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CHAPTER II

THE CONCEPT OF CRIME:

I. THE NATURE AND SCOPE OF CRIMINAL LAW:

Criminal Law is that part of the law which relates to crimes and their punishment. The functions which this law has to perform are to help the State in establishing peace and order in the society and punish those who disturb the peace.

Every individual in a civilized society has a right to life, liberty and property, and wishes to enjoy these rights in a peaceful atmosphere. Any attack on these rights is, therefore, considered as a crime and punishment is prescribed for it in the Criminal Law.

A. CERTAIN IMPORTANT ASPECTS OF CRIMINAL LAW:

Criminal Law is the instrument through which the State strives to secure conditions in which every individual may enjoy his natural rights and the State itself may discharge its functions towards the society.

Criminal Law is only a part of the system of social control. The importance of the law lies in the fact that it carries a special kind of stigma and a distinct range of sanctions.
B. THE SOURCES OF CRIMINAL LAW:

(i) The General Law.

In England the Criminal Law has its sources in Common Law, Equity and Statute. The Judges of the Common Law Courts originally contributed greatly to the emergence of the legal system of their country. They evolved rules not only on the civil wrongs but also on the public wrongs, namely, crimes. They evolved these rules on the basis of customs and convention common to the whole of England and thus constructed their national jurisprudence. In the initial stages of the legal system of England, the Judges of the Common Law Courts built up a coherent body of the doctrines. At a later stage, a new institution known as the Star Chamber introduced principles of natural justice in the interpretation of the Criminal Law of the time and thus modified most of the existing rules. But owing to the prejudices which the Common Law Judges had towards the principles of equity, the Star Chamber could not make much of a contribution to the English Law. Since then the Parliament has been enacting new rules on a large number of offences and thus modifying the existing rules. But in regard to most of the offences on which there is no Parliamentary enactment, the Common Law still survives. Thus, the Common Law retains and enjoys a unique position in the realm of English Criminal Jurisprudence. The next important source of Criminal Law is the delegated legislation.
By virtue of the authority vested in the Executive by the Legislature, the rules framed by the Executive constitute one of the important sources of Criminal Law. Yet another important source of English Criminal Law is the Body of Judicial decisions which directly or indirectly evolve a new rule in the process of interpreting the existing rules.

In India the substantive Criminal Law is in the form of the Indian Penal Code, 1860, which was adopted during the British regime and has been undergoing changes since then. The influence of the local laws and the traditions that prevailed in the country in the earlier days under the Hindu and the Muslim rulers is also found in the legislation which was undertaken by the Britishers then. The Penal Code has borrowed traditions from the British who had developed a major part of their Criminal Law through the Common Law.

The need for codification of Criminal Law was felt because the Regulations adopted by the Britishers in the early days of their rule for each of the three Presidencies, differed in their content and hence owing to the disparities in the rule, it was felt necessary to refer them to a Law Commission for consolidating the Law. Lord Macaulay was the Chairman of the Law Commission to which the task of codifying the Criminal Law was entrusted.
In view of the scanty means of information which were available to the Commission on this subject, the Law Commission borrowed freely the principles of Western Jurisprudence in codifying the law of crime. The Code was enacted in 1860 and the work has been acclaimed by common consent as a monumental piece of legal drafting and rich tribute has been paid to the great genius of Lord Macaulay.

The Penal Code is the general law of crimes in India. It is divided into 23 chapters and these in turn are subject to great divisions. The offences described in the Code mostly fall into offences against the State and offences against the person and property. Many offences were included in the Penal Codes because they were socially disapproved at that time.

It was not possible for the framers of the Code to include in it all offences and thus repeal the existing local or the special laws. It was impossible for them to make an exhaustive Code on all offences. The Penal Code, therefore, preserves the Special and Local Laws by which certain offences were punishable. The two important forms of the Criminal Law of our country are the Special and the Local Laws besides the General Penal Code.

(ii) The Special Law.

According to Section 41 of the Indian Penal Code,
Special Law is a law applicable to a particular subject. A particular subject is a subject dealing with an individual, for example, Excise, Opium, Income Tax, Land Acquisition, Criminal Trespass, Immigration, Railway or the like.

The expression Special Law means provision of law which is not applicable generally but it applies to a particular or specified subject or class of subject.

Legislation on socio-economic offences (is mostly in the form of Special Law, because it deals with a particular subject and makes certain specified things belonging to that subject punishable.

(iii) The Local Law.

According to Section 42 of the Indian Penal Code, a local law is a law applicable to a part of India. As a special law applies to special subject, the operation of local law is confined to particular localities, such as, for example, Special Revenue Acts, Excise Act, Courts of Wards Act, Port Trust Act, and the like.

Side by side with the substantive criminal law which is in the form of the General Penal Code and the Special Laws and the Local Laws, the Britishers had introduced the Procedural Law of Crimes. The Code of Criminal Procedure was enacted by them for the first time in 1898 and at about the
same time the Indian Evidence Act was enacted. The Code of Criminal Procedure underwent a number of changes and was thoroughly revised in 1973, with a view to secure quick disposal of cases and provide more and more opportunities to the accused for his proper defence.

II. THE MEANING AND DEFINITION OF CRIME.

Crime is a form of social injury. It varies according to the social values of the time. It may be sinful, immoral or a thing contrary to the public good.

The "Oxford Companion to Law" gives the meaning of the word crime as an act or omission which, whether or not, it is morally wrongful, is legally deemed an offence against the State or Community, or the public and is punishable as a deterrent to the offender either for the sake of public order, peace, well-being or the interest of society.

In the eye of the law, crime is a wrongful act or omission which has been made punishable in criminal proceedings as a matter of public policy and is intended to secure peace, security and harmony by protecting the persons and property of the members of the community.

According to Blackstone wrongs are divisible into two sorts or species, private wrongs or public wrongs. The former
are infringement or privation of the private or civil rights belonging to individuals considered as individuals and are thereupon termed civil injuries, the latter are a breach and violation of public rights and duties which affect the whole community considered as a community and are distinguished by a harsher appellation of crimes and misdemeanours.

Crime is not only a legal problem but a social and economic problem too, in view of its consequences and therefore is regarded to be a wrong against the state and society.

The essential element of crime is that it is an act forbidden by the State and is made punishable by the Law.

Various definitions of Crime have been given by different writers at different times.

Halsbury defines crime as an unlawful act or default which is an offence against the public and which renders the perpetrator of the act or default liable to legal punishment.

A procedural definition of crime is found in Salmond's definition as follows:-

"A wrong regarded as a subject of criminal proceedings is termed a criminal wrong or a crime." (Jurisprudence, XI Edition 110).

Kenny's definition of crime is "wrongs whose sanction is punitive and is in no way remissable by any private person, but is remissible by the Crown alone, if remissible at all". This definition again is not only procedural, but also incomplete in so far as it leaves out of its purview offences compoundable by a person who has been injured even without interference by the Crown or the State.

According to K.D. Gaur, "Crime is a violation of a Right in rem. In case of wrong, the rights and duties are fixed by law irrespective of the parties.

According to Stephen, "Crime is the violation of a right considered in reference to the evil tendency of such violation as regards the community at large.

Austin defines a crime as "a wrong which is pursued by the Sovereign or his subordinates. A wrong which is pursued by the injured party and his representatives is a civil wrong."

Prof. Sutherland defines a crime in terms of criminal behaviour. Criminal behaviour is behaviour in violation of the criminal law. No matter what the degree of immorality, reprehensibility, or indecency of act, it is not a crime unless it is prohibited by the Criminal Law.

What may be regarded as a crime at one particular time
may not be regarded as a crime at another period of time. Suicide in English Law was a crime until August 3, 1961, when by the Suicide Act, 1961, it became perfectly lawful to kill oneself.

Homo-sexual acts committed by adult male persons in private were offences until July 27, 1967, when by the Sexual Offences Act, 1967, such acts became permissible in England.

Miscarriage was a crime in the past in all cases in our country, but it is not so in certain cases from 1971, that is from the time when the Indian Parliament passed the Medical Termination of Pregnancy Act, 1971.

Thus, in time of war burning a waste paper or not shading the lights may be regarded as a crime, as an act or omission as the case may be punishable by fine or even with imprisonment, but such an act or omission is not regarded as crime in time of peace. Further, what may be regarded as a crime at one place or country, may not be regarded as crime in another place or country. Thus in some States of the United States of America it is a criminal offence punishable by imprisonment for a person suffering from a venereal disease or from tuberculosis not to have medical treatment, but there is not such a law in our country.

On an analysis of these definitions, it may be concluded that a combination of two abstract criteria are generally regarded by legal scholars as necessary to define a crime, namely, legal
description of an act as socially injurious and legal provision of penalty for the act.

III. ESSENTIAL FEATURES OF A CRIME:

After studying some of the definitions stated above, we find the salient features of a wrong known as crime to be the following:

1) Crime is an act or omission which the State has thought fit to punish or otherwise deal with it under its laws for the time being.

2) It may be an act sinful or non-sinful.

IV. THE DEFINITION OF CRIME IN INDIAN LAW.

While the English Law uses discriminating nomen clatures to describe what is a punishable wrong, the Indian Law adopts a simple nomenclature of 'Offence' to describe a crime.

The term "Offence" in legal literature is another name for a crime. The modern Criminal Law prefers to use the term "Offence" and hence the word "Crime" is dropping out of use. Even while Crimes like Murder, and Rape are termed offences in the Statute Book. But it is not wrong to call them crimes as well. The word "Crime" bears a generic meaning.

i) Definition of Offence' in the Indian Penal Code.

(a) Section 40 of the Penal Code says,
"Except in the Chapters and Sections mentioned in Clauses 2 and 3 of this Section, the word "Offence" denotes a thing made punishable by this Code."

"In Chapters IV (Chapter VA), and in the following Sections, namely, Section 64, 65, 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389, and 445, the word "Offence" denotes a thing punishable under this Code or under any Special or Local Law, as hereinafter defined.

Under Sections 141, 176, 177, 201, 202, 212, 216 and 441, the word "Offence" 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.

(b) Section 216 of the Penal Code.

216 Harbouring Offender who has escaped from custody or whose apprehension has been ordered.

Offence in this Section includes also any act or omission of which a person is alleged to have been guilty out of India, which if he had been guilty of it, in India, would have been punishable as an offence and for which he is under any law relating to extradition or otherwise liable to be apprehended or detained in custody in India and every such act or omission shall, for the purposes of this Section be deemed to be punishable as if the accused had been guilty of it in India."
ii) Definition of Offence in the Code of Criminal Procedure.

Section 4 (c) defines an offence as follows:

Offence means any act or omission punishable by any law for the time being in force. It also includes any act in respect of which a complaint may be made under Section 20 of the Cattle Trespass Act, 1871.

An offence under the Indian Law is said to denote a thing made punishable by the Penal Code or by any special or local law with exceptions to a few wrongs. The word 'thing' is as vague as it is comprehensive for it may mean either a subject or the object, the doer or the deed. It is more appropriate to say that it is used in the latter sense denoting acts and omissions made penal by the Code, but no legal responsibility attaches to them apart from the doer. It is he who is punishable in respect of them. The term must mean then, acts and omissions for which a person is punishable under the Code. But the language of the Section is inapt, for it speaks of a thing made punishable by the Code, which of course could only mean the doer punishable by the Code.
V. CLASSIFICATION OF CRIMES:

The common classification of crimes in Civil Law countries is the one denoting respectively serious crimes, major offences and petty offences.

Many countries have reduced the categories of crimes to two:

1) Duties which involve criminal intent and directly infringe the rights of individuals and groups.

2) Contraventions which are acts forbidden by law even without criminal intent.

According to David M. Walker, crimes are distinguished into Common Law Crimes and Statutory Crimes. Statutory crimes are usually Statutory Offences. This classification is based upon the source of criminal law.

Depending upon the nature of offences or the gravity of offences, crimes are classified in English Law as Treason, Felony, and Misdemeanours.

(a) Treason, Felony and Misdemeanour.

At Common Law, a crime could be classified either as treason, felony or misdemeanour. Originally the distinction between felony and misdemeanour was a distinction between serious and minor offences (The former involving penalties of a different order from the latter). But over the year, this distinction became blurred.
By Section 1 of the Criminal Law Act, 1967, all distinctions between felony and misdemeanour have been abolished on all matters on which a distinction had been drawn.

(b) **Classification of Offences in Indian Law.**

The Indian Penal Code has classified offences for different purposes. In some cases offences are only offences under the Indian Penal Code, but Section 40 of the Indian Penal Code defines the word "Offence" by enlarging it for the purposes of Sections 66-67 of the Code and the word "Offence" for that purpose includes an illegal act under the Indian Penal Code or under any Special or Local Law as defined in Section 41 to 42 of the Indian Penal Code.

The Code of Criminal Procedure in India has classified offences into the categories of Bailable and non-Bailable Offences, depending upon the availability of Bail in each case.

VI. **DISTINCTION BETWEEN CRIME AND TORT:**

Since Crime had its origin in common law as was the case with Tort, it resembles Tort in some respects. Firstly,
both Tort and Crime are violation of rights in rem, that is rights vested in some determinate person and available against the world at large, and secondly in case of both wrongs, the rights and duties are fixed by law irrespective of the consent of the parties unlike contract.

Not all crimes are torts, and not all torts are crimes. Even when the same act is both an important offence relates to the possible legal consequences of the act, to say that the act is a Tort or the other civil wrong means that it can be followed by a civil action for damages or other civil redress. To say that it is a Crime means that it can be followed by a criminal prosecution. If it is both, a tort and crime, then it can be followed by both forms of proceedings.

Not only the procedure and evidence but the outcomes differ. Usually the outcome of the civil proceedings is a judgement for debt or damages or compensation or restitution or an order for specific performance of contract or an injunction to prevent the commission of the wrong or its continuation or a declaration as to rights. There are also civil remedies in relation to the dissolution of marriage and to parental rights and proceedings for prerogative orders, in the form of writs. Civil wrongs also can be against the State, for example, in the case of breach of contract with Government.
All crimes, it is true, are offences against the society, but some are more directly so than others. Some crimes injure directly and immediately an individual. The effect on society is indirect, particularly in causing sense of insecurity.

Other crimes do not directly injure a nameable individual, but the damage that they cause is caused directly to the society or else is caused to such important officer of Society that they can be regarded as causing direct damage to Society. Examples of such Crimes are Treason and Sedition.

Civil proceedings are in general brought by the person directly affected and cannot be stopped by any official. Criminal Proceedings (Prosecution) can in general be brought by any one, whether he is affected by the offence or not, though in practice, they are nearly always brought by the Police, local authorities or other public officers. Occasionally the Legislature provides that a prosecution can be brought only by a public authority or with the consent of the Director of Public Prosecution or the Attorney General, the idea being to protect offenders from harrassment by private prosecutors, where it seems that no purpose will be served by prosecuting.

Generally prosecutions unlike civil actions cannot be compromised. A Defendant may be punished only as a result of
a judgement of the Court. The Prosecutor (whether Private Prosecutor or Police Officer) cannot be sure of bringing the proceedings he has started to a premature close if he changes his mind about them, if he withdraws from the case, anyone else can continue the proceedings on behalf of the public. It is unlikely that an ordinary member of the public would take over someone else's prosecution, but the Police may do so and the Director of Public Prosecution has to take over any private prosecution, whether or not the private prosecutor wishes to relinquish it.

VII. **The Elements of Crime:***

(a) **The Elements of Crime in English Law.***

*Actus Non-Facit Reum, Nisi Mens Sit Rea* signifies that there can be no crime without a guilty mind. The literal meaning of the maxim is that an act itself does not make a man guilty unless his intentions were so. The earliest trace of the maxim is to be found in St. Augustine's Sermon, No.118.02.

The implication of this maxim is that in order to make a person criminally liable for an act, it must be proved that a certain event or state of affairs, which is forbidden by law has been caused by his conduct and that the conduct was accompanied by a legally blameworthy attitude of mind. Thus, there are two components of every crime, namely, the physical
element and a mental element. The physical element is known as *actus reus* and the mental element is known as *mens rea*.

1) **Actus Reus.**

The word "Actus" connotes a deed, a physical result of human conduct. The word "Reus" means "forbidden by law". The words "Actus Reus" may be defined as, such result of human conduct as the law seeks to prevent.

*Actus Reus* is made up of three constituent parts, namely:

1. Human action which is usually termed as conduct.

2. The result of such act in the specified circumstances, which is designated as injury.

3. Such act as is forbidden by law.

An act is defined as an event subject to the control of the will. In **other** words an act means something, voluntarily done by a human being, for example, giving a blow, walking, speaking or any external manifestation of one's mind.

An act for the purpose of fixing criminal liability may be analysed to consist of three parts:
1. Its origin in some mental or bodily activity or passivity of the doer, that is a willed movement or omission.

2. Its circumstances.

3. Its consequence.

To constitute a crime there must always be a result brought about by human conduct, a physical event which the law prohibits. **Actus Reus**, therefore, is the result of human conduct and is an event.

Only those acts are crimes which the law has chosen to forbid. An act howsoever reprehensible, it may be is not a crime unless prohibited by law.

**Actus Reus** is one of the essential ingredients of criminal liability. It does not merely refer to an act, active or passive of commission or of omission. It refers to an act done in the presence of certain surrounding material circumstances, as also to the bringing of certain specific circumstances mentioned in the Statute. Selling of milk is not prohibited by any law, but selling of adulterated milk is prohibited by the Prevention of Food Adulteration Act, and therefore, constitutes an Actus Reus. The guilt of an act does not lie in the act itself, but in defiance of the law.
ii) **Mens Rea.**

If the *Actus Reus* of a crime consists of a number of definite consequences and circumstances which in the view of the law constitute an evil to be prevented by criminal sanctions, most blameworthy state of mind with respect to those consequences and circumstances is clear. intention followed by recklessness, negligence and blameworthiness.

The Old English Law had started with the rule of strict liability. The reason was obvious, at that stage, the distinction between tort and crime had not been drawn and the policy of the law was largely influenced by the desire to promote the maintenance of public order by providing simple legal remedies as a substitute for disruptive exercise of self-help. Then again the Courts had no proper machinery for criminal investigation and there was no wide range of penalty which could be adjusted to the variations between the behaviour and the mental attitude of one accused and another. The penalty of punishment at that time consisted of money payment by way of compensation to the wronged person. Therefore, under such circumstances the mental attitude of the wrong-doer was legally irrelevant. Then came an era of reform and development. Punishment as payment of money was substituted by cruel corporal punishment. All these circumstances gave rise to a gradual recognition of mental elements in criminal liability. Later on it became firmly fixed as an essential element of a crime.
Mens Rea is now a technical term, generally taken to mean some blameworthy mental condition, whether constituted by intention or knowledge or otherwise. The absence of it on any particular occasion negatives the contention of a crime. It means, there must be a mind at fault to constitute a crime. In other words no act is Per Se criminal. An act becomes criminal when the actor does it with a guilty mind. There is, however, no single state of mind that must be present as a pre-requisite for all crimes. Mens Rea takes on different colours in different surroundings. What is an evil intent for one kind of offence cannot be so for another kind. For instance in the case of murder, it is the intent to cause death, in the case of theft an intention to steal, in the case of rape an intention to have forceable sexual intercourse with a woman without her consent, in the case of receiving stolen goods, knowledge that the goods were stolen, and in the case of homicide by rash or negligent act, the recklessness or negligence. Therefore, in order to appreciate the meaning of the term Mens Rea, it is necessary to have a clear conception of words like intention, knowledge, recklessness and negligence which are often used to indicate different possible mental attitudes, constituting Mens Rea of a particular crime.

In common parlance, Intention means purpose or desire to bring about the contemplated results or the foresight that certain consequences will follow from the conduct of the
person. A man is presumed to intend the necessary or the natural and probable consequences of his act and this presumption will prevail unless from the consideration of the evidence the Court entertains a reasonable doubt, whether such intention existed or not.

**Knowledge** is the awareness of the consequences of an act. A man may be aware of the consequences of his acts, though he may not intend to bring them about.

Knowledge is distinguishable from **reason to believe**. A person is supposed to know where there is a direct appeal to his senses. Whereas, reason to believe means, sufficient cause to believe a thing but not otherwise. Recklessness is the state of mind of a person who foresees the possible consequences of his conduct, but act without any intention or desire to bring them about. A man is said to be reckless with respect to the consequences of his act if he foresees the probability that it will occur but does not desire it, nor foresees it as certain.

**Negligence** is used to denote want of care and caution which a reasonable man would have taken under the particular circumstances of the case. It is the State of mind of a person who pursues a course of conduct without adverting at all to its consequences.
The principle of Mens Rea thus brings in several states of mind, namely, intention, motive, knowledge, negligence, recklessness and so on. It also introduces those cases where there is no liability, because there is absence of Mens Rea, for example, compulsion, mistake, infancy, insanity, intoxication and necessity and so on.

(b) **Elements of Crime in Indian Law.**

An Offence under the Indian Penal Code consists of three elements or ingredients.

First, an act, using the word act as that word is used in the Indian Penal Code as restricted to the bare physical act, namely, muscular change and what might be called the concomitant circumstances, such as, for example, the instrument employed and as including no part of its consequences, not even the target of the act.

Secondly, the Mens Rea or the mental element accompanying the act, and

Thirdly, the harmful social consequences of the act which is why the law makes it culpable.

The definitions in the Indian Penal Code take note of these elements, although in some, the first and the third element, together constituting what is generally understood by the term Actus Reus in English Law, are combined in one expression.