a closed room or in their personal space using their computers, and nobody could know about what they are doing on their computer.

This makes it difficult to track the offenders. All these loopholes becomes an incentive for the offenders to fearlessly commit such crimes because the punishment is also for a short term unlike in blue-collar crimes. Offenders are mostly seen roaming freely which poses a danger to the society.

7. Effects on the temperament of the affected person

The target of the offenders is generally elderly people with little access to liquid assets and their cognitive ability is less than that of younger people. So they become an easy target for the offenders. The victims of such crimes often undergo depression and are seen to have suicidal tendencies, because sometimes the loss incurred is unbearable.

The renowned startup founder, **Vijay Shekhar Sharma**, the person who founded the widely used app for transaction namely Paytm, became a victim of blackmailing by his personal secretary Sonia Dhawan. She along with others stole his personal data along with sensitive business plans, to extort money from him. Also, Sharma received regular calls stating that his personal information would be revealed to the public if he doesn't give the required amount to them. Sharma was put under a lot of pressure.

Socio – Economic Offences an Approach

Introduction

Socio-economic offences are usually considered to be synonymous with white collar crimes but a deep study into the concept reveals that although there is an intersection between socio economic offences and white collar crimes, but the latter is narrower in scope.

White Collar crimes are those which are committed by upper class of the society in the course of their occupation, for *e.g.*, a *big multinational* corporation guilty of tax evasion. A pensioner submitting false return may not be committing a white collar crime but interestingly, both are socio economic offences.

Social crimes are those which affect the health and material of the community and economic crimes are those which affect the country's economy and not merely the victim.

Hence it can be safely assumed that socio economic offences are those which affects the country's economy as well the health and material of the society.

In India, the 29th Law Commission Report suggested to take into consideration the Santhanam Committee Report of 1964. The committee report observed that, "the Penal Code does not deal with any satisfactory manner with acts which may be described as social offences having regard to the special circumstances in which they are committed and which have now become a dominant feature of certain powerful sections of modern society.

In most of the offences that were identified, two features could be witnessed, economic benefit and unjust enrichment. It suggested that a separate chapter should be included in IPC to deal with socioeconomic crimes".

The committee broadly categorized the offences as (a) offences calculated to prevent or obstruct the economic development of the country and endanger its economic health;

(b) evasion and avoidance of taxes lawfully imposed;

(c) misuse of their positions by public servants in making of contracts and disposal of public property, issue of licenses and permits and similar other matters;

(d) delivery by individuals and industrial and commercial undertaking of goods not in accordance with agreed specifications in fulfilment of contracts entered into with public authorities;

(e) profiteering, black marketing and hoarding;

(f) adulteration of foodstuffs and drugs;

(g) theft and misappropriation of public property and funds; and

(h) trafficking in licenses, permits, etc.

The 47th Law Commission Report laid down a new composite category of socio-economic crimes. The three basic forms include illegal economic activities, illegal way of performing commercial and allied transactions and evasion of public taxes or monetary liabilities. The survey includes an analysis of the case-laws having socio-economic ramifications.

Some of the acts enacted to tackle the socio economic crimes by the Indian legislation are:

The Essential Commodities Act, 1955

The Prevention of Corruption Act, 1988

The Prevention of Food Adulteration Act, 1955

The Prevention of Immoral Traffic (Amendment) Act, 1986.

The Drugs and Cosmetics Act, 1940

The Essential Commodities (Amendment) Act, 2010

The Dowry Prohibition Act, 1961

The Narcotic Drugs Psychotropic Substances Act, 1985.

The Standard of Weights and Measures Act, 1976

The Customs Act, 1962

The Drug (Control) Act, 1950

The Income Tax Act, 1961

The Anti-Corruption Laws (Amendment) Act, 1976

The Indian Penal Code, 1860 etc

Socio- Economic Offenders:

There are various views about the 'socio-economic offences' from the aspects of civil law, criminal law, the torts and morality. The father of criminology-Lombroso believed that, criminals had different physical characteristics of inferior nature.

Criminals having atavistic qualities were categorized as the "born criminals" the other group known were "insane criminals" and the third are Criminaloids (*A criminaloid (from the word "criminal" and suffix -oid, meaning criminal-like) is a person who projects a respectable, upright facade, in an attempt to conceal a criminal personality. This type, first defined by Cesare Lombroso in the later editions of his 1876 work "the Criminal man", the persons who commit crimes or vicious acts only under certain circumstances, otherwise they are normal persons with normal behavior.*

The crimes committed by the persons of the third category characterize the class of the offenders called as white-collar criminals. It can be said that such offences are committed in presence of moral insensibility. The key drivers or the motivators of the crime are money, recognition, power, success, satisfaction and consideration.

Sutherland defined white-collar crimes based upon three types of misbehaviors and crimes as state:

1) Any crime committed by a person of high status (whether or not it is done in the course of their occupational activities).

2) Those crimes committed on behalf of organizations (by people of any status).

3) Those crimes committed against organizations, whether or not these are carried out by people working in the same organization, another organization, or none at all.

Every occupation, profession and trade involves the following of certain rules, policies, norms, practices, values, ethics and laws.

Application of *Mens Rea*:

Socio economic offences includes to know the extent to which the practice is justified, to know the extent the judicial practice of mens rea into statutes dealing with such offences and knowledge of most appropriate and justified response to such offences. Also, there are number of issues involved in socio economic offences- vicarious liability, situational liability in statutory offences etc.

There are number of offences in the Indian Penal Code (IPC), for which there is no element of *mens rea* required. Such offences mainly include national interest but even then it is observed that the courts apply mens rea in such cases as well.

In a developing country like India, constraints of economic resources have necessitated the imposition of certain social controls to promote planned development with the enforcements of the provisions of licensing, controls, regulation, laws and policies etc. In certain cases it is must to impose the provisions strictly and impose the liabilities to the offenders for disobeying and violation of the standards of behaviour.

However the imposition of such strictness in all the cases irrespective of its individuality is questioned on grounds of justification. The criminalization of productive social and economic conduct is seen from the national and societal interest.

Mens rea requirement is a common law legacy. However, there are instances in common law where the doctrine is dispensed with (like public nuisance contempt of court and libel). This was justified because:

- (i) it was difficult to prove mens rea in some cases,

(ii) as they were penalized under social welfare legislations, a purposive construction was required to further the objectives of the act.

(iii) Punishment in these cases is usually light and

(iv) they are offences which are in the nature of *mala prohibita* and not *mala in se*.

DEVIANCE

Introduction

Deviance is *the recognized violation of cultural norms*. Norms guide virtually all human activities, so the concept of deviance is quite broad. One category of deviance is crime; *the violation of a society's formally enacted criminal law*. Even criminal deviance spans a wide range, from minor traffic violations to prostitution, sexual assault, and murder.

Most familiar examples of nonconformity are negative instances of rule breaking, such as stealing from a campus bookstore, assaulting a fellow student, or driving while intoxicated.

Not all deviance involves action or even choice. The very existence of some categories of people can be troublesome to others. All of us are subject to social control, attempts by society to regulate people's thoughts and behavior.

Often this process is informal, as when parents praise or scold their children or when friends make fun of a classmate's choice of music. Cases of serious deviance, however, may bring action by the criminal justice system; the organizations—police, courts, and prison officials—that respond to alleged violations of the law.

How a society defines deviance, which is branded as deviant, and what people decide to do about deviance all have to do with the way a society is organized. Only gradually, however, have people come to understand that the roots of deviance are deep in society.

Deviance is always a matter of difference. Deviance emerges in everyday life as we encounter people whose appearance or behavior differs from what we consider “normal.”

Deviance can be beneficial to society if unorthodox behavior leads to creativity or innovation. Alternatively deviance may be harmful as in the case of crime.

The Biological Context

The human behavior to be the result of biological instincts. Early interest in criminality therefore focused on biological causes. In 1876, Cesare Lombroso (1835–1909), an Italian physician who worked in prisons, theorized that criminals stand out physically, with low foreheads, prominent jaws and cheekbones, protruding ears, hairy bodies, and unusually long arms. All in all, Lombroso claimed that criminals look like our apelike ancestors.

Biological theories offer a limited explanation of crime. The best guess at present is that biological traits in combination with environmental factors explain some serious crime. Most of the actions we define as deviant are carried out by people who are physically quite normal.

In addition, because a biological approach looks at the individual, it offers no insight into how some kinds of behaviors come to be defined as deviant in the first place.

Therefore, although there is much to learn about how human biology may affect behavior, research currently puts far greater emphasis on social influences.

Personality Factors

Like biological theories, psychological explanations of deviance focus on individual abnormality. Some personality traits are inherited, but most

psychologists think personality is shaped primarily by social experience. Deviance, then, is viewed as the result of “unsuccessful” socialization.

Psychologists have shown that personality patterns have some connection to deviance. Some serious criminals are psychopaths who do not feel guilt or shame, have no fear of punishment, and have little sympathy for the people they harm. However, as noted in the case of biological factors, most serious crimes are committed by people whose psychological profiles are normal.

Both biological and psychological research views deviance as a trait of individuals. The reason these approaches have limited value in explaining deviance is that wrongdoing has more to do with the organization of society. We now turn to a sociological approach, which explores where ideas of right and wrong come from, why people define some rule breakers but not others as deviant, and what role power plays in this process.

The Social Foundations of Deviance

To view deviance as the free choice or personal failings of individuals, all behavior—deviance as well as conformity—is shaped by society. Three social foundations of deviance identified here.

1. Deviance varies according to cultural norms.

No thought or action is inherently deviant; it becomes deviant only in relation to particular norms.

2. People become deviant as others define them that way.

Everyone violates cultural norms at one time or another. For example, have you ever walked around talking to yourself or “borrowed” a pen from your workplace? Whether such behavior defines us as mentally ill or criminal depends on how others perceive, define, and respond to it.

3. Both norms and the way people define rule breaking

Involve social power. The law, claimed Karl Marx, is the means by which powerful people protect their interests. A homeless person who stands on a street corner speaking out against the government risks arrest for disturbing the peace; a mayoral candidate during an election campaign doing exactly the same thing gets police protection. In short, norms and how we apply them reflect social inequality.

The key insight of the structural-functional approach is that deviance is a necessary element of social organization. This point was made a century ago by Emile Durkheim.

Durkheim's Basic Insight

In his pioneering study of deviance, Emile Durkheim (1964a, orig. 1893; 1964b, orig. 1895) made the surprising statement that there is nothing abnormal about deviance. In fact, it performs four essential functions:

1. Deviance affirms cultural values and norms.

As moral creatures, people must prefer some attitudes and behaviors to others. But any definition of virtue rests on an opposing idea of vice: There can be no good without evil and no justice without crime. Deviance is needed to define and support morality.

2. Responding to deviance clarifies moral boundaries.

By defining some individuals as deviant, people draw a boundary between right and wrong. For example, a college marks the line between academic honesty and deviance by disciplining students who cheat on exams.

3. Responding to deviance brings people together.

People typically react to serious deviance with shared outrage. In doing so, Durkheim explained, they reaffirm the moral ties that bind them. For example, after the September 11, 2001, terrorist attacks, people across

the United States were joined by a common desire to protect the country and bring the perpetrators to justice.

4. Deviance encourages social change.

Deviant people push a society's moral boundaries, suggesting alternatives to the status quo and encouraging change.

FORMS OF PRIVILEGED CLASS DEVIANCE

Introduction

It is general practice in sociology to regard deviant behavior as an alien element in society. Deviance is considered a vagrant form of human activity, moving outside the more orderly currents of social life.

And since this type of aberration could only occur (in theory) if something were wrong within the social organization itself, deviant behavior is described almost as if it were leakage from machinery in poor condition. It is an accidental result of disorder and anomie, a symptom of internal breakdown.

Deviant behavior is most likely to occur when the sanctions governing conduct in any given setting seem to be contradictory. This would be the case, for example, if the work rules posted by a company required one course of action from its employees and the longer range policies of the company required quite another.

Any situation marked by this kind of ambiguity, of course, can pose a serious dilemma for the individual: if he is careful to observe one set of demands imposed upon him, he runs the immediate risk of violating some other, and thus may find himself caught in a deviant stance no matter how earnestly he tries to avoid it.

In this limited sense, deviance can be regarded a "normal" human response to "abnormal" social conditions, and the sociologist is therefore invited to assume that some sort of pathology exists within the social structure when- ever deviant behavior makes an appearance.

Deviance can be defined as conduct which is generally thought to require the attention of social control agencies that is, conduct about which "some- thing should be done." Deviance is not a property inherent in certain forms of behavior; it is a property conferred upon these forms by the audiences which directly or indirectly witness them.

Types of deviances

- A. Professional Deviance
- B. Official Deviance
- C. Police Deviance

A. Official deviance

- State is a welfare State.
- But the abuse of powers will lead to totalitarian State.
- Though there are many laws and regulations, the corrupt officials do not hesitate to continue their illegal activities.

Deviance by bureaucrats

Bureaucracy means – officials who conduct the work of administration.

Traditional work – collection of revenue tax.

Act of Deviance:

1. Arrogant behaviour.
2. Stiff-necked attitude.
3. Arbitral behaviour.

4. Adhere to too much formalism.
5. Red-tapism (delay in action) to extract bribe.
6. Corruption.
7. Misappropriation of money and property.
8. Acquiring disproportionate wealth.

They are fearless because they are supported by the politicians.

Deviance by judges

Justice has become a costly affair now days. The court procedure has become tedious and dilatory and a costly affair. There is doubt about the integrity of the court staff including magistrate and judges. The judges take bribes to influence their decision, giving biased decisions and misappropriation of funds Judges are influenced by political pressure. Judges maintain personal contacts with Lawyers. Personal interest may also play important role in delivering justice in a true spirit.

Deviance by Legislature

The legislator should only serve the interests of the electorate but certain group often tries to influence legislator by offering money or information and in exchange for policy favor. Corruption by legislators has become a dominant mode of official deviance.

1. They seek Ministerial Posts by hook or crook and later on start violating morals and ethical norms.
2. They are also actively involved in Corruption.
3. They collect money as contribution from various rich Industrialist and Businessman during elections.
4. In return the contributors multiply their earnings by making profit out of the licenses obtained with the help of their favorable legislatures.
5. Corrupt Govt. officials are also backed by the politicians.

6. They approve the Bill only if it is beneficial personally to them or to their party.

7. Create artificial shortage of consumer goods and raise prices

Huge money is spend for election and votes are purchased and often do not hesitate to break the election code of conduct.

a) They also nominate quotas for diesel, petrol pump, paper industries etc. to their own relatives, etc.

b) They are also actively involved in defection.

c) There is a close relationship between the criminals and the politicians.

PROFESSIONAL DEVIANCE

Introduction

India is having a rich culture and tradition, coming from the different walks of people. Looking to the past of this country we find that due to intermingling of various types of races and civilization, India has emerged with wide categories of richness in all senses. But as said everything has its two sides. We find that due to diversified people coming to this country there are various classes also emerged.

The class system is not new or the inculcated one, even ancient India do have few classes. Now with the modernization we find that this categorization goes very wide and prominent. One such class is the privileged class. This means those who are enjoying some sort of the privileges or the facilities. In India we find a very good numbers of such people. These privileges are being given to them either because of the name or fame or because of their excellence in any particular area. They used to constitute a whole class of people as we find that they are variously present. And above all in a country like India they are prominent too. They are being given the rights and powers.

Although there is no such hard and fast categories being decided among the common men but conventionally they are so present. The term called as the deviances is also to be highlighted. We find that it is nothing but the “deflection from the right path”. When one is given some facility then definitely he should have some responsibilities too. These responsibilities can also be termed as the ethics or the duties.

When they are not being followed by the respective person they are called as the Deviances. Here in India we find that there are so many problems as to the large population to support along with that there are certain other things as the problem of the employment and that of sustenance. Hence the deviances become too typical.

The various types of the privileges classes are as those coming from the arenas like the politics, sports, education, administration, glamour...etc. They all are today reported to have the deviances. The position of the privilege people makes them so as to control the situation in the society.

May that be only a teacher but he/she may dictate their terms to the pupils and parents! Likewise we have the bureaucrats, they are to perform functions for the welfare of the common men but what they are doing is just to have their own good and at the expense of the ordinary people!

‘White collar crime’ is a crime committed by persons of respectability and high social status, in course of their occupation. A white collar criminal belongs to upper socio-economic class who violates the criminal law while conducting his professional qualities.

Thus misrepresentation through fraudulent advertisements, infringement of patents, copyrights and trademarks etc., are frequently resorted to by manufactures, industrialists and other persons of repute in course of their occupation with a view to earning huge profits.

What follows now is a brief discussion relating to some of the more important white collar crimes in India. Some of the professions involving technical expertise and skill provide sufficient opportunities for white collar

criminality. They include Journalists, Teachers, Doctors, Lawyers, Engineers, Architectures and Publishers.

Professional Deviance:

Profession Defined –

According to Webster (1969) it is believed that profession comes from the word 'profess' which means to receive formally into a religious community following a novitiate by acceptance of required vows. It might have something to do with the word 'priest' who is authorized to perform the sacred rites of a religion especially as a mediatory agent between man and God. According to Shaffer (1968) may be that priesthood was the oldest profession with special knowledge.

A priest was capable of doing such things, which an ordinary person could not do. Seen in this context, profession is originally meant to be a calling requiring specialized knowledge and often long and intense academic preparation. *Oxford English Dictionary* defines a profession as "a vocation in which professed knowledge of some department of learning or science is used in its application to affairs of others or in the practice of an art founded on it".

Cambridge International Dictionary of English defines a profession as "any type of work which needs a special training or a particular skill, often which is 'respected because it involves a high level of education". Both definitions lay emphasis on intellectual and skill aspects of the profession.

- Every profession has code of conduct, conditions, rules and ethics.
- If any act violates such rules, etc., it is called as professional deviance.
- Professions includes: legal, medical, journalism, education, engineer, architect etc.

Causes of professional deviances

Majority of people in India are poor, illiterate and backward, hence they easily get exploited by the professionals.

Some professions tend to have support from politicians – in return they finance the politicians during the election.

Accumulation of wealth by illegal means to meet for future uncertain needs for their children.

Professional Deviance by Lawyers

White collar criminality among lawyer is believed to be fairly widespread. The lawyer of good mass who not only advise organized criminals, but play a leading part in promoting and facilitating white collar criminality. It is not surprising that few lawyers often of the highest standard at the Bar, who specialize in corporation and constitutional law have suggested or guided the criminal or quasi-criminal activities of corporations under the guise of professionalism especially the wholesale white collar crimes of public utility in the past [*Bar Council of Maharashtra v. M. V. Dabholkar reported in (1975) 2 SCC 702, 1976 AIR 242, 1976 SCR (2) 48*]

The deteriorating standards of legal education and unethical practices resorted to by the members of legal profession to procure clientage are mainly responsible for the degradation of this profession which was once considered to be one of the noblest vocations, the instances of fabricating false evidence, engaging professional witnesses, violating ethical standards of legal profession and dilatory tactics in collusion with the ministerial staff of the courts are some of the common practices which are truly speaking, the white collar crimes qualities often practiced by the legal practitioners. Though there is a definite code of conduct for legal profession but it is only an ornamental document.

However, this is not to say that all lawyers are corrupt and unethical, quite a large number of them are most sincere and honest in their profession commanding greater respect from all sections of society, perhaps, it is because of the peculiar nature of their profession that the lawyers and advocates have to resort to these tactics in order to survive on the profession which is becoming more and more competitive with the passage of time.

- a) Legal profession is a noble profession.
- b) As it is said, “As justice is the great interest of men on earth and as the lawyer is the high priest at the shrine of justice.
- c) Lawyers can perform well only if they maintain certain ethical moral standards.
- d) But today in India the lawyer’s profession is not looked with much respect.

The laws governing legal profession in India are:

- i. The Legal Practitioners Act, 1879
- ii. The Indian Bar Council Act, 1926
- iii. The Advocates Act. 1961

These laws act as guidance to the legal profession. But these codes are only ornamental documents for a deviant lawyer.

Examples of deviances by lawyers

- 1) Fabrication of false evidences.
- 2) Engaging professional witnesses and false security.
- 3) Violating professional ethics and using dilatory tactics in collusion with Court Staff.
- 4) Chamber practice – settlement of case in consideration of huge sum of money by lawyers.
- 5) There are criminal lawyers who arrange professional alibies, cooked witnesses for the gangsters.
- 6) Even the lawyers have their own trusted police officers who help them personally by taking heavy bribe.

- 7) Even the Investigation Officer and Medical Officers can be managed by the lawyers to help win their case.
- 8) Sometimes lawyers engage touts for the purpose of advertisement of professional services on percentage basis.
- 9) Manage opposite lawyers by payment of money.
- 10) Sometimes finance is provided for filing litigation against any reputed and rich person.
- 11) Asking indecent and irrelevant questions to the rape victims during cross examination to embarrass her.

Doctors

Professional deviance by doctors

Medical professional is considered as a noble profession as it relieves pain and disease of people. Most of the doctors are law abiding citizens and believe in ethical medical practice and are aware of their responsibilities towards the patients. But some doctors deviate from their ethics and use wrong methods in their medical practice and forget humanitarian aspect.

People have too much faith and respect for doctors even today. Doctors perform certain unethical acts during the course of their professional and violate legal norms. There are also doctors who are involved in corruptions, issuance of medical certificates, helping illegal abortions, secret services to dacoits. Dilatory tactics are also adopted by the members of this profession for extracting huge money. Generally, Doctors are treated as Gods. But sometimes these Gods can also become deviants. The Indian Medical Council prescribes code of ethics to regulate medical profession.

The Acts applicable to this profession are:

1. Indian medical Council Act, 1956.
2. Indian Medical Degree Act, 1916.

3. Indian Medical Council Amendment Act, etc.

Some of the forms of Medical Deviances

- Issue of false medical Certificate.
- False Post-mortem reports.
- Commissions from suppliers of medicines.
- Medicines and other equipments supplies to Govt. hospitals are sold to private hospitals.
- Sex determinations.
- Illegal abortions.
- False evidence in criminal cases.
- Extortion of money from patients in Govt. Hospitals.
- Running Kidney rackets, etc.
- Fake and misleading advertisements claiming medical cure, cosmetics, etc.
- Prescribing medicine for which he does not possess adequate qualifications.
- Conducting operations for when the Doctor does not possess a qualified degree.
- Providing secret services to criminals and dacoits, etc.
- Avoiding first aid treatment to an injured person unless a Police Report is being filed.

Case: *Parmananda Katara v. Union of India*, AIR 1989 SC 2039:

SC said that it is the professional obligation of all doctors to extend medical aid to the injured immediately to preserve life without waiting for the legal formalities to be complied.

Applicable act and Fact: - Constitution of India, 1950: Article 21--Obligation on the State to preserve life--Every doctor has professional obligation to extend services to protect life—All Government hospitals/Medical institutions to provide immediate medical aid in all cases. Indian Medical Council Act, 1956: Section 33—Indian Medical Council/Code of Medical Ethics--Clauses 10 and 13—Obligation to sick--Patient not to be neglected—Court emphasized necessity to provide immediate medical aid. Practice and Procedure: Medical professional--Law courts will not summon unless evidence is necessary--Should not be made to wait and waste time unnecessarily.

TEACHERS

Teaching profession falls under a special category among other professions, For instance, the job of a doctor as a professional is finished when the cure is attained and that of a lawyer when the case is decided in the court of law. But the influence of a teacher as a professional does not cease merely after passing of an examination by a student.

The professional role of a teacher is not analogous to that of a lawyer or a doctor, because the former's influence endures and is reflected in the minds sharpened (or not sharpened), personalities shaped (or not shaped) and characters moulded (or not moulded). Moreover, the teacher as a professional is the maker of other professionals.

Professional deviance by teachers

1. Large sum is collected in the name of donations.
2. In Govt. Schools and Colleges money is collected as fees for the seats.

3. Some portion of the salary from the teachers will be cut as charges towards their appointment as a teacher in the institution.
4. Corruption and favouritism at the time of admission and exams.
5. Exploitation and victimization of students. Especially for internal marks.
6. Preparation and prescribing of textbooks of dubious (doubtful) standard.
7. Private coaching by Permanent appointed teachers banned by Maharashtra Coaching Classes Ordinance, 2000.

White collar crime in Education

Many private educational institutions involve themselves in false practices like using fictitious documents to and fake details in order to obtain grants from the government to run their institutions. The teachers and staff are often seen to be working at very low wages than what was the signing amount. These false practices help the institution raise the high sum of illegal money.

It was in 2019 when the New India Express had reported that a senior railway ticket checking staff was arrested by the Central Crime Branch, for leaking out the questions papers of the exams for the post of constables and sub-inspectors in return for money.

It was in 2013 when the Time of India published an article stating that the Gujarat Technological College had been appointing engineers for lectureship were not even qualified with a B. Tech degree. Yogesh Patel, who was a lecturer of Civil Engineering at S.R. Patel Engineering College which is affiliated to Gujarat Technological University, had not even cleared his Bachelor's degree.

He had failed in some subjects like the applied mechanical and earthquake engineering. And he even went for checking papers and also received remuneration for his work. An inquiry into how a person who is not

eligible for the post of ad hoc that is temporary, lectureship was appointed for teaching purposes.

JOURNALISTS

Journalism is the activity of gathering, assessing, creating, and presenting news and information. It is also the product of these activities.

Journalism can be distinguished from other activities and products by certain identifiable characteristics and practices. These elements not only separate journalism from other forms of communication, they are what make it indispensable to democratic societies. History reveals that the more democratic a society, the more news and information it tends to have.

Journalists educate the public about events and issues and how they affect their lives. They spend much of their time interviewing expert sources, searching public records and other sources for information, and sometimes visiting the scene where a crime or other newsworthy occurrence took place. After they've thoroughly researched the subject, they use what they uncovered to write an article or create a piece for radio, television or the internet.

Duties of journalists

1. Reporting Duties

Before journalists can write about a subject, they must first gather information. They usually conduct several interviews with people involved in or having knowledge of the subject. They may also go to the scene of an event, such as a crime or an accident, to interview witnesses or law enforcement officers and to document what they see. In addition, they often search public records or other databases to find information and statistics to back up their stories. Researching a story is often similar to conducting an investigation, and journalists must sometimes ask difficult questions.

They may have to invest a lot of time tracking down information and people relevant to the story.

2. Working with People

Even though a news article bears a single journalist's byline, the process requires significant collaboration. How good a journalist's story is often depends on how adept he is at communicating and working with others. For example, journalists take instruction from their editors regarding what angle to approach when writing a story, how long the story should be and whom to interview. They also need strong people and communication skills so they can persuade sources to talk to them. Journalists frequently approach people they don't know, whether when reporting from the scene or calling to request an interview. If they're uncomfortable around strangers, they'll make others uncomfortable as well, making it less likely that people will want to be interviewed.

3. Legal Responsibilities

In addition to serving the public interest, journalists must also follow the law, especially regarding the confidentiality and privacy of the people they interview or write about. For example, while journalists often tape record their interviews to ensure accuracy, federal and state laws generally make it illegal to record a conversation without the permission of the other party. In this case, journalists must tell their sources they're recording the interview before it begins. Journalists must also understand the laws regarding libel and invasion of privacy. If a journalist is careless when reporting criminal allegations against a person, for example, he could face a defamation lawsuit if the accusations are proved untrue.

4. Ethical Responsibilities

Some aspects of a journalist's job are not subject to any kind of law but are just as important. Journalists must strive to present an accurate, well-balanced explanation of the stories they cover. For example, they have an obligation to present all sides of an issue, and to conduct extensive research and talk to several sources knowledgeable about the subject. If they present only popular opinion, or if they conduct minimal research

without fully exploring the subject, they don't give readers and viewers the information they need to understand the implications of the event or issue. Journalists must also be honest with the people they interview, telling them before talking to them what the article is about and that they plan to quote them in the piece.

Deviance by press or journalists

- Journalism – a fourth pillar of democracy.
- Freedom of speech and expression – Art. 19(1)(a).
- Can keep effective check on the State Administration.
- But today the social object of Journalism is lost.
- Journalists demand bribes for shutting their mouth in the case they have any sensitive news about politicians or reputed and rich people.
- Investigative journalism – interference into private life and conducting of case.
- Press Council of India has laid down ethics for journalism.

Engineers

Engineers develop new technological solutions. During the engineering design process, the responsibilities of the engineer may include defining problems, conducting and narrowing research, analyzing criteria, finding and analyzing solutions, and making decisions.

Deviance by Engineers

1. Underhand dealing with contractors and suppliers.
2. Passing of substandard works and materials.
3. Construction of buildings, roads, canals, dams and bridges with sub-standard material.

4. Computer related crimes – theft of communication services, tax evasion, etc.
5. Cyber-crimes by highly talented engineers.

White Collar Crimes *vis-a-vis* Architectural Practice

With respect to architectural practice, white collar crimes are rampant in the construction industry. The construction industry is perhaps one of the oldest industries in the world. The ancient monuments like the Egyptian pyramids, the temples of Greeks and Romans like Parthenon and Pantheon, the robust bridges, old Roman theatres, the citadels and many more are the best testament to it. At the same time, there are many reports available depicting that the construction industry is one of the most corrupt sectors worldwide.

The reason for corruption in construction is the nature of the construction project itself which facilitates corruption. Construction projects normally have a large number of participants linked together. Each link has its own contractual form where every item of work, acceptance of lower quality work extension of time or approval of additional payments provide an opportunity for corruption, indeed every contractual link provides the opportunity for someone to be engaged in corrupt practices.

Major reasons are project phases, size, uniqueness, the complexity of the projects, concealed work, and lack of transparency and extent of government involvement. Architects form a part of the chain and contribute to the economic offences.

It is important to understand the specific areas where the architects contribute to the white collar crimes in the infrastructure sector. They are as follows-

- 1. Manipulation of Design** – A project owner appoints an architect to design a project. One of the competing contractors who is tendering for the project bribes the architect to provide a design with which only that contractor can fully comply. The bribe is the promise by the contractor of significant future work for the architect. The architect

provides an appropriate design. This design can be manipulated to the advantage of the contractors.

- 2. Inflated claim for variation** – A contractor is instructed by the architect appointed by the project owner to carry out a variation to the works. The contract entitles the contractor to an extension of time and an additional payment in this circumstance. The contractor submits a written claim in respect of the variation to the architect which deliberately exaggerates the manpower, materials, equipment and time required to carry out the variation
- 3. False extension of time application** – In case of delay on the contractor's part, the contractor submits a written claim to the architect appointed by the project owner which alleges that the whole delay was attributable to the change in specification. The architect accepts the contractor's claim and awards the contractor an extension of time and additional payment. The project owner pays the additional payment.
- 4. False variation claim** – A contractor carries out work which is not in compliance with the contract specification. Under the contract, the architect is responsible for issuing variations. The contractor offers the architect a bribe if he confirms in writing that the work was carried out pursuant to a variation issued by the architect, and is therefore acceptable. The architect does so.
- 5. Delayed issue of payment certificates** – The project owner offers the architect a future appointment on another project if the architect delays the issue of payment certificates which are due to the contractor. The architect agrees.
- 6. Set-off of false rectification costs** – Under the contract, the architect appointed by the project owner is required to specify outstanding defects. The project owner persuades the architect to include, in the schedule of defects, additional purported defects which in fact are not outstanding. Other deviances include conducting architectural practice without due registration. The architects who

were involved in the 2014 Moulivakkam building collapse in Chennai were later found to have not registered with the Council of Architecture under the Act. When these professionals engage with the public sectors, they involve economic offences.

In 2016, an architect in Washington, D.C was found to have bribed the official in Cleveland Veterans Administration for getting insider information so as to enable their firm to procure the contracts in bidding.

In India, architects join hands with the government officials in committing white collar crimes. In construction cases, the architects are authorized to give completion certificate after the completion, and corruption happens at this place. In 2017, an architect, along with the engineers of Vadodara Urban Development Authority (VUDA), was arrested for demanding a bribe for providing the completion certificate.

Deviance by Religious Leaders and organizations

The history of modern India has several incidents of religious violence. In the 1947 Partition when both India and Pakistan achieved their independence from the British Raj there took place one of the greatest migrations in history when Muslims left India for Pakistan and Hindus and Sikhs Pakistan for India. It is estimated that between 10 and 12million people crossed the border between India and Pakistan in 1947. In the ensuing violence between the Muslims and Hindus and Muslims and Sikhs between 1.5 to 2million lost their lives.

Since independence hundreds of religious riots have been recorded in Indian which thousands have been killed, mostly Muslims Minorities in India, especially Sikhs, Muslims and Christians, are being persecuted by Hindu nationalists belonging to the ruling Hindu nationalist *Bharatiya Janata Party (BJP)*. This has been widely reported in the media and by international watch dog organizations.

There has also been a rise in communal and sectarian violence in India. For instance, a Muslim has been beaten to death in the eastern Indian state of Jharkhand after reportedly asking a group to stop playing

loud music on New Year's Day. Earlier this year, a Muslim man was reportedly killed by a mob who accused him of transporting beef in his car. On January 26, 2018, Hindu youth clashed with Muslims in Kasganj, Uttar Pradesh in which one person was killed. This led to riots in the town for a couple of days.

Vigilante cow protection groups harassed and attacked people in states including Gujarat, Haryana, Madhya Pradesh and Karnataka in the name of upholding laws prohibiting the killing of cows.

Earlier, the bodies of two Muslim cattle traders were found hanging from a tree in Jharkhand. In June, members of a cow protection group in Haryana forced two Muslim men, who they suspected were beef transporters, to eat cow dung. A woman in Haryana said that she and her 14-year-old cousin were gang-raped by men who accused them of eating beef. A team formed to reinvestigate closed cases related to the 1984 Sikh massacre identified 77 cases for further investigation and invited people to testify. The functioning of the team continued to lack transparency.

Ananya Bhattarya claimed in his article published in Quartz, April 14, 2017 that India is the fourth-worst country in the world for religious violence

According to civil rights groups there is an extensive list of brutalities in the name of religion in India. For instance, the killing of at least 2,000 Muslims in Gujarat in 2002. Since independence in 1947, the Muslim community has been subject to and engaged in sectarian violence in Gujarat state. In 2002, Hindu extremists carried out acts of violence against the Muslim minority population. The starting point for the incident was the *Godhra* train burning which was allegedly done by *Muslims*. During the incident, young girls were sexually assaulted, burned or hacked to death. These rapes were condoned by the ruling BJP, whose refusal to intervene led to the displacement of 200,000. Death toll figures range from the official estimate of 790 Muslims and 254 Hindus killed, to 2,000 Muslims killed. Then Chief Minister Narendra Modi has also been

accused of initiating and condoning the violence, as have the police and government officials who took part, as they directed the rioters and gave lists of Muslim-owned properties to the extremists.

In 2007, *Tehelka* magazine released *The Truth: Gujarat 2002* which was a report based on a six-month-long investigation and involving video sting operations. It stated that the violence was made possible by the support of the state police and the then Chief Minister of Gujarat Narendra Modi for the perpetrators. The report and the reactions to it were widely covered in Indian and international media. The recordings were authenticated by India's Central Bureau of Investigation. There was great media interest in the report's description of Narendra Modi's role in the riots, based, for example, on video footage of a senior Bajrang Dal leader saying that at a public meeting on the day of the fire, "he had given us three days to do whatever we could. He said he would not give us time after that, he said this openly."

The only conclusion from the available evidence points to a methodical pogrom, which was carried out with exceptional brutality and was highly coordinated.

According to Human Rights Watch, the violence in Gujarat in 2002 was pre-planned, and the police and state government participated in the violence. In 2012, Modi was cleared of complicity in the violence by a Special Investigation Team appointed by the Supreme Court. As expected, the Muslim community was very angered by the development and viewed it as a betrayal of trust.

On 6 December 1992, riots took place between Hindus and Muslims in Mumbai in which at least 11 people were killed in various incidents in the city. The riots changed the demographics of Mumbai greatly, as Muslims moved to Muslim-majority areas and Hindus moved to Hindu-majority areas.

The 2002 *Godhra* train burning incident in which Hindus were burned alive allegedly by Muslims led to the Gujarat riots in which mostly

Muslims were killed. According to the death toll given to the parliament on 11 May 2005 by the United Progressive Alliance government, 790 Muslims and 254 Hindus were killed, and another 2,548 injured. Some 223 people are missing. According to one advocacy group, the death tolls were up to 2000. According to the Congressional Research Service, up to 2000 people were killed in the violence.

Tens of thousands were displaced from their homes because of the violence. According to New York Times report, witnesses were dismayed by the lack of intervention from local police, who often watched the events taking place and took no action against the attacks on Muslims and their property.

Sangh leaders as well as the Gujarat government maintain that the violence was spontaneous and uncontrollable reaction to the burning. However, the Government of India has implemented almost all the recommendations of the *Sachar Committee* to help Muslims.

In its annual human rights reports for 1999, the United States Department of State criticized India for “increasing societal violence against Christians.” The report listed over 90 incidents of anti-Christian violence, ranging from damage of religious property to violence against Christian pilgrims.

In Madhya Pradesh, unidentified persons set two Statues inside St Peter and Paul Church in Jabalpur on fire. In Karnataka, religious violence was targeted against Christians in 2008.

A 1999 Human Rights Watch report states increasing levels of religious violence on Christians in India, perpetrated by Hindu organizations. In 2000, acts of religious violence against Christians included forcible reconversion of converted Christians to Hinduism, distribution of threatening literature and destruction of Christian cemeteries.

In 2007 and 2008 there occurred a massacre of more than 100 Christians and torching of thousands of homes in Orissa and Karnataka.

Undoubtedly, religious intolerance is very high in India. A Few Research Center analysis of 198 countries has ranked India as fourth worst in the world for religious intolerance. Tensions between religious communities, especially Hindus and Muslims, has long divided India. However, the rifts have intensified lately. Muslims in India at times experience attacks by Hindus because of alleged cow slaughter. In addition, there are multiple incidents of rioting and mob violence involving the two communities. Officials of the BJP have made declarations that India should be exclusively Hindu.

Minority communities, including Muslims, Christians and Sikhs, complained of numerous incidents of harassment by Hindu nationalist groups. There is a government ban on buying cows for slaughter in animal markets. Also, there is the promotion of Hindi, and there are the appointments of *Hindutva* sympathizers to top posts in educational and cultural organizations.

In Gujarat state anti-conversion laws do not allow people to adopt a religion without permission from the district magistrate, also hampering religious autonomy. In Haryana state the Hindu holy text, the Bhagwad Gita, has been included in the school curriculum. The Hindu nationalist wing of the governing BJP, the *Rashtriya Swayamsevak Sangh* (RSS) has organizes mass *ghar wapsi* (return to Hinduism) ceremonies, which are also viewed as an attempt to dismantle minority religions.

Most troubling is the role of the BJP in religious violence in the country. The party has been complicit in many incidents of religious violence, especially against Muslims. The historical development of the BJP is intrinsically tied to its minorities, especially Muslim, populist bashing catering to its Hindu nationalist base. The development of the party took place because of this stance against minorities, especially Muslim. In 1983, right-wing Hindu zealots from the *Vishva Hindu Parishad* and the Bajrang Dal destroyed the 16th Century *Babri* mosque, declaring, without any proof. That it was built on the site of a temple destroyed by Muslim rulers.

Many political analysts trace the rise of the Party BJP since that event. It is believed that the demolition of the mosque was indeed the most blatant act of defiance of law in India and a watershed for Indian nationhood. Then the BJP had hoped that the demolition of the mosque would consolidate Hindu votes in its favor, but the party failed in coming into power until 1999.

Later, a 2010 Allahabad court ruled that the site was indeed a Hindu monument before the mosque was built there, based on evidence submitted by the Archaeological Survey of India. This action had caused great humiliation to the Muslim community. The resulting religious riots caused at least 1200 deaths. The Government of India then blocked off the disputed site and the matter lingers on in the court.

Much later, the BJP achieved its first absolute majority in parliament in 2014 and Narendra Modi became prime minister. Since then he has actively promoted Hindu nationalism and has started to implement the BJP's *Hindutva* agenda.

Human Rights Watch, an influential global human rights watchdog organization, in its latest World Report 2018 states:

1. Vigilante violence aimed at religious minorities, marginalized communities, and critics of the government—often carried out by groups claiming to support the ruling Bharatiya Janata Party (BJP)—became an increasing threat in India in 2017.
2. The government failed to promptly or credibly investigate the attacks, while many senior BJP leaders publicly promoted Hindu supremacy and ultra-nationalism, which encouraged further violence.
3. Dissent was labeled anti-national, and activists, journalists, and academics were targeted for their views, chilling free expression. Foreign funding regulations were used to target nongovernmental organizations (NGOs) critical of government actions or policies.

4. Lack of accountability for past abuses committed by security forces persisted even as there were new allegations of torture and extrajudicial killings, including in the states of Uttar Pradesh, Haryana, Chhattisgarh, and Jammu and Kashmir.... Mob attacks by extremist Hindu groups affiliated with the ruling BJP against minority communities, especially Muslims, continued throughout the year amid rumors that they sold, bought, or killed cows for beef.
5. Instead of taking prompt legal action against the attackers, police frequently filed complaints against the victims under laws banning cow slaughter. As of November, there had been 38 such attacks, and 10 people killed during the year. In July, even after Prime Minister Narendra Modi finally condemned such violence, an affiliate organization of the BJP, the *Rashtriya Swayamsevak Sangh (RSS)*, announced plans to recruit 5,000 “religious soldiers” to “control cow smuggling and love jihad.” So-called love jihad, according to Hindu groups, is a conspiracy among Muslim men to marry Hindu women and convert them to *Islam*.

The Indian media acknowledges that hate crimes are taking place in India. Lynching of Muslims suspected of consuming beef, a taboo for Hindus, have become commonplace. Paranoid extremist Hindus accuse Muslim men of engaging in “love jihad” or converting Hindu women by seducing them into marriage. Christians also face the same sort of allegations. Today, it is common that Hindu extremists beat up a Hindu-Muslim couple in India. Recently, a court annulled a marriage between a Muslim man and a 25-year-old Hindu woman in medical school.

Although Modi constantly proclaims his aim is to develop India for all Indians, Muslims are barely represented in BJP governments in the center and in the states. The chief minister Modi has selected to govern Uttar Pradesh is renowned for his hostility to Muslims. The state is the most important one in India because of its population and political significance. Meanwhile, the voices of the country’s vulnerable Muslim minority are

being stifled, as never in history. These incidents of religious persecution aren't new in India. In the past, the country has witnessed numerous incidents of religious violence, mostly against religious minorities. Often religious tensions are a product of narratives that seek to justify violence based on certain myths.

Although, the country's constitution provides for religious freedom, India does not always practice it. Indeed, it is a tragedy that India, under Modi and the BJP, has turned more intolerant of religious minorities who continue to suffer under the Hindu nationalists rule. Given India's success in economic development, it is tragic indeed that religious violence is tearing the country's social fabric and thereby hurting the country's overall development as a global power.

Unit- II

PREVENTION OF CORRUPTION ACT, 1988 GENESIS AND SALIENT FEATURES

Introduction

Corruption is considered to be one of the greatest impediments on the way towards progress for developing country like India. The economic, social and cultural structure of our country is very strong; however, due to the menace called- Corruption, it has been adversely affected and has become defenseless against the forces of anti-social elements.

According to Shri N.Vittal, Former Chief Vigilance Commissioner, the first stage in the dynamics of the rule of law is the framing of effective rules and laws, which are equipped to hinder the ever-rising escalation of the corruption graph. It is in this context that the Prevention of Corruption Act, 1988 becomes highly significant.

Genesis of the Act

The Prevention of Corruption Act, 1988 (henceforth referred to as PCA) came into force on 9th September, 1988. It incorporated the Prevention of Corruption Act, 1947, the Criminal Law Amendment Act, 1952, and Section 161 to 165-A of the Indian Penal Code with modifications, enlarged the scope of the definition of the expression 'Public Servant' and amended the Criminal Law Amendment Ordinance, 1944. The PCA, 1988, thereby widened the coverage, strengthened the provisions and made them more effective.

In the Criminal Procedure Code, offences relating to public servants are not cognizable, but the 1947 Act made it obligatory for the court to make certain presumptions of guilt against the accused. The 1947 Act shifted the burden of proof from the prosecution to the accused. The investigation against the accused was to be made by an officer not below the rank of Deputy Superintendent of Police.

The 1947 Act declared such corrupt acts offences as taking bribe, misappropriation, obtaining a pecuniary advantage, possessing assets disproportionate to income, and abusing official position. However, the authority for prosecution was vested only in the department authorities and not in the Central Bureau of Investigation (CBI).

The 1988 Act enlarged the scope of the term 'public servant' and included a large number of employees within its ambit. Besides the employees of the central government and the union territories, the employees of public undertakings, nationalized banks, office-bearers of cooperative societies of the central and the state government receiving financial aid, employees of the University Grants Commission (UGC), vice-chancellors, professors, and scientists in institutions receiving financial aid from the central or state governments or even from the local authorities have all been declared as public servants.

However, MPs and MLAs, even though performing 'public duties', have been kept out of the ambit of the Act. The Act covers all the 'corrupt' acts as covered by the 1947 Act, (bribe, misappropriation, obtaining pecuniary advantage, possessing assets disproportionate to income, etc.). The Act extends to whole of India except Jammu and Kashmir and applies to all Indian citizens, whether living in the country or outside it.

If the offence against the public servant is proved in the courts, it is punishable with imprisonment of not less than six months but extending to a maximum period of five years. Six months imprisonment is thus mandatory and the courts have no discretion in this regard. If public servant is found committing offence habitually, he is to be punished with imprisonment of not less than two years but not more than seven years, and also a fine.

Salient Features

Essential feature of this Act

- it makes it obligatory for the Court to make **certain presumptions** of guilt against the accused radical departure from the normal rule under which the prosecution is required to prove **'beyond doubt'** all the ingredients of an offence.

Section 1 - gives extent of the ACT

Section 2 – defines terms like public servant, Government, etc.

The term 'public servant' as contained in Section 21 of IPC has been enlarged to include a large number of employees within the ambit of definition by incorporating Sections 2(c)(iii) and 2(c)(ix) covering employees of Nationalised Banks and office bearers of Co-operative societies of the Central and State

Section 3

This Section empowers Central Government and State Government to **appoint Special Judges** to try the following offences punishable under this Act any conspiracy to commit or any attempt to commit offences specified in above

Section 4

- Specifies the **jurisdiction of the special Judges** appointed in Sec 3.
- offences described in Sec 3 are to be tried by Special Judges.
- Special Judge also has powers to try any offence, other than an offence specified in Sec 3.

Section 5

Describes the **procedure** to be followed and the **powers of Special Judge**.

Special judge

- can take cognizance of offences without the accused being committed to him
- may tender a pardon to such person who makes a true disclosure of the whole circumstances relating to the offence

Provisions of Cr. P. C. shall apply to the proceedings before the Special Judge**Section 6**

- Authorises Special Judge to conduct a trial in a summary manner, in cases where violation of Section 12-A(1) of Essential Commodities Act, 1955.
- and pass upon any person a sentence of imprisonment for a term not exceeding one year.
- Convicted person will not have any right to appeal against such summary trial if the term of imprisonment does not exceed one month

Section 7**If a public servant is charged with**

Accepting any gratification other than legal remuneration in respect of an official act, as a motive or reward for doing any official act or showing any favour or disfavour to any person in official function

Section 8**If a public servant is charged with**

Accepting or attempting to obtain any gratification by corrupt or illegal means, to do any official act

Section 9

If a public servant is charged with

Accepting or attempting to obtain any gratification for exercise of personal influence with public servant, to do any official act.

If any public servant

Section 10 - *abets the offences defined in Sec 8 & 9*

Section 11 - *obtains valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant.*

Section - 12

Punishment for abetment of criminal offences defined in Sec 7 & 11

Public servant shall be punishable with imprisonment which shall not be less than six months but which may extend to five years and shall also be liable to fine

It would be seen that a minimum sentence of six months has been made mandatory and fine is no more optional before the Courts

Criminal misconduct defined

Section 13 - *actions which can be described as criminal misconduct*

if the public servant

habitual defaulter under section 7

under section 11

dishonestly or fraudulently misappropriates any property entrusted to him or under his control as public servant or allows any other person to do so

- *obtains for himself or for any other person any valuable thing or pecuniary advantage*
- *by corrupt or illegal means, or*

- by abusing his position
- *possesses pecuniary resources or property disproportionate to his known sources of income*

Punishment

- criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine

Section 14

Habitual committing of criminal offence under Section 8, 9 and 12

Punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.

Section 15

Any attempt to commit an offence referred in Section 13

Punishable with imprisonment for a term which shall be not less than two years but which may extend to seven years and shall also be liable to fine.

Section 16

Where a sentence of fine is imposed under Section 13 or 14, the court shall take into consideration the amount or the value of the property which the accused has obtained by committing the offence.

Section 17

Offence punishable under the PC Act can be investigated by a police officer not below the rank of an Inspector of Police - Metropolitan areas a DSP or a police officer of equivalent rank – elsewhere.

Section 18

A Police Officer empowered to investigate under Section 17 can even inspect any bankers' books in so far as they relate to the accounts of the person suspected to have committed that offence.

Section 19

Before taking cognizance of ***an offence punishable under Sections 7, 10, 11, 13 and 15*** alleged to have been committed by a public servant, court shall obtain ***prior sanction of the authority competent to remove the public servant from office.***

Section 20

Deeming fictions in regard to the offences committed under section 7 or 11 or 12, 13 (1) (a) or (b) or 14 (b)

It shall be presumed that the public servant accepted or obtained the gratification, unless the contrary is proved.

Section 21

Defines the accused *public servant as a competent witness to disprove the charges made against him.* He can give evidence on oath to defend himself.

Section 22

Describes *application of Cr.P.C. 1973 in respect of Sections 243(1), 309(2), 317(2) and 397(1), to the proceedings under 'the Act' with certain modifications.*

Section 23

Deeming fiction and enjoins upon the authority under 'the Act' to deem the public servant accused of the offence U/S 13(1) (c), i.e. in charge of property without specifying particulars.

Section 24

Grants immunity to the bribe giver from prosecution proceedings U/S 12.

Section 25

PC Act not interfere with the procedure applicable to Military, Naval and Air Force Acts.

Section 26

Special Judges appointed under Criminal Law Amendment Act, 1952 shall be deemed as Special Judge.

Section 27

Authorises High Court to exercise all powers of appeal and revision conferred by the Cr. P. C. as if the Court of the Special Judge were a Court of Session trying cases within the local limits of the High Court

Section 28

Nothing contained in 'the Act' shall exempt any public servant from any proceeding which might be instituted against him

Section 29

Lists various amendments/ substitutions/ insertions, in respect of authorities, time limit, Schedules, Paragraphs etc., in the Criminal Law Amendment Ordinance, 1944.

Section 30

Repeal and saving.

Section 31

Allows application of Section 6 of the General Clauses Act, 1897 in place of sections which had been repealed.

Corruption Laws in India

Public servants in India can be penalized for corruption under the Indian Penal Code, 1860 and the Prevention of Corruption Act, 1988. The Benami Transactions (Prohibition) Act, 1988 prohibits *Benami* transactions.

The Prevention of Money Laundering Act, 2002 penalizes public servants for the offence of money laundering. India is also a signatory (not ratified) to the UN Convention against Corruption since 2005. The Convention covers a wide range of acts of corruption and also proposes certain preventive policies.

Key Features of the Acts related to corruption

Indian Penal Code, 1860:

- The IPC defines “public servant” as a government employee, officers in the military, navy or air force; police, judges, officers of Court of Justice, and any local authority established by a central or state Act.

- Section 169 pertains to a public servant unlawfully buying or bidding for property. The public servant shall be punished with imprisonment of up to two years or with fine or both. If the property is purchased, it shall be confiscated.

- Section 409 pertains to criminal breach of trust by a public servant. The public servant shall be punished with life imprisonment or with imprisonment of up to 10 years and a fine.

The Prevention of Corruption Act, 1988

- In addition to the categories included in the IPC, the definition of “public servant” includes office bearers of cooperative societies receiving financial aid from the government, employees of universities, Public Service Commission and banks.

- If a public servant takes gratification other than his legal remuneration in respect of an official act or to influence public servants is liable to minimum punishment of six months and maximum punishment of five years and fine. The Act also penalizes a public servant for taking

gratification to influence the public by illegal means and for exercising his personal influence with a public servant.

- If a public servant accepts a valuable thing without paying for it or paying inadequately from a person with whom he is involved in a business transaction in his official capacity, he shall be penalized with minimum punishment of six months and maximum punishment of five years and fine.

- It is necessary to obtain prior sanction from the central or state government in order to prosecute a public servant.

The Benami Transactions (Prohibition) Act, 1988

- The Act prohibits any *Benami* transaction (purchase of property in false name of another person who does not pay for the property) except when a person purchases property in his wife's or unmarried daughter's name.

- Any person who enters into a *Benami* transaction shall be punishable with imprisonment of up to three years and/or a fine.

- All properties that are held to be *Benami* can be acquired by a prescribed authority and no money shall be paid for such acquisition.

The Prevention of Money Laundering Act, 2002

- The Act states that an offence of money laundering has been committed if a person is a party to any process connected with the proceeds of crime and projects such proceeds as untainted property. "Proceeds of crime" means any property obtained by a person as a result of criminal activity related to certain offences listed in the schedule to the Act. A person can be charged with the offence of money laundering only if he has been charged with committing a scheduled offence.

- The penalty for committing the offence of money laundering is rigorous imprisonment for three to seven years and a fine of upto Rs 5 lakh. If a person is convicted of an offence under the Narcotics Drugs and Psychotropic Substances Act, 1985 the term of imprisonment can extend upto 10 years.

- The Adjudicating Authority, appointed by the central government, shall decide whether any of the property attached or seized is involved in money laundering. An Appellate

Tribunal shall hear appeals against the orders of the Adjudicating Authority and any other authority under the Act.

- Every banking company, financial institution and intermediary shall maintain a record of all transactions of a specified nature and value, and verify and maintain records of all its customers, and furnish such information to the specified authorities.

Process followed to investigate and prosecute corrupt public servants

- The three main authorities involved in inquiring, investigating and prosecuting corruption cases are the Central Vigilance Commission (CVC), the Central Bureau of Investigation (CBI) and the state Anti-Corruption Bureau (ACB). Cases related to money laundering by public servants are investigated and prosecuted by the Directorate of Enforcement and the Financial Intelligence Unit, which are under the Ministry of Finance.

- The CBI and state ACBs investigate cases related to corruption under the Prevention of Corruption Act, 1988 and the Indian Penal Code, 1860. The CBI's jurisdiction is the central government and Union Territories while the state ACBs investigate cases within the states. States can refer cases to the CBI.

- The CVC is a statutory body that supervises corruption cases in government departments. The CBI is under its supervision. The CVC can refer cases either to the Central Vigilance Officer (CVO) in each department or to the CBI. The CVC or the CVO recommends the action to be taken against a public servant but the decision to take any disciplinary action against a civil servant rests on the department authority.

Prosecution can be initiated by an investigating agency only after it has the prior sanction of the central or state government. Government appointed prosecutors undertake the prosecution proceeding in the courts.

- All cases under the Prevention of Corruption Act, 1988 are tried by Special Judges who are appointed by the central or state government.

Corruption is a worldwide phenomenon. It has become the part of our daily life. It is detestable as it has entered the very roots of our society. Corruption, nepotism, dishonesty is increasing rapidly.

Santhanam Committee Report on Prevention of Corruption

It was created by Central Government in 1960. The chairman of the committee was K. Santhanam. This committee gave its report in 1962. The committee observes that “Corruption cannot be eliminated or reduced unless preventive measures are been taken and implemented in a proper manner. Preventive measures must include administrative, legal, social, economic and educative measures.” On the recommendations of this committee, central government set up Central Vigilance Commission in 1964 for looking into the cases of corruption against central government.

Recommendations by the committee

- A thorough study has to be done of each department, undertaking or ministry. The study should also mention preventive measures to be taken.
- Citizens should be educated and made aware of their rights and responsibilities. They should know how the government operates.
- Various facilities such as housing, medical etc. should be given to the employees. There must be an increment in their salaries.
- Recreational activities should be conducted for the employees of each department.
- Companies and businessmen are required to keep detailed accounts of expenditure.
- Administrative officers should be selected with due care. Only those who satisfy the requirements to the fullest must be appointed for the key posts.
- The government servants cannot accept any private commercial employment for two years after retirement.

- Administrative delays should be reduced to avoid corruption practices.
- The licenses and permit system along with taxation laws must be reviewed.
- The higher authorities should make sure that laws are properly enforced.
- Media should play a positive role in encouraging honesty and discouraging corruption.

Unit -III

POLICE DEVIANCE

Police

Indian Police Act, 1861 enacted by British still governs the Police System in India.

Role of Police:

- Maintenance of law and order situation.
- Patrolling and surveillance
- Implement Preventing function
- Investigation of crimes
- Arrest criminals
- Interrogation of offenders and suspect
- Search and Seizure
- To assist the Prosecutor
- Perform general welfare function.
- Control juvenile delinquency.

Deviance by police

Police deviance occurs when law enforcement officers behave in a manner that is “inconsistent with the officer's legal authority, organizational authority, and standards of ethical conduct”

Police Atrocities

Unconstitutional – Third Degree Methods:

Case – Niranjan Singh v. Praphakar Rajaram

SC held that the police instead of being protector of law, have become the engineer of terror and putting people into fear.

Case – Saheli v. Commr. of Police

Death of one nine year boy was caused by police in one of the police station of Delhi. Saheli the women's Civil Right Organization filed a Writ petition for the mother of the boy. The Court granted Rs. 75,000/- as a compensation to his mother.

Rape and related forms of gender based aggression by police and Para-military force.

Encounter Killings:

Encounter Killings are self defense of the police.

They are empowered to use firearms in extreme circumstances to avoid the notorious criminal to escape and enter the society and commit crimes and disturb the peace and harmony.

Some examples of famous encounters so far:

1. Manohar Arjun Surve (Manya Surve) – 1982
2. Anand Pande – 1997

Fake encounters:

3. Police take money and conduct encounters:
4. Ishrat Jahan Fake encounter– 2004.

These fake encounters are nothing but deviance by police.

POLITICAL DEVIANCE AND N.N. VOHRA COMMITTEE REPORT

Introduction

Political deviance is a broad concept, less frequently invoked than the concept of political crime. It can be perpetrated by those in power, in the name of the state or individually, or by those struggling to effect social change.

Political deviance is a across the board perception which is the greater part of the circumstances identified with the political deviance. The majority of the circumstances, it is rehearsed by the people who are in expert. Political deviance is executed in the position of administration or people attempting to have changes in social changes. It concentrates on implies that will ascribe to fear based oppression and furthermore defiance with the guide of social equality. There are the presumptions of obligation by people to accomplish their represents diverse reasons and purposes. The presumptions of obligations are qualities with the dubious origination which is as the results of the ground of legislative issues.

CRIMINALIZATION OF POLITICS

The Preamble of the Constitution of India begins with the phrase “WE THE PEOPLE OF INDIA”, underlining the spirit of democracy in India. Therefore, democracy in the form of representation of people is what exists in India. The members of the legislature are mandated to represent vicariously the aspirations and concerns of the people whom they represent.

India has witnessed a crisis of empathy, quality, fairness, integrity, honesty, and intellectual capability among the members of its legislatures, both at the Centre as well as the State level. The very spirit and objective of democracy could be lost if India continues to suffer at the hands of such law-makers who are a liability to the society.

Corruption has been rampant in Indian polity, not only at the electoral level, but also at the Executive level. In addition to this, India stands witness to an alarmingly high number of people with criminal background who have polluted Indian polity.

The criminalization of our political system has been observed almost unanimously by all recent committees on politics and electoral reform. Criminalization of politics is of forms, but the most alarming among them is the significant number of elected representatives with criminal charges pending against them.

Political Control over the Police

The image of the police in this country has always been bad. With the passage of time, it has only become worse. Citizens are highly dissatisfied with the quality of policing. There are many reasons for the poor quality of policing, but a major reason identified is the type of control that has been exercised over the police. Control over the police is exercised by the state government. The situation resulting from wrong control over the police has become worse during the last few decades because of increasing criminalization of politics.

The fact that the rule of law is gradually being replaced by the rule of politics is a cause of concern to all who are interested in establishing good governance in the country. The Padmanabhaiah Committee too has shown this concern.

Reasons for Criminalization of Politics

Despite the best intentions of the drafters of the Constitution and the Members of Parliament at the onset of the Indian Republic, the fear of a nexus between crime and politics was widely expressed from the first general election itself in 1952. In fact, as far back as in 1922, Mr. C. Rajagopalachari had anticipated the present state of affairs twenty five years before Independence, when he wrote in his prison diary: "Elections and their

corruption, injustice and tyranny of wealth, and inefficiency of administration, will make a hell of life as soon as freedom is given to us. . .”

Interestingly, observers have noted that the nature of this nexus changed in the 1970s. Instead of politicians having suspected links to criminal networks, as was the case earlier, it was persons with extensive criminal backgrounds who began entering politics. This was confirmed in the Vohra Committee Report in 1993, and again in 2002 in the Report of the National Commission to Review the Working of the Constitution (NCRWC). The Vohra Committee report pointed to the rapid growth of criminal networks that had in turn developed an elaborate system of contact with bureaucrats, politicians and media persons.

Money – The Root of the Problem

The primary function of money is to serve as a medium of exchange, and as such it is accepted without question in final discharge of debts or payment of goods or services. The term ‘money’ generally includes banknotes as well as coins, although it may be limited to such of each as are legal tender at the time and place in question.

Money has been regarded as bone of contention between friends and relatives. It is said lend money to a person if you want to spoil him or make foe (enemy), money – wealth, property or estate have always caused family, feuds (rivalry), and even murders for it is said that all is fair in love and war. Money is devil’s child and is responsible for many mischief and evils. Some people think that wealth can bring happiness in life but it is not so.

Money is the root cause of many evils like corruption, black marketing, smuggling, drug trafficking, tax evasion, and the buck does into stop here it goes to the extent of sex tourism and human trafficking.

Corruption

“Just as it is impossible not to taste the honey or the poison that finds itself at the tip of the tongue, so it is impossible for a government servant

not to eat up, at least, a bit of the king's revenue. Just as fish moving under water cannot possibly be found out either as drinking or not drinking water, so government servants employed in the government work cannot be found out (while) taking money (for themselves).”

Corruption in India is also a legacy of the colonial system. As colonial governments were generally regarded as alien and hence illegitimate, consequently cheating and deceiving such an alien power was considered a fair game. The roots of political corruption in developing states thus lie in the colonial order or native tyrannical rule from which they have emerged as independent democratic states.

Democracy implies rule of law and holding of free elections to ascertain the will of the people. But in quite recent times this peaceful process of social change has been much vitiated. Criminalization of politics has become a headache for the Indian democracy. It's shameful to admit that in the world's largest democracy the cult of the gun prevails; Goondas and Criminals are hired to kill political rivals etc.

Vohra Committee Report

Twelve bomb blasts that shook Bombay on 13th March 1993, had involved the collaboration of a diffuse network of criminal gangs, police and customs officials as well as their political patrons. A commission was instituted to investigate the so-called nexus.

The Vohra (Committee) Report was submitted by the former Indian Union Home Secretary, N.N. Vohra, in October 1993. It studied the problem of the criminalization of politics and of the nexus among criminals, politicians and bureaucrats in India.

The report contained several observations made by official agencies on the criminal network which was virtually running a parallel government. It also discussed criminal gangs who enjoyed the patronage of politicians, of all parties, and the protection of government functionaries. It revealed that

political leaders had become the lenders of gangs. They were connected to the military. Over the years criminals had been elected to local bodies, State Assemblies and Parliament.

The Report says “In the bigger cities, the main source of income relates to real estate – forcibly occupying lands/buildings, procuring such properties at cheap rates by forcing out the existing occupants/tenants etc. Over time, the money power thus acquired is used for building up contacts with bureaucrats and politicians and expansion of activities with impunity. The money power is used to develop a network of muscle-power which is also used by the politicians during elections.”

“The nexus between the criminal gangs, police, bureaucracy and politicians has come out clearly in various parts of the country. The existing criminal justice system, which was essentially designed to deal with the individual offences/crimes, is unable to deal with the activities of the Mafia; the provisions of law in regard economic offences are weak.

The report by N.N. Vohra found such deep involvement of politicians with organized crime all over India that it was barred from publication. Here Vohra observes “the various crime syndicate mafia organizations have developed significant muscle and money power and established linkage with governmental functionaries, political leaders and other to be able to operate with impunity.

As highlighted by the Vohra Committee, our elections involve a lot of black money and it is this use of black money in elections which has also brought about the criminalization of politics.

After all, the story of the Hawala scam started by the police stumbling to the Jain diaries in their effort to trace the money received by the Kashmiri militants, The scam brought out the linkage between the corrupt businessmen, politicians, bureaucracy and the criminals. The 1993 Bombay blasts which took away the life of 300 people was made possible because RDX could be smuggled by allegedly bribing a customs official with 20

lakhs. 25 years ago, Vohra committee submitted its report to curb criminalization of politics but the fact is that no application in this way is being made.

This was mentioned in the petition submitted to the Speaker of Lok Sabha and President of India on 16th May that – “The subject of criminalization of politics is one that concerns the entire nation closely. It is deeply disturbing that on the one hand, our polity is tolerant of ‘fake encounters’ of alleged criminals and terrorists, while our highest representative body Indian Parliament – harbours people caught red-handed in acts of human trafficking, and convicted on charges of abduction and suspected murder.”

In 1997 the Supreme Court recommended the appointment of a high level committee to ensure in-depth investigation into the findings of the N. N. Vohra Committee and to secure prosecution of those involved.

The Santanam Committee Report 1963

The Santhanam Committee, 1963 was a Parliamentary Committee which was requested to give a report on the methods of eradicating corruption. The Committee went into the matter extensively and suggested that there should be Vigilance Commission both at the Centre and in the States. It referred to political corruption as more dangerous than corruption of officials.

“That there is wide spread public, impression that some Ministers who held office for several years have enriched themselves illegitimately, obtained good jobs for their sons and relations through nepotism and have obtained other benefits inconsistent with any notion of purity in public life.”

The Committee counseled priority to prevention of political corruption over prevention of administrative corruption. It opined that the top had to be made clean to expect cleanliness at the lower levels. It emphasized that

elected representatives, ministers and legislators have to first create a climate of integrity as an example for others to follow.

Padmanabhaiah Committee Report

The Padmanabhaiah Committee on Police Reforms (The Committee) was set up by the Ministry of Home Affairs, Government of India in January 2000. In addition to the Chairman, a former Union Home Secretary, the Committee consisted of four members, who were all policemen—two retired and two serving. The report was submitted by the Committee to the central government in October, 2000.

Regarding the Politicization and Criminalization of Police, the Committee pointed out that politicization and criminalization of the police force has been growing. According to the Committee, “Corruption is the root cause of both politicization and criminalization of the police.”

And criminalization of police cannot be de-linked from criminalization of politics. It is the criminalization of politics, which has produced and promoted a culture of impunity that allows the wrong type of policeman to get away with his sins of commission and omission.

The Committee ascribes the growing political interference in the police administration and its work to “recruitment and transfer policies/procedures, failure of political leadership and the failure of police leadership.” The Committee is of the view that most problems of police are due to arbitrary and frequent transfers of police personnel of different ranks and once the powers in this regard are given to the departmental hierarchy, political interference in policing will be reduced.

To reduce political interference, the Committee has suggested that “(i) coordination with the secretariat should be the function of the DG/Commissioner of Police” or their nominee and (ii) any officer approaching a politician for transfers/postings, training, rewards etc, should be severely dealt with.”

Lokpal Institution

The word "Lokpal" is derived from the *Sanskrit* word "*loka*" meaning people and "*pala*" meaning protector or caretaker. Together it means "protector of people". The aim of passing such a law is it to eradicate corruption at all levels of the Indian polity. For a nation to develop it needs to have an extremely well organized and meticulously planned organization. A failure of the administrative set up reflects on the holistic growth of the state, the biggest reason for the failure of the administration can be attributed to the ill effects of corruption. The growth of the country has been plagued by corruption and it has extended its wings throughout the entire administrative set up. To root out the menace of corruption the institution of "ombudsman" came up and has played a great role in fighting administrative malpractices.

Historical Background

The institution of ombudsman originated in Scandinavian countries. The institution of ombudsman first came into being in Sweden in 1713 when a "chancellor of justice" was appointed by the king to act as an invigilator to look into the functioning of a war time government. From 1713 the duty of this ombudsman was to mainly ensure the correct conduct of royal officials. The institution of the ombudsman was firmly incorporated into the Swedish constitution from 1809.

It was defined as the parliamentary body supervising judges, government and other officials, and ensuring their compliance with laws and other legal regulations.

The embedding of the ombudsman in the constitution was completed by a further law specifying in greater detail the scope of his activities and his legal authority. The institution of the ombudsman developed and grew most significantly in the 20th century. Ombudsman institutions were on the increase especially in the period after the Second World War when almost a hundred of them were established. The institutions took varied forms and

modifications depending on the historical, political and social background of the given country.

In India the ombudsman is known as *Lokpal* or *Lokayukta*. The concept of constitutional ombudsman was first proposed by the then law minister Ashok Kumar Sen in parliament in the early 1960s. The term *Lokpal* and *lokayukta* were coined by Dr.L.M.Singhvi as the Indian model of ombudsman for the redressal of public grievances, it was passed in Lok Sabha In the year 1968 but it was lapsed with dissolution of Lok Sabha and since then has lapsed in the Lok Sabha many times.

Need For Lokpal

There are several deficiencies in our anti-corruption systems because of which despite overwhelming evidence against the corrupt, no honest investigation and prosecution takes place and the corrupt are hardly punished. The whole anti-corruption set up ends up protecting the corrupt.

1) Lack of Independence Most of our agencies like CBI, state vigilance departments, internal vigilance wings of various departments, Anti-corruption Branch of state police etc. are not independent. In many cases, they have to report to the same people who are either themselves accused or are likely to be influenced by the accused.

2) Powerless some bodies like CVC or *Lokayukta* are independent, but they do not have any powers. They have been made advisory bodies. They give two kinds of advice to the governments “to either impose departmental penalties on any officer or to prosecute him in court. Experience shows that whenever any minister or a senior officer is involved, their advice is rarely followed.

3) Lack of Transparency and internal accountability in addition, there is the problem of internal transparency and accountability of these anti-corruption agencies. Presently, there isn't any separate and effective mechanism to check if the staff of these anti-corruption agencies turns

corrupt. That is why, despite so many agencies, corrupt people rarely go to jail. Corruption has become a high profit zero risk business. There is absolutely no deterrence against corruption.

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Lokpal and Lokayukta Act, 2013

The Lokpal and Lokayukta Act, 2013 seeks to provide for the establishment of Lokpal for the Union and Lokayukta for States to inquire into allegations of corruption against certain public functionaries and for related matters. The act extends to whole of India, including Jammu & Kashmir and is applicable to "public servants" within and outside India. The act mandates for creation of Lokpal for Union and Lokayukta for states. The Bill was tabled in the Lok Sabha on 22 December 2011 and was passed by the House on 27 December as The Lokpal and *Lokayukta* Bill, 2011.

It was subsequently tabled in the Rajya Sabha on 29 December. After a marathon debate that stretched until midnight of the following day, the vote failed to take place for lack of time. On 21 May 2012, it was referred to a Select Committee of the Rajya Sabha for consideration. It was passed in the Rajya Sabha on 17 December 2013 after making certain amendments to the earlier Bill and in the Lok Sabha the next day. It received assent from President Pranab Mukherjee on 1 January 2014 and came into force from 16 January.

Structure of Lokpal

The institution of Lokpal is a statutory body without any constitutional backing. Lokpal is a multimember body, made up of one chairperson and maximum of 8 members. The person who is to be appointed as the chairperson of the Lokpal should be either the former Chief Justice of India Or the former Judge of Supreme Court Or an eminent person with impeccable integrity and outstanding ability, having special knowledge and expertise of minimum 25 years in the matters relating to anti-corruption policy, public administration, vigilance, finance including insurance and banking, law and management.

Out of the maximum eight members, half will be judicial members. Minimum fifty per cent of the Members will be from SC / ST / OBC / Minorities and women. The judicial member of the Lokpal should be either a former Judge of the Supreme Court or a former Chief Justice of a High Court. The non-judicial member should be an eminent person with impeccable integrity and outstanding ability, having special knowledge and expertise of minimum 25 years in the matters relating to anti-corruption policy, public administration, vigilance, finance including insurance and banking, law and management.

The members are appointed by the president on the recommendation of a selection committee. The selection committee is composed of the Prime Minister who is the Chairperson; Speaker of Lok Sabha ,Leader of Opposition in Lok Sabha ,Chief Justice of India or a Judge nominated by him / her, and One eminent jurist.

Jurisdiction of Lokpal

The jurisdiction of the Lokpal will include the Prime Minister except on allegations of corruption relating to international relations, security, the public order, atomic energy and space and unless a Full Bench of the Lokpal and at least two-thirds of members approve an inquiry. It will be held in-camera and if the Lokpal so desires, the records of the inquiry will

not be published or made available to anyone. The Lokpal will also have jurisdiction over Ministers and MPs but not in the matter of anything said in Parliament or a vote given there. *Lokpal* jurisdiction will cover all categories of public servants.

Group A, B, C or D officers defined as such under the Prevention of Corruption Act, 1988 will be covered under the Lokpal but any corruption complaint against Group A and B officers, after inquiry, will come to the Lokpal. However, in the case of Group C and D officers, the Chief Vigilance Commissioner will investigate and report to the Lokpal. However, it provides adequate protection for honest and upright Public Servants. Also any person who is or has been in charge (director / manager/ secretary) of anybody / society set up by central act or any other body financed / controlled by central government and any other person involved in act of abetting, bribe giving or bribe taking.

Salient features of The Lokpal and Lokayukta Act, 2013

- 1) The Lokpal and *Lokayukta* Act, 2013 provided for Lokpal at the Centre having jurisdiction of trying cases of corruption against all Members of Parliament and central government employees. The *Lokayukta* have functions similar to the Lokpal, but they function on a state level.
- 2) The office of the Lokpal and *Lokayuktas* deals with charges of corruption against any public official and includes the office of the prime minister of the court but with reasonable safeguards. Both the Lokpal and the Lokayukta deal with charges of corruption against the government and its employees, in fact they even conduct investigations and based on the findings from such investigations they conduct trials.

3) The act lays down the provision to set up a Lokayukta and its set of powers for each state without clearly defining the extent of the same, this has led to various different Lokayukta being setup, some with more power than the others. In order to create uniformity a proposal to implement the Lokayukta uniformly across Indian states has been made. The Act provides that all states set up office of the Lokpal and/or Lokayukta within one year from the commencement of the said Act. On the other hand, Lokpal will consist of a chairperson and a maximum of eight members, of which 50% will be judicial members, 50% members of Lokpal shall be from SC/ST/OBCs, minorities and women.

4) The newly enacted Lokpal Act provides for confiscation and attachment of any property of any government official which he or she has come to own through corrupt practices and the same can be done during pendency of proceedings against the said official.

5) The Lokpal Act mandates that all public officials should furnish the assets and liabilities of themselves as well as their respective dependents. In fact the said Act even guarantees protection to any government official who acts as a whistle blower and as an ancillary a Whistle Blowers Protection Act has also been enacted

Powers of Lokpal

- 1) It has powers to superintendence over, and to give direction to CBI.
- 2) If it has referred a case to CBI, the investigating officer in such case cannot be transferred without approval of Lokpal.
- 3) Powers to authorize CBI for search and seizure operations connected to such case.
- 4) The Inquiry Wing of the Lokpal has been vested with the powers of a civil court.
- 5) Lokpal has powers of confiscation of assets, proceeds, receipts and benefits arisen or procured by means of corruption in special circumstances

- 6) Lokpal has the power to recommend transfer or suspension of public servant connected with allegation of corruption.
- 7) Lokpal has power to give directions to prevent destruction of records during preliminary inquiry.

Lokayukta in Karnataka

In the State of Karnataka, the history of the Lokayukta institution could be traced back to 1978 when Justice C. Honnaiah, a former Chief Justice of Rajasthan High Court, was appointed the first Lokayukta under an ordinance which was short lived. The Ordinance was allowed to lapse. However, when the Janata Party came in to power in 1983 as a fulfillment of its election pledge made to the people for —clean and value based policies, the R K Hegde Government introduced a Bill in the legislature in March 1983.

The Bill was aimed at ending political and administrative corruption. Even after the passage of the Bill and the clearance of the Union Government in October 1983, the functioning was delayed as none in the panel of names approved by the Government and the leader of the opposition was ready to head it. As a result of this the State Government not only requested the Union Government to suggest some names but the emoluments and the service conditions of the Lokayukta were made better and attractive. Finally, Justice A.D. Koshal, a retired judge of the Supreme Court of India, was sworn in as the Lokayukta on 15th January 1986. The appointment of the Lokayukta, it may be pointed out here, was one of the major planks of the Janata Government of Hegde as part of its declared commitment to purity in public life.

Appointment of Lokayukta

Section 3(1) of the Karnataka Lokayukta Act, 1983 provides for a mode of appointment of the *Lokayukta* and *Upa-lokayukta* or *Upalokayuktas*. only an independent institution is able to render justice

impartially on the basis of law, thereby protecting the human rights and fundamental freedoms of an individual. For this essential task to be fulfilled efficiently the public must have full confidence in the ability of the institution to carry out its functions in independent and impartial manner. Whenever this confidence begins to be eroded neither the Lokayukta as an institution nor Lokayukta or *Upa-lokayukta* personally will be able to fully perform this important task or at least will not easily be seen to do so. Transparency forms the sole component and is the idea behind appointments at the most respectable and reliable institution of the state. No doubt, Lokayukta institution is regarded and has been bestowed with utmost confidence of the people of this nation.

The higher faith is inculcated the higher the expectations are generated out of the same. Any lack of transparency, concealment of fact, or biasness on the matter of any function so performed would render the Lokayukta institution less-reliable and resulting in the loss of confidence and a strong backlash against the institution. To hinder such a possible backlash to occur necessary steps are to be taken immediately. The inception of consultation process with certain constitutional machineries would rather buttress the belief of the people causing transparency to grow. It can most certainly be used as a vehicle for gaining transparency.

Qualifications for Lokayukta

No specific qualification has been prescribed for Lokayukta in the States of Maharashtra, Bihar and Rajasthan. This is in conformity with some of the most successful Ombudsman plan in different countries of the world including France, England and some of the Canadian provinces where the Ombudsman have no legal training. So far as Lokayukta and *Upa-lokayukta* of Karnataka is concerned, a person to be appointed as an *Upa-lokayukta* shall be a person who has held the office of the Judge of a High Court. A person to be appointed as the Lokayukta shall be a person who has held the office of a Judge of the Supreme Court or that of the Chief Justice of a High Court. Every person appointed as the Lokayukta or an *Upa-*

lokayukta before entering upon his office shall make and subscribe before the Governor or some other person appointed on behalf of him, an oath of affirmation.

Terms and conditions of the office

Unless judges have some long-term security of tenure, there is a serious risk that their independence will be compromised, since they may be more vulnerable to inappropriate influence in their decision-making. To begin with, in all the states the term of appointment for the Lokayukta and the Upa-lokayukta was fixed for five years. A person appointed as the Lokayukta or Upa-lokayukta in Karnataka shall hold office for a term of five years from the date of appointment.

Jurisdiction of Lokayukta and Upa-lokayukta

The Government of Karnataka has authorized the Lokayukta and Upa-lokayukta institutions as the Designated Agency 'to receive written complaints for disclosure on any allegation of corruption or misuse of office and recommend appropriate action.

Under Section 7(1) of the Karnataka Lokayukta Act, 1983, the Lokayukta may investigate any action which is taken by or with the general or specific approval of, the Chief Minister or a minister or a member of the State Legislature or the Chairman and Vice-Chairman (by whatever name called) or a member of an authority, board or a committee, a statutory or a non-statutory body, or a corporation established by law of the State Legislature including a society, cooperative society or a Government company within the meaning of Section-617 of the Companies Act, 1956, nominated by the State Government; in any case where a complaint involving a grievance or an allegation is made in respect of such action.

In *M. Arjundas v.State Of Karnataka And Ors*, the Supreme Court of India viewed that the statute does not empower the Lokayukta to proceed under Section 14 even if he finds that the offence committed by the public servant will have criminal ramifications in a matter referred to him under Section 7(2A) of the Act. Such a course is open to him only in a case

investigated by him on a complaint made to him under Section 9 of the Act by any aggrieved person. This is because the Act reserves the right to make the final order against the delinquent public servant with the competent authority in a matter referred by it to the Lokayukta under Section 7(2A) of the Act.

Exemption from the Jurisdiction of Lokayukta

However, there are certain matters which are not subjected to investigate by the Lokayukta or Upa-lokayukta. These have been spelt out in section 8 of the Karnataka Lokayukta Act, 1983. According to this section 8 (1) of the Act, the Lokayukta or an Upa-lokayukta shall not conduct any investigation under this Act in the case of a complaint involving a grievance in respect of any action, -

(a) If such action relates to any matter specified in the Second Schedule; or

(b) If the complainant has or had, any remedy by way of appeal, revision, review or other proceedings before any tribunal, Court officer or other authority and has not availed of the same. Section 8(2) of the Act, excludes from the jurisdiction of the Lokayukta or Upa-lokayukta investigation into any action in respect of the following circumstances:

(i) Any action in respect of which a formal and public enquiry has been ordered with the prior concurrence of the Lokayukta or an Upa-lokayukta, as the case may be;

(ii) Any action in respect of a matter which has been referred for inquiry, under the Commission of Inquiry Act, 1952 with the prior concurrence of the Lokayukta or an Upa-lokayukta, as the case may be;

(iii) Any complaint involving a grievance made after the expiry of a period of six months from the date on

which the action complained against become known to the complainant; or

- (iv) Any complaint involving an allegation made after the expiry of five years from the date on which the action complained against is alleged to have taken place.

Functioning of Lokayukta

The primary objective of the office of the Lokayukta is to investigate and counter corruption and mal administration in the functioning of the government and the public offices. Any aggrieved person can seek justice from the Lokayukta without the long delays and costs involved in filing a suit in the Courts of law. There can be two types of complaints that may be submitted to the Lokayukta, viz. grievances and allegations.

The Lokayukta Act specifies against whom grievances or allegations could be filed as well as the procedure for filing complaints. A grievance is defined as a claim by a person that he sustained injustice or undue hardship as a consequence of maladministration. For the purpose of grievance Mal-administration means action taken or purporting to have been taken in the exercise of administrative function in any case where

(a) Such action or the administrative procedure or practice governing such action is unreasonable, unjust, oppressive or improperly discriminatory;

(b) There has been willful negligence or undue delay in taking such action or the administrative procedure or practice governing such action involves undue delay.

Powers of the Lokayukta and Upa-lokayukta

The Office of the Lokayukta institution is endowed with wide latitude of investigating power, virtually free from legislative, executive and judicial

intrusion. The proceeding before the Lokayukta or an Upa-lokayukta shall be deemed to be a judicial proceeding within the meaning of Section 193 of the Indian Penal Code. To achieve the objectives of the Act, the Office of the Lokayukta and Upa-lokayukta is empowered with Criminal as well as Civil Court powers.

1. Power to investigate

The procedure regarding the investigation of complaints is almost the same in the states of Orissa, Maharashtra, Bihar, Rajasthan, Uttar Pradesh, Assam and Karnataka.

2. Power to issue search warrant

The Act confers power to Lokayukta or the Upa-lokayukta to require any public servant or any person who can furnish any information or produce documents relevant in the investigation to furnish such information or produce such documents by issuing search warrant.

3. Power to issue summons and require attendance

For the purpose of this Act, The Lokayukta and Upa-lokayukta has the power of the Civil Court while trying a suit under the Civil Procedure Code. For the purpose of any investigation (including the preliminary inquiry, if any, before such investigation) under this Act, the Lokayukta or an Upa-lokayukta may require any public servant or any other person who, in his opinion is able to furnish information or produce documents relevant to the investigation to furnish any such information or produce any such document.

4. Power to Direct Public Servant to Vacate Office

After investigation into a complaint the Lokayukta or an Upa-lokayukta is satisfied that the complaint involving an allegation against the public servant is substantiated and that the public servant concerned should not continue to hold the post held by him, the Lokayukta or the Upa-lokayukta shall make a declaration to that effect in his report under subsection (3) of Section 12 of K.L Act, 1984.

5. Power to Enquiry

The Government may, by order, in writing and after consultation with the Upa-lokayukta, confer on the Upa-lokayukta powers to hold, in such manner and through such officers, employees and agencies referred to in Section 15 of K.L Act,1984 as may be prescribed, enquiries against Government servants and persons referred to in sub clause (g) of clause (12) of Section 2 of K.L Act,1984, other than those falling under clause (ii) and (iv)of sub section (1) of Section 7 in disciplinary or other proceeding transferred under sub-section (3) of Section 26 of K.L Act,1984 commenced in furtherance of the recommendations of the Upa-lokayukta or otherwise. Where powers are conferred on an Upa-lokayukta, under sub-Section (1) of Section 26of K.L Act, 1984 such Upa-lokayukta shall exercise the same powers and discharge the same functions as he would in the case of any investigation made on a complaint involving a grievance or an allegation, as the case may be, and the provisions of this Act shall apply accordingly.

6. Power to Delegate Power

The Upa-lokayukta may, subject to such rules as may be prescribed, by general or special order, in writing direct that the functions and powers conferred by Section 19 of K.L Act, 1984 may also be exercised or discharged by such of the officers, employees or agencies referred to in Section 15 of K.L Act, 1984 as may be specified in the order.

7. Power to Punish for Contempt

The Lokayukta or Upa-lokayukta shall have, and exercise the same jurisdiction powers and authority in respect of contempt of itself as a High court has and may exercise, and, for this purpose, the provisions of the Contempt of Courts Act, 1971 (Central Act 70 of 1971) shall have the effect subject to the modification that the references therein to the High Court shall be construed as including a reference to the Lokayukta or Upa-lokayukta, as the case may be.

8. Power Require Public Servant to Submit Property Statements

Every public servant referred to in Sub-Section (1) of Section 7 of K.L. Act, 1984, other than a Government Servant, shall within three months after the commencement of this Act and thereafter before the 30th June of every year submit to the Lokayukta in the prescribed form a statement of his assets and liabilities and those of the members of his family.

9. Power to Make Rules

The State Government may, by notification in the Official Gazette, make rules for the purpose of carrying into effect the provisions of this Act. The State Government may, make rule pertaining following aspects;

- a) the authorities to be prescribed under sub-clause (d) of clause (4) of Section.2 of K.L Act, 1984;
- b) the allowance and pensions payable to and other conditions of service of the Lokayukta and an Upa-lokayukta;
- c) the form and manner in which a complaint may be made;
- d) the powers of a Civil Court which may be exercised by the Lokayukta or an Upa-lokayukta under clause (f) of sub-section (2) of Section 11 of K.L Act, 1984;
- e) the salary, allowances, recruitment and other conditions of service of the staff and employees of the Lokayukta or Upa-lokayukta under sub-Section (2) of Section 15 of K.L Act, 1984;

Unit- IV

DEVIANCE IN MEDICAL PROFESSION & LENTIN COMMISSION REPORT

Introduction

Professional deviance in medical field - a time to rethink. Medical profession is the noble profession as it directly concerns with saving the life of human being. This professional deviance not only harm the patient's health but also encouraging white collar criminality in the medical profession and the society.

Doctors are considered as most reputed and responsible citizens of the society. They are considered to be inculcated with principles of moral and ethics. But, sometimes it has been heard about commission of illegal acts by medical professional violating their professional and legal norms.

Usually in the entire tenure of medical profession, the health professionals could add good money in to his income and pay taxes honestly. But there are also doctors who involved in the corruptions, including issuance of false medical certificates, helping illegal abortions, providing secret services to criminals, by giving expert opinion in criminal cases leading to acquittal of true criminals and selling sample drugs and medicines to patients or chemists.

Doctors are also human beings having their own needs of life. They are considered as white collar personality without any defect and expected to have morals, ethics and professionalism while treating their patients. But as a human being to fulfill the never ending demands, some doctors get involved in unethical practice in their profession leading to white collar crimes.

“Deviation” is interpreted as a frank violation of an operational rule, or a variation in practice that departs from standard and increase in risk to

people. Professor Sutherland defined White collar criminal (WCC) as, “A person of upper socio-economic class who violates the criminal law in the course of his occupational or professional activities”.

James Cameron, an eminent journalist described in the following words: “it is denied by nobody indeed, the totality and persuasiveness of India, corruption is almost a matter of National pride”.

A White Collar Crime is more dangerous to society than ordinary crimes, because the financial loss to the society from WCC is much more than other known crimes such as burglaries, robberies etc. and the injury or damage caused as a result of WCC affects large body of society.

In the recent era White Collar Crime are mostly related to health, wealth, weight and measures, food, standards, insurance, banking, tax matters and computer related crimes such as banks frauds, insurance frauds, counterfeiting, drug trafficking, human trafficking are all master planned crimes by well educated persons or professionals.

Implication of medical professional deviance

Financial loss to the patients

Financial loss of patient and society at large from WCC is probably much more than the financial loss from traditional crimes.

Social damage to morals

Ordinary crimes cause some inconvenience to the victims only and occasionally, when repeated in succession causes great loss to general community. But medical professional deviances destroy the moral and ethics and promote social disorganization. Since these crimes are generally causes violation of trust, they create the feeling of distrust towards the medical profession not for that victimized patient but also evenly spread out to the entire community.

Causes

Increased industrialization, urbanization, growing competitive tendency, greed and lack of morals, ethics and lack of vigorous punishment are some causes of any types of deviance. There are some additional causes for such deviances are as follows.

1. Increased professional deviance due to strong back up of corrupt politician, who always support them to perform their illegal activities. In return such deviant professionals finance politicians at the time of election or help them in any illegal acts.
2. Majority of people in our country are poor and illiterate and economically backward. They blindly follow what the health professional advised to them due to the trust on the doctors. They do not have adequate knowledge so they become easy prey for exploitation by such professionals. Whereas educated people who are well aware of such illegal acts of these professional deviants, are helpless to fight against such practices based on money, flattery and opportunism.
3. Changing tendency of people to accumulate wealth by all means, when they find acute shortage of jobs and other opportunities for their children, as there is no guarantee from the State to provide livelihood.

Difference between Medical negligence and professional deviance

Negligence is define as, “Omission to do something which a reasonable man would do or doing something which a prudent and reasonable man would not do”.

In cases of medical negligence, the person is bound to have certain standard of duty and care by his professional ethics and he fails to accomplish that duty and care. In negligence, there must be element of 'guilty mind' i.e. *mens rea* and also due to that act the patient has suffered injury /damage. Also subsequent damage should be closely related (nexus) or inter related.

Whereas professional deviance in medical field includes, deviation from ethical norms and morals of that profession such as issuing false medical certificates, performing illegal abortions or by giving false expert opinion in criminals cases etc.

Cases of medical deviance in India

Syed Akbar vs. State of Karnataka

Criminal malpractice occur, when a doctor during the course of treatment violates the provisions of penal law and subject himself to prosecution by the state or to a complaint by the concerned party.

Facts of the case: A plastic surgeon may alter the features of ridge characteristics of a criminal to erase the identification so that his foot print / full proof identification mark gets destroyed which generally happens in United States of America and some advanced country which amounts to an unlawful act. A doctor is duty bound to report all cases of violence coming to his knowledge, in which the commission of criminal acts suspected. If he fails to abide by this provision of the law, he will be liable for punishment under Section -202 of Indian Penal Code (I.P.C.). A doctor, if willfully make false a birth or death certificate or prepares a fraudulent affidavit for any purpose or willfully attempts to conceal the nature of a criminal act, is making him liable for criminal proceeding.

Jaggan Khan vs. State of MP

A Kaviraj, who was not a qualified Surgeon, cut the internal piles of a patient by an ordinary knife resulting of which the patient died of profuse bleeding.

The Kaviraj was convicted under Sec.304-A IPC for his rash and negligent act. He pleaded for the benefit of Sec. 88 of the IPC saying that what he did was in good faith and he had obtained the consent of the patient and in the past he had performed several operations of same type. His plea was unacceptable to the court and he was held liable.

Parmananda Katara Vs. Union of India

Supreme Court gives a bold judgment that, it is the professional obligation of all doctors whether Government or private, to extend the medical aid to injured immediately to preserve the life without waiting legal formalities to be completed with the police under Criminal Procedure Code (CrPC). Article 21 of Indian Constitution, casts the obligation of those who are in charge of the health community and preserve life so that the innocent may be protected and the guilty may be punished. The given judgment by S.C. is a very significant ruling of the Court. It is submitted that if this decision of the court is followed in its true spirit it would help in saving the lives of many citizens who die in accidents because no immediate medical aid is given by the doctors on the ground that they are not authorized to treat medico-legal cases.

When all doctors of this country would follow the rulings of the court earnestly and devote their profession for the services of patients and needy people of society that would become the true inspiration beyond the concept of professional ethics.

Lentin Commission Report

'In January 1986, tragedy struck the J.J. Hospital. Four departments were affected, Neurology, Neurosurgery, Nephrology and Ophthalmology.

'It started with Bapu Thombre. He died on 21st January 1986. He was followed by 13 others. The last was Dawood Dholakia on 7th February 1986. They were all patients in the J.J. Hospital. They all died unnatural and untimely deaths. Their ages ranged from 10 to 76. Two of them were well on their way to recovery ... they too died. The common drug administered to all 14 was glycerine, otherwise a harmless drug in therapeutical doses used down the years by the medical profession the world over including the J.J. Hospital to combat oedema or swelling of the brain.

The 289 pages of the report, again in the restrained words of Justice Lentin, 'describe and illustrate the ugly facets of the human mind and human nature, projecting errors of judgment, misuse of ministerial power and authority, apathy towards human life, corruption, nexus and *quid pro quo* (a favour or advantage granted in return for something) *between unscrupulous licence holders*, analytical laboratories, elements in the Industries Department controlling the awarding of rate contracts, manufacturers, traders, merchants, suppliers, the Food and Drugs

Administration (FDA) and persons holding ministerial rank. None of this will be palatable in the affected quarters. But that cannot be helped.'

THE FACFS OF THE CASES

Chapter III of the Lentin report summarizes the case histories of the 14 patients who died from the poisonous effects of diethylene glycol present in the glycerol given to them. Four of them had brain tumours; three were under treatment for head injury; one was being investigated for cerebral stroke; three had glaucoma; two had cataracts; one had iridocyclitis and one had undergone keratoplasty.

The early clinical manifestations of nephrotoxicity appeared within one to seven days of exposure to the toxic chemical. In all fourteen cases the average time of death was four to five days. Vomiting, gastrointestinal bleeding, abdominal pain, guarding and rigidity, distension and diarrhea formed the early features. Over the next two to three days oliguria, anuria, acidosis and instability of blood pressure followed.

Infusion of sodium bicarbonate, administration of acetazolamide, mannitol, frusemide and the use of dialysis (in twelve of the fourteen patients) were of no help. Autopsy showed acute necrosis of the renal cortices (with destruction of glomeruli and proximal tubules), centrilobular hepatic necrosis, extensive adrenal hemorrhage and changes secondary to renal failure.

Two patients had died by 24 January 1986. Glycerol was first incriminated on 27 January. Diethylene glycol was recognized as the toxic agent on 28 January. The animal experiments were concluded on 31 January.

As pointed out by Justice Lentin, glycerol for medical use must have a concentration of glycerine not less than 98% and moisture not more than 2%. 'As against this, the glycerol sold by Alpana Pharm a to J.J. Hospital was:

Diethylene glycol	18.5%
Water	21 %
Polyglycol	51 %
Glycerol	9 %

RECOMMENDATIONS OF THE COMMISSION

'If I could have it my way, several would be candidates for instantaneous dismissal from service and certain others for permanent cancellation of their licences. However, the rule of the law must prevail.

Administratively, the J.J. Hospital, at one time reputedly the best-run government hospital in all Asia, is today in shameless. Evidence reveals total lack of administrative or medical control or supervision by the Dean and Superintendent. If there had been, I have no doubt this ghastly incident could have been averted. The J.J. Hospital is a gigantic complex.

Hence it must be managed administratively and medically on the footing of an industry and in its present state of shameless, must be resuscitated on a war footing. In the present set-up, the Dean, even with the best of intentions (which however were lacking here), cannot possibly hope to cope up with administrative and medical problems single-handed. Put a professional in administrative charge and give him a free hand with clearly laid down parameters. '

Justice Lentin recommended two Deans--one on the medical side and one for administration, the two interacting harmoniously. 'A reasonable tenure must be assured to the Deans so as to ensure their involvement and commitment to the institution.

This would prevent Deans considering themselves merely as birds of passage and would also obviate their having an eye to aggrandizement by way of promotion, or preventing their transfers, to which end, ministers, bureaucrats and politicians must be pandered to and time wasted in Mantralaya rather than in the performance of their duties in the J.J. Hospital.

The Deans must be persons of independence and not compromise on principles or be subservient to ministers, politicians and bureaucrats in the discharge of their duties or in order to survive. The Deans must be given more power to operate within the budget for local purchases instead of having to run to "higher authority" every time for the purpose.

Commenting on the FDA, Justice Lentin pointed out that the Drugs and Cosmetics Act 1940 and Rules are comprehensive and contain requisite provisions and safeguards to ensure public health and safety.

'Unfortunately, by reason of rampant corruption, nepotism and total lack of accountability prevailing in the FDA, and ministerial interference, the provisions of the Act and Rules are observed more in the breach than in their compliance.

Justice Lentin emphasized that it was absolutely imperative that the provisions of the Act and Rules be scrupulously followed and implemented by the FDA officers without fear or favour.

The FDA must be headed by an assertive Commissioner of proven administrative ability, preferably drawn from the Indian Administrative Service, Indian Police Service or the Defence Services, capable of withstanding ministerial, bureaucratic and political pressure without

compromising on principles or being subservient to anyone in the discharge of his duties or in order to survive.

He also recommended periodic refresher courses for FDA. Officers to keep themselves fully acquainted with the provisions of the Act and Rules.

Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 at Nutshell

The Act was enacted in 1994, amended and effectively implemented in 2003 and strictly amended in 2011. As can be seen from the daily media reports, almost all over the country, absolute stringent action is being taken against all the erring radiologists/ sonologists/ gynecologists. The effective implementation of The Act has painted a grim picture of The Act. This article is an effort to show that The Act though draconic can be easily followed by fulfilling certain mandatory requisitions laid under the Act.

The PC-PNDT Act was enacted on 20th September, 1994 with the intent to prohibit prenatal diagnostic techniques for determination of the sex of the fetus leading to female feticide. That is to say the preliminary object was to put a check on female feticide. No doubt the bare perusal of the Act indicates that it is a draconic act from the point of its effect on radiologists/sonologists. The Act does not offer any escape to the erring radiologist/sonologist.

But at the same time it is very simple to fulfill and abide by the requisitions of the Act. The few basic requirements of the Act are:

1. Registration under Section (18) of the PC-PNDT Act.
2. Written consent of the pregnant woman and prohibition of communicating the sex of fetus under Section 5 of the Act.
3. Maintenance of records as provided under Section 29 of the Act.

4. Creating awareness among the public at large by placing the board of prohibition on sex determination.

A look at the basic requirement of the Act shows the simplicity of the Act, but non-compliance of the Act in any manner, be it the smallest of an error brings wrath upon the errant. The Act penalizes all the errant, either involved in sex determination or non-maintenance of records.

The Act is legislated in a manner that it should be a deterrent for those indulging in sex determination. The unfortunate decline in the male-female sex ratio has brought in stringent measures, there is suspension of registration, filing of criminal cases and sealing of machines. Besides, criminal prosecution will also bring in suspension and cancellation of registration granted by the State Medical Council.

Remedies are also provided—like filing an appeal before the appellate authority and getting the machine released from the court of law, but all these remedial measures are time-consuming and bring the career of an individual to a standstill.

It would not be out of place to therefore state that the most effective precautionary measures are to maintain records scrupulously, fill the Form-F as provided in the Act, accurately and correctly, submit the records to the appropriate authority within the stipulated time; then there will be nothing to worry.

There is no doubt that there are a few shortcomings in the Act but that does not give any reason for non-compliance of or contravention of any of the provisions of the Act.

The major contribution by radiologists/ sonologists/ gynecologists towards prevention of female feticide can be achieved by thus fulfilling the mandatory requisitions of the PC-PNDT Act.

PC – PNDT’s Legal Aspects and Judgment

The Preconception and Prenatal Diagnostics Techniques (Prohibition of Sex Determination) Act 2003, with Rules made thereunder is an act to safeguard the girl child. The Courts have at all material times and in all possible manners delivered judgments indicating therefore that the PC-PNDT Act is actually a whip to penalize those indulging in sex determination and to serve as a deterrent to others.

The recent judgments of the Courts are also supportive of the strict implementation of the PC-PNDT Act. The IRIA is fighting tooth and nail to support the cause of the radiologists all over and also to prevent the misuse or improper and erroneous application of the Act by the appropriate authority.

The appropriate authority on the other hand is itself coming up with some or the other suggestion/idea to somehow curb the menace of female feticide. But in the process the radiologists are at the receiving end and the best possible solution in today's scenario is to abide by the dictum of the PC-PNDT in its true letter and spirit.

The Maharashtra State Branch of IRIA challenged the ban being imposed by the Municipal Corporation of Mumbai on the use of portable machines before the Hon’ble High Court Mumbai, which petition came to be dismissed and the judgment in the petition means that the portable machine can now be used only in the institute or hospital where it is registered thereby restricting the portability of the portable USG.

There is another judgment of the Hon’ble High Court, which upholds the installation of SIOB (i.e. Silent Observer) in the USG. The Collector of Kolhapur has come up with this novel idea of installing the SIOB under the delicate issue of “Save the Baby Girl Child” and which has been done in Kolhapur. The device is a private external device for the purpose of filling the F-form online and recording all images of the sonographies whether

obstetrics or non-obstetrics. The Hon'ble High Court dismissed the petition and review petition filed by the IRIA.

Then the IRIA has also filed a petition before the Hon'ble High Court Delhi, whereby a few provisions of the PC-PNDT Act have been challenged, such as the registration given to other faculty members, the mode of training imparted. The said petition is still pending.

Besides, there are many machines sealed for non-compliance of provisions of the PC-PNDT Act or for improper maintenance of records under the provisions of the Act. Then subsequent thereto-criminal cases are also registered. It is pertinent to note that the conviction may not be very severe, but it may result in suspension of registration under the State Council Act, which is an issue to be seriously noted by all.

There is another issue which arises and that is sealing of machines. Sealing is not a mandamus but all the appropriate authorities are doing that. The release of the machine in a criminal case will be the subject of jurisdiction of the criminal court and otherwise before the appellate authority provided under the PC-PNDT Act.

The recent scenario indicates the strict actions of the appropriate authority and the stern view of the Courts. To sum it all BEWARE.

Medical Deviance *viz- a-viz* The Medical Termination of Pregnancy Act, 1971

Abortion, a subject often discussed in medico-legal circles, interims various streams of thoughts and multiple discipline, like theology, because most religions have something to say in the matter, ethics, because human conduct and its moral evaluation are the basic issues involved; medicine (in several of its sub-disciplines), because, interference with the body for a curative or supposedly curative issue is at focus; and law, because regulation of human conduct by sanctions enforced by the state through the

process of law ultimately become the central theme for discussion.

Abortion may be classified into various categories depending upon the nature and circumstances under which it occurs. For instance, it may be either, (i) natural; (ii) accidental; (iii) spontaneous; (iv) artificial or induced abortion. Abortions falling under the first three categories are not punishable, while induced abortion is criminal unless exempted under the law. Natural abortions is a very common phenomena and may occur due to many reasons, such as bad health, defect in generative organs of the mother, shocks, fear, joy, etc. Accidental abortion very often takes place because of pathological reasons where pregnancy cannot be completed and the uterus empties before the maturity of fetus. Induced abortions is denied in law as an untimely delivery voluntarily procured with intent to destroy the foetus. It may be procured at any time before the natural birth of the child.

When does life begin?

'When does life begin' is a key question to be addressed in the matter of abortion. Technically, by definition, abortion is destruction of life after conception and before birth. Between these two points of terminus, life must have begun. However, literature reveals that life sciences have not offered any well-laid guidelines to determine these crucial questions. Some non-medical men and women have made bold assumptions on the subject, which have come to represent the layman's view.

For example, one view states 'to my mind life begins at the moment of conception, and to suggest otherwise seems to be casuistry.....conception is the magic moment.....' another view states: 'I do not believe a fertilized ovum is human life in the common sense meaning of the term, I believe human life begins at birth. Or more technically, when a foetus is sufficiently developed to be capable of living if removed from the mother's womb'. That human life begins at the moment of conception is a religious tenet that makes no claim whatsoever to scientific truth.

The Medical Termination of Pregnancy Act, 1971

During the last thirty years many countries have liberalized their abortion laws. The worldwide process of liberalization continued after 1980. Today only 8% of the world's population lives in countries where the law prevents abortion. Although the majority of countries have very restricted abortion laws, 41% of women live in countries where abortion is available on request of women. In India, Shantilal Shah Committee (1964) recommended liberalization of abortion law in 1966 to reduce maternal morbidity and mortality associated with illegal abortion. On these bases, in 1969 Medical termination of pregnancy bill was introduced in Rajya Sabha and Lok Sabha and passed by Indian Parliament in Aug. 1971. Medical Termination Of Pregnancy Act, 1971 (MTP Act) was implemented from Apr.1972. Implemented rules and regulations were again revised in 1975 to eliminate time consuming procedures for the approval of the place and to make services more readily available. The MTP Act, 1971 preamble states" an Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto".

The preamble is very clear in stating that termination of pregnancy would be permitted in certain cases. The cases in which the termination is permitted are elaborated in the Act itself. Moreover, only a registered medical practitioner who is defined in Sec.2 (d) of the Act as "a medical practitioner who possess any recognize medical qualification as defined in Cl.(h) of sec.2 of the Indian Medical Register and who has such experience or training in gynecology and Obstetrics as may be prescribed by rules made under this Act" is permitted to conduct the termination of pregnancy. Also other matters connected there with the incidental thereto are incorporated, for example, the question of consent of termination of pregnancy, the place where the pregnancy could be terminated, the power to make rules and regulations in this behalf.

Grounds for termination of pregnancy

Sec.3: When pregnancies may be terminated by registered medical practitioner.

(i) Notwithstanding anything contained in the Indian Penal Code (45 of 1860) a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act".

This makes it clear that the provisions of the MTP Act, so far as abortion is concerned suppresses the provisions of the Indian Penal Code. Sub-sec. (2) of Sec.3: "Subject to the provisions of sub-sec (4), a pregnancy, may be terminated by a registered medical practitioner.

(a) Where the length of the pregnancy does not exceed 12 weeks if such medical practitioner is, or

(b) Where the length of the pregnancy exceeds 12 weeks but does not exceed 20 weeks, if not less than 2 registered medical practitioners are of opinion, formed in good faith that:

1. The continuance of the pregnancy would involve a risk to the life of the pregnant women; or
2. A risk of grave injury to the her physical or mental health; or
3. If the pregnancy is caused by rape; or
4. There exist a substantial risk that, if the child were born it would suffer from some physical or mental abnormalities so as to be seriously handicapped; or
5. Failure of any device or method used by the married couple for the purpose of limiting the number of children; or
6. Risk to the health of the pregnant woman by the reason of her actual or reasonably foreseeable environment.

The Act does not permit termination of pregnancy after 20 weeks. The medical opinion must off course be given in "good faith". The term good faith has not been defined in the Act but sec. 52 if the IPC defines good faith to mean as act done with 'due care and caution'. It

is important to note that certain loopholes exist in the provisions. Firstly, nowhere has the Act defined what would involve a risk or a grave injury to her mental health. The term grave injury or substantial risk remains undefined. The gravity of the injury or the extent of the risk being left to the interpretation of the clause by the medical practitioner. However the MTP Act provides some guidance for the doctors in the form of two explanations.

Sec 3(2) Explanation 1: where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Therefore, rape per se is not an indication. It is the mental anguish following pregnancy due to rape, which is the main indication. In other words, mental anguish is to be taken into consideration; proving rape and affecting her character is not necessary. Her allegation that she has been raped is sufficient. Further proof of rape like medical examination, trial, and judgment is not necessary.

Explanation 2: where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for purpose of limiting the number of children they anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

The Act says that mental anguish due to pregnancy due to contraceptive failure in a married woman is an indication. Can an unmarried woman avail of this clause? She cannot use this, but she can get abortion under the general clause of mental indication.

Sub Section (3) clarifies that:

Sub-Sec.3 (3) In determining that whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-sec (2), account may be taken of the pregnant woman's actual or reasonable foreseeable environment. Therefore in determining whether the continuation of pregnancy would constitute a risk to the physical or mental

health of the pregnant woman the Indian Law permits the consideration of the woman actual or reasonably foreseeable environment.

The terms reasonably or foreseeable being left to the interpretation of the medical practitioner. Environmental clauses could include, by interpretation, drunkard husband, low-income group, large family etc. By and large, these explanations provide for two instances where continued pregnancy is assumed to constitute a grave injury to the mental health of the pregnant woman, namely where the pregnancy is alleged by a woman to have being caused by rape and second where the pregnancy occurs as a result of failure of any device by a married woman or her husband for purpose of limiting the number of children. The provision provides the doctors with a yardstick for a broad interpretation of the basic concept of the potential injury to the mental health of the pregnant woman.

The rest of the matters come in the case of mental indication where abortion is allowed and continuation of pregnancy would involve grave injury to her mental health. This is a subjective indication and commonly restored one.

In one of the case, where a girl detained in a Women's Welfare institution applied to the High Court during the pendency of her writ petition that the Court be pleased to order termination of her pregnancy and the Court found that the Pregnancy was against her will and that unless it was terminated the girl would suffer traumatic and psychological shock, the High Court directed termination in a govt. Maternity hospital if the doctors there on examination found that the termination would not affect her life and safety.

Qualification of Doctors

According to the Act, 'a medical practitioner who possess any recognized medical qualification as defined in cl. (h) of Sec.2 of the Indian Medical Council Act, 1956 whose name has been entered in a state medical register and who has such experience or training in gynecology or obstetrics as may be prescribed by rules made under this Act is permitted to conduct

the termination of pregnancy'. Allopathic doctors who are duly registered with the State Medical Council are authorized to do abortion. Other like *Homeopathic, Ayurvedic, Unani* doctors and unqualified doctors like RMP, Quacks, et al are not entitled to perform abortion. Even among allopathic doctors, only those who satisfy one or the other of the following qualifications are eligible to do MTP. Once a doctor satisfies the require qualifications, he automatically becomes eligible to do abortions. He need not apply for eligibility to any authority. A doctor cannot refuse to do abortions on religious grounds. If he does so, his name is liable to be erased from the Medical Council. If he is a Govt. doctor, he is liable for departmental action.

Consent for Abortion

Section 3(4) of MTPA clarifies as to whose consent would be necessary for termination of pregnancy.

- (a) No pregnancy of a woman, who has not attained the age of 18 years, or who having attained the age of 18 years, is a lunatic, shall be terminated except with the consent in writing of her guardian.
- (b) Save as otherwise provided in cl (a), no pregnancy shall be terminated except with the consent of the pregnant woman. It is important to note, in this section, that the consent of the woman is the essential factor for termination of her pregnancy. The husband's consent is irrelevant. Therefore, if the woman wants an abortion but her husband's objects to it, the abortion can still be done. However, if the woman does not wants an abortion but her husband wants, it cannot be done. However, the consent of the guardians is needed in the case of minors or lunatics.

Where the pregnancy can be terminated

Section 4 specifies the place where, under MTP, a pregnancy can be terminated. It stipulates that an operation must take place in either "a hospital established or maintained by the government" or in "a place which has been approved for the purpose of this Act by the government." However exceptions are made for emergencies.

Under section 5(1), a doctor may terminate a pregnancy if it is "immediately necessary to save the life of the pregnant woman". In such situations, the requisites relating to the length of pregnancy, the need for two medical opinions and the venue for operation do not apply. However, it needs to be pointed out that one aspect of this emergency clause tends to restricts rather than liberalize the old law. Section 312 of the IPC permitted abortions by anyone with the object of saving the life of the mother, but under MTPA only a doctor can terminate the pregnancy.

Approval of a Place

No place shall be approved under Cl (b) of sec.4 (1) unless the Government is satisfied that termination of pregnancy may be done therein under safe and hygienic conditions. (2) Unless the following facilities are provided therein namely:

- i. An operation table and instruments for performing abdominal gynecological surgery
- ii. Anesthetic equipment, resuscitation equipment and sterilization equipment
- iii. Drugs and parental fluids for emergency use.

Thus, the oft-argued following justifications in favour of the permissive abortions are found in the Indian law.

In countries where abortion is legal, death rates are usually below 1 per 100,000 procedures. Abortion is a very safe operation if the operation is performed by skilled medical practitioners, having proper facilities and equipment's. In developing countries like India with scarce medical resources treatment of complications of abortion often possess a heavy burden on the health care's system. According to recent estimates made by

the World Health Organization, about one-quarter to one-third of maternal deaths are due to complications of (illegally) induced abortion. This can be prevented through offering easily accessible safe abortion services and through family planning services and education. Reliable statistics show that in many countries where abortion is legally available, the abortion rate is much lower than in countries where it is completely illegal.

Ethical Issues in MTP

Ethical and legal debate regarding prevention of unwanted pregnancies has been continuing for many years throughout the world, and this has established an idea of legislation of termination of pregnancy within certain terms and conditions. In India MTP act was passed in 1971 and implemented in Apr 1972 and revised in 1975. Basic principle is that pregnancy can be terminated when there are some maternal and fetal indications, and is to be done by 20 weeks. But in spite of legislative and judicial action, ethical controversies surrounding MTP still continues.

Ethical issues in MTP

Though many people believe that MTP is immoral but in today social context it is a reality. The ethical and legal issues regarding MTP currently revolve around the quality of service, right of the dependent minor to give her own consent for MTP, fetal viability and the coercion. A few of the ethical issues are highlighted here.

Unsafe Abortion

It is estimated that 40-60 million abortions take place throughout the world and half of them performed by unauthorized person mostly in developing countries with grave consequences (WHO, 1990). Health education and community awareness are the basic aspects of its prevention.

Illegal abortions are performed much more frequently in India with their disastrous results even today In spite of liberalization of the Medical Termination of Pregnancy Act. Two cases of unsafe abortions are reported

where the procedure was carried out by doctors without any training in midwifery and family planning. One patient had extensive small bowel injury secondary to uterine perforation but survived whereas the other expired due to septicaemia, peritonitis, disseminated intravascular coagulopathy following uterine perforation.

Medical Termination of Pregnancy (MTP) is a maternal health care measure, which helps to avoid the maternal mortality and morbidity resulting from illegal abortions. Under the provision of the Act, pregnancies upto 20 weeks can be terminated under the certified opinion of one or two registered medical practitioners depending upon the period of gestation. Pregnancy termination can be performed on humanitarian, eugenic, medical and social grounds . A variety of induced abortion services are available in Asian countries and these may be obtained from

1. Government hospitals and centers
2. Municipal hospitals and maternity homes
3. Non-Government organizations (NGO) or voluntary agency clinics, and
4. Private hospitals, nursing homes or clinics.

The services are completely free of charge/cost in government and municipal centers. It is important to understand that establishment of good abortion services on a completely free basis is a cost benefit measure.

Pre Natal Diagnosis and MTP

Ethical controversies always appear in pre natal screening and specific termination. A great dilemma exists in couples for making decision for termination of handicapping abnormalities. Things become worse where the pregnancy is much wanted one. It may be accepted by many couple, but may not be by some for religious and moral reasons. In less severe chromosomal defects as with sex chromosomal aneuploidies, it is agonizing decision for the couples. So, proper counseling must be done and every view of the couple must be respected.

Sex Selective Abortion

Sex selective abortion is of grave social concern. It is unethical and illegal too. Social and family pressures are such that inspite of legislation pregnant woman does opt for prenatal sex determination for selective female feticide. We must realize that selective feticide challenges equality of sex and status of women. Failure to recognize equality of sex is the sign of ageing and decaying society.

Psychosocial Aspects of MTP

"No woman can call herself free until she can choose consciously whether she will or will not be a mother". Margaret Sanger Women have come a long way since the day of Margaret Sanger when abortion was an illegal, secretive and socially unacceptable procedure, hidden from family members. Today with MTP legally available in most countries of the World, the physiological trauma and social isolation are considerable less. Most studies report psychologically favorable outcomes following MTP in the majority of women. In a landmark study, Osofsky and Osofsky reported psychologically favorable outcomes in 64.6% of 250 women undergoing legal abortions in New York State. On the other hand, there is no denying that MTP can be an emotionally disturbing procedure in many women. However in the socially favorable circumstances following legalized abortion, the patient's relief of getting rid of the unwanted pregnancy out shadows and feeling of guilt that either used to accompany an illegal and socially unsanctioned procedure. In a minority of patients, we see major psychological disturbances in the form of major psychoses or depression.

Salient Features of the Narcotic Drugs and Psychotropic Substances Act, 1985.

This is a special Act, while adopting the liberal construction of the Act, it is found that the Act has been enacted with a view to make stringent provisions for the control and regulation of operation relating to the narcotic drugs and psychotropic substances.

Here, it will be apt to reproduce some of the provisions commonly used in day to day working of the courts.

It extends to the whole of India [and it applies also-
(a) to all citizens of India outside India;
(b) to all persons on ships and aircraft registered in India, wherever they may be.]

Section 32A- No suspension, remission or commutation in any sentence awarded under this Act.-

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force but subject to the provisions of Section 33, no sentence awarded under this Act (other than Section 27) shall be suspended or remitted or commuted.

In Union of India v. Mahaboob Alam, (2004) SCC (Cri) 912 it was held that though the Court has the power of granting bail pending appeal in spite of the language of Section 37 of the NDPS Act, the same should be done only and strictly subject to the conditions spelled out in Section 37 of the Act.

Section 33- Application of Section 360 of the Code of Criminal Procedure, 1973 and of the Probation of Offenders Act, 1958.

Nothing contained in Section 360 of the Code of Criminal Procedure, 1973 (2 of 1974) or in the Probation of Offenders Act, 1958 (20 of 1958) shall apply to a person convicted of an offence under this Act unless such person is under eighteen years of age or that the offence for which such person is convicted is punishable under Section 26 or Section 27.

Section 35- Presumption of culpable mental state.-

(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation. - in this Section “culpable mental state” includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this Section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.

Section-54 Presumption from possession of illicit articles in trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of

- (a) any narcotic drug or psychotropic substance or controlled substance;
- (b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;
- (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or
- (d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily.

In *State of Punjab Versus Rampal*, 2009(2) RCR Criminal 762, Hon'ble Apex Court defined the meaning of word possession that it need not only be physical possession but can also be constructive one that is having power and control over the article in question while the person to whom physical possession is given holds it subject to that power or control. Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge.

Conscious possession - Meaning explained-

- (1) Whether there was conscious possession has to be determined with reference to the factual backdrop.
- (2) The expression 'possession' is a polymorphic term which assumes different colors in different contexts - It may carry different meanings in contextually different backgrounds - It is impossible.
- (3) To work out a completely logical and precise definition of "possession" uniformly applicable to all statutes.
- (4) The word 'conscious' means awareness about a particular fact - It is a state of mind which is deliberate or intended.
- (5) Possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question; while the person whom physical possession is given holds it subject to that power or control.
- (6) The word 'possession' means the legal right to possession.
- (7) Once possession is established the person who claims that it was not a conscious possession has to establish it.

In *Balwinder Singh v. Assistant Commissioner, Customs and Central Excise*, 2005 AIR, Supreme Court 2197, the accused/ appellant was registered owner of the truck from which heroine and opium was recovered. Appellant sold the truck prior to the occurrence but the registration was not changed to the name of purchaser. No evidence came on record that the accused appellant knowingly allowed any person to use vehicle for any illegal purpose. It was held that accused/ appellant had no control over the vehicle nor he was in the possession of truck.

In *Baldev Singh v. State of Haryana*, 2015(4) RCR (Criminal) 1014, it was held by Hon'ble Apex Court that once possession is proved, then it is for the accused to establish that he was not in conscious possession of the contraband.

Section 36A-Offences triable by Special Courts.-

- (1) notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a)xxx

(b) Where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-Section (2) or sub-Section (2A) of Section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), such Magistrate may authorize the detention of such person in any custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:

Provided that in cases which are friable by the Special Court where such Magistrate considers-

- (i) when such person is forwarded to him as aforesaid; or
- (ii) upon or at any time before the expiry of the period of detention authorized by him,

that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) XXX

(d) a Special Court may, upon perusal of police report of the facts constituting an offence under this Act or upon complaint made by an officer of the Central Government or a State Government authorized in his behalf, take cognizance of that offence without the accused being committed to it for trial.

(4) In respect of persons accused of an offence punishable under Section 19 or Section 24 or Section 27A or for offences involving commercial quantity the references in sub-Section (2) of Section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), thereof to ninety days, where they occur, shall be construed as reference to one hundred and eighty days. Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the

detention of the accused beyond the said period of one hundred and eighty days.

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973(2 of 1974), the offences punishable under this Act with imprisonment for a term of not more than three years may be tried summarily.

Section-55. Police to take charge of articles seized and delivered.

An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.

Section-57 Report of arrest and seizure.

Whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior.

Provisions of Sections 55 and 57 not complied with - Conviction bad in law and set aside Provisions of Sections 52, 55 and 57 are not mandatory - They are only directory.

Provisions of Sections 52 and 57 is directory - Violation of these provisions would *not ipso facto violate* the trial or conviction - However, Investigating Officer cannot totally ignore these provisions and such failure will have bearing on appreciation of evidence regarding arrest of accused or seizure of article.

Section-52-A Disposal of seized narcotic drugs and psychotropic substances

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in sub-Section (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-Section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application to any Magistrate for the purpose of-

(2) (a) Certifying the correctness of the inventory so prepared; or
 b) taking, in the presence of such Magistrate, photographs of [such drugs, substances or conveyances] and certifying such photographs as true; or
 (c) Allowing drawing representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-Section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every Court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-Section (2) and certified by the Magistrate, as primary evidence in respect of such offence.

Some of the important citations:

(1) ***Iqbal Moosa Patel v. State of Gujarat*** 2011(1) RCR (Criminal) 473 (SC)- Sections 21, 29, 8(c) NDPS Act, 1985, Sections 103, 102 Indian Evidence Act, 1872-

It was held by Hon'ble apex Court that, proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice.

(2) ***Jagdish Rai v. State of Punjab*** AIR 2011 SC 1568-Sections 35,54-Appellant driving motorcycle. On intercepted by the police, appellant tried to turn away and flee. It can be presumed that appellant was conscious of the fact that pillion rider is carrying opium.

(3) ***Roop Singh v.. State of Punjab*** 1996(1) R.C.R. (Cr.) 146 (P&H) (Division Bench)- Giving up of independent witness by the prosecution in the present

day situation prevailing in the society is fully justified and no adverse inference can be drawn against the prosecution.

(4) ***Davinder Kumar v. State of Punjab*** 2012(2) R.C.R. (Cr.) 600 (DB)- Sections 42, 43-when recovery of contraband is effected from the vehicle in transit, Section 43 of the Act shall apply and not Section 42.

(5) ***Dharampal Singh v. State of Punjab*** (2010) 9 SCC 608- Sections 18,35,54- Under Section 18- Once possession is established, accused who claims that it was not a conscious possession, has to establish that it was not, because it is with in his special knowledge.

(6) ***Akmal Ahmed v. State of Delhi*** 1999 Criminal Law Journal, 2041 (SC)- The evidence of search or seizure, made by the police, will not become vitiated solely for the reasons that the same was not supported by an independent witness.

(7) ***State of Punjab Versus Baldev Singh*** 1999(6) SCC 172-âœdrug abuse is a social malady. While drug addiction eats into the vitals of the society, drug trafficking not only eats into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illegal activities including encouragement of terrorism. It has acquired the dimensions of an epidemic, affecting the economic policies of the State, corrupts the system and is detrimental to the future of a country.

(8) ***State of Himachal Pradesh v. Pawan Kumar*** 2005(2) RCR (Criminal) 621-those who indulge in this kind of nefarious activities should not go Scot free on technical pleas which come handy to their advantage in a fraction of second.

(9) It is held in ***Arif Khan @ Agha Khan v. State of Uttarakhand*** 2018(2) R.C.R. (Criminal) 931by Hon'ble apex Court that it is mandatory on the part

of authorized officer to make suspect aware of existence of his right to be searched before Gazetted Officer or Magistrate, if so required by him and this requires strict compliance. Evidence adduced by prosecution neither suggested nor proved that search and recovery made in presence of magistrate or Gazetted Officer. Accused entitled for benefit of doubt. •

10. In ***State of Haryana v. Jarnail Singh***, 2004(2) RCR Criminal 960, Hon'ble Apex Court held that Section 50 is applicable only when personal search of accused is made. When search is made from vehicle Section 50 has no applicability.

11. In ***Ajmer Singh v. State of Haryana***, 2010(3) SCC 746, it was held by Honorable Apex Court that search and recovery from a bag, briefcase, container etc. does not come within ambit of Section 50.

12. Recently, in ***Mohan Lal v. State of Punjab***, Criminal Appeal No. 1880 of 2011, decided on 16.8.2018, A three judge bench of Hon'ble Apex Court held that fair investigation which is the very foundation of a fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof.

If an informant police official in a criminal prosecution, especially when carrying a reverse burden of proof, makes the allegations, is himself asked to investigate, serious doubts will naturally arise with regard to his fairness and impartiality. It is not necessary that bias must actually be proved. It would be illogical to presume and contrary to normal human conduct, that he would at the end of the investigation submit a closure report to conclude false implication with all its attendant consequences for the complainant himself. The result of the investigation therefore, is a foregone conclusion.

LEGAL PROFESSION – DISCIPLINARY COMMITTEE OF BCI

Introduction

The sad truth is becoming more and more apparent; our profession has seen a steady decline by casting aside established traditions and canons of professional ethics that evolved over centuries ...When we speak of the decline in "ethical" standards, we should not use the term 'ethics' to mean only compliance with the Ten Commandments or other standards of common, basic morality. A lawyer can and still fail to meet the standards of a true profession, standards calling for fearless advocacy within established canons of service.

Society is undergoing rapid transformation and the pace of change is likely to gather speed. In the context of change ahead, it will be important to devote thought on how to adopt our legal education to modern conditions so that the coming generation may fit in the new society that is envisaged.

Legal education is an investment, which if wisely made will produce most beneficial results for the nation and accelerate the pace of development.

Legal profession has been regarded from times immemorial and all over the world as a very honorable, prestigious and proud profession. A lawyer has an important and dignified place in the society and he is respected by one and all because of the fact that he carries on a most intellectual profession and what is more because he fights for justice.

Lawyers have been in the forefront generations, in every aspect of social and political development in every country. Most of the politicians of the world are and were lawyers and therefore lawyers can truly be regarded as a maker of history.

It is not merely their role in the courts for the cause of justice to their respective parties that enable them to win an enviable place in the society but also their multi-pronged attack on the evils that beset the several

aspects of the society and for winning a just place even for the under-dog in society.

Sri P.V. Rajamannar, the former Chief Justice of Madras High Court explains the importance of legal profession thus: In the forefront I will place the special feature of the lawyer's profession, which is also shared by the doctor profession, viz that it is independent profession.

Through you may have onerous duties and obligations; you will not be a servant of any master. You will be instead servant of the country. It is pleasure to describe the lawyer's profession and the doctors profession as noble profession.

In Christian countries the clergyman's profession is also spoken as such.

This very characteristic common to these three professions has sometime given rise to cynical comments.

A character in one of Scott novel, a hard working farmer, exclaims, Hell Heaven, the clergyman is paid; win or lose the lawyer is paid; deal or alive, the is paid; but this is only a superficial criticism.

The truth is that the lawyers and the doctor place all their knowledge and skillet the disposal of their clients, and their duty consists only in this. So long as a judge or a doctor does his duty he is not concerned with anything else, he is not answerable to anyone.

Role of BCI for Combat Deviance by Lawyers

- The Bar Council of India is a statutory body that regulates and represents the Indian bar.
- The Bar Council of India was established under Section – 4 of the Advocates Act, 1961.
- It prescribes standards for professional conduct, etiquettes, and exercises disciplinary jurisdiction over the bar.

The members of BCI are:

1. The Attorney General of India, ex officio,
2. The Solicitor General of India, ex officio,

Main functions of BCI

1. To lay down standards of professional conduct and etiquette for advocates.
2. To promote and support law reform
3. To safeguard the rights, privileges and interests of advocates.
4. To exercise general supervision and control over state Bar Council.

Committee of BCI

There are three main committee of Bar Council of India:-

1. Legal Education Committee
2. Disciplinary Committee
3. Executive Committee

Deviance created by Advocates

• Legal Profession is a noble profession. Lawyers can perform well if they maintain certain ethical & moral standards. But Today in India the lawyer's profession is not looked with much respect.

Deviances created by lawyers are:

1. Fabrication of false Evidence.
2. Violating professional ethics.
3. Settlement of case in consideration of huge sum of money by lawyers.
4. Manage opposite lawyers by payment of money.

5. Chamber Practice

6. Investigation Officer and Medical officers managed with the lawyers to win their case.

Role of Bar Council of India to combat deviance by lawyers.

- Disciplinary Committee of Bar Council of India plays an important role in combating deviance by lawyers.
- Chapter-V of the Advocates Acts, 1961 deals with the conduct of Advocates.
 - Section – 35: Punishment of Advocates for misconduct.
 - Section – 36: Disciplinary powers of Bar Council of India.
 - Section - 37: Appeal to the Bar Council of India.

Powers of Disciplinary Committee

- Section 42 of the Advocates Act, 1961 deals with the powers of Disciplinary committee.
- The powers of Disciplinary Committee is same as that of Civil court.
 1. Summoning and enforcing the attendance of any person and examining him on oath,
 2. Requiring discovery and production of any documents.
 3. issuing commission for the examination of witness

Cases

1. *P.D.Gupta v Ram Murti AND ANR.*

(Purchase of the property in dispute of the client)

2. *Allahabad Bank v. Girish Prasad Verma*

(Non filing of the case with a nominal court fee)

3. *Surendra Nath Mittal v. Daya Nand Swaroop*

(Manipulation of decree)

Difference between contempt of court *vis-a-vis* Professional misconduct.

Professional Misconduct	Contempt of Court
1. It applies only to Lawyers	1. It applies to both layers as (well as public)
2. Cross examination is Allowed	2. It is limited in sense
3. Principle of Natural Justice will not be applicable	3. Principle of Natural Justice will be applicable

Suggestions

To play a constructive role in the administration of legal system.

- Forums that work on legal reform should be encouraged.
- The legal system should be client friendly.
- Legal education should be improved.
- To improve the image of the lawyer in the society.

BAR COUNCIL OF INDIA AND ITS DISCIPLINARY COMMITTEE

Organization

Section 36 of the Advocates Act empowers the Bar Council of India to refer, in certain circumstances, the case for disposal to its disciplinary committee.

Section 9 provides that the a Bar Council shall constitute one or more disciplinary committees, each of which shall consist of **three persons** of

whom two shall be persons elected by the Council from amongst its members and the other shall be a person elected by the council amongst advocates who possess the qualifications specified in the provision to sub-section (2) of Section 3 and who are not members of the council and the senior most advocate amongst the members of disciplinary committee shall be the chairman thereof.

Powers:-

Section 42 deals with the powers of the disciplinary committee of a Bar Council. The provisions of Section 42 have already been stated in context of powers of the disciplinary committee of the State Bar Council.

Section 42-A makes it clear that the provisions of Section 42 shall, so far as may be, apply in relation to the disciplinary committee of the Bar Council of India.

Section 43 makes it clear that the disciplinary committee of the Bar Council of India may make such order as to the costs of any proceedings before it as it may draw fit and any such order shall be executable as if it were an order of the Supreme Court.

CASES OF MISCONDUCT

V.P.Kumarvelu v. The Bar Council of India

In this case the Appellant was appointed as city Government pleader in all the civil Courts other than the High Courts constituted at Madras, in October, 1978.

The Commissioner and Secretary of Tamil Nadu filed a complaint against the appellant before the Disciplinary Committee of the Bar Council of Tamil Nadu in respect of suit No. 400/1978 on the file of the City Civil Court at Madras.

Professional misconduct of lawyers in India

Advocacy is a noble profession and an advocate is the most accountable, privileged and erudite person of the society and his act are role model for the society, which are necessary to be regulated. Professional misconduct is the behaviour outside the bounds of what is considered acceptable or worthy of its membership by the governing body of a profession. Professional misconduct refers to disgraceful or dishonorable conduct not befitting an advocate.

Chapter V of the Advocate Act, 1961, deals with the conduct of Advocates. It describes provisions relating to punishment for professional and other misconducts. Section 35(1) of the Advocate Act, 1961, says, where on receipt of a complaint or otherwise a State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee. Generally legal profession is not a trade or business, it's a gracious, noble, and decontaminated profession of the society. Members belonging to this profession should not encourage deceitfulness and corruption, but they have to strive to secure justice to their clients. The credibility and reputation of the profession depends upon the manner in which the members of the profession conduct themselves. It's a symbol of healthy relationship between Bar and Bench.

The Advocates Act, 1961 as well Indian Bar Council are silent in providing exact definition for professional misconduct because of its wide scope, though under Advocates Act, 1961 to take disciplinary action punishments are prescribed when the credibility and reputation on the profession comes under a cloud on account of acts of omission and commission by any member of the profession.

Meaning and Definition

Profession is a vocation requiring some significant body of knowledge that is applied with high degree of consistency in the service of some relevant segment of society, by Hodge and Johnson. Occupation especially

one requiring advanced education and special training by A. S. Hornby. It is different from other types of jobs, in the sense that it requires skills and these skills will be improved with experience.

The attributes of a profession as laid down by Dalton E. McFarland are;

- 1) The existence of a body of specialized knowledge or techniques
- 2) Formalized method of acquiring training and experience
- 3) The establishment of representative organization with professionalism as its goal.
- 4) The formation of ethical codes for the guidance of conduct.
- 5) The charging of fees based on services but with due regards for the priority of service over the desire for monetary rewards.

A person who carries/undertakes the profession is called a professional.

Depending on the profession a person undertakes, he/she is identified with a special name relevant to the profession.

Misconduct, according to Oxford dictionary means a wrongful, improper, or unlawful conduct motivated by premeditated act. It is a behavior not conforming to prevailing standards or laws, or dishonest or bad management, especially by persons entrusted or engaged to act on another's behalf. The expression professional misconduct in the simple sense means improper conduct. In law profession misconduct means an act done willfully with a wrong intention by the people engaged in the profession. It means any activity or behaviour of an advocate in violation of professional ethics for his selfish ends. If an act creates disrespect to his profession and makes him unworthy of being in the profession, it amounts to professional misconduct. In other word an act which disqualifies an advocate to continue in legal profession.

To understand the scope and implication of the term 'misconduct', the context of the role and responsibility of an advocate should be kept in mind. Misconduct is a sufficiently wide expression, and need not necessarily imply the involvement of moral turpitude. 'Misconduct' per se has been defined in

the Black's Law Dictionary to be "any transgression of some established and definite rule of action, a forbidden act, unlawful or improper behavior, willful in character, a dereliction of duty." In a different context, the Supreme Court has opined that the word "misconduct" has no precise meaning, and its scope and ambit has to be construed with reference to the subject matter and context wherein the term occurs. In the context of misconduct of an advocate, any conduct that in any way renders an advocate unfit for the exercise of his profession, or is likely to hamper or embarrass the administration of justice may be considered to amount to misconduct, for which disciplinary action may be initiated.

Darling J, defined the expression professional misconduct in, *In re A Solicitor ex parte the law society* as, It is shown that the advocate in the pursuit of his profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonorable by his professional brethren of good repute and competency, then it is open to say that he is guilty of professional misconduct.

Misconduct is sufficiently comprehensive to include misfeasance as well as malfeasance and is applied to the professional people, it include unprofessional acts even though they are not inherently wrongful. The professional misconduct may consist the fact in any conduct, which tends to bring reproach on the legal profession or to alienate the favorable opinion which the public should entertain concerning it. In *State of Punjab v Ram Singh* the Supreme Court held that the term misconduct may involve moral turpitude, it must be improper or wrong behaviour, unlawful behaviour, willful in character, a forbidden act, a transgression of established and definite rule of action or code of conduct, but not mere error of judgment, carelessness or negligence in performance of duty.

The Supreme Court has, in some of its decisions, elucidated on the concept of 'misconduct', and its application. In ***Sambhu Ram Yadav v. Hanuman Das Khatri***, a complaint was filed by the appellant against an advocate to the Bar Council of Rajasthan, that while appearing in a suit as a counsel, he wrote a letter stating that the concerned judge, before whom the

suit is pending accepts bribes, and asked for Rs. 10,000 to bribe and influence the judge to obtain a favorable order. The Disciplinary Committee, holding that the advocate was guilty of “misconduct”, stated that such an act made the advocate “totally unfit to be a lawyer.”

The Supreme Court, upholding the finding of the Rajasthan Bar Council held that the legal profession is not a trade or business. Members belonging to the profession have a particular duty to uphold the integrity of the profession and to discourage corruption in order to ensure that justice is secured in a legal manner. The act of the advocate was misconduct of the highest degree as it not only obstructed the administration of justice, but eroded the reputation of the profession in the opinion of the public.

In another case, ***Noratanman Courasia v. M. R. Murali*** the Supreme Court explored the amplitude and extent of the words “professional misconduct” in Section 35 of the Advocates Act. The facts of the case involved an advocate (appearing as a litigant in the capacity of the respondent, and not an advocate in a rent control proceeding) assaulted and kicked the complainant and asked him to refrain from proceeding with the case. The main issue in this case was whether the act of the advocate amounted to misconduct, the action against which could be initiated in the Bar Council, even though he was not acting in the capacity of an advocate. It was upheld by the Supreme Court that a lawyer is obliged to observe the norms of behavior expected of him, which make him worthy of the confidence of the community in him as an officer of the Court. Therefore, in spite of the fact that he was not acting in his capacity as an advocate, his behavior was unfit for an advocate, and the Bar Council was justified in proceeding with the disciplinary proceedings against him.

It may be noted that in arriving at the decision in the case, the Supreme Court carried out an over-view of the jurisprudence of the courts in the area of misconduct of advocates. It reiterated that the term “misconduct” is incapable of a precise definition. Broadly speaking, it envisages any instance of breach of discipline. It means improper behavior, intentional wrongdoing or deliberate violation of a rule of standard of

behavior. The term may also include wrongful intention, which is not a mere error of judgment. Therefore, “misconduct”, though incapable of a precise definition, acquires its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of duty.

In *N.G. Dastane v. Shrikant S. Shind*, where the advocate of one of the parties was asking for continuous adjournments to the immense inconvenience of the opposite party, it was held by the Supreme Court that seeking adjournments for postponing the examination of witnesses who were present without making other arrangements for examining such witnesses is a dereliction of the duty that an advocate owed to the Court, amounting to misconduct.

Ultimately, as it has been upheld and reiterated that “misconduct” would cover any activity or conduct which his professional brethren of good repute and competency would reasonably regard as disgraceful or dishonorable. It may be noted that the scope of “misconduct” is not restricted by technical interpretations of rules of conduct. This was proven conclusively in the case of ***Bar Council of Maharashtra v. M.V. Dabholkar***.

The facts under consideration involved advocates positioning themselves at the entrance to the Magistrate’s courts and rushing towards potential litigants, often leading to an ugly scrimmage to snatch briefs and undercutting of fees. The Disciplinary Committee of the state Bar Council found such behavior to amount to professional misconduct, but on appeal to the Bar Council of India, it was the Bar Council of India absolved them of all charges of professional misconduct on the ground that the conduct did not contravene Rule 36 of the Standards of Professional Conduct and Etiquette as the rule required solicitation of work from a particular person with respect to a particular case, and this case did not meet all the necessary criteria, and such method of solicitation could not amount to misconduct.

This approach of the Bar council of India was heavily reprimanded by the Supreme Court. It was held that restrictive interpretation of the relevant rule by splitting up the text does not imply that the conduct of the advocates

was warranted or justified. The standard of conduct of advocates flows from the broad canons of ethics and high tone of behavior. It was held that “professional ethics cannot be contained in a Bar Council rule nor in traditional cant in the books but in new canons of conscience which will command the member of the calling of justice to obey rules or morality and utility.” Misconduct of advocates should thus be understood in a context-specific, dynamic sense, which captures the role of the advocate in the society at large.

Provisions in Advocates act 1961

The Advocate’s Act, 1961 is a comprehensive legislation that regulates the legal practice and legal education in India. It envisages for the establishment of Bar Council of India and State Bar Councils with various disciplinary committees to deal with misconduct of the advocates. It also provides for the provisions relating to the admission and enrolment of advocates and advocates right to practice. Chapter V containing sections 35 to 44 deals with the conduct of the advocates. It provides for punishment for advocates for professional and other misconduct and disciplinary powers of the Bar council of India. In order to attract the application of section 35 of the advocates act the misconduct need not be professional misconduct alone. The expression used in the section is Professional or other misconduct.

So even conduct unconnected with the profession may account to a misconduct as for example, conviction for a crime, though the crime was not committed in the professional capacity. At the same time it is to be noted that a mere conviction is not sufficient to find an advocate guilty of misconduct, the court must look in to the nature of the act on which the conviction is based to decide whether the advocate is or is not an unfit person to be removed from or to be allowed to remain in the profession.

Misconduct is of infinite variety, the expression professional or other misconduct must be understood in their plain and natural meaning and there is no justification in restricting their natural meaning. The term

misconduct usually implies an act done willfully with a wrong intention and as applied to professional people it includes unprofessional acts even though such acts are not inherently wrongful.

The Code of Conduct Prescribed for Advocate Section 49 of the Advocate's Act, 1961 empowers the Bar Council of India to frame rules regulating standards of professional conduct. Accordingly various duties are prescribed for the advocates some of them are highlighted below.

No advertising or soliciting work, it is against an advocate's code of ethics to solicit or advertise work and amounts to a misconduct on the part of the advocate. Both direct and indirect advertising is prohibited. An advocate may not advertise his services through circulars, advertisements, touts, personal communication or interviews not warranted by personal relations. Similarly, the following forms of indirect advertising are prohibited:

(i) by issuing circulars or election manifestos by a lawyer with his name, profession and address printed on the manifestos, thereby appealing to the members of the profession practicing in the lower courts who are in a position to recommend clients to counsel practicing in the HC.

(ii) canvassing for votes by touring in the province or sending out his clerk or agents to the various districts, which must necessarily mean directly approaching advocates practicing in subordinate courts. Further, the signboard or nameplate displayed by an advocate should be of reasonable size. It should not refer to details of an affiliated by the advocate i.e. that he is or has been president or member of a bar council or of any association, or he has been a Judge or an Advocate-General, or that he specializes in a particular kind of work, or that he is or was associated with any person or organization or with any particular cause or matter.

Not to demand fees for training; An advocate is restrained from demanding any fees for imparting training to enable any person to qualify for enrolment.

Not use name/services for unauthorized practice; An advocate may not allow his professional services or his name to be associated with, or be used for any unauthorized practice of law by any lay agency.

Not to enter appearance without consent of the advocate already engaged: an advocate is prohibited from entering appearance in a case where there is already another advocate engaged for a party except with the consent of such advocate. However if such consent is not produced, the advocate must state the reasons for not producing it, and may appear subsequently, only with the permission of the court.

Duty to opposite party:- While conducting a case, a lawyer has a duty to be fair not only to his client but also to the court, and to the opposite party. An advocate for a party must communicate or negotiate with the other parties regarding the subject matter of controversy, only through the opposite party's advocate. If an advocate has made any legitimate promises to the opposite party, he should fulfill the same, even if the promise was not reduced to writing or enforceable under the rules of the court.

Duties of an advocate towards his client: The relationship between a lawyer and a client is highly fiduciary and it is the duty of an advocate fearlessly to uphold the interests of the client by fair and honorable means without regard to any unpleasant consequences to himself or any other person.

The above are only few important code of conduct to be observed by an advocate practicing in India. According to Justice Abbot Parry, there are seven important qualities that a lawyer should possess, he call these qualities as seven lamps of advocacy, they are; Honesty, Courage, Industry, Wit, eloquence, Judgment, and Fellowship. Apart from that the panchsheel of the bar are Honesty, Industry, Justice, Service and Philosophy and Panchsheel of the bench according to Sri ram Kishore Rande are, Impartiality, Independence, Integrity and Industry, Judicial activism and

Prayer. Among the various duties of the advocates like, duties to client, court, public, colleagues and self, selected points can be picked up and arranged according to the due and relative importance and are called as ten commandments of advocates they are;

a) **Duties to client**

- 1) Protection of the interest of the client
- 2) Proper estimation of the value of legal advices and services

b) **Duties to court**

- 3) Honesty and respect
- 4) Preparation of the case

c) **Duties to Public**

- 5) Service
- 6) Loyalty to law and justice

d) **Duties to colleagues**

- 7) Fellowship
- 8) Fairness

e) **Duties to self**

- 9) Systematic study
- 10) Prudence and diligence

The rules laid down by the Bar Council of India forms the code of conduct for advocates and in broad sense any violation of such rules or code of conduct can be termed as professional misconduct. The scope of the term has been still widened by the Supreme Court in various decisions.

Instances of Misconduct

Legal Practitioners Act 1879 has not defined the word Misconduct. The word Unprofessional conduct is used in the act. Even the Advocates Act 1961 has not defined the term misconduct because of the wide scope and application of the term. Hence to understand the instances of misconduct we have to rely on decided cases. Some of the instances of Professional misconduct are as follows,

- 1) Dereliction of duty
- 2) Professional negligence
- 3) Misappropriation
- 4) Changing sides
- 5) Contempt of court and improper behaviour before a magistrate
- 6) Furnishing false information
- 7) Giving improper advice
- 8) Misleading the clients in court
- 9) Non speaking the truth
- 10) Disowning allegiance to court
- 11) Moving application without informing that a similar application has been rejected by another authority
- 12) Suggesting bribing the court officials
- 13) Forcing the prosecution witness not to tell the truth.

Contempt of Court AS Misconduct

In the recent case of ***B. M. Verma v. Uttarakhand Regulatory Commission*** court noted that, it was given the wide powers available with a Court exercising contempt jurisdiction. In the case of *Court of Its Own Motion v. State* dealing with the contempt proceedings involving two senior advocates, observed that 'given the wide powers available with a Court exercising contempt jurisdiction, it cannot afford to be hypersensitive and therefore, a trivial misdemeanor would not warrant contempt action. Circumspection is all the more necessary because as observed by the SC in *SC Bar Association v. Union of India* the Court is in effect the jury, the judge and the hangman; while in *M.R. Parashar H. L. Sehgal* it was observed that

the Court is also a prosecutor **Anil Kumar Sarkar v. Hirak Ghosh**, reiterates this.

In the most controversial and leading case of **R.K. Anand v. Registrar of Delhi High Court**, on 30th May, 2007 a TV news channel NDTV carried a report relating to a sting operation. The report concerned itself with the role of a defence lawyer and the Special Public Prosecutor in an ongoing Sessions trial in what is commonly called the BMW case. On 31st May, 2007 a Division Bench of this Court, on its own motion, registered a writ Petition and issued a direction to the Registrar General to collect all materials that may be available in respect of the telecast and also directed NDTV to preserve the original material including the CD/video pertaining to the sting operation. The question for our consideration is whether Mr. R.K. Anand and Mr. I.U. Khan, Senior Advocates and Mr. Sri Bhagwan Sharma, Advocate have committed criminal contempt of Court or not. It was observed that prima facie their acts and conduct were intended to subvert the administration of justice in the pending BMW case and in particular to influence the outcome of the pending judicial proceedings.

Accordingly, in exercise of powers conferred by Article 215 of the Constitution proceedings for contempt of Court (as defined in Section 2(c) of the Contempt of Courts Act, 1971) were initiated against Mr. Anand, Mr. Khan and Mr. Sri Bhagwan Sharma and they were asked to show because why they should not be punished accordingly. Court said that Courts of law are structured in such a design as to evoke respect and reverence for the majesty of law and justice. The machinery for dispensation of justice according to law is operated by the court. Proceedings inside the courts are always expected to be held in a dignified and orderly manner.

The very sight of an advocate, who was found guilty of contempt of court on the previous hour, standing in the court and arguing a case or cross-examining a witness on the same day, unaffected by the contemptuous behaviour he hurled at the court, would erode the dignity of the court and even corrode the majesty of it besides impairing the confidence of the public in the efficacy of the institution of the courts. This

necessitates vesting of power with the HC to formulate rules for regulating the proceedings inside the court including the conduct of advocates during such proceedings. That power should not be confused with the right to practice law. Thus court held that there may be ways in which conduct and actions of an advocate may pose a real and imminent threat to the purity of court proceedings cardinal to any court's functioning, apart from constituting a substantive offence and contempt of court and professional misconduct.

In such a situation the court does not only have the right but also the obligation to protect itself. Hence, to that end it can bar the advocate from appearing before the courts for an appropriate period of time. In the present case since the contents of the sting recordings were admitted and there was no need for the proof of integrity and correctness of the electronic materials. Finally the Supreme Court upheld High Court's verdict making Anand guilty on the same count. On the other hand, the Supreme Court let off I U Khan, who was found guilty by the High Court.

Attempt of Murder:

In the case of *Hikmat Ali khan v. Ishwar Prasad Arya and ors*, Ishwar Prasad Arya, respondent No. 1, was registered as an advocate with the Bar Council of Uttar Pradesh and was practicing at Badaun. An incident took place on May 18, 1971 during lunch interval at about 1.55 p.m., in which respondent No. 1 assaulted his opponent Radhey Shyam in the Court room of Munsif/Magistrate, Bisauli at Badaun with a knife. A pistol shot is also said to have been fired by him at the time of incident. After investigation he was prosecuted for offences under Section 307 of the Indian Penal Code and Section 25 of the Arms Act. The 1st Temporary Civil and Sessions Judge, by his judgment dated July 3, 1972, convicted him of the said offence and sentenced him to undergo rigorous imprisonment for three years for the offence under Section 307, I.P.C. and for a period of nine months for offence under Section 25 of the Arms Act.

On the basis of the said complaint disciplinary proceedings were initiated against respondent No. 1 by the Bar Council of U.P. he was found guilty of gross professional mis-conduct by taking the benefit himself of a forged and fabricated document which had been prepared at his behest. The Disciplinary Committee of the Bar Council of U.P. directed that respondent No. 1 be debarred from practicing as an advocate for a period of two years from the date of the service of the order. Respondent No. 1 filed an appeal, the said appeal was allowed by the Disciplinary Committee of the Bar Council of India by order dated June 8, 1984 and the order of the Disciplinary Committee of the Bar Council of U.P. dated January 30, 1982 was set aside on the view that there was no material on the basis of which it could reasonably be held that respondent No. 1 had prepared the document which was subsequently found forged.

Further the submission of Shri Markendaya was that having regard to the gravity of the misconduct of respondent No. 1 in assaulting his opponent in the Court room with a knife and his having been committed the offence under Section 307, I.P.C. and his being sentenced to undergo rigorous imprisonment for three years in connection with the said incident, the punishment of removal of the name of respondent No. 1 from the roll of advocates should have been imposed on him and that the Disciplinary Committee of the Bar Council of U. P. was in error in imposing the light punishment of debarring respondent No. 1 from practicing as an advocate for a period of three years only and that this was a fit case in which the appeal filed by the appellant should have been allowed by the Disciplinary Committee of the Bar Council of India.

It was held that the acts of mis-conduct found established are serious in nature. Under Sub-section (3) of Section 35 of the Act the Disciplinary Committee of the State Bar Council is empowered to pass an order imposing punishment on an advocate found guilty of professional or other misconduct. Such punishment can be reprimand [Clause (b)], suspension from practice for a certain period [Clause (c)] and removal of the name of the advocate from the State roll of advocate [Clause (d)], depending on the

gravity of the mis-conduct found established. The punishment of removal of the name from the roll of advocates is called for where the misconduct is such as to show that the advocate is unworthy of remaining in the profession.

In this context, it may be pointed out that under Section 24(A) of the Act a person who is convicted of an offence involving moral turpitude is disqualified for being admitted as an advocate on the State roll of advocates. This means that the conduct involving conviction of an offence involving moral turpitude which would disqualify a person from being enrolled as an advocate has to be considered a serious misconduct when found to have been committed by a person who is enrolled as an advocate and it would call for the imposition of the punishment of removal of the name of the advocate from the roll of advocates.

In the instant case respondent No. 1 has been convicted of the offence of attempting to commit murder punishable under Section 307, IPC. He had assaulted his opponent in the Court room with a knife. The gravity of the mis-conduct committed by him is such as to show that he is unworthy of remaining in the profession. The said mis-conduct, therefore, called for the imposition of the punishment of removal of the name of respondent No. 1 from the State roll of advocates and the Disciplinary Committee of the Bar Council of U. P., in passing the punishment of debarring respondent No. 1 from practicing for a period of three years, has failed to take note of gravity of the misconduct committed by respondent No. 1.

Having regard to the facts of the case the proper punishment to be imposed on respondent No. 1 under Section 35 of the Act should have been to direct the removal of his name from the State roll of advocates. The appeal filed by the appellant, therefore, deserves to be allowed. Finally court held that the respondents name should be removed from the rolls.

Misbehavior as Misconduct

Vinay Chandra Mishra, in re; In this case a senior advocate in on being asked a question in the court started to shout at the judge and said

that no question could have been put to him. He threatened to get the judge transferred or see that impeachment motion is brought against him in Parliament. He further said that he has turned up many Judges and created a good scene in the Court. He asked the judge to follow the practice of this Court. He wanted to convey that admission is as a course and no arguments are heard, at this stage.

But this act was not only the question of insulting of a Judge of this institution but it is a matter of institution as a whole. In case dignity of Judiciary is not being maintained then where this institution will stand. The concerned judge wrote a letter informing the incident to the chief justice of India. A show cause notice was issued to him.

Whether the advocate had committed a professional misconduct? Is he guilty of the offence of the criminal contempt of the Court for having interfered with and obstructed the course of justice by trying to threaten, overawe and overbear the Court by using insulting, disrespectful and threatening language, and convict him of the said offence? Since the contemnor is a senior member of the Bar and also adorns the high offices such as those of the Chairman of the Bar Council of India, the President of the U.P. HC Bar Association, Allahabad and others, his conduct is bound to infect the members of the Bar all over the country.

We are, therefore, of the view that an exemplary punishment has to be meted out to him. Thus the contemnor Vinay Chandra Mishra is hereby sentenced to undergo simple imprisonment for a period of six weeks and he shall stand suspended from practicing as an advocate for a period of three years.

Strike as Misconduct

Ex-capt. Harish uppal V. Union of India, Several Petitions raises the question whether lawyers have a right to strike and/or give a call for boycotts of Court/s. The petitioners submitted that strike as a mean for collective bargaining is recognized only in industrial disputes. He submitted that lawyers who are officers of the Court cannot use strikes as a means to

blackmail the Courts or the clients. He submitted that the Courts must take action against the Committee members for giving such calls on the basis that they have committed contempt of court.

He submitted that the law is that a lawyer who has accepted a Vakalat on behalf of a client must attend Court and if he does not attend Court it would amount to professional misconduct and also contempt of court. He submitted that Court should now frame rules whereby the Courts regulate the right of lawyers to appear before the Court. He submitted that Courts should frame rules whereby any lawyer who mis-conducts himself and commits contempt of court by going on strike or boycotting a Court will not be allowed to practice in that Court.

He further submitted that abstention from work for the redressal of a grievance should never be resorted to where other remedies for seeking redressal are available. He submitted that all attempts should be made to seek redressal from the concerned authorities.

He submitted that where such redressal is not available or not forthcoming, the direction of the protest can be against that authority and should not be misdirected, e.g., in cases of alleged police brutalities Courts and litigants should not be targeted in respect of actions for which they are in no way responsible. He agreed that no force or coercion should be employed against lawyers who are not in agreement with the “strike call” and want to discharge their professional duties. Respondent submitted that lawyers had a right to go on strike or give a call for boycott.

He further submitted that there are many occasions when lawyers require going, on strike or gave a call for boycott. He submitted that this Court laying down that going on strike amounts to misconduct is of no consequence as the Bar Councils have been vested with the power to decide whether or not an Advocate has committed misconduct. He submitted that this Court cannot penalize any Advocate for misconduct as the power to discipline is now exclusively with the Bar Councils. He submitted that it is for the Bar Councils to decide whether strike should be resorted to or not.

Petitioner further relied on the case of Lt. Col. S.J. **Choudhary v. State (Delhi Administration)**, the HC had directed that a criminal trial go on from day to day. Before this Court it was urged that the Advocates were not willing to attend day to day as the trial was likely to be prolonged. It was held that it is the duty of every advocate who accepts a brief in a criminal case to attend the trial day to day. It was held that a lawyer would be committing breach of professional duties if he fails to so attend.

In the case of **K. John Koshy and Ors. v. Dr. Tarakeshwar Prasad Shaw**, one of the questions was whether the Court should refuse to hear a matter and pass an Order when counsel for both the sides were absent because of a strike call by the Bar Association. This Court held that the Court could not refuse to hear the matter as otherwise it would tantamount to Court becoming a privy to the strike.

Considering the sanctity of the legal profession the court had relied on words said in case of “In **Indian Council of Legal Aid and Advice v. Bar Council of India**, the SC observed thus: “It is generally believed that members of the legal profession have certain social obligations, e.g., to render “*pro bono publico*” service to the poor and the underprivileged. Since the duty of a lawyer is to assist the court in the administration of justice, the practice of law has a public utility flavour and, therefore, an advocate must strictly and scrupulously abide by the Code of Conduct behaving the noble profession and must not indulge in any activity which may tend to lower the image of the profession in society. That is why the functions of the Bar Council include the laying down of standards of professional conduct and etiquette which advocates must follow to maintain the dignity and purity of the profession.”

In Re: Sanjeev Datta, the SC has stated thus: “The legal profession is a solemn and serious occupation. It is a noble calling and all those who belong to it are its honorable members. Although the entry to the profession can be had by acquiring merely the qualification of technical competence, the honour as a professional has to be maintained by its members by their exemplary conduct both in and outside the Court.

The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of the civilized society. Both as a leading member of the intelligentsia of the society and as a responsible citizen, the lawyer has to conduct himself as a model for others both in his professional and in his private and public life. The society has a right to expect of him such ideal behavior. It must not be forgotten that the legal profession has always been held in high esteem and its members have played an enviable role in public life.

The regard for the legal and judicial systems in this country is in no small measure due to the tireless role played by the stalwarts in the profession to strengthen them. They took their profession seriously and practice it with dignity, deference and devotion. If the profession is to survive, the judicial system has to be vitalized. No service will be too small in making the system efficient, effective and credible.”

In the case of *SC Bar Association v. Union of India*, it has been held that professional misconduct may also amount to Contempt of Court. It has further been held as follows: “An Advocate who is found guilty of contempt of court may also, as already noticed, be guilty of professional misconduct in a given case but it is for the Bar Council of the State or Bar Council of India to punish that advocate by either debarring him from practice or suspending his licence, as may be warranted, in the facts and circumstances of each case. The learned Solicitor General informed us that there have been cases where the Bar Council of India taking note of the contumacious and objectionable conduct of an advocate, had initiated disciplinary proceedings against him and even punished him for “professional misconduct”, on the basis of his having been found guilty of committing contempt of court.”

Solicitation of Professional Work

Rajendra V. Pai V. Alex Fernandes and Ors. Court held that debarring a person from pursuing his career for his life is an extreme punishment and calls for caution and circumspection before being passed.

No doubt probity and high standards of ethics and morality in professional career particularly of an advocate must be maintained and cases of proved professional misconduct severely dealt with; yet, we strongly feel that the punishment given to the appellant in the totality of facts and circumstances of the case is so disproportionate as to prick the conscience of the Court. Undoubtedly, the appellant should not have indulged into prosecuting or defending a litigation in which he had a personal interest in view of his family property being involved.

Breach of Trust By Misappropriating The Asset Of Client **Harish Chandra Tiwari v. Baiju**; Court held on these fact, Appellant Harish Chandra Tiwari was enrolled as an advocate with the Bar Council of the State of UP in May 1982 and has been practicing since then, mainly in the courts at Lakhimpur Kheri District in UP. Respondent Baiju engaged the delinquent advocate in a land acquisition case in which the respondent was a claimant for compensation.

The Disciplinary Committee has described the respondent as “an old, helpless, poor illiterate person.” Compensation of Rs. 8118/- for the acquisition of the land of the said Baiju was deposited by the State in the court. Appellant applied for releasing the amount and as per orders of the court he withdrew the said amount on 2.9.1987.

But he did not return it to the client to whom it was payable nor did he inform the client about the receipt of the amount. Long thereafter, when the client came to know of it and after failing to get the amount returned by the advocate, complaint was lodged by him with the Bar Council of the State for initiating suitable disciplinary action against the appellant. Court held that among the different types of misconduct envisaged for a legal practitioner misappropriation of the client’s money must be regarded as one of the gravest. In this professional capacity the legal practitioner has to collect money from the client towards expenses of the litigation, or withdraw money from the court payable to the client or take money of the client to be deposited in court.

In all such cases, when the money of the client reaches his hand it is a trust. If a public servant misappropriates money he is liable to be punished under the present Prevention of Corruption Act, with imprisonment which shall not be less than one year. He is certain to be dismissed from service. But if an advocate misappropriates money of the client there is no justification in de-escalating the gravity of the misdemeanor. Perhaps the dimension of the gravity of such breach of trust would be mitigated when the misappropriation remained only for a temporary period. There may be justification to award a lesser punishment in a case where the delinquent advocate returned the money before commencing the disciplinary proceedings.

Informing About Bribe

Shambhu Ram Yadav v. Hanuman Das Khattry, the Court upheld the order of bar council of India dated 31st July 1999, which held that the appellant has served as advocated for 50 years and it was not expected of him to indulge in such a practice of corrupting the judiciary or offering bribe to the judge and he admittedly demanded Rs.10,000/- from his client and he orally stated that subsequently order was passed in his client's favour.

This is enough to make him totally unfit to be a lawyer by writing the letter in question. We cannot impose any lesser punishment than debarring him permanently from the practice .His name should be struck off from, the roll of advocates maintained by the Bar Council of Rajasthan. Hereafter the appellant will not have any right to appear in any Court of Law, Tribunal or any authority. Court imposes a cost of Rs. 5,000/- to the appellant which should be paid by the appellant to the Bar Council of India which has to be within two months.

The list of instances of professional misconduct is not exhaustive, the Supreme Court has widened the scope and ambit of the term misconduct in numerous instances, only few cases has been elaborated above.

Sl. No.	Instance of misconduct	Held in Case	Citation
1	Retention of money deposited with advocate for the decree holder even after execution proceedings	<i>Prahlad Saran Gupta v. Bar council of India</i>	AIR 1997.SC.1338
2	Misguiding Junior Advocate	<i>Harish Chander Singh v. SN Tripathi</i>	AIR. 1997 SC 879
3	Assaulting opponent with Knife in Court room	<i>Hikmat AliKhan v. Ishwar Prasad Arya</i>	AIR 1997. SC 864
4	Scandalisation against Judge	<i>In re DC Saxena</i>	AIR 1996 SC 2481
5	Attending court with fire arm	<i>UP Sales tax service association v taxation Bar Association, Agra</i>	AIR 1996.SC 98
6	Discussion of the conduct of judge and pass resolution by bar council, bar association or group of practicing advocates	<i>C Ravichandran Iyer v Justice AM Bhattacharjee</i>	1995. (2) KLT, SN 56 case no 77.
7	Failure to return will executed and kept in safe custody	<i>John D Souza v Edward Ani</i>	1994. SC 975
8	Constant abstention from conducting of cases	<i>Onkar Singh V Angrez Singh</i>	1993, (1) KLT 650, P&H High Court.
9	Misappropriation of amount paid	<i>DS Dalai V State Bank of India JS Jadhav v Mustafa Haji Mohamed Yusuf</i>	AIR 1993 SC 1608 / AIR 1993. SC 1535
10	Attesting forged affidavit	<i>M Veerendra Rao v Tek Chand</i>	AIR 1985 SC 28
11	Failure to attend trial after accepting the brief	<i>SJ Choudhary v State</i>	AIR 1984 SC 618
12	Improper legal advice	<i>PD Khandekar v Bar Council of Maharashtra</i>	AIR 1984 SC 110
13	Misappropriation of Decretal amount	<i>KV Umre v Venubai</i>	AIR 1983 SC 1154
14	Taking money from client for the purpose of giving bribe	<i>Chandra Sekhar Soni v Bar Council of Rajasthan</i>	AIR 1983 SC 1012
15	Rushing towards potential clients and snatching briefs	<i>The bar Council of Maharashtra v MV</i>	AIR 1976 SC 242

		<i>Dabholkar</i>	
16	Taking advantage of the ignorance and illiteracy of the clients	<i>NA Mirzan V the disciplinary committee of the Bar council of Maharashtra</i>	AIR 1972 SC 46
17	Appearing without authority on a forged vakalat	<i>In re advocate</i>	AIR 1971 Ker 161
18	Advertising profession	<i>CD Sekkizhar v Secretary, Bar Council, Madras.</i>	AIR 1967 Mad. 35
19	Gross negligence involving moral turpitude	<i>In the matter of P an Advocate and VP Kumaravelu v the Bar council of India</i>	AIR 1963. SC 1313 / AIR 1997 SC 1014
20	Coercing Colleagues	<i>In re Badri Narin</i>	AIR 1960 Pt. 307
21	Appearing for both sides	<i>Rambharosa Kalar v Surendra nath Thakur</i>	AIR 1960 MP 81
22	False identification of Deponents	<i>Brahma din and others v Chandrasekhar Shukla</i>	AIR 1958 AP 116
23	Indecent cross examination	<i>Shri Narain Jafa v. The Hon. Judges of the High Court, Allahabad</i>	AIR 1953 SC 368
24	Shouting political slogans and holding demonstrations in court	<i>In the matter of a pleader, Ottapalam</i>	AIR 1943, Mad. 130
25	Attending court in drunken state	<i>In the matter of a lower grade pleader</i>	AIR 1934 Rang. 423
26	Breach of trust	<i>Bapurao Pakhiddey v. Suman Dondey</i>	1999 (2) SCC 442
27	bribe	<i>Purushottam Eknath Nemade v. DN Mahajun</i>	1999 (20) SCC 215
28	Fraud and forgery	<i>LC Goyal v. Nawal Kishore and Devender Bhai Shanker Mehta v. Ramesh Chandra Vithal Dass Seth</i>	1997 (2) SCC 258 / AIR 1996 SC 2022

Procedure followed on the Notice of Professional Misconduct
the following is the procedure followed

(1) In exercise of powers under Section 35 contained in Chapter V entitled “conduct of advocates”, on receipt of a complaint against an advocate (or *suo motu*) if the State Bar Council has ‘reason to believe’ that any advocate on its roll has been guilty of “professional or other misconduct”, disciplinary proceeding may be initiated against him.

(2) Neither Section 35 nor any other provision of the Act defines the expression ‘legal misconduct’ or the expression ‘misconduct’.

(3) The Disciplinary Committee of the State Bar Council is authorized to inflict punishment, including removal of his name from the rolls of the Bar Council and suspending him from practice for a period deemed fit by it, after giving the advocate concerned and the ‘Advocate General’ of the State an opportunity of hearing.

(4) While under Section 42(1) of the Act the Disciplinary Committee has been conferred powers vested in a civil court in respect of certain matters including summoning and enforcing attendance of any person and examining him on oath, the Act which enjoins the Disciplinary Committee to ‘afford an opportunity of hearing’ (vide Section 35) to the advocate does not prescribe the procedure to be followed at the hearing.

(5) The procedure to be followed in an enquiry under Section 35 is outlined in Part VII of the Bar Council of India Rules made under the authority of Section 60 of the Act. Rule 8(1) of the said Rules enjoins the Disciplinary Committee to hear the concerned parties that is to say the complainant and the concerned advocate as also the Attorney General or the Solicitor General or the Advocate General. It also enjoins that if it is considered appropriate to take oral evidence the procedure of the trial of civil suits shall as far as possible be followed.

Critique

The advocates act 1961 was a long sought after legislation to consolidate the law relating to the legal Practitioners, constitution of autonomous Bar Councils, prescription of uniform qualification for admission and enrolment of persons as advocates, more importantly it

imposes punishment for professional misconduct by advocates and in that respect it acts as a quasi-judicial body. Only body that can be approached for professional misconduct of advocate is Bar Council constituted under the Act except for contempt of court which is also misconduct. However the following criticisms are leveled against the Act in terms of its power to punish for professional and other misconduct;

1) No provision of appeal is provided in the act in respective High courts; hence power of bar Council of the State is equated with that of High court.

2) In ordinary course it is difficult for an advocate to approach the Supreme Court and get the case admitted from an aggrieved order of the Bar Council of India.

3) The act has not defined the term misconduct, instead it has included professional and other misconduct and definition is left to the Bar councils and Supreme Court to decide and to widen the scope.

4) Denial of the principle of natural justice to an ordinary litigant who is aggrieved with the misconduct of the advocate, as the body of their association ie Bar Council is deciding the case in which their own member is the respondent. This is against the rule that “no man can be a judge in his own case”. The lay person has to approach appropriate fora constituted under Consumer Protection act 1986 to get any pecuniary relief due to the loss caused by such misconduct, if it fits under deficiency of service.

5) At times, based on the circumstances the Act is violative of Article 19 (1) (g), right to practice trade or profession, and also freedom of speech and expression enshrined in Article 19(1)(a).

However the intention of the legislature to uphold the dignity of the profession and to preserve the moral etiquette among legal Practitioners has been largely achieved by the Act.

Section 42 of Advocates Act, 1961 - Powers of disciplinary committee –

(1) The disciplinary committee of the Bar Council shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters, namely;-

- a. summoning and enforcing the attendance of any person and examining him on oath ;
- b. requiring discovery and production of any documents ;
- c. receiving evidence on affidavits ;
- d. requisitioning any public record or copies thereof from any court or office ;
- e. issuing commissions for the examination of witness or documents ;
- f. any other matter which may be prescribed ;

Provided that no such disciplinary committee shall have the right to require the attendance of

- a. any presiding officer of a court except with the previous sanction of the High Court to which court is subordinate ;
- b. any officer of a revenue court except with the previous sanction of the State Government.

(2) All proceedings before a disciplinary committee of a Bar Council shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code, 1860 (45 of 1860), and every such disciplinary committee shall be deemed to be a civil court for the purpose of sections 480, 482 and 485 of Code of Criminal Procedure, 1898 (5 of 1898).

(3) For the purpose of exercising any of the powers conferred by sub section (1), a disciplinary committee may send to any civil court in the territories to which this Act extends, any summons or other process, for the attendance of a witness or the production of a document required by the committee or any commission which it desires to issue, and civil court shall cause such process to be served or such commission to be issued as the case may be, and may enforce any such process as if it were a process for attendance or production before itself.

(4) (Note:- *Sub-sections (4) and (5) ins. by Act 60 of 1973, sec.32*) Notwithstanding the absence of the Chairman or any member of a disciplinary committee on a date fixed for the hearing of a case before it, the disciplinary committee may, if it so thinks fit, hold or continue the proceedings on the date so fixed and no such proceedings and no order made by the disciplinary committee in any such proceedings shall be invalid merely by reason of the absence of the Chairman or member thereof on any such date.

Provided that no final orders of the nature referred to in sub-section (3) of Section 35 can be made in any proceedings unless the Chairman and other members of the disciplinary committee are present.

(5) Where no final order of the nature referred to in sub section (3) of section 35 can be made in any proceedings in accordance with the opinion of the Chairman and the members of a disciplinary committee either for want of majority opinion amongst themselves or otherwise, the case, with their opinion thereon, shall be laid before the Chairman of the Bar Council concerned or if the Chairman if the Bar Council is acting as the Chairman or a member of the disciplinary committee, before the Vice Chairman of the Bar Council, and the said Chairman or the Vice Chairman of the Bar Council, as the case may be, after such hearing as he thinks fit, shall deliver his opinion and the final order of the disciplinary committee shall follow such opinion.

Unit- V

GENDER BASED DEVIANCE – SEXUAL HARASSMENT

Introduction

India has articulated its commitment to eliminating violence against women and girls through numerous policies, laws and programmes (for example, the National Policy for the Empowerment of Women 2001, the Protection of Women from Domestic Violence Act 2005, and the strategies outlined in the XI Five-Year Plan).

However, violence against women remains widespread. Nationally, one in three (35%) women aged 15–49 has experienced physical or sexual violence, in general, increasing to 56 percent among women in Bihar.

The key challenge underlying the gap between policy and programme commitments and realities is the limited evidence on both what drives violence against women and girls, and effective programme strategies that reduce such violence.

Deviance & Gender

Early studies on deviance largely ignored the intersections of deviance and gender in society. However, recent researches have been able to better understand and define deviance by examining the points where deviance and gender converge. Although theories regarding social deviance have been generated for decades, it is only recently that theorists have begun to explore the intersections between deviance, crime and gender. The principle theories are Control Balance Theory, Self Control Theory, Differential Association Theory examines these theories using a gender specific lens.

By definition, deviance is any action or activity that differs from accepted social standards or what society deems to be normal. Early studies on deviance largely ignored the intersections of deviance and gender in society. However, recent researches have been able to better understand and

define deviance by examining the points where deviance and gender converge.

Today what is considered to be deviant behavior continues to evolve. Consider how views of homosexuality have changed over the past decades. Once considered deviant behavior by the majority of people and the American Psychological Association (APA), it is now viewed as an innate trait and accepted by many people in society, and the APA has dropped it from its diagnostic manual.

The evolving nature of what is considered to be deviant makes deviance a bit difficult to understand from a sociological perspective. However, understanding deviance and its impacts on people within a society helps to inform how people deal with the roles imposed on them by society and how society works to maintain these social roles. Hence, many theories of deviance have been developed, and many researches have examined the differences in perceived deviance in males and females. Some of the more prevalent theories here discussed are control balance theory, self-control theory and differential association theory.

Control Balance Theory

This theory, devised by Charles Tittle (1995), claims that the types of deviance in which one engages are based on a control ratio –

Control balance theorists believe deviance will occur when all three of the following factors are present:

- The person is motivated toward deviance by virtue of temperament or situational circumstances,
- Constraint (i.e., the risk of being caught or punished) is perceived as low, and

* Opportunity is present.

If one of these factors is absent, the deviance is less likely to occur. This theory clearly reveals the convergence of deviance and gender by taking into account the differences in how females and males are socialized in society.

Self-Control Theory

This theory purports to have identified one of the major causes of deviant behavior. Gottfredson and Hirschi (1990) hypothesize that the amount of self-control one has is predictive of how likely one will engage in socially deviant behavior.

Self-control theorists suggest that propensity for self-control is established during childhood, is correlated to the quality of child rearing practiced by parents, and is unlikely to change much during one's lifetime.

Differential Association Theory

Older people always have a saying that helps describe what they have learned from life experience, such as "Birds of a feather flock together," meaning people who are similar will hang out with each other. That is the gist of the differential association theory, except in reverse: according to the theory, people tend to adopt the behaviors of the group, rather than deviant people seeking out groups who are deviant. This is more a case of peer influence than one of peer pressure.

Sexual Harassment

Sexual and gender-based harassment are forms of gender-based violence which violate important human rights. Incidents of sexual harassment occur every day in every space.

Sexual harassment is a type of discrimination based on sex involving unwanted comments or behaviour that intimidate, offend, or humiliate another person. Examples include:

Asking for sex in exchange for a benefit (e.g. a promotion or a passing grade)

Unwanted touching

Calling people sex-specific derogatory names

Gender-based harassment

It is a form of sexual harassment involving behaviour that reinforces heteronormative gender roles. Examples include:

Making gender-related comments about a person's appearance or mannerisms

Bullying someone using gender-related comments or conduct

Treating a person badly because they don't fit stereotypic gender roles

Sexual Harassment - What is a myth & what is reality?

Myths	Realities
Sexual harassment is no big deal <ul style="list-style-type: none"> ▪ It is an invention of feminists ▪ Women exaggerate the impacts ▪ It's not like she was raped 	It is a violation of human rights. It is a violation of various federal, provincial/territorial and/or municipal legislations.
It is a "deviant" or rare event Men who harass must be perverse, ugly, sexually frustrated – not regular guys It only happens to women in male-dominated fields	Sexual harassment is a widespread problem. Anyone can be sexually harassed; however, subordinated groups (e.g. women, LGBTQ people, people with disabilities) are targeted more often. Street harassment can be sexist, racist, transphobic, homophobic, ableist, sizeist and/or classist.

<p>It is “normal” behaviour between sexes It’s innocent flirtation/sexual attraction Women are being hyper-sensitive</p>	<p>It is not part of courtship; nor about unrequited love or romantic attraction. It is often used to express power over another person. It is discrimination</p>
<p>He didn’t mean to do it He was having fun/drinking and got carried away He’s a good guy/my friend/co-worker</p>	<p>Sexual harassment is intentional behaviour. Often, it re-asserts gender, race, age or class hierarchies within environments (school, work, street) in harmful ways.</p>
<p>Stopping/reporting sexual harassment is easy Women file reports lightly Women easily gain the upper hand by reporting She can verbally protest She can avoid harm if she wants to</p>	<p>There are many barriers to reporting that silence women or lead them to minimize, ignore or “put up” with harassment. Sometimes reporting creates additional problems for victims: e.g. s/he may be ostracized by co-workers, not believed, or pay for being a “whistle-blower”.</p>
<p>“Reactions” to sexual harassment are the real problem Results in political correctness Ruins “normal relationships” Stops people from having fun</p>	<p>Sexual harassment causes negative consequences (e.g. poor health, loss of earning potential). Its repercussions should never be blamed on the person being harassed.</p>
<p>She asked for it She chose to work in a male environment She wears sexy clothes</p>	<p>Everyone has the right to learn, work and be in settings free from discrimination.</p>

Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

Workplace sexual harassment is a form of gender discrimination which violates a woman's fundamental *right to equality and right to life, guaranteed under Articles 14, 15 and 21 of the Constitution of India.*

Workplace sexual harassment not only creates an insecure and hostile working environment for women but also impedes their ability to deliver in today's competing world. Apart from interfering with their performance at work, it also adversely affects their social and economic growth and puts them through physical and emotional suffering.

India's first legislation specifically addressing the issue of workplace sexual harassment; the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("**POSH Act**") was enacted by the Ministry of Women and Child Development, India in 2013.

The Government also subsequently notified the rules under the POSH Act titled the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 ("**POSH Rules**").

The year 2013 also witnessed the promulgation of the Criminal Law (Amendment) Act, 2013 ("Criminal Law Amendment Act") which has criminalized offences such as sexual harassment, stalking and voyeurism.

The POSH Act has been enacted with the objective of preventing and protecting women against workplace sexual harassment and to ensure effective redressal of complaints of sexual harassment.

The Supreme Court, in the Vishaka Judgment, laid down certain guidelines making it mandatory for every employer to provide a mechanism to redress grievances pertaining to workplace sexual harassment ("**Vishaka Guidelines**") which were being followed by employers until the enactment of the POSH Act.

As per the **Vishaka judgment**, ‘*Sexual Harassment*’ includes such *unwelcome sexually determined behavior (whether directly or by implication)* as:

- a. *Physical contact and advances*
- b. *A demand or request for sexual favours;*
- c. *Sexually coloured remarks;*
- d. *Showing pornography;*
- e. *Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.*

Post Vishaka – Some Other Judgments

Apparel Export Promotion Council v. A.K Chopra

Medha Kotwal Lele & Ors. V. Union of India & Ors.

Key Provisions of the POSH Act

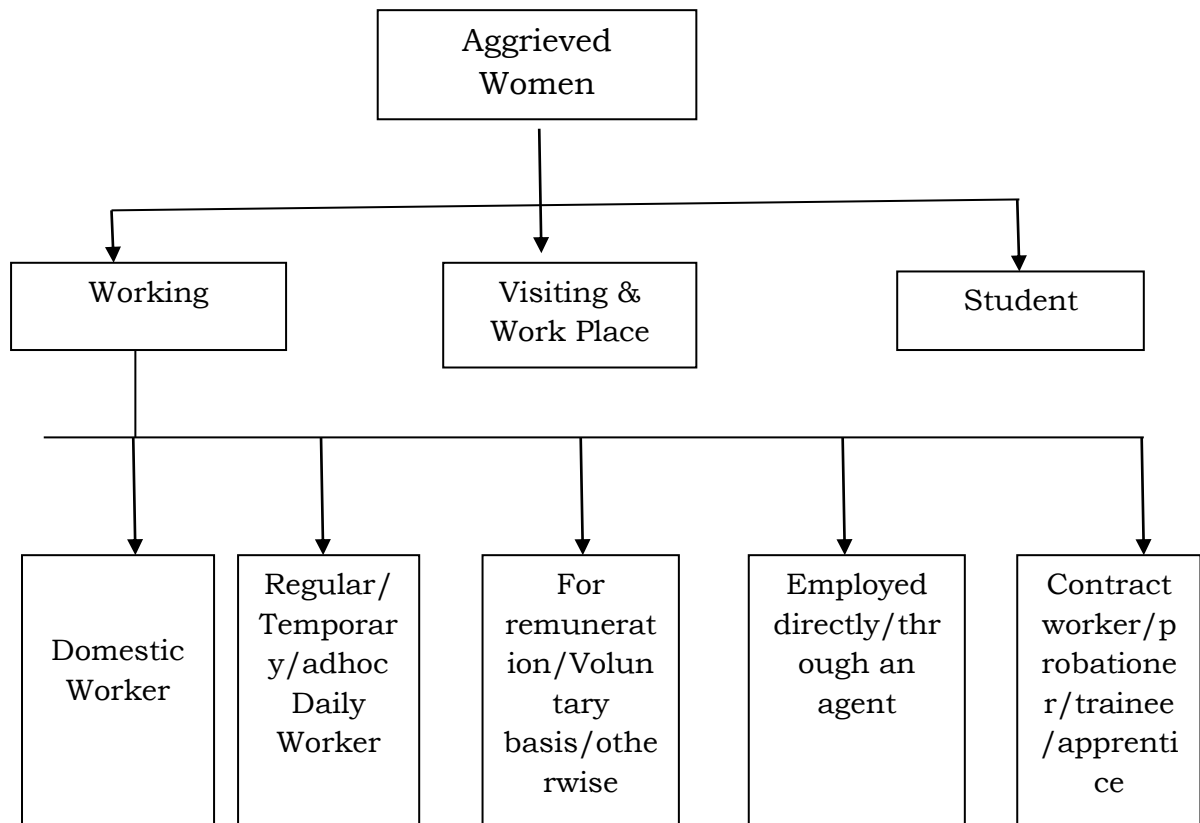
Applicability and scope

Applicable Jurisdiction: The POSH Act extends to the ‘whole of India’
(**Section 1 of the POSH Act**)

Aggrieved Woman:

As per the POSH Act, an ‘aggrieved woman’ in relation to a workplace, is a woman of any age, whether employed or not, who alleges to have been subjected to any act of sexual harassment. (Section 2(a))

The POSH Act further stipulates that a woman shall not be subjected to sexual harassment at her workplace. (Section 3) Accordingly, it may be noted that in order for a woman to claim protection under the POSH Act, the incident of sexual harassment should have taken place at the ‘workplace’.



What amounts to Sexual Harassment?

The POSH Act defines 'sexual harassment' in line with the Supreme Court's definition of 'sexual harassment' in the Vishaka Judgment. As per the POSH Act, 'sexual harassment' includes unwelcome sexually tinted behaviour, whether directly or by implication, such as

(i) physical contact and advances,

(ii) demand or request for sexual favours,

(iii) making sexually coloured remarks,

(iv) showing pornography, or

(v) any other unwelcome physical, verbal or non-verbal conduct of a sexual nature. (Section 2(n))

The following circumstances, among other circumstances, if they occur or are present in relation to or connected with any act or behaviour of sexual harassment may amount to sexual harassment:

- ✓ implied or explicit promise of preferential treatment in employment;
- ✓ implied or explicit threat of detrimental treatment in employment;
- ✓ implied or explicit threat about present or future employment status;
- ✓ interference with work or creating an intimidating or offensive or hostile work environment; or

Humiliating treatment likely to affect the lady employee's health or safety. **(Section 3(2))**

Complaints Committee

An important feature of the POSH Act is that it envisages the setting up of a grievance redressal forum.

Internal Complaints Committee

The POSH Act requires an employer to set up an 'internal complaints committee' ("**ICC**") at each office or branch, of an organization employing 10 or more employees, to hear and redress grievances pertaining to sexual harassment. (Section 4)

Constitution of the ICC

Presiding Officer Woman employed at a senior level at the workplace from amongst the employees.

Members Not less than 2 members from amongst employees.

Preferably committed to the cause of women or who have had experience in social work or have legal knowledge.

External member From an NGO or association committed to the cause of women or person familiar with issues relating to sexual harassment.

Not less than half of the ICC Members shall be women

The term of the ICC Members shall not exceed 3 years

A minimum of 3 Members of the ICC including the Presiding Officer are to be present for conducting the inquiry.

Local Complaints Committee

At the district level, the Government is required to set up a 'local complaints committee' ("LCC") to investigate and redress complaints of sexual harassment from the unorganized sector or from establishments where the ICC has not been constituted on account of the establishment having less than 10 employees or if the complaint is against the employer. (Section – 5) The LCC has special relevance in cases of sexual harassment of domestic workers or where the complaint is against the employer himself or a third party who is not an employee.

Constitution of the LCC

Chairperson shall be an eminent woman in the field of social work and committed to the cause of women.

Local Woman One of the members to be nominated from amongst the women working in block, taluka, tehsil or ward or municipality in the district.

NGO member's Two members, out of which, at least one shall be a woman to be nominated from a NGO or an association committed to the cause of women or a person familiar with issues pertaining to sexual harassment

At least one of the members should have a background in law.

At least one of the members should be a woman belonging to the Scheduled Castes or Scheduled Tribes.

Powers of the ICC/LCC

The POSH Act stipulates that the ICC and LCC shall, while inquiring into a complaint of workplace sexual harassment, have the same powers as vested in a civil court under the Code of Civil Procedure, 1908 when trying a suit in respect of:

- i. summoning and enforcing the attendance of any person and examining him on oath;
- ii. requiring the discovery and production of documents; and
- iii. any other matter which may be prescribed. (Section 11(3))

Complaint mechanism

An aggrieved woman who intends to file a complaint is required to submit six copies of the written complaint, along with supporting documents and names and addresses of the witnesses to the ICC or LCC, within 3 months from the date of the incident and in case of a series of incidents, within a period of 3 months from the date of the last incident.

Prompt reporting of an act of sexual harassment is probably as important as swift action to be taken by the authorities on receiving a complaint.

The law also makes provisions for friends, relatives, co-workers, psychologist & psychiatrists, etc. to file the complaint in situations where the aggrieved woman is unable to make the complaint on account of physical incapacity, mental incapacity or death. **(Section – 6)**

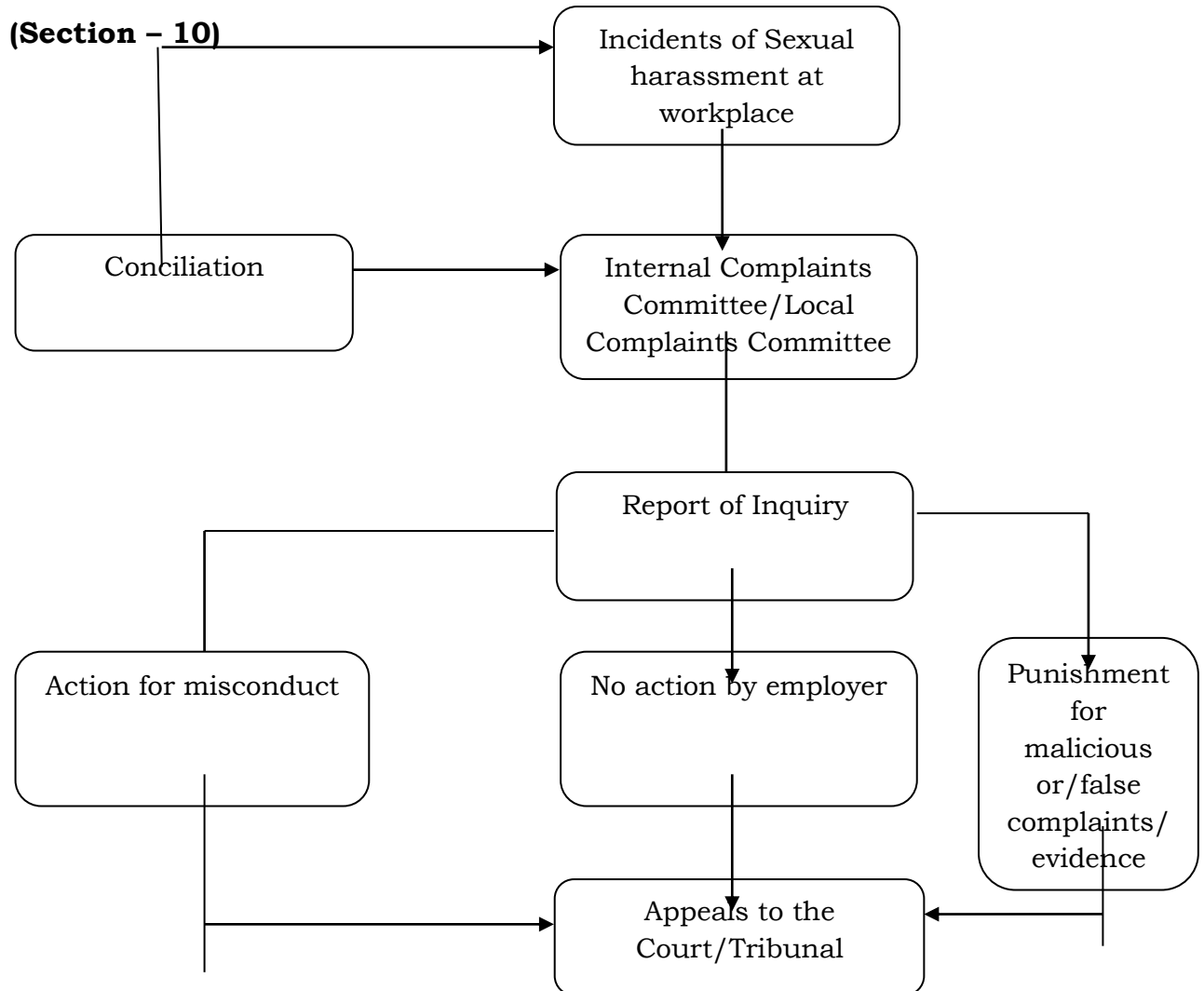
Given that the POSH Act and the POSH Rules do not prescribe any format in which the complaint needs to be filed.

Conciliation

Before initiating action on a complaint, the ICC on the request of the aggrieved woman, can make efforts to settle the matter between the parties through conciliation by bringing about an amicable settlement.

Conciliation is basically an informal method of resolving complaints before the complaint escalates into a fully blown formal inquiry.

Thus, after a complaint of sexual harassment has been lodged, the aggrieved woman may request the ICC to resolve the matter by conciliating between the parties before commencement of the inquiry proceedings, although monetary settlement should not be made as a basis of conciliation.



Timelines

Written complaints (6 copies) along with supporting documents and names and addresses of witnesses have to be filed within 3 months of the date of the incident. Timeline extendable by another 3 months.

Upon receipt of the complaint, 1 copy of the complaint is to be sent to the respondent within 7 days.

Upon receipt of the copy of complaint, the respondent is required to reply to the complaint along with a list of supporting documents, and names and addresses of witnesses within 10 working days.

The Inquiry has to be completed within a total of 90 days from the receipt of the complaint.

The Inquiry report has to be issued within 10 days from the date of completion of inquiry.

The employer is required to act on the recommendations of the ICC/LCC within 60 days of receipt of the Inquiry report.

Appeal against the decision of the committee is allowed within 90 days from the date of recommendations.

Interim Reliefs

At the request of the complainant, the ICC or the LCC (as the case maybe) may recommend to the employer to provide interim measures such as:

- i.** transfer of the aggrieved woman or the respondent to any other workplace;
- ii.** granting leave to the aggrieved woman up to a period of 3 months in addition to her regular statutory/ contractual leave entitlement;

iii. restrain the respondent from reporting on the work performance of the aggrieved woman or writing her confidential report, which duties may be transferred to other employees.

Punishment and compensation

The POSH Act prescribes the following punishments that may be imposed by an employer on an employee for indulging in an act of sexual harassment:

- i. punishment prescribed under the service rules of the organization;
- ii. if the organization does not have service rules, disciplinary action including written apology, warning, reprimand, censure, withholding of promotion, withholding of pay rise or increments, terminating the respondent from service, undergoing a counseling session, or carrying out community service; and
- iii. deduction of compensation payable to the aggrieved woman from the wages of the respondent. (Section – 13)

The POSH Act also envisages payment of compensation to the aggrieved woman. The compensation payable shall be determined based on:

- i.** the mental trauma, pain, suffering and emotional distress caused to the aggrieved employee;
- ii.** the loss in career opportunity due to the incident of sexual harassment;
- iii.** medical expenses incurred by the victim for physical/ psychiatric treatment;
- iv.** the income and status of the alleged perpetrator; and
- v.** feasibility of such payment in lump sum or in installments. (Section – 15)

In the event that the respondent fails to pay the aforesaid sum, ICC may forward the order for recovery of the sum as an arrear of land revenue to the concerned District Officer.

Frivolous complaints

In order to ensure that the protections envisaged under the POSH Act are not misused, provisions for action against “false or malicious” complainants have been included in the statute. As per the POSH Act, if the ICC/ LCC concludes that the allegation made by the complainant is false or malicious or the complaint has been made knowing it to be untrue or forged or misleading information has been provided during the inquiry, disciplinary action in accordance with the service rules of the organization can be taken against such complainant.

Where the organization does not have service rules, the statute provides that disciplinary action such as written apology, warning, reprimand, censure, withholding of promotion, withholding of pay rise or increments, terminating the respondent from service, undergoing a counseling session, or carrying out community service may be taken. The POSH Act further clarifies that the mere inability to substantiate a complaint or provide adequate proof need not mean that the complaint is false or malicious. Section - 14

Confidentiality

Recognizing the sensitivity attached to matters pertaining to sexual harassment, the POSH Act attaches significant importance to ensuring that the complaint and connected information are kept confidential. The POSH Act specifically stipulates that information pertaining to workplace sexual harassment shall not be subject to the provisions of the Right to Information Act, 2005.

The POSH Act further prohibits dissemination of the contents of the complaint, the identity and addresses of the complainant, respondent,

witnesses, any information relating to conciliation and inquiry proceedings, recommendations of the ICC/LCC and the action taken to the public, press and media in any manner.

That said, the POSH Act allows dissemination of information pertaining to the justice that has been secured to any victim of sexual harassment, without disclosing the name, address, identity or any other particulars which could result in the identification of the complainant or the witnesses. Section - 16

Disclosure of the justice secured could not only deter other individuals from engaging in acts of sexual harassment, but also instill in the minds of employees and public that the employer is serious about providing a safe work environment and harbours zero tolerance for any form of sexual harassment at the workplace.

Breach of the obligation to maintain confidentiality by a person entrusted with the duty to handle or deal with the complaint or conduct the inquiry, or make recommendations or take actions under the statute, is punishable in accordance with the provisions of the service rules applicable to the said person or where no such service rules exist, a fine of INR 5,000. Section - 17

Consequences of non-compliance

If an employer fails to constitute an ICC or does not comply with the requirements prescribed under the POSH Act, a monetary penalty of up to INR 50,000 (approx. US\$ 900) may be imposed.

A repetition of the same offence could result in the punishment being doubled and/or de-registration of the entity or revocation of any statutory business licenses. *It is however unclear as to which business licenses are being referred to in this case.* **Section – 26**

It is also pertinent to note that all offences under POSH Act are non-cognizable. **Section – 27**

An overview of the Immoral Traffic Prevention Act, 1956 (ITPA)

In India, the legal system on sex work in India is laid down under the Suppression of Immoral Traffic (Prevention) Act, 1956 (“SITA”). The act was further amended and changed in 1986, resulting in the Immoral Traffic Prevention Act also known as ‘ITPA’.

ITPA does not proscribe sex work per se but deal with severely specific activities related to commercial sex. It also provides for liberation & rehabilitation of persons in sex work. The Act is applied through Police & the Magistracy. Acts is carrying a punishment under ITPA include:

1. Brothel keeping (Section 3)
2. Living on earnings of sex work (Section 4)
3. Procuring, inducing or detaining for prostitution (Section 5 & Section 6) Penalties are of more degree where offences involve children (under age of 18 years)
4. Prostitution in areas notified by Police & near public places (Section 7)
5. Soliciting (Section 8) all offences are cognizable i.e. police do not require a warrant to arrest or search. (Section 14) Police personnel entrusted with the application of the Act locally (Special Police Officers) as well as at the national level (Trafficking Police Officers) are conferred special powers (Section 13) to raid, rescue & search properties suspected of serving as brothels (Section 15). Magistrates are authorized to order arrests & removal, direct custody of rescued persons, close down brothels & remove sex workers (Sections 16, 17, 18 & Section 20).The Act provides institutional rehabilitation for “rescued” sex workers. (Sections 19, 21, 23 & ITPA State Rules)

Consequences

Sex work per se is not illegal under the Act, but, its de facto criminalization through prohibition of soliciting, brothel & street work, has effectively weakened sex workers’ ability to claim protection of law.

Absence of safeguards has intensified violence & exploitation by brokers, agents & the mafia.

Punitive provisions are unreceptive to public health interventions to reduce HIV. Terror of arrest, infringement by Police makes negotiation of safer sex difficult.

Peer educators carrying condoms are detained for “promoting sex work”. Efforts to promote condom use in brothels have been aborted.

Disempowerment of sex workers increases harms of HIV & Trafficking
Specific Problems

I. Prohibition of Brothels: Section 2(a) defines “brothel” as “„any house, room, conveyance or place or any portion of any house, room, conveyance or place which is used for purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes. Section 3 provides punishment for keeping, running & managing a brothel. The term “mutual gain of two or more sex workers”, eases premises shared by sex workers illegal, including their residence. There have been several occasions where sex workers have lost their homes & earnings under the pretext of “closing down brothels”. As long as brothels remain illegal, widespread condom use cannot be achieved.

II. Criminalization of Earnings of Sex Work: Section 4 punishes adult persons being economically supported by sex workers including those living with sex workers. Therefore, aged parents, siblings, partner(s), and offspring over 18 years, who are reliant on sex workers, are treated as criminals. In reality, a significant majority of persons, particularly women, turn to sex work to upkeep their families including children & parents. Ironically, these very persons are punishable by law.

III. Penalties for Soliciting: Section 8 punishes a sex worker drawing attention of potential customers from a visible, noticeable site, whether in a street or private dwelling. The criminalization of soliciting is one of the most apparent legal problems for sex workers, who are faced with arrests, court hearings & convictions on a repetitive basis. Sex workers are arrested even when they are not soliciting. Number of them pleads guilty finding themselves in a vicious cycle of criminalization. Though this provision does nothing to prevent or halt trafficking, it is “most-used”, with maximum

arrests & convictions being reported under Section 8, Immoral Traffic Prevention Act.

IV. Statutory Powers & Procedures: Immoral Traffic Prevention Act confers wide-ranging powers on Police to conduct & Magistrates to order: Raid Police can enter and search any properties on suspicion. Raids are often carried out in breach of legal procedure for public witness, female Police etc. Violence, abuse & humiliation of sex workers are day to day phenomena. Raids impair sex workers' ability & result in greater than before harm. Medical examination Section 15 (5A) mandates medical examination of persons removed from brothels for, inter alia detection of sexually transmitted diseases. Sex workers are reportedly against their will are tested for HIV & their results are revealed in open Court. This is opposing to national policy, which requires consent, secrecy & counseling for HIV Testing. Rescue & Rehabilitation Police can remove any person found in premises where sex work is carried out irrespective of age & consent. Rehabilitation is synonymous with detention in State run homes for unspecified periods. Viable economic substitutes are either non-existent or inaccessible to sex workers on account of stigma.

Expulsion of sex workers: Section 18 & Section 20 authorizes Magistrates to close down brothels & oust persons from premises where sex work is being carried out, including their residence. Vulnerable with eviction, sex workers are forced to relocate with no access to health & HIV services. Over the last 50 years, Immoral Traffic Prevention Act has failed to prevent & stop trafficking. On the contrary, it has become a source of cruelty on sex workers, who face routine harassment & repeated arrests.

If a person is found with a child it is presumed that he has imprisoned that child there for the purpose of sexual intercourse and hence shall be punishable to seven year in prison up to life imprisonment, or a term which may extend to ten year and also a maximum fine of one lakh rupees. If a child is found in a brothel and after medical examination has been found to have been sexually abused, it is presumed that the child has been detained for the purpose of prostitution.

Any person committing prostitution in public with a child shall be punishable to seven year in prison up to life imprisonment, or a term which may extend to ten year and also a maximum fine of one lakh rupees. If prostitution of a child is being committed with knowledge of an establishment owner such as a hotel the license of the hotel license is likely to be cancelled along with the given prison sentence and or fines.

Any child found in a brothel or being abused for the purpose of prostitution can be placed in an institution for their safety by a magistrate. Landlords, leasers, owner, agent of the owner who unknowingly previously rented their property to a person found guilty of prostituting a child, must get approval from a magistrate before re-leasing their property for three years after the order is passed.

The Act is an abject failure & requires changes which can help to overcome the loopholes which are prevailing in it. For better administration it should be amended and special attention should be given on execution of the Act. Some of the amendment suggested by National Commission for Women of India which can help to overcome gaps are

The word 'person' used in the Act for the purpose of punishment, should be substituted with the words 'man and woman' because the women in prostitution only are punished and the man who play an important role in the process goes without punishment. In place of the words 'commercial sex worker' the word 'prostitute' should continue to be used. The names of the women in red-light areas should be included in the voters' list. A group insurance scheme should be introduced for the women in red light areas.

There should be a provision in the Act to distinguish the girls who are thrown forcibly into the prostitution through an act of rape and intimidation and the punishment should be made more stringent for the person responsible. Very often such girls are rescued only after their prolonged stay in the brothels and it is not possible to point out who was the first client although the first client is invariably committing rape on her. In case of such girls, the Brother Owner and pimps and touts should be charged as abettors and onus of the proof should be on them that; they have not

abetted or forced the girl or woman to enter into prostitution through the act of rape.

The law enforcement machinery should also be made more effective to save those girls in time who are likely to be forced into prostitution.

As per the recent figures of crimes recorded by Delhi Police, of all the persons arrested under different provision of the Act nearly 85 to 95 % accused were women. This clearly brings out the fact that the present law is not very effective in stopping prostitution because the men involved in promoting prostitution are mostly not considered guilty. It is especially surprising to note that there are many more women arrested for being pimps and touts.

It is also necessary to bring out suitable amendment in the Act to punish the customer who visits the red light areas for having sex at a commercial price. Provision should be made to provide Free Education to the women in prostitution under various non-formal or adult education schemes.

Schemes for vocational training should be available to the women in prostitution so that they can earn their livelihood by other means if they decide to come out of the flesh trade.

There should be a specific provision that police personnel or related department should render help and support to the NGOs and communities who are working for the welfare of the women in prostitution.

OFFENCES AGAINST SCHEDULED CASTE AND SCHEDULED TRIBES

Introduction

India is committed to the welfare and development of its people in general and of vulnerable sections of society in particular. Equality of status and opportunity to all citizens of the country is guaranteed by the Constitution of India, which also provides that no individual shall be discriminated against on the grounds of religion, caste or sex, etc.

Fundamental rights and other specific provisions, namely, Articles 38, 39 and 46 in the Constitution of India stand testimony to the commitment of the State towards its people.

The strategy of the State is to secure distributive justice and allocation of resources to support programmes for social, economic and educational advancement of the weaker sections in general and persons belonging to Scheduled Castes and Scheduled Tribes in particular.

Govt said in 2015, a total of 38,564 cases were registered for alleged crime against the SCs in which charge-sheets were filed in 73.8% cases and the conviction rate was 27.2%.

Govt says 47,338 cases of crime against Scheduled Castes and Scheduled Tribes were registered in 2016. Of these, charge-sheets were filed in 78.3% cases, and the conviction rate was 25.8%.

“Police’ and ‘Public Order’ are State subjects under the Seventh Schedule to the Constitution of India. The responsibilities to maintain law and order, protection of life and property of the citizens rest primarily with the respective state governments. The state governments are competent to deal with such offences under the extant provisions of laws,”

Constitutional Rights

The Indian Constitution *vide* Article 15 lays down that no citizen shall be subjected to any disability or restriction on the grounds of religion, race, caste, sex or place of birth. It also guarantees that every citizen shall have equality of status and opportunity.

The problems of social inequality and class divide in a country like India with heterogeneous groups and sub-groups needs to be recognized and resolved by all available democratic measures including special legislations to deal with particular acts constituting offences against such weaker sections of the society.

'Scheduled Castes' and 'Scheduled Tribes' are two such identified social groups. Article 46 of the Constitution of India expressly provides that the State shall promote the educational and economic upliftment of the weaker sections of the society, in particular of SCs & STs with special care and shall protect them from injustice and all forms of exploitation.

Legal Rights

Special social enactments have come into force from time to time for SCs and STs in order to uphold the constitutional mandate and safeguard the interests of these sections of the society.

The major legal enactments at the national level are:

(i) The Protection of Civil Rights Act, 1955

(ii) The Scheduled Caste/Scheduled Tribe (Prevention of Atrocities) Act, 1989

The Protection of Civil Rights Act, 1955 was enacted in furtherance of Article 17 of the Constitution to abolish untouchability and its practice in any form.

The Scheduled Castes/ Scheduled Tribes (Prevention of Atrocities) Act, 1989 was brought into force from 30th January 1990 in order to check and deter crimes against persons belonging to SCs/STs by persons belonging to other communities

These enactments have extended the positive discrimination in favour of SCs and STs to the field of criminal law in as much as they prescribe penalties that are more stringent than the corresponding offences under Indian Penal Code (IPC) and other laws. Special Courts have been established in major states for speedy trial of cases registered exclusively under these Acts.

Classification of Crimes

Considering the data requirements of various stakeholders, the classifications of crimes have been revised recently for collection of comprehensive data on crime committed against SCs and STs.

The new classification of crimes against persons belonging to SCs & STs broadly categorized under three major crime heads, namely:-

(i) the Protection of Civil Rights Act, 1955 for measuring incidents of discriminations against persons belonging to SCs & STs by Non-SCs/STs.

(ii) Atrocities committed against persons belonging to SCs and STs by Non-SCs and STs i.e. where SC/ST (Prevention of Atrocities) Act has been applied along with various Sections of IPC. Incidents of various Sections of IPC viz. murder, grievous hurt, rape etc. along with the SC/ST (PoA) Act.

(iii) Crime committed against SCs and STs where SC/ST (PoA) Act has not been applied and only IPC Sections have been involved.

Besides these three major heads, data on following crime heads have also been collected:-

(iv) The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1923

(v) Other crimes

Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989

An Act to prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes, to provide for Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Fortieth Year of the Republic of India.

The Act is divided into V Chapters and it contains 23 Sections.

Chapter I: PRELIMINARY

Section – 1 of the Act deals with Short title, extent and Commencement

Definitions – Section – 2

1. In this Act unless the context otherwise requires -

- a.** "atrocities" means an offence punishable under Section 3
- b.** "Code" means the Code of Criminal Procedure, 1973
- c.** "Scheduled Castes and Scheduled Tribes" shall have the meanings assigned to them respectively under clause (24) and clause (25) of Article 366 of the Constitution
- d.** "Special Court" means a Court of Session specified as a Special Court in Section 14
- e.** "Special Public Prosecutor" means a Public Prosecutor specified as a Special Public Prosecutor or an advocate referred to in Section 15
- f.** words and expressions unused but not defined in this Act and defined in the Code or the Indian Penal Code, 1860 shall have the meanings assigned to them respectively in the Code, or as the case may be, in the Indian Penal Code.

2. Any reference in this Act to any enactment or any provision thereof shall in relation to an area in which such enactment or such provision is not in force, be construed as a reference to the corresponding law, if any, in force in that area.

CHAPTER II: OFFENCES OF ATROCITIES

Punishment for offences of atrocities – Section – 3

1. Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe

i. forces a member of a Scheduled Caste or a Scheduled Tribe to drink or eat any inedible or obnoxious substance

ii. acts with intent to cause injury, insult or annoyance to any member of a Scheduled Caste, or a Scheduled Tribe by dumping excreta, waste matter, carcasses or any other obnoxious substance in his premises or neighborhood;

iii. forcibly removes clothes from the person of a member of a Scheduled Caste or a Scheduled Tribe or parades him naked or with painted face or body or commits any similar act which is derogatory to human dignity

iv. wrongfully occupies or cultivates any land owned by, or allotted to, or notified by any competent authority to be allotted to, a member of a Scheduled Caste or a Scheduled Tribe or gets the land allotted to him transferred;

v. wrongfully dispossesses a member of a Scheduled Caste or a Scheduled Tribe from his land or premises or interferes with the enjoyment of his rights over any land, premises or water

vi. compels or entices a member of a Scheduled Caste or a Scheduled Tribe to do 'begar' or other similar forms of forced or bonded labour other than any compulsory service for public purposes imposed by Government

vii. forces or intimidates a member of a Scheduled Caste or a Scheduled Tribe not to vote or to vote to a particular candidate or to vote in a manner other than that provided by law

viii. institutes false, malicious or vexatious suit or criminal or other legal proceedings against a member of a Scheduled Caste or a Scheduled Tribe

ix. gives any false or frivolous information to any public servant and thereby causes such public servant to use his lawful power to the injury or annoyance of a member of a Scheduled Caste or a Scheduled Tribe

x. intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view

xi. assaults or uses force to any woman belonging to a Scheduled Caste or a Scheduled Tribe with intent to dishonour or outrage her modesty

xii. being in a position to dominate the will of a woman belonging to a Scheduled Caste or a Scheduled Tribe and uses that position to exploit her sexually to which she would not have otherwise agreed.

xiii. corrupts or fouls the water of any spring, reservoir or any other source ordinarily used by members of the Scheduled Castes or a Scheduled Tribes so as to render it less fit for the purpose for which it is ordinarily used

xiv. denies a member of a Scheduled Caste or a Scheduled Tribe any customary right of passage to a place of public resort or obstructs such member so as to prevent him from using or having access to a place of public resort to which other members of public or any section thereof have a right to use or access to

xv. forces or causes a member of a Scheduled Caste or a Scheduled Tribe to leave his house, village or other place of residence

shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine.

2. Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe

(i) gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any member of a Scheduled Caste or a Scheduled Tribe to be convicted of an offence which is

capital by the law for the time being in force shall be punished with imprisonment for life and with fine; and if an innocent member of a Scheduled Caste or a Scheduled Tribe be convicted and executed in consequence of such false or fabricated evidence, the person who gives or fabricates such false evidence, shall be punished with death.

(ii) gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any member of a Scheduled Caste or a Scheduled Tribe to be convicted of an offence which is not capital but punishable with imprisonment for a term of seven years or upwards, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to seven years or upwards and with fine.

(iii) commits mischief by fire or any explosive substance intending to cause or knowing it to be likely that he will thereby cause damage to any property belonging to a member of a Scheduled Caste or a Scheduled Tribe, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine.

(iv) commits mischief by fire or any explosive substance intending to cause or knowing it to be likely that he will thereby cause destruction of any building which is ordinarily used as a place of worship or as a place for human dwelling or as a place for custody of the property by a member of a Scheduled Caste or a Scheduled Tribe, shall be punishable with imprisonment for life and with fine.

(v) commits any offence under the Indian Penal Code, 1860 punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine.

Punishment for neglect of duties – Section - 4

Whoever, being a public servant but not being a member of a Scheduled Caste or a Scheduled Tribe, wilfully neglects his duties required to be performed by him under this Act, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to one year.

Enhanced punishment for subsequent conviction - Section - 5

Whoever, having already been convicted of an offence under this Chapter is convicted for the second offence or any offence subsequent to the second offence, shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to the punishment provided for that offence.

Application of certain provisions of the Indian Penal Code – Section - 6

Subject to the other provisions of this Act, the provisions of Section 34, Chapter III, Chapter IV, Chapter V, Chapter VA, Section 149 and Chapter XXIII of the Indian Penal Code, 1860, shall, so far as may be, apply for the purposes of this Act as they apply for the purposes of the Indian Penal Code.

Forfeiture of property of certain persons – Section - 7

1. Where a person has been convicted of any offence punishable under this Chapter, the Special Court may, in addition to awarding any punishment, by order in writing, declare that any property, movable or immovable or both, belonging to the person, which has been used for the commission of that offence, shall stand forfeited to Government.

2. Where any person is accused of any offence under this Chapter, it shall be open to the Special Court trying him to pass an order that all or any of the properties, movable or immovable or both, belonging to him, shall, during the period of such trial, be attached, and where such trial ends in

conviction, the property so attached shall be liable to forfeiture to the extent it is required for the purpose of realization of any fine imposed under this Chapter.

Presumption as to offences – Section - 8

In a prosecution for an offence under this Chapter, if it is proved that

–

a. the accused rendered any financial assistance to a person accused of, or reasonably suspected of committing, an offence under this Chapter, the Special Court shall presume, unless the contrary is proved, that such person had abetted the offence.

b. a group of persons committed an offence under this Chapter and if it is proved that the offence committed was a sequel to any existing dispute regarding land or any other matter, it shall be presumed that the offence was committed in furtherance of the common intention or in prosecution of the common

Conferment Powers – Section - 9

1. Notwithstanding anything contained in the Code or in any other provision of this Act, the State Government may, if it consider it necessary or expedient so to do -

a. for the prevention of and for coping with any offence under this Act, or

b. for any case or class or group of cases under this Act,

in any district or part thereof, confer, by notification in the Official Gazette, on any officer of the State Government, the powers exercisable by a police officer under the Code in such district or part thereof or, as the case may be, for such case or class or group of cases, and in particular, the powers of arrest, investigation and prosecution of persons before any Special Court.

2. All officer of police and all other officers of Government shall assist the officer referred to in sub-section (1) in the execution of the provisions of this Act or any rule, scheme or order made thereunder.

3. The provisions of the Code shall, so far as may be, apply to the exercise of the powers by an officer under sub-section (1).

Special Court – Section - 14

For the purpose of providing for speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, specify for each district a Court of Session to be a Special Court to try the offences under this Act.

Special Public Prosecutor – Section - 15

For every Special Court, the State Government shall, by notification in the Official Gazette, specify a Public Prosecutor or appoint an advocate who has been in practice as an advocate for not less than seven years, as a Special Public Prosecutor for the purpose of conducting cases in that Court.

Power of State Government to impose collective fine – Section – 16

Preventive action to be taken by the law and order machinery – Section - 17

Section 438 of the code not to apply to persons committing an offence under the Act – **Section – 18**

Section 360 of the Code or the Provisions of the Probation of Offenders Act not to apply to persons guilty of an offence under the Act – **Section - 19**

Act to override other laws – Section - 20

Duty of Government to ensure effective implementation of the Act – **Section - 21**

Protection of action taken in good faith – **Section - 22**

JUDICIAL ATTITUDE TOWARDS WHITE COLLAR CRIMES IN INDIA

Three organs of the Government are legislature, Executive and Judiciary with defined roles of each other. Laws have no meaning without adequate enforcement, which is why our Constitution has put in place an elaborate judicial system with the Supreme Court at the apex. As law abhors vacuum, so therefore, when the Executive refused to act and legislature could do little about it, Indian Judiciary stepped in to save the day. The public interest litigation has proved to be a strong and potent weapon to control white collar crimes. *Hawala scam, fodder scam, St. kits scam*, illegal allotment of government houses and petrol pumps scam have come to light through public interest litigation. This chapter is a reflection of pure judicial response to assist in the eradication of white collar crimes from India. The chapter is not considering other material for its support but is relying exclusively upon the judicial precedents. Thus, the work is directly proceeding from judicial activism. Indian Judiciary has taken a serious note of the growing intensity of white collar crimes.

1. PREVENTION OF CORRUPTION ACT, 1988

Prevalence of corruption is one of the problems which our country has been facing from time immemorial. Corruption retards our country's growth and welfare to the maximum extent. According to Stroud's Judicial Dictionary³ corruption means moral obliquity or moral perversity. Corruption⁴ can be defined as departure from what is pure or correct from the original. The strict vigilance over corruption under the Prevention of Corruption Act 1988 is reflected in various important judgments of the Supreme Court of India and different High Courts. In spite of various tools available, corruption has increased.

The present scenario of corruption in India has been depicted by Justice A.K. Ganguli in ***Subramanian Swami v. Dr. Manmohan Singh***, in following words:

“Today corruption in our country not only poses a grave danger to the concept of constitutional governance, it also threatens the very foundation of Indian Democracy and the Rule of Law. The magnitude of corruption in our public life is incompatible with the concept of socialist, secular, democratic republic. It cannot be disputed that where corruption begins, all rights end. Corruption devalues human rights, checks development and undermine justice, liberty, equality, fraternity which are the core values of our Preamble. Therefore, the duty of the court is that any anti-corruption law has to be interpreted and worked out in such fashion as to strengthen the fight against corruption”.

The Supreme Court of India in **J. Jayalalitha v. Union of India**, has held that *“Corruption corrodes the moral fabric of the society and corruption by public servant not only leads to the corruption of the moral fabric of the society but is also harmful to the national economy and national interest, as the person occupying high posts in government by misusing their powers due to corruption can cause considerable damage to the national economy, national interest and image of the country”.*

In a landmark judgment of **Parkash Singh Badal v. State of Punjab**, Supreme Court of India has expressed that if an accused is a public servant who has retired or ceased to be a public servant then to prosecute him no sanction in terms of Section 19(1) of the Act is necessary.

Similarly in **Subramaniam Swami v. Manmohan Singh**, it has been held by the court that when an offence is committed by a public servant and he resigns before cognizance is taken by the court, no prior sanction is needed. A. Raja, Union Tele-com Minister resigned from the post of Minister in 2G Spectrum Scam but continued to be a Member of Parliament. It was held by the Court that no sanction is required under section 19 of the Prevention of Corruption Act 1988.

The Supreme Court of India in **State v. S. Bangarappa**, has ruled that even if the High Court found that the City Civil and Sessions Judge was not empowered under Section-4 of the Prevention of Corruption Act to try the cases, that could not be a ground to quash the criminal proceedings. At the

worst that would be a ground to transfer the case from that court to the court having jurisdiction to try the offence, and if no court had been empowered till then, the criminal proceedings could be kept in abeyance till the Government issues a notification conferring such power on any other court.

2. THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985

The Narcotic Drugs and Psychotropic Substances Act, 1985 prescribes stringent punishments. Hence a balance must be struck between the need of the law and the enforcement of such law on the one hand and the protection of citizens from oppression and injustice on the other. The provisions under the special Act are to be followed meticulously since the punishments are stringent. The judgments of the Supreme Court of India and various High Courts are guiding force and have been referred in detail.

One of the formalities that have to be observed is that the searching officer should give his personal search to the witnesses before entering the premises to be searched and should similarly search the witnesses also in the presence of one another.

The Supreme Court of India in ***Ali Mustafa Abdul Rehman Moosa v. State of Kerala***, where Sub-Inspector of Police received reliable information that a foreigner was waiting in the first class waiting room with huge quantity of charas. The SI of police went to the first class waiting room and found one Ali Mustafa, a Kuwaiti National. He was searched and 780gms. of charas was recovered from his possession.

The accused Ali Mustafa was convicted and sentenced to imprisonment for 11 years and to pay fine of Rs. one lakh by the Court of Sessions. The matter went up to Supreme Court in appeal.

The Supreme Court has set aside the order of conviction and sentence on the ground that the provisions of Section-50 of NDPS Act were not complied with. It is held that when a police officer receives information that a person is in possession of drugs, it is the duty of the police officer to give

option to the person as to whether he desires to be searched in the presence of a Gazetted officer or a magistrate as envisaged by Section-50. The failure to provide that option to the accused vitiates his conviction. The provisions of Section-50 are mandatory.

However in ***State of Punjab v Balbir Singh***, the Supreme Court has held that if a police officer without any prior information as contemplated under the provisions of NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offence as provided under the provisions of Cr.P.C. and when such search is completed at that stage section 50 of NDPS Act would not be attracted and the questions of complying with the requirements there under would not arise. If during search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. Then the empowered officer shall carry out investigation as per provisions of NDPS Act from that stage onwards.

In ***Pon Adithan v. Dy. Director Narcotics Control Bureau, Madras*** it was contended before the Supreme Court that the mandatory requirement of informing the accused about his right under Section 50(1) of N.D.P.S. Act to be searched in presence of a Gazetted Officer or a Magistrate was not complied with only on the basis of evidence of searching officer.

By rejecting the above contention of the defence and by upholding the order of conviction and sentence of the Courts below, it is held by the Supreme Court that it cannot be laid down as a proposition of law that in the absence of an independent evidence or any other supporting documentary evidence, oral evidence or a witness conducting the search cannot be regarded as sufficient for establishing compliance with the requirement of Section 50(1) of N.D.P.S. Act.

3. THE INFORMATION TECHNOLOGY ACT, 2000

No matter how we enact laws and various control regimes in the and it is judiciary, which, in any Legal system, is responsible for administration of justice. Since cybercrime is relatively a very recent phenomenon, the judicial response in terms of interpretation of various statues of cyber law assumes vast significance. In traditional crimes, there is a plethora of judicial decisions but in case of cyber-crimes it is not so. Here we have very little go ahead and look forward for interpretation of Laws on the matter. Moreover, judicial decisions in cyber law have a lot of bearing on technicality of the subject matter.

There has been little litigation or judicial response to cyber-crimes so far in India and this will be a challenge for judicial decisions on cyber-crime in near future.

There has been a landmark judgment on domain dispute in the case of **Rediff Communication Ltd. v. Cyber Booth and another**. Similarly in **Yahoo! Inc. v. Akash Arora and another**, also the issue of domain name is entitled to equal protection as trademark. There are a number of issues involved in handling Cybercrimes.

The first problem is that India does not have a comprehensive legal and regulatory framework for regulating all kinds of cyber-crimes. The Indian Cyber law viz., The Information Technology Act, 2000 has introduced a chapter entitled Offences and in this chapter, only a limited number of cyber-crimes have been covered. These include damage to computer source code, hacking, publishing obscene electronic information breach of protected systems, publishing false Digital Signature Certificates in certain particulars or for fraudulent purposes. Barring these offences, no other cyber-crimes are covered under the IT Act. In addition, the IT Act 2000 has amended the Indian Penal Code, 1860.

However, the amendments have been made in such a manner so as to make the ambit of documents stipulated in various criminal provisions to include therein, electronic records. Consequently, a number of cybercrimes are not all covered under the Indian Penal Code. These include cyber

stalking, cyber harassment, cyber nuisance, identity theft, cyber terrorism etc.

YAHOO CASE

The case of *Yahoo, Inc. v. Akash Arora*, was the first case where an Indian Court delivered its judgment relating to domain names. The plaintiff Yahoo Inc. instituted a suit in the Delhi High Court against the defendants seeking inter-alia a decree of permanent injunction restraining the defendants, their partners, servants and agents from operating any business and/or selling, offering for sale, advertising and in any manner dealing in any services or goods on the internet or otherwise under the trademark/domain name 'Yahooindia.com' or any other mark/domain name which is identical with or deceptively similar to the plaintiff's trademark 'Yahoo!'. The plaintiff also moved an application seeking temporary.

In this case, instituted by Yahoo! Inc., the Delhi High Court granted an ad interim injunction restraining the defendants from operating any business or selling, offering for sale, advertising and/or in any manner dealing in services or goods on the internet or otherwise under the trademark/domain name "Yahooinida.com" or any other trademark/domain name which is identical! with or deceptively similar to the plaintiff's trademark "Yahoo!".

REDIFF COMMUNICATION CASE

Subsequently, in another matter *Rediff Communication Ltd. v. Cyber Booth*, the Yahoo judgment was once again reiterated. In this case, the plaintiff filed a suit for permanent injunction for inter alia restraining the defendants from using the mark/domain name 'RADIFF' or any other word or work or name which is deceptively similar to the plaintiff's mark/name 'REDIFF'. Bombay High Court granted an injunction against the defendants. The Special Leave Petition filed by Cyber booth in the Supreme Court was also dismissed. Though the Cyber Law was passed under the Information Technology Act in 2000, but the corporates houses have been shy of reporting cyber-crimes fearing adverse publicity which results into less

judicial pronouncements. Only conviction reinforces the confidence of the people in the capability of the law enforcement agencies to crack cybercrime and in the Indian judicial system's resilience in dealing with new challenges in the cyber age.

CYBER DEFAMATION

SMC Pneumatics (India) Pvt. Ltd.v.JogesKwatra

A company's employee started sending derogatory, defamatory and obscene emails about company's Managing Director. The emails were anonymous and frequent and were sent to many company's business associates to tarnish the image and goodwill of the company. The accused was identified by the company by the private computer expert.

Delhi High Court granted an injunction and restrained the employee from sending, publishing and transmitting emails which are defamatory or derogatory to the plaintiffs. The order of Delhi High Court assumes tremendous significance as this is for the first time that an Indian court assumes jurisdiction in a matter concerning cyber defamation and grants an ex-parte injunction restraining the defendant from defaming the plaintiff.

RITU KOHLI CASE

One Mrs. Ritu Kohli complained to the police against the person who was using her identity to chat over the website www.mirc.com, mostly in the Delhi channel for four consecutive days. Mrs. Kohli further complained that the person was chatting on the Net, using her name and giving her address and was talking obscene language. The same person was also deliberately giving her telephone number to other chatters encouraging them to call Ritu Kohli at odd hours. Consequently, Mrs. Kohli received almost 40 calls in three days mostly at odd hours from as far away as Kuwait, Cochin, Bombay and Ahmedabad. The said calls created havoc in the personal life and mental peace of Ritu Kohli who decided to report the matter.

The IP addresses were traced and the police investigated the entire matter and ultimately arrested Manish Kathuria on the said complaint.

Manish apparently pleaded guilty and was arrested. A case was registered under section 509, of the Indian Penal Code, 1860.

SOME MORE IMPORTANT CASE LAWS ON WHITE COLLAR CRIMES

Explaining the gravity of white collar crimes the Supreme Court in ***State of Gujarat v. Mohan Lal Jitmalji Porwal and Another***, has held that unfortunately in the last few years, the country has seen an alarming rise in white-collar crimes which has affected the fiber of the country's economic structure. These cases are nothing but private gain at the cost of public, and lead to economic disaster." In the present case also, if not national interest, but in view of the rampant white collar crimes in the field of cooperative banking business of the State, it can hardly be denied that it has adversely affected the economic conditions of the public at large in general and the class of depositors in particular whose life saving money in either deposited or whose livelihood is dependent on the income of interest.

The cause of the community deserves better treatment at the hands of the Court in the discharge of its judicial functions. The Community or the State is not a persona non grata whose cause may be treated with disdain. The entire community is aggrieved if economic offenders who ruin the economy of the state are not brought to book; a murder may be committed in the heat of moment upon passions being aroused.

An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the Community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage: done to the National Economy and National Interest.

Again ***Mohammad Giasuddin v. State of Andhra Pradesh***, it is held that the whole man is a healthy man and every man is born good. Criminality is a curable deviance. If every saint has a past every sinner has

a future and it is the role of law to remind both of this. Man is subject to more stress and strains in this age than ever before and a new class of crimes arising from restlessness of the spirit and frustration of ambitions has erupted. White collar crime, as in the present case, as in the present case, belongs to this disease of man's inside. Barbarity and injury recoils as injury so that if healing the mentally or morally maimed or malformed man is the goal, awaking the inner being more than torturing through exterior compulsions, holds out better curative hopes. The infliction of harsh and savage punishment is thus a relic of past and regressive times. Therefore, a therapeutic, rather than a terrors outlook should prevail in our criminal courts.

The question of imposing death penalty on white collar offender was considered by the Supreme Court in ***Rajendra Prasad v. State Of Uttar Pradesh***, It is held that if the Courts were to be guided by the classification for inflicting death penalty only in the case of three categories of criminals, namely, (i) for white collar offences (ii) for anti-social offences, and (iii) for exterminating a person who is a menace to the society, that is, a 'hardened murderer', the death sentence for an offence of murder punishable under section 302, for all practical purposes would be virtually nonexistent.

Unfortunately our penal laws do not provide for death sentence for either white collar crimes or anti-social offences. As regards 'hardened' murderers, there are few to be found. Many murders unfortunately go undetected and many a brutal murderer has to be acquitted for want of legal evidence bringing his guilt beyond reasonable doubt. Nevertheless, when the guilt is proved, the Court should leave aside all humanitarian considerations if the extreme penalty is called for. A 'professional' murderer must, as matter of course, be sentenced to death because he is menace to the society. Whatever sympathy the Court can have should be reserved for the victims of the crime rather than for the perpetrators. In such cases, the law must take its course.

Again in ***Mohan Lal v. State of Rajasthan and Ors.***, it is held that white collar crimes and there again, 'economic crimes', shocking and rocking

the entire society, ever increasing either in the form of 'black marketing' or 'food adulteration' or 'smuggling', have assumed disastrous dimensions, providing manifold litigation. The snail moving, halting and faltering speed, with which the administration and prosecution both act rather in-act is not only shocking, but is challenging the very utility of the laws which are fast 'break-ing and cracking' on account of this lethargy, indifference and 'red tapism'. Whether, this tantamount to moral abetment or acquiescence is a question to be answered by law-makers and not law-interpreters, if not, the decision would be of pauserity (posterity?) alone and not courts of law.

Following the same trend, in ***ITO v. Gopal Dhammani***, wherein it was observed that in serious economic and anti-social white collar crimes, the rule should be jail and not bail.

Similarly in ***G.B.S. Omkarv. Shri Venkateswara University***, it is held that white-collar crimes must be dealt with much more severely than crimes of passion.

In ***Sunil Kumar v. State of Haryana Dr. B.S. Chauhan, J*** has opined that criminals do not hesitate in approaching the courts, even by abusing the process of the court and sometimes succeed also. The instant case belongs to the same category. The petitioner feels that merely because he has a black marketer and succeeded in exploiting the helplessness of the poor people of the society and is capable of engaging lawyers, he has a right to use, abuse and misuse the process of the court and can approach any court any time without any hesitation and without observing any required procedure prescribed by law.

The Supreme Court in ***Prashant Kumar v. Mancharlal Bhagatram Bhatia*** has held economic offences are increasing all the time .The smugglers disrupt the economy of the nation and erode the valuable foreign exchange. It is necessary to facilitate the investigation into economic offences and the remand courts should not ignore this aspect while considering the question of liberty of a suspect. It should be born in mind that the common good of the society should be properly balanced against the individual liberty.

Again in ***State of Maharashtra v. Ketan Parekh***, while considering the question of bail in white collar crimes, whether custody of accused is required for the purpose of investigation and if he is released on bail whether he is likely to abscond, are relevant considerations. A question whether the transaction in question was purely a civil transaction and whether any criminal liability arises against the accused is not to be decided at the stage of bail application.

In ***N. Sasikala v. Enforcement Directorate***, the was charged under Section 9 of FERA for an offence making unauthorized payment to a foreign supplier, considering the gravity and magnitude of complicity of the accused, stage of investigation required to be conducted in India and abroad and the possibility the existing situation would be unsettled if accused was released on bail which might cause obstacle for further investigation, the Madras High Court declined to grant bail.

Similarly in ***Jayanti Dhrama Teja (Dr.) v. State the*** accused was involved in an offence under Ss. 409, 467, 420, 477A, and 120B of the Indian Penal Code 1860 for the alleged embezzlement of a sum of about two crore rupees in foreign exchange out of the funds belonging to a corporate body of which the accused had been the Chairman. Rejecting the bail application it was held by the Delhi High Court that there was a well-founded reasonable apprehension about the accused escaping from India and becoming fugitive from justice if he were released on bail.

Measures to curb white collar crimes

The measures that can be adopted to prevent the commission of white collar crimes are:

1. The top investigating agencies of the country like the Central Bureau of Investigation, the Enforcement Directorate, the Income-tax Department, The Directorate of Revenue Intelligence and the Customs Department, needs strengthening, by way of implementing strong regulating policies. The Central Vigilance Commission should monitor

the working of the officials sitting at top positions and also cross-check their works, so as to ensure transparency in the system.

2. As the method of commission of such white collar crimes is advancing, so should the training of the investigating officials. It often happens that ageing officers are well experienced to understand the nature and techniques, but are not able to utilize the technology for tracking the suspect. This happens due to lack of training. So, every investigating officer must be trained in such a manner that, no matter how complicated the case is, they would be able to easily resolve it.
3. To uproot the existence of such crimes, it is very important to include strict laws into the system. Less amount of fine and shorter period of imprisonment makes it very casual for the offenders to commit such crimes.
4. Fast track courts and tribunals should be set in all the parts of the country for the early disposal of these cases. The tribunal should be provided with the power to fine or imprison someone who has been held guilty. Such measures would lower the rates of occurrence of white collar crimes.
5. The electronic and print media should be utilized in the right way to spread awareness about white collar crimes. The general people need to be aware of such crimes and that they are taking place everywhere, from a small cafe to big multinational companies. Also, they need to be aware of the remedies they could seek in case they become victim to such crimes.
6. Stringent laws and hefty fine and long term imprisonment should be given to the offenders for committing such crimes. And for this to happen, the Indian Penal Code, 1860 should be amended and include provisions for the white collar crimes. For example, the IPC could have a separate chapter dealing with white collar crimes.
7. The government may establish a separate body which would look into the matter of crimes and criminality prevailing in the country. The independent body could be named as the National Crime Commission.

Since their entire work would be related only to the crimes and would be an independent body, it could work more efficiently towards reducing criminality in the country.

***Nullum Crimen Sine Lege* – The Principle of Legality**

The principle of legality in criminal law declares that no crime and punishment can exist without a legal base. It is also known as *nullum crimen, nulla poena sine lege*. It is Latin for no crime, no punishment without law. A person shall not be convicted or punished for an act which is not in violation of existing law or which is not criminalised by law at the time it was committed. During criminal procedures, this principle of legality keeps the supremacy of law and ensures fair and transparent judgment.

The Principle of legality is closely associated with the principle of non-retroactivity and the principle of specificity. The former states that a person cannot be prosecuted by a law that is passed retroactively to criminalize the action which was not criminal at the time of being committed. The latter demands a sufficiently precise definition for the proscribed act. A person cannot be convicted by law for a crime that is not publicly declared or defined as a crime. But, ignorance of the law is not a legitimate defense.

The principle of legality also ensures the prohibition of analogy. It requires a strictly construed definition of the crime. An unclear law does not form the basis to prosecute anyone. The principle of legality is a fundamental human right. It protects people from unjust, biased and arbitrary judgments.

Origin, Conception and Interpretation

Anselm Von Feuerbach formulated the famous *maxim* '*Nullum crimen, nulla poena sine lege*' in 1813. It was also the part of penal code of Bavaria. The principle is stated in various declarations of Human Rights from 1789

till present. There are various examples in international law where the principle was ignored or (at the very least) eluded.

During Nuremberg trials of the late 1940s, judges from major allied powers: America, Britain, France and the Soviet Union conducted 13 trials from 1945-1947. These trials indicted 177 Germans and Austrians. Out of which 35 pronounced guilty, 25 executed, 20 sentenced to life imprisonment and 97 sentenced to shorter prison terms. These trials also convicted low ranking soldiers. Whereas, before World War II, the prosecution was subjected to high ranking commanders or head of state only. In the trials, the prosecution of Nazis pleaded the defense of superior, which was an accepted principle of the criminal law. At the trials, the prosecution was denied protection from this retroactive criminal law on the grounds that their act was against humanity.

Nuremberg trial served as a model for of the Universal Declaration of Human Rights (UDHR), 1948 and Geneva Convention III, 1949.

The Article 11(2) of the Universal Declaration of Human Rights (UDHR), 1948 structured the definition of the principle which states:

- 'No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.'

The Geneva Convention III, 1949 focused on the Treatment of Prisoners of War. The convention with the help of an impartial humanitarian body, the International Committee of the Red Cross (ICRC), conducted a study and catalogued 161 customary international humanitarian laws (IHL) and protocols. Rule 101 is the principle of legality which states:

- 'No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed.'

The General Assembly of the United Nations on 19 December 1966 adopted International Covenant on Civil and Political Rights (ICCPR). Its article 15 defines the principle similar to UDHR which states:

- No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
- Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Principle of Legality in India

The constitution of India has adopted the principle *nullum crimen, nullum poena sine lege*; i.e., the principle of legality. In the constitution of India, part 3 of fundamental rights under the rights of freedom, article 20 (1) states, 'No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.' Article 20(1) of the Indian constitution can be understood in two parts:

- The first part implies that a person is only convicted of violating a law which was in force when the act charged was being committed. A law enacted after, an act done earlier (not an offence when done) as an offence, will not make the person liable for being convicted under it. For example, 'The Dowry Prohibition Act, 1961 came into force from 20.5.1961. A person guilty of accepting dowry is punishable under the Act after 20.5.1961 and not before 20.5.1961.'
- The second part immunises a person from a penalty more than what he might have incurred at the time of his committing the crime. Meaning that an ex-post-facto law or retroactive law, cannot make a person suffer more than what he was subjected to at the time of committing the offence. For example, *Satwant Singh v. Punjab*. Satwant Singh was charged according to section 420 of Indian Penal Code (IPC). According to Sec. 420 IPC, an unlimited fine can be imposed for offence punishable under this provision. Later, an ordinance laid down the minimum fine which a court must inflict on a person convicted u/s 420 IPC. The Supreme Court held that article 20(1) was not infringed by the ordinance because the minimum penalty fixed by it could not be said to be greater than what could be inflicted.

The definition in section 3 (37) of the general clauses act is applied as there is no definition of offence in the constitution and for application of article 20(1) there has to be an 'offence.'

Case Study Rattan Lal v. State of Punjab

Rattan Lal, age 16 years was found guilty of an offence and was awarded a rigorous imprisonment of 6 months with a fine on 31-5- 1962. His appeal was dismissed by the session's judge on 22-9-1962 and by the high court on 27-9-1962. The probation of offenders act came into force on 1-9-1962. No plea was taken before the high court that the boy should be given benefit of the act. Later he filed an appeal in the Supreme Court by

special leave and it was argued whether he should be given the benefit of the act or not. Respondent argued that the act is not retrospective and the offence was committed much before the act came into the force. But the Supreme Court observed that a retroactive law which only pacifies the rigorous of a criminal act does not fall within the said prohibition. The court therefore ruled in favour of Rattan Lal to reduce the punishment of the young offender.

Illustrations

1. A asked for dowry from B at the time when there was no law against it. After the enactment of Dowry Prohibition Act, 1961 passed A cannot be punished for taking dowry as it happened before the act was enacted.

2. P, a minor committed a crime before the enactment of Probation of Offenders Act but made an appeal to the SC to avail its facilities. Under the Principle it was declared that the law cannot punish retroactively but can decrease the punishment, if such a situation arises.

The Principle of Legality or Article 20(1) of the Indian Constitution provides protection with respect to the conviction of an offence. It safeguards civilians from arbitrary bias. It upholds the sanctity of law guaranteeing the fundamental rights of people. But, it should be ensured that people do not misuse their right. Therefore, the sovereign legislature has the power to enact prospective as well as retrospective laws, as it is provided in article 245 of the Indian constitution.

Social Disabilities under protection of civil Rights Act, 1956

Section 4 established that social disabilities must be on the ground of untouchability. Before the amendment of the Act in 1976, the Court was free to punish the accused with imprisonment which could extend up to six months or fine which could not be more than five hundred rupees or both. But after the above said amendment, the Court is bound to pass sentence of

imprisonment and also fine. Hence, no discretion is left with the Court (after amendment), once the offence was committed under section 4 of the Act.

In *Benudhas Sahu v. State*, the court held that Section 4(iv) does not apply to private wells because the owner of private well-being free to regulate the use of well by co-villagers. If the owner of private well permitted other people in the village to draw water from the well, it does not means that every villager has a right of access to or right to use the well. One explanation has been mentioned under Section 4. Explanation of section 4 lays down enforcement of any disability which includes denial of equal treatment and discrimination on the ground of “untouchability.”

Section 4 provides that: - Whoever on the ground of ‘untouchability’ enforces against any person any disability with regard to:-

- (i) access to any shop, public restaurant, hotel or place of public entertainment; or
- (ii)** the use of any utensils, and other articles kept in any public restaurant, hotel, dharamshala, sarai or musafirkhana for the use of the general public or of [any section thereof;]or
- (iii)** the practice of any profession of the carrying on of any occupation, trade or business or [employment in any job;] or
- (iv)** the use of, or access to, any river, stream, spring, well, tank, 49 *State of Karnataka v. Annappa and Others*, (1992) Cri LJ. 158. 50 ILR (1962) Cut 256. 165 cistern, water-tap or other watering place, or any bathing ghat, burial or cremation ground, any sanitary convenience, any road, or passage, or any other place of public resort which other members of the public, or and section thereof, have a right to use or have access to; or
- (v)** the use of, access to, any place used for a charitable or a public purpose maintained wholly or partly out of State funds or dedicated to the use of the general public or any section thereof; or

- (vi)** the enjoyment of any benefit under a charitable trust created for the benefit of the general public or of any section thereof; or
- (vii)** the use of, or access to, any public conveyance; or
- (viii)** the construction, acquisition, or occupation of any residential premises in any locality, whatsoever; or
- (ix)** the use of any *dharamshala*, *sarai* or *musafirkhana* which is open to the general public, or to any section thereof; or
- (x)** the observance of any social or religious custom, usage or ceremony or taking part in, or taking out, any religious, social or cultural procession; or
- (xi)** the use of jewelry and finery; shall be punishable with imprisonment for a term of not less than one month and not more than six months and also with fine which shall be not less than one hundred rupees and not more than five hundred rupees. Explanation for the purposes of this section, “enforcement of any disability” includes any discrimination on the ground of “untouchability”.