LAW COMMISSION OF INDIA

ONE HUNDRED FIFTY - SIXTH

REPORT

ON

THE INDIAN PENAL CODE

(VOLUME I)

AUGUST, 1997.

STICE
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August 30. 1997.

Dear Law Minister,

I have pleasure in forwarding herewith the 156th Report on "Indian Penal Code". This brings to a conclusion one of the maior tasks assigned to the Law Commission by the Government of India.

2. Pursuant to the reference made by the Government of India, Law Commission undertook a comprehensive revision of the Indian Penal Code, with special reference to the IPC (Amendment) Bill, 1978, immediately after I assumed charge on July 15, 1995.

3. In order to elicit public opinion, the Commission circulated a detailed questionnaire and working paper setting out various aspects of the subject under study. The Commission organised workshops/seminars at Chennai, Hyderabad, Visakhapatnam, Panjim, Shimla and New Delhi. The Commission also examined the provisions of the IPC (Amendment) Bill, 1978 while making its recommendations.

4. We have endeavoured to make the present report a comprehensive one, particularly after a careful scrutiny of all the provisions of the IPC (Amendment) Bill, 1978.

5. The recommendations have been made with a view to plugging the loopholes and making the provisions of the Code more effective. We hope that the recommendations, if implemented, will make the Code more comprehensive.

With regards,

Yours sincerely,

(K.Jayachandra Reddy)

Shri Ramakant D.Khalap,
Hon'ble Minister of State for Law & Justice,
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CHAPTER - I

INTRODUCTION

The origin of Crimes and of Criminal Law lies in a primitive system, by which all wrongs were redressed by private revenge; a system of self-redress, based on the principle of Retaliation. "A system of self-redress" says Mr. Moyle, an eminent scholar, "in the form of private vengeance, preceded everywhere the establishment of a regular judicature; the injured person, with his kinsmen or dependents, made a foray against the wrong-doer, and swept away his cattle, and with them, perhaps, his wife and children or he threatened him with supernatural penalties by "fasting" upon him, as in the East even at the present day; or finally, he reduced his adversary to servitude, or took his life. Such savage retaliation did not constitute law, but it was the germ from which the Penal Law gradually developed, for the idea of such a procedure was not compensation but punishment. This system led naturally to terrible anarchy. The offender was often as strong, if not stronger than his adversary, and the assistance of the kinsmen on each side created a blood feud, lasting perhaps for generations."[1]

1.02. Thus, there was no systematic criminal law in uncivilized society. Every man was liable to be attacked in his person or property at any time by any one. The person attacked either succumbed or overpowered his opponent. "A tooth for a tooth, an eye for an eye, a life for a life" was the forerunner of criminal justice. As time advanced, the injured person agreed to accept compensation, instead of killing his adversary. Subsequently, a sliding scale came into existence for satisfying ordinary offences. Such a system gave birth to archaic criminal law. For a long time, the application of these principles remained with the parties themselves, but gradually this function came to be performed by the State.

In India anciently, the genesis of criminal jurisprudence can be traced to Smrtis but came into existence particularly from the time of 'Manu'. In the category of 'crimes', Manu had recognized assault, theft, robbery, false evidence, slander, criminal breach of trust, cheating, adultery and rape. The king protected his subjects and the subjects in return owed him allegiance and paid him revenue. The king administered justice himself, and, if busy, the matter was entrusted to a Judge. If a criminal was fined, the fine went to the king's treasury, and was not given as compensation to the injured party.

1.03. Vasco Da Gama, a subject of Portugal, first discovered the passage to India around the Cape of Good Hope, the southernmost point of Africa. Briefly stated, thereafter, the Portuguese began to carry on trade with India, and later, the Englishmen came on the scene and began to carry on trade with India. As they were very successful, Queen Elizabeth granted, in 1600, a Charter which incorporated the East India Company. The Charter also gave the power to the Company for making laws. In 1609, James I renewed the Charter, and in 1661 Charles II again gave similar powers while renewing it.[2]

1.04 . The Charter of 1668 transferred Bombay to the East India Company, and directed that proceedings in the court should be like unto those that were established in England. The Court of Judicature which was established in 1672 sat once a month for its general sessions and cases that remained undisposed of were adjourned to "Petty Sessions" which were held after general sessions. This Court inflicted punishment of slavery in cases of theft and robbery. In ordinary cases of theft the offender had to pay monetary compensation, or else he was forced to work for the owner of the article stolen.[3]

In 1683, Charles II granted a further Charter for establishing a Court of Judicature at such places as the Company might decide. In 1687, another Charter was granted

by which a Mayor and Corporation were established at Fort St. George, Madras, in order to settle small disputes. By these Charters Englishmen who came to India were entrusted with administration of justice, both civil as well as criminal. In these Courts the powers exercised by the authorities were very arbitrary. Strange charges were framed and strange punishments were inflicted.[4]

In 1726, the Court of Directors made a representation to the Crown for proper administration of justice in India in civil and criminal matters. Thereupon, Mayors' Courts were established for proper administration of justice. But the laws administered were arbitrary because the Mayor and Aldermen were the Company's mercantile servants, and they possessed very little legal knowledge. The law that was administered was utterly incapable of suiting the social conditions of either the Hindus or the Mohammedans. In 1753, another Charter was passed under which Mayors were not empowered to try suits between Indians; and no person was entitled to sit as a judge who had an interest in the suit. English law was no more applicable to Indians, and they were left to be governed by their own laws and customs. In 1765, Robert Clive came to India for the third time and succeeded in obtaining the grant of the Dewani from the Moghul Emperor. The grant of the Dewani included not only the holding of Dewani Courts, but the Nizamat also, i.e. the right of superintending the whole administration in Bengal, Bihar and Orissa.[5]

In 1772, Warren Hastings took steps for proper administration of criminal justice. A Fouzdari Adalat was established in each district for the trial of criminal offences. With these Courts the Company's European subjects had no connection, nor did they interfere with their administration. The Kazi or Mufti sat in these Courts to expound the law and determine how far criminals were guilty of the offence charged. The Collector of each district was ordered to exercise a general supervision over their work. In addition to District Courts a Suddar Nizamat Adalat was also established. This Court was to revise and confirm the sentences of Fouzdari Adalat in capital cases and offences involving fines exceeding one hundred rupees. The officers who presided over these Courts were assisted by Mohammedan Law officers. The scheme of justice adopted by Warren Hastings had two main features. First, he did not apply English law to the Indian provinces; and, secondly, Hindu and Muslim laws were treated equally. The administration of criminal justice remained in the hands of Nawabs, and therefore, Mohammedan criminal law remained in force. These were the Courts in the capital. In the rest of the country the administration of justice was in the hands of Zamindars. In Bengal and Madras, Muslim criminal law was in force. In Bombay Presidency, Hindu criminal law applied to the Hindus, and Muslim criminal law to the Muslims. The Vyavahara Mayukha was the chief authority in Hindu law. But the Hindu

criminal law was a system of despotism and priestcraft. It did not put all men on equal footing in the eye of law, and the punishments were discriminatory.[6]

In 1773, the Regulating Act was passed, which affected the administration of criminal justice. Under that Act a Governor-General was appointed and he was to be assisted by four Councillors. A Supreme Court of Judicature was established at Fort William, Bengal. This court took cognizance of all matters - civil, criminal, admiralty and ecclesiastical. An appeal against the judgement of the Supreme Court lay to the King-in-Council. All offences which were to be tried by the Supreme Court were to be tried by a jury of British subjects resident in Calcutta. Any crime committed either by the Governor-General, a Governor, or a judge of the Supreme Court, was triable by King's Bench in England. The Charter of Justice that laid the foundations of the jurisdiction of the Supreme Court was dated March 26, 1774, and the justice administered in Calcutta remained so until the establishment of the High Court under the Act of 1861.

In 1781, amending Act was passed to remedy the defects of the Regulating Act. This Act expressly laid down and defined the powers of the Governor-General in Council to constitute provincial Courts of Justice and to appoint a Committee to hear appeals therefrom. The Governor-General

was empowered to frame regulations for the guidance of these Courts. Muslim criminal law was then applicable both to the Hindus and Muslims in Bengal.

In 1793, towards the close of Lord Cornwallis' Governor-Generalship, fresh steps were taken to renew the Company's Charter. Accordingly, the Act of 1793, which consolidated and repealed certain previous measures, was passed.

1.05. In the mofussil towns in Bengal, the law officers of the Zilla and City Courts, who were Suddar Ameens and Principal Suddar Ameens, were given limited powers in criminal offences. They could fine up to Rs.50 and award imprisonment, with or without labour, upto one month only. An appeal from their decision lay to the Magistrate or Joint Magistrate. Offences for which severe punishment was prescribed were tried by Magistrates, who were empowered to inflict imprisonment extending to two years with or without hard labour. There were also Assistant Magistrates and Deputy Magistrates but they had not full magisterial powers. Offences requiring heavier punishment were transferred to the Sessions Judge. Death sentence and life imprisonment , awarded by Sessions Judges, were subject to confirmation by the Nizamat Adalat. An appeal from the decisions of Sessions Judges lay to the Nizamat Adalat. Such was the criminal administration in Bengal up to 1833.

In Madras, District Munsiffs had limited criminal jurisdiction. They could fine up to Rs.200 or /and award upto one month's imprisonment. By regulation X of 1816, Magistrates were empowered to inflict imprisonment upto one year. There were also Suddar Ameens who tried trivial offences. Offences of heinous nature were forwarded for trial to the Sessions Judge, Offences against the State were referred to the Fouzdari Adalat. The Fouzdari Adalut was the Chief criminal court in the Madras Presidency, and was vested with all powers that were given to the Nizamat Adalat in Bengal.

The administration of criminal justice in Bombay was on the pattern of Bengal and Madras presidencies with certain minor changes.

The practice and procedure in Courts in Bengal, Madras and Bombay were prescribed by Regulations which were passed from time to time. In Bengal 675 Regulations were passed from 1793 to 1834; in Madras 250 Regulations were passed from 1800 to 1834; and in Bombay 259 Regulations were passed during the same period.

1.06. The History of the Indian Penal Code, or the Code of Criminal Law prevailing in British India, commences with the year 1833, the year which followed the Reform Bill, a period which was full of the subject of Law Reform, and of the Reform of Criminal Law in particular. Indirectly the Indian Penal Code owed its origin to Bentham, the most

conspicuous writer of the day on the subject of Law Reform, whose death had occurred only in the previous year. James Mill, Bentham's favorite disciple, had written the History of British India under the influence of Bentham's ideas. Thus, owing, in a great measure, to the influence of these two authors, the necessity for extensive legislation for India was keenly and widely felt.

1.07. In 1833, Macaulay moved in the House of Commons to codify the whole criminal law in India and bring about uniformity. Lord Macaulay, while speaking on the Bill in the British Parliament, said -

> "I believe that no country ever stood so much in need of a Code as India, and I believe also that there never was a country in which the want might be so easily supplied. Our principle is simply this - uniformity when you can have it; diversity when you must have it; but in all cases, certainty."[7]

Lord Macaulay also told the House of Commons that Mohammedans were governed by the Koran and in the Bombay Presidency Hindus were governed by the institutes of Manu. Pandits and Kazis were to be consulted on points of law, and in certain respects, the decisions of Courts were arbitrary. Thus the year 1833 is a great landmark in the history of

codification in India. The Charter Act of 1833 introduced a single Legislature for the whole of British India. The Legislature had power to legislate for Hindus and Mohammedans alike for Presidency towns as well as for mofussil areas.

1.08. Accordingly, the Charter Act of 1833 (3 and 4 Will. IV.c. 85) was passed, by which the Governor-General of India, was empowered to legislate for the whole of India. To assist this project a Commission under the Chairmanship of Lord Macaulay was constituted which consisted of himself and two members namely, - Mr. Millet and Sir John M'Leod. During the years 1834-38 the Commission drafted what afterwards became the Indian Penal Code. From 1838 to 1860 the draft Code remained in the form of a mere draft. After undergoing elaborate revision by the Legislative Council, Under the supervision of late Sir Barnes Peacock the Bill concerning the Penal Code was passed into law and became Act XLV, of 1860.

1.09. The Title of "Indian Penal Code" given by the Law Commission to the basic criminal law aptly describes its contents. The word "penal" no doubt, emphasizes the aspect of punishing those who transgress the law and commit offences, but it could hardly be otherwise, so long as

punishment and the threat of it are the chief methods known to the State for maintaining public order, peace and tranquillity.

1.10. In June 1971, the Law Commission had submitted its 42nd Report for revision of the Indian Penal Code. Accordingly, the Government had introduced a Bill, namely, the Indian Penal Code (Amendment) Bill, 1978 in Rajya Sabha. That Bill was passed by the Rajya Sabha. However before passing the Bill, the then Lok Sabha was dissolved and the said Bill could not find a place in the book of statutes.

Since then much water has flown and a number of new problems and issues have come to light, which gave rise to the necessity of undertaking a further comprehensive revision of the Indian Penal Code, with special reference to the provisions of the Indian Penal Code (Amendment) Bill, 1978. It was precisely for that purpose that the Government of India requested the Law Commission to undertake revision of the Indian Penal Code, with special reference to the aforesaid Bill, in the light of current socio legal scenario.

In this background, a comprehensive study for revision of the Indian Penal Code, particularly with reference to the Indian Penal Code (Amendment) Bill, 1978 was undertaken.

1.11. In order to elicit public opinion on the relevant issues the Commission circulated a detailed questionnaire and also working paper in respect of the main issues to all the State Governments, Director-Generals of Police of all States, Supreme Court and High Court Judges, Bar Associations, Professors of law, Advocates and Non-Governmental Organisations. Various responses were taken into consideration (vide Annexures). The Commission organised several workshops at Hyderabad, Vishakhapatnam, Goa, Shimla and a National Seminar was held at Delhi. At all these places the Commission had the benefit of discussion with judges, senior lawyers, police officers, legal academicians and non-governmental organisations. All the clauses of the I.P.C. (Amendment) Bill, 1978 were discussed thread-bare in all these workshops. After making an intensive study, the Commission apart from focussing on the important issues, has in a separate chapter discussed every clause of the Bill and has made the necessary recommendations keeping in view the new trends since 1978, and they have to be duly considered before introduction of a fresh Bill.

However, at this stage, we may also mention that under Clause 197 of the Bill, for the existing Chapter XIX, a new Chapter bearing the same number (Chapter XIX) is sought to be inserted to deal with "Offences against Privacy". In the existing Chapter XIX, three sections namely, sections 490, 491 and 492 are mentioned. But out of them sections 490 and 492 are repealed and the only remaining section 491 deals

with "Breach of Contract" to protect the contractual rights of helpless persons. In the proposed new Chapter XIX which is sought to be substituted in place of the existing Chapter, sections 491 to 492 are mentioned and they deal with "Offences against Privacy" like use of artificial listening or recording apparatus either to listen or to record conversation of person or persons without their knowledge or consent or making unauthorised photographs, etc. We have dealt with this clause in detail in Chapter XII after duly referring to the contents of 42nd Report as well as the concept of right to privacy as extended under Article 21 of the Constitution and also various reports of foreign Law Commissions and ultimately recommended that these offences cannot appropriately be incorporated in the Indian Penal Code and that a separate legislation should be there to comprehensively deal with such offences against privacy. It is also mentioned that Law Commission is proposing to take up a comprehensive study on this subject separately as early as possible.

FOOT NOTES

1. Nelson, "Indian Penal Code", (1897) p.4

2. Ratanlal & Dhirajlal, "The Indian Penal Code", (1982) p.i.

3. Id. p.ii.

4. Ibid.

5. Ibid.

6. Id. p.iii

7. Diwan Anil, "Indian Advocates", Vol. XXV, p.8.

CHAPTER - II

SENTENCES AND SENTENCING - POLICIES & PROCEDURES

A healthy administration of criminal law is essential for a proper functioning of the constitutional democracy. It is the criminal law that protects the society from the intentional and culpable acts of individuals or group of individuals. Criminal law also prescribes many preventive measures for, it is well-settled that prevention is better than cure. However, we have to refresh our views on the problems of crime and its punishment keeping abreast with the fast developments all around.

2.02. The purpose which punishment achieves or is required to achieve are fourfold.[1] First, retribution; i.e. taking of eye for eye or tooth for tooth. The object behind this is to protect the society from the depredations of dangerous persons; and so, if somebody takes an eye of another, his eye is taken in vengeance. This form of punishment may not receive general approval of the society in our present state of social conditions and understanding of human psychology.

The other purpose of sentencing is preventive. We are sure that the sentence of imprisonment suffered would be an eye opener to the convict and he would definitely not venture to repeat the illegal act again.

Deterrence is another object which punishment is required to achieve. Incarceration of sentence undergone by the convict and upholding of his conviction by Court is likely to have its effect, and should deter others from indulging in similar illegal acts.

As against the retributive, deterrent and preventive theories of punishment, the reformative approach to punishment as a measure to reclaim the offender lays emphasis on rehabilitation so that the offenders are transformed into good citizens.

The various theories have been reviewed from time to time. The theory of expiation and the theory of retribution have faded out. Some jurists also have their own doubts about the theory of deterrence. They doubt whether there is something inherent in it which is aimed at the protection of society.

2.03. Coming to the question of abolition of death sentence which we will examine in the next chapter, it is reasonably felt that the deterrence does work in appropriate cases depending on circumstances and it cannot altogether be

eliminated in the administration of criminal Justice. There are certain types of offences for which deterrent sentence is necessary. The growing menace of economic offences does warrant awarding deterrent sentence and a minimum sentence of imprisonment should be made compulsory. We find such provisions in certain enactments dealing with economic offences.

But at the same time there are certain offences which, when examined in the background of circumstances, do not attract deterrent sentence. In the case of juvenile delinquency, it is the reformative theory that has gained significant recognition. By a systematised reformation, the juvenile offenders can successfully be prevented from resorting to criminal activities and the tendency towards crime can be curbed. If they are left untouched they may prove to be greater menace to the society by becoming hardened criminals as they get mentally developed. It is on the mental development that the reformative theory lays its stress.

2.04. Now coming to the other types of offences against person and property, the provisions of the Indian Penal Code have fairly stood the test of time in the matter of awarding punishment. Depending upon the gravity of the offence the punishment varies. It is generally felt that too lenient a sentence does not meet the ends of justice. But the courts

are seen generally reluctant to award always a severe sentence. Therefore, it is well-settled that the punishment is an art which involves the balancing of several factors.

It is accepted that punishment is only the manifestation of crime, the second half of which is necessarily pre-supposed in the first, and the deed of the criminal Judges itself. The State as the punishing authority never thinks in terms of retribution and old notion of retribution has no place in the modern world. Our penal laws, particularly the Indian Penal Code, gives latitude to the court in awarding the prescribed sentence. In the matter of infliction, the punishment as a deterrent is expected to serve twofold purpose -- individual and general. The object is to teach the offender a lesson and at the same time to demonstrate to the public that such offences would attract a severe punishment. Deterrence does work, but it may not be correct to presume that it works well in all circumstances and in all cases.

2.05. Our system recognises reformative theory also. The Borstal School Act, 1926; The Juvenile Justice Act; 1986 and The Probation of Offenders Act, 1958 are some of the enactments which reflect the reformative approach. Caldwell observes thus:

"Punishment is an art which involves the balancing of retribution, deterrence and reformation in terms not only of the court and the offender but also of the values in which it takes place and in the balancing of these purposes of punishment, first one and then another, receives emphasis as the accompanying conditions change."[2]

It is generally felt that punishment under the Indian Penal Code needs review. The sentence of 14 years as it works out ultimately in the case of sentence for murder, is considered to be low and lenient. Likewise, the sentences in respect of certain offences against property are considered to be not commensurating with the degree of crime like cheating and forgery, particularly committed in respect of the public institutions. So far as the economic offences are concerned, it is universally accepted that severe and deterrent sentences should be awarded. Illogical and unreasonable variations in punishment have brought the courts under criticism. To enable the court to arrive at a correct determination of punishment, it is essential that all the information about the antecedents of the accused should be there. There are so many relevant factors in determination of the quantum of sentence. So far as habitual offenders are concerned, section 75 of the I.P.C. provides for enhanced punishment of imprisonment. Many eminent jurists have pointed out that when the discretion is given to the judges in the matter of awarding punishment and for an effective

exercise of such a discretion, the judge has to resort to the additional fact-finding processes. Therefore, a time has come to consider whether an independent authority like Probation Officer should be required to gather the necessary information about the accused and which information should be made available to the judge before awarding punishment to that individual accused. Having regard to the fast changes in the society and social thinking, it has also become necessary to modify the provisions of the Borstal Schools Act, 1926, Juvenile Justice Act, 1986 and Probation of Offenders Act, 1958 suitably.

2.06. A survey of the provisions of the Indian Penal Code reveals that out of 511 sections in the Indian Penal Code, 330 are punitive provisions, the remaining being definitions, exceptions and explanations. The offences covered by these punitive provisions are broadly divided into two categories (i) cognizable and (ii) non-cognizable on the lines of arrestable and non-arrestable.

In our law the Police are prohibited from investigating the non-cognizable offences mainly on the ground that most of them are trivial. The offences are then further divided into bailable and non-bailable depending upon the gravity of the offence. About 120 offences in the Indian Penal Code are non-cognizable. In many workshops it was pointed out that this division requires to be re-examined in the context of rapid social changes and that some of them

should be made cognizable. It is voiced that some trivial offences affecting public order also can lead to serious developments if they are not dealt with promptly and, therefore, it is desirable that such offences are made liable for public intervention.

We are of the view that such a re-examination is necessary and the offences punishable under sections 290, 298, 431, 432, 434, 504, 505 and 510 should be made cognizable.

In section 53 Indian Penal Code, the punishments that can be imposed are mentioned. Section 53 is in the following terms:

> "53. **Punishments.**- The punishments to which offenders are liable under the provision of this Code are -
> First,- Death;
> Secondly,- Imprisonment for life;
> Thirdly,- (Replaced by Act 17 of 1949); Fourthly, which is of two descriptions, namely:-
> (1) Rigorous, that is, with hard labour;
> (2) Simple;
> Fifthly,- Forfeiture of property;
> Sixthly,- Fine"

2.07. The Law Commission in its 42nd Report considered the question whether any changes are necessary but did not recommend any change regarding the types of punishment. It, however, recommended certain changes only in sections 64 to 69, 71 and 75. The Commission also recommended that a new section 55 should be inserted with effect that the imprisonment for life shall be rigorous. To the same effect are the recommendations made by the Law Commission in its 39th Report regarding the punishment of imprisonment for life.

In the Indian Penal Code (Amendment) Bill, 1978, however, certain other types of punishments are proposed to be added in section 53 and these are community service, disqualification from holding office, order for payment of compensation and public censure. In the various workshops held it is highlighted that the punishment of community service is not practicable. It is also voiced that the fine amount fixed many years ago have no relation to the realities to the present changed economic scenario and therefore, an upward revision is necessary. Doubts have been expressed whether the respective punishments, namely, disqualification from holding office and public censure should be included in section 53. It is said that when there is conviction and punishment is awarded, disqualification from holding office should automatically be called for by virtue of the service rules or in view of the regulations governing the management of corporations. Likewise, it was voiced that public censure

does not relate to the concept of punishment and, therefore, it would be out of place to include the same in section 53. The National Commission for Women recommended that more severe punishment should be awarded under section 376.

At this stage it is necessary to consider a few important criteria in the assessment of the value and impact of punishment. It has to be borne in mind that crime is a phenomenon of time and an opportunity to which the need and compulsion are to be added. These factors reflect the problems like environmental, social, psychological and economic, in the society. The ultimate object of criminal law is to prevent crime. Regarding the determination of what should be the proper sentence in a particular case should necessarily be left to the court except in respect of the offences where minimum sentences are prescribed, and where the discretion of the court is curtailed. The Law Commission in its 14th Report observed:

> "The determination of what should be the proper sentence in a particular case has always been left to the court for the very weighty reason that no two cases would ever be alike and the circumstances under which the offence was committed and the moral turpitude attaching to it would be matters within the special knowledge of the court which has tried the case. There can be no rule of general application laying down a specific quantum of

punishment that should be inflicted in the case of a particular offence. A sound judicial discretion on the part of the trial judge in awarding punishment can alone distinguish between case and case and fit the punishment to the crime in each individual case."

2.08. The Law Commission in its 42nd Report also considered the position whether the present distinction between simple and rigorous imprisonment should be done away with and all offenders deserving jail sentence should be simply sentenced to imprisonment for a specified term, leaving it to the jail authorities and the prison rules to regulate the kind of work to be taken from particular classes of prisoners. The Commission, however, ultimately recommended that the legislative policy underlying the classification is sound and should be maintained. It may be mentioned that under the Indian Penal Code the majority of the offences are punishable with "imprisonment of either description", and only few with simple imprisonment thereby leaving it to the discretion of the court. No doubt the court while awarding sentence has to take into consideration the nature of the offence, the motive, state of mind, the extent of breach of duty, the manner of commission of a crime, the means employed in its commission, the age and antecedents of the perpetrators, etc. In view of the changes in the social set up that have taken, a fresh look to consider the efficacy of punishments have become necessary.

A serious study on the question of revising the list of offences and also of describing punishments is felt necessary. Then the time scale and the system of punishment has to undergo a change. Taking up the justification of deterrent punishment, we find that the objective aimed at the protection of the society, and the expectation that people will refrain from committing the offence for fear of deterrent punishment have not resulted in refraining the people from committing offences. However, in the matter of infliction, the deterrent punishment is expected to serve twofold purpose individual and general. A survey of the system of punishment obtaining in various countries would show that the concept of deterrence cannot be entirely eliminated from the present day policy of criminal law. However, the reformative theory of punishment has gained considerable importance and it aims at reformation by stressing that the offender should while being punished by detention, there is a need to expose him to educative, healthy and ameliorating influences. If the offender can be re-educated and traits of his character can be re-shaped, he can be put once again in the mainstream.

2.09. Now coming to the sentencing, policy in the various workshops it is voiced that the amounts of fine to be imposed should considerably be enhanced and it should, as far as possible, be substitute for short-term imprisonment. It is also expressed that the poor victims of uses and abuses of criminal law should be compensated by way of reparation and

that the amounts of fine prescribed long ago have lost their relevance and impact in the present day and the fines imposed have no relation to the economic structure of society and necessary element of deterrence is generally absent.

An examination of the various sections in the Code where sentence of fine, is provided for, reveals that from a minimum fine of Rs.100/- it varies up to Rs.1,000/-. In respect of most of the offences it is below Rs.500/-. Therefore, a change regarding the quantum of fine should be made in all those sections correspondingly, at least by 20 times and make a provision in the Code of Criminal Procedure regarding the powers of the First Class Magistrates to impose such a fine.

The main problem with the fine is in respect of the defaulter. In this context, the financial status of the offender also becomes relevant. A rich man can pay the fine and avoid being imprisoned in default whereas a poor man who cannot afford to pay the fine has to undergo the imprisonment.

2.10. A statistical survey shows that imposition of fine by the criminal courts is much more frequent than before. To ameliorate the problem regarding payment of fine by an indigent accused it would be salutary to make him pay the fine in instalments, namely, a gradation between different penalties corresponding to the resources of the offender.

Some of the eminent jurists have observed that a provision of instalment payment of fines besides saving the tax-payer's money and the prisoner from an unwholesome experience and incidental demoralisation, creates a wholesome effect on the family of the offender. In the case of defaulters, even where such benefit is given, some other course can also be evolved. He can be put on compulsory work outside the prison, e.g., on public projects like dams, roads or rural construction. Thus there are so many advantages of fine being the punishment as far as possible besides the same having a reformatory treatment. The fines thus collected can usefully be utilised by the State. Of course, there are certain disadvantages noticed. One of them is that fines in practice are adjusted to the offence and therefore bear unequally on the rich and the poor. The fear of fine does not stop rich people from committing certain offences. No doubt some of the objections are of some importance; but taking an overall view it cannot be denied that fines have an important role to play in law enforcement but they must be imposed with the sound discretion and understanding particularly the means to pay. They, however, should not be used in dealing with habitual offenders, prostitutes, drug addicts, etc. since imposition of fine on them cannot have any expected reformative results.

With this background, we propose to examine the various types of punishment proposed in the Bill.

2.11. Section 53 to 75 in Chapter III of the Code deal with punishments that can be awarded under the Code. Clause 18 of the Bill provides for substitution of section 53 by a new section which is as follows:

> "53. **Punishments.-** The punishment which may be imposed on conviction for any offence are -
>
> (i) death;
>
> (ii) imprisonment for life which shall be rigorous, that is, with hard labour;
>
> (iii) imprisonment for a term which may be -
>
> (a) rigorous, that is, with hard labour, or
>
> (b) simple, that is, with light labour;
>
> (iv) Community service;
>
> (v) Disqualification from holding office;
>
> (vi) order for payment of compensation;
>
> (vii) forfeiture of property;
>
> (viii) fine;
>
> (ix) public censure."

We find that in the proposed section the imprisonment for life shall be rigorous, that is, with hard labour. This description of imprisonment is not there in the existing section. Likewise simple imprisonment can be with light labour.

Four new types of punishments are included, namely, (i) community service, (ii) disqualification from holding office, (iii) order for payment of compensation and (iv) public censure. In section 53 the punishment, namely, "transportation for life" was substituted by the words "imprisonment for life" by Act 26 of 1959. Section 53A which has been added by Act 26 of 1959 states that in every case in which a sentence of transportation for a term has been passed, the sentence shall be dealt with in the same manner as rigorous imprisonment for the same. Questions often arose before the courts whether the punishment "imprisonment for life" means "rigorous imprisonment for life". The Law Commission in its 39th Report noted that there is no clear provision as to how the person sentenced to imprisonment for life should be dealt with under the law as it now stands, namely, whether it should be same as sentence of rigorous imprisonment for life or simple imprisonment for life and whether it is a punishment different in quality despite being different in duration when the sentence of imprisonment of either description or for a specified term and whether it is legally permissible for a court passing a sentence to lay down that the imprisonment for life shall be rigorous or simple. Since there is no clear provision, a new section 56 is sought to be inserted in the Code of Criminal Procedure to the effect "imprisonment for life shall be rigorous with a view to resolve the doubts". Correspondingly, the proposed amendment making imprisonment for life rigorous is necessary.

The other change, namely, that simple imprisonment as compared to rigorous imprisonment can be with a light labour is also a desirable change.

2.12. Now coming to the "community service" by way of punishment, the question is whether it is practicable. The punishment by way of community service is a new concept and closely connected with reformative theory. In "Declaration of Principles of Crime and Punishment of the Cincinnati, Ohio meeting of the First Congress in 1880", it was observed, "the supreme aim of present discipline is the reformation of criminals, not the infliction of indigent suffering". On these lines the All India Jail Manual Committee has also suggested the system of open jails for the rehabilitation and pre-release preparation of the prisoners. It is an accepted principle that the ultimate object of punishment is to make the anti-social person a good citizen. The open air jail system is recommended to achieve this object of rehabilitation and pre-release of the prisoners by giving them necessary training and adopting correctional methods. It is recognised that with a view to rehabilitate the prisoners socially, they should be employed in work which will prepare them for useful and remunerative employment after release. However, it is to be borne in mind that in this open air prison system the prisoner enjoys a degree of freedom but not fully. The community service no doubt is

another innovation in the direction of correctional methods but as voiced in many workshops it may not be practicable to give an effect to and also may not amount to a punishment.

Clause 27 of the Bill provides for insertion of a new section 74A exclusively to deal with punishment of community service and is in the following terms:

> "74A. (1) Where any person not under eighteen years of age is convicted of an offence punishable with imprisonment of either description for a term not exceeding three years or with fine, or with both, the court may, instead of punishing him as aforesaid or dealing with him in any other manner, make an order (hereinafter in this section referred to as the Community Service Order) requiring him to perform, without any remuneration, whether in cash or in kind, such work and for such number of hours and subject to such terms and conditions, as may be specified in the said Order:
>
> Provided that the number of hours for which any such person shall be required to perform work under a Community Service Order shall be not less than forty hours and not more than one thousand hours:

Provided further that the court shall not make a Community Service Order in respect of any such person, unless-

(a) such person consents in writing to perform the work required of him under such Order:

(b) the court is satisfied that such person is a suitable person to perform the work required of him and that for the purpose of enabling him to do such and such work under proper supervision, arrangements have been made by the State Government or any local authority in the area in which such person is required to perform such work.

(2) Every Community Service Order made under 'sub-section (1) shall specify the nature of the work to be performed by such person which shall be of general benefit to the community.

(3) Where the court by which any Community Service Order was made is satisfied at any time that-

(a) any person against whom a Community Service Order has been made under sub-section (1) has failed, without reasonable cause or excuse, to comply with any of the terms and condition specified in such Order: or

(b) having regard to the circumstances that exist subsequent to the date of making the Community Service Order, it is necessary or expedient in the interests of justice so to do, it may-

(i) in a case falling under clause (a), modify or revoke the Community Service Order and deal with the person convicted of the offence in such manner as he may have been liable to be dealt with for the offence in relation to which such Order was made or, without prejudice to the continued operation of the Community Service Order, impose on him a fine not exceeding one hundred rupees; or

(ii) in a case falling under clause (b), modify or revoke the Community Service Order and deal with the person convicted of the offence in such manner as he may have been liable to be dealt with for the offence in relation to which such Order was made.

(4) Where a court makes two or more Community Service Orders against a person convicted of two or more offences at the same trial, it may direct that the hours of work required to be done under any Community Service Order shall be concurrent with or in addition to the hours of work

under any of the Community Service Orders made by the court at the same trial, subject to the condition that the total number of hours of work to be done by such person under all or any such Community Service Orders shall not exceed one thousand hours."

2.13 A careful reading of this new section shows that the punishment of community service can be awarded to any person above eighteen years of age convicted of an offence punishable with imprisonment of either description for a term not exceeding three years or with fine or with both and the court instead of sending him to the prison or dealing with any other manner make an order, namely, "community service order" requiring the said convict to perform without any remuneration such work for such number of hours subject to certain terms and conditions. In other words, an order called community service order is passed after conviction by way of punishment with all those conditions mentioned in the proposed section 74A. The implementation part of it is provided in sub-section 1A and 1B and work is to be performed under proper supervision as per the arrangements to be made by the State Government or any local authority. Sub-section (2) lays down that the nature of the work to be performed by the convict has to be specified. The object underlying in awarding this kind of punishment though outwardly appears to be attractive, but there are any number of difficulties in enforcing the same. A mere reading of sub-section (3) makes

the point clear. This section contemplates a supervisory authority to see whether the convict is working and rendering service for the number of hours specified and if he fails to do so by way of default, he has to be sentenced thereafter. We think an open air prison system is better suited from the point of view of the correctional measures rather than the proposed punishment of community service.

2.14. The next aspect is whether the punishment "disqualification from holding office" should be incorporated in section 53 of the Indian Penal Code. In some types of cases particularly involving public servants and other persons holding office in corporations, companies, registered societies, etc., ending in conviction should necessarily entail with the disqualification from holding office, but such a course is intrinsically connected with their respective service rules and regulations. It is a matter of common knowledge that in almost all such service rules we find some provision or other disqualifying such a person after conviction, from holding the office. Therefore, it would be appropriate to leave the issue to be decided by the concerned authorities under all those rules and regulations because incidentally some other questions pertaining to the service conditions may also arise which warrant a further inquiry.

8.15. Coming to the payment of compensation by way of punishment, the Supreme Court in Shri Bodhisattawa Gautan v Miss Subhra Chakraborty,[3] citing its earlier decision in Delhi Domestic Working Women's Forum v Union of India[4] observed:

> "It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some, for example, are too traumatised to continue in employment.
>
> Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy as a result of the rape."

The Court added:

> "The decision recognises the right of the victim for compensation by providing that it shall be awarded by the Court on conviction of the offender subject to the finalisation of Scheme by the Central Government. If the Court trying an offence of the rape has jurisdiction to award the compensation at the final stage, there is no reason

to deny to the Court the right to award interim compensation which should also be provided in the scheme."

On the basis of principles set out in the aforesaid decision in Delhi Domestic Working Women's Forum, the jurisdiction to pay interim compensation shall be treated to be part of the overall jurisdiction of the Courts trying the offences of rape which, as pointed out above is an offence against basic human rights as also the Fundamental Right of Personal Liberty and Life."

2.16. The Law Commission in its 154th Report on the Code of Criminal Procedure has recommended insertion of a new provision, namely, 357A providing for framing victim compensation scheme by the respective State Governments under which the compensation can be awarded to the victims on the lines indicated therein wherever it is found to be necessary apart from the compensation awarded by the court under section 357 out of the fines. We may also indicate that awarding sufficient compensation depends upon many circumstances which require some inquiry. Further in some cases an order for payment of compensation need not necessarily be by way of punishment. Therefore, we are of the view that it is not appropriate to include order for payment of compensation in section 53 by way of punishment.

Another punishment which is sought to be included in section 53 is 'public censure', namely, publication of the name of the offender and details of the offence and sentence. The proposed Section 74C provides for imposition of the punishment by way of public censure in addition to the substantive sentence under sub-section (3) and this is limited to offences mentioned in chapters XII, XIII, sections 272 to 276, 383 to 389, 403 to 409, 415 to 420 and offences under chapter XVIII of the case as offences under proposed new Sections 420A and 462A under the Indian Penal Code (Amendment) Bill. These are all offences where persons entrusted with some public duties commit offences. Such a punishment has great relevance in respect of anti-social offences, economic offences, otherwise called white-collar offences particularly committed by sophisticated persons. It is of common knowledge that while these offences affect a large number of people, the offenders are not readily booked. However at least in such cases which end in conviction, the punishment of public censure is likely to act as a greater deterrence because of the fear of infamy resulting from the publicity and consequent repercussions like loss of business etc. Such a censure is one of the prescribed punishments in USSR, Columbia and other countries. In India such form of punishment is included in the Prevention of food Adulteration Act and Income-tax Act. The Law Commission in its 42nd Report considered the inclusion of such a punishment and recommended that such additional punishment would be useful in the case of persons convicted for the second time of any

of the offences under chapter XII and XIII, like extortion, criminal misappropriation, cheating and of offences relating to documents. We are also of the view that such public censure by way of an additional punishment should be there and accordingly be included in section 53 of the Indian Penal Code and it should be left to the discretion of the court regarding imposition of the same in selective cases.

2.17. There are only few sections in the Indian Penal Code which prescribe death as penalty. They are sections 121, 132, 194, 302, 305, 2nd part of 307 and 396. However, by virtue of Criminal Law Amendment Act of 1983, minimum sentence in respect of offence of rape has been prescribed under section 376 (1) & (2). A question whether there should be such minimum sentence in respect of some more offences was debated and ultimately consensus is that restrictions on judicial pronouncements in the matter of award of sentence on principle is not a healthy practice. There may be instances occasionally where judges have failed to award proportionate sentences, but that cannot, however, be a factor to assume that the judges as a whole have failed to award adequate sentences. In the 14th Report as well as in the 42nd Report, The Law Commission examined this question and took the view that except in exceptional cases there should not be any provision for a minimum sentence. We agree with this view.

In respect of number of offences the punishment prescribed is "imprisonment or with fine or with both". It is voiced in various workshops that in view of the changes in the modern society, the type of crimes and the repetition of those crimes or the frequent occurrence of certain types of crimes, it is necessary that the punishment should be imprisonment and in addition fine also. Having examined various provisions in the IPC and the modern trends of crime, we are of the view that in respect of the offences under sections 153, 153A, 160, 166 to 175, 177, 182, 221, 269 to 291, 292, 294 to 298, 336, 465 and 477A, the punishment should be imprisonment as well as fine. Incidentally, we also suggest that the extent of imprisonment should be enhanced suitably in respect of these offences.

FOOTNOTES

Dr.Jacob George v. State of Kerala, 1994(2) Crimes 100

Caldwell, Criminology, p.403 cited by R.C.Nigam. "Law of Crimes in India"- Principles of Criminal Law, Vol.I, p.232.

JT 1995(9) SC 509

JT 1994(7) SC 183

CHAPTER - III

DEATH PENALTY

Retention of Capital Punishment

Clause 125 of the Bill seeks to substitute existing Section 302 by inserting the following provisions:

"302(1) Whoever commits murder shall, save as otherwise provided in sub-section (2), be punished with imprisonment for life and shall also be liable to fine.

(2) Whoever commits murder shall -

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the union or of a member of any police force or of any public servant and was committed -

(i) while such member or public servant was on duty;

or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under section 43 of the Code of Criminal Procedure 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under section 37 or section 129 of the said Code; or

(e) if the murder has been committed by him, while undergoing sentence of imprisonment for life, and such sentence has become final, be punished with death or imprisonment for life, and shall also be liable to fine.

(3) Where a person while undergoing sentence of imprisonment for life is sentenced to imprisonment for an offence under clause (e) of sub-section (2), such sentence shall run consecutively and not concurrently."

The basic issue which needs consideration is whether the capital punishment should be abolished?

3.02. The framers of the Bill intended to list out the cases when death sentence should be awarded. The question is whether such categories can be or may be prescribed thereunder. We would like to examine the punishment as death penalty in detailed manner and give our conclusions. However, before taking up the examination of the relevant provision, it would be desirable to refer to the development and the judicial response on the subject.

The controversy of capital punishment is an age old phenomenon. For the past few decades there has been a move to abolish death sentence. There has been a growing public opinion in favour of it. Some countries have even abolished the death penalty. In Britain, there has been a move for restoration of death penalty supported by substantial sections of public opinion.

There has been a worldwide feeling of humanistic pproach to the criminals and punishment. Efforts have been de and are being made to make punishment liberal and reform e prisons. For quite some time, there has been a move to olish death sentence. There has been a growing public inion in favour of it. Though it has not been abolished so r, the law has growingly become liberal in this respect.

In all the offences falling under sections 121, 132, 194, 302, 305, Second part of 307 and 396 of the Indian Penal Code provide for punishment of death or in the alternative, imprisonment for life. Thus, it is seen that all grave offences are made punishable with death sentence. Death sentence is executed in India by hanging by a rope until the person is declared dead.

3.03. In India the constitutionality of death penalty for murder provided under Section 302 of the Indian Penal Code and the sentencing procedure embodied in Sec.354(3) of the Code of Criminal Procedure, 1973 was challenged in the Supreme Court on the ground that they are violative of Articles 14, 19 and 21 of the Constitution of India. The majority view of the Constitution Bench, to whom the matter was referred, held that the provisions of death penalty as an alternative punishment for murder and also the sentencing procedure in Sec.353(3) Code, did not violate Articles 14, 19

and 21 of the Constitution of India. The Supreme Court, however, upheld the constitutional validity of a death penalty.

Thus, in Jagmohan Singh v. State of Punjab[1] the Supreme Court was invited to dwell upon the constitutional validity of such a wide, unguided and uncontrolled judicial discretion to make a choice between "death" and "life" of a convict. It was forcefully argued before the five-member Bench that such a discretion results in discrimination and involves arbitrariness violating article 14 of the Constitution. The Court rejected the argument and justified such a wide judicial discretion owing to impossibility of laying down sentencing norms as facts and circumstances of no two cases are alike and, wrong discretion in matter of sentence, if any, is liable to be corrected by superior courts.

3.04. Again in Bachan Singh v. State of Punjab[2] the Supreme Court reacting to the argument that the sentencing procedure embodied in section 354(3) of Cr.P.C. allowing death sentence only in undefined and unguided "special reasons" is unfair, unreasonable and unjust, and is, therefore, violative of articles 14, 19 and 21 of the Constitution, showed its reluctance to formulate rigid standards to determine what could be "special reasons". But it advised the courts to pay due regard to the crime and criminal, and weigh relatively the aggravating and mitigating

factors and to resort to the death sentence in the most exceptional class of cases - "the rarest of rare cases" - when the alternative option is unquestionably foreclosed.

Section 354(3) is in the following terms:

> "When the conviction is for an offence punishable with death or, in the alternative with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded and, in the case of sentence of death, the special reasons for such sentence".

From a reading of section 354(3) of Cr.P.C. and other related provisions it is clear that for making the choice of punishment or for accepting the existence in that context, the court must pay due regard both to the crime and the criminal. The relative weight that can be given to the aggravating and mitigating factors depends on the facts and circumstances of the particular case. In imposing sentence the main aspects of the character and magnitude of the offence and the court has to keep in view the proportion which must be maintained between offence and the penalty and the other attendant circumstances that exist in the case.

The Supreme Court in a series of cases ruled that death penalty be awarded in "rarest of rare" cases.

In Machhi Singh v. State of Punjab[3] a Bench of three Judges of the Supreme Court having noted the principles laid down in Bachan Singh's case (supra) regarding the formula of 'rarest of rare cases' for imposing death sentence, observed that the guidelines indicated in Bachan Singh's case will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. It was further observed as under:

> "If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so".

Likewise in Allauddin Mian and Others v. State of Bihar[4] the same view has been reiterated thus:

> "However, in order that the sentences may be properly graded to fit the degree of gravity of each case, it is necessary that the maximum sentence prescribed by law should, as observed in Bachan Singh's case (A.I.R. 1980 S.C. 898), be reserved for the rarest of rare cases which are of a exceptional nature. Sentences of severity are imposed to reflect the seriousness of the crime, to promote respect for the law, to provide just

punishment for the offence, to afford adequate deterrent to criminal conduct and to protect the community from further similar conduct. It serves a three-fold purpose (i) punitive, (ii) deterrent and (iii) protective. That is why this Court in Bachan Singh's case observed that when the question of choice of sentence is under consideration the court must not only look to the crime and the victim but also the circumstances of the criminal and the impact of the crime on the community. Unless the nature of the crime and the circumstances of the offender reveal that the criminal is a menace to the society and the sentence of life imprisonment would be altogether inadequate, the Court should ordinarily impose the lesser punishment and not the extreme punishment of death which should be reserved for exceptional cases only."

In Mithu v. State of Punjab[5] the Constitution Bench, held:-

"The gravity of the offence furnishes the guidelines for punishment and one cannot determine how grave the offence is without having regard to the circumstances in which it was committed, the motivation and its repercussions. The legislature cannot make relevant circumstances irrelevant,

deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death. Equity and good conscience are the hallmarks of justice".

In Kehar Singh v. Delhi Administration[6] similar rinciples are reiterated and it is further observed "it is a ruesome murder committed by the accused who was employed as ecurity guard to protect the Prime Minister. It is one of he rarest of the rare cases in which extreme penalty is alled for".

The aforesaid principles have been approved in many ater cases[7].

.05. The campaign against capital punishment no doubt as gained momentum in recent years. In 1962, a resolution as moved in the Lok Sabha for the abolition of capital unishment. The Government assured the House to refer the atter to the Law Commission of India and consequently the atter was referred to the Law Commission. The Law ommission after considering the matter thoroughly, felt that n the particular circumstances existing in India, it cannot

risk the experiment of abolition of capital punishment. In its 35th report the Commission has elaborately dealt with the retention of death penalty and ultimately observed as under:

> "The issue of abolition or retention has to be decided on a balancing of the various arguments for and against retention. No single argument for abolition or retention can decide the issue. In arriving at any conclusion on the subject, the need for protecting society in general and individual human beings must be borne in mind.
>
> It is difficult to rule out the validity of the, or the strength behind many of the arguments for abolition. Nor does the Commission treat lightly the argument based on the irrevocability of the sentence of death, the need for a modern approach, the severity of capital punishment and the strong feeling shown by certain sections of public opinion in stressing deeper questions of human values.
>
> Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for

maintaining law and order in the country at the present juncture, India cannot risk the experiment of capital punishment.

Arguments which would be valid in respect of one area of the world may not hold good in respect of another area, in this context. Similarly, if abolition in some parts of India may not make a material difference, it may be fraught with serious consequences in other parts.

On a consideration of all the issues involved, the Commission is of the opinion that capital punishment should be retained in the present state of the country."

3.06. However, the Law Commission has recommended that children below 18 years of age at the time of the commission of the offence should not be sentenced to death. The Criminal Procedure Code, 1973 made a further progress in the direction of liberalisation. The shift towards liberalisation in imposing life imprisonment as against death sentence in capital offences has also been highlighted by the Supreme Court in Sarweshwar Prasad Sharma V. State of M.P.[8] in the following words:

"The recent benign direction of the penal law is towards life sentence as a rule and death as an exception, awarding of which must be accompanied by recorded reasons."

Thus in cases where there are extenuating circumstances, the accused is punished with life imprisonment. In the absence of extenuating circumstances and in the "rarest of rare cases", capital punishment is awarded.

3.07 We have carefully considered the question from several angles after making comparative study of the law in other countries and after examining various judgments till date rendered by the apex court, we reiterate the recommendation of Law Commission in its 35th Report for retention of the capital punishment, but to be awarded in accordance with the guidelines laid down by the Supreme Court.

PART - II

Specification of categories of awarding death penalty - not necessary

3.08. We now turn to examine the second issue arising out proposed sub-section (2) of Section 302 occurring under clause 125 of the bill, namely, whether categories of cases

should be specified for awarding death penalty. The categories specified in the proposed sub-section (2) of Section 302 is not exhaustive.

Section 354(3) of the Code of Criminal Procedure, 1973, as has been seen earlier, mandates the judge called upon to exercise his choice between the alternative sentence of death and imprisonment for life to state "special reasons" for the death sentence awarded. The provision, in the light of its legislative history, in unmistakable terms makes it evident that imprisonment for life is a rule in case of offences punishable with death or in the alternative imprisonment for life and it is only in exceptional cases, for special reasons to be recorded, death sentence can be imposed. But it is nowhere indicated in either the Code of Criminal Procedure or any other statutory instrument as to what constitutes the so-called "special reasons" justifying imposition of sentence of death. This is, again, entirely left to the discretion of the court[9].

3.09. Before the amendment of section 367(5) of the Criminal Procedure Code, 1898 by Act 26 of 1955, the normal rule was to impose the sentence of death on a person convicted of a capital offence and if a lesser sentence was to be imposed, the court was required to record reasons in writing. But by the aforesaid amendment, the provision in section 367(5) was omitted and consequently, the court became

free to award either death sentence or life imprisonment and no longer death sentence was the rule and life imprisonment the exception.

Interpreting the liberal provision brought about by legislation, Justice Krishna Iyer in E.Annamma v. State of Andhra Pradesh[10], observed:

> "That the disturbed conscience of the State on the vexed question of legal threat of the life by way of death sentence has set to express itself legislatively. The screen of tendency being towards cautious, partial abolition and a retreat from total retention."

Justice Krishna Iyer, admitted the impossibility to "feed into a judicial computer" all the situations warranting life imprisonment or death sentence"

He, however, suggested factors to be taken into consideration while making a choice between death sentence and life imprisonment like personal, social, motivational and physical circumstances: horrendous features of the crime; hapless and helpless state of the victim, intense suffering endured by prison, torture, and excruciating death penalty hanging over head of the convict consequent of the legal process.

One can also visualise even in cases falling under the proposed sections 302(2)(a) or (b) (c) or (d), that there may be extenuating, mitigating circumstances which may deter imposition of death sentence, and thus again the principle laid down in Jagmohan Singh v. State of UP[11] and Bachan singh's case[12] as discussed earlier comes into play. This is even statutorily recognised in section 354(3) of Code of Criminal Procedure 1973 which enjoins that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts. Therefore, in spite of the proposed amendment in the IPC Bill under section 302(2), the situation will be virtually be the same.

3.10. Therefore, we are of the view that it is better to retain section 302 as it is instead of reading any limitations into the same regarding imposition of death sentence for the reason that it is impossible to put them in any straight jacket for the reason that what circumstances make a case a 'rarest of rare one', cannot be fixed by way of a legal provision. Therefore, we would not recommend any change in section 302 as is proposed in clause 125 of the Bill.

PART - III

Proposed clause (3) of section 302 in IPC Bill

3.11. We now turn to examine the sub-clause (3) of clause 125 of the Bill which provides:

"Where a person while undergoing sentence of imprisonment for life is sentenced to imprisonment for an offence under clause (a) of sub-secton (2), such sentence shall run consecutively and not concurrently."

We wish to examine the aforesaid provisions of the Bill in the light of recent legislative and judicial policy.

Under the Code of Criminal Procedure, 1898 if a person undergoing the sentence of transportation for life for another offence, the latter sentence was to commence at the expiration of the sentence of transportation to which he was previously sentenced, unless the court directed that the subsequential sentence of transportation was to run concurrently with the previous sentence of transportation.

3.12. It was in 1955 that section 307 of the Code of Criminal Procedure of 1898 was replaced by a new section 397 by Amendment Act 26 of 1955. Under the new sub-section (2) of section 397 which came into force on January 1, 1956 if a person already undergoing a sentence of imprisonment for life was sentenced on a subsequent conviction to imprisonment for life, the subsequent sentence had to run concurrently with the previous sentence. Section 427(2) of the Code of Criminal Procedure, 1973 is to the same effect.

Further in Bhagirath v. Delhi Administration[3], (Constitution Bench), it was held:

> "Graver the crime, longer the sentence, greater the need for set offs and remissions. Punishments are no longer retributory. They are reformative."

We feel that clause (3) of section 302 of IPC Bill providing for running of sentence of life imprisonment consecutively instead of concurrently, will be a retrograde step in accord with deterrent and retributive theories of the past as observed by the Supreme Court. In view of this, we do not approve the proposed clause (3) of section 302 in the Bill.

PART - IV

Punishment for murder by life convict

3.13. Section 303 of the Indian Penal Code provides:

> "whoever being under sentence of imprisonment of life commits murder shall be punished with death."

The Law Commission in its 42nd Report did not recommend any change in the aforesaid section since it is "very rarely applied".

The Supreme Court in Mithu v. State of Punjab[14] declared that the aforesaid provisions of Section 303 violate the guarantee of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution. Chinnappa Reddy J in his concurring opinion observed:

> "it is impossible to uphold section 303" as valid as it excludes judicial discretion. He added that "the scales of justice are removed from the hands of the judge as soon as he pronounced the accused guilty of the offence. So final, so irrevocable and so irrestitutable (sic irresuscitable) is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law necessarily be stigmatised as arbitrary and oppressive. Section 303 is such a law and it must go the way of all".

Clause 126 of the Bill seeks to omit Section 303 of the Indian Penal Code.

3.14. We have carefully considered the various provisions of the Bill and feel that if section 303 is omitted the second part of Section 307 which provides that "when a person offending under this Section is under sentence of imprisonment for life, he may, if hurt is caused, be punished

with death" cannot be retained, on the same analogy and principles which hold section 303 to be arbitrary and oppressive and violative of Articles 14 and 21 of the Constitution. We accordingly recommend deletion of the second part of Section 307.

FOOTNOTES

1. 1973(2) SCR 541
2. AIR 1980 SC 898
3. 1983(3) SCC 470
4. 1983(3) SCC 5
5. 1983(2) SCC 277
6. 1988 SCC 389
7. See K.J.Chatterjee v. State (1994(2) SCC p.220), Bhairon Singh v. State of Rajasthan (1994(2) SCC p.467). Gauri Shankar & Ors. v. State of Tamil Nadu (JT 1994(3) SCC 54); Amrutlal Someshwar Joshi v. State of Maharashtra (1994(3) Crimes 197).
8. AIR 1977 SC 2423
9. Balwant Singh v. State of Punjab, AIR 1976 SC 230; AIR 1976 SC 2196; AIR 1977 SC 2423.
10. AIR 1974 SC 799
11. 1973 (2) SCR 541
12. 1980(2) SCC 684
13. 1985(2) SCC 580
14. (1983) 2 SCC 277.

CHAPTER - IV

CRIMINAL CONSPIRACY

So long as a crime generates in the mind, it is not punishable. Thoughts even criminal in character often involuntary are not crimes. But when the thoughts take the concrete shape of an agreement to do or cause to be done an illegal act or an act which is not illegal by illegal means then even if nothing further is done, the agreement is designated as criminal conspiracy. However, the proviso to section 120A makes it clear that except on agreement to commit an offence, a bare agreement of the aforementioned nature would not amount to an offence of criminal conspiracy unless some act besides the agreement is done by one or more parties to the agreement in pursuance thereof. It is the next overt step which may otherwise be of a preparatory nature such as buying arms to implement the criminal conspiracy that makes it punishable. The act of purchasing arms pursuant to an agreement to do an illegal act or an act which is not illegal by illegal means shall constitute an offence. Section 120A of the IPC is as follows:-

> "120A. Definition of criminal conspiracy.- When two or more persons agree to do, or cause to be done,

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof,

Explanation- It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

4.02. The offence of criminal conspiracy was introduced in the Penal Code by the Criminal Law Amendment Act of 1913, which inserted a separate Chapter VA consisting of only two sections 120A and 120B. Despite the obvious and considerable overlapping between the provisions of these two sections and the provisions governing abetment of an offence by conspiracy contained in Chapter V, the legislature did not think it necessary to amend the earlier Chapter in any way. Now whether or not some act or illegal omission takes place, he is guilty of a criminal conspiracy as soon as he becomes a party to the agreement to commit the offence and is

punishable under sub-section (1) or sub-section (2) of section 120B, as the case may be. So far as conspiracies to commit serious offences are concerned, section 120B (1) puts a party to the conspiracy in exactly the same position as an abettor of the offence for the purpose of punishment. Although it is theoretically possible to charge a person with conspiring to commit an offence even where no overt act in pursuance of the conspiracy has been done, it seldom, if ever, happens that two or more persons are prosecuted for a criminal conspiracy merely on the strength of evidence proving the agreement and nothing more.

4.03. However, that may be, there is no doubt that, after the enactment of Chapter VA, abetment by conspiracy is of little practical use, and is redundant as a criminal law concept. It may be noted, that in England there is no separate mention of conspiracy as a species of abetment. Therefore, in the 42nd report, the Law Commission had recommended the omission of the second paragraph of section 107 and all subsequent references in Chapter V of the Code of abetment by conspiracy.

One is struck by the wide sweep of the definition of criminal conspiracy in section 120 A. It covers not only (i) an agreement to commit an offence, but also (ii) an agreement to commit an illegal act, and (iii) an agreement to commit an act not illegal by illegal means. This distinction between achievement of any object by illegal means must

involve the doing of something illegal, i.e. the committing of an illegal act. The act which is an offence punishable under sub-section (1) or sub-section (2) of section 120B is being a party to a criminal conspiracy as defined in section 120A. In other words, now criminal conspiracy is not an offence ancillary to another offence, but an independent and substantive offence by itself.

4.04. In fact, the modern crime of conspiracy is almost entirely the result of the manner in which a conspiracy was treated by the Court in the doctrine of conspiracy which does not commend itself to jurists of civil law countries, despite universal recognition that an organised society must have legal weapons for combating organised criminality. Most other countries have devised what they consider more discriminating principles upon which to prosecute criminal gangs, secret associations, and subversive syndicates.

According to the definition of criminal conspiracy two or more persons must be parties to such an agreement and one person alone can never be held guilty of criminal conspiracy for the simple reason that one cannot conspire with oneself.[1] The offence of criminal conspiracy consists in the very agreement between two or more persons to commit a criminal offence irrespective of the further consideration whether or not those offences have actually been committed.

The very fact of the conspiracy constitutes the offence and it is immaterial whether anything has been done in pursuance of the unlawful agreement.[2]

Thus, even if there is concurrence in the intention of the accused persons to do an illegal act it is not enough for the purpose of establishing a charge of conspiracy. In other words, where there is no meeting of minds there cannot be a conspiracy.[3]

4.05. It is not an ingredient of the offence under this section that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. Where the accused are charged with having conspired to do three categories of illegal acts, the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevancy in considering the question whether the offence of conspiracy has been committed. They can all be held guilty of the offence of conspiracy to do illegal acts, though for individual offences all of them may not be liable.[4] It is not necessary that each member of the conspiracy must know all the details of the conspiracy.[5] An offence under this section consists in the conspiracy without any reference to the subject-matter of the conspiracy and it is not necessary to establish the offence that there must have been definite purpose about which the parties are negotiating or which they have conspired.

4.06. The Law Commission in its 42nd report was of the view that there is neither theoretical jurisdiction nor practical need for punishing agreements to commit petty offences or non-criminal illegal acts. In practice, few private prosecutions of such petty conspiracies are sanctioned by the State government or its officers under the Criminal Procedure Code. Therefore, it was recommended that section 120A which defines criminal conspiracy should be revised as follows:-

> "120A. When two ore more persons agree to commit an offence punishable with death, imprisonment for life or imprisonment of either description for a term of two years or upwards or to cause such an offence to be committed, the agreement is designated a criminal conspiracy.
>
> Explanation 1. - It is immaterial whether the commission of the offence is the ultimate object of such agreement or is merely incidental to that object.
>
> Explanation 2. - To constitute a criminal conspiracy, it is not necessary that any act or illegal omission shall take place in pursuance of the agreement."

4.07. It may be mentioned that the IPC (Amendment) Bill, 1978 is silent and has not indicated any change about the offence of criminal conspiracy. But the then Law Commission in its 42nd report was of the view that criminal conspiracy for petty offences should not be covered under this chapter. In this context, it is submitted that a petty offence may lead to an offence of serious nature and it would not be easy to separate such crimes as per doctrine of Res-gestae.

Moreover, the crime of criminal conspiracy differs from other offences. In other offences, the intention to do a criminal act is not a crime in itself until something is done amounting to the doing or the attempting to do some act to carry out the intention. On the other hand conspiracy consists simply in the agreement or confederacy to do some act, no matter whether it is done or not. Further, section 120A does not just contain a principle of constructive liability, therefore, if an accused is found guilty of criminal conspiracy, may be for a petty offence, he should be convicted under this section.

4.08. Therefore, it is suggested not to disturb this section as the same is working well.

> "120B. Punishment of criminal conspiracy.- (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for

a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both."

4.09. This section is the supplement of previous section and provides punishment for the crime committed thereof. It will be noticed that, for the purposes of punishment, section 120B divides criminal conspiracies into two classes. Where the conspiracy is to commit a serious offence, i.e. an offence punishable with imprisonment for two years or upwards, a party to the conspiracy is punished in the same manner as if he had abetted the offence. In the second category there are included conspiracies to commit any other offence (including offences punishable only with fine) and conspiracies to commit illegal acts other than offences; and for these, sub-section (2), provides a uniform punishment, viz. imprisonment of either description upto six months or fine or both. Recognising that it would be dangerous to leave these petty conspiracies to be alleged before courts by any person so provision is made in the Criminal Procedure

Code, that no court shall take cognizance of them except upon complaint made by order or under authority from the State Government or some officer empowered in this behalf.

In other words, the punishment for a criminal conspiracy is more severe if the agreement is one to commit a grave offence; and less severe if agreement is to commit an act, which although illegal, is not an offence punishable with death, imprisonment for life or rigorous imprisonment for more than two years. This section applies where no offence has been actually committed by the members of the conspiracy who are parties during the period of conspiracy for which they are charged under this section.

4.10. In England the law of conspiracy is not so widely drawn as in India. Conspiracy is a common law misdemeanour punishable with fine or imprisonment at the discretion of the court, except in the case of murder where by statute there is a maximum punishment of ten years. It consists in the agreement between two ore more persons to effect some -"unlawful" purpose. While the commission of a crime, even a non-indictable crime, is naturally recognised as an unlawful purpose, there are no precise or clear rules in regard to non-criminal unlawful purposes of an indictable conspiracy. Conspiracies to defraud, to commit a tort involving malice, or to commit a public mischief, are, broadly speaking, indictable. A conspiracy to commit or induce breach of contract is probably not indictable at the present day.

4.11. Though the present sub-section (1) of section 120B only refers to offences punishable with rigorous imprisonment for a term of two years or upwards, the offences which are punishable with imprisonment of either description for a term of two years or upwards, should be brought within the definition of criminal conspiracies. The second Explanation as suggested by the Law Commission in its 42nd Report is on the same lines as the explanation to section 121A; though not strictly necessary, it seems desirable to have it in this section also.

Under sub-section (1) of section 120B a party to a criminal conspiracy is liable to be punished in the same manner as if he had abetted the intended offence. This means that, in every case of conspiracy, the appropriate provision contained in Chapter V will have to be found out and applied. It would obviously be preferable to make the section self-contained.

Therefore, in the 42nd report, the then Law Commission had recommended that section 120B should be revised as follows:

"120B. Whoever is a party to a criminal conspiracy shall, where no express provision is made for the punishment of such a conspiracy, -

(a) if the offence which it is the object of the conspiracy to commit or cause to be committed is committed in pursuance of the conspiracy, be punished with the punishment provided for that offence; and

(b) if the offence is not committed in pursuance of the conspiracy, be punished with imprisonment of any description provided for that offence for a term which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for that offence, or with both."

4.12. It appears that the Law Commission made the recommendation for the revision of section 120B with the intention to make the section self-contained. But the recommendation will make the language ambiguous. Therefore, this recommendation could not find a place in the IPC (Amendment) Bill, 1978 which is silent about this section.

This section, no doubt, is very important as it provides a punishment only for criminal conspiracy where no express provision is made in the Code for the punishment of such a conspiracy. Where, therefore, a criminal conspiracy amounts to an abetment under section 107, it is unnecessary to invoke the provisions of this section, because the Code has made specific provisions for the punishment of such a conspiracy. Now it is well settled that a criminal conspiracy is a separate offence, punishable separately from the main offence.[6]

4.13. In the light of the above discussion, we are of the view that our recommendation in the matter is same for both the sections for the reasons mentioned earlier. In other words, there is no need to disturb Chapter VA as it works like residuary provision for the crime of conspiracy.

FOOT NOTES

1. Topandas Vs. State, (1955), 25 SCR 881.
2. Noor Mohammad Vs. State, (1970) SCC(Cri) 274.
3. Union of India Vs. Prafulla K. Sonal, (1979) SCC(Cri) 609.
4. Major EG Barsay Vs. State. AIR 1961 SC 1762.
5. Dalmia R.K. Vs. Delhi Administration (1962) II Cr.L.J 805.
6. Mahesh Chand, 1986 (1) Crimes 63. Also "Hazari Baria,1928, 30 Cr. L.J 473.

CHAPTER - V

FINANCIAL SCAMS

CONSPIRACY TO DEFRAUD PUBLIC INSTITUTIONS

There are various serious economic offences which are damaging the society. It is needless to say that the motive for commission of these crimes is the greed of the person and the method employed is nothing short of fraud. The Union Government appointed a Committee known as "Santhanam Committee"[1] in the year 1962 which, after a careful survey, categorised 8 kinds of Socio-Economic offences such as, inter alia ,

i) Offences calculated to prevent or obstruct the economic development of the country and endanger its economic health,

ii) Evasion and avoidance of taxes, and

iii) Profiteering, black-marketing and hoarding.

5.02 Recently, various sort of scams in various fields, e.g., banks, hospitals, investment of public shares involving crores of rupees have surfaced. In Shiv Sagar Tiwari v. Union of India,[2] the Supreme Court has also observed that there are various scams in the country.

5.03 Apparently, financial scams have the genesis of committing fraud with the public money running into crores and crores of rupees. The nation's economy is put in

doldrums when such colossal amount is pocketed in by vested interests through fraudulent means leaving the poor citizen's hard earned money which he invested for his prosperity or to cater for his evenings of his life, for being siphoned off by few culprits. Above all, if such culprits go scot free after even a protracted trial, or are met with punishments similar to an accused of fraud of insignificant amount as compared to those of scams, people start loosing faith in the jurisprudence of justice prevailing in the country. This has the direct inroad into the confidence of democratic set up of the country and the very existence of an orderly society is put at stake. In A.Jayaram and Another v. State of Andhra Pradesh by CBI,[3] the Supreme Court deprecated that officials involved in a fertilizer scandal of large scale went scot free because of tardy inquiries made by State Police. It held:-

> "It is really unfortunate that in fertilizer scandal of such magnitude, appropriate steps at the right time had not been taken and for want of convincing and unimpeachable evidence, the accused who were government officials have been acquitted by giving them benefit of doubt. It appears to us that such large scale scandal in transporting imported fertilizer would not have occurred if larger number of government officials and other than prosecuted were not involved. It is not unlikely that the superior government officials had also played a vital role in perpetrating the said

fraud or concealing the same. The tardy enquiries made by the State Police thereby necessitating an enquiry by the CBI at a belated stage is only a sad commentary on the efficiency of the police administration..."

In Delhi Development Authority v. Skipper Construction Company (p) Ltd.[4] , it was held:-

"The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned..."

" We feel impelled to make a few observations. What happened in this case is illustrative of what is happening in our country on a fairly wide scale in diverse forms. Some persons in the upper strata (which means the rich and the influential class of the society) have made the 'property career' the sole aim of their life. The means have become irrelevant - in a land where its greatest son born in this century said "means are more important than

the ends". A sense of bravado prevails; everything can be managed; every authority and every institution can be managed. All it takes is to "tackle" or "manage" it in an appropriate manner. They have developed an utter disregard for law nay, a contempt for it; the feeling that law is meant for lesser mortals and not for them. The courts in the country have been trying to combat this trend, with some success as the recent events show. But how many matters can we handle. How many more of such matters are still there? The real question is how to swing the polity into action, a polity which has become indolent and soft in its vitals? Can the courts alone do it? Even so, to what extent, in the prevailing state of affairs? Not that we wish to launch upon a diatribe against anyone in particular but Judges of this Court are also permitted, we presume, to ask in anguish, "what have we made of our country in less than fifty years"? Where has the respect and regard for law gone? And who is responsible for it?"

Thus no more support is required to conclude that scams of diverse forms cited above, have to be very effectively tackled.

5.04 Needless to say that that most of the frauds generally are not committed individually but with the aid and assistance of others in an organised manner.

5.05 The Law Commission (UK) in its report[8] on "Criminal Law: conspiracy to defraud" (LAW COM No.228) has considered conspiracy to defraud, which remains a common law offence. The scope of conspiracy to defraud is extremely wide. As its name indicates, it cannot be committed by one person acting alone.

The Commission (UK) explained the conspiracy to defraud as follows:-

"2.7 The decision of the Court of Appeal in Moses (1991) Crim LR 617, provides a recent illustration of the use of conspiracy to defraud to deal with an agreement to deceive a public official into acting contrary to his public duty. The defendants conspired to facilitate applications for work permits by immigrants who were barred by a passport stamp from obtaining such permits. The deception consisted in the withholding from departmental supervisors of information about the applicants, which increased the likelihood of a national insurance number being issued to them.

2.8 The extent to which a conspiracy to cause non-economic loss extends beyond this category is unclear. The authorities conflict. Different judicial views were expressed in the House of Lords

in Withers (1975 AC 842). the narrower view, that this type of case was the only form of non-economic loss covered by conspiracy to defraud, was also expressed by Lord Diplock in Scott (1975) Ac 819, 841 B-C. The wide views expressed in Welham ((1961) AC 103) by Lord Radcliffe and Lord Denning were specifically approved by the Privy Council in Wai Yu-tsang ((1992)1AC 269,) in which Lord Goff of Chieveley, who delivered the Board's opinion, said that the cases concerned with public duties did not comprise a special category, but merely exemplified the general principle that conspiracy to defraud need not involve an intention to cause economic loss."

3.16. There is, however, a significant distinction in this respect between conspiracy to defraud and a conspiracy to commit an offence. Where the parties to a statutory conspiracy have carried out their scheme, they are not normally charged with conspiracy as well. On the other hand, whether or not the plan of conspirators to defraud has succeeded, they can be convicted only of conspiracy."

5.06 Analysis of above position particularly the observations of the Supreme Court made in Skippers case clearly indicate a need to carve out an aggravated form of

conspiracy particularly in cases when fraud is committed against Government, Public Sector Banks or Public Financial Institutions, local authority, or any State Undertaking or Agency. In the Skipper's case,[6] the offence was committed by the Skipper's Construction Company (P) Ltd. in collusion with DDA officials. We are of the view that this problem can be tackled if the following new section, namely Section 120BB, is inserted in IPC:-

> "120BB. Criminal conspiracy to defraud public institution, etc.
>
> When two or more persons agree to defraud a public institution or a local authority, fraudulently or dishonestly, to cause, or cause to be done, wrongful gain to themselves or to any person, or to cause or cause to be done, wrongful loss to such public institution or local authority, such an agreement is designated a criminal conspiracy to defraud and whoever is a party to such criminal conspiracy shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine:
>
> Provided that no agreement shall amount to a criminal conspiracy to defraud unless some act besides the agreement is done by one or more parties to such agreement in furtherance thereof.

Explanation - Any bank or financial organisation or company or body or body corporate, which is owned or controlled by the Government, shall be deemed to be a 'public institution' for the purposes of this section".

FOOTNOTES

1. Committee on Prevention of Corruption, 1962 Report, headed by Chairman Shri K.Santhanam
2. 1996(9) SCALE 680.
3. 1995(4) SCALE 393.
4. AIR 1996 SC 2005.
5. The Law Commission (UK) (LAW COM. NO.228) 'Criminal Law Conspiracy to defraud' Item 5 of the Fourth Programme of Law Reform: Criminal Law.
6. Supra note 4.

CHAPTER - VI

ATTEMPT - INSERTION OF NEW SECTIONS 120 C & 120 BY WAY OF NEW CHAPTER VB IN THE BILL

The IPC (Amendment) Bill, 1978 made a provision for this new Chapter under Clause 45. Also by mistake, clauses 46 to 51 of the Bill were incorporated in this Chapter which, in fact, constitutes an independent Chapter, i.e., Chapter VI as per IPC contents. Therefore, this new Chapter is confined to sections 120 C and 120 D only which are dealing with the "Attempt".

6.02 The subject of attempt has already been incorporated in the last Chapter i.e. XXIII (containing only one section 511 of the Code as a residuary provision. However, in the Bill it is inserted just after Chapter VA, perhaps, in view of the importance of the concept and its close connection with abetment and conspiracy. In the Bill, section 511 has been omitted by inserting this new Chapter which has only two sections, namely sections 120 C and 120-D.

6.03 It may be mentioned that numerous sections in the Code, while defining the acts which constitute particular offence, place attempts to do those acts at par with doing the acts themselves and make them punishable to the same extent. Such provisions of the Code may be summed as under:-

(1) Under section 121, with which the next chapter begins, waging war against the Government of India and any attempts to wage such war are both capital offences.

(2) Section 124, attempt wrongfully to restrain the President and other high officials with intent to induce or compel them to exercise or refrain from exercising any of their lawful powers.

(3) Section 125, attempt to wage war against the Government of an Asiatic Power in alliance or at peace with the Government of India.

(4) Under section 130, one who attempts to rescue a prisoner of war is punished to the same extent as one who actually rescues a prisoner of war.

If one were to construe section 511 strictly as a residuary provision, none of the ideas contained therein would be applicable for interpreting what constitutes an attempt to wage war under section 121 or an attempt to rescue a prisoner of war under section 130. These sections themselves do not furnish any guidance for this purpose.

(5) Section 153A - attempt to promote feelings of enmity, etc.

(6) Section 161 - attempt by a public servant to obtain an illegal gratification.

(7) Section 162 - attempt to obtain a gratification in order by corrupt or illegal means to influence a public servant.

(8) Section 163 - attempt to obtain a gratification for exercising personal influence over a public servant.

(9) Section 165 - attempt by public servant to obtain a valuable thing without consideration from a person concerned in proceeding or business transacted by the public servant.

(10) Section 196 - attempt to use as true, evidence known to be false.

(11) Section 213 - attempt to obtain a gratification to screen an offender from punishment.

(12) Sections 239 and 240 - attempt to induce a person to receive a counterfeit coin.

(13) Section 241 - attempt to induce a person to receive as genuine a counterfeit coin which, when the offender took it into his possession, he did not know to be counterfeit.

(14) Section 307 which, without using the word attempt except in the margin, defines attempt to murder.

(15) Section 308 which similarly defines attempt to commit culpable homicide not amounting to murder.

In the preceding last two sections, the attempt consists in doing any act with such intention or knowledge, and under such circumstances, that <u>if the actor by that act caused death,</u> he would be guilty of murder or, as the case may be, culpable homicide not amounting to murder. The hypothetical condition if he <u>by that act</u> caused death is not easy to apply in cases where the act done was physically incapable of causing any one's death. The question whether there could be an attempt to murder not falling within section 307, or an attempt to commit culpable homicide not falling within section 308, but punishable as such under section 511, the residuary section, is not entirely theoretical as it has been raised before the courts fairly often.

(16) Section 309 - attempt to commit suicide.

(17) Section 385, 387 and 389 - attempt to put a person in fear of injury or accusation in order to commit extortion.

(18) Section 391 - conjoint attempt of five or more persons to commit a dacoity.

(19) Sections 393, 394 and 398 - attempt to commit robbery.

(20) Section 460 - attempt by one of many joint house-breakers by night to cause death or grievous hurt.

6.04 Finally, there is section 511 which runs as under:-

"511. **Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.-** Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does not act towards the commission of the offence, shall where no express provision is made by this Code for the punishment such attempt, be punished with imprisonment for any description provided for the offence, for a term which may extend to

one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both.

Illustrations

(a) A makes an attempt to steal some jewels by breaking open a box and finds, after so opening the box, that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

(b) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section."

6.05 However, the Law Commission in its 42nd report (para 5.43) found that the language used in section 511 is very confusing. It was also mentioned that section 309 defines attempt to commit suicide in the same way "Whoever attempts to commit suicide and does any act towards the commission of such offence..." Therefore, to constitute a criminal attempt two requirements are apparently to be satisfied, namely

(i) The offender must first attempt to commit an offence, which presumably he can only by doing some act, but that apparently is not sufficient.

(ii) He must, in doing that act which is the attempt, also do something else towards the commission of the offence.

6.06 The crux of the problem of defining attempt seems to lie in stating with precision a test as to when the act has travelled beyond the preparatory stage.

There are two tests to determine the "attempt".

(i) First test is of proximity. The much-quoted dictum is that acts remotely leading towards the commission of an offence are not to be considered as attempts to commit it, but acts immediately connected with it are, states the proximity rule.

In other words, to constitute an attempt, the act done must be immediately, and not merely remotely, connected with the commission of the offence.

(ii) Secondly, test is known as the test of last act. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are.

But this test of last act has, however, obvious flaws. It cannot be applied to a situation where the accused intends to accomplish his object by degrees, such as, murder by slow poisoning. Moreover, the act which remains to be done by the offender puts poison in a glass and also intends to pour wine in it, but the wine is actually poured by the victim. Here the "last act" which the offender wished to do was not, in fact, done by him, but that need not prevent the act from being an attempt.

6.07 In order to constitute an attempt, the acts of the accused must be such as to clearly and unequivocally indicate of themselves, the intention to commit the offence.: Salmond, whose view is most frequently quoted, observed, (1)

> "An act done with intent to commit a crime is not a criminal attempt unless it is of such a nature as to be in itself sufficient evidence of the criminal intent with which it is done. A criminal attempt is an act "which shows criminal intent on the face of it....An act.....which in its own nature and on the face of it innocent.....cannot be brought within the scope of criminal attempt by evidence aliunde as to the criminal purposes with which it is done."

6.08 It is, therefore, suggested that a practical test for the actus reus in attempt is that the prosecution must prove that the steps taken by the accused must have reached the point when they themselves clearly indicate what was the end towards which they were directed. In other words, the steps taken must themselves be sufficient to show, prima facie, the offender's intention to commit the crime which he is charged with attempting.

It is also to be mentioned that the actus reus necessary to constitute an "attempt" is complete if the accused does an act which is a step towards the commission of the specific crime, which is immediately and not merely remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose other than the commission of specific crime.

The Supreme Court had expressed its view regarding an attempt as under [2] -

> "A person commits the offence of attempt to commit a particular offence when (i) he intends to commit that particular offence; and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence."

Eminent Jurist Sir James Stephen, in his Digest of Criminal Law, Article 50, defines an attempt as follows:-

> "an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begins cannot be defined, but depends upon the circumstances of each particular case."

6.09 After having a glance of juristic interpretation of an "attempt", it is crystal clear that for an "attempt", a futile act of the accused is a must. Had he been successful, the same would have been a crime. But his failure for the same converts the crime into an "attempt". Similar approach was taken in both the illustrations of section 511, where it is stated that a person during the futile act is guilty of attempting to commit theft.

6.10 The Law Commission in its 42nd report had recommended that the last Chapter of the Code containing only section 511 be omitted and, instead, a new chapter V-B entitled "Attempt" consisting of two sections 120C and 120D be inserted after Chapter VA as follows:-

120C. Definition of attempt:- A person attempts to commit an offence punishable by this Code, when -

(a) he, with the intention or knowledge requisite for committing it, does any act towards its commission;

(b) the act so done is closely connected with, and proximate to, the commission of the offence; and

(c) that act fails in its object because of facts not known to him or because of circumstances beyond his control.

Illustrations

(a) A, intending to murder Z, buys a gun and loads it. A is not yet guilty of an attempt to commit murder. A fires the gun at Z, he is guilty of an attempt to commit murder.

(b) A, intending to murder Z by poison, purchases poison and mixes the same with food which remains in A's keeping; A is not yet guilty of an attempt to commit murder. A places the food on Z's

table, or delivers it to Z's servant to place it on Z's table. A is guilty of an attempt to commit murder.

(c) A, with intent to steal another person's box, while travelling in a train, takes a box and gets down. He finds the box to be his own. As he has not done any act towards the commission of the offence intended by him, he is not guilty of an attempt to commit theft.

(d) A, with intent to steal jewels, breaks open Z's box, and finds that there is no jewel in it. As his act failed in its object because of facts not known to him, he is guilty of an attempt to commit theft."

"120D. Punishment for attempt: Whoever is guilty of an attempt to commit an offence punishable by this Code with imprisonment for life or with imprisonment for a specified term, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life, or, as the case may be,

one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both."

6.11 In view of this definition of attempt, which could be applied in relation to murder and culpable homicide not amounting to murder without any serious difficulty, the Law Commission in 42nd report did not consider it necessary to have a different formula to define attempt to commit either of these offences. It was also recommended to revise Sections 307 and 308 as follows:

"307.Attempt to murder:- Whoever attempts to commit murder shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender may -

(a) if under sentence of imprisonment for life, be punished with death; and

(b) in any other case, be punished with imprisonment for life."

"308. Attempt to commit culpable homicide:Whoever attempts to commit culpable homicide not amounting to murder shall be punished with imprisonment of either description for a term which may extend to

three years, or with fine, or with both; and if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Illustration

A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that if he thereby caused death he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section."

6.12 In the IPC (Amendment) Bill, 1978, the recommendations made by the Law Commission were incorporated with minor amendments like -

(i) Illustration (c) to section 120C was dropped and illustration (d) was made illustration (c).

(ii) At the end of section 307 (b), the following words were inserted:

"or with rigorous imprisonment for a term which may extend to ten years."

In the Bill, the texts of sections 120-C and 120-D runs as under.

120-C. Definition of Attempt:- A person attempts to commit an offence, when -

(a) he, with the intention or knowledge requisite for committing it, does any act towards its commission;

(b) the act so done is closely connected with, and proximate to, the commission of the offence; and

(c) that act fails in its object because of facts not known to him or because of circumstances beyond his control.

Illustrations

(a) A, intending to murder Z, buys a gun and loads it. A is not yet guilty of an attempt to commit murder. A fires the gun at Z, he is guilty of an attempt to commit murder.

(b) A, intending to murder Z, by poison, purchases poison and mixes the same with food which remains in A's keeping; A is not yet guilty of an attempt to commit murder.

A places the food on Z's, table, or delivers it to Z's servant to place it on Z's table. A is guilty of an attempt to commit murder.

(c) A, with intent to steal jewels, breaks open Z's box, and finds that there is no jewel in it. As his act failed in its object because of facts not known to him, he is guilty of an attempt to commit theft.

120D. Punishment of attempt:- Whoever is guilty of an attempt to commit an offence punishable with imprisonment for life or with imprisonment for specified term, shall, where no express provision is made for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both"

6.13 After examining the suggestions of the Law Commission in its 42nd report, judicial as well as academic interpretation pertaining to "attempt", it has become clear that there are four distinct stages through which an act ordinarily passes before it becomes a crime punishable by the Code. The first stage is described as intention to commit a crime i.e.'mens rea'. The intention, however, criminal

itself, without anything more is not punishable. The next stage is described as preparation and excepting a few exceptional categories, preparation is not punishable.

Section 511 of the Code deals with the third stage, namely, the stage of attempt. One who commits offence first intends to commit an offence, then prepares for committing offence and then attempts to commit offence and when succeeds, he is said to have committed an offence. This third stage is made punishable under section 511.

No doubt that this is a general and residuary provisicn dealing with attempts to commit offences not made punishable by any other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not those punishable with death only.

An "attempt" is made punishable, because every 'attempt', although it fails in achieving the result, must create alarm, which of itself is an injury, and the guilt of the offender is the same as if he had succeeded. Guilt must be related to injury in order to justify punishment; when the injury is not as great as of the act committed, only upto half the punishment prescribed is awarded. However, preparation to commit an offence is not punishable except when the preparation is to commit offences under section 122 (waging war against the Government of India) and section 399 (preparation to commit dacoity).

6.14 It is very vital to note that the offence of an "attempt" leaves untouched attempts to commit, or to cause to be committed offences under special or local laws which also are not offences under the Code. No criminal liability can be incurred under the Code by an attempt to do an act which, if done, will not be an offence under the Code.

To constitute a crime of an attempt under the Code, the offender's intention to commit a complete offence is necessary. The very wording in section 511 that **"To cause such an offence to be committed"** will include an attempt to abet an offence. So it has been held that it is not legally possible to attempt the abetment of an offence, the abetment of an offence being itself an offence. A common form of such attempt is the soliciting of another to commit an offence. The act done towards the commission of the offence consists in the solicitation itself. It will not affect the offence though the person solicited declines the persuasion.

Similarly, the wording of section 511 **"Does any act towards the commission of the offence"** are also vital words. "Intention alone, or intention followed by preparation are not sufficient to constitute an attempt. But intention followed by preparation, followed by any act done towards the commission of the offence, are sufficient." In each of the two illustrations given under this section there is not merely an act done with the intention to commit an offence,

which act is unsuccessful because it could not possibly result in the completion of the offence, but an act is done "towards the commission of the offence," that is to say, the offence remains incomplete only because something yet remains to be done, which the person intending to commit the offence is unable to do by reason of circumstances independent of his own volition. Thus, in illustrations

(a) the act of breaking open the box is done towards the commission of the theft of the jewels. The theft itself, that is, actual removal of the jewels, still remains to be done and it remains undone only because it turns out that there are no jewels to remove.

(b) Z fails to comply with the essentials of theft simply because there is nothing in the pocket.

For the conviction under this section it is not necessary that the accused should complete the stage in the actual offence except the final stage. it is enough if in the attempt he did any act towards the commission of the offence.

6.15 Section 511 was never meant to cover only the penultimate act towards completion of an offence and not the preceding acts. If such acts are done in the course of the attempt to commit the offence, then they are done towards its commission.

It appears from the above discussion, that it would be most difficult to frame a satisfactory and exhaustive definition which shall lay down for all cases where preparation to commit an offence ends and where attempt to commit that offence begins. The question is not one of mere proximity in time or place. Many offences can easily be conceived where, with all necessary preparations made, a long interval will still elapse between the time when the attempt to commit the offence commences and the time when it is completed. The offence of cheating and inducing delivery is an offence on point. The time that may elapse between the moment when the preparations made for committing the fraud are brought to bear upon the mind of the person to be deceived and the moment when he yields to the deception practised upon him may be a very considerable interval of time. There may be the interposition of inquiries and other acts upon his part. The acts whereby those preparations may be brought to bear upon the mind may be several in point of number, and yet the first act after preparations completed will, if criminal in itself, be beyond all doubts, equally an attempt with the ninety ninth act in the series.

Moreover, the definition in section 511 uses the word 'attempt' in a very large sense; it seems to imply that such an attempt may be made up of a series of acts, and that any one of those acts done towards the commission of the offence is itself punishable, and, though the sections does not use the words, it can mean nothing but punishable as an attempt. It does not say that the last act which would form the final part of an attempt in the larger sense is the only act punishable under the section. The words, "whoever attempts to commit an offence" obviously have the larger meaning to cover any act, done towards the commission of the offence. The term 'any act' excludes the notion of the final act.

6.16 In the light of above discussion, it is very clear that section 511 is working well and there is no need to omit it. Therefore, no need to introduce a new Chapter V-B containing sections 120 C and 120 D. Nonetheless, if need be, the language of section 511 may be amended.

FOOTNOTES

Russell on Crime, (1964) Vol.1 page 184. (Edited by Dr.Turner).

Abhayanand Mishra Vs. State of Bihar, (1962) 2 SCR 241.

CHAPTER - VII

OFFENCES AGAINST THE STATE

Offences against the State are included in this chapter. It has the flavour of the approach of Empire builders. The chapter has undergone very little amendment save for the introduction of section 121A by the Act XXVII of 1870 and section 124A by the Act IV of 1898. These additional sections were introduced to plug a loophole because of an inadvertent omission of a special provision for the punishment of the offence of abetment of rebellion, to protect at the relevant time the Empire builders. However, no Government can afford to allow a threat to develop to its existence by a small coterie of people. There is no country on earth in which there is not a small minority group commonly known as terrorists which is always up in arms against the established Government. The secessionist activity has reared its ugly head even in countries which appeared to have an integrated personality. It has become necessary to provide permissible norms of political behaviour, violation of which must be punishable.

This chapter provides for punishment of those engaged in waging a war against the Government of India, conspiracy to commit such offences, preparation to commit such offences such as collecting arms etc. with intention of

waging war and concealing the existence of a design to wage war. Section 124A which provides punishment for sedition was described by the Father of the Nation as the prince amongst the political sections of the Indian Penal Code. It may be mentioned that such renowned personalities as Mahatma Gandhi, the Father of the Nation, and Bal Gangadhar Tilak were also tried and punished during the heyday of British Empire under section 124 A.

The line dividing preaching disaffection towards the Government and legitimate political activity in a democratic set-up cannot be neatly drawn. Where legitimate political criticism of the Government in power ends and disaffection begins, cannot be ascertained with precision. The demarcating line is thin and wavy. What was sedition against the Imperial rulers may today pass off as a legitimate political activity in a democratic set-up under our libertarian Constitution. The interpretation of the relevant sections in this chapter will have to be moulded within the letter and spirit of the Constitution.

In this chapter, the first five sections deal with what may be called acts of high treason waging war against the Government of India, conspiring to wage war, preparation to wage war, facilitating of such activities and overawing the Government or the Head of State by force.

Next section is the punishing one of sedition. Then three sections aim at preserving friendly relations with foreign States by punishing those who attempt to prejudice those relations by unwarranted aggressive action. The last three sections of the chapter, which relate to prisoners of war and state prisoners, are not of much practical importance during peace time, especially since the category referred to as "State prisoners" during the British regime no longer exists, having given place to the less dignified appellation of "persons under preventive detention".

7.02 With this chapter begins the definition of particular offences which the makers of the Code thought fit to include in it. Despite the large number - about 400 - of such offences for which the punishment is prescribed in the Code, the compilation cannot in the nature of things be exhaustive. Other types of wrongful, injurious or anti-social conduct made punishable under other special laws like Army Act, Air Force Act, and so on. The Law Commission in its 42nd report observed that while an enlargement of the scope of the Penal Code by including therein some of the offences now punishable under a special or local law may be desirable, it is neither necessary nor practicable to attempt to make the Code an absolutely complete law of crime. However, in brief some of these special laws which are dealing treason, sedition and other kindred offences against the security and integrity, may be mentioned as under -

(i) The Foreign Recruitment Act, 1874

(ii)The Indian Criminal Law Amendment Act, 1908

(iii)The Official Secrets Act, 1923

(iv) The Criminal Law Amendment Act, 1938

(v) The Criminal Law Amendment Act, 1961

(vi)The Unlawful Activities (Prevention) Act,1967; and so on

7.03 It is clear that treason, sedition and cognate offences which may be classified as offences against the security of the state, are dealt within codes of other countries in much greater detail than in our Penal Code. In particular, it is noticeable that treason and treasonable activities are spelt out elaborately, and not limited to waging war against the Government and assaulting the head of State. On a preliminary study of the problem it appears that the strengthening, consolidation and revision of some of the provisions of this important branch of criminal law would be necessary. However, in the Amendment Bill only two changes are proposed, namely, insertion of a new section 123A and substitution of section 124A and changing the nature of sentence to rigorous imprisonment under sections 122 and 123. Having regard to the importance of the Penal provisions in

this regard, we would also examine the question whether any changes are necessary in these existing provisions, namely, section 121 and 121A.

7.04 Section 121 prescribes the punishment, namely death or imprisonment for life, for the principal offence of waging war against the Government of India and for abetting that offence or attempting to commit that offence. Neither 42nd Report nor IPC (Amendment) Bill, 1978 has suggested any change.

Therefore, this section does not require any change.

7.05 Section 121A provides as under:-

> "121A. Conspiracy to commit offences punishable by section 121- Whoever within or without India conspires to commit any of the offences punishable by section 121, or conspires to overawe, by means of criminal force or the show of criminal force, the Central Government or any State Government, shall be punished with imprisonment for life, or with imprisonment of either description which may extend to ten years, and shall also be liable to fine.

Explanation: To constitute a conspiracy under this section, it is not necessary that any act, or illegal omission shall take in pursuance thereof."

Section 121A punishes two different kinds of conspiracy. The first is a conspiracy to wage war against the Government of India, and the second is a conspiracy to overawe by force the Central Government or any State Government. In view of section 120 B, there is hardly any need for a separate section to deal with the first kind of conspiracy. If any such conspiracy actually results in the waging of war against the Government of India, or even an attempt to wage such war, the conspirators will be punishable with death or imprisonment for life under section 121 read with section 120 B; and the conspiracy is infructuous, they will be punishable with half the longest term of imprisonment provided for the offence, that ten years, which may be sufficient.

7.06 On reading, it looks difficult that purpose is served at present by the words "within or without India" which appear at the beginning of the section. When it was enacted in the last century, the extra-territorial application of the Code was limited during colonial days, to offences committed by Government servants in the territory of any Indian State. By referring to conspiracies entered into "without British India", the section was apparently intended to cover British subjects and not foreigners.

In view of sections 1 and 4 of the Code as they stand at present, it is fairly clear that section 121A cannot apply to the acts of foreigners committed outside India. It was also considered by the Law Commission in its 42nd report that the words "within or without India" are of no practical consequence and should be omitted.

7.07 In the 42nd report, it was also recommended to extend the idea to overawe by criminal force or by show of criminal force, the Parliament of India or the legislature of any State in addition to overawing the Central Government or any State Government as an offence of conspiracy. At present, the award of simple imprisonment is permissible under the section, which in view of the gravity of the offence is not appropriate. It was accordingly proposed by then Law Commission that section 121A may be revised as follows:-

> "121A. <u>Conspiracy to overawe the Parliament or Government of India or the Legislature or Government of any State:</u>Whoever conspires to overawe, by means of force or show of force, the Parliament or Government of India, or the Legislature or Government of any State, shall be

punished with imprisonment for life or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Explanation:- To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof."

The Law Commission observed in its 42nd report that since this offence is akin to the one described in section 124, it would be logical to bring it after the three sections dealing with waging war and the proposed new section about assisting India's enemies, and to number it 123B.

7.08 Pertaining to the second kind of conspiracy (para 05 above), in the 42nd report it was recommended that section 121A may be amended but in the IPC (Amendment) Bill 1978, the same was not accepted. Also in the proposed amendment, the idea to overawe by criminal force as an offence was extended to the Parliament or the State's On the other hand, the original text of section 121A (which was inserted by the Act 3 of 1951) provides general and wide scope to cover all types of conspiracy for the offence mentioned in section 121 of the Code. Needless to mention that the words,

"or conspires to overawe, by means of criminal force or the show of criminal force the Central Government or any State Government, shall be punished..."

are sufficient to cover the words, "Parliament or the State Legislature" as the legislative is an essential part/wing of every democratic government. About the said recommendations nothing has been mentioned in the Amendment Bill.

7.09 Having earnestly considered in the aforesaid manner these provisions, namely, section 121A, we are of the view that no changes are necessary and we endorse that the absence of any major policy changes in the Bill is of no consequence. Likewise, having examined sections 121, 122, 123 and also having noted that the Law Commission in its 42nd Report did not suggest any amendment, and these sections will remain as they are except that the words "imprisonment of either description" being substituted with "rigorous imprisonment".

7.10 The Law Commission in its 42nd Report recommended for inserting a new section 123A and the same finds place in the Amendment Bill. The New Section 123A as recommended by the Law Commission reads as follows:

"123A. <u>Assisting India's enemies:</u> Whoever assists in any manner an enemy at war with India, or the armed forces of any country against whom the

armed forces of India are engaged in hostilities, whether or not a state of war exists between that country and India, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

The above recommendation for inserting a new section 123-A got a place in the IPC (Amendment) Bill. But in the Bill, an Explanation was added in the proposed section. The said Explanation may be read as under:-

"Explanation - In this section -

(i) "Armed forces of India" means the military, naval and air forces, and includes any other armed forces of the Union;

(ii) "enemy" includes any person or country committing external aggression against the Union, or any person belonging to such country."

7.11 Proposed section 123A in the Bill is based on the recommendation of the Law Commission in its 42nd Report. An Explanation is, however, added in the Bill which explains the expressions 'armed forces of India' and 'enemy' in the context of the offence covered by the main section 123A as recommended by the Law Commission. Therefore, there is no harm in having this Explanation.

7.12 The existing section 124A defines the offence of sedition. Despite the umbra of repression which a mention of this section is likely to evoke in one's mind, it is a provision which has to find a place in the Penal Code for the reason that every State, whatever its form of Government, has to be armed with the power to punish those who by their conduct, jeopardise the safety and stability of the State, or disseminate such feelings of disloyalty as have the tendency to lead to the disruption of the State or to public disorder.

7.13 In England, the crime of sedition is a crime against society nearly allied to that of treason, and it frequently precedes treason by a short interval. The objects of sedition generally are to induce discontent and insurrection and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create public disturbances, or to lead to civil war; to bring into hatred or contempt the Sovereign or the Government, the laws or Constitution of the realm, and generally all endeavours to promote public disorder.

7.14 It may be observed that criticism on political matters is not of itself seditious. The test is the manner in which it is made. Candid and honest discussion is permitted. The law only interferes when the discussion passes the bounds of fair criticism. More especially will this be the case when the natural consequence of the prisoner's conduct is to promote public disorder.

It may be mentioned that the definition of sedition in the existing section 124A is limited to exciting disaffection towards the Government established by law. Exciting disaffection towards the Constitution or Parliament or the administration of justice is not mentioned as a seditious activity. On the other hand, while promotion of public disorder in some form or other is considered an essential ingredient of seditious conduct in England, this idea is not brought out in the wording of section 124A.

7.15 In view of the controversy which has raged round section 124A for all this time, it is clearly necessary to revise the formulation of the offence so as to make it a patently reasonable restriction under Article 19 (2). The elements mentioned in this Article which are relevant to the offence of sedition are integrity of India, security of the State and public order. The section has been found to be defective because "the pernicious tendency or intention" underlying the seditious utterance has not been expressly related to the interests of integrity or security of India or

of public order. The Law Commission in its 42nd report observed that this defect should be removed by expressing "mens rea" as "intending or knowing it to be likely to endanger the integrity or security of India or of any State or to cause public disorder."

7.16 Another defect already noticed in the definition of sedition is that it does not take into account disaffection towards (a) the Constitution, (b) the Legislatures, and (c) the administration of justice, all of which would be as disastrous to the security of the State as disaffection towards the executive Government. These aspects are rightly emphasised in defining sedition in other Codes and section 124 A should be revised to take them in.

The punishment provided for the offence is very odd. It could be imprisonment of life, or else, imprisonment upto three years only, but nothing in between. The Law Commission observed that there is a need to give a firmer indication to the Courts of the gravity of the offence by fixing the maximum punishment at seven years rigorous imprisonment and fine. That is why, the Law Commission in its 42nd report asked that this section be revised as follows:-

> "124A. Sedition - Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise,

excites, or attempts to excite, disaffection towards the Constitution, or the Government or Parliament of India, or the Government or Legislature of any State, or the administration of justice, as by law established,

intending or knowing it to be likely thereby to endanger the integrity or security of India or of any State, or to cause public disorder,

shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Explanation 1: The expression "disaffection" includes feelings of enmity, hatred or contempt.

Explanation 2: Comments expressing disapprobation of the provisions of the Constitution, or of the actions of the Government, or of the measures of Parliament or a State Legislature, or of the provisions for the administration of justice, with a view to obtain their alteration by lawful means without exciting or attempting to excite disaffection, do not constitute an offence under this section."

7.17 This recommendation found a place in the IPC (Amendment) Bill, 1978 under the heading "sedition". Clause 48 of the Bill is substituting a new section for section 124-A as was originally proposed by the Law Commission in its 42nd report.

7.18 For the reasons discussed above, the section 124-A may be substituted.

7.19 The then Law Commission had suggested in its 42nd report that the Code should contain a provision for punishing insults to the book of the Constitution, the national flag, the national emblem and the national anthem. Burning of the copies of the Constitution, desecration of the national flag or national emblem and offering deliberate insults to the national anthem, are not only unpatriotic acts but are also likely to cause a disturbance of public order. As such, they are reprehensible enough to be made offences in the Penal Code.

Legislative competence of Parliament in the matters is derivable from the entry relating to criminal law in the Concurrent List and from the residuary entry in the Union List. It could hardly be said that such a provision curtails the freedom of expression unreasonably, and the restriction would be clearly in the interests of public order.

7.20 The Law Commission had already recommended that a new section be inserted after section 124 B, as follows:-

> "124B. Insult to the book of the Constitution, national flag, national emblem or national anthem. - Whoever deliberately insults the book of the Constitution, the national flag, the national emblem or the national anthem, by burning, desecration or otherwise, shall be punished with imprisonment of either description for a term which may extend up to three years, or with fine, or with both."

The above recommendation was incorporated in clause 48 of the IPC (Amendment) Bill, 1978.

7.21 Under this clause a new section 124B is also sought to be inserted. Under this new section, whoever deliberately insults the Constitution of India or any part thereof, the national flag, the national emblem or the national anthem, by burning the national flag etc., shall be punishable. The Law Commission in its 42nd Report observed that there should be a provision for punishment for insults to the Constitution, national flag, emblem and the national anthem which may include burning of the Constitution and deliberate insults to the national anthem which are unpatriotic. Therefore, they recommended the insertion of this new section. However, on

the basis of those recommendations, Prevention of Insults to National Honour Act, 1971 has been enacted. Therefore, this new section 124B need not be inserted again in IPC and the same may be deleted from clause 48 of the Bill.

7.22 The existing section 125 reads as under:-

> "125. **Waging war against any Asiatic Power in alliance with the Government of India** - Whoever wages war against the Government of any Asiatic Power in alliance or at peace with the Government of India or attempts to wage such war, or abets the waging of such war, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment of either description for a term which may extend to seven years, to which fine may be added, or with fine."

7.23 Section 125 makes it an offence to wage war against the Government of any Asiatic Power in alliance or at peace with the Government of India. The reference to 'Asiatic Power' is now meaningless, and the words "in alliance or" are unnecessary. It would be sufficient to refer to the Government of any foreign State at peace with India.

The punishment of life imprisonment for the offence is unduly severe; on the other hand, if ever the offence is committed, the offender ought not to be let off with a fine

as now provided in the section. The Law Commission had already proposed that the punishment should be imprisonment of either description not exceeding ten years, and also fine.

The section may accordingly be revised as follows:-

"125. Waging war against any foreign state at peace with India. - Whoever wages war against the Government of any foreign State at peace with India, or attempts to wage such war, or abets the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

7.24 The same recommendation was incorporated in the IPC (Amendment) Bill, 1978. Clause 49 of the Bill runs as under:

"49. In section 125 of the Penal Code, for the words "any Asiatic Power in alliance or at peace with the Government of India", the words any foreign State at peace with India: shall be substituted."

Thus the recommendation for reducing the quantum of the punishment was not accepted. It may be mentioned that in the existing provision the punishment is prescribed "with

imprisonment for life to which fine may be added, or with imprisonment of either description for a term which may extend to seven years....."

When there is already a provision for reducing the punishment, then there is no need to reduce expressly the upper limit of the punishment.

7.25 In view of the above, section 125 may be amended as proposed in the IPC (Amendment) Bill, 1978.

CHAPTER-VIII

SUICIDE : ABETMENT AND ATTEMPT

Section 306: Abetment of Suicide

Section 306 of the Indian Penal Code penalises abetment of suicide. It reads as :

> "306. **Abetment of Suicide.-** If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine."

8.02. The constitutionality of section 306 was challenged in Smt.Gian Kaur v State of Punjab.[1] Upholding the constitutionality of section 306, the Supreme Court held that section 306 enacted a distinct offence which is capable of existence independent of section 309. The Court observed:[2]

> "Section 306 prescribes punishment for 'abetment of suicide' while Section 309 punishes 'attempt to commit suicide'. Abetment of attempt to commit suicide is outside the purview of section 306 and it is punishable only under section 309 read with section 107, IPC. In certain other jurisdictions,

even though attempt to commit suicide is not a penal offence yet the abettor is made punishable. The provision there provides for the punishment of abetment of suicide as well as abetment of attempt to commit suicide. Thus even where the punishment for attempt to commit suicide is not considered desirable, its abetment is made a penal offence. In other words assisted suicide and assisted attempt to commit suicide are made punishable for cogent reasons in the interest of society. Such a provision is considered desirable to also prevent the danger inherent in the absence of such a penal provision."

8.03. In England and Wales, the Suicide Act of 1961 has abrogated the rule of law whereby it is a crime for a person to commit suicide (S.1). Section 2(1) of the Act imputes criminal liability for complicity in another's suicide. It reads:

"2(1).- A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years."

II. Section 309 - ATTEMPT TO COMMIT SUICIDE

8.04. Section 309 of IPC punishes attempt to commit suicide with simple imprisonment for a term which may extend to one year or with fine or with both.

8.05. The Law Commission in its Forty Second Report had examined whether attempt to commit suicide be retained as a penal offence. The Commission referred to the Dharma Sastras which legitimised the practice of taking one's life in certain situations[3] and also referred to the provisions of Suicide Act, 1961 in Britain which decriminalised the offence of attempt to commit suicide.[4] After examining these views, the Commission recommended that section 309 is harsh and unjustifiable and it should be repealed.

8.06. In pursuance of the recommendations of the Law commission, clause 131 of the Bill omits section 309 from IPC.

8.07. Subsequently, there have been significant judicial developments. The Delhi High Court in State v Sanjay Kumar Bhatia[5] speaking through Sachar J, as he then was, for the Division Bench observed that the continuance of section 309 is an anachronism and it should not be on the statute book. However, the question of its constitutional validity was not considered in that case.

8.08. Soon thereafter the Bombay High Court in Maruti v Shripati Dubal v State of Maharashtra[6] speaking through Sawant J., as he then was, examined the constitutional validity of Section 309 and held that the section is violative of Article 14 as well as Article 21 of the Constitution. The Section was held to be discriminatory in nature and also arbitrary and violated equality guaranteed by Article 14. Article 21 was interpreted to include the right to die or to take away one's life. Consequently it was held to be violative of Article 21.

8.09. The Andhra Pradesh High Court also considered the constitutional validity of section 309 in Chenna Jagadeeswar v State of Andhra Pradesh.[7] Amareshwari J., speaking for the Division Bench, rejected the argument that Article 21 includes the right to die. The court also held that the courts have adequate power to ensure that "unwarranted harsh treatment or prejudice is not meted out to those who need care and attention". The court also negatived the violation of Article 14.

8.10. The Supreme Court examined the constitutional validity of section 309 in P.Rathinam v Union of India[8] with reference to Articles 14 and 21. The Court considered the decisions of the Delhi, Bombay, and Andhra Pradesh High Courts and disagreed with the view taken by Andhra Pradesh

High Court on the question of violation of Article 21. Agreeing with views of the Bombay High Court, the Supreme Court observed:

> "On the basis of what has been held and noted above, we state that section 309 of the Penal Code deserves to be effaced from the statute book to humanise our penal laws. It is a cruel and irrational provision, and it may result in punishing a person again (doubly) who has suffered agony and would be undergoing ignominy because of his failure to commit suicide. Then an act of suicide cannot be said to be against religion, morality or public policy, and an act of attempted suicide has no baneful effect on society. Further, suicide or attempt to commit it causes no harm to others, because of which State's interference with the personal liberty of the persons concerned is not called for.
>
> We, therefore, hold that section 309 violates Article 21, and so, it is void. May it be said that the view taken by us would advance not only the cause of humanisation, which is a need of the day, but of globalisation also, as by effacing section 309, we would be attuning this part of criminal law to the global wavelength".

3.11. But this view of Supreme Court was overruled by a larger Bench in Smt. Gian Kaur v. State of Punjab[10] wherein Verma J.,(as he then was) speaking for the Court, held that P.Rathinam's case was wrongly decided. The Court observed:[11]

> "When a man commits suicide he has to undertake certain positive overt acts and the genesis of those acts cannot be traced to, or be included within the protection of the 'right to life' under Article 21. The significant aspect of 'sanctity of life' is also not to be overlooked. Article 21 is a provision guaranteeing protection of life and personal liberty and by no stretch of imagination can 'extinction of life' be read to be included in 'protection of life'. Whatever may be the philosophy of permitting a person to extinguish his life by committing suicide, we find it difficult to construe Article 21 to include within it the 'right to die' as a part of the fundamental right guaranteed therein. Right to life is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of 'right to life'. With respect and in all humility, we find no similarity in the nature of the other rights, such as the right to 'freedom of speech' etc. to provide a comparable basis to hold that the 'right to life' also includes the

'right to die'. With respect, the comparison is inapposite, for the reason indicated in the context of Article 21. The decisions relating to other fundamental rights wherein the absence of compulsion to exercise a right was held to be included within the exercise of that right, are not available to support the view taken in P.Rathinam qua Article 21.

To give meaning and content to the word 'life' in Article 21, it has been construed as life with human dignity. Any aspect of life which makes it dignified may be read into it but not that which extinguishes it and is, therefore, inconsistent with the continued existence of life resulting in effacing the right itself. The 'right to die' if any, is inherently inconsistent with the 'right to life' as is 'death with life'."

8.12. On the question of violation of Article 14, the Court agreed with the view taken by Hansaria J. in P.Rathinam's case.

8.13. Verma J. further observed that the arguments "on the desirability of retaining such a penal provision of punishing attempted suicide, including the recommendation for its deletion by the Law Commission are not sufficient to indicate that the provision is unconstitutional being violative of Article 14. Even if those facts are to weigh,

the severity of the provision is mitigated by the wide discretion in the matter of sentencing since there is no requirement of awarding any minimum sentence and the sentence of imprisonment is not even compulsory. There is also no minimum fine prescribed as sentence, which alone may be the punishment awarded on conviction under Section 309, IPC. This aspect is noticed in P.Rathinam for holding that Article 14 is not violated."[12]

8.14. The Supreme Court's decision in Smt. Gian Kaur has thus categorically affirmed that right to life in Article 21 does not include the right to die. Consequently section 309 which penalises attempt to commit sucide is not unconstitutional.

8.15. There is a school of thought which advocates the decriminalisation of the offence of attempt to commit suicide. They plead for a compassionate and sympathetic treatment for those who fail in their attempt to put an end to their lives. They argue that deletion of section 309 is not an invitation or encouragement to attempt to commit suicide. A person indulges in the act of attempt to commit suicide for various reasons some of which at times are beyond his control.[13]

8.16. On the other hand, certain developments such as rise in narcotic drug-trafficking offences, terrorism in different parts of the country, the phenomenon of human

bombs, etc. have led to a rethinking on the need to keep attempt to commit suicide an offence. For instance, a terrorist or drug trafficker who fails in his/her attempt to consume the cyanide pill and the human bomb who fails in the attempt to kill himself or herself along with the targets of attack, have to be charged under section 309 and investigations be carried out to prove the offence. These groups of offenders under section 309 stand under a different category than those, who due to psychological and religious reasons, attempt to commit suicide.

3.17. Accordingly, we recommend that section 309 should continue to be an offence under the Indian Penal Code and clause 131 of the Bill be deleted.

FOOTNOTES

1. 1996 (2) Scale 881.
2. Id at 891.
3. Law Commission, Forty Second Report, para 16.31, page 243.
4. Id, para 16.32, page 243.
5. (1985) Cri.L.J. 931.
6. (1987) Cri. L.J. 743.
7. (1988) Cri. L.J. 549.
8. (1994) 3 SCC 394.
9. Id at 429.
10. Supra note 1.
11. Id at 888.
12. Id at 890.
13. Justice R.A.Jahagirdar (Retd.), " Attempt at Suicide - A Crime or a Cry" (1996).

CHAPTER-IX

OFFENCES AGAINST WOMEN AND CHILDREN

I. RAPE.

The Law Commission in its Eighty-fourth Report on Rape and Allied offences : Some Questions of Substantive Law, Procedure and Evidence has defined rape as "the ultimate violation of the self. It is a humiliating event in a woman's life which leads to fear for existence and a sense of powerlessness".[1] Other scholars have described rape as an internal assault or sexual invasion which is characterised by violent taking away of control over the sexual autonomy of the woman. Rape is an act of violence affecting the physical and emotional integrity and dignity of the victim.[2]

9.02. The Law Commission in its Forty Second Report had recommended certain changes in Section 375 which deals with the offence of rape. The following were the changes recommended by the Commission to Section 375.

Clause 'Thirdly' of Section 375 defines sexual intercourse as rape with the woman's consent when it has been obtained by putting her in fear of death or of hurt. The Commission had recommended that the words "either to herself or to anyone else present at the place" be added after the word "hurt".

On the question of consent, the Commission had pointed out that section 90 of IPC includes the term "injury" which is of wider import. Injury includes any injury to mind, body, reputation or property. The Commission, however, did not recommend any amendment on this count.

9.03. The Commission also recommended that marital rape should be removed from the scope of Section 375 and placed as a separate offence. The Commission observed:[8]

> "The exception in Section 375 provides that sexual intercourse by a man with his own wife, the wife not being under 15 years of age is not rape. The punishment for statutory rape by the husband is the same when the wife is under 12 years of age but when she is between 12 and 15 years of age the punishment is mild, being imprisonment upto two years, or fine or both. Naturally, the prosecutions for this offence are very rare. We think, it would be desirable to take this offence altogether out of the ambit of section 375 and not to call it rape even in a technical sense. The punishment for the offence also may be provided in a separate section."

9.04. The Commission considered the position of legally separated wife vis-a-vis the offence of rape. It was observed:

> "Under the exception, a husband cannot be guilty of raping his wife if she is above fifteen years of age. This exception is to take note of one special situation, namely when the husband and wife are living apart under a decree of judicial separation or by mutual agreement. In such a case, the marriage technically subsists and if the husband has sexual intercourse with her against her will or without her consent, he cannot be charged with the offence of rape. This does not appear to be right. We consider that, in such circumstances, sexual intercourse by a man with his wife without her consent will be punishable as rape."[4]

9.05. Explanation II as recommended by the Commission is as follows:

> "A woman living separately from her husband under a decree of judicial separation or by mutual consent shall be deemed not to be his wife for the purpose of this Section."

9.06. The Forty-Second Report had recommended amendment in Section 375 on the following lines:

"Section 375 - Rape - A man is said to commit rape who has sexual intercourse with a woman other than his wife -

(a) against her will ; or

(b) without her consent; or

(c) with her consent when it has been obtained by putting her in fear of death or of hurt, either to herself or to anyone else present at the place; or

(d) with her consent, knowing that it is given in the belief that he is the husband.

Explanation I. - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Explanation II. - A woman living separately from her husband under a decree of judicial separation or by mutual agreement shall be deemed not to be his wife for the purpose of this section."[5]

9.07. The existing Section 375 stipulated a maximum sentence of life or imprisonment of either description for 10 years for rape. The Commission suggested that it should be rigorous imprisonment for a term upto 14 years.

9.08. The Commission recommended the incorporation of Sections 376A and 376B. Section 376A distinguished sexual intercourse between a wife of 12 to 15 years of age and a wife of less than 12 years of age, sexual intercourse with

the wife over 15 years of age without her consent not being an offence. The Commission recommended rigorous imprisonment upto 7 years if the wife was under 12 years and in any other case, imprisonment upto 2 years of either description.

9.09. Section 376B made illicit intercourse with a girl under 16 years but not under 12 years of age even with her consent punishable with imprisonment of either description upto 7 years.

9.10. The Commission added that it shall be a defence to a charge under this section for the accused to prove that he, in good faith, believed the girl to be above sixteen years of age.[6]

9.11. The Forty-Second Report's signal contribution to the reform of rape laws was the introduction of the concept of custodial rape. The Commission recommended the addition of sections 376C,376D and 376E dealing with custodial rape by a public servant or by a superintendent etc. of a women's or children's institution, and by a manager of a hospital with a woman patient suffering from mental disorder respectively.'

9.12. The provisions on rape law remained unamended, as the Indian Penal Code Amendment Bill could not be passed due to the dissolution of the Lok Sabha in 1979.

9.13. In the interregnum the Supreme Court of India decided some cases which took a restricted view of the scope of the offence of rape and acquitted the accused. The relevant decisions are Pratap Misra v. State of Orissa[7] and Tuka Ram v. State of Maharashtra.[8] The latter case popularly known as the Mathura Rape case involved the rape of a young girl aged between 14-16 years of age by two police constable in the police station. The Bombay High Court reversed the order of acquittal of the accused by the Session Court and sentenced them to rigorous imprisonent of varying terms. The High Court came to the conclusion that the policemen had "taken advantage of the fact that Mathura was involved in a complaint filed by her brother, and she was alone in the dead hour of the night " in a police station. This proved that she could not in any probability, have consented to intercourse. The Supreme Court after assessing the evidence on record concluded that the circumstantial evidence was such that it did not lead to "reasonable evidence of guilt" and reversed the Bombay High Court decision and acquitted the accused. This led to four law teachers writing an Open Letter to the Chief Justice of India criticising the judgment. The Open Letter generated nationwide protests from women's organisations and different sections of the Indian society.[9] Their collective demand was for reform of the law on rape. The Union Government responded to the public campaign and referred the matter of reforming rape laws to the Law Commission.

9.14. The Law Commission sent its 84th Report on "Rape and Allied Offences; Some Questions of Substantive Law, Procedure and Evidence" to the Government in 1980.

9.15. The Commission gave particular attention to the definition of consent and to rape of girls below the minimum age. It also took into account some of the recommendations incorporated in the Forty Second Report. The Commission had dispensed with the suggestions in the earlier Report which had characterized rape as -

1. rape proper;
2. rape with child-wife and
3. Rape i.e. sexual intercourse with the girl between 12-16 years of age, with her consent.

The reasons given by the Commission for discarding the above categorisation were:[10]

> "...the Commission now feels that such a restructuring would be out of tune with the current thinking on the question of trial of offenders for rape and, therefore, structure of Section 375 should not be altered. Since the making of the recommendation by the Commission in its earlier Report, there has been a radical and revolutionary change in the approach to the offence of rape; its enormity is frequently brought into prominence and

> heightened by the revolting and gruesome circumstances in which the crime is committed; the case law has blurred the essential ingredients of the offence and introduced instability into the previously well established law bearing on the offence of rape. The Commission feels that restructuring will produce uncertainty and distortion in section 375, which should in its opinion, retain its present logical and coherent structure."

Consequently, the Commission recommended the omission of Section 375A and Section 375B. Instead, the Commission recommended leaving rape of child-wife (S.375A) in the general Section 375 instead of placing it in a separate section. Section 375B which dealt with rape on a girl between 12-16 years of age with her consent was omitted altogether. Further, the Commission retained Sections 376C,376D and 376E which dealt with custodial rape; but renumbered them as Sections 376A,376B and 376C.

9.16. On the question of consent, the Commission observed that they would not only include the suggestions made in the earlier Report but suggested further amendments which would strengthen the concept of "free consent" for the purposes of Section 375. The Commission felt that the term "consent" was inadequate and should be substituted by the phrase "free and voluntary consent". The Commission observed:[11]

"The substitution of the expression "free and voluntary consent" for the word "consent" in the second clause makes it clear that the consent should be active consent as distinguished from that consent which is said to be implied by silence."

The Commission proceeded to say:

"Under the amendment as recommended, it would not be open to the Court to draw an inference of consent on the part of the woman from her silence due to timidity or meekness or from such circumstances without any more,- as that the girl meekly followed the offender when he pulled her, catching hold of her hand, or that the woman kept silent and did not shout or protest or cry out for help."

The Commission further stated:[12]

"The modifications recommended by us in the third clause vitiated consent not only when a woman is put in fear of death or hurt, but also when she is put in fear of any "injury" being caused to any person (including herself) in body, mind, reputation or property and also when her consent is obtained by criminal intimidation, that is to say by any words or acts intended or calculated to put

her in fear of any injury or danger to herself or to any person in whom she is interested or when she is threatened with any injury to her reputation or property or to a reputation of any one in whom she is interested. Thus, if the consent is obtained after giving the woman a threat of spreading false and scandalous rumours about her character or destruction of her property or injury to her children or parents or by holding out other threats of injury to her person, reputation or property, that consent will also not be consent under the third clause as recommended to be amended."

9.17. The Commission made significant recommendations on age of consent. The age of consent as applicable to the offence under Section 375 has been amended several times since the framing of IPC. The 84th Report has graphically presented in the form of a chart which is given below:[13]

CHART

Year	Age of consent under S.375, 5th clause, I.P.C.	Age mentioned in the Exception to S.375, I.P.C.	Minimum age of marriage under the Child Marriage Restraint Act,1929
1860	10 yrs.	10 yrs.	-
1891 (Act 10 of 1891) (after the amendment of IPC)	12 yrs	12 yrs.	-

1925 (after the amendment of IPC)	14 yrs.	13 yrs.	-
1929 (after the passing of the Child Marriage Act)	14 yrs.	13 yrs.	14 yrs.
1940 (after the amendment of the Penal Code and the Child Marriage Act)	16 yrs.	15 yrs.	15 yrs.
1978	16 yrs	15 yrs.	18 yrs.

9.18. As may be seen from the chart, the minimum age of marriage for girls has been increased to 18 years after the amendment of the Child Marriage Restraint Act, 1929 in 1978. The Commission recommended that "since marriage with a girl below eighteen years is prohibited ... sexual intercourse with a girl below eighteen years should also be prohibited."

9.19. The 84th Report did not recommend any changes in section 376 which provides punishment for the offence of rape. The Commission was of the view that judicial discretion be not fettered by prescribing a minimum sentence.

9.20. The 84th report by introducing a broader concept of "misconception of fact" has eliminated any examination of morality or the sexual antecedents of the victim of rape. Section 375, fourthly (b) allows this under a broader misconception of fact which includes the narrower mistake of identity.

9.21. Consequent on the recommendations of the Law Commission in its 84th Report, the Government introduced in the Lok Sabha the Criminal Law (Amendment) Bill, 1980 to amend, inter alia, the Indian Penal Code. The Government accepted the following recommendations of the Law Commission:

1. Accepting the concept of consent as free and voluntary consent;
2. making a distinction between judicially separated wife and wife; and
3. accepting the three concepts of custodial rape as recommended in the Commission's 42nd Report.

9.22. The Bill made a significant addition by introducing the separate offence of gang rape by two or more persons.

9.23. The Bill was sent to the Joint Committee of the Parliament. The changes made by the Committee were:

1. It reduced the age of marital rape. The exception to Section 375 stated that sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape. The Committee reduced this age to 12 years.

2. A new section, section 376A was incorporated, which deals with sexual intercourse with judicially separated wife without her consent. The Committee provided a lower punishment for rape of a judicially separated wife

3. The Committee did not accept the expanded concept of free and voluntary consent in Section 375.

9.24. In the Draft Bill reported by the Joint Committee, one change was made in its final reading stage. The age above which sexual intercourse with the wife is not rape was retained at 15.

9.25. The Parliament enacted the Criminal Law (Amendment) Act,1983. The chief features of which, so far as the offence of rape in IPC was concerned, were:

1. Increase in the punishment of rape;
2. distinction between gang rape and custodial rape and stiffer penalties for the same;
3. separate category of rape on pregnant woman;
4. distinguishing rape on a judicially separated wife and provision for a lower

punishment for it than in other instances of rape;

5. reduction in the punishment of rape on wife between 12 and 15 years of age;

6. distinguishing rape on woman of unsound mind or one who is intoxicated.

9.26. Accordingly sections 375 and 376 were amended and new sections 376A,376B and 376C were inserted. All the important recommendations of the Law Commission have been incorporated.

The provisions read as follows:

"375.Rape.- A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First.- Against her will.

Secondly.-Without her consent.

Thirdly .-With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.-With her consent, when the man knows that he is not her husband, and that her consent is

given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.-With her consent, when at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.-With or without her consent, when she is under sixteen years of age.

Explanation.-Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.-Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

"376. **Punishment for rape.**- (1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term

which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both;

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,-

(a) being a police officer commits rape-

(i) within the limits of the police station to which he is appointed ; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody

as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in the hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine;

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation I.-Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2.-"Women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widows' home or by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3.-"hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation."

"376A. **Intercourse by a man with his wife during separation.-** Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine."

376B. **Intercourse by public servant with woman in his custody.-** Whoever, being a public servant, takes advantage of his official position and induces or seduces, any woman, who is in his custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

376C. **Intercourse by Superintendent of jail, remand home, etc.-** Whoever, being the superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his

official position and induces or seduces any female inmate of such jail, remand home, place or institution to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

Explanation 1.-"superintendent" in relation to a jail, remand home or other place of custody or a women's or children's institution includes a person holding any other office in such jail, remand home, place or institution by virtue of which he can exercise any authority or control over its inmates.

Explanation 2.-The expression "women's or children's institution" shall have the same meaning as in Explanation 2 to sub-section(2) of section 376.

"376D. Intercourse by any member of the management or staff of a hospital with any woman in that hospital.- Whoever, being on the management of a hospital or being on the staff of a hospital takes advantage of his position and has sexual intercourse with any woman in that hospital, such sexual intercourse not amounting to the offence of

rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

Explanation.- The expression 'hospital' shall have the same meaning as in Explanation 3 to sub-section (2) of section 376."

9.27. Now we shall examine the recommendations of the National Commission for Women(NCW) and other suggestions made in response to the Questionnaire. Following are the recommendations of the National Commission for Women:

1. Section 375 be amended to change the reference to 16 years in paragraph, sixthly, to 18 years to provide for the increase in the age of majority of girls to 18 years.

2. Also a consequential amendment to change the reference to 15 years to 18 years has also been made in the Exception which deals with "sexual intercourse by a man with his own wife not being under 15 years of age".

3. Section 376 providing for punishment of rape be amended thus:

(a) The reference of sentence of punishment to 2 years for rape by the husband with his own wife who is more than 12 years of age is proposed to be increased to 5 years(Section 376 sub-clause(1)).

(b) The punishment provided in sub-section (2) is proposed to be increased from a minimum punishment of 10 years to punishment of rigorous imprisonment for life. At the same time, the punishment for rape when a woman who is less than 12 years of age is proposed to be taken out of this section and dealt with in a separate Section providing for higher punishment. This is sought to be done by incorporating a new section, namely sub-section (3) to section 376 which would read as :

> Whoever commits rape on a woman when she is under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than ten years and shall also be liable to fine.

It is also recommended that three new sections, section 376E, Section 376F and Section 376G be incorporated in the Indian Penal Code.

> Section 376E: Offence under Section 376A to Section 376D against children:

Whoever commits an offence under Section 376A to Section 376D (both inclusive) shall, if the woman is under eighteen years of age, be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Section 376F: Offence of eve-teasing.- Whoever intending to annoy any woman utters any word or makes any sound or gesture or exhibits any object or does any other act in any public place intending that such word or sound shall be heard or that such gesture or object shall be seen or that such act shall be noticed or felt by such woman, commits the offence of eve-teasing.

Section 376G: Punishment for eve-teasing.- Whoever commits the offence of eve-teasing shall be punished with imprisonment of either description for a term which may extend to 5 years and shall also be liable to fine.

9.28. According to the latest report of the National Crime Records Bureau entitled Crime in India, 98,948 cases of crime against women were registered in 1994 compared to 83,954 cases in 1993 and 79,037 cases in 1992. This amounts to an increase of 17.9 per cent in crime against women at the national level in 1994 with considerable increase in cases

registered under rape, kidnapping and abduction. The Report points out that Delhi, Rajasthan, Tamil Nadu, Madhya Pradesh, Himachal Pradesh, Karnataka and Pondicherry have been categorised as "high crime prone" States. In 1994 Madhya Pradesh reported the highest incidence of rape (2,929) accounting for 22.2 per cent of the national ratio. This was followed by Uttar Pradesh(2,078), Maharashtra (1,304), Bihar (1,130), Rajasthan (1,002). Other States which recorded more than 500 cases of rape during the year were. Andhra Pradesh, West Bengal and Assam. Delhi reported 309 incidents contributing 2.3 per cent towards national average.

Among the cities, Delhi and Mumbai continued to record more cases of rape. At the national level, victims of rape were the highest in the age group of 16-30 years accounting for 56.3 per cent of the total victims. But in the metropolitan cities, the situation was altogether different as 50 per cent of the total victims were girls below 16 years of age.[14]

The Delhi State Commission for Women in its Report Situation of Girls and Women in Delhi (1997) has pointed that the "rate of rape" in delhi is twice as high as in the whole country. During 1993 as many as 233 rape cases were reported which rose to 321 in 1994, to 362 in 1995 and to 470 in 1996. An analysis of 1996 crime data showed that in 88 per cent of the rape cases relatives and acquaintances were involved and in 89 per cent of the cases the crime was committed at home.

The Report also points out that 60 per cent of the reported cases in Delhi are of girls below 16 years. Further in 1993 as many as 18 per cent of rape victims were below 10 years of age as against 5 per cent in the whole country. About 42 per cent of the rape victims were in the 10 to 16 age groups compared to 23 per cent in the country.[15]

9.29. The UN Commission on the Status of Women in its Draft Declaration of Violence Against Women declares that "violence nullifies women's enjoyment of human rights of freedom". The Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW 1979), ratified by India recently, also does not speak of gender-based violence. It is generally agreed that violence against women is an infringement of their fundamental rights to life, liberty and dignity

9.30. There is a school of thought that the existing definition of rape in IPC is narrow and does not cover different forms of sexual violence experienced by women.[16] The present definition requires proof of penetration by penis and lack of consent by the complainant. Consent plays a crucial part in a rape trial .

9.31. Further, section 354 (assault or criminal force on woman with intent to outrage her modesty) and section 509 (word, gesture or act intended to insult the modesty of a woman) as interpreted by the courts do not cover virulent forms of sexual assault on women.

9.32. The proponents of this view advocate that the sections of IPC dealing with rape (sections 375 and 376) and sections 354 and 509 be repealed and be substituted by provisions on "Sexual Assault" - to be defined broadly to include all forms of sexual violence on women including rape.

9.33. After giving considerable thought to the point of view referred to above, the Law Commission is of the opinion that the offence of rape including custodial rape and its punishment be retained in IPC subject to the modifications stated below in para 9.34.

9.34. The Law Commission recommends that clause 'Thirdly' in section 375 be amended on the following lines:

> Section 375: A man is said to commit rape -
>
> Firstly -...
>
> Secondly - ...
>
> Thirdly - With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt, <u>or of any other injury</u>.

The words "or of any other injury" expand the scope of this clause to provide for situations of rape by persons in position of trust, authority, guardianship or of economic or social dominance. These cases will include incestuous rape and other instances where a victim of rape is totally dependent on the offender who is in a dominant position.

The National Commission for women has recommended that section 375 be amended to change the reference of age to 16 years in clause 'Sixthly' (rape with or without her consent) to 18 years. The Law Commission approves that the charge proposed by NCW is necessary particularly in view of raising the age in section 361 (Kidnapping from lawful guardianship - age changed from 16 to 18 years).

The Law Commission, however, does not endorse the change proposed by NCW in the Exception to Section 375 (sexual intercourse by a man with his wife) increasing age from 15 years to 18 years. Consequently, there need not be any amendment to section 198(6) Cr.P.C. as suggested by the National Commission for Women.

The Law Commission is of the opinion that the offence of child rape and its punishment is provided for under the existing Section 376(2)(f). Consequently, the

incorporation of a new sub-section (3) to Section 376, as recommended by the National Commission for Women, is not called for.

9.35. To deal with the issue of increasing sexual violence on women and female children, the Law Commission recommends that the offence of sexual assault be added to the existing offence of outraging the modesty of women in Section 354 and punishment be increased from two years to five years. Accordingly, Section 354 be amended on the following lines:

> Section 354. **Assault or criminal force to woman with intent to outrage her modesty.-** Whoever assaults or uses criminal force to any woman, intending to outrage her modesty or to commit sexual assault to her or knowing it to be likely that he will thereby outrage her modesty or commit sexual assault to her, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

Expanding the scope of Section 354 in the above manner, would in our view, cover the varied forms of sexual violence other than rape on women and female children.

The Law Commission is further of the view that the offence of eve teasing falls within the scope of Section 509 and there is no need for a new section 376F as recommended by the National Commission for Women. However, the Law Commission feels that the quantum of punishment be increased from 1 year to 3 years and fine. Accordingly, we recommend that Section 509 be amended in the following manner:

> Section 509. **Word, gesture or act intended to insult the modesty of a woman.**- Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending, that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

II. BIGAMY

9.36. Section 494 defines bigamy as the act of a person who, having a husband or wife living, marries but only in a case where such subsequent marriage is void under his or her personal law.

9.37. Till the enactment of the Hindu Marriage Act, 1955, the impact of this section fell only on Christians and Parsis. But after the coming into force of that Act, Hindus also have come within the purview of this provision. Muslims and some tribes, who are permitted by their family law and customs to practice polygamy, are excluded.

9.38. The Law Commission in its 42nd Report had revised the section as follows:

> "494. Bigamy.- Whoever, being married, contracts another marriage in any case in which such marriage is void by reason of its taking place during the subsistence of the earlier marriage, commits bigamy.
>
> Explanation.- Where a marriage has been dissolved by the decree of a competent court under an enactment but the parties are, by virtue of a provision of the enactment under which their marriage is dissolved prohibited from re-marrying within a specified period, then, for the purposes of this section, the marriage shall, notwithstanding its dissolution, be deemed to subsist during that period.

Exception. - The offence is not committed by any person who contracts the later marriage during the life of the spouse by earlier marriage, if, at the time of the later marriage, such spouse shall have been continually absent from such person for seven years and shall not, within that period, have heard of by such person as being alive, provided the person contracting the later marriage inform the person with whom it is contracted of the real state of facts so far as the same are within his or her knowledge."

The Commission felt that the punishment for bigamy was "unnecessarily high" and so be reduced from seven years to three years.[17]

9.39. The Commission also recommended the reduction of punishment for the aggravated form of bigamy, under section 495 namely where bigamy is accompanied by the concealment of the fact of former marriage from the person with whom the subsequent marriage is contracted, from ten years to seven years.[18]

9.40. But the IPC Bill (Clause 198) has not accepted the recommendation of reduction of punishment for bigamy under section 494.

9.41. The Bill significantly has added Explanation I which stipulates that a person shall be deemed to marry again whatever legal defect there may be in contracting, celebrating or performing such marriage.

For prosecution for bigamy to succeed, prosecution must show first of all that at the time of second marriage, there was a valid subsisting marriage. Where proof of either marriage is unsatisfactory, there would be no conviction. Explanation I to Section 494 in the Bill has introduced a deeming fiction. It deems the second marriage valid despite legal defects in contracting, celebrating or performing such marriage. By this, the accused cannot take the defence of non performance of ceremonies in the second marriage to save himself from the clutches of the offence of bigamy.

The incorporation of this deeming provision in Explanation was in consequence of the judicial decisions on the scope of section 17 of the Hindu Marriage Act,1955. The Supreme Court in Bhaurao v. State of Maharashtra[19] held that the offence of bigamy was not proved unless it was established that the second marriage was celebrated with proper ceremonies and due form. This conclusion was reached on the ground that S.17 of the Hindu Marriage Act, had used the word "solemnized". Accordingly the court held that it was essential for the purpose of section 17, that the marriage to which section 494 applies on account of the provisions of the Act, should have been celebrated with

proper ceremonies and due form. As the law requires no specific ceremonies but recognises ceremonies of marriage according to custom, it becomes extremely difficult to determine which ceremony or ceremonies were really essential. Bhaurao decision was reiterated in two subsequent decisions of the Supreme Court in Keval Ram v. H.P. Administration [20] and Priya Bala v. Suresh Chandra.[21] Consequently a great burden is cast on the prosecution to show that the second marriage is performed with all due formalities. This burden in many cases cannot be discharged satisfactorily to prove the offence of bigamy. Therefore, it was felt neceesary to add the Explanation. The Committee on the Status of Women in its Report "Towards Equality" (1975) had recommended the incorporation of Explanation to Section 17 of the Hindu Marriage Act that an omission to perform some essential ceremonies by parties shall not be construed to mean that the offence of bigamy was not committed. This recommendation has also found a place in Explanation (1) to Section 494 in the Bill.

Explanation 2 has been added to section 494 by which it is made clear that where the relevant divorce law prohibits re-marriage of the parties within a specified period after the decree of dissolution, such re-marriage amounts to bigamy. Explanation 2 is as follows:

"Where a marriage has been dissolved by a decree of a competent court but the parties are, by virtue of a provision of the enactment under which their marriage is dissolved, prohibited from re-marrying within a specified period, then for the purposes of this section, the marriage shall, notwithstanding its dissolution, be deemed to subsist during that period."

The Supreme Court in Sarla Mudgal's[22] case held that conversion from a monogamous religion (Hinduism) to a polygamous religion (Islam) for the purpose of second marriage, during the subsistence of first marriage, would make the second marriage violative of justice, equity and good conscience etc. The Court also held that the apostate husband would be guilty of the offence of bigamy. The Court has thus removed the uncertainty as regards the effect of conversion on marriage.

9.42. We recommend that another Explanation, Explanation 3 be added to section 494 incorporating the principle laid down by the Suprqaeme Court in the Sarla Mudgal's case on the following lines to put the matter beyond doubt:

"Explanation 3: The offence of bigamy is committed when any person converts himself or herself to another religion for the purpose of marrying again during the subsistence of the earlier marriage."

III. ADULTERY

9.43. In the First Report on the Draft Indian Penal Code, adultery was not made an offence. However, the First Law Commission in its Second Report on the Draft Indian Penal Code, after giving due consideration to the subject, came to the conclusion that it was not advisable to exclude this offence from the Code.[23]

9.44. The offence of adultery under section 497 is very limited in scope in comparison to the misconduct of adultery in divorce (civil) proceedings. The offence is committed only by a man who has sexual intercourse with the wife of another man without the latter's consent or connivance. The wife is not punishable for being an adulteress or even as an abetter. Punishment is imprisonment of either description for a term up to five years or with fine or with both.

9.45. The Law Commission in its 42nd Report recommended the retention of section 497 in its present form with the modification that, even the wife, who has sexual relations with a person other than her husband, should be made punishable for adultery. The Commission also recommended that five years' imprisonment is "unreal and not called for

n any circumstances and should be reduced to two years".[24] 'he Commission recommended that the section may be revised as 'ollows:-

> "497. Adultery.- If a man has sexual intercourse with a woman who is, and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, the man and the woman are guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."[25]

9.46. The constitutionality of section 497 was challenged under article 32 as violative of the right to equality in article 14 in Sowmithri Vishnu v. Union of India[26]. The basis of challenge was that the section makes an irrational classification between men and women and it unjustifiably denies to women the right given to men. This section confers upon the husband the right to prosecute the adulterer but does not confer any right upon the wife of the adulterer to do so. The Supreme Court negatived the contention and upheld the constitutionality of section 497.

Clause 199 of the Indian Penal Code Amendment Bill, 1978 reads as Section 497:

"Whoever has sexual intercourse with a person who is, and whom he or she knows, or has reason to believe, to be the wife or husband as the case may be, of another person, without the consent or connivance of that other person, such sexual intercourse by the man not amounting to the offence of rape, commits adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both."

The IPC (Amendment) Bill has brought in the concept of equality between sexes in marriage vis-a-vis the offence of adultery in the substituted section 497. However, the Law Commission recommends that the phraseology of clause 199 has to be modified on the following lines to reflect the concept of equality between sexes. Accordingly clause 199 shall read as:

"Section 497.- Whoever has sexual intercourse with a person who is, and whom he or she knows, or has reason to believe, to be the wife or husband, as the case may be, of another person, without the consent or connivance of that other person, such sexual intercourse not amounting to the offence of rape, commits adultery, and shall be punished with

imprisonment of either description for a term which may extend to five years, or with fine or with both."

The Supreme Court in Sowmithri Vishnu case had observed that "it is for the Legislature to consider whether section 497 should be amended appropriately so as to take note of the 'transformation' which the society has undergone". The proposed change reflects the transformation of women's status in the Indian society. The punishment of five years remains the same.

9.47. If section 497 is amended on the lines indicated above, sub-section (2) of section 198 of the Code of Criminal Procedure,1973 needs to be suitably amended.

IV. UNNATURAL OFFENCES

9.48. Section 377 deals with unnatural offences like sodomy, buggery and bestiality. This section was amended in 1955 making the punishment more stringent to one of imprisonment for life or with imprisonment of either description for a term up to ten years and fine. Section 377 reads as:

"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years".

9.49. The Law Commission in its 42nd Report had recommended that cases of bestiality should be regarded as pathological manifestations to be ignored by the criminal law.

9.50. The Commission, however, felt that "Indian Society, by and large, disapproves of homo-sexuality and this disapproval is strong enough to justify it being treated as a criminal offence even where adults indulge in it in private", and observed that "Buggery" may continue as an offence punishable less severely than at present but, where it is committed by an adult on a minor boy or girl, the punishment be higher. So the Commission had recommended that section 377 be revised as follows:-

"377. Buggery- Whoever voluntarily has carnal intercourse against the order of nature with any man or woman shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both;

and where such offence is committed by a person over eighteen years of age with a person under that age, the imprisonment may extend to seven years.

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

The Indian Penal Code (Amendment) Bill (clause 160) ıas adopted the above recommendation of the Law Commission.

).51 We recommend that in view of the growing incidence)f child sexual abuse in the country, where unnatural offence is committed on a person under the age of eighteen years, :here should be a minimum mandatory sentence of imprisonment)f either description for a term not less than two years, but vhich may extend to seven years. The court shall, however, ıave discretion to reduce the sentence for adequate and ;pecial reasons to be recorded in the judgment. Consequently ;ection 377 be amended on the following lines:-

"S.377. Unnatural offences.- Whoever voluntarily has carnal intercourse against the order of nature with any man or woman shall be punished with imprisonment of either deecription for a term which may extend to two years, or with fine, or with both; and where such offence is committed by a

person over eighteen years of age with a person under that age, he shall be punished with imprisonment of either description for a term which shall not be less than two years but may extend to seven years and fine.

Provided that the court may for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment of either description for a term of less than two years.

Explanation - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

V. CHILD SEXUAL ABUSE

9.52. Child sexual abuse (CSA) is considered one of the 'new' epidemics of the last decade. CSA could be any kind of "physical or mental violation of the child with sexual intent usually by an elder person who is in possession of trust or power viz-a-viz the child".[27] The experience may vary from an adult exposure of genitals to the child or to persuade the child to do the same, the adult touching the child's genital or making the child to touch his own, involving the child in

pornography - both printed and visual, having oral, vaginal or anal intercourse with the child, making verbal or other sexual suggestions or indecent overtures. In addition, fondling or fingering, touching or voyeurism or any such attempt could also be CSA.[28]

9.53. According to the statistics reported in Crime in India, of the total victims of rape cases, children accounted for more than 25 per cent. There is an increasing trend since 1990 as regards child rape.

While 3,393 cases of child rape were reported in 1993, it increased to 3,986 in 1994. Giving the state-wise incidence of child rape, the Report says Madhya Pradesh led in reporting the highest number of 809 child rape cases, followed by Uttar Pradesh (538), Rajasthan (205) and Delhi (206) in 1994. Among the cities, Delhi and Mumbai reported more victims of child rape in the age group below 10 years and also in the age group of 10-16 years.[29]

While conducting the study of CSA in Delhi, the Delhi Police found that information regarding the offences of molestation or outraging of modesty (S.354 IPC) and unnatural sex offences (S.377 IPC) committed on children below 16 years was not readily available. Information was collected for 1994 wherein a total number of 291 cases was recorded out of which 69 girls were below 16 years.(31%). In respect of

unnatural offences, out of 24 cases, there were 22 boys and 2 girls indicating that 95.9% of the victims, were children below 16 years.[30]

It is difficult to get hard data on the extent of CSA in the country. But there is a silver lining in the horizon. Some NGOs have undertaken studies on CSA and preliminary findings are none too happy. Samvada, a Bangalore based NGO found, in a study of 348 college girls, that 47 per cent of students had been subjected to sexual abuse. About 45 per cent had experienced such abuse before the age of 14. The most common offender was a known male family member. Similar are the findings of Sakshi, a Delhi based NGO in a study made of 357 girls of government and private schools. It was found that 63 per cent of the children had suffered some form of sexual abuse, about 22 per cent suffered serious sexual abuse and in 29 per cent of the cases, the abuse was by a person whom they trusted fully. In their analysis of 19 cases of CSA in 1995 it was found that in majority of the cases, the victims were children between one and twelve years.

9.54. The Constitution of India provides special protection to children. Article 15(3) confers powers on the State to make special provisions for women and children. Article 39(f) provides that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and

youth are protected against exploitation and against moral and material abandonment. This provision was added to the Constitution by the Constitution (Forty-fourth Amendment Act), 1978. Article 45 mandates the State to provide for free and compulsory education for all children until they complete the age of 14 years.

9.55. Since 1945 the welfare and rights of children have been a matter of great concern for the United Nations. One of the first acts of the General Assembly was to establish the United Nations Children Fund (UNICEF). In 1959, the Declaration on The Rights of the Child was drafted which has been serving as a guide post to private and public action in the interest of children on the basis "that mankind owes to the child the best it has to give". This Declaration ultimately led to the drafting of the Convention on The Rights of The Child which was adopted unanimously by the General Assembly on 20th November, 1989. 187 States have ratified this Convention. The Convention came into force in India on 11th January, 1993. Some of the provisions of the Convention specifically deal with the protection of children from sexual offences and violation, in particular Articles 34,35 and 36. Article 34 of the Convention imposes an obligation on the State parties to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes the States are mandated to take appropriate measures to prevent (i) the inducement or coercion of children to engage in any unlawful sexual activity; (ii) the exploitative

use of children in prostitution or other unlawful sexual practices and (iii) the exploitative use of children in pornographic performances and materials. Article 35 requires States to take all measures to prevent the abduction of the sale of or traffic in children for any purpose or in any form. Article 36 mandates states to protect the children against all other forms of exploitation prejudicial to any aspects of the child's welfare.

9.56. So far as rape of children under 12 years is concerned, the existing section 376(2)(f) provides a minimum mandatory sentence of 10 years rigorous imprisonment which may extend to life and fine.

9.57. To counter the evil of all other forms of sexual abuse of female children, the Law Commission's recommendations for amendment of section 354 as stated in para 9.35. in Part-IV should be adequate. In addition, the Law Commission's recommendation in para 9.52 of Part-IV for aggravated punishment for the commission of unnatural offences under section 377 IPC, on both male and female persons under eighteen years of age by adults would cover child sexual abuse on children, both male and female.

9.58. In the opinion of the Law Commission, the existing section 376(2)(f), and the Law Commission's recommendations for amendment of sections 354 and 377 are adequate to deal with child sexual abuse. Consequently, the Law Commission

does not recommend the incorporation of new section 354A as suggested in clause 146 of the Indian Penal Code (Amendment) Bill.

9.59 Sexual-child abuse may be committed in various forms such as sexual intercourse, carnal intercourse and sexual assaults. The cases involving penile penetration into vagina are covered under section 375 of the IPC. If there is any case of penile oral penetration and penile penetration into anus, section 377 IPC dealing with unnatural offences, i.e., carnal intercourse against the order of nature with any man, woman or animal, adequately takes care of them. If acts such as penetration of finger or any inanimate object into vagina or anus are committed against a woman or a female child, the provisions of the proposed section 354 IPC whereunder a more severe punishment is also prescribed can be invoked and as regards the male child, the penal provisions of the IPC concerning 'hurt', 'criminal force' or 'assault' as the case may be, would be attracted. A distinction has to be naturally maintained between sexual assault/use of criminal force falling under section 354, sexual offences falling under section 375 and unnatural offences falling under section 377 of the Indian Penal Code. It may not be appropriate to bring unnatural offences punishable under section 377 IPC or mere sexual assault or mere sexual use of criminal force which may attract section 354 IPC within the ambit of 'rape' which is a distinct and graver offence with a definite connotation. It is needless to mention that any

attempt to commit any of these offences is also punishable by virtue of section 511 IPC. Therefore, any other or more changes regarding this law may not be necessary.

FOOTNOTES

1. Law Commission, Eighty Fourth Report, para 1.2, page 1 (1980).

2. See Susan Brownmiller, Against Our Will Men,Women and Rape (1990); Lotika Sarkar, "Rape A Human Rights versus a Patriarchal Interpretation," I Indian Journal of Gender Studies 69 (1994); Flavia Agnes, "Protecting Women against Violence?" 27 Economic and Political Weekly (EPW) 19 (1992); also by the same author, State, Gender and the Rhetoric of Law Reform (1995) Lorenne Clark and Debra Lewis, Rape - The Price of Coercive Sexuality (1977).

3. Law Commission, Forty Second Report, para 16.115, page 277.

4. Ibid.

5. Id., para 16.117, pages 277-278.

6. Id., para 16.120, page 278.

7. AIR 1977 SC 1307.

8. AIR 1979 SC 185.

9. See Vasudha Dhagamwar, Law, Power and Justice 237-287 (2nd ed. 1992).

10. Law Commission, Eighty Fourth Report, supra note 1, para 2.21, page 9.

11. Id., para 2.8, page 6.

12. Id., para 2.9, page 6.

13. Id., para 2.19, page 8.

14. See, "Upsurge in Crime against Women: Report", Hindu (Delhi ed.) 9.12.1996.

15. See " Delhi's Shame: Women Most unsafe," incorporating an analysis of the Report of the Delhi State Commission for Women, Hindustan Times (Delhi ed.) 5.21997.

16. See provisions of the Sexual Assault Draft Bill, 1993 prepared by the Ad hoc Committee of the National Commission for Women; also see the Memorandum on Reform of Laws relating to Sexual Offences prepared by Shomona Khanna and Ratna Kapur, Centre for Feminist Legal Research, New Delhi.

17. Report, para 20.10, page 323.

18. Ibid, para 20.10.

19. AIR 1965 SC 1964.

20. AIR 1966 SC 1564.

21 AIR 1971 SC 1153.

22. Sarla Mudgal v Union of India, AIR 1995 SC 1531.

23. Second Report on the Draft Indian Penal Code 134-35 (1847), Law Commission.

24. Forty Second Report on the Indian Penal Code, para 20.18, page 327 (1971).

25. Ibid.

26. AIR 1985 SC 1618; 1985 (Supp) SCC 137.

27. Child Sexual Abuse literature by 'Sakshi' New Delhi.

28. Schwartz, Horovitz and Cardarelli Child Sexual Abuse 58-59 (Sage Publications 1990)

29. Amod Kanth, "CSA Legal and Investigative, Perspective", in Sheela Barse (Ed) Child Victims'Rights: Report of International Conference on Child Sex Abuse, Victim Protective Investigation and Trial Procedure 11 at 13(1996).

30. See Pioneer (Delhi ed.) dated 7.11.1996, page 3. See also "Incestuous Father Poisons Pregnant Daughter to Death," Indian Express - Express Newsline (Delhi ed.) 3.12.1996.

CHAPTER-X

ABDUCTION INCIDENTAL TO HIJACKING

The Indian Penal Code has been spoken of as a model piece of legislation as the premier Code of Criminal law, and as the monument of the great genius of Lord Macaulay under whose supervision it was constructed. The Code deals with territorial as well as extraterritorial crimes.

Section 4 extends the Code to extraterritorial offences. Accordingly, the provisions of the Code apply also to any offence committed by any person on any ship or aircraft registered in India wherever it may be.

To deal with the problem of "Piracy" which was very common in the last Century, two special legislations were enacted namely:-

(i) Admiralty Offences Act, 1894; and
(ii) The Merchant Shipping Act, 1894.

But the framers of the Code never thought about the crime of "Air-Piracy" which is commonly known as "Air-Hijacking" now a days. So the Code confines to the

crimes of the abduction of person only but not the abduction of the aircraft or vehicles. Hence a need has been felt to include the crime of "Air-Hijacking" in the Code.

PRESENT POSITION IN THE IPC

10.02. Section 362 of the Indian Penal Code is dealing with the abduction which runs as under:

> "362. Abduction:- whoever by force compels, or by deceitful means induces, any person to go from any place, is said to abduct that person."

The ingredients necessary to constitute an abduction of a person are-

1. that the person must have been made to go from any place, and
2. that such going must have been -

> (a) under compulsion by the use of force, or
> (b) induced by deceitful means -

(1)Abduction by itself is not punishable as a substantive offence.
(2) But if it falls within the categories dealt with by sections 364 to 369 except 366A, 366B and 368 by reason

of other additional elements apart from force or fraud, it will be an offence punishable under those sections.

Of course, Section 362 is dealing with the problem of "Abduction" of a "person". But in the crime of Air-hijacking, the "Aircraft" is a juristic "person". Moreover, at the time of committing the crime of Air-Hijacking, there may be persons inside the aircraft either as passengers or as crew members or both.

But legally, it will be very difficult to cover the crime of Air-Hijacking under Section 362 of the IPC as this crime was never imaginated by the framers of the Code. And as society progressed, the notions of property and revenge grew up which germinates new crimes in the society and one of them is the modern crime of Air-Hijacking.

Proposal to Include "Air-hijacking" in the IPC

10.03. In the recent past, the new crime of air hijacking has increased. Despite the steps taken by the countries as well as International Civil Aviation Organisation (ICAO) there is no reduction in the incidence of hijacking.

The Law Commission of India in its letter dated 26th December 1996 sought the suggestions to tackle the problem of hijacking of aircrafts or other vehicles. Item 13 of the letter says that-

> " the cases of hijacking of aircraft and vehicles in recent past have been galore in parts of our country ridden with terrorism. In view of this, it is felt that the hijacking of an aircraft or vehicle be made punishable under the Indian Penal Code. Do you think that there should be a uniform punishment for both the offences or it should vary according to gravity of the offence and be deterrent punishment in case of hijacking of an aircraft on board or in flight?"

Similarly in its questionnaire on IPC, 1860 (Item 18 p. 36), the Law Commission has asked the opinion to include this crime in the IPC, namely-

(i) hijacking of aircraft; and
(ii)hijacking of the vehicles.

In the questionnaire, the option has been suggested whether there should be a uniform punishment for both the offences or it should vary according to the gravity of the offence and be deterrent punishment in case of hijacking of an aircraft on board or in flight.

EARLIER REPORT (42nd) OF THE LAW COMMISSION

10.04. The Law Commission of India has submitted its 42nd Report in June 1971. In the said report (Item 16.96 p.296), the problem of abduction incidently to hijacking was discussed. The Commission had received the suggestion that, to cover the crime of hijacking of aircraft or other vehicle, an amendment may be made so as to punish those who indirectly cause persons to be transported to a place which is not their intended destination. In other words, extradition was sought. The need for such amendment was emphasised on the ground that the compulsion in such cases, at least so far as the passengers are concerned, is indirect. However, the Law Commission expressed its view that such cases could be regarded as falling within the Section 362, notwithstanding the indirect nature of the compulsion and therefore, no amendment is necessary.

Nonetheless, IPC (Amendment) Bill, 1978 made an attempt to include the crime of "Air-hijacking in a new section 362A.

Insertion of section 362A in the IPC:

10.05. By clause 149 of the IPC (Amendemnt) Bill, 1978, it is proposed to add a new section 362A. The proposed section which explains the meaning of Air-hijacking and hijacking of the Vehicles and also prescribed the punishment for the said crime reads as follows:

> "362A. (1) Whoever on board an aircraft in flight, being an aircraft registered in India, or any other aircraft in flight over Indian air space, unlawfully by force or show or threat of force or by any other form of intimidation seizes such aircraft or exercises control over it or attempts to seize or exercise control over it for the purpose of landing it at a place other than the place of its destination or for any other purpose, is said to commit the offence of hijacking of aircraft and whoever commits such hijacking shall be punished with imprisonment for life, and shall also be liable to fine.
>
> (2) Whoever on board a vehicle in India or a vehicle registered in India unlawfully by force or show or threat of force or by any other form of intimidation seizes such vehicle or exercises control over it or attempts to seize or exercise

control over it for the purpose of taking it to a place other than the place of its destination or for any other purpose, is said to commit the offence of hijacking of vehicle and whoever commits such hijacking shall be punished with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine.

Explanation- In this section-

(i) the period during which an aircraft is in flight shall be deemed to include any period from the moment when power is applied for the purpose of the aircraft taking off on a flight until the moment when the landing run, if any, at the termination of that flight ends;

(ii) the word "vehicle" include any vessel but does not include an aircraft."

10.06. Apart from the above, the following offences are also contained in the Bill:

i. <u>To substitute of section 103 IPC,</u> (Clause 35(d) of the Bill)

Clause 35 of the Bill substituting section 103 relevant sub-clause 35(d)

"Sub-Clause 35(d) mischief to property used or intended to be used for the purposes of the Government or a local authority or a Corporation owned or controlled by the Government, where such mischief is committed by intentional destruction of, or substantial damage to, property, or"

(e) hijacking of aircraft, or

(f) sabotage."

However, this clause does not deal with the ıischief intended to be committed with the private aircraft.

:I. To substitute of section 105 IPC (clause 37 of the Bill)

"Clause 37 of the Bill for substituting section 105 ›f the IPC runs as under:

105. "The right of private defence of property commences when a reasonable apprehension of danger to the property commences; and it continues-

(a)....

(b)....

(c) against mischief, criminal trespass, hijacking of aircraft, or sabotage, as long as the offender continues in the commission of the offence."

III. To substitute sections 426 to 432 and 434 to 440 of the IPC: (clauses 179 and 180 of the Bill) -

In Clause 179, it is proposed to substitute Sections 426 to 432 of the IPC. Similarly, it is proposed in clause 180 to substitute Sections 434 to 440. The most important proposed section in the Bill relating to the Mischief of Aircraft runs as under:-

"432. Whoever commits mischief by doing any act whereby he destroys or moves or renders less useful any air-route, beacon or aerodrome light, or any light at or in the neighborhood of an air-route or aerodrome provided in compliance with law, or any other thing exhibited or used for the guidance of aircraft, such act not amounting to the offence of sabotage, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."

10.07. The IPC (Amendment) Bill, 1978, though paseed by the Rajya Sabha, but could not become an Act due to dissolution of the then Lok Sabha. In the meantime, the problem of "Air Hijacking" was increased and it was felt urgently to have an effective piece of legislation to deal with the burning problem. Therefore, two principal Acts came into force in 1982 and after amendments the Acts are known as under:

(i) The Anti-Hijacking Act, 1982;

(ii) The Anti-Hijacking (Amendment) Act, 1994;

(iii)The Suppression of Unlawful acts against Safety of Civil Aviation Act, 1982;

(iv) The Suppression of Unlawful acts against Safety of Civil Aviation (Amendment) Act, 1994.

<u>The Anti-Hijacking Act, 1982</u>

10.08. This Act was enacted to give effect to the Convention for the Suppression of Unlawful Seizure of Aircraft and for matters connected therewith. The said Act (No 65/1982) came into existence on 15th November 1982.

Section 3 of the Act explains the crime of hijacking" as under-

"3.(1) Whoever on board an aircraft in flight, unlawfully, by force or threat of force or by any other form of intimidation, seizes or exercises control of that aircraft, commits the offence of hijacking of such aircraft.

(2) Whoever attempts to commit any of the acts referred to in sub section (1) in relation to any aircraft, or abets the commission of any such act, shall also be deemed to have committed the offence of hijacking of such aircraft.

(3) For the purposes of this section, an aircraft shall be deemed to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation, and in the case of a forced landing, the flight shall be deemed to continue until the competent authorities of the country in which such forced landing takes place take over the responsibility for the aircraft and for persons and property on board."

Section 4 has prescribed the punishment for the crime of hijacking. It says that whoever commits the offence of hijacking shall be punished with imprisonment for life and shall also be liable to fine.

Section 7 explains the provisions as to extradition. Accordingly, the offences under the Act shall be deemed to have been included as extraditable offences and provided for in all the extradition treaties made by India with Convention countries and which extend to, and are binding on, India on the date of commencement of this Act.

10.09. This Act was amended in 1994 (No. 39/94). Through the amendment any police officer by notification was made competent to arrest, investigate and prosecute the criminal of hijacking. The Amendment Act also prescribed the establishment of special Designated Court and the Designated Court shall presume, unless the contrary is proved, that the accused had committed such offence.

<u>The Suppression of Unlawful Acts Against Safety of Civil Aviation Act, 1982</u>

10.10. The said Act was enacted to give effect to the Convention for the Suppression of Unlawful acts Against the Safety of Civil Aviation and for matters connected therewith. This Act came into force on 15th November 1982.

Section 3 of the Act defines the offence committing violence on board an aircraft in flight, etc. Section 3 runs as under -

"3.(1) Whoever unlawfully and intentionally-

(a) commits an act of violence against a person on board an aircraft in flight which is likely to endanger the safety of such aircraft; or

(b) destroys an aircraft in service or causes damage to such aircraft in such a manner as to render it incapable of flight or which is likely to endanger its safety in flight; or

(c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or

(d) communicates such information which he knows to be false so as to endanger the safety of an aircraft in flight,

shall be punished with imprisonment for life and shall also be liable to fine.

(2) Whoever attempts to commit, or abets the commission of, any offence under sub-section (1) shall also be deemed to have committed such offence and shall be punishable with the punishment provided for such offence."

10.11. This Act was amended by an Amendment Act (No.14/94) and Section 3A was added which explains the mischief too. It runs as under.

After Section 3 of the Principle Act, the following sections shall be inserted, namely:-

"3A.(1) whoever, at any airport, unlawfully and intentionally, using any device, substance or weapon-

(a) commits an act of violence which is likely to cause grievous hurt or death of any person; or

(b) destroy or seriously damages any aircraft or facility at an airport or disrupts any service at the airport,

endangering or threatening to endanger safety at that airport, shall be punished with imprisonment for life and shall also be liable to fine.

3(2) whoever attempts to commit, or abets the commission of, any offence under sub-section (1) shall also be deemed to have committed such offence and shall be punished for such offence."

The Section 9A was also inserted in the Principle Act and accordingly the Designated Court shall presume, unless the contrary is proved that the accused had committed such offence mentioned in the Act.

Thus, it is crystal clear that this Special Act is dealing about the mischief to aircraft and its operation in an effective manner, and certainly in a better manner than proposed section 432 in the IPC (Amendment) Bill of 1978 (Clause -179).

Thus these two special legislations are sufficient for dealing with the offences relating Hijacking, Safety, and mischief of Civil Aviation in an effective manner.

Special Legislation vis-a-vis Indian Penal Code

10.12. For the framers of the Code, it was impossible to make the Code exhaustive of all offences. Section 5 of the Code is important and has wisely left all pre-existing, special, or local laws. The Code deals only with general

offences, and it cannot cover the offences which are covered by local or special laws. The saving of special or local law as in accordance with the general principle generalia specialibus non derogant which means that general words do not derogate from special. In other words, general words do not repeal or modify special legislation. (Seward vs. Vera, 10 AC 68)

10.13. The effect of this section is to qualify the general repeal contained in section 2 of the code seeking to repeal all other laws for punishment of offence. Thus the code was intended to be a general one, it was not found desirable to make it exhaustive and hence offences defined by local or special laws were left out of the code, and merely declared to be punishable as thereto fore.

Therefore, it is provided in Section 26 of the General Clauses Act, 1897 that-

> "Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punishable under any of those enactments, but shall not be liable to be punished twice for same offence." (Also double jeopardy Article 20 (2) of the Constitution).

But this, of course, assumed, that there is nothing in the one to exclude the operation of the other. In other words, where a special or local Act prescribes its own penalties they are presumed to be exhaustive, unless there is anything in the Act to save general law. Moreover, it is well settled law that where an Act is punishable both under the code as well as under a special or local law, the preferable course is to convict under the special law and not under the code, both because specialia generalibus derogant, as well as because the special Acts are primarily constituted to punish such delinquencies.

Moreover, it is proposed in clause 3 of the IPC (Amendment) Bill, 1978 to substitute section 5 of the IPC as under:

> "Nothing in this code shall affect the provisions of any special or local law."

Problem of hijacking of aircraft or vehicles sum up.

10.14. The existing general provisions in the IPC cover moving of any property unlawfully amounting to theft and when a force is used it may become robbery and if committed by five persons or more it amounts to dacoity. But in view of new trends of crime like hijacking of aircraft or vehicles, in 1978 Bill certain provisions are sought to be included and

hijacking of aircraft or vehicles are being made specific offences by virtue of section 362A under clause 149. Incidentally, some changes are suggested in the provisions relating to private defence and are sought to be made in seditions 103, 105 by adding hijacking of aircraft or sabotage. The other existing provisions relating to mischief also cover some of the alleged offences committed in respect of the aircraft or vehicles. In view of the changes to be brought about relating the offence of hijacking in the Bill, they have explained under the proposed section 437 the meaning of sabotage which is sought to be introduced or inserted under clause 180. Likewise, some changes are suggested in the Bill in the proposed new section 432 regarding mischief committed in respect of the air services like beacon, lights, etc. at the airport. The IPC (Amendment) Bill was prepared in 1978, thereafter the Anti-hijacking Act of 1982, subsequently amended in 1994. Also the Suppression of Unlawful acts against Safety of Civil Aviation Act, 1982 was enacted which was also amended in 1994. An examination of the provisions of these Acts it is crystal clear that the changes what are sought to be brought about in this regard under clause 179 are being taken care of in these special enactments both in respect of hijacking as well as the mischief to the service as such.

Therefore, there is no necessity now to have section 362A as proposed in the IPC (Amendment) Bill, 1978 in respect of hijacking of aircraft. Consequently, the changes

proposed under clauses 35 and 37 of the IPC (Amendment) Bill, 1978 for the amendments in sections 103 and 105 of the IPC which deal with the mischief to property including hijacking of aircraft, would not be necessary. Needless to mention that the mischief to the air service etc. has been made a crime and punishable under the special enactments mentioned above. Hence, no amendment is also required in section 432 of the IPC as proposed in the IPC (Amendment) Bill, 1978.

10.15. In the light of above discussion, it is recommended that section 362A is not required to be inserted in the IPC. Similarly there is no need to amend sections 103, 105, 432 of the IPC for covering the crime of air hijacking and mischief to air service etc.

10.16. But this crime is tremendously increasing throughout the world. The legislation of a country fails when the jurisdiction for the crime of air hijacking or criminal arises in two or more countries. It is the need of the hour that to prevent this crime international cooperation is required. Therefore, it is very necessary to have a look for international trends towards the problem specially where the crime is a continuing crime and have jurisdiction of two or more countries. In brief, discussion pertaining to international trends and convention pertaining air hijacking shall be useful not only for our recommendations but also for academic value.

International Trends and Conventions relating to the Crime of Air-hijacking:-

10.17. Aircraft hijacking is a contemporary addition to the roster of international and national crimes and the necessity for its control at international and national level is only beginning to be recognized by States. In its wide sense hijacking is an act against the safety of civil aviation and resembles piracy.

Tokyo Conventions, 1963.

10.18. According to Article 1, when a person on board has unlawfully committed, by force or threat thereof, an act of interference, seizure or wrongful exercise of control of an aircraft in flight or when such an act is about to the committed, contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve its control of the aircraft. Further, the contracting State, when the aircraft lands, shall permit its passengers and crew to continue their journey as soon as practicable and shall return the aircraft and its cargo to the persons lawfully entitled to the possession. Article 13 further provides that any contracting State shall take the delivery of any person whom the aircraft commander delivers and that it shall immediately make a preliminary enquiry into the facts. It is clear from the

bove provisions that an attempt to define the term hijacking' has not been made, but it simply imposes certain bligations upon a contracting State and lays more emphasis n the return of the hijacked aircraft and its passengers to hose persons who are entitled to its possession and to ermit its passengers and crew to continue their journey as oon as practicable.

he Hague Convention of 1970

0.19. Article 1 provides that "Any person who on board an ircraft in flight:

(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of that aircraft or attempts to perform any such act, or

(b) is an accomplice of a person who performs or attempts to perform any such act, commits an offence....."

This provision also does not define the term hijacking', but simply mentions its essential elements. onetheless, according to International Law, following are he essential elements of the offence of hijacking:

(i) Unlawful use of force or threat thereof or any other form of intimidation;

(ii) To do above-mentioned acts with a view to seize the aircraft or to exercise control over it;

(iii) The said acts should have been committed on board an aircraft in flight;

(iv) Accomplice of person who performs to attempts to perform the above-mentioned act is also guilty of the offence of hijacking.

The above-mentioned essential elements are similar to those mentioned in Article 11 of the Tokyo Convention, 1963. The only innovation in "Hague Convention, 1970" is that it includes an accomplice of a person who performs or attempts to perform any such act.

The Montreal Convention, 1971.

10.20. A conference was called by ICAO at Montreal from 8th to 23rd September, 1971. As a result of this conference, a Convention (known as Montreal Convention For The Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971) was adopted. Article 1 of the Montreal Convention provides that any person commits an offence if he unlawfully and intentionally-

(a) performs an act of violence against a person on board an aircraft if that act is likely to endanger the safety of that aircraft;

(b) destroys an aircraft in service or causes damages to such an aircraft which renders it incapable of flight or it is likely to endanger its safety in flight; or

(c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damages air navigation facilities or interferes with that operation, if any act is likely to endanger the safety or aircraft in flight; or

(d) destroys or damages air navigation facilities or interferes with that operation, if any such act is likely to endanger the safety or aircraft in flight; or

(e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

Besides this, it is further provided that a person also commits an offence if he attempts to commit any of the offences mentioned above or if he is an accomplice of a person who commits or attempts to commit any such offence.

No doubt, Under Article 1 of this Convention, the concept of the offence of hijacking was further widened. Under this Convention, the State parties have undertaken that they will provide deterrent punishment to the hijackers. Other provisions are similar to that of the Hague Convention. It would not be wrong to say that it is simply an improvement of the Hague Convention. As a matter of fact, it would have been better if the provisions of Montreal Convention had been adopted as protocol to the Hague Convention.

Principle of universal jurisdiction in respect of the crime of the hijacking.

10.21. The principle of universal jurisdiction is universally recognised in respect of the crime of piracy. Since hijacking is generally described as aerial piracy, the principle of universal jurisdiction should apply in respect of the crime of hijacking. By universal jurisdiction in respect of a crime, it is meant that the crime is against the interests of international community and in order to suppress such a crime, all States can exercise jurisdiction in respect of the crime. The Hague Convention, 1970, and the Montreal Convention, 1971 on hijacking have gone a long way to confer

universal jurisdiction to a great extent on all States, if an offender or alleged offender is within the territory of a State, both conventions contain provisions for him to be taken into custody, and if he is not extradited, for his case to be placed before the prosecution authorities.

Although neither Convention creates a duty to extradite or an inescapable duty to prosecute authorities are nevertheless under a duty to take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. If the decision is in the affirmative, the above mentioned universal jurisdictional clause ensures that the courts will be competent to hear the case.

Proposal for the Establishment of an International Criminal Court:

0.22. The idea of the establishment of an International riminal Court is not a new one. It has been a much iscussed topic since the end of the first World War. It has ssumed urgency in view of the fact that political aspects re not sufficiently regulated in the Hague convention of 970. On September 14, 1970,the than Secretary-General of he U.N. proposed that hijacker should be brought to trial efore an international tribunal. In his view, the proposed nternational tribunal would defend the interests of all eoples and nations and would be effective if governments

pledged themselves to extradite hijackers to be brought before the tribunal. One of the reasons for the establishment of an International Criminal Court is that some times it will be difficult for a National Court to punish an International delinquent.

In this connection, following three kinds of proposals have been made.

(1) A separate court administered by the United Nations;

(2) A Special Division of the International Court of Justice; or

(3) A court by means of International Conventions.

But since many States do not still seem to be prepared to take stringent measures against hijackers and in view of the present state of international relations and affairs, preventive measures comprising of thorough searches of all passengers, and their luggage constitute the best means to prevent or at least minimise the incidents of hijacking.

Problems of Extradition of the Hijackers:-

10.23. Yet another shortcoming in the existing law is in respect of extradition of the hijackers. Extradition of alleged offenders is obligatory only when there is a treaty to that effect. Moreover, the hijacking is not included as an extradition offence in some extradition treaties. Also extradition treaties often provide that State is under no obligation to extradite its own nationals, or persons who have committed crimes of political nature. Further, the reluctance of States to extradite hijackers who have acted for political motives is understandable, hijacking an aircraft is often the only way in which an individual can escape from a country where he is liable to political, social or religious persecution and it would be undesirable to require other States to send him back to a country where he faces such persecution. But unless such an individual is punished, there is danger that other people with less excusable motives will be tempted to imitate him. It is, therefore a matter of regret that the Hague and Montreal Conventions stopped short of requiring States prosecute hijackers, who are not extradited.

As regards action against States which refuse to extradite or prosecute, it may be suggested that an amendment to the Chicago Convention which empowered the Council of I.C.A.O. to order the suspension of all services to or from member States or I.C.A.O. which refused to extradite or prosecute hijackers would override air service treaties previously concluded between member States. If member States

were forced to choose between accepting such an amendment and ceasing to be members of I.C.A.O. they would probably accept the amendment, because they would not like to lose the advantage of membership of I.C.A.O. It was unfortunate that such an amendment when presented to the I.C.A.O. Assembly in 1973 could not be adopted as it failed to secure the requisite 67 votes. It could secure only 65 votes, i.e. only two votes less than the requisite number.

Extradition and Indian Law

10.24. In India, there is the Extradition Act, 1962. The Act felicitate the Extradition Treaty with other countries if the same provides extradition of the accused of the crime including Crime of Air-Hijacking.

Moreover, Section 7(2) of the Anti-Hijacking Act, 1962 provides that for the purposes of the application of the Extradition Act, 1962 to offences under this Act, any aircraft registered in a Convention country shall, at any time while that aircraft is in flight, be deemed to be within the jurisdiction of that country, whether or not it is for the time being also within the jurisdiction of any other country.

10.25. In the light of the above discussion, it appears that there is an urgent need to have an International Court of Civil Aviation. The proposed Court will deal with the crimes of Air hijacking, mischief in the air service where the jurisdiction will arise in two or more countries. The Law Commission is aware that making a direct recommendation in International Law is not within its jurisdiction, nevertheless this recommendation is being made incidentally and in the interest to prevent the crime of international civil aviation. Therefore, it is expected from the Government of India to take up this recommendation with the international comity as and when possible.

HIJACKING OF THE VEHICLES ETC.

10.26. In the recent past the crime of vehicle hijacking has increased in various parts of the countries. To take away the passenger vehicle sometimes by miscreants like terrorists etc. has created the problems for the administration of Law and order.

10.27. In this connection, it is proposed that amendment is required in the IPC to tackle this problem. Though the Chapter XVII of the IPC " offences against the property" is already dealing with the offence against the property but not dealing with hijacking of vehicles as there is no motive to take the ownership of vehicle in case of hijacking of

vehicle. In the hijacking, generally motive may be to create terror or demand ransom or counter bargaining. But on the other hand, in Chapter XVII of the IPC; sole motive is to take the property for the purpose of ownership ultimately. If the criminals for the hijacking of vehicles will be booked under this Chapter as well as Section 362 of the IPC which is dealing with the abduction of the person either in the vehicle or outside the vehicle, then prosecution may face problem in proving "mens rea". Another problem may be to punish and identify the actual group behind the crime.

The establishment of the principle that there must be a mental,even though objective, in crime, is now a few centuries old. Tracing the evolution of this principle, Russell on Crime (11th Edition p.23) says: "The new conception that merely to bring about a prohibited crime should not involve a man in liability to punishment unless in addition he could be regarded as morally blameworthy, came to be enshrined in the well-known maxim "actus non facit reum nisi mens sit rea". This ancient maxim which means that an act does not make a man guilty unless there be guilty intention propounds a moral test of criminal liability which has lingered in the law for no man can be convicted of a crime at common law unless both the physical and mental elements are present in the crime.

Statutory Offence:

10.28. The law relating to mens rea in statutory offences is substantially the same. The basic rule of interpretation of statutory offences is that "unless the statute, either clearly or by necessary implication rules out mens rea as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has a guilty mind". This rule is "of the utmost importance for the protection of liberty of the subject". With this view their Lordships of the Privy Council agreed in Srinivasa Mall vs. Emperor (AIR 1947 P.C.135). This statement of the law by the Privy Council was approved by the Supreme Court in Ravula Hariprasada Rao vs. State (AIR 1951 SC 204)

Though it is true that actus non facit reum nisi mens sit rea is a cardinal doctrine of criminal law the Legislature can create an offence which consists solely in doing an act, whatever the intention or state of mind of the person acting may be. Whether mens rea is a constituent part of a crime or not must in every case depend upon the wording of the particular enactment. The Privy Council observed in Srinivasa Mall's case that in a limited class of offences which are usually of a comparatively minor character the offence can be committed without a guilty mind. This class is generally made up of acts mala prohibita and the prohibitions are intended to protect the public or to promote

the general welfare, and , therefore, mens rea is not insisted upon as an essential ingredient of the offence unless so declared in express words by the Legislature.

However, so far as the Indian Penal Code is concerned, every offence under it virtually imports the idea of criminal intent or mens rea. Intent denotes all those states of mind which the statute creating the offence in question regards as necessary that an accused must have in order to fix the guilt in him.

Needless to mention that to constitute a crime the act must, except in the case of certain statutory crimes, be accompanied by a criminal intent or by such negligence or indifference to duty or to consequences as is regarded by the law as equivalent to criminal intent. Intention, however, is not capable of positive proof: it can only be implied from overt acts. As a general rule, every sane man is presumed to intend the necessary or the natural and probable consequences of his acts and this presumption of law will prevail unless from a consideration of all the evidence the Court entertains a reasonable doubt whether such an intention existed. This presumption, however, is not conclusive, nor alone sufficient to justify a conviction and should be supplemented by other testimony.

10.29. The gravity is such that it cannot be left as theft. Therefore, there is an urgent need to make it a separate offence. Therefore, to avoid doubts, it is recommended to incorporate the Crime of "Hijacking of Vehicles" etc. in the IPC. By making this crime a "Statutory Crime",all the controversies (like whether the said crime can be covered or not in Chapter XVII), will disappear.

10.30. In the light of the above, it is recommended that-

I. Section 362A (1) as mentioned in the IPC (Amendment) Bill, 1978 (Clause 149) may be omitted but clause (2) may be inserted in the IPC as under:

> S.362A. Whoever on board a vehicle in India or a vehicle registered in India unlawfully by force or show of threat or force or by any other form of intimidation seizes such vehicle or exercises control over it or attempts to seize or exercise control over it for the purpose of taking it to a place other than the place of its destination or for any other purpose, is said to commit the offence of hijacking of vehicle and whoever commits such hijacking shall be punished with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine.

Explanation- In this section-

(i) The word "Vehicle" include any vessel but does not include an aircraft.

II. Section 432 of the IPC (Amendment) Bill, 1978 (Clause 179) may be dropped.

III. In the above mentioned explanation the words, "helicopter, air glider etc." may be inserted. It may read as under:-

(i) The word "Vehicle" include any vessel including helicopter, or air-glider etc., but does not include an aircraft.

OR

The words "helicopter, air-glider etc." may be inserted in S.2 (a) of the Anti-Air Hijacking Act 1982, as well as in the Suppression of Unlawful, acts Against Safety of Civil Aviation Act, 1982.

IV. If need be, necessary amendment may be carried out in the special legislations, mentioned above.

CHAPTER- XI

DOCUMENT - SCOPE OF ITS DEFINITION

Section 463 defines the term "forgery". This section provides that "whoever makes any false document or part of a document with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery". Section 464 defines making of a false document and enumerates various situations as to when a person can be said to make a false document. The Commission proposes to further examine the scope of the term 'document' in view of the latest scientific developments in the field of computers as well as in the context of forgery of a copy of a document as also the implications of fabricating a document to conceal a past injury or fraud to escape liability for criminal prosecution.

11.02 Commission of fraud through the use of computers:

With the advent of electronics many transactions are done through computers. Recent scam of fraud in New Delhi Municipal Corporation electricity bills through use of computers is an illustration of computer fraud.

The topic of computer crime has recently formed the subject of a report by the Scottish Law Commission. In this respect the Scottish Law Commission identified eight distinct forms of behaviour, while the English counterpart referred to five main headings. In both cases, however, three critical issues stand out, namely (i) the involvement of the computer in a scheme to secure unlawful financial advantage or the unauthorised amendment or deletion of data, (ii) the unauthorised use of a computer system or the securing of unauthorised access to data held therein and (iii) the 'theft' of the information.

The Audit Commission (U.K.)(1) has conducted a triennial survey of 'computer fraud and abuse'. The Commission was only able, in their survey covering the years 1984-87 to discover 118 incidents of frauds within England and Wales with total losses amounting to a little over 2.5 million pounds. It has also been alleged that clearing banks have set aside the sum of 85 million pounds to cover losses arising from computer fraud. The Audit Commission (U.K.) further found that the concept of computer frauds spans a wide range of activities ranging from sophisticated multimillion pound frauds to the misuse of a bank's automatic teller machine.

Therefore, there is a need to explicitly bring the computer frauds within the purview of Chapter XVIII of the IPC dealing with offences relating to documents by enlarging

the scope of the term 'document'.

11.03 The term 'document' is defined in Section 29 IPC as follows:-

> "29. **Document.** - The word "document" denotes any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used or which may be used, as evidence of that matter.
>
> Explanation I. - It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended, for or may be used in, Court of Justice, or not.
>
> Illustrations
>
> A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.
>
> A cheque upon a banker is a document.
>
> A power-of-attorney is a document.
>
> A map or plan which is intended to be used or which may be used as evidence, is a document.
>
> A writing containing directions or instructions is a document.

Explanation 2. - Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures or marks within the meaning of the section although the same may not be actually expressed.

Illustration

A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsements, as explained by mercantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words "pay to the holder" or words to that effect had been written over the signature."

Evidently, this definition though wide in nature, needs to contain explicitly a provision in the light of the recent electronic developments. The Law Commission in its 42nd Report, para 2.56, observed that :-

"2.56 The main idea in all the three Acts is the same and the emphasis is on the "matter" which is recorded, and not on the substance on which the matter is recorded. We feel, on the whole, that the Penal Code should contain a definition of

"document" for its own purpose and that section 29 should be retained.

The two Explanations attached to section 29 are, we think, helpful. The first Explanation helps to clear ambiguity about the import of the word "evidence" used in the section, and is in accord with the view of the Courts."

11.04 It may be noticed that in the Forgery and Counterfeiting Act, 1981 (U.K.), Section 8(1), the term 'instrument' means:

"... in this part of this Act 'instrument' means -

(a) any document, whether of a formal or informal character;

(b) any stamp issued or sold by the Post Office;

(c) any Inland Revenue Stamp; and

(d) any disc, tape, sound track or other device on or in which information is recorded or stored by mechanical, electronic or other means."

Arlidge & Parry on Fraud,(2) pr.5-012, observes:

"in particular it is submitted that the words "any device on or in which information is recorded or stored by mechanical, electronic or other means" in section 8(1)(d) include the magnetic stripe on a payment card: the stripe is clearly a device on

which encoded information about the holder's account is recorded and stored. The same must apply to electronic chip used on "smart" card. Since the stripe or chip is attached to the card, it follows that information is also stored on the card; but is the card a "device"? It is submitted that if it is not a "document" within section section 8(1)(d). It is clear that cheque cards and credit cards, at least, are intended to qualify as instruments because they are expressly included among the special category of instruments possession of which can be an offence. Other forms of payment card are not so included; but it would be strange if a credit card were an instrument and a debit card were not."

11.05 A survey of definition of 'Document' in other legislations would be of great use. According to Black's Law Dictionary,(3) 'Document' means-

"An instrument on which is recorded, by means of letters, figures, or marks, matter which may be evidentially used. In this sense the term "document" applies to writings; to words printed, lithographed, or photographed; to seals, plates or stones on which inscriptions are cut or engraved; to photographs and pictures; to maps or plans. The inscription may be on stone or gems, or on wood, as well as on paper or parchment."

Under Section 3 of the Indian Evidence Act, 1872, the term 'Document' "means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Illustrations

A writing is a document; words printed lithographed or photographed are document;

A map or plan is a document;

An inscription on a metal plate or stone is a document;

A caricature is a document."

Under section 10(1) of the Civil Evidence Act, 1968 (U.K.) the word 'document' is defined as follows:-

"Document: A written paper or something similar which may be put forward as evidence.

'Document' includes in addition to a document in writing.

(a) any map, plan, graph or drawing;

(b) any photograph;

(c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being

reproduced from it; and

(d) any film, negative tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced from it."

Under clause 11 of the Companies (Amendment) Bill, 1996 the following Section was proposed to be inserted in the Company's Act, 1956:-

"610A. (1) Notwithstanding anything contained in any other law for the time being in force, -

(a) a micro film of a document or the reproduction of the image or images embodied in such micro film whether enlarged or not); or

(b) .....

(c) a statement contained in a document and included in a printed copy produced by a computer (hereinafter referred to as a computer printout), if the conditions mentioned in sub-section 2 are satisfied

shall be deemed to be also a document for the purposes of this Act.....

(2) The conditions referred to in sub-section (1) in respect of a computer print-out shall be the following, namely:-

(a) the information contained in the statement reproduced or is derived from returns and documents filed by the company on paper or on computer

network, floppy, diskette, magnetic, cartridge tape, CD-rom or any other computer readable media;

(b) .....

(c) ....."

11.06 It is, thus, evident that there is a trend of widening the scope of the term 'document' having regard to the latest scientific inventions in the field of electronics. Consequently, there is apparent need to combat frauds committed through computers. This would give rise to the need to exhaustively define the term 'document' under section 29, IPC. In this connection, it is pertinent to refer to clause 11 of the Bill which seeks to amend section 29 of the Penal Code.

Under sub-clause (a) of clause 11 of the Bill, it is provided that in section 29 of the Penal Code, for the words "expressed or described", the words "expressed, described or recorded" shall be substituted. By virtue of sub-clause (b) of clause 11, for the words "figures or marks", the words "figures, images, marks or sounds" shall be substituted in section 29, IPC.

11.07 The Law Commission in its 42nd report, para 2.57 recommended for a slight alteration of the language of section 29 of the Penal Code. It observed that the definition under section 29 relating to the term "document" is wide enough to cover every kind of document. Some doubt

was however, noticed as to whether it includes mechanical records of sound or image. It recommended that it should include such, as mechanical devices like "tape-records" which are in frequent use. It referred to the decision of the Supreme Court in Pratap Singh Kairon, (AIR 1964 SC 72, 86, pr.15) that a conversation recorded on a tape is good evidence, and obviously if a person forges a tape record, he ought to be punishable the same way as a person preparing a false document. The Commission recommended to make this clear by adding an illustration to section 29. The Commission recommended that section 29 should be revised to read as follows:-

> "29. Document - The word 'document' denotes any matter recorded upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter.
>
> Explanation I. - It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice or not.

Illustrations

The following are documents-

(a) a map or plan;

(b) a caricature;

(c) a writing on a metal plate, stone or tree;

(d) a film, tape or other device on which sounds or images are recorded.

Explanation 2. - Whatever is expressed by means of letters, figures or marks as understood by mercantile or other usage, shall be deemed to be recorded by such letters, figures or marks within the meaning of this section, although the same may not be actually expressed.

Illustration

A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsement as understood by mercantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words 'pay to the holder' or words to that effect had been written over the signature."

The proposed substitution of the words "expressed or described" under sub-clause (a) of clause 11 of the Bill by the words "expressed, described or recorded" are thus intended to widen the scope of the term "document" by bringing within its import any matter even "recorded". One may argue that by virtue of the insertion of the word "recorded" in the definition of term 'document' under section 29, IPC that any matter recorded on any disc, tape, sound track or other device on or in which information is recorded or stored by mechanical, electronic or other means would fall within the ambit of the proposed amended definition of 'document' vide clause 11 of the Bill. Nevertheless, the matter is arguable both ways. Accordingly, it would be advisable to define the term 'document' on the lines of definition of 'document' given under section 8(1)(d) of the Forgery and Counterfeiting Act, 1981 (UK).

11.08 Therefore, the term 'document' as defined in Section 29, IPC may be enlarged so as to specifically include therein any disc, tape, sound track or other device on or in which any matter is recorded or stored by mechanical, electronic or other means. These words also find place in Sec.8(1)(d) of the Forgery and Counterfeiting Act, 1981(U.K.) quoted above. In order to achieve this purpose, in addition to the amendment proposed to be added vide clause 11 of the Bill, we recommend that a new Explanation 3 be also inserted in Section 29, IPC on the following lines:-

"Explanation 3. - The term "document" also includes any disc, tape, sound track or other device on or in which any matter or image or sound is recorded or stored by mechanical or other means."

The aforesaid proposed amendment in section 29 would also necessitate consequential amendment of the term "document" under section 3 of the Indian Evidence Act, 1872 on the lines indicated above.

FOOT NOTES

1. Audit Commission (U.K.)
2. Arlidge & Parry on Fraud, -edn, ch.5 pr.5.012
3. Black's Law Dictionary, Fifth Edn., p.432.

CHAPTER XII

THE INDIAN PENAL CODE (AMENDMENT) BILL, 1978

The Indian Penal Code was placed on the statute book in the middle of the last century and the title "Indian Penal Code" given by the then Law Commission refers to the basic criminal law. The Indian Penal Code which is the basic penal law of India, is thus more than 134 years old and the task of bringing it to date was taken up by the Law Commission of India in the year 1969 and it presented its 42nd Report in 1971. The Government after a careful examination of the recommendations made by the Law Commission, introduced a comprehensive Bill in the Rajya Sabha in 1972. A Joint Parliamentary Committee scrutinised the same for nearly four and a half years. After finalisation by the Parliamentary Committee, the Bill was passed in the Rajya Sabha in November, 1978. However, it could not be passed in the Lok Sabha as it was dissolved in 1979. For some reason or the other this Bill was not again introduced. The Government of India, however, made a reference to the Law Commission of India to undertake a comprehensive revision of the IPC and to come up with appropriate recommendations.

12.02 Since the provisions of the Bill are mainly based on the recommendations made in 42nd Report, we propose to examine the recommendations made by the Law Commission in its

2nd Report and the changes in the circumstances in the meanwhile and make our own assessment of the necessity to bring about the changes and also indicate modifications to the various clauses in the Bill wherever it is necessary.

In the present Bill there are 151 amendments, 95 substitutions, 32 omissions and 25 insertions. Apart from these, new sections 130A to 140 are substituted to the existing Chapter VII and sections 490, 491 and 492 are substituted under Chapter XIX by changing the heading as 'Offences against Privacy' instead of the existing heading 'Criminal Breach of Contracts of Service'. In addition, two new chapters, namely, Chapters VB and XVIIIA are inserted and Chapter XXIII containing section 511 under the title 'Attempts to Commit Offences" has been omitted. Sections 161 to 165A have been omitted by and transposed to the Prevention of Corruption Act, 1988. Besides, some of the sections or clauses or sub-clauses are renumbered. After introduction of the proposed Bill, sections 228A (Disclosure of identity of the victim of certain offences, etc.) and 304B (Dowry death) were inserted by Acts 43 of 1983 and 43 of 1986, respectively. Sections 375 and 376 (Sexual offences) and heading of the chapter were substituted by sections 375, 376, 376A, 376B, 376C and 376D by Act 43 of 1983. A partial amendment to Explanation 1 to section 405 has been made. In addition, a new chapter XXA containing a new section 498A was inserted by Act 46 of 1983.

There are 207 clauses in the 1978 Bill. Clauses 1, 6, 7, 8, 12, 16, 39, 40, 44, 46, 47, 49, 50, 51, 53, 55, 56, 57, 59, 60, 61, 62, 65, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 92, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 112, 113, 114, 115, 116, 117, 118, 120, 121, 126, 127, 129, 132, 133, 135, 136, 138, 139, 140, 141, 142, 143, 147, 148, 150, 153, 154, 156, 157, 158, 185, 186, 189, 191, 192, 193, 195, 200, 202, 205 and 207 are only inconsequential.

The changes proposed in the other clauses contemplate to bring about the basic penal statute of this country updated to remove lacunae and make it useful for meeting the optimum needs. Several new offences are proposed to be included which would result in large scale changes in the First Schedule of the Code of Criminal Procedure.

We have carefully perused these clauses of the Bill and we find that some of the changes contemplated go beyond the recommendations made by the Law Commission in its 42nd Report. Therefore, we think it necessary to examine each of these clauses as indicated already.

Clauses 2 to 8

12.03 Chapter II provides for general explanations. Sections 6 to 52A contain various definitions and explanations. The object of definition is to avoid the

necessity of frequent repetitions in describing the subject-matter to which the word or expression is intended to apply. The definitions may be restrictive and exhaustive but sometimes may be inclusive and exclusive. In other words, a definition may be inclusive and exclusive, i.e., it may include certain things and exclude others. It is well settled that the definition is not to be read in isolation but must be read in the context of the phrase which defines because the function of a definition is to give precision and certainty to a word or a phrase which would otherwise be vague and uncertain. In The Vanguard Fire and General Insurance Co. Ltd., Madras vs. M/s Fraser and Ross and another (AIR 1960 SC 971), the court observed -"It is well settled that all statutory definitions of abbreviations must be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject of the context".

Section 6 lays down that throughout the Code (IPC), every definition of an offence, every penal provision, etc., shall be understood subject to the exceptions contained in the chapter titled "General Explanations", though those exceptions are not repeated in such definition, penal provision or illustration.

Section 7 adds that every expression which is explained in any part of the Code, is used in every part of the Code in conformity with the explanation.

In these sections, various words and explanations used in the Code are defined.

The Law Commission, in its 42nd Report, clearly observed that neither the definitions nor the general rules of construction contained in General Clauses Act are applicable to the Indian Penal Code except to a very limited extent but, however, noted that tc some extent there is overlapping resulting in duplication which can be removed by expressly providing that the General Clauses Act shall apply for the interpretation of the Code. To that extent, the Commission recommended the omission of certain sections containing the definitions which are there in the General Clauses Act also. In this view, the Law Commission recommended deletion of sections 8, 9 and 10 which define 'gender', 'number', 'man', 'woman' and section 11 defining 'person'. In the Bill, by virtue of clause 5, these sections 8, 9 and 11 stand deleted since these expressions are in the same terms as they are found in the General Clauses Act.

A perusal of the General Clauses Act, 1897 would show that the definitions and the General Rules of Construction contained therein are not specifically made

applicable to the Indian Penal Code except to a very limited extent. It is well accepted that all penal statutes are to be construed strictly and that the court must see that any act or omission charged of, amounts to an offence within the plain meaning of the words used in the Code and the word should not be strained in construing the penal statutes, its cardinal principle being that in case of doubt the construction favourable to the subject should be preferred. The framers of the Indian Penal Code had in view this general scope of the substantive law in incorporating the definitions in the chapter of General Explanations. It is also an accepted principle that the essence of a penal law is to be exhaustive on the merits in respect of which it declares the law. In so construing very often the meaning and the object underlying the definitions with reference to the offence charged assumes importance. To determine that a case is within the ambit of the statute, its language must be explicit and facilitate the court as to what to say and how to interpret. Having regard to these aspects, it is better to retain the definitions in the Penal Code instead of omitting them as recommended by the Law Commission in its 42nd Report. In the result, we do not recommend any changes in sections 8, 9 and 11. Consequently, clauses 2 to 8 of the Bill have to be deleted.

[redacted]

[redacted]Clause 9

[redacted]04 By virtue of this clause, sections 18 to 21 are [redacted]ght to be substituted. Existing section 18 says- "India"

means the territory of India excluding the State of Jammu & Kashmir. As pointed out by the Law Commission, there is a need to amend this definition to make it clear that the Indian Penal Code extends to the territorial waters of India in the same manner as it extends to the land territory. The Law Commission, in its 42nd Report suggested an amendment to section 18, namely, "India" means a territory of India including territorial waters but does not include the territory of Jammu & Kashmir." In recommending this amendment, the Law Commission laid more stress in extending the Code to the land territory as well as internal waters of India. Though clause 2 has more clearly covered the territorial jurisdiction, it is silent as to the extension of the Code to the State of Jammu & Kashmir. It has been voiced in many workshops as well as observed in court judgments and suggestions from the members of legal fraternity and jurists to extend the applicability of Indian Penal Code to the entire country (including Jammu & Kashmir). Though this is a laudable object, new section 18 is not in conformity with the same.

The existing section 1 reads, "the title and extent of operation of the Code- this Act shall be called the Indian Penal Code and shall extend to the whole of India except the State of Jammu & Kashmir". The words "extend to the whole of India" were introduced by way of an amendment in the year 1950 and the words "except the State of Jammu & Kashmir" were substituted in the year 1951. The existing section 18 defines India as "India means the territory of India

excluding the State of Jammu & Kashmir". It may be noted that this section was substituted in the year 1950. By reading these two sections together it appears that the intention was not to extend the Penal Code to the State of Jammu & Kashmir as can be noticed from section 1. But India as defined in section 18 is somewhat incongruous, i.e., as the territory of India excluding the State of Jammu & Kashmir. However, in the Bill the existing section 1 is not touched upon whereas the existing definition of India as found in section 18 is sought to be substituted by new section 18 which reads, "the word 'India" wherever it occurs in this Code means the territories to which this Code extends". When the existing section 1 is not modified then the definition of India in the new section does not carry the matter further because it says that India means the territories to which this Code extends, thereby clearly implying that this Code would not be applicable to the State of Jammu & Kashmir. In the 42nd Report, the Law Commission made a recommendation for amendment of section 18 in a slightly different way than what we find in the new section 18 sought to be substituted under the Bill. Having examined the matter carefully and also bearing in mind that in the Bill there is no reference to section 1 at all, there is no need to substitute the existing section 18 by the proposed new section. However, to make things clear if necessary and to remove any ambiguity, namely, that the restricted meaning of India for the purpose of applicability of this Code would

be the territories to which this Code extends, as found in the existing section 1, the proposed new section 18 may suitably be worded.

The existing section 19 defines 'judge' and section 20 'Court of Justice'. There was some confusion as to the interpretation of the expression 'judge'. Section 19 is sought to be substituted by the new section. The existing section 19 reads-

> "Judge- the word "judge" denotes not only every person who is officially designated as a Judge, but also every person-
>
> who is empowered by law to give, in any legal proceeding, civil or criminal, definitive judgment or a judgment which, if not appealed against, would be definitive, or a judgment which is confirmed by some other authority, would be definitive, or
>
> who is one of a body of person, which body of persons is empowered by law to give such a judgment."

The Law Commission in its 42nd Report noticed some lacunae in this and recommended that illustrations can be omitted and section suitably be amended. Now the section that is sought to be substituted reads as follows-

"The word "judge" denotes not only every person who is officially designated as a Judge, but also-

(a) every person-

(i) who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive or a judgment which, if confirmed by some authority, would be definitive, or

(ii) who is one of a body of persons, which body of persons is empowered by law to give such a judgement; and

(b) a magistrate."

While retaining the emphasis on giving a 'definitive judgment' and while recommending it, the only change brought out is inclusion of magistrate. We endorse the changes sought to be introduced by the Bill.

The existing section 20 defines a "court of justice" as meaning a judge or body of judges empowered by law to act judicially when such judge or body of judges is acting judicially. The Law Commission, in its 42nd Report, having examined the language of the Section, observed that the definition is unnecessarily lengthy and suggested that the same may be simplified. As mentioned above, section 19

defining 'judge' as we find in the Bill comprehensive and all those words need not be repeated again. Section 20, as we find in the Bill after the change is simple and sufficient.

The existing section 21 defines 'public servant'. The same contains the categories of persons which come within the meaning of 'public servant'. The concept of 'public servant' is quite important from the point of view of administration of criminal justice. The definition of 'public servant' in section 21 has nexus to section 197 Cr.P.C. whereunder sanction is necessary for prosecuting a public servant. Now, it is well settled that if the act complained of is connected with official duties of the accused and if reasonably found that it was done in the course of discharging of his official duties, section 197 is attracted and sanction is essential for his prosecution. Therefore, it becomes necessary to find out whether the accused is a public servant as defined in section 21. The Law Commission having examined the existing section observed that the elaborate enumeration of various categories of public servants in section 21 is primarily based on the functions discharged by such servants and further noted that there is considerable overlapping particularly after the recast of clause twelve by the amending Acts of 1958 and 1964 and that some of the clauses require drastic revision. In the Bill, the new section 21 reads as follows-

21. "Public Servant" means,-

(i) any person in the service or pay of the Government, or remunerated by the Government by fees or commission for the performance of any public duty;

(ii) any person in the service or pay of a local authority;

(iii) any person in the service or pay of a corporation owned or controlled by the Government;

(iv) any judge, including any person empowered by law to discharge, whether by himself or as a member of a body of persons, any adjudicatory functions;

(v) any person specially authorised by a Court of Justice to perform any duty in connection with the administration of justice, including a liquidator, receiver or commissioner appointed by such court;

(vi) any arbitrator or other person to whom any cause or matter has been referred for decision or Report by a court of justice or by a competent authority;

(vii) any person employed or engaged as an examiner or as an invigilator by any public body in connection with any examination recognised or approved by or under any law.

Explanation-- The expression "public body", includes-

(a) a University, Board of Education or other body or institution, either

established by or under a Central, State or Provincial Act or constituted by the Government;

(b) a local authority;

(viii) any person who holds an office by virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election; or

(ix) any person who holds an office by virtue of which he is authorised or required by law to perform any public duty.

Explanation 1.- Persons falling under any of the above clauses are public servants whether appointed by the Government or not.

Explanation 2.- A person calling under any of the above clauses by virtue of any office or situation he is actually holding is a public servant, whatever legal defect there may be in his right to hold that office or situation.

The Law Commission in its 42nd Report having carefully examined the various clauses in section 21 suggested certain changes which are incorporated in the new section. In this context, the Law Commission has examined various judgments of the High Courts and Supreme Court.

The corresponding provisions in existing section reads as follows-

"Twelfth - Every person -

(a) in the service or pay of the government or remunerated by fees or commission for the performance of any public duty by the government.

(b) in the service or pay of local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956)."

It can be seen that in this clause there is emphasis on public duty. In G.A.Monterio v. The State of Ajmer , (1956 SCR 682), the Supreme Court indicated that the requirements of pay and public duty are cumulative. The court observed, "If therefore, on the facts of a particular case, the court comes to the conclusion that a person is not only in the service or pay of the government but is also performing a public duty he has delegated to him the functions of the government or is in any event performing duties immediately auxiliary to those of some one who is an officer of the government and is, therefor, an officer of the government within the meaning of section 21(9), Indian Penal Code. The Supreme Court reiterated the same view in State of Ajmer v. Shivji Lal, (1959 Supp(2) SCR 739). After noting

these observations, the Law Commission opined that the expression "public servant" cannot be easily defined and no court has attempted any such definition.

Taking into consideration various aspects mentioned above, the Law Commission recommended in its 42nd Report substitution of section 21. The definition of "public servant" as found in the Bill (new section 21) elaborately contains the recommendations made by the Law Commission. However, the Law Commission specifically mentioned one clause to be included, namely- "any person who is a Member of Parliament or of a State Legislature". In view of the various political developments and where numerous instances of criminalisation of politics are alleged it is necessary to have a provision, but in what manner can it be effectively done?

The existing provisions to the effect that any person receiving remuneration for discharging public duty may in a general way cover them since they are receiving some remuneration and also discharging a public duty. The Law Commission in its 42nd Report clearly recommended that these people should specifically be included as public servants under the relevant provisions. But the question would be whether or not suitable amendments are also necessary to section 19 of the Prevention of Corruption Act and correspondingly section 197 of Cr.P.C. because a reading of these provisions would show that the emphasis is on the

government service and the power to remove the delinquent officer by the State Government or the Central Government as the case may be. But in the case of legislators these provisions providing for grant of sanction as such do not contemplate as to who should be the sanctioning authority in case a legislator is to be prosecuted for an act of criminal misconduct while discharging or purporting to discharge his official duties which to whatever limited extent may be a public duty performed by them, namely, being members of the legislatures. It is but logical that the power should rest only with the presiding officer of the legislature since the proceedings or any acts connected with such proceedings including voting or defecting also are within the privileged category and it is only the presiding officer who can take a decision whether the act has any nexus of public duty of a legislator. Consequently, in case of legislators committing misconduct, the sanctioning authority can be only the presiding officers of the legislatures. Unless such changes in the provisions providing for sanction are also brought about it may not be appropriate to just include them as public servants in the relevant provisions. If for argument's sake no sanction would be necessary under section 19 of the Prevention of Corruption Act or section 197 of Cr.P.C., then it would be ironical to say that only such protection can be extended to the other public servants and not to the members of the legislatures who are also by virtue of performance of public duty fall in the category of public servants. Unless such major changes are brought about, it is

not desirable and highly inappropriate to just merely bring them within the purview of public servants under section 21 by inserting a new clause and make them amenable to any of the relevant penal provisions.

Clause 10

12.05 The existing section 25 defines the expression "fraudulently" - a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise. The expression "fraudulently" occurs in few sections, namely, 206, 207, 208, 242, 243, 246, 247, 252, 253, 261, 262, 263 and sections 421 to 424. The existing section 23 explains the terms "wrongful gains" and "wrongful loss". Section 24 says that a person does a thing dishonestly if he does it with the intention of causing wrongful gain to one person or wrongful loss to another person. These definitions are in clearer terms. But the same cannot be said about the definition of "fraudulently". The courts, however, observed that to attract the definition, there must be some advantage on the one side with the corresponding loss on the other. The Supreme Court in Dr.S.Dutt v. State of U.P. (1966 (1) SCR 493) observed that the words "with intent to defraud" in section 25 indicate not a bare intent to deceive but an intent to cause a person to act or omit to act, as a result of deception played upon him, to his advantage." Having examined various views, the Law

Commission recommended the change in the definition, so that the meaning can be brought out in clearer terms. The amendments suggested in the Bill serve the purpose.

Clause 11

12.06 The existing section 29 defines a document and there are two Explanations. Section 3 of the Evidence Act and section 3(18) of the General Clauses Act also define the word 'document'. A reading of these three sections would show that the main idea in all the three Acts is the same and the emphasis is on the matter which is recorded. The Law Commission in its 42nd Report examined the provisions in all these Acts and recommended an amendment. It also observed that the existing definition with its Explanations is wide enough to cover every type of document. A doubt was expressed whether it includes mechanical records of sound or image like tape recording etc., which are in frequent use. Taking these aspects into consideration, the Law Commission suggested slight alteration in the language of the definition to make its intention clear. It is on this basis, in clause 11, the words "particularly expressed, described or recorded" and the words "figures, images, marks or sounds" are sought to be substituted. A detailed discussion on this aspect can be found in Chapter XI entitled "Document-Scope of its Definition". In view of the changes in the audio and video technology and computers, it is recommended that another Explanation (3) can be added to the existing section. So we

recommend that Explanation (3) namely, "The term document also includes any disc, tape, sound track or other device on or in which any matter or image or sound is recorded or stored by mechanical or other means".

Clause 12

12.07 Under this clause, existing sections 31, 32 and 33 which define the words "will" referred to in the Act are sought to be omitted. A perusal of the 41st Report of the Law Commission shows that the omission of this section was recommended on the basis that they are defined in the General Clauses Act. Having given our earnest consideration, we have already noted that such words which are defined in the General Clause Act and which are specifically found in the other provisions of the IPC should be retained for several reasons already mentioned. For the same reasons we are of the view that there is no harm in retaining existing sections 31, 32 and 33 and Clause 12 has to be omitted.

Clause 13

12.08 By virtue of this clause the words "several persons" wherever they occur are sought to be substituted by the words "two or more persons". A perusal of some of the judgments would show that the courts felt that there is some ambiguity in the language of the section, particularly in respect of the meaning to be given to the expression "several

persons". Section 34 embodies the principle of constructive liability in the doing of a criminal act, the essence of that liability being the existence of a common intention. Section 34 explains that when a criminal act is jointly done by several persons who are actuated by common intention, in furtherance of that intention each of them is liable for it as if the whole of it had been done by him alone. Starting from Barendra Kumar Ghosh v. King Emperor, (AIR 1925 PC1) uptil now there have been a number of judgments rendered by the courts about the scope of section 34. The expression "several persons" has been examined with reference to the question whether two persons should at least be there as participants for section 34 and whether a single known offender can be convicted by application of section 34 if the facts show that he along with one unknown offender at least must have committed the offence. The Law Commission with a view to see that this ambiguity is not there recommended in its 42nd Report the substitution of the words "two or more persons" for the words "several persons" which expression is rather wide and vague. By carrying out this amendment the language of section 34 becomes more explicit. For the same reason the expression "several persons" occurring in sections 35 and 38 also can be substituted by the expression "two or more persons".

Clause 14

12.09 Under this clause it is proposed to substitute section 40 by another section. The existing section 40 has three clauses giving three different definitions of the expression "offence". The first clause provides that except in the chapters in sections mentioned in clauses 2 and 3, the word "offence" denotes "a thing made punishable by the Code". Clause 2 lays down that the offences covered by Chapters IV and VA and also several sections enumerated therein, the word "offence" denotes "a thing punishable under the Code or under any special or local law". According to clause 3, the word "offence" in respect of the eight sections mentioned therein has "the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine."

It has to be noted that the expression "offence" has a definite meaning. The existing section lacks clarity nor is it conducive. The Law Commission in its Report pointed out that whenever a question arises as to the meaning of the word "offence" appearing in a particular section of the Code, one has to go to section 40 and go to the clauses to find out where the section in question is mentioned. In the General Clauses Act, section 3(38) says that "offence" shall mean any act or omission made punishable by any law for the time being in force. The language in this definition is

precise and would be sufficient to cover all the offences under the Penal Code since they are a result of an act or omission made punishable under the court. However, there are some sections having the expression "offences punishable with death or imprisonment for life". The Law Commission suggested that there should be a separate definition for capital offence incorporated in section 40 which has to substitute the existing section. The expression "offences punishable with death or imprisonment for life" occur in many sections like 115, 118, 120B, 388, 389, 506, etc. It was suggested by the Law Commission and as proposed in the Bill, a new section 40 shall contain the definition of capital offence wherever the expression "offences punishable with death or imprisonment for life" occurs. Even this expression has to be substituted by the words "capital offence" which would be more specific and from the Bill we find in all those sections the expression "capital offence" had been used. The amendment by way of substitution of section 40 as proposed under clause 14 defining "capital offence is an appropriate change. In our considered view and as noted already, to make IPC as a self-contained Code, it would be better to have the definitions of the relevant words in IPC itself. The section 40 as mentioned above is sought to be substituted on the ground that the word "offence" is clearly defined in the General Clauses Act and the definition of offence in the existing section 40 defining offence lacks clarity. In that view of the matter and to provide a definition in respect of the offences punishable with imprisonment for life and death,

section 40 is to be only substituted by the new section defining capital offences. Thereby if one want to know the section, one has to refer to the General Clauses Act which in the process while adopting may not be necessary. Therefore, it is better to have the meaning of the offence as defined in the General Clauses Act also incorporated in that new section 40 which shall read as follows:-

> "Section 40- Offences which mean any act or omission made punishable by any law for the time being in force and "capital offence" means offence for which death is one of the punishments provided by the law".

Clause 15

12.10 The existing section 43 defines the expressions "illegal"- "legally bound to do" and lays down that the word "illegal" is applicable to everything which is an offence or which is prohibited by law or which furnishes ground for a civil action and a person is said to be "legally bound to do whatever is illegal in him to omit." Under this clause in the Bill, this section is sought to be substituted by a new section having two clauses. The proposed section is in the following terms-

> "43.(1) A thing is "illegal" if it is an offence or is prohibited by law or furnishes ground for a

civil action.

(2) A person is "legally bound to do" a thing when he is bound by law to do that thing or when it is illegal in him to omit to do that thing."

It can be noticed that according to the definition in the existing section a person is legally bound to do only what is "illegal" in him to omit and the word "illegal" is applicable to everything which is an offence or which is prohibited or which furnishes ground for civil action." The Law Commission also noticed that these definitions are in a circle and have led to some difficulties as is seen from decisions rendered by the courts including the privy council in Ali Mohomed Adamalli v. Emperor, (AIR 1945 PC 147), it was recommended by the Law Commission in the 42nd Report to omit the definition of the expression "offence" in the Penal Code and go by the wider definition of the word in the General Clauses Act as it would obviate the difficulty pointed out by the courts. However, there may be situations creating difficulties if the omission to do what is enjoined by law is not made an offence under the particular Act in question. The Law Commission in its 42nd Report observed in other words under the present definition of the term "legally bound to do" unless a law which enjoins a person to do a particular thing also lays down, in so many words, that the person shall not omit to do that thing, then the person cannot be

considered "legally bound to do" that thing. In this view a new section is sought to be substituted which appears to be sound.

Clause 16

12.11 Under this clause, existing sections 48, 49 and 50 defining words "vessel, year, month, section" respectively are sought to be omitted for the reasons that they are defined in the General Clauses Act. For the same reasons mentioned above in respect of clause 12, etc., the section need not be omitted and accordingly Clause 16 of the Bill has to be omitted.

Clause 17

12.12 The existing section 52 defines the word "good faith" and section 52A defines the word "harbour". As per this clause, these two sections are to be substituted by new sections. In the existing section 52 the definition of "good faith" is different from that which we find in the General Clauses Act. In the General Clauses Act the term "good faith" is defined in the following terms-

> "A thing shall be deemed to be done in good faith where it is in fact done honestly whether it is done negligently or not".

It can be seen that so far as the other laws are concerned,

the definition in the General Clauses Act appears to lay down that honesty of purpose alone is sufficient to make an act bona fide. Under the Penal Code the emphasis is on due care and attention. The Supreme Court in Harbhajan Singh v. State of Punjab, (1965 SCR 235-243) while reversing the judgment of the Punjab High Court, however, observed "the element of honesty which is introduced by the definition prescribed by the General Clauses Act is not introduced by the definition prescribed by section 52 of the Code". It can also be noticed that the language of the definition in section 52 is in the negative form as compared to the language in the General Clauses Act. From the observation of the Supreme Court it can be seen that the Code does not expressly exclude the requirement of honesty. However, the Code stresses the aspect of care and attention but honesty is implicit in the idea of good faith. Therefore, taking the overall view a substitution of section 52 is an appropriate one. The existing section 52A was introduced in the year 1942 and lays down that except in sections 130 and 157 in the case in which the harbouring is given by the wife or husband of that person, the word "harbour" includes supplying a person shelter, food, drink, etc. The Law Commission noticed that special mention of sections 130 and 157 in the general definition is inappropriate and section 52A has to be revised. A new section sought to be introduced under this clause in the Bill reads as follows-

"52A.Harbouring-The expression 'harbouring' means giving shelter to a person, and includes supplying a person with food, drink, money, clothes, arms, ammunition or means of conveyance or assisting a person in any manner to evade apprehension."

It can be seen that the expression harbouring in the proposed section is clear and explicit. Therefore, we recommend a substitution of sections 52 and 52A.

Clause 18

12.13 Under this clause, the existing section 53 is sought to be substituted. The proposed section 53 enumerates various kinds of punishments. Under this proposed new section 4, new forms of punishments such as Community service, Disqualification from holding office, Order for payment of compensation and Public censure have been added. The sentencing policy and the proposed changes have already been discussed in detail in Chapter II. For the reasons stated in that Chapter, we do not endorse the addition of those new forms of punishments except public censure.

Clause 19

12.14 Under this clause sections 54, 55 and 55A of the Penal Code are sought to be omitted. Section 54 provides for commutation of sentence of death and lays down that in every

case in which sentence of death has been passed, the appropriate government may without the consent of the offender commute the punishment for any other punishment provided by IPC. Section 55 provides for commutation of sentence of imprisonment for life by the appropriate government for a term of imprisonment of fourteen years. Section 55A defines appropriate government that can exercise the powers under sections 54 and 55, namely, the Central and State Governments. The Law Commission in its 41st Report on the Code of Criminal Procedure having examined section 402(1) of Cr.P.C. 1898 as well as sections 54, 55 and 55A of the Penal Code noticed that the appropriate government as mentioned in section 402(3) Cr.P.C., 1898, is somewhat ambiguous. However, the Law Commission noticed that the provisions regarding commutation in sections 54, 55 and 55A are mostly repeated in section 402, 1898 Cr.P.C. and recommended that this duplication should be removed and the law should be stated at one place, namely, Cr.P.C. In this view of the matter in 42nd Report, the Law Commission recommended deletion of these three sections. On that basis clause 19 is incorporated in the Bill. In the 1973 Code of Criminal Procedure this recommendation has been taken care of and incorporated in the newly numbered sections, namely, 432 and 433. It can be noticed that the Law Commission in its 41st Report on Cr.P.C. 1898 mentioned that section 402 should be revised incorporating some of the provisions of sections 54, 55 and 55A to remove the ambiguity particularly in respect of the definition of appropriate government. In

section 432(7) the meaning of the expression "appropriate government" is given and the ambiguity which is noticed by the Law Commission in the language in section 55A has been removed. So for as the commutation is concerned the provisions in sections 54 and 55, IPC have been duly incorporated in section 433, Cr.P.C. 1973. Therefore, clause 19 under which sections 54, 55 and 55A are sought to be omitted is very appropriate in view of the changes in the Cr.P.C. as noticed above.

Clause 20

12.15 Under this clause the words "imprisonment for 20 years", are sought to be substituted by the words "rigorous imprisonment for 20 years". This is necessary in view of some of the judgment as discussed in Chapter II.

Clause 21

12.16 By virtue of this clause, sections 64 and 65 are to be substituted by revised sections. These revised sections provide for the sentence to be imposed in default for payment of fine etc., and the amendments are incidental and they may be carried out.

Clause 22

12.17 In view of the revised sections 64 and 65, section 66 may be omitted.

Clause 23

12.18 Under this clause section 67 and 68 are sought to be substituted by the revised sections providing for imposing imprisonment for default of payment of fine in case of offence punishable with fine only. In the amended sections it may be included.

Clause 24

12.19 Under this clause the existing section 69 providing for termination of imprisonment on payment of proportional part of fine is sought to be omitted.. This omission is necessary in view of the new revised section 68.

Clause 25

12.20 Under this clause the existing sections 70, 71 and 72 providing for the limitation of time for levy of fine and limit of punishment in case made of several offences are sought to be substituted by revised sections. The revised sections are comprehensive on these aspects and the amendments may be carried out.

Clause 26

12.21 Under this clause sections 73 and 74 providing for solitary confinement by way of punishment is sought to be omitted. In earlier Reports the Law Commission has observed that this punishment is out of tune with the modern thinking. Therefore, it has to be omitted as solitary confinement cannot be one of the general punishments under the statute like IPC. It may be necessary in case of indiscipline in the jail for which the prison laws may provide for. Therefore, it is necessary to omit these two sections.

Clause 27

12.22 Under this clause new sections 74A, 74B, 74C and 74D are sought to be incorporated. New section 74A provides for imposition of punishment of community service. We have already discussed this aspect in Chapter II. We have reached the conclusion that the punishment by way of community service cannot be executed in a practical manner. The proposed section 74B provides for compensation to the victims. In our Report on Cr.P.C. we have proposed suitable amendments to section 357 providing for such compensation and all the aspects mentioned in section 74B in IPC have been incorporated there. Therefore, we do not recommend addition or incorporation of new sections 74A and 74B.

Section 74C, however, provides for imposition of the punishment by way of censure in addition to the substantive sentence under sub-section (3) and this is limited to offences mentioned in Chapters 12, 13, sections 272 to 276, 383 to 389, 403 to 409, 415 to 420 and offences under chapter 18 as well as offences under proposed new sections 420A and 462A under the Bill. These are all offences where persons entrusted with some public duties commit offences. Therefore, the additional punishment by censure will have salutary effect.

The new section 74D provides for imposition of additional punishment, namely, disqualification for holding office. This applies to public servants. We have discussed this aspect in Chapter II and reached the conclusion to leave this aspect to the concerned Departments for taking disciplinary action under the relevant Acts or rules. Therefore, we do not recommend incorporation of this new section 74D. Consequently, the new section 74C providing for additional punishment by way of censure can be numbered as 74A and may be added.

Clause 31

12.23 Proposed new section 94 - The existing section 94 lays down that except murder and offences against the state punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats which at the

time of doing it, reasonably cause apprehension that instant death to that person will otherwise be the consequence. However, a rider is there to the effect that the person doing the act did not of his own accord place himself in the situation. This section embodies the principle that a person compelled by force or threat of force to do any act should not be punished for that act. However, two exceptions are also there. The Law Commission in its 42nd Report suggested that such defence of duress can be usefully extended so as to include the threats to "near relatives" enumerating them as parents, spouse, son or daughter. The two exceptions and also the embargo are provided for in the he new section.

A view has also been expressed that a person may not be close or near relative but may be one in whom a person compelled is very much interested and that the concept of "person interested in" is not new to the I.P.C. as we find the same embodied in section 97 I.P.C. We are of of the view that such an inclusion of threats to any other person in whom the person committing the act is interested would be very wide and may not be an acceptable concept from the point of view of the principles of jurisprudence. In view of the recent threats of kidnapping of children for ransom, advancing threats to cause the death or grievous bodily injury to the victim have become a common feature. Therefore, the inclusion of threats to near relatives like parents, son, daughter, etc. would adequately serve the purpose.

It may be noted that two exceptions in the existing section 97 are murder and offences against the state. Further the threat must be of instant death to the person made to commit the offence. To that extent he gets the benefit under this provision. Section 99 I.P.C. enumerates the restrictions to the exercise of right of private defence. Section 100 enumerates the circumstances under which the right of private defence of the body extends to causing the death. Exception 2 to section 300 is to the effect that culpable homicide is not murder if the offender in the exercise in good faith of the right of private defence, exceeds the power given to him and commits the death of the person without pre-meditation and without any intention of doing more harm than is necessary.

A question may arise as to what would be the nature of offences when a person under threat causes death as contemplated under section 94 or under the new section to be substituted. Would it be culpable homicide not amounting to murder under certain circumstances ? Causing death prima facie amounts to culpable homicide. The question is whether it amounts to murder or not depends on the attendant circumstances. If they satisfy the requirements of section 300, then it would be murder. This aspect would be a matter for consideration of the court while extending the benefit of section 94. With these clarifications, we recommend substitution of section 94.

Proposed new sections 94A and 94B - Under this clause two more new sections 94A and 94B are also sought to be inserted. Section 94A seeks to cast prima facie absolute and strict liability upon a company and punish the company concerned whenever any employee commits an offence in the course of furthering the affairs of the company. It also specifies that any act constituting such offence must either be authorised, requested, commanded, ratified or facilitated by any violation of a duty to maintain effective supervision by the management, the board of directors or any other person who is placed in a position of control over other employees or in the evolution of company policy and affairs. Section 94A(2) discusses the class of offences in which the existence of a culpable mental state is a condition and fixes absolute liability upon the company for the offence committed by an employee whatever his position may be. Section 94B is supplementary to section 94A under which the persons who were in charge of or were responsible to the company for the conduct of the business of the company, are also made constructively liable for the offence committed by the employee and the whole concept underlying the two provisions is that the persons who are in charge or control of the company affairs and their employees should also be made constructively liable which denotes that they are expected to exercise the duty of loyalty and the duty of care in managing the affairs of the company and if they in any manner authorise, request, command, ratify or facilitate an offence

of that nature by an employee by violation of the duty, should be equally responsible. We have gone through every limb of the two provisions carefully. In the several workshops, detailed discussions and deliberations were there about the desirability of incorporating these two new provisions in the Indian Penal Code which is substantive loss. It needs no mention that if any of the offences under IPC are committed then the provisions of the IPC may apply and the concept of constructive liability would be taken care of by the relevant provisions including abetment, attempt and conspiracy. That apart, the offences that could be envisaged being committed with reference to the affairs of the company would be altogether of a different nature and some of them could be statutory. There are several other special enactments which to a large extent cover many such offences which could be capable of being committed by the companies. Acts like MRTP Act, Essential Commodities Act, FERA Act, Prevention of Adulteration Act, Fertilizers Act, are some such. With regard to the employment there are other labour laws including Shops and Establishment Acts, Factories Act etc. That apart, in the new emergence of globalisation, liberalisation of trade and commerce, insertion of such provisions in IPC may prove to be counter-productive to the growth of business and any regulation that impedes the production and productivity and also creation of wealth should be discouraged as in the final analysis the overall growth of the nation's wealth would be impaired. Therefore, we are of the view that sections 94A and 94B should be

deleted from clause 31. If necessary we may add some of such provisions in the other enactments including the Companies Act, which may be strengthened to meet such a situation.

Clauses 32 to 37

12.24 Under these clauses some of the existing sections relating to right of private defence of persons and property are either sought to be amended or substituted. The law of private defence of person and property in India is codified in sections 96 to 106 based on the concept that the right of self-preservation is a basic one. The right of private defence must be distinct from the doctrine of necessity though the right of self-defence arises out of the necessity for self preservation. Still the latter is wider for there cannot be a right of self defence in all cases of necessity. The motive of self preservation is inherent in every man. The authors of the 1860 Code, Rattan Lal & Dhiraj Lal "Law of Crimes" (23rd Edition 1987) p.273, said

> "We propose to excepting from the operation of the penal clauses of the Code large class of acts done in good faith for the purpose of repelling unlawful aggression. In this part of the chapter we have attempted to define as such exactness as the subject appears to us to admit the limits of the right of private defence. It may be thought that we have allowed to accord a latitude to the

exercise of this right; and we are ourselves of the opinion that if we have in framing laws for a bold and high spirited people, accustomed to take the law in their own hand, and to go beyond a line of moderation in repelling injury, it would have been convenient to provide additional restrictions. In this country the danger is on the other side; the people are too little deposed to help themselves. The punishments with which they submit to the cruel depredations of gang murders, dacoities and mischiefs committed in the most outrageous manner by all of us of ruffians, is one of the most remarkable and at the same time most discouraging society in India presents to us. In these circumstances we are desirous rather to rouse and to encourage a manly trade than to multiply restrictions on the exercise of a right to self defence. We are of opinion that all the evil which is likely to arise from the abuse of that right is far less serious than the evil which would arise from the execution of one person for overstepping what might appear to be the exact line of moderation in resisting a body of dacoits."

If we take the present scenario into consideration, we find that the situation in respect of such crimes noted by the authors has not in any way changed. Therefore, the law of private defence of persons and property based on the right of self-preservation is absolutely necessary.

The existing sections 96 to 106 analyse and delimit the right of private defence. These provisions have very often come up before the courts for interpretation and application. Section 96 states that nothing is an offence which is done in exercise of this right. This right is analysed in the subsequent sections from two aspects, namely, defence of the body and defence of property. Section 97 defines these two aspects while sections 98 and 99 are applicable to both the aspects. Sections 100, 101, 102 and 106 are concerned with defence of the body and sections 103, 104 and 105 are concerned with the defence of property.

The Law Commission in its 42nd Report proposed a rearrangement of the provisions bringing together those relating to the right to defend the body in one section and those relating to the property in another for the purpose of an easier understanding and for facilitating their application. In the Bill no change in respect of sections 97 and 98 is mooted. Coming to section 99 the Law Commission after having considered the various clauses in section 99 recommended the insertion of a new provision in section 99 so as to make the immunity conferred by section 97 co-extensive

with the deprivation of right of private defence and such action in the first paragraph of section 99. The Law Commission was also of the view that extra protection should be given only when the public servant acts in pursuance of an order of a court of justice. Coming to the third paragraph of section 99, the Law Commission recommended for deletion of the third paragraph. It may be noted that the third paragraph in the existing section 99 lays down a restriction, namely, debarring the right of private defence in cases where there is time to have recourse to the public authority. However, whether there was sufficient time to have recourse to the public authorities is a question of fact in each case. If this restriction is removed altogether, then ever in respect of acts where there is no immediate danger particularly those relating to property, people with impunity may resort to exercise this right even though they had ample time to go to the public authorities for the purpose of averting the danger to the property. Therefore, we are of the view that this restriction should be retained.

Under clause 32 of the Bill the existing section 99 is sought to be substituted and to altogether remove the third clause. Therefore, we recommend that the third paragraph in the existing section should be included in the proposed section and rearrange the clause.

The existing section 100 justifies the killing of an assailant when apprehension of serious crimes enumerated in several clauses thereunder is caused and they should be read subject to the provisions of section 99. The section lays down that the right of private defence of body extends under the restrictions mentioned in section 99 to the voluntary causing of death or of any other harm to the assailant for an offence which occasions the exercise of the right by any of the descriptions enumerated in clauses 1 to 6. In these clauses 1 to 6 serious offences like death, grievous hurt, committing rape, unnatural lust, kidnapping or abducting, wrongful confinement are mentioned. The Law Commission, after examining the existing section 100 did not suggest any amendment in respect of 3rd, 4th and 5th clauses. However, minor change is suggested, namely, that in the 5th clause the right to exercise in respect of abducting should be limited where the abduction is punishable under the Code, since abduction by itself is not punishable unless it is committed with one or the other of the intents specified in sections 364 to 369. Under clause 33 of the Bill some more changes have been added. The clauses are numbered as (a) to (e). Assault with the intention of having carnal intercourse is also added and with regard to abduction it should be one punishable under the Code. However, there is clause (e) which is to the same effect - as clause "sixthly" in the existing section. Therefore, the proposed change is appropriate.

Under the existing section 101 the words "voluntarily causing to the assailant of any harm other than death" are sought to be substituted in clause 34 of the Bill by the words "voluntary causing of any harm other than death or the involuntary causing of the death to the assailant". The Law Commission suggested such a change because there may be cases of involuntary causing of death, for example, death by rash and negligent act. This change appears to be appropriate.

Section 103 indicates as to when a person can act in defence of property and enumerates the offences in clauses 1 to 4 in respect of which the right extends. The right under this section extends not only when the offences thus enumerated are committed but also when an attempt to commit is made. The Law Commission in its 42nd Report noted that clause "secondly" mentions housebreaking by night, but not lurking house trespass by night, which is as severely punishable as housebreaking by night, and that it is often difficult to decide whether the offender has committed lurking housetrespass or housebreaking. The Law Commission also observed that since certain amendments in chapter XVII relating to offences against property where housebreaking by night would cease to be a separate offence recommended to omit clause "secondly" also on the ground that the existing clause 4 governs aggravated forms of criminal trespass. Existing section 441 defines criminal trespass, 442 house trespass, 443 lurking house trespass, 444 lurking house

trespass by night, 445 house breaking, 446 housebreaking by night. These sections were there incorporated in the existing Code, taking into consideration the circumstances prevailing in India. The Law Commission in its 42nd Report while dealing with offences under chapter XVII that is relating to property recommended deletion of these provisions and introduced a new section 445 under the head "Burglary". We have considered these changes while examining clause 182 of the Bill and are of the view that the changes proposed are salutary. Consequently, the changes proposed by the Law Commission in respect of clause "secondly" of section 103 need to be incorporated. The Law Commission also recommended that clause 3 relating to offence - mischief by fire should be amplified including mischief by explosive substances, mischief by fire or explosive substances committed on any vehicle should be added.

In the proposed section 103 of the Bill, there is a new clause (d) relating to the offences of mischief to property, house, or intended to be used for the purpose of Government or any corporation.

Two more new clauses (e) and (f) are sought to be added in the proposed section. Clause (e) includes hijacking of aircraft and clause (f) includes sabotage. While discussing the offence of hijacking under new section 362A, we have indicated that the same need not be incorporated because of the reasons stated in Chapter X. Therefore, here

also clause (e) has to be omitted. We may also add that clause (e) was added in conformity with the new section 362A applying to the offence of hijacking of an aircraft. If that section is to be deleted, clause (e) need not be there. It may be mentioned that in every offence of hijacking, there would be an offence being committed against property or person. To that extent the relevant provisions of right of private defence would be applicable. Under (f), the offence of sabotage is mentioned. In our discussion under clause 180 we have suggested that the new provisions with reference to the offence of sabotage can be retained. Therefore, clause (f) can be retained but may be renumbered as (e).

Under clause 36 a minor amendment to section 104 is proposed. The words "voluntary causing to the wrong-doer of any harm other than death" are sought to be substituted on the same lines as in clause 34 with reference to section 101. These changes can be carried out.

Clause 37

12.25 Under this clause the existing section 105 is sought to be substituted by a new section bearing the same number. The existing section 105 deals with commencement and continuance of private defence of property. The Law Commission did not propose any change to the section. However, it recommended to omit 5th para which deals with house breaking by night. The new section deals with house

trespass which has been considered by us under clause 182 and because of the consequent changes approved thereunder the clause 5 has to be accordingly omitted. In the new section, however, we find clause (c) which also mention hijacking of aircraft. While considering changes in clause 35 with reference to section 103, we observed that clause (e) dealing with "hijacking of aircraft" should be omitted. For the same reason, the words "hijacking of aircraft" in clause (c) in the proposed new section 105 have to be omitted.

Clauses 38 to 44

12.26 Under the Indian Penal Code 'abetment' is a separate and distinct offence provided a thing abetted is an offence. As a general rule, a charge of abetment fails if the substantive offence is not established against the principle assailant. The Supreme Court in Jamuna Singh's case, (AIR 1967 SC 553) has held that it cannot be held in law that a person cannot ever be convicted of abetting a certain offence when the person alleged to have committed that offence in consequence of abetment, has been acquitted and that the question of abettor's guilt depends upon the nature of abetment and the manner that the abetment was made.

Sections 107 to 120 in Chapter V relate to the abetment. Section 107 classifies abetment under three heads, i.e., by instigating or by conspiracy or by intentional aids. These are explained in both Sections 107 and 108. The Law Commission in its 42nd Report examined Section 120-A which

lays down that when two persons agree to commit an offence or to cause an offence to be committed, they are guilty of criminal conspiracy to commit that offence whether or not any of the parties thereto does any act besides the agreement in pursuance thereof and noted that the persons who are initially guilty of conspiracy to commit an offence become guilty of abetting the offence as soon as an act or illegal omission takes place in pursuance of the conspiracy and that after an enactment in 1913 of Sections 120A and 120B making conspiracy itself punishable in the same manner as abetment. Abetment of an offence by conspiracy has lost its relevance and, therefore, all references in Chapter V including Section 107 'abetment by conspiracy' should be omitted. The Law Commission also examined Sections 108 and 108A and after referring to some of the decided cases recommended that Explanations 2 and 3 may be combined and revised and that Explanation 4 may be reworded and that Explanation 5 which mentions about the abetment by conspiracy to be omitted. On these lines, the Law Commission recommended that Section 108 and 108A may be combined and revised. Clause 38 of the (Amendment) Bill 1978 has incorporated these recommendations but with some changes. By and large, Section 108 as mentioned in clause 38 is in conformity with the recommendations made by the Law Commission. Therefore, we do not recommend any further change.

Sections 115 and 116 deal with the punishments for successful abetment of offence. Section 115 specifically deals with the punishment for unsuccessful abetment of offence punishable 'with death or imprisonment for life'. The Law Commission in its 42nd Report noted that the words 'death or imprisonment for life' are ambiguous and they may cover sedition. Therefore, they recommended to limit it to capital offences for which death is the only punishment or one of the punishments provided by law and accordingly recommended revision of this Section. Existing Section 116 prescribes punishments of offences punishable with imprisonment when the offence is not committed. The Law Commission recommended that in order to avoid any overlapping between Section 115 and 116, it is desirable to exclude capital offences by inserting the words in Section 116 'not being a capital offence'. The Law Commission also noted that the maximum punishment for abetment if that offence be not committed is only 1/4th of the longest term and this was too low and should be increased to 1/2 of the maximum term provided for the offence. The Law Commission also examined second paragraph of Section 116 and recommended that where the abettor is a private person who abetted a public servant should not be dealt with more severely than in a case where the person abetted is a private individual. Section 117 applies to abetment of the commission of an offence by the public generally or a number of class of persons exceeding ten. The Law Commission having noted judgments of some High Courts recommended a new Section 117A to be inserted which is

to the effect that whoever commits the commission of an offence punishable with imprisonment by a child under 15 years of age whether or not the offence is committed shall be punished with imprisonment of any description provided for that offence which may be extend twice the longest term of imprisonment provided for that offence. Likewise, the Law Commission also examined Sections 118 and 119 and suggested some minor changes like the words 'a capital offence' be substituted. A perusal of the new provision sought to be included would show that they are in conformity with the recommendations of the Law Commission and we are also of the view that the changes are warranted.

The changes suggested in clause 39 of the Bill are of minor nature.

Clause 45

12.27 Under this clause a new Chapter VB is sought to be inserted under which new section 120C, 120D defining attempt and punishment for offence of attempt. The existing section 511 is sought to be omitted. We have carefully examined this clause and the scope of these new two sections in Chapter No.VI and recommend that section 511 be retained and this clause be deleted.

Clause 47

12.28 Under this clause a new section 123A is sought to be inserted. The new section lays down that whoever assists in any manner an enemy at war with India, or the armed forces of any country against whom the armed forces of India are engaged in hostilities, whether or not a state of war exists between that country and India, shall be punishable. The Law Commission in its 42nd Report recommended insertion of a new section but in the Bill we find that an Explanation is also added to the section which is explanatory in nature. We are also of the view that the new section may be inserted.

Clause 48

12.29 Under this clause, the existing section 124A which deals with Sedition is sought to be substituted by a new section bearing the same number. Most of the clauses mentioned in the existing section 124A find a place in the new section. In addition, certain acts are included. The new section postulates that whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise, excites, or attempts to excite, disaffection towards the Constitution, or the Government or Parliament of India, or the Government or Legislature of any State or the administration of justice, intending or knowing it to be likely thereby to endanger the integrity or security of India or of any State or to cause public disorder shall be punishable. The expression "disaffection" is the same except the word "disloyalty" is omitted. This change is in

conformity with the addition of offence of disaffection towards Parliament, Legislatures, administration of justice which was not there in the existing section. Having considered both these provisions, we are of the view that the changes as found in the Bill can be carried out. We have discussed all these aspects in Chapter No.VII in detail and we have also given reasons why the changes should be carried out.

Under this clause a new section 124B is also sought to be inserted. Under this new section, whoever deliberately insults the Constitution of India or any part thereof, the national flag, the national emblem or the national anthem, by burning the national flag etc., shall be punishable. The Law Commission in its 42nd Report observed that there should be a provision for punishment for insults to the Constitution, national flag, emblem and the national anthem which may include burning of the Constitution and deliberate insults to the national anthem which are unpatriotic. Therefore, they recommended the insertion of this new section. On the basis of that recommendations, Prevention of Insults to National Honour Act, 1971 has been enacted. Therefore, this new section 124B need not be inserted and the same may be deleted from clause 48. (Vide Chapter VII)

Clause 52

12.30 Under this clause the existing Chapter VII is sought to be substituted by a new Chapter bearing the name

number. This chapter deals with offence which might be committed by the civilians in relation to the defence services personnel. In the Bill a new section 130A is there which only deals with definitions occurring in the sections 131 onwards. The new section 131 deals with abetment of mutiny. Section 132 deals with attempts, 133, 134 & 135 with abetment, 136 & 137 with Deserter, 138 with abetment and 138A with incitement etc. The Law Commission in its 42nd Report recommended these changes. It is observed that civilian population are not dealt with severely as service personnel involved. Therefore, the Law Commission suggested that there should be co-relation between such offences punishable under the Penal Code and the offences punishable by court martial. Likewise the Law Commission also referred the Air Force Act also. The new section 139 clearly lays down that persons subject to certain laws like Army Act, Navy Act, Air Force Act not to be punishable under this chapter. Taking the implications recognised by the Law Commission, there is no harm in having this Chapter inserted in place of existing Chapter.

Clause 54

12.31 Having regard to the large scale riotings of various crimes that are taking place, the Law Commission in its 42nd Report observed that it is desirable that rioting should be checked at the earliest stage and also mentioned collecting sticks, knives, other weapons by anti social elements who are bent upon committing mischief and with a

view to check such preparation, the Law Commission recommended insertion of a new section 147A. Accordingly a new section 147A is sought to be added vide clause 54 of the Bill. We agree with that proposed insertion:

Clause 58

12.32 Under this clause a new section 153C is sought to be added. Sections 153A and 153B were added in the year 1972 in chapter VIII which deals with offences against public tranquillity. Under section 153A whoever by words, either spoken or written, promotes disharmony, ill-will, etc., or commits any act, organise any movement etc. with a view to promote enmity between different groups on grounds of religion etc., is punishable. Under section 153B whoever, by words either spoken or written, etc. makes or publishes any imputation, asserts, propagates, makes or publish any assertion or an appeal concerning the obligation of any person belonging to any religion, language, caste or community, is also punishable. In its 42nd Report, the Law Commission having traced the legislative history of these sections referred to the judgment of the Supreme Court in Kedarnath's case (AIR 1962 SC 955) wherein the validity of section 124A was upheld. On a parity of reasoning the Law Commission noted that the validity of section 153A could also be supported. Thereafter, the Law Commission proceeded to consider the scope of section 153A and observed that explanation to section 153A protects honest criticism or any act of the person criticising a political party without a

malicious intention. The Law Commission, however, did not recommend insertion of section 153C. It may be noted at this stage that the existing section 505 deals with offence of making statements conducive to public mischief and lays down that whoever makes, publishes or circulates, etc., with intent to cause fear to the personnel of the defence services or with a view to cause fear to public etc. would be punishable. The Law Commission in its 42nd Report recommended deletion of this section. However, there was a recommendation to bring changes in sections 153A and 153B, but section 153C, however, is being added under clause 58 of the Bill and the same carries the essence of section 505 except omitting the soldiers, Navy, etc. Obviously, because, these offences against defence personnel have been taken care of in the respective Acts applicable to those services. We have already discussed this in this Chapter dealing with offences against armed forces, etc. We agree that section 153C may accordingly be added.

Clauses 63 & 64

12.33 Clauses 63 and 64 of the Bill seeks to amend sections 161, 162 and 163 of the IPC. Since these sections had and already been repealed by the Prevention of Corruption Act, 1988 and transposed thereto, clauses 63 and 64 have to be, therefore, omitted.

Clause 66

12.34 Under this clause a new section 166A is sought to be inserted which deals with offences by or relating to public servants. It may be mentioned that sections 161 to 165A which deal with offences of misconduct have been deleted in the IPC and made offences under the Prevention of Corruption Act, 1988. The remaining sections 166 to 171 deal with other kinds of offences committed by a public servant. The existing section 166 deals with offences of disobeying law by public servants with intent to cause injury. The Law Commission in its Forty Second Report observed that the Code does take into account this kind of misconduct by a public servant where the misconduct takes the shape of bribery. It is further observed that it is desirable to ensure that no public servant shall in the exercise of the duties of his office while acting under colour of his office, do any act which is wrongful in itself, or do an otherwise lawful act in wrongful manner. From this point of view the Law Commission recommended that there will be a penalty to punish misconduct and also recommended insertion of new section 166A. The content of new section 166A proposed is different from the content of section 166 as we finds earlier. The words as to "maliciously to cause injury to any person" are added, otherwise the spirit behind the section is more or less same. Therefore, 166A may be inserted.

Clause 68

12.35 Under this Clause a new section 167A is sought to be inserted in Chapter IX which deals with offences by or relating to public servants. The Law Commission in its 42nd Report noted that even in their earlier Report namely 29th Report it was recommended that to tackle the problem of cheating of Government on large scale by dishonest contractors while supplying goods or executing works, unauthorised payment in respect of such contracts should be made punishable under specific provisions. Having noted so the Law Commission in its 42nd Report recommended insertion of new section 167A. A perusal of the provision would show that it is a salutary one particularly in the present scenario where large scale execution of public works is taking place. Therefore we agree that 167A may be inserted.

Clause 91

12.36 Under this clause new sections 198A and 198B are sought to be added in Chapter XI which deals with the offences of giving false evidence and offences against public justice. The unscrupulous persons do not hesitate to use false medical certificate to gain advantage in the course of the litigation and sometimes for purposes unconnected with the Courts. The Law Commission recommend that issuing false medical certificates and using the same should be made specifically punishable under the new provisions. We find

from the Report that in so recommending the Commission noted that people are accepting generally the medical certificates because they are issued by doctors and therefore it would be better to have a specific provision. In the workshops and in the National Seminar in particular it was deliberated in detail whether such a provision dealing with medical certificate issued by any practitioner should be made a separate offence. The consensus particularly from those practitioners who participated was to the effect that provisions are unnecessary and if in a given case a false certificate is deliberately given with intention that it should be used in the judicial proceedings and if any person uses such certificate then he would be punishable under section 197 of the IPC. That apart, section 196 is in general terms and may cover any such usage or attempt to use such document as evidence. Having given our earnest consideration and also having regard to the fact that the medical practitioners are also brought within the provision of Consumer Protection Act which is a later Act, we think that addition of new sections 198A and 198B is unnecessary. Consequently clause 91 has to be omitted.

Clause 93

12.37 Chapter XI of the Code deals with offences of false evidence and offences against public justice. The existing sections 206 and 207 punish certain fraudulent acts designed to prevent the seizure of property under the order of court.

Section 206 deals with fraudulent removal or concealment of property to prevent its seizure as forfeited or in execution. Likewise section 207 deals with an offence of a fraudulent claim to property to prevent its seizure as forfeited or in execution. It can be seen that while section 206 deals with removal or concealment or such property, section 207 deals with a fraudulent claim to such property. There is no specific provision to deal with other types of removal or interference of such property. Once property is lawfully attached by an order of a court, it is obligatory that no removal of any kind or interference whether fraudulent or otherwise should be there. The Law Commission in its 42nd Report having considered this aspect, pointed out that once any movable property has been lawfully attached by a court order, any unauthorised removal or any interference with that property should be punishable irrespective of the motive or the intention of the person concerned. Accordingly, the Law Commission recommended insertion of a new section 208A under this clause. This provision appears to be necessary as the concept is that the court's order should prevail under any circumstances to promote ends of justice.

Clause 94

12.38 The existing section 182 deals with the offence of giving false information with an intent to cause public servant to use his lawful power to the injury of another person. Section 211 deals with the offence of making false

charge of offence of making false charge of offence made with intent to injure and it is in two parts. The second part deals with such a false charge of an offence punishable with death, imprisonment for life, etc. and makes it to be a graver offence punishable with higher sentence. To some extent the contents of these two provisions overlap. The Law Commission in its 42nd Report rightly noted that the practical importance of this overlapping or conflict lies in the procedural rule with reference to section 195 of the Criminal Procedure Code. The Law Commission also noted that the wording of section 211"is not as clear and unambiguous as could be desired". Consequently the Law Commission recommended rewording of that section and the new section is to substitute the existing section. The change proposed is an appropriate one.

Clause 100

12.39 In Chapter XI the existing section 229 deals with an offence of personation of a juror or assessor. It has no relevancy. Therefore, it has been rightly suggested to omit that section. The Law Commission however recommended in its 42nd Report to substitute two new sections in the place of section 229, namely, sections 229A and 229B. As per that recommendation section 229A is to deal with the offence of interference with witnesses and section 229B is to deal with the offence of failure by a person who is on bail or on bond

to appear in court. Under clause 100, however, they are numbered as sections 229 and 229A. In the present scenario of criminal trials, the enormous delay is due to various reasons, particularly the non-attendance of the witnesses due to some reason or the other and in many cases mainly because of threats and corrupt means etc. and likewise absence of persons who are on bail. Therefore, these two proposed sections under this clause which are in conformity with the recommendations of the Law Commission are much needed.

Clause 110

12.40 The existing sections 254 and 263A deal with offences of delivery of coins as genuine and using fictitious stamps that occur in chapter XII dealing with the offences relating to coins and government stamps. New types of criminal acts are coming to light, namely, dishonest use of slugs in vending machines, misuse by inserting something else in the place of a coin. Though this recommendation was made by the Law Commission in 1971, as at present we noticed that such machines are being largely used even by public authorities or private concerns and in places where such services are being rendered. The insertion of new section 254A under this clause is a salutary on that will combat such malady.

Clause 111

12.41 Under this clause new sections 263A, 263B and 263C are sought to be substituted. These sections also deal with offences relating to fictitious postage stamps and also preparation to commit such offences. The existing section 263A lays down that whoever makes, knowingly utters, deals or sells any fictitious stamps or has in possession are sought to be punished. In its place the new sections are sought to be substituted. In the new proposed sections we find more coverage of such offences and having regard to the large scale use of stamps at present by the public and to prevent misuse, it would be better to have these provisions.

Clause 112

12.42 In Chapter XIII sections 264-267 deal with offences of using false instruments for weighing and measuring and being in possession of false weights or measures or making or selling the same. In 42nd Report the Law Commission having regard to such offences committed on large scale recommended that the sentence should be two years instead of one year and on the basis of that recommendation in clause 112 the substitution of words "two years" for "one year" in those sections is sought to be contemplated.

In this context, in several workshops it was highlighted whether the retention of those sections in Chapter XIII would be necessary in view of the Standards of Weights and Measures Act, 1976. A perusal of the penal provisions of sections 50-70 and an examination of the scope and object of the Act would reveal that the main purpose in enacting this Act is to see that the standards of measures and weights are established and the same to be used in trade and commerce. This aspect is also clear from an examination of the definition of "false weight or measure" which means any weight or measure which does not conform to the standard established by or under this Act of 1976. Therefore, any such violation, namely, using non-standard weights and measures per se amounts to an offence. The word "fraudulently" which is used in each of the sections 264, 265 and 266 IPC and the words "which he knows" occurring in sections 266 and 267 IPC are not found in the various offences enumerated in Part 6 of the Standards of Weights and Measures Act. That means for an offence punishable under those sections, the question of mens rea or an element of fraud is not relevant. Whereas in respect of those offences in Chapter XIII of IPC such a state of mind is an important factor. It can also be noticed that the sentence in respect of offences punishable under the Standards of Weights and Measures Act is much more lenient and a complaint can be filed only by a Director or an authorised officer mentioned therein and a private citizen who is a victim cannot

prosecute in a court. Therefore, it is appropriate that the said sections in IPC should be retained as they are and increase the sentence as proposed under clause 112.

Clause 119

12.43 Under this clause a new section 279A is sought to be inserted. The existing section 279 deals with one type of offences relating to rash driving or riding on a public way. Under the new section the offence of driving unsafe or overloaded vehicle on a public way is sought to be punished. Having regard to the increase in the volume of road traffic and indiscriminate use of vehicles whether they are roadworthy or not, such a provision is very much needed.

Clause 122

12.44 The existing section 292 in chapter XIV dealing with offences affecting the public health, safety, convenience, decency and morals, punishes the obscene books etc. This section has been also amended in the year 1969. As to the nature of the test of obscenity, the assessment of the same depends upon so many factors and there have been judgements rendered on it. There have always been a practical problem in deciding what is "lascivious" and what appeals to the "prurient" interest, and what does or does not tend to deprave or corrupt. The Law Commission in its 42nd Report observed that "more important than this attempted

definition is the new exception, which allows a defence on the ground that the publication is in the interest of art or science or literature or learning. This will actually turn on "expert evidence", which would be permissible under section 45 of the Evidence Act. The Law Commission however recommended that it would be safer if in the section itself a provision is specifically made for admission of such expert evidence. We are also of the view that such expert evidence in respect of the facts and circumstances in a case on the question whether they are of lascivious nature etc. should be covered by the section on the lines recommended by the Law Commission in the new sub-section sought to be inserted in section 292 under clause 122 of the Bill which would be an appropriate addition.

Clause 123

12.45 After section 292 a new section 292A is sought to be inserted. Under this clause the new section deals with an offence of printing etc. of grossly indecent or surreptitious matter or matter intended for blackmailing. A perusal of this new section shows that the object of inserting the same is to prevent the irresponsible way of printing newspapers, periodicals or other exhibits meant for public view in such matter when the same is intended for blackmailing. This will be a good check on such printings etc. which are grossly indecent. This section also provides for a minimum punishment if the same offence is committed

again on the same lines as we find in section 292. There are also explanations to this new section dealing with good faith etc. Explanation 2 gives certain guidelines to the court and provides certain considerations regarding general character of the person incharge etc. to be taken into consideration by the court. However, we are of the view that the sentence may be made three years so that it may be on par with the new section 292A to be inserted. Further, in conformity with our recommendations on sentencing policy vide Chapter II, the punishment under this proposed new section 292A should also be imprisonment and fine.

Clause 124

12.46 The existing section 294A deals with offence of keeping lottery office. This section is sought to be substituted by a new sections 294A and 294B under this clause. The existing section lays down that whoever keeps any office or place for the purpose of drawing any lottery not being a State lottery shall be punished with imprisonment and also deals with publication of any proposal to pay any sum. The new section is more elaborate and enumerates the various steps and prescribes the necessary punishment. In view of the modern trends in proliferation of the lotteries, this new section is a salutary one and it is on the lines recommended by the Law Commission in its 42nd Report. Likewise, section 294B though a new section only prescribe the necessary punishment in respect of the offences of sale,

distribution of lottery tickets. Section 294B deals with the sale, distribution of lottery tickets of a State lottery without authorisation by the respective Governments and makes such sale punishable. The object underlying is obvious, namely, to prevent illegal dealing with the State lottery tickets. In conformity with our recommendations on sentencing policy vide Chapter II, the punishment under these proposed new sections 294A and 294B should also be imprisonment and fine.

Clause 125

12.47 In this clause Section 302 is sought to be substituted by the new section bearing the same number. Under Section 302 a person who commits murder shall be sentenced to [redacted] death. The question in what type of cases the death [redacted] uld be awarded has been considered in a number of cases by the Supreme Court and a concept of "rarest of rare cases" have been evolved. But in the proposed section it is sought to be enumerated as to in what type of cases death sentence can be awarded. We have considered this aspect in Chapter III and arrived at a conclusion that all categories of such cases can not be in the said Chapter. Consequently, Section 302 should be left as it is and clause 125 may stand deleted.

Clause 128

12.48 Under this clause a new section 304B is sought to be inserted. At the outset we must point out that in 1986 by amending Act 43 of 1986, the existing section 304B dealing with dowry death was inserted. Therefore, the new section namely 304B under this clause cannot be given the same number. It is obvious that the Bill is much anterior. However, a perusal of the new section shows that all those offenders who indulge in rash and negligent driving, drive or run away without informing any police station within a reasonable time after having caused death or injury. This is a phenomenon, namely, "hit and run" to escape from the liability. Therefore, this provision can be inserted as mentioned above, but the number cannot be 304B. We recommend that this may be inserted in 304A as subsection (2).

Clause 130

12.49 Under this clause sections 307 and 308 are sought to be substituted. In general, both the sections are analogous in many respects to the existing sections. Illustrations to section 307 are, however, sought to be deleted under the proposed section. The Law Commission in its 42nd Report proposed a new Chapter 5B defining attempt and also prescribing punishment by inserting sections 120C and 120D. Consequently, the Law Commission also have recommended substitution of the new sections 307, 308 while dealing with Chapter VB and the proposed sections 120C and

120D. We make it clear that it is not necessary to have these new sections 120C and 120D and also recommended to retain sections 307, 308 and 511 as they are except to delete the second part of existing section 307 which prescribes death as the punishment for any attempt made by a life convict. This has to be deleted for the same reasons for deleting section 303. (Vide Chapter VI)

Clause 131

12.50 Under this clause the existing section 309 which makes attempt to commit suicide punishable is sought to be omitted. But in view of the recent judgement by the Supreme Court In Gian Kaur (Smt) VS State of Punjab, (1996 SCC(Cr)374) vires of the section has been upheld. consequently, the existing section 309 has to be retained and clause 131 has to be omitted from the Bill.(Vide Chapter VIII)

Clause 134

12.51 Under this clause the existing section 320 defining grievous hurt is sought to be substituted. The Law Commission in its 42nd Report observed that the word "privation" used in the existing section is archaic and "emasculation" in that clause may be omitted as the same is covered by the widened 5th clause. The proposed changes are only peripheral, but a little more explanarative. Therefore, that can be carried out.

Clause 137

12.52 Under this clause the existing section 328 is sought to be substituted by the new section. In content though both the sections are same except in the new section in place of "unwholesome drug or other thing" the word "unwholesome substance" are inserted which are of same effect but little wider.

Clause 144

12.53 Under this clause the existing sections 341 and 344 are sought to be substituted. The Law Commission in its 42nd Report recommended that under section 341 the sentence of imprisonment is unnecessary but fine may be upto Rs. 1,000/and where, however, the offence is jointly committed by ten or more persons, it should be more severely punishable with imprisonment of either description upto one year, or fine or both. Accordingly, the Commission recommended the revision of section 341 and also section 342. While dealing with section 343 and 344 the Law Commission recommended that both of them could be incorporated in one section and proposed new section 343 dealing with wrongful confinement for five days or more. In the Bill, however, we find on the same lines, the new sections are being incorporated. The question is whether the offence is aggravated if there are ten persons and whether there should be such a limit. We are of the view that the number of persons on the basis of

constructive liability can be limited to two or more persons as we find in the proposed amendment in section 34, 35 and 38 IPC.

Clause 146

12.54 Under this clause a new section 354A dealing with offence of indecent assault on a minor is sought to be inserted. This aspect was considered in Chapter IX and accordingly for the reasons stated therein, this clause has to be omitted.

Clause 149

12.55 Under this clause, the existing section 362 is sought to be substituted by the new section. This existing section 362 deals with offence of definition of abduction. Under the new section it is elaborated. This new section 362A dealing with hijacking of aircraft or any other vehicle is sought to be added. We have discussed about this new section in Chapter X. For the reasons mentioned therein the new section 362A need not be inserted. However, so for as the new section 362 is concerned, it has enlarged the meaning of abduction and it can be inserted.

Clause 151

12.56 Under this clause, after section 364, a new section 364A dealing with offences of kidnapping is sought to be inserted. Having regard to the present crime scenario of this nature, the new section is a salutary one and has been rightly carried out by Act No.42 of 1993.

Clause 152

12.57 Under this clause, the existing section 366 and 366A are sought to be substituted by the new section. The second half of the section 366 and 366A are closely connected with each other. The Law Commission also accordingly recommended that they could appropriately be put in one section. Accordingly, the second half of section 366 is incorporated 366A. The change is only consequential and we endorse the same.

Clause 155

12.58 Under this clause the existing section 368 is sought to be substituted. The Law Commission in its 42nd Report observed that the existing section 368 which deals with wrongfully concealing a person knowing to be kidnapped or abducted, leaves the punishment to be regulated according to the punishment for the principal offence of kidnapping or abduction. It would be better if specific punishment is

provided in the section. The new section is on the same lines suggested by the Law Commission. Therefore, the substitution accordingly be made.

Clause 159

12.59 Under this clause, the existing sections 375 and 376 are sought to be substituted by new sections 375, 376A to 376C. For the reasons stated in Chapter IX this clause may be omitted. We, however, recommend a modification in clause 3 of section 375 by inserting the word "injury". The change may be brought about.

Clause 160

12.60 Under this clause the existing section 377 is sought to be substituted by the new section. This existing section makes as unnatural offence punishable and the sentence prescribed is imprisonment for life or imprisonment of either description for a term which may extend to ten years and also shall be liable to be fined. The Law Commission in its 42nd Report examined the question whether the sentence of imprisonment for life or for the ten years is a serve one. A questionnaire was issued and one of the questions was whether unnatural offences should be punishable at all and the replies received appears to be conflicting.

However, having regard to the social values in our country, the Law Commission recommended some changes particularly in respect of punishment. The Law Commission rightly observed that the sentence of imprisonment for life or ten years in every case is unrealistic and very harsh. They, however recommended that such assault on a minor by an adult should be punishable sever. On those lines, the new section 377 is formulated. So the same may be substituted, on the lines suggested in Chapter IX.

Clause 161

12.61 Under this clause, the existing Sections 380 and 381 which deal with offences of theft are sought to be substituted by Sections bearing the same numbers. This existing Section 380 deals with theft in any building, dwelling house, tent or vessel etc. and lays down that such an offence shall be punishable with imprisonment of either description, which may extend to seven years and shall also be liable to fine. In the new Section, more number of places where such theft is committed are added. For instance aircraft etc and Sub-section (2) specifically includes theft of "antiquity or art treasure" and theft in respect of those things is made a graver offence and is punishable with ten years. In Clause (d) of the Section in the Bill the words "shall be punished with imprisonment of either description for a term" appear to be missing. They have to be added. Another new Section 380A deals with theft of property

affected by accident, fire, flood etc. The property thus affected cannot be easily protected and committing the theft of the same is rather easy and, therefore, this Section is specifically meant to deal with the offence of theft of such property. There is no existing provision which covers such crime. The changes may be carried out.

Section 381

12.62 The existing Section 381 deals with theft by clerk or servant of property. The scope of the Section is broadened by the new Section 381. The earlier Section covered only theft by clerk or servant but the new Section says that whoever being employee in any capacity would be liable when he commits such theft.

Section 381 A, a new Section intends to cover thefts of any property by putting any person in a State of intoxication. Though in a way, it may be covered by the Section dealing with theft in general but the object appears to be to make the sentence severe by making the same rigorous and the same may be inserted.

Clause 162

12.63 Under this clause a new section 385A is sought to be inserted. The proposed section is intended to cover an offence of blackmailing with the dishonest intention. The

existing section 383 defines extortion and section 385 lays down that putting the person in fear of injury in order to commit extortion irrespective of delivery of any property etc. is an offence punishable under the Code. The Law Commission in its 42nd Report examined the question whether the definition of extortion as it exists covers every case as blackmail as, for instance, where money is obtained by threatening to expose something true but unsavory about a person and when such conduct though reprehensible may not squarely attract the definition of extortion or at any rate an ambiguity is there because it is not clear whether such a threat would amount to a threat of injury. The word 'injury' is defined as to denote any harm whatever illegally caused to any person in body, mind or reputation or property. The word 'dishonesty' is defined to mean that "whoever does anything with the intention of causing wrongful gain to any person or wrongful loss to any person is said to have acted dishonestly". Now the new section 385A is to the effect that whoever by words either spoken or intended to be read or by signs or by visible representations, dishonestly threatens any person with the making or publication of any imputation—— which is likely to harm his reputation or the reputation of any near relative or any person shall be punishable. The object underlying the new section is that such an act of blackmailing with the dishonest intention is to threaten in the manner mentioned therein which may result in harm should be made punishable. The Law Commission in the proposed section did not use the words "any near relative" but on the

other hand used the words "any other person". In the new section in place of words "any other person" we find the words "any near relative of that person." The change brought about in the new section appears to be more coherent than make it so wide as to cover harm to any "other person". A doubt may arise whether this new section can properly be added after 385 for the reason that the word "extortion" as defined in Section 383 envisages extortion of some property or putting the person in fear. But in the new section the word "dishonestly" itself indicates the intention of causing wrongful gain or wrongful loss which naturally implies the delivery of property or valued security, etc. The further usage of the word likely to harm the reputation would mean causing an injury. In the present crime scenario the blackmailing has become very rampant. Therefore, the new section dealing with such offences is very necessary.

Clause 163

12.64 Under this clause the words "may be punished with imprisonment for life" occurring in sections 388 and 389 are sought to be substituted with imprisonment of lesser periods. Sections 388 and 389 deal with specific offences of extortion by threat or accusation or putting a person in fear in order to commit extortion. Under section 388 the threat or accusation contemplated is one of putting any person in fear of such an accusation of having committed or attempted to commit any offence punishable with death etc. and the

punishment for such extortion is imprisonment upto 10 years, and if the accusation is with reference to an offence under section 377 then the punishment is imprisonment for life. Likewise, under section 389 where in order to commit extortion puts a person in fear of accusation of offences mentioned therein then he would be punishable with a sentence extendable to 10 years and if the accusation is with reference to the offence under section 377 "may be punished with imprisonment for life". A bare perusal of these sections would show that sentences are severe and disproportionate and perhaps violate the doctrine of proportionality. Therefore, the substitution of the words "may be punished with imprisonment for life" with "lesser periods of sentence" is called for.

Clause 164

12.65 Under this clause a new section 396 is sought to be substituted in place of existing section. The existing section lays down that when a person while committing dacoity commits murder, every one of the persons participating in the offence shall be punished with death or imprisonment for life or rigorous imprisonment for ten years. Imposition of death sentence is made to be applicable to some categories mentioned in the proposed section 302. We have already dealt with this aspect in Chapter III and suggested that it should be left to the court as to in what circumstances the death sentence can be imposed. In this context, we have also

referred many of the Supreme Court judgements where the concept of rarest of rare cases has been vividly considered. We finally suggest that section 302 must be left as it is. For the same reasons in respect of section 396, no changes are necessary thereby leaving it to the discretion of the court to give death sentence in appropriate cases.

Clauses 165 & 166

12.66 Under these clauses the words "uses any deadly weapon, or" in section 397 is sought to be omitted and section 378 after the words "at the time of" the words "committing or" are sought to be inserted and for the words "seven years", the words "five years are sought to be substituted.

Section 397 contemplates even use of any deadly weapon while committing robbery or dacoity apart from causing grievous hurt or attempt to cause death or grievous hurt. Likewise section 398 which deals with attempt to commit robbery or dacoity also lays down that if the offender is armed with any deadly weapon the imprisonment shall not be less than seven years. It can be seen that under section 397 the emphasis is on use of any deadly weapon or whereas in section 398 mere being armed with any deadly weapon. This is more explanatory. This clause is proper and in the same section the words "five years" in place of "seven years" thereby making the punishment less severe also appears to be

proportionate with the gravity of offence. However, we do not find any reason as to why the words "uses any deadly weapon" should be omitted in section 397. Otherwise, in a case where a dacoit being armed with deadly weapon puts into use any deadly weapon for creating fear without causing grievous hurt or attempting to cause hurt may not be covered by the section. So it is better to retain the words and clause 165 may be omitted.

Clause 167

12.67 Under this clause in section 399 for the words "ten years ", the words "seven years" are sought to be substituted. This offence is with reference to making preparation and making the sentence lesser appears to be proportionate.

Clause 168

12.68 Under this clause a new section 399A is sought to be inserted. The existing section 399 makes "preparation to commit dacoity" punishable. The dacoity is only an aggravated form of robbery when committed by five or more persons. Therefore, it is logical, if preparation to commit robbery is also made punishable under section 399A which is a new section. We suggest that the change may be made.

Clauses 169 and 170

12.69 The changes proposed under these sections are only consequential and can be made.

Clause 171

12.70 A new Explanation I is sought to be added in section 403. Consequently renumbering of the existing Explanation is also sought. The new Explanation which relates to offence of misappropriation committed by partner in respect of the property belonging to the partnership is sought to be covered. Therefore, the proposed changes can be brought about.

Clause 172-173

12.71 Under these clauses some minor changes are proposed in sections 404 and 408. The changes can be brought about.

Clause 174

12.72 Under this clause the word "factor" occurring in section 409 is sought to be omitted. May be in certain respects the word "factor" may be obsolete, but there is no no harm in retaining this word. Accordingly clause 174 may be omitted.

Clause 175

12.73 Under this clause the existing section is sought to be substituted by way of giving an extended meaning to the expression "stolen property". The existing section 410 describes the stolen property as property a portion whereof has been transferred by theft or by extortion etc. A question arose whether a property a portion whereof has been transferred by committing an offence of cheating would also amount to stolen Property. The Law Commission in its 42nd Report examined this aspect and recommended that property obtained by cheating should also be included. The Law Commission also considered the question whether the property which is subject matter of a theft committed by an offender who gets the benefit of general exceptions under Section 82, 83 or 84 can be described as stolen property when a portion thereof has been transferred. Having considered this tissue, the Law Commission recommended that it is but logical and transfer of a portion of such property will also come within the meaning of stolen property though the actual offender may not be punishable by virtue of the applicable exceptions. To amplify the point, an illustration also was recommended to be added. The proposed new section 410 with illustration is based on the Law Commission's recommendations, which is appropriate having regard to the meaning which can logically be given to the expression stolen property.

Clause 176

12.74 Under the existing Section 411 dishonestly receiving a stolen property is made punishable and under Section 414 dishonestly receiving stolen property in the commission of dacoity is made a graver offence. There were suggestions that such dishonest receipt of stolen property belonging to the government or local authority or corporation etc. should be made punishable with very severe punishment. Accordingly under this clause the words mentioned therein to carry out this suggestion are sought to be inserted in both the Sections which would serve the purpose.

Clause 177

12.75 Under this clause the existing Section 415 is sought to be substituted by a new section with some changes. In the existing section, the damage or harm likely to be caused is with reference to only the person deceived but in the proposed section the scope of the damage is sought to be extended to not only that person but to any person. Therefore, the words "to any person" are virtually substitute to the words "to that person" thereby extending the sweep. The only other change is the words "wrongful gain" after the words "reputation or property" are sought to be added which are in line with the change contemplated in clause (a) viz. adding the words "to any person". The scope of the existing explanation is expanded by including that if any person

dishonestly omits to disclose the fact which he is bounc under the law to disclose also amounts to deception. We may mention here by way of clarity that the Bill does not specifically refers to Explanations under Section 415 but as cheating is of such a wide connotation it would be better tc retain the illustrations.

Clause 178

12.76 Under this clause Section 420 is sought to be substituted by a new Section with some changes. Likewise. anew Section 420A relating to cheating of public authorities in performance of certain contracts is sought to be inserted. Yet two new Sections, Section 420B relating to publication of false advertisements and Section 420C relating to fraudulent acts in relation to property of a company are also sought tc be added. The existing Section 420 lays down that whoever cheats thereby dishonestly induces a person to deliver the property to any person or to make or alter, destroy etc. shall be punished. A question came up that in a case where by deceiving any person fraudulently induces to consent that any person shall retain any property would also be covered. The Law Commission in its 42nd Report recommended that such a clause be added. That is the only change in the proposec Section 420 which makes the Section more explicit. The change may be carried out.

The Law Commission in its 29th Report considered as to how to tackle the problem of cheating of government on a large scale by dishonest contractors while supplying goods. The Law Commission in its 42nd Report adverted to this aspect and recommended that a provision should be made making such offences punishable. The new Section 420A is fairly exhaustive to cover such offences and the punishment provided is not severe. In the modern trend of trade and commerce, a number of false advertisements are being made to mislead the public. Though the Law Commission in its 42nd Report has not adverted to that, the proposed new Section 420B appears to be salutary.

420C

Fraudulent transfer of property in relation to companies is sought to be covered by this Section. This section lays down that whoever with an intent to mislead or injure a person or public, makes or causes to make any transfer of property belonging to a company by a gift, sale etc. or with such intent alters, removes and conceals any sign or name plate of the company to indicate that the company has ceased to exist shall be punishable. This is in line to check fraudulent acts by way of cheating as mentioned therein.

Clause 179

12.77 Under this clause the existing sections 426 to 432 are sought to be substituted by new sections covering in general the offence of mischief. The existing section 425 in general defines mischief. Sections 426 to 440 are punishing sections applicable to different kinds of offences of mischief and higher punishments are prescribed in respect of aggravated offences of mischief like destroying public property or public services etc. The Law Commission in its 42nd Report considered these sections and recommended that in respect of certain offences the punishment should be increased from five to seven years. With reference to section 437 it is also recommended that a reference to aircraft should be added. The Law Commission however recommended that sections 426 to 440 should be substituted. Section 426 prescribes punishment for mischief and the Law Commission recommended enhancement of sentence from three months to one year. Sections 427 to 436 as proposed by the Law Commission deal with the offence of causing mischief to the public property or machinery to the amount of Rs.100/- or more, mischief by killing or maiming animals, injury to public road, aircraft etc. and mischief by fire or explosive substances with intent to destroy place of worship. So far as sections 438 to 440, the only changes are with regard to sentence and omission of section 439. In the Bill, the new sections 426 to 432 cover the offences of mischief more or less as proposed by the Law Commission in the above mentioned

sections to be substituted as per its Report. We hav examined the new sections 426 to 431. However, we recommer that the sentence of three years prescribed under each c these sections may be enhanced to five years. Now coming t section 432 proposed in the Bill, we find that the type o mischief covered by this section is with reference tc destroying, moving or rendering less useful any air route or a beacon or lights etc. used for guidance of the aircraf and such a mischief is made punishable and the sentence being seven years, but it is also mentioned there that if it does not amount to sabotage then it would be a different matter tc be covered by section 437. This Bill was prepared in 1978. perhaps having noticed the alarming increase in the types of offences of hijacking and rendering air service unsafe, the Anti-Hijacking Act of 1982 and the Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982 (SUACA) were passed. These two Acts were further amended in 1994. We have discussed the offence of hijacking in Chapter X with reference to the new section 362-A proposed in the Bill and we suggested that in view of the provisions of the Anti-Hijacking Act as amended it may not be necessary to have this proposed provision.

In the Suppression of Unlawful Acts against Safety of Civil Aviation Act as amended in 1994 a new section 3A was inserted which reads as follows:-

"3A.(1) Whoever, at any airport, unlawfully and intentionally, using any device, substance or weapon-

(a) commits an act of violence which is likely to cause grievous hurt or death of any person; or

(b) destroys or seriously damages any aircraft or facility at an airport or disrupts any service at the airport, endangering or threatening to endanger safety at that airport, shall be punished with imprisonment for life and shall also be liable to fine.

(2) Whoever attempts to commit, or abets the commission of any offence under subsection (1) shall also be deemed to have committed such offence and shall be punished with the punishment provided for such offence."

A comparison of the contents of this section with the contents of section 432 would show that the acts of violence mentioned in the latter are in a general way covered by the words used in section 3A-1B of the SUACA Act. However, the disruption of the words used in section 432, namely, less useful route etc. and the damage to various other gadgets would be of a specific type of mischief. To make the section more comprehensive and effective we recommend that section 3A of the SUACA Act may further be amended incorporating some of the acts mentioned in the

proposed section 432. We may also add that we are making these suggestions, firstly because we have already recommended deletion of new section 362A to the extent applicable to the aircraft and also for the reason that so many technical issues would be involved in these kinds of offences and the special courts with the help of technicians acting as assessors would be in a better position to understand and decide the complicated questions that may arise. If amendment of section 3A is not to be carried out in the above manner then the new proposed section 432 may be retained in the clause. If so, then the sentence under section 432 may be brought in accordance with section 3A.

Clause 180

12.78 Under this clause the new sections 434 to 440 which also deal with graver or serious type of mischief are sought to be substituted in the place of the existing sections. We have already mentioned that the changes suggested by the Law Commission with reference to sections 438 to 440 were only regarding sentence. But in the Bill in these proposed sections the mischief caused to the public institutions, public services and to aircraft etc. with a view to impair the efficiency or impede the working thereof of any of these public institutions rendering service is made punishable severely. The proposed section 434 again deals with mischief to any aircraft or to any docked vessel or to any vessel of a burden of 20 tones upwards with a view to render it unsafe

etc. Section 435 covers the offence of mischief by fire or any explosive substance intending to cause or knowing it to be likely that thereby would be causing damage to any property to the amount of Rs.100/- or upwards. Section 436 again covers the offence of mischief by fire or any explosive etc. which results in destruction of any building or any object which is held sacred. The language of this section is somewhat analogous to existing section 436. Section 437 is a new one and the offence mentioned therein is "sabotage". This section is very exhaustive. A careful reading of this section which contains several types of acts of mischief would reveal that the intention of the Legislature is to combat the destructive acts of violence with an intent to impair the efficiency of the public institutions and the services which in the present type of organised crime sometimes of international ramifications. Sub-sections (2) has been rightly added in this section. Sub-Sections (3) and (4) also have been properly added in this very section. Though preparation by itself in general is not an offence but having regard to the magnitude and the propensities the preparation for committing sabotage also is made punishable under section 438, but the sentence of three years may be enhanced to five years. However, the word "aircraft" occurring in section 434 may be omitted in view of our suggestions made in Chapter X. In respect of other types of mischief regarding the aircraft section 3A of the SUACA Act

is to be amended. If not, the section as proposed may be retained and the sentence be brought in accordance with section 3A of SUACA Act.

Clause 181

12.79 Under this clause the word "lawfully" found in the existing section is omitted in the the proposed section. In the existing section the second limb of the definition of criminal trespass reads: "having lawfully entered into or upon such property unlawfully remains....." The new clause (b) in the proposed section 441 also carries out the same meaning.

Clause 182

12.80 Under this clause sections 443-460 dealing with various kinds of house trespass are sought to be substituted. In the proposed section 443 a new expression 'burglary' is defined and it says that a person commits burglary if he commits house-trespass in order to commit or having committed house-trespass he commits theft. The existing section 443 gives the meaning of offence in lurking trespass. In the new proposed section such an offence is not mentioned. It can be seen from the existing sections 443, 444, 445 and 446 that the various types of trespassing by night and by house breaking by night are with reference to commit an offence like theft. The framers of the Bill by introducing the

offence of burglary were of the opinion that the various types of offences of house-trespassing or lurking house-trespassing by night etc. would be covered. The Law Commission having considered some judgments of the High Courts and amendments made by the UP Government suggest the change in section 441 to which we have already adverted. The Law Commission also recommended that sections 443 and 444 which define lurking house trespass and lurking house trespass by night should be omitted and instead of house-breaking the burglary should be defined in section 445. These suggestions of the Law Commission are logically reflected in the proposed sections and it may be noticed at this stage that the existing section 445 is somewhat lengthy and enumerates six ways of house-breaking and section 446 mentions that whoever commits house-breaking after sun-set or before sun-rise is said to commit house-breaking by night and in other sections the punishment is prescribed. Coming to the proposed sections we find "burglary" as recommended by the Law Commission, is defined.

Sections 444 to 447 deal with various types of criminal trespass. Some of them prescribe punishment varying from 3 years to 7 years. Section 448 prescribes punishment for burglary being extended to ten years and with fine.

Section 449 lays down that whoever whilst committing burglary causes grievous hurt or attempts to cause death or grievous hurt to any person shall be punishable with imprisonment for life or with rigorous imprisonment for a term which may extend to ten years and with fine.

Section 450 deals with conjoined liability of other persons who were also concerned in committing house-burglary during which one of them commits offence under section 449 and all of them made constructively liable.

We have carefully considered these provisions and we think that such substitution in the place of the existing sections will be salutary.

Clause 183

Under this clause, Chapter XVIIA is sought to be introduced by way of inserting section 462A. A perusal of this new section manifestly shows that it is meant to cover the offences committed in relation to private employment. The relationship between an employer and employee in a private employment is different as compared to the employment relating to a public servant as defined in section 21 of IPC. Corruption by public servant is of public concern and is specifically dealt with under the Prevention of Corruption Act as well as by some of the provisions in IPC. The same principle cannot be made applicable to private employees even

if the acts mentioned under the new section amount to a kind of misconduct with reference to discharge of his duty vis-a-vis the employer. If during the course of such employment the employee commits offences like forgery, cheating, criminal breach of trust, misappropriation etc., then that would definitely amount to an offence punishable under the Penal Code. But other types of acts like taking some remuneration other than legal remuneration for doing some act by themselves may not amount to any one of these offences and if such act or omission by the employee results in injury or loss to the employer then that would be a cause for dismissing or claiming damages and the liability will be one of the tortuous nature. Having carefully considered all the aspects, we are of the view that this new Chapter dealing with offences relating to private employment need not be there. So consequently clause 183 should be omitted.

Clause 184

12.82 The Law Commission in its 42nd Report recommended that (i) the word "place" be also added in the first paragraph of section 464 and that (ii) the words "addition" and "obliteration" be also added in the second paragraph thereof in addition to the existing word "cancellation" and that (iii) sections 463 and 464 be combined and the illustrations provided thereunder be omitted. Clause 184 of the Bill seeks to bring about the aforesaid recommendations

(i) and (ii) except (iii). While we agree with the aforesaid changes proposed in Clause 184 of the Bill, we propose to further examine the scope of section 464 I.P.C.

While section 463 defines "forgery", section 464 defines "making a false document" and enumerates various circumstances which would amount to making of a false document. It is not clearly spelt out under either of the sections 463 or 464 as to whether forgery of a copy of a document or copying a false document or making a false copy of a document, would also amount to forgery within the meaning of section 464, IPC. It would not be out of place to mention that under sections 2 and 4 of the Forgery & Counterfeiting Act, 1981(U.K.) copying a false document and using a copy of a false document, has been specifically made punishable. As regards the position in India, there existed a controversy on the above point (see H.S.Shamosundorariah v. State of Mysore, (1968) 1 Mys LJ 294 at p.297; Gobinda Prasad Parui v. State, AIR 1962 Cal.174 at p.175) (cited at page 3939 of Penal Law Of India by Dr.Hari Singh Gaur, 10th Edn. and 5 Bom HC Rep cc 56 (ref.Law of Crimes (A Handbook) by V.V.Raghavan, Second Edition, page 931).

However, the Supreme Court has finally settled the position in Rama Shankar Lal v. State of U.P., 1970 UJ(SC) 507 by approving the following observations in Essan Chunder Dutt & others v. Baboo Prannauth Chowdry & others, 1 Marshalla's Reports 270

"we regard the forgery of a copy clearly to come within the purview of the section just cited. Forgery of a copy which was not true copy, would be the offence there rendered penal, and the criminal intention to make a false document serves the purpose of a true one would be clear by such act of forgery."

We are of the view that though the position is now settled it would be desirable to add an Explanation in section 464, IPC so as to make it specifically clear that knowingly committing forgery of a copy of a document or knowingly making copy of a false document or making a false copy of a document would also amount to forgery within the meaning of section 464, IPC.

We recommend that in order to meet the above situation, Explanation 3 in Section 464 may be added on the following lines:-

"Explanation 3. - Knowingly committing forgery of a copy of a document or knowingly making a false copy of a document or copying a false document which he knows or believes to be a false document, with the intention that he or another shall use it to induce somebody to accept it as a copy of a

genuine document to do or not to do some act to his own or any other person's prejudice, will amount to making a false document."

Clause 187

12.83 The proposed changes under sub-clauses (a), (b) and (c) of clause 187 of the Bill are on the basis of the reasons and recommendations contained under paras 18.8, 18.10 and 18.11 of Chapter 18 of the aforesaid 42nd Report.

By virtue of sub-clause (a), the words "in respect of a document which is, or purports to be..." are proposed to be substituted in Section 467, IPC for the sake of clarity as stated under the preceding paragraph in respect of Sec.466 IPC and also as recommended under para 18.10 of the 42nd Report. We also concur with the proposed changes under sub clause (a) that the words "authority to adopt a son or" should be substituted by the words "authority to adopt any person or " as a female may also be adopted as a daughter (vide the Hindu Adoption and Maintenance Act, 1956). Besides, adoption of a female child may also be permissible under the laws or customs or usages governing other religions.

Under sub-clause (b) the proposed substitution by the words "or an acquittance" is in the interests of clarity as recommended in the revised form of Section 467 IPC as stated under Para 18.11 of the 42nd Report.

By virtue of sub-clause (c) the words "with imprisonment for life, or" are sought to be omitted under Section 467 IPC. This is necessary because the imprisonment for life provided in Section 467 for forgery of valuable securities appears to be too harsh as observed in the 42nd Report. We also concur with this change.

Clause 188

12.84 The proposed changes in sections 470 and 471 of the Penal Code are on the basis of the reasons and recommendations contained under paras 18.13 to 18.15 of Chapter 18 of the aforesaid 42nd Report.

Section 470, IPC is proposed to be substituted because the existing section 470 which defines a "forged document" as "a false document made wholly or in part by forgery" is defective as observed by the Law Commission in its 42nd Report, (para 18.13) thereof. This is in view of the fact that forgery is itself defined in Section 463 read with Section 464, IPC as "making a false document" with the requisite intent, so that, when one reads section 470 and sections 463 and 464 together, one meets the idea of "making

a document" twice. By virtue of second part of clause 188, section 471, IPC is proposed to be substituted. The proposed changes are in accordance with the recommendations of the Law Commission and the changes can be carried out.

Clause 190

12.85 Under this clause the existing section 474 is sought to be substituted by the proposed new section. The change suggested is only peripheral and the proposed new section simply lays down that whoever has in his possession any document of the description mentioned in both the sections 466 and 467 knowing the same to be forged and intending to use the same fraudulently or dishonestly shall be punished with rigorous imprisonment of seven years.

Clause 194

By virtue of clause 194 of the Bill, certain amendments are sought to be made under the Explanation Clause of Section 489A of the Code. These include (a) the Explanation Clause shall be numbered as [A Explanation I and in the Explanation as so numbered, the words "and includes a traveller's cheque" shall be inserted at the end; (b) the following shall be inserted as Explanation II:

"Explanation II. For the removal of doubt it is

hereby declared that in this section and in sections 489B, 489C, 489D and 489E the expression "currency notes" includes a foreign currency note".

Since the proposed changes are clarificatory nature, the changes sought to be made under sub-clauses (a) and (b) of clause 194 of the Bill may be carried out.

Clause 196

12.87 Clause 196 of the Bill seeks to insert a new section 489 F which provides for punishment for 'preparation' for committing offences under Section 489A to Section 489E.

Counterfeiting of currency notes is a serious offence since it affects the economy of the country. We agree with the insertion of the proposed new section 489F.

Clause 197

12.88 The existing Chapter XIX entitled "OF THE CRIMINAL BREACH OF CONTRACTS OF SERVICE" contains only Section 491.

The Law Commission in its 42nd Report under para 19.2 has recommended for deletion of the chapter XIX of IPC which includes Section 491, IPC mainly on the ground that it is not of practical utility. A close look at the provision would indicate that the provision is implemented to protect

the contractual rights of helpless or incapable person who, by reason of youth or of unsoundness of mind, or of a disease or bodily weakness is helpless or incapable of providing for his own safety or of supplying his own wants. In other words the provision intends to protect the rights of such persons on the grounds of humanity. Such persons may not be in a position to seek civil remedy. Therefore in the present context of the human rights, it may be desirable to retain this provision with enhanced punishment. We recommend that the existing punishment may be enhanced from three months to one year and the existing limit of imposing fine of Rs.200 may be substituted by the word "fine" only so that the Court may fix the quantum of fine depending upon circumstances of the case. We also recommend that this offence be made cognizable, if information relating to the Commission of the offence is given to an officer incharge of a Police Station by the person aggrieved by the offence or by any person related to him by blood, marriage or adoption or by any public servant belonging to such class or category as may be notified by the State Government in this behalf.

This clause also seeks to substitute Chapter XIX and insert thereunder new sections 490, 491 and 492 providing for the offences against privacy.

The Law Commission examined the various aspects of right to privacy under Chapter 23 of its 42nd Report and recommended for insertion of a new Chapter on "Offences

against Privacy". While adopting the recommendations of the Law Commission, with certain modifications, Clause 197 of the Bill seeks to substitute the existing Chapter XIX of the Penal Code for the said purpose which contains new sections 490, 491 and 492. Under the proposed section 490 use of artificial listening or recording apparatus for listening the to or recording any conversation in any premises without the knowledge or consent of the person in possession of the premises is made punishable for imprisonment upto six months. In case any one publishes such conversation while knowing that it was so listened to or recorded, he will be liable for a higher punishment of imprisonment upto one year. The proposed section 491, makes the taking of unauthorised photography is made punishable for imprisonment upto six months, and if one publishes such photograph, the imprisonment may extend to one year. However, the proposed Sec.492 provides for exceptions regarding certain acts of public servants, and persons acting under their directions.

Right to privacy is a vast subject and its scope has been widened considerably under Article 21 of the Constitution of India by the Supreme Court under its various decisions. Various countries abroad have also dealt with the various aspects of right to privacy in separate legislations. For example, the Law Reform Commission of Hongkong in its Report of December 1996 entitled "Privacy: regarding the Interception of Communications", has referred to various legislations in different countries regulating interception

of communications. It observed under para 4.11 of its Report that several jurisdictions, including common law jurisdictions, have legislation regulating interception of communications and although the scope of protection by such legislation varies, all the statutes apply criminal sanctions to safeguard the privacy interests of individuals in one way or another. The Law Reform Commission of Hongkong suggested various legislative measures under Chapter 6 of its Report to provide protection against undue interference with the privacy of the individual and in the interest of public security. Similarly, the Law Reform Commission of the Ireland in its Consultation Paper headed 'Privacy; Surveillance and Interception of Communications' has provisionally recommended for the enaction of a separate Act to protect the privacy of the individual from intrusive surveillance.

It may be pointed out that in the National Seminar on Criminal Justice in India, organised by the Law Commission on 22nd & 23rd February, 1997 New Delhi, many participants viewed that the proposed provisions under clause 197 of the Bill are bare and sketchy and do not meet the existing demands of society for protection of right of privacy of individuals. A view was also expressed in that Seminar that the exceptions carried out under the proposed section 492 virtually render the provisions of the proposed sections 490 and 491 meaningless.

In view of the above discussion, we are of the view that a separate legislation should comprehensively deal with various aspects of offences against right to privacy in the context of the present day needs. The Law Commission is proposing to take up a comprehensive study on this subject separately. It is, therefore, recommended that clause 197 of the Bill which seeks to substitute the existing Chapter XIX of the Penal Code, may be deleted.

Clause 198

12.89 Under this clause the existing Section 494 is sought to be substituted by new section. We have discussed the proposed amendment in Chapter IX and for the reasons stated therein. The proposed new Section can be substituted but as already noted, another Explanation 3 should be added in accordance with the principle laid down by the Supreme Court in Smt. Sarla Mudgal v. Union of India, (AIR 1995 SC 1531).

Clause 199

12.90 Under this Clause again, the existing Section 497 is sought to be substituted by a new Section. This Section deals with offence of committing adultery. We have discussed about this proposed amendment in Chapter No. IX in detail and we suggested some changes by way of corrections in the proposed Section so as to make the woman also punishable and

to carry out the consequential changes in the provision of Cr.P.C. Accordingly, in the proposed Section, the words "by the man" have to be omitted.

Clause 201

12.91 Under this clause the existing section 500 is sought to be substituted. The Law Commission in its 42nd Report considered this aspect and observed that certain changes are necessary in the existing section. Under the existing section the punishment for defamation is one of simple imprisonment which may extend to two years. The Law Commission considered the suggestions for enhancing the same but opined in its 42nd Report that there is no practical justification for doing so. They, however, recommended that the imprisonment to be imposed should be of either description and accordingly suggested a change. Another suggestion made is that, where the defamatory statement has been published in a newspaper and thus made known to a large number of persons, the fact of the offender's conviction should be similarly published and costs should be made recoverable from the convicted person as if it were a fine. The amendments are in conformity with the recommendations of the Commission and may be carried out. Likewise, the other sub-sections (1) and (2) are also in accordance with the recommendations of the Law Commission.

Clause 203

12.92 The Law Commission has recommended in para 22.6 read with para 7.9 of its 42nd Report that Clause (a) of sub-section (1)) of Section 505, IPC should be incorporated with certain modifications in Chapter VII as new section 138A on the lines mentioned in the Report.

The Commission further recommended under para 22.6 read with para 8.26 of 42nd Report that the rest of the section 505 should be taken in Chapter VIII as new section 158B:

By virtue of clause 52 of the Bill, Chapter VII is proposed to be substituted and under the proposed section 138A thereof, the provisions of existing sub-section (1) of section 505, IPC are proposed to be transposed with modifications. Similarly, by virtue of clause 58 of the Bill, sub-sections (2) & (3) of the existing section 505 are proposed to be transposed with modifications, as section 153C.

The Law Commission in para 22.6 read with para 7.9 of its 42nd Report, recommended that clause (a) of sub-section (1)) relating to statements made with intent to cause mutiny, dereliction of duty, insubordination etc. among the armed forces should find a place in the Chapter relating to offences against the armed forces. The

Commission recommended to add it as section 138A on the lines stated under para 7.9 of the Report. The proposed section 138A is in accordance with the said recommendations to which we agree.

However with regard to the rest of section 505 i.e. section 505(2) and (3) of the Penal code, the Commission recommended under pr.22.6 read with para 8.26 that the provisions could well be regarded as creating offences against public tranquillity and should be taken in Chapter VIII as section 158B. It felt that the provisions of section 505(2) and (3) of the Penal Code really relate to public tranquillity. This part of the section is very similar to, though not wholly covered by section 153-A and thus it would be logical to include it in Chapter 8 immediately after section 153-A.

A perusal of the proposed section 153-C under clause 58 of the Bill shows that these provisions are on the lines of the proposed section 158B recommended under para 8.26 of the 42nd Report which incorporates the provisions of section 505 (2) and (3) with certain modifications. Thus the provisions under the existing section 505 may be omitted since these are covered and transposed in the proposed provisions as stated above.

Clause 204

12.93 By virtue of clause 204, after section 507, a new section 507A is proposed to be inserted. Proposed section 507A provides punishment with imprisonment of either description for a term which may extend to two years, or with fine, or with both for causing damage etc. to places open to public view. The term "place open to public view" and "objectionable matter" are comprehensively clarified under the sub-section (2) of proposed section 507A.

Proposed section 507 A has a laudable objective for creating an orderly society and we endorse the same.

Clause 206

12.94 The Law Commission in its Forty second Report recommended that the last chapter of the Indian Penal Code containing section 511 be omitted and, instead, a new Chapter VB entitled "Attempt" consisting of two sections 120C and 120D be inserted after Chapter VA on the lines indicated by the Commission under para 5.54 thereof. Accordingly, clause 206 of the Bill seeks to omit chapter XXIII of the Indian Penal Code. After having carefully considered the matter, we are of the view that section 511 is working well and there is no need to omit it and transpose its provisions to a new Chapter VB containing sections 120C and 120D for the reasons discussed in Chapter VI of this Report.

CHAPTER - XIII

CONCLUSION AND RECOMMENDATIONS

We have now come to the end of our detailed study of the Code. The recommendations which we have made for its improvement are numerous, ranging from verbal changes designed to remove ambiguities and clarify underlying ideas, to substantial changes with a view to its simplification and modernisation along with some additions in the existing provisions.

13.02. No doubt, the evaluation of The Indian Penal Code (Amendment) Bill, 1978 was the main task in this Report. The said Bill was based on 42nd Report of the Law Commission, and could not become an Act in spite of having been passed by the Rajya Sabha as the then Lok Sabha was dissolved. Beside the said Bill, the Law Commission also examined a number of new problems and issues which gave rise to the necessity of undertaking a further comprehensive revision of the Indian Penal Code in the light of current Socio-legal Scenario.

13.03. We have given special attention to the extent and nature of the punishments prescribed in the Code for various offences and suggested modifications to bring them into accord with modern notions of penology. We have indicated in each Chapter of this Report, corresponding to a Chapter of

the Code, the provisions which should be made in lieu of, or in addition to, the existing provisions, and also the amendments, both major and minor, to be made in them. A sum up of the principal recommendations made in each Chapter is as under:-

CHAPTER - I

13.04. At this stage, we may also mention that under Clause 197 of the IPC (Amendment) Bill, 1978, for the existing Chapter XIX, a new Chapter bearing the same number (Chapter XIX) is sought to be inserted to deal with "Offences against Privacy". In the existing Chapter XIX, three sections namely, sections 490, 491 and 492 are mentioned. But out of them sections 490 and 492 were repealed and the only remaining section 491 deals with "Breach of Contract" to protect the contractual rights of the helpless persons. In the proposed new Chapter XIX which is sought to be substituted in place of the existing Chapter, sections 491 to 492 are inserted and they deal with "Offences against Privacy" like use of artificial listening or recording apparatus either to listen or to record conversation of person or persons without their knowledge or consent or making unauthorised photographs, etc. We have dealt with this clause in detail in Chapter XII after duly referring to the contents of 42nd Report as well as the concept of right to privacy as extended under Article 21 of the Constitution and also various reports of foreign Law Commissions and

ultimately recommended that these offences cannot appropriately be incorporated in the Indian Penal Code and that a separate legislation should be there to comprehensively deal with such offences against privacy.

It is also mentioned that Law Commission is proposing to take up a comprehensive study on this subject separately as early as possible.

(Para 1.11)

13.05. CHAPTER - II

SENTENCES AND SENTENCING - POLICIES & PROCEDURE

1. In the context of fast changes in the sociolegal scenario warranting application of the reformative theory of punishment, it is necessary to modify provisions of the BORSTAL School Act, 1970, Juvenile Justice Act, 1986 and Probation of Offenders Act, 1958 suitably.

(Para 2.05)

2. In the Indian Penal Code, the offences are divided into bailable and non-bailable depending upon the gravity of the offence. About 120 offences in the Indian Penal Code are non-cognizable. It is voiced that some trivial offences affecting public order also can lead to serious developments

if they are not dealt with promptly and, therefore, it is desirable that such offences are made liable for public intervention.

It is recommended that the offences punishable under sections 290, 298, 431, 432, 434, 504, 505 and 510 be made cognizable.

(Para 2.06)

3. The amounts of fine to be imposed should considerably be enhanced and it should, as far as possible, be substituted for short-term imprisonment. Further, the poor victims of uses and abuses of criminal law should be compensated by way of reparation and that the amounts of fine prescribed long ago have lost their relevance and impact in the present day and the fines imposed have no relation to the economic structure of society and necessary element of deterrence is generally absent.

An examination of the various sections in the Code where sentence of fine, is provided for, reveals that from a minimum fine of Rs.100/- it varies up to Rs.1,000/-. In respect of most of the offences it is below Rs.500/-.

Therefore, a change regarding the quantum of fine should be made in all those sections correspondingly, at least by 20 times and make a provision in the Code of

Criminal Procedure regarding the powers of the First Class Magistrates to impose such a fine.

(Para 2.09)

4. The proposed amendment vide clause 18 of the IPC (Amendment) Bill, 1978 making imprisonment for life rigorous, that is, with hard labaour, is necessary.

(Para 2.11)

5. Clause 27 of the IPC (Amendment) Bill, 1978, provides the insertion of a new Section 74A exclusively to deal with punishment of community service. It means that convict will have to perform the service without any remuneration. The implementation part of it provides that the work is to be performed under proper supervision as per arrangements to be made by the State Government or any local authority.

The Commission felt that there are a number of difficulties in enforcing the same like that supervisory authority will have to see whether the convict is working and rendering service for the number of hours specified and if he fails to do so by way of default, he has to be sentenced thereafter.

Therefore, we think an open air prison system is better suited from the point of view of correctional measures rather than the proposed punishment of community service.

(Para 2.13)

6. Another suggestion was whether the punishment "disqualification from holding office" should be incorporated in section 53 of the Indian Penal Code. In some types of cases particularly involving public servants and other persons holding office in corporations, companies, registered societies, etc., ending in conviction should necessarily entail with the disqualification from holding office, but such a course is intrinsically connected with their respective service rules and regulations. It is a matter of common knowledge that in almost all such service rules we find some provision or other disqualifying such a person after conviction, from holding the office.

It is recommended that it would be appropriate to leave the issue to be decided by the concerned authorities under all those rules and regulations because incidentally some other questions pertaining to the service conditions may also arise which warrant a further inquiry.

(Para 2.14)

7. The Law Commission in its 154th Report on the Code of Criminal Procedure has recommended insertion of a new provision, namely, 357A providing for framing victim

compensation scheme by the respective State Governments under which the compensation can be awarded to the victims on the lines indicated therein wherever it is found to be necessary apart from the compensation awarded by the court under section 357 out of the fines. We may also indicate that awarding sufficient compensation depends upon many circumstances which require some inquiry. Further in some cases an order for payment of compensation need not necessarily be by way of punishment.

Therefore, we are of the view that it is not appropriate to include order for payment of compensation in section 53 by way of punishment.

(Para 2.16)

8. Another punishment which is sought to be included in section 53 is 'public censure', namely, publication of the name of the offender and details of the offence and sentence. The proposed Section 74C provides for imposition of the punishment by way of public censure in addition to the substantive sentence under sub-section (3) and this is limited to offences mentioned in chapters XII, XIII, sections 272 to 276, 383 to 389, 403 to 409, 415 to 420 and offences under chapter XVIII of the Code as offences under proposed new Sections 420A and 462A under the Indian Penal Code (Amendment) Bill, 1978. These are all offences where persons entrusted with some public duties commit offences. Such a punishment has great relevance in respect of anti-social

offences, economic offences, otherwise called white-collar offences particularly committed by sophisticated persons. It is of common knowledge that while these offences affect a large number of people, the offenders are not readily booked. However at least in such cases which end in conviction, the punishment of public censure is likely to act as a greater deterrence because of the fear of infamy resulting from the publicity and consequent repercussions like loss of business, etc. Such a censure is one of the prescribed punishments in Russia, Columbia and other countries. In India such form of punishment is included in the Prevention of Food Adulteration Act and Income-tax Act. The Law Commission in its 42nd Report considered the inclusion of such a punishment and recommended that such additional punishment would be useful in the case of persons convicted for the second time of any of the offences under chapter XII and XIII, like extortion, criminal misappropriation, cheating and of offences relating to documents.

It is recommended that such public censure by way of an additional punishment should be there and accordingly be included in section 53 of the Indian Penal Code and it should be left to the discretion of the court regarding imposition of the same in selective cases.

(Para 2.16)

9. In respect of number of offences the punishment prescribed is "imprisonment or with fine or with both". It is voiced in various workshops that in view of the changes in the modern society, the type of crimes and the repetition of those crimes or the frequent occurrence of certain types of crimes, it is necessary that the punishment should be imprisonment and in addition fine also.

Having examined various provisions in the IPC and the modern trends of crime, we are of the view that in respect of the offences under sections 153, 153A, 160, 166 to 175, 177, 182, 221, 269 to 291, 292, 294 to 298, 336, 465 and 477A, the punishment should be imprisonment as well as fine. Incidentally, we also suggest that the extent of imprisonment should be enhanced suitably in respect of these offences.

(Para 2.17)

13.06. CHAPTER - III

DEATH PENALTY

1. The Commission carefully considered the question from several angles after making comparative study of the law of other countries and after examining various judgments till date rendered by the apex court.

We reiterate the recommendation of Law Commission in its 35th Report for retention of the capital punishment, but to be awarded in accordance with the guidelines laid down by the Supreme Court.

(Para 3.07)

2. It is already recommended to retain section 302 as it is instead of reading any limitations into the same regarding imposition of death sentence for the reason that it is impossible to put them in any straight jacket for the reason that what circumstances make a case a "rarest of rare one" cannot be fixed by way of a legal provision.

The Law Commission recommends that no change is required in Section 302 as is proposed in clause 125 of the Bill.

(Para 3.10)

3. Clause (3) of section 302 of IPC (Amendment) Bill, 1978 is providing for running of sentence of life imprisonment consecutively instead of concurrently. It will be a retrograde step in accord with deterrent and retributive theories of the past as observed by the Supreme Court.

Therefore, we do not approve the proposed clause (3) of section 302 in the Bill.

(Para 3.12)

4. Section 303 of the Indian Penal Code provides:

> "303. **Punishment for murder by life convict.**whoever, being under sentence of imprisonment for life commits murder, shall be punished with death."

The Supreme Court in Mithu v. State of Punjab (1983) 2 SCC 277, declared that the aforesaid provisions of Section 303 violate the guarantee of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution.

We have carefully considered the various provisions of the Bill and feel that after section 303 is omitted, the second part of Section 307 which provides that "when any person offending under this Section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death" cannot be retained on the same analogy and principles on the basis of which section 303 has been held to be arbitrary and oppressive and violative of Article 14 and 21 of the Constitution. We accordingly recommend deletion of the second part of Section 307.

(Para 3.14)

13.07. **CHAPTER - IV**

CRIMINAL CONSPIRACY

1. Though the IPC (Amendment) Bill, 1978 is silent about the offence of criminal conspiracy but the Law Commission earlier in its 42nd Report recommended that the criminal conspiracy for petty offences should not be covered under this Chapter. Therefore, a revision of Section 120 of this Chapter was recommended.

Now after re-examining, it is recommended that there is no need to disturb Chapter VA as it works well even it covers conspiracy for petty economic crimes. (Para 4.08)

2. The Law Commission in its 42nd Report had recommended that Section 120B should be revised to make the section self-contained. But the same was not incorporated in the IPC (Amendment) Bill, 1978.

We are of the view that a Criminal Conspiracy is a separate offence and punishable separately from the principal offence. Chapter VA works like residuary provision for the crime of conspiracy. Therefore, no need to disturb the current provisions pertaining to criminal conspiracy.

(Para 4.13)

13.08.

CHAPTER V

FINANCIAL SCAM

1. Recently, various sort of financial scams in various fields like banks, hospitals, non-financial institutions involving crores of rupees have surfaced.

We are of the view that this problem can be tackled if the following new section, namely, Section 120BB is inserted in the IPC.

> "120BB. Criminal conspiracy to defraud public institution, etc.
>
> When two or more persons agree to defraud a public institution or a local authority, fraudulently or dishonestly, to cause, or cause to be done, wrongful gain to themselves or to any person, or to cause or cause to be done, wrongful loss to such public institution or local authority, such an agreement is designated a criminal conspiracy to defraud and whoever is a party to such criminal conspiracy shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine:

Provided that no agreement shall amount to a criminal conspiracy to defraud unless some act besides the agreement is done by one or more parties to such agreement in furtherance thereof.

Explanation - Any bank or financial organisation or company or body or body corporate, which is owned or controlled by the Government, shall be deemed to be a 'public institution' for the purposes of this section".

(Para 5.06)

13.09. CHAPTER -VI

ATTEMPT - Insertion of new sections 120 C & 120 D by way of new Chapter VB in the Bill

1. The Indian Penal Code (Amendment) Bill, 1978 made a provision for this new Chapter under clause 45. Clauses 46 to 51 of the Bill seem to be incorporated by mistake in this Chapter i.e. Chapter VI of the IPC. Therefore, this new Chapter ought to be confined to sections 120C and 120D only which are dealing with "Attempt".

After examining from various angles, it is recommended that there is no need to insert proposed sections in the IPC as Section 511 is working well and covers the said aspects. Therefore, in view of it, no need to introduce a

new Chapter VB containing Section 120C and 120D. If need be the language of section 511 may be amended.

(Para 6.16)

13.10. CHAPTER - VII

OFFENCES AGAINST THE STATE

SECTIONS 121 - 130

1. Having considered the provisions of section 121-A, we are of the view that no changes are necessary. Similarly sections 121, 122 and 123 need not be disturbed as already suggested in the 42nd Report of the Law Commission except, the words "imprisonment of either description" be substituted with "rigorous imprisonment".

(Para 7.09)

2. The proposed section 123 A in the Bill is based on the recommendations of the Law Commission in its 42nd Report. However, the Bill, apart from incorporating new section 123A in the IPC, sought to add an Explanation thereto. We are of the view that there is no harm in having the said Explanation.

(Para 7.11)

3. The Law Commission in its 42nd Report had recommended the revision of section 124A dealing with sedition. The same has been incorporated in the IPC (Amendment) Bill, 1978 under clause 48. After reexamining

the matter, we are of the view that section 124A may be substituted as recommended.

(Para 7.18)

4. On the basis of earlier recommendations made by the Law Commission in its 42nd Report, Prevention of Insults to National Honour Act, 1971 was enacted.

Therefore, the proposed section 124B in the IPC (Amendment) Bill, 1978, is not required to be inserted in the IPC and the same may be deleted from Clause 48 of the Bill.

(Para 7.21)

5. We agree with the proposed Clause 49 of the IPC (Amendment) Bill, 1978 that section 125 of the IPC may be revised as follows:

> "125. <u>Waging war against any foreign state at peace with India.</u> - Whoever wages war against the Government of any foreign State at peace with India, or attempts to wage such war, or abets the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

(Para 7.25)

13.11. CHAPTER - VIII

SUICIDE : ABETMENT AND ATTEMPT

1. Law Commission in its 42nd Report had recommended that Section 309 is harsh and unjustifiable and it should be repealed.

However, on re-examining, we recommend that Section 309 should continue to be an offence under the Indian Penal Code and Clause 131 of the Bill be deleted.

(Para 8.17)

13.12. CHAPTER - IX

OFFENCES AGAINST WOMEN AND CHILDREN

1. The Law Commission recommends that clause Thirdly in Section 375 be amended as under:-

Section 375: A man is said to commit rape-

Firstly- .....

Secondly- .....

Thirdly - With her consent, when her consent has been obtained by putting her or any person in whom

she is interested, in fear of death or of hurt, or of any other injury.

(Para 9.34)

2. To deal with the issue of increasing sexual violence on women and female children, the Law Commission recommends that the offence of sexual assault be added to the existing offence of outraging the modesty of women in Section 354 and punishment be increased from two years to five years. Accordingly, Section 354 be amended on the following lines:

"354. Assault or criminal force to woman with intent to outrage her modesty.- Whoever assaults or uses criminal force to any woman, intending to outrage her modesty or to commit sexual assault to her or knowing it to be likely that he will thereby outrage her modesty or commit sexual assault to her, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine."

Expanding the scope of Section 354 in the above manner, would in our view, cover the varied forms of sexual violence other than rape on women and female children.

(Para 9.35)

3. The Law Commission is further of the view that the offence of eve teasing falls within the scope of Section 509 and there is no need for a new section 376F as recommended by the National Commission for Women. However, the Law Commission feels that the quantum of punishment be increased from one year to three years and fine.

Accordingly, we recommend that Section 509 be amended in the following manner:

> "Section 509: Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with imprisonment of either description for a term which may extend to 3 years and shall also be liable to fine."
>
> (Para 9.35)

4. We recommend that another Explanation, Explanation 3 be added to section 494 which reads as under:-

"Explanation 3: The offence of bigamy is committed when any person converts himself or herself to another religion for the purpose of marrying again during the subsistence of the earlier marriage."

(Para 9.42)

5. About Adultery, the IPC (Amendment) Bill, 1978 has brought in the concept of equity between sexes in marriages vis-a-vis offence of adultery in the subsequent section 497.

However, the Law Commission recommends that the phraseology of clause 199 has to be modified on the following lines to reflect the concept of equality between sexes. Accordingly clause 199 shall be amended as under:

"497.Adultery.- Whoever has sexual intercourse with a person who is, and whom he or she knows, or has reason to believe, to be the wife or husband, as the case may be, of another person, without the consent or connivance of that other person, such sexual intercourse not amounting to the offence of rape, commits adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine or with both."

(Para 9.46)

6. If section 497 is amended on the lines indicated above, sub-section (2) of section 198 of the Code of Criminal Procedure,1973 would also need to be suitably amended.

(Para 9.47)

7. We recommend that in view of the growing incidence of child sexual abuse in the country, where unnatural offence is committed on a person under the age of eighteen years, there should be a minimum mandatory sentence of imprisonment of either description for a term not less than two years, but which may extend to seven years. The court shall, however, have discretion to reduce the sentence for adequate and special reasons to be recorded in the judgment. Consequently section 377 be amended on the following lines:-

> "377. **Unnatural offences.-** Whoever voluntarily has carnal intercourse against the order of nature with any man or woman shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; and where such offence is committed by a person over eighteen years of age with a person under that age, he shall be punished with imprisonment of either description for a term which shall not be less than two years but may extend to seven yenrs and fine.

Provided that the court may for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment of either description for a term of less than two years.

Explanation - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

(Para 9.52)

8. In the opinion of the Law Commission, the existing Section 376(2)(f), and the Law Commission's recommendations for amendment of Sections 354 and 377 are adequate to deal with child sexual abuse.

The Law Commission, therefore, does not recommend the incorporation of a new Section 354A as suggested in clause 146 of the IPC (Amendment) Bill, 1978.

(Para 9.59)

13.13. CHAPTER X

ABDUCTION INCIDENTAL TO HIJACKING

1. Clause 149 of IPC (Amendment) Bill, 1978 proposed to insert a new Section 362A in respect of hijacking of aircraft. The proposed clauses 35 and 37 of the IPC

(Amendment) Bill, 1978 also seek amendments in Section 103 and 105 of the IPC, inter alia, regarding hijacking of aircraft.

We recommend that there is no need to insert Section 362A as well as to amend Sections 103 and 105.

(Para 10.15)

2. The Law Commission is aware that making direct recommendation in International Law is not within its jurisdiction. Nevertheless, we recommend incidentally that there is an urgent need to have an International Court of Civil Aviation. It is in the interest to prevent the crime of international civil aviation. The proposed court will deal with the crimes of Air-Hijacking, mischief in the air service, etc. where the jurisdiction will arise in two or more countries. It is expected from the Government of India to take up this recommendation with the International Comity as and when possible.

(Para 10.25)

3. About the crime of "Hijacking of Vehicles" etc., the following Clause 2 in Section 362A may be inserted in the IPC. The Law Commission also recommends that Clause(1) as proposed in the the IPC(Amendment) Bill, 1978 may be omitted. The Clause (2) may be read as under:

"362A(2).- Whoever on board a vehicle in India or a vehicle registered in India unlawfully by force or show of threat or force or by any other form of intimidation seizes such vehicle or exercises control over it or attempts to seize or exercise control over it for the purpose of taking it to a place other than the place of its destination or for any other purpose, is said to commit the offence of hijacking of vehicle and whoever commits such hijacking shall be punished with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine.

Explanation- In this Section-

(i) The word "Vehicle" include any vessel but does not include an aircraft."

(Para 10.30)

4. Clause 179 of the IPC (Amendment) Bill, 1978 to amend Section 432 may be dropped.

(Para 10.30)

5. The words "helicopter, air-glider etc." may be inserted in Section 2 (a) of the Anti-Air Hijacking Act 1982, as well as in the Suppression of Unlawful Acts Against Safety of Civil Aviation Act, 1982.

(Para 10.30)

13.14. CHAPTER - XI

DOCUMENT - SCOPE OF ITS DEFINITION

1. The term "document" as defined in Section 29 in IPC needs to be enlarged.

Therefore, we recommend that an Explanation 3 may be inserted in Section 29 of the IPC on the following lines:-

> "Explanation 3. - The term "document" also includes any disc, tape, sound track or other device on or in which any matter or image or sound is recorded or stored by mechanical or other means."

(Para 11.08)

2. If the proposed amendment in Section 29 is carried out then there would also be a need for consequential amendment of the term of the "document" under Section 3 of the Indian Evidence Act, 1872 on the lines indicated above.

(Para 11.08)

13.15. CHAPTER - XII

THE INDIAN PENAL CODE (AMENDMENT) BILL, 1978

We have carefully perused the IPC (Amendment) Bill, 1978 which have 151 amendments, 95 substitutions, 32 omissions and 25 insertions. The changes proposed in the Bill contemplate to bring about the basic penal statute of this country updated to remove lacuna and make it useful for meeting the optimum needs. We find that some of the changes contemplated go beyond the recommendations made by the Law Commission in its 42nd Report. Therefore, we think it necessary to re-examine all clauses of the Bill.

1. The amendments sought in clauses 1, 6, 7, 8, 12, 16, 39, 40, 44, 46, 47, 49, 50, 51, 53, 55, 56, 57, 59, 60, 61, 62, 65, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 92, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 112, 113, 114, 115, 116, 117, 118, 120, 121, 126, 127, 129, 132, 133, 135, 136, 138, 139, 140, 141, 142, 143, 147, 148, 150, 153, 154, 156, 157, 158, 185, 186, 189, 191, 192, 193, 195, 200, 202, 205 and 207 are only inconsequential and the same may be carried out.

(Para 12.02)

2. Clauses 2 to 8 - By these clauses, some amendments are sought in Sections 4 to 17 of the Code. We do not recommend any changes in Section 8,9 and 11 of the IPC.

Consequently, clauses 2 to 8 of the Bill have to be deleted. Remaining amendments in various Sections are pertaining to various words and explanations used in the Code and the same are based mainly on 42nd Report.

(Para 12.03)

3. Clause 9- By virtue of this clause Sections 18 to 21 are sought to be substituted.

We are of the view that unless major changes are brought out, it is not desirable to insert new clause and make them amenable to any of the relevant penal provisions.

(Para 12.04)

4. Clause 10 - By virtue of this clause, the definition in the existing Section 25 is sought to be substituted.

We agree to the proposed substitution.

(Para 12.05)

5. Clause 11 - By this clause, an amendment in Section 29 of the IPC is sought.

In view of the changes in the audio and video technology and computers, it is recommended that following Explanation (3) may be added to the existing Section.

"Explanation (3):- The term 'document' includes any

disc, tape, sound track or other device on or in which any matter or image or sound is recorded or stored by mechanical or other means".

(Para 12.06)

6. Clause 12 - In this clause, existing Sections 31, 32 and 33 which define the word "will" are sought to be omitted.

On examining, we are of the view that there is no harm in retaining the existing Sections 31, 32 and 33 of the IPC. Therefore, Clause 12 has to be omitted.

(Para 12.07)

7. Clause 13 - By virtue of this clause, the words "several persons" whenever they occur are sought to be substituted by the words "two or more persons".

We are of the view that by carrying out this amendment the language of Section 34 becomes more explicit. For the same reason the expression "several persons" occurring in Sections 35 and 38 also can be substituted by the expression "two or more persons".

(Para 12.08)

8. Clause 14 - Under this clause it is proposed to substitute Section 40 by another Section.

We recommend that Section 40 may be substituted on the following lines -

> "Section 40- Offences which mean any act or omission made punishable by any law for the time being in force and <u>capital offence</u> means offence for which death is one of the punishments provided by the law".

(Para 12.09)

9. <u>Clause 15 -</u> By this Clause Section 43 is sought to be substituted by a new Section.

We agree that Section 43 needs amendment as sought in this clause.

(Para 12.10)

10. <u>Clause 16 -</u> Under this clause, existing Sections 48, 49 and 50 defining words "vessel, year, month, Section" respectively are sought to be omitted for the reasons that they are defined in the General Clauses Act.

We are of the view that these Sections need not to be omitted and accordingly Clause 16 of the Bill has to be deleted.

(Para 12.11)

11. Clause 17 - The existing Section 52 defines the word "good faith" and Section 52A defines the word "harbour". As per this clause, both these Sections are to be substituted by new Sections.

We agree to the substitution of Sections 52 and 52A.

(Para 12.12)

12. Clause 18 - Under this clause, the existing Section 53 is sought to be substituted.

We do not endorse the addition of new forms of punishments except public censure.

(Para 12.13)

13. Clause 19 - Under this clause Sections 54, 55 and 55A of the Indian Penal Code are sought to be omitted.

We agree and are of the view that clause 19 is very appropriate in view of the changes in the Cr.P.C.. (Para 12.14)

14. Clause 20 - Under this clause the words "imprisonment for 20 years", are sought to be substituted by the words "rigorous imprisonment for 20 years".

We agree to the proposal.

(Para 12.15)

15. Clause 21 - By virtue of this clause, Sections 64 and 65 are to be substituted.

We are of the view that the proposed amendments are incidental and they may be carried out.

(Para 12.16)

16. Clause 22 - By this clause Section 66 of the IPC is sought to be omitted.

In view of the revised Sections 64 and 65, Section 66 may be omitted.

(Para 12.17)

17. Clause 23 - Under this clause, Sections 67 and 68 are sought to be substituted.

We are of the view that the existing Sections may be substituted.

(Para 12.18)

18. Clause 24 - Under this clause the existing Section 69 providing for termination of imprisonment on payment of proportional part of fine is sought to be omitted.

We are of the view that this omission is necessary in view of the new revised Section 68.

(Para 12.19)

19. Clause 25 - Under this clause the existing Sections 70, 71 and 72 providing for the limitation of time for levy of fine and limit of punishment in case made of several offences are sought to be substituted.

We are of the view that amended Sections are comprehensive and the amendments may be carried out.

(Para 12.20)

20. Clause 26 - Under this clause, Sections 73 and 74 providing for solitary confinement by way of punishment is sought to be omitted.

We are of the view that it is necessary to omit these two Sections.

(Para 12.21)

21. Clause 27 - Under this clause new Sections 74A, 74B, 74C and 74D are sought to be incorporated.

We are of the view that proposed Sections 74A and 74B need not to be incorporated. We also do not recommend incorporation of new Section 74D. Consequently, the new

Section 74C providing for additional punishment by way of censure can be numbered as 74A and may be added.

(Para 12.22)

22. Clause 31 - Under this clause, Section 94 is sought to be substituted. Also new Sections 94A and 94B are sought to be inserted.

We are of the view that with the classifications indicated, Section 94 may be substituted. We also recommend that the proposed new Section 94A and 94B be deleted from clause 31. If necessary some of such provisions may be added in the other enactments including the Companies Act to strengthen the same to meet such a situation.

(Para 12.23)

23. Clauses 32 to 37 - Under these clauses, some of the existing Sections relating to right of private defence of persons and property are either sought to be amended or substituted. However, in the Bill, no change in respect of Sections 96 to 98 is mooted.

(ii) We recommend that the third paragraph in the existing Section be included in the proposed Section and rearrange the clauses.

(Para 12.24)

(iii) We are of the view that the proposed change in Section 100 is appropriate.

(iv) Clause 34 seeks an amendment in the existing Section 101. This change appears to be appropriate.

(v) In the proposed Section 103 of the Bill, there is a new clause (d) relating to the offences of mischief to property, house, or intended to be used for the purpose of Government or any corporation. Two more new clauses (e) and (f) are sought to be added in the proposed Section.

In this context, it is recommended that if the new Section 362A is to be added then there is no need of clause (e). Clause (f) can be retained but may be renumbered as (e).

(vi) Under clause 36, a minor amendment to Section 104 is proposed. We are of the view that the changes may be carried out.

(Para 12.24)

24. Clause 37 - Under this clause, the existing Section 105 is sought to be substituted by a new Section bearing the same number.

We are of the view that in the proposed new clause (c), the words "hijacking of aircraft" have to be omitted.

(Para 12.25)

25. Clauses 38 to 44 - (i) Clause 38 of the IPC (Amendment) Bill, 1978 has incorporated some changes. Section 108 as mentioned in clause 38 is in conformity with the recommendation made by the Law Commission in its 42nd Report and, therefore, we do not recommend any further change.

(Para 12.26)

(ii) Under clause 39, changes sought are minor in nature and are warranted.

(iii) The changes suggested in clauses 40-44 are warranted.

(Para 12.26)

26. Clause 45 - Under this clause, a new Chapter VB seeks to insert new Sections 120C and 120D defining attempt and punishment for offence of attempt. The existing Section 511 is also sought to be omitted.

We have carefully examined this clause and recommend that Section 511 be retained and this clause be deleted. (Para 12.27)

27. Clause 47 - Under this clause, a new Section 123A is sought to be inserted.

We are of the view that the proposed Section may be inserted.

(Para 12.28)

28. Clause 48 - Under this clause, the existing Section 124A which deals with Sedition is sought to be substituted by a new Section bearing the same number. We agree.

We are of the view that the proposed Section 124B need not be inserted.

(Para 12.29)

29. Clause 52 - Under this clause, the existing Chapter VII is sought to be substituted by a new Chapter bearing the same number.

We are of the view that there is no harm in substituting the existing chapter.

(Para 12.30)

30. Clause 54 - By this clause, a new Section 147A is sought to be added.

We agree with the proposed insertion.

(Para 12.31)

31. Clause 58 - Under this clause, a new Section 153C is sought to be added.

We agree that Section 153C may be added.

32. Clauses 63 & 64 - Clauses 63 and 64 of the Bill seek amendments in Sections 161, 162, and 163 IPC.

Since these Sections had already been repealed by the Prevention of Corruption Act, 1988 and transposed thereto, clauses 63 and 64 have to be, therefore, omitted.

33. Clause 66 Under this clause, a new Section 166A is sought to be inserted.

We are of the view that the proposed Section 166A may be inserted.

(Para 12.34)

34. Clause 68 - Under this Clause, a new Section 167A is sought to be inserted in Chapter IX.

We agree that the proposed Section may be inserted.

(Para 12.35)

35. Clause 91 - Under this clause, two new Sections 198 A and 198 B are sought to be added in Chapter XI.

We think that addition of new Sections 198A and 198B is unnecessary. Consequently, clause 91 has to be omitted.

(Para 12.36)

36. Clause 93 - By this clause, a new Section 207A is sought to be added.

We are of the view that the new Section 207A may be inserted in the Code.

(Para 12.37)

37. Clause 94 - By this clause, the existing Section 211 is sought to be substituted by a new Section with the same number.

The change proposed is an appropriate one.

(Para 12.38)

38. Clause 100 - By this clause, the existing Section 229 is sought to be substituted by the two new Sections, namely, 229 and 229A.

We are of the view that both the Sections are very much needed in the Code.

(Para 12.39)

39. Clause 110 - By this clause, a new Section 254A is sought to be inserted in the Code.

We are of the view that the new Section may be inserted in the Code.

(Para 12.40)

40. Clause 111 Under this clause, for Section 263A of the Code, new Sections 263A, 263B and 263C are sought to be substituted.

We agree to the proposal.

(Para 12.41)

41. Clause 112 By this clause, the substitution of words "two years" for "one year" in the Sections 264-267 is sought to be contemplated.

We agree to the proposal.

(Para 12.42)

42. Clause 119 - Under this clause, a new Section 279A is sought to be inserted.

Having regard to the increase in the volume of road traffic and indiscriminate use of vehicles whether they are roadworthy or not, such a provision is very much needed.

(Para 12.43)

43. Clause 122 :- Under this clause, a new sub-Section is sought to be inserted in Section 292 of the IPC.

We are of the view that the proposed amendment would be appropriate addition. However, we are of the view that the sentence may be made "three years" in Section 292 in place of "two years" to be on par with the new secion 292A.

(Para 12.44)

44. Clause 123 :- Under this clause, after Section 292, a new Section 292A is sought to be inserted to deal with an offence of printing etc. of grossly indecent or scurrilous matter or matter intended for blackmail.

We are of the view that Section 292A may be inserted.

(Para 12.45)

45. Clause 124 - The existing Section 294A deals with offence of keeping lottery office. By this clause this Section is sought to be substituted by a new Section. New Section 294B for sale distribution etc. of lottery tickets is also sought to be added.

The proposal is salutary one.

(Para 12.46)

46. Clause 125 - By this clause, Section 302 is sought to be substituted by the new Section bearing the same number.

We are of the view that this clause may be deleted as there is no need of any amendment in Section 302.

(Para 12.47)

47. Clause 128 - Under this clause, a new Section 304B is sought to be inserted.

At the outset we must point out that in 1986 by amending Act 43 of 1986, the exisitng Section 304 B dealing with dowry death was inserted.

Therefore, we recommend that this may be inserted in Section 304A as sub-section (2).

(Para 12.48)

48. Clause 130 - Under this clause, Sections 307 and 308 are sought to be substituted.

We are of the view that there is no need to disturb the existing Sections 307 and 308 of the Code except the second part of existing Section 307.

(Para 12.49)

49. Clause 131 - Under this clause, the existing Section 309 which makes attempt to commit suicide punishable is sought to be omitted.

We are of the view that the existing Section 309 has to be retained and the clause be omitted.

(Para 12.50)

50. Clause 134 - Under this clause, the existing Section 320 defining grievous hurt is sought to be substituted.

We are of the view that the proposed changes are only peripheral, but a little more explanarative. Therefore, that can be carried out.

(Para 12.51)

51. Clause 137 - Under this clause, the existing Section 328 is sought to be substituted by a new Section. In content, both the Sections are same except in the new Section in place of "unwholesome drug or other thing" the words "unwholesome substance" are inserted which are of same effect but little wider.

(Para 12.52)

52. Clause 144 - Under this clause, the existing Sections 341 to 344 are sought to be substituted.

We are of the view that the number of persons on the basis of constructive liability can be limited to two or more persons as we find in the proposed amendment in Sections 34, 35 and 38 IPC. Therefore, the proposed clause may be amended accordingly.

(Para 12.53)

53. Clause 146 - Under this clause, a new Section 354A dealing with offence of indecent assault on a minor is sought to be inserted.

We are of the view that this clause has to be omitted.

(Para 12.54)

54. Clause 149 - Under this clause, the existing Section 362 is sought to be substituted by the new Section.

We are of the view that the proposed change may enlarge the meaning of abduction and the same may be carried out.

(Para 12.55)

55. Clause 151 - Under this clause, a new Section 364A dealing with offences of kidnapping is sought to be inserted.

Having regard to the present crime scenario of this nature, the new Section is a salutary one and, the same is inserted in the Code.

(Para 12.56)

56. Clause 152 - Under this clause, the existing Section 366 and 366A are sought to be substituted by the new Section.

We are of the view that the change is only consequential and we endorse the same.

(Para 12.57)

57. Clause 155 - Under this clause the existing Section 368 is sought to be substituted.

We endorse the substitution.

(Para 12.58)

58. Clause 159 - Under this clause, the existing Sections 375 and 376 are sought to be substituted by new Sections 375, 376A to 376C.

We are of the view that this clause may be omitted. However, We recommend a modification in clause 3 of Section 375 by inserting the word "injury".

(Para 12.59)

59. Clause 160 - Under this clause, the existing Section 377 is sought to be substituted by a new Section.

We endorse the substitution on the lines suggested in Chapter IX.

(Para 12.60)

60. Clause 161 - (i) Under this clause, the existing Sections 380 and 381 are sought to be substituted. Also a new Section 380A is proposed to be inserted.

The changes may be carried out.

(Para 12.61)

(ii) Similarly, a new Section 381A needs to be inserted in the Code.

(Para 12.62)

61. Clause 162 - Under this clause, a new Section 385A is sought to be inserted. The proposed Section is intended to cover an offence of blackmailing with the dishonest intention.

We are of the view that the new Section dealing with such offences is very necessary and insertion may be carried out.

(Para 12.63)

62. Clause 163 - Under this clause, the words "may be punished with imprisonment for life" occurring in Sections 388 and 389 are sought to be substituted with imprisonment of lesser periods.

We are of the view that the substitution of the words "may be punished with imprisonment for life" with "lesser periods of sentence" is called for.

(Para 12.64)

63. Clause 164 - Under this clause, Section 396 is sought to be substituted.

We are of the view that no change in this Section is necessary.

(Para 12.65)

64. Clauses 165 & 166 - Under these clauses, the words "uses any deadly weapon, or" in Section 397 is sought to be omitted and in Section 398 after the words "at the time of" the words "committing or" are sought to be inserted and for the words "seven years", the words "five years" are sought to be substituted.

We are of the view that it is better to retain the existing words and the said clauses may be omitted.

(Para 12.66)

65. Clause 167 - Under this clause, in Section 399 for the words "ten years", the words "seven years" are sought to be substituted.

We are of the view that as the offence in this Section is with reference to making preparation, making the sentence lesser appears to be proportionate.

(Para 12.67)

66. Clause 168 - Under this clause, a new Section 399A is sought to be inserted.

We agree to the proposal and the required change may be carried out.

(Para 12.68)

67. Clauses 169 and 170 - By virtue of these Clauses, a few words in Section 400-402 are sought to be substituted.

The proposed changes are only consequential and we are of the view that the same may be carried out.

(Para 12.69)

68. Clause 171 - A new Explanation I is sought to be added in Section 403.

We are of the view that the proposed changes may be brought about.

(Para 12.70)

69. Clause 172-173 - Under these clauses, some minor changes are proposed in Sections 404 and 408.

We are of the view that the proposed changes may be carried out.

(Para 12.71)

70. Clause 174 - Under this clause, the word "factor" occurring in Section 409 is sought to be omitted

We are of the view that there is no harm in retaining this word. Accordingly, this clause may be omitted.

(Para 12.72)

71. Clause 175 - Under this clause, the existing Section 410 is sought to be substituted.

We are of the view that the proposed new Section is appropriate and may be carried out.

(Para 12.73)

72. Clause 176 - By this clause, the existing Sections 411 and 414 are sought to be amended.

We agree to the amendments in both the Sections.

(Para 12.74)

73. Clause 177 - Under this clause, the existing Section 415 is sought to be substituted.

We are of the view that the substitution may be carried out but we may also mention that it would be better to retain the existing illustrations in the Section.

(Para 12.75)

74. Clause 178 - Under this clause, Section 420 is sought to be substituted. New Sections namely, Section 420A, 420B and 420C are also sought to be inserted.

The proposed changes may be carried out.

(Para 12.76)

75. Clause 179 - Under this clause, the existing Sections 426 to 432 are sought to be substituted by new Sections covering in general the offence of mischief.

(i) We have examined new Sections 426 to 431 and recommend that the sentence of "three years" prescribed under each of these Sections may be enhanced to "five years".

(ii) About Section 432, it may be mentioned that after the IPC (Amendment) Bill, 1978, special legislations were brought in 1982 which were amended in 1994, as mentioned in Chapter X. We recommend deletion of new Section 362A.

For the same reasons, we recommend that Section 3A of the Suppression of Unlawful Acts Against Safety of Civil Aviation Act, 1982(SUACA) may be amended. If amendments to Section 3A of this Act is not to be carried out in the same manner, then the proposed Section 432 may be retained in the clause, but the sentence under Section 432 may be brought in accordance with Section 3A of the said Act.

(Para 12.77)

76. Clause 180 - Under this clause, the new Sections 434 to 440 are sought to be substituted.

(i) We recommend that the word "Aircraft" occuring in the proposed Section 434 may be omitted in view of our suggestion made in Chapter X.

(ii) In respect of other types of mischief regarding aircraft, Section 3A of the SUACA is to be amended. If not, the Section as proposed may be retained and the sentences be brought in accordance with Section 3A of the SUACA Act.

(iii) In the proposed Section 438, the sentence of three years may be enhanced to five years.

(Para 12.78)

77. Clause 181 - Under this clause, Section 441 is sought to be substituted.

However, it may be mentioned that the proposed amendment does not carry any substantial change.

(Para 12.79)

78. Clause 182 - Under this clause, Sections 443-460 are sought to be substituted.

We have considered this provision and we think that such substitution in the place of the existing Section will be salutary.

(Para 12.80)

79. Clause 183 - Under this clause, Chapter XVIIA is sought to be introduced by way of inserting Section 462A.

We are of the view that this new Chapter dealing with offences relating to private employment is not necessary. So consequently this clause may be omitted.

(Para 12.81)

80. Clause 184 - By this clause, an amendment is sought to be inserted in Section 464 of the IPC.

We recommend that an Explanation 3 in Section 464 of the IPC on the following lines may also be added-

"Explanation 3. - Knowingly committing forgery of a copy of a document or knowingly making a false copy of a document or copying a false document which he knows or believes to be a false document, with the intention that he or another shall use it to induce somebody to accept it as a copy of a genuine document to do or not to do some act to his

own or any other person's prejudice, will amount to making a false document."

(Para 12.82)

81. Clause 187 - Under this clause, Section 467 is sought to be amended.

We agree to this change.

(Para 12.83)

82. Clause 188 - By this clause, substitution of new Sections for existing Section 470 and 471 is sought.

We recommend that the changes may be carried out.

(Para 12.84)

83. Clause 190 - Under this clause, the existing Section 474 is sought to be substituted.

The change suggested is only peripheral and the same is endorsed.

(Para 12.85)

84. Clause 194 - By virtue of this clause, certain amendments are sought to be made under the Explanation part of Section 489A of the Code.

Since the proposed changes are clarificatory in nature, the same may be carried out.

(Para 12.86)

85. Clause 196 - By this clause, a new Section 489F is sought to be inserted.

We agree to the insertion of the proposed Section.

(Para 12.87)

86. Clause 197 - Under this clause, the existing Chapter XIX is sought to be substituted regarding offence against privacy.

(i) Since there is a need to have separate legislation on the subject, the proposed substitution may not be carried out.

(ii) We further recommend that existing Section 491 IPC may be retained and the punishment therein may be enhanced from "three months" to "one year" and the existing limit of imposing fine of Rs.200/= may be substitued by the words "fine only". And the offence be made cognizable.

(Para 12.88)

87. Clause 198 - Under this clause, the existing Section 494 is sought to be substituted.

We think that the proposed new Section may be substituted but as already mentioned, the Explanation 3 should be added in accordance with the principle laid down by the Supreme Court.

(Para 12.89)

88. Clause 199 - Under this Clause, the existing Section 497 is sought to be substituted.

We have already suggested some changes in Chapter IX. In the proposed Section, the words "by the man" have to be omitted.

(Para 12.90)

89. Clause 201 - Under this clause, the existing Section 500 is sought to be substituted.

We recommend that the changes be carried out.

(Para 12.91)

90. Clause 203 - By this clause, the omission of Section 505 is sought.

A perusal of the proposed Section 153C under clause 58 of the Bill shows that these provisions are on the lines of the proposed Section 158B recommended under para 8.26 of the 42nd Report which incorporates the provisions of Section 505 (2) and (3) with certain modifications.

Thus the provisions under the existing Section may be omitted since these are covered and transposed in proposed provisions as stated above.

(Para 12.92)

91. Clause 204 - By virtue of this clause, a new Section 507A is proposed to be inserted.

We endorse the proposal.

(Para 12.93)

92. Clause 206 - By this clause, it is sought that Chapter XVII, containing only Section 511, of the Indian Penal Code shall be omitted.

We are of the view that Section 511 is working well and there is no need to omit it.

We recommend accordingly.

(JUSTICE K. JAYACHANDRA REDDY)

CHAIRMAN

(JUSTICE R.L.GUPTA)

MEMBER

(CH.G.KRISHNAMURTHY)

MEMBER

(MRS ALICE JACOB)

MEMBER

(R.L. MEENA)

MEMBER-SECRETARY