4.0 AN APPROACH TO THE MANAGEMENT OF CRIME

The social forces have been active through religious precepts art and literary works, social custom usage convention political mandates declarations and enactments to oppose animality and to protect rationality. The human rationality has created the society as protected area against animality. The deliberate invasion into the person or his right is said to be a wrong or injury or offence. An animal can't have any sense or respect for right of others and as such animal or irrational being can't be a responsible member of a society. Animality thus remains as the potential danger or threat to the rational human being. And this very foundation operates as the infinite source of animal like activities or offences causing wrong-injury loss pains-sufferings-damage to other and will remain so for all the time to come. And thus the most important vital and massive activity in society has remained to be the conscious effort and struggle against all expressions of animality causing injury to others.

The purpose of crime management will thus be to prevent cure and eradicate the disease and to protect the patient not to kill him. The investigation and tracing the offender, pursuing and chasing the offender, compensating the victim, depriving the offender of some of his liberties for reformation.

Thus however desirable it is, the human society can't get rid of the criminal activities, in coming near or distant future. So a system of facing and managing the flow of crimes has been established through legal rules, administrative framework and police, the trial of accused through conviction of some of them.

The various wrongful activities done by members of the society have been divided into two broad groups for the convenience of attention, persuasion, trial and remedy. The broader part has been named as civil wrong and the other part the crime or offence. “Writers on English legal history have often mentioned that in early law there was no clear distinction between criminal and civil offenses. --- There is indeed no fundamental or inherent difference between a crime and a tort .... Any conduct which harms an individual to some extent harms society, since society is made up of individuals .... The difference is one of degree only ....”. P-1

Thus the task of crime management has been separated from the other part for effective control and has been given a priority like the fire-brigade or emergency ward of a health care unit of the municipality. And a coherent system of the three organs the substantive and procedural law, the judicial approach, and the police department has been devised to manage the continuous flow of crimes injuring peace stability security and order in the society.

And in view of the fact that man the homo sapiens a biological descendant of a wild creature and as such a carrier of animal instinct modified to an extent varying from pure animality to a high degree of rationality, the base has remained and will remain to be the animality for all the time to come. And the rationality which has been built upon this base of animality is nothing but a fragile superstructure liable to break down under suitable environment. “Even if, juristically speaking, we were not accessories to the crime, we are always, thanks to our human nature, potential criminals. None of us stands outside of humanity’s collective shadow. Whether crime occurred many generations back or happens today, it remains the symptom of a disposition that is always and everywhere present – and one would therefore do well to possess some imagination for evil, for only the fool can permanently disregard the conditions of his own nature. ---Carl – Lung, The undiscovered self.”

And hence the approach to crime management requires to be a systematic approach or to maintain a system of the three coherent organs-namely law –judiciary and police supported by continuous and regular research work on the functioning of the system as a whole.

The control and management of crime means and includes, but not limited to, the successful prosecution or conviction. The entire process of information, detection, reporting, trial and conviction as a whole comes under the system of crime management. This also includes preventive measures, surveillance and censuring potential offenders, recorded offenders and their associates. The present work deals with the control and management of cyber crimes only, being a rapidly growing concern in the cyber space which has been opened to the public use in late 1990s only. The issue of cyber crime, being a part of the crime-generally is also directly connected to the traditional crime management infrastructure in all respects such as concept of crime, principles of criminal liability, procedural law, partly with the present substantive law, law enforcing authorities, judicial approach to trial & punishment, reformation and prison system.

The Information Technology Act has also dealt with the subject of cyber crime. And the policy of crime management under IT Act has divided the subject in two broad groups on U/s 43 under chapter – IX and the other U/s.43 under chapter – IX and other U/s. 65 to S/75 under the chapter – XI. “ Though the focus of the Act is not on cyber crimes as such the Act defines certain offences and penalties that deal with acts and omissions falling under the term cyber crimes. Chapter XI of the Act deals with offences and chapter IX deals with penalties and adjudication. Chapter IX brings a welcome change in the minds of law makers as, may be for the first time, Indian Parliamentarians have come out of their obsession with the idea of ‘criminalisation’ as the sole means of regulating human conduct and upholding societal peace and tranquility and introduced civil liabilities as an alternative”

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The crime management under the IT Act largely depends on the existing crime management infrastructure and the criminal law. And the Act has made some necessary and relevant changes in law of Evidence and the penal code, though however with some deviations of procedural law in relation to the entry search or arrest U/s. 80 “It was this provision for search without warrant in public places, that caused a stir during the discussions on the Bill just prior to passing it into law. However the provision was passed untouched. The provision of a clause of such nature is clearly to try through quick preventive action, to control the misuse of public Internet access systems such as those found at cyber cafes. It may be noted that there can be no search of this nature of private homes or offices and the provisions of the code of criminal procedure, as they stand, will be applicable to such a case. * 4.

The Act also dealt with the issue of ISP liability in relation to cyber crimes and has limited the ISP liability so far they are innocent as to any abuse committed by any user therefrom.

4.1 CONCEPT DEFINITION & ESSENTIALS OF CRIME

Crime as such attracts violent disapproval of the society, subject to time and place of worse. Irregular behavior causing some kind of injury (physical or property related) or to the sense of dignity or any attempt. There for may be classified as a crime. Of course serious violation of moral rules or religious rules may be accepted as a crime.” In a broad sense, crime can be defined as the violation of rules and regulations which are enforced by the State and the Society. Members of every society are expected to act in accordance with its norms and law.* 5

But crime as a legal concept needs clear definition so that the state can identify the criminal and take necessary steps. “The domain of criminal Jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to the crimes and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished. * 6.

6.* Supra – 1 - 1966 – P- 5.
Crime and civil injuries both are wrongful acts but crimes are comparatively graver wrongs, in crude form, causing a sudden alarm in security safety peace and order in society. In crime wrongdoer is personally punished with or without fine. It is also observed that all irregular conducts are not crime but only a part of it has been termed as crime. And this line of separation is not at all universal one – it varies from State to State and also it changes with time – and socio economic changes. “The unsoundness of the classification which was so uncritically accepted in the past can be seen by a consideration of some of the offences which were placed in the one group on the other by Blackstone who was a convinced exponent of the arrangement. Amongst the mala in se, which he described as offences against those rights which God and Nature have established, he included heresy, witchcraft, theft, perjury, breaches of natural duties such for instance, the worship of God, the maintenance of children and the like.* 7. And gradually this approach based on prevailing social moral religious values have been accepted by the State declarations of legal codes. And the political Government. thus finds a freehand to declare any or other act to be criminal one.

As a whole in legal sense crime is that part of human behavior which demands immediate and special attention of the law keepers, in respect of a particular place and time. And hence new areas and wrongs have been included and recognized as crime such as white collar crime as defined by Prof. Sutherland in 1939. He defined it as an act committed by a person of high respectability and status but causes serious financial losses to others.

And again in the late 20th century, the damages and injury caused to the people exploiting the cyber-space and the I C T – has been recognized as cyber – crime. The study and management of this particular area of Crime has been the subject of this present work.

The Information Technology Act – enacted in response to UN Model Law face global challenge of cyber-offences also deals with this particular branch of crime. “To prevent the possible misuse arising out of transactions and other dealings concluded over the electronic medium, it is also proposed to create civil ands criminal liabilities for contravention of the provisions of the proposed legislation. --- [Statement of objects and Reasons – IT Act 21 of 2000]. And the Act imposes criminal liability on some particular acts like Tampering with Computer source document (U/s. 65), Hacking with Computer System U/s. 66, and also publishing of information which is obscene in electronic form (U/s. 67), and accessing a protected computer (U/s. 70).

A precise definition of crime has been attempted by different Jurists for the purposes of criminal law and also to distinguish it from religious and moral wrongs or sin, Stephen described Crime as ‘an act which is forbidden by law and revolting to the moral sentiments of society.’

“Paul W. Tappan defined crime as an intentional act or omission in violation of criminal law, committed without defence or justification and sanctioned by the law as felony or misdemeanor. * 8.

The definition has also been made in a more descriptive manner but with same spirit as follows:

“A crime or offence is an illegal act omission or event, whether or not it is also a tort, a breach of contract or a breach of trust, the principal consequence of which is that the offender, if he is detected and the police decide to prosecute, is prosecuted by or in the name of the state and if he is found guilty is liable to be punished whether or not he is also ordered to compensate his victim. * 9.

Keeping the essential elements same as a traditional crime as above-cyber crime may thus be defined as an intentional act or omission involving information and/or communication system causing injury to information and communication system in violation of information and communication technology law. The IT Act however does not define cyber-crime but provides a list of specific wrongs in chapter IX and chapter XI of which the wrongs described in Chapter – XI have been put under criminal law. Thus the real confusion as to criteria of a crime remains undecided – as it is the criminal law which ultimately decides an act to be or not to be a crime. “So long as crimes continue (as would seen inevitable) to be created by Government policy the nature of crime will elude true definition. * 10.

The concept of crime for all practical purposes can, however, more correctly be understood from the anatomy of the act the actor and the attending circumstances. There must be some essential elements in any crime-situation. “The following elements must be present in every crime :-

(1) A human being under a legal obligation to act in a particular way and a fit subject for the infliction of appropriate punishment;

(2) An evil intent on the part of such a human being;

(3) An act committed or omitted in furtherance of such an intent;

(4) An injury to another human being on to society at large by such act’ *11.

10*. Supra – 1 --- 1966 --- P-5.
Eastern Book Co. – P – 14.
Thus any injurious act or omission must be associated with an evil intent to make the person concerned liable to law.

The rule of *mens-rea* is then the evil intent or criminal intention. "A cardinal principle of criminal law is embodied in the maxim – *act us non facit reum, nisi mens sit rea* – an act does not make a person legally guilty unless the mind is legally blameworthy *12. Thus the two elements – an act (actus reus) and the state of mind (mens-rea) are two basic elements of crime.

Thus where A, intending to kill B shoots at him and caused fatal injury leading to death soon thereafter, A is guilty of murder. And if A failed to hit his target B but kills an animal nearby – then also A will be held liable for the guilty mind of course, for attempting to murder B. But in case the victim would be another human being, A would than be guilty of murder, though by missing the target. R. V. Hopwood (1913) 8. G. Appl. R. 143.

In cyber space the link between the actor and the victim is so remote that the actor can't be said to have any physical contact with the victim in case of hacking, cracking and malicious code. The effect in cyber crime can in no way be compared with gun firing, bombing or missile – attack in real world.

The elements like evil intent and injury are present in cyber crimes but it is really difficult to imagine any cause and effect relation between the actor and the victim in cyber space. The IT Act however has provided for criminal liability of hackers and hacking activities for illegal access in to any computer, computer system or network.

The study of crime, the person committing, the victim and social reaction as a whole certainly is an important branch of social science “Criminal Science is therefore a social study and its aims are to discover the causes of criminality, to devise the most effective methods of reducing its amount and to perfect the machinery for dealing with those who have committed crimes. It has three main branches - criminology, criminal policy and criminal law”. *13. And also that “Criminology is concerned with the causes of crime – and comprises - criminal biology which investigates causes of criminality which may be found in the mental and physical constitution of delinquent himself ( such as hereditary tendencies and physical defects ) and (b) criminal sociology, which deals with enquiries into the effects of environment as a cause of criminality.*14.

The Government of respective territory led by the urge to control crime incidents formulates some policy to take effective measures therefor, so criminal policy is the branch of criminal science which provides for the means and measures to reduce the harmful activities. This includes appropriate administration, arrest, detention, trial and punishment of offenders etc.
And the criminal law is the express concrete provisions of the state criminal policy. The state criminal policy decides the rules of criminal liability and rules of procedure. So criminal law is the instrument of criminal policy.

4.1.1 CAUSATION OF CRIME

Any attempt to control the crimes in society must inquire into the root or causes of crime, otherwise the effect i.e. crime can't be stopped or eradicated, at least minimized. “But it is impossible to check such tendencies absolutely and for various reasons, social, economic, political or psychological, people challenge the norm of the society.” 15. In early Europe the crime management was very crude and unscientific in respect of (a) the determination of criminal liability of the accused, (b) the effect of socio economic conditions of the society and also (c) in respect of sentencing process. “As a result of barbarity and arbitrariness in the criminal law and its processes in Europe in the 18th century the classical school represented by Beccaria and Bentham came into existence.” 16.

Gradually finer and scientific development in criminal law attempted to determine the true extent of the liability of the accused person on due consideration of the attending or accompanying circumstances, socio-economic factors and personal factors. Marchese de Beccaria (1738 – 1794) an advocate of classical school however upheld the free-will theory of criminal liability. But he attempted also to enquire the real causes behind the commission of crimes. And he along with other like Jeremy Bentham (1748 – 1832) opposed severe punishments including capital punishments. And the subject of crime management was thus recognized by him as a branch of social science. The free will concept of classical jurists explained that an individual is free to do the right or wrong thing and will be held liable accordingly.

Further study was carried on by Cesare Lombroso (1836 – 1909) and some others who attempted to explain the origin of crime to be the personal factors like physical biological and mental structure of the accused. And they rejected free-will theory. And Gabriel de Tarde explained that the cause of crime has a root in society itself; the socio-economic conditions. His concept was further developed by William Aldrian Bonger (1876 – 1940). “The most notable and stimulating contribution to criminology in understanding the relation of crime and economic structure by William Aldrian Bonger (1876 – 1940). Who sought to explain the phenomenon of crime on the basis of the Marxist approach.” 17.

Further study on the explanation of crime reveals that group of individuals may engage in criminal activities irrespective of age, social status and other factors. Social institutions like family also may be a source of criminal bent of an individual or an adolescent. According to psychologists, the formation of the basic personality of a child is complete in the first ten or twelve years of his life and it is obvious that the family impact in this period is almost exclusive"*17A. The environmental approach to crime causation also has been recognized by the jurists. Here the cause lies outside the person concerned. The natural tendency to satisfy unlimited desire of an individual on the other hand, can be controlled by moral and religious teachings. The rapid erosion abolition and rejection of these things may have an effect on the causation of crime.

In a sense, every findings or inquiries made in search of the causation of crime has some real values may be of varying degrees. But an integrated approach based on all the findings taken together may be effective. Ferracuti, a psychiatrist and wolfgang, a sociologist, call attention to the need for integrated of the clinical and the sociological approaches to the study of delinquent and criminal behavior. * 18. In true sense, the mental structure of an individual the course of human life, the human society and the subject of livelihood in unstable economic condition collectively contribute to the criminal attitude movement and conduct of an individual or a group of individuals.

The positive school as against the free-will concept of Classical school stresses on social origin of conditions commits or compelled to commit offence. And hence he is not a free agent in society and can’t act on his free-will. “Criminal law though by and large, continues to base responsibility on free will has accepted determinism to a limited extent as manifested in the therapeutic and rehabilitative ideas in the administration of criminal justice and prison reforms. * 19. In cyber space the causation of crime is not much different than in real space. However the temptation to cause a havoc by a simple mouse click without leaving own safe shelter is not a negligible cause behind numerous crimes in the digital world. The IT Act crime management generally relies on existing infrastructure and as such the same concept and approaches equally apply to the IT crimes namely hacking, tampering with digital databases and creation storage and transmission of obscene materials.

4.2.a PRINCIPLES OF CRIMINAL LIABILITY

The crude form of criminal law in early Europe imposed strict liability on the offender making the act. when the ‘positive act’ itself was the focus of the criminal law. And thus a person striking or killing a man by mistake or in self defense also would be strictly liable for the active conduct done by him. CASE :- R – Vs – Martin (1881 ) 8 . Q.B.D. 54

17A * Sup -----8 ----- 1983----- P--52
This position gradually changed through recognition of other accompanying factors like mental element or state of the mind of offender. "It was a phrase which was destined to win general application and to become the best known maxim of English Criminal Law, in the words ultimately used by Coke to express it: Et actus non facit reum nisi mens sit rea. In this famous phrase there is a clear distinction between a man's 'deed' (actus) and his mental processes (mens) at the time when he was engaged in the activity which resulted in the deed. But the expression 'actus reus' covers also results caused by omissions to act in those rare circumstances in which the common law imposes a legal duty to take action." * 20.

CASE: R-Vs-Hilton (1838). R-Vs-Swindall & Osborne (1846) - where rash driving killed a foot passenger.

Thus the harmful consequence of the act or omission (having duty to act) is the point came to be considered to determine liability in criminal law. The other element for determining liability has been the mental element or mensrea. An act (or omission) can't make a person legally guilty unless he has a guilty mind or evil motive. R-Vs-Swindall & Osborne (1846)

In a case: for instance-White (1910) 2 K.B. 124 the accused put a killer poison in the drink of another intending to kill her. And shortly afterwards the person, supposed to take the drink was found dead. The medical evidence however revealed that the death was caused by heart attack not by the poisonous drink and also it was revealed that the strength of the poison administered was insufficient to cause death. The accused was held liable for attempted murder for his guilty mind, though excused from the liability of causing murder.

CASE: R-Vs-Jordan (1956) 40 Cr. App. R. 152 - death was caused by wrong medicine not by stab injury. This was a peculiar case however where actus reus, one of the two essential elements actus reus and the evil intention, is missing. Also R-Vs-Hilton (1838) 2 Lew.214 (TAC)

Similarly in another case - Houghton V Smith 1975 AC 485 1973 All ER 1109
The accused handles some goods by mistaken belief that those were stolen goods and he is the real custodian of those. The accused could not be convicted for handling stolen goods since the goods were not in his custody in legal sense. Here actus reus is absent. Also in R-Vs-Shorty 1950 S.R.280 where death caused by drowning not by assault.

"The expression mens-rea means the mental state expressly or impliedly required by the definition of the offence charged. This varies from offence to offence but typical instances are intention, recklessness, guilty knowledge and malice". * 21.

The mens-rea in recklessness means to take an unjustified risk having full knowledge of it. Guilty knowledge however implies knowledge in any fact situation which has been declared unlawful. But malice means either ill intention or recklessness which necessarily cause injury to others.

In a case

Cunningham – (1957) 2 Q. B. 396 (1957) 2 All E.R. 412

The accused person took away a gas meter, keeping the supply pipe open. The gas coming out therefrom filled the adjoining room causing health hazards to the inmate while in sleep. Here the accused was charged with unlawfully and maliciously causing the victim inmate to inhale noxious thing endangering his life. So malice an element of criminal liability means either actual intention or recklessness likely to cause injury, pain or sufferings to others.

The law of liability has further been refined by the rule of foresight or knowledge of harmful consequence of the act or omission done by the accused. “Thus Bentham stated that the factors which should be considered in every transaction which is examined with a view to punishment are, the act itself; the accompanying circumstances, the intention of the perpetrator his degree of understanding or his perceptive faculties, to be inferred from the nature of the act or from circumstances peculiar to it; the particular motive or motives at its root and the general disposition of which it is indicative”. *22.

In the issue of vicarious liability the master is not held liable for any criminal act or omission of his servant unless he has actually authorized him or aided and abetted him in doing so. Case :- Moreland V The State (1927)139 SE 77.

In Ferguson V Weaving (1951)1 All Er 412

Where visitors were allowed by the servant to come and drink liquor beyond official hours and fell ill. The owner of the bar was held not liable for misdeed if any done by the servant.

A distinct deviation from these established rules of criminal liability however took place in the case of statutory offences in the 19th century, “The general proposition that mens-reas must be presumed to be a necessity in any crime created by statute was once time so fully accepted that it used commonly to be stated that nothing but express words or a very strong implication in the statute itself could rebut the presumption.

Case :-
Fowler V Padget. (1798) 7 TR 509
R V sleep (1861) Laud C at 52

But in the later half of the nineteenth century, the policy of the legislature moved towards more minute regulation of social life by the creation of many non-indictable offences carrying a relatively light punishment and defined in the statutes with greater exactitude than had formerly been the practice.

The result was that the courts were more inclined to have regard solely to the words of the statute without importing the common law requirement of mens-reas. This development became more marked after the case of R V Prince@ in which the accused reasonably believing her to be over the age of sixteen years, had taken a girl, who was in fact below the age, out of the possession and against the will of her father contrary to the words of 24 and 25 Vict. C. 100 S/55. His conviction was upheld by all

22. Supra – 1 --- 1966 --- P – 33.
@ (1875) 2. CCR.154 TAC
the judges save one of the Court for crown cares Reserved ; the words of the statute were plain and made no reference to mens-rea and it was not necessary to read into the section any such words as ‘with-knowledge that she is under sixteen”’. * 23.

In a subsequent case -
Parker V Alder (1899)1. Q. B. 20.
The accused person was charged with milk adulteration. And the adulteration was actually done by a stranger beyond the control and knowledge of the accused. But the accused was held liable and convicted accordingly.

In another case – also Watson V Coupland (1945),1. All. E. R. 217, the accused a dairy farmer was convicted for adulteration of milk. In fact though, however, the offence was committed by a stranger while it passed out of his control.

And thus by the end of 19th century the courts took strict interpretation of the statute words excluding mens rea altogether.

But later – this position was to some extent corrected and moved towards the previous view of mens rea and liability.

In a case –
Kay V Butterworth (1945) 89 S. T. 381

The accused, a driver was charged under Road Traffic Act 1930 due to drowsiness while driving. In fact he was returning home after working at night and fell unconscious while driving as drowsiness was overtaking him. It was observed. “It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out mensre, as constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he had a guilty mind”. * 24.

In Brenda Vs Wood (1946)62 TLR the same view has been upheld.

Also in – State of Maharastra Vs Mayer Hans George AIR 1965 SC 722;

Actually the mensrea can’t be altogether excluded in determination of criminal liability.

In Harding V Price (1948) 1 All E. R. P – 285.

In was observed that were a duty was to report but the reporting can’t be done of which the person himself has no knowledge.

So in the cases of statutory offences the first essential task is to make a careful scrutiny of the statute words, if no authoritative interpretation of court are available the common rules of construction are to be employed. And the principle of no liability in case of in voluntary actions is to be applied along with the rule of common law mens rea, as far as possible. The rule of mens rea actually is almost paralyzed by straight prohibited words of the statute. The simple prohibition in a statute takes away the defense of mens rea.

22. Supra – 1 --- 1966 --- P – 33.
And it has been recognized that out of the four stages of the commission, the first one the
intention alone can’t be a ground of criminal liability. But sometime ‘preparation’ to commit
a crime has been held to make a person liable to criminal law. But attempt has been
recognized as serious as commission of the crime itself.

The administration of criminal law however presupposes the existence of a clear legal
 provision prohibiting the wrongful conduct in question through the maxim nullum peona sine
lege. This has been effectively applied in case of statutory offences in modern states.

4.2.b. Liability in cyber space crimes

No consistent principle of criminal liability has yet been developed for the purposes of cyber
space. The judicial pronouncements made so far have been conflicting and inconsistent with
the traditional rules of criminal liability.

In the cases of hacking, the most prominent and widespread among the various forms
of cyber wrongs the link between the actor and the victim machine is so remote that no
prevailing concept of liability can justify the hackers liability in causing any injury to the
person concerned. “In examining the body as the primary locus for the juridical construction
of the hacker, it becomes readily apparent that the notion of virtual crime problematizes the
Law at its’ most basic level. Perhaps as important, the non-corporeal nature of hacking has
yet to be grasped and understood by both law enforcement and the mainstream media. As a
result, hackers are continually defined in corporeal terms in an effort to reattach the act of
hacking to a physical presence .......... As a result outmoded standards of legality and
characterizations of criminality are forced upon hackers and in the process retroactively
reconstruct their activities as ‘criminal’.,” *25

Hacking presupposes access into the device which may or may not be authorized
access. Actually there is no physical access by the hacker himself or even not by any material
or tangible instrument as such is put or sent or attached to the concerned computer. The
hacker in reality through intelligent programs/software views the data resources kept therein.
This process of gaining a full view or as far as possible picture of the digital reserve may
only be compared with the process of using a telescope to have a view of a foreign territory
or by satellite survey from the deep-space or by some other technical means and analysis.

And so far these accesses to the interior territory of a state by other states can’t attract
criminal liability the hackers’ activity also in the same sense can’t be made illegal. Cyber
space as such is an open space and any notice prohibiting access there in can stop the
physical access of any person but can’t stop technical access through any suitable devices
like telescope, photography, or the access of light, air or sound.

The blue tooth technology of remote wireless access already raised the question on
legal the illegal access. And the intruding hacker himself does not take the access, but his
device actually the software program takes the access. And this device is so much abstract
and truly intangible in all sense of the term, that this access can’t have any legal implication
in the present legal concept.

Moreover the hacking program is nothing but an intelligent instruction to the target
machine to send a copy of the entire database to a suitable machine so selected and the
hacker gets a view of it there in the 2nd machine (generally a server). So in technical sense of

the term it is not a case of access by hacker to the database, but getting a technically aided view of the digital store house like a view through a telescopic camera.

So in many respects the so called access by hacker is not at all access in legal sense. So the liability for trespass can’t be attributed to the hacker. “We must understand that the virtual presence of the hacker is never enough to constitute crime – what is always needed is a body a real body a live body, through which law can institute its well-established exercises of power.” * 26. At best the statutory liability can be imposed in the cases of cyber – wrongs. keeping them altogether outside the scope of criminal science.

However in making the hackers criminally liable in the eye of law the prevailing and widespread practice is to make charges for keeping or possessing of the devices and softwares to get unauthorized access. Hackers are often charged with the possession of hardwares, softwares or other access devices. If the possession of technical goods devices or tools can be made illegal, how long the possession of technical knowledge creating the tools be kept outside the reach of criminal law is a reasonable apprehension, of course:

To have a view of the contents in digital devices can’t be made punishable in the prevailing rules of criminal science. The famous media company Google Inc has opened Google Earth website to provide through the Internet the satellite photos of the earth-surface. And it is observed by the Government of India through the Hon’ble President APJ Abdul Kalam. “When you look deeper into it, you would realize that laws in some countries regarding spatial observations over their territories and UN recommendations about the display of spatial observations are inadequate.” * 27

In-American Civil Liberties Union (ACLU)

Vs

Reno – 1996 WL 65464 (ED Pa.).

Running a porn website has been declared illegal. But where adult literature, film and artistic creations are not illegal, a website content (being obscene hence injurious) being accessible to children, can’t be declared illegal by virtue of the prevailing legal principles.

And the rules of criminal liability of the real world find no recognition in the cyber space. In a case : - Minnesota V Granite Gate Resorts Inc. 65 USLW 2440 1996 WL 767431. Gambling through website has been declared illegal. In real space the wagering contracts (or gambling) are not enforceable by law but it is allowed within a particular section, group community or in a particular situation of time and place where law can’t intervene. The liberty though restricted, thus can’t be altogether denied in cyberspace.

In most cases of virus attacks – the link between the creator and the victim machines or network is so remote uncertain that no principle of criminal liability be applied to hold the creator liable for injuries, if any, caused. In many cases, the creator could not be traced at all such as .......... code Red ............ I love you bugs.

Changing the content of any digital device kept on line can’t be, again, reasonably linked with the alleged person. The method applied here is nearer to magic-words but far away from legally acceptable device or means. And any magical words or power can’t be a subject of law. The complainant, keeping his device on-line has voluntarily exposed the materials to the risk of being changed or deleted altogether.

26 * Sup. 25 -------------- 2000 --------------- P – 21.
27*APJ Abdul Kalam. President GOI The Statesman 16 – 10 – 05…… P--
And downloading of data from database of another person can't be compared with theft of tangible goods. In this case there is no removal or displacement of the materials in question unlike common cases of theft. At best it may be compared with the taking of a photographic shot of something kept in open space, unguarded and unprotected. And this act can't be said to be an act of theft and hence a criminal act. "With physical objects it is easy to understand the crime of theft, of depriving some one of the possession and use of physical property. With information, the issue is more complex. When a hacker copies a piece of information or even views it without permission, is he or she guilty of theft? ----- In doing so they pose fundamental challenges to the structure of the law and the value and definition of property." * 28.

The IT Act has provided for criminal liability in the case of tampering (U/s. 65) hacking (S/66) (S/70) and creation of obscene materials (U/s. 67) and some other U/43.

In view of the peculiar characteristics of the cyber crimes, the traditional principles of criminal liability like mens rea, actus reus, voluntary conduct, injury and human actor etc. can't be applied to hold the hacker liable for criminal offense.

But the statutory prohibition on the other hand has provided for the criminal liability in such cases and has linked the person concerned the offender with the loss or injury caused to the victim.

"In the first category wrongs (S/43,44,45) are not subjected to criminalisation and mens rea is not made applicable to them. These acts or omissions are subject to strict liability and civil penalties in the form of fine etc. are prescribed for them.

In the second category of offences like tampering with computer source documents (S/65) hacking with computer system (S/66) and publication for fraudulent purposes (S/74), mens rea has been made an integral part of the definition of the offence itself, by including term like 'knowledge' or intention' there in. Finally, there are some other acts or omissions that are met with criminal liability under strict liability principle (S/71 to 73 of IT Act 2000)." * 29.

It has been observed that irrespective of universal principles of criminal liability, any statute can impose liability by way of prohibition. But the later developments have established that unless the statute rules out the application of mens rea in express terms the universal principles of criminal liability would be applied in statutory offences as well.

29*. ---Sup---3-----------------2004-------------------P----157
For very obvious reasons like peace and progress stability and tranquility every society maintains its own system to control undesirable and violent activities done by a section of the society or individuals. In early days the monarchs used to apply state power to control the criminal activities like loot, arson and murder. "In the first stages of national development there is little or no police organization and the sanctions of crime are feely left to the hands of the ordinary citizen." *30 In course of social development a systematic process was developed to deal with the issues of criminal activities and the state enlisted the criminal offences in order of gravity and continued to add more and more items in the list of crimes with a view to control and guide the conduct of citizens.

The subject of crime management on further development provided for the creation of criminal science. And Criminal Science again has three distinct parts—namely criminology, criminal policy and the criminal law. "Criminal science is therefore a social study and its aims are to discover the causes of criminality to devise the most effective methods for reducing its amount and to perfect the machinery for dealing with those who have committed crimes. It has three main branches criminology, criminal policy and criminal Law." *31. The subject of criminology deals with the causes of crime from the view point of physical and mental constitution of the criminal (criminal biology). And it also studied the effect of social environment as a cause of criminality (criminal sociology). The criminal policy deals with the various methods to prevent the commission of wrongs and also the measures to be taken to deal with the offenders.

The third branch, the criminal law provides the detail description of the criminal activities through a list of crimes, rules of procedures to investigate and the methods of trial nature and quantum of sanctions. The criminal policy actually decides the principles and rules for making the list of criminal wrongs.

Law operates as a control mechanism by itself through detection investigation trial and punishment. "Law is an instrument of social control and is part of the total system of control in society. Law is not only based on the values of society but is also based on the perceived need to maintain conformity to society’s rules and regulations." *32 Though however the legal control of crime being the most effective means, there is need of other methods to control crimes like moral education, religious teachings and social environment etc. In old days these were the only effective control mechanism against all irregular wrongful and injurious activities done by members of the society. The accepted principles as to the function of law in crime management is that law cant interfere into the transactions of private life of the people. Hence law cant criminalize this or that behaviour so long its is confined within the private life of the people. The Wolfendon Committee in UK has clarified the position as to law and private life of a citizen. "The Committee observed that the function of criminal law is to preserve public order and decency, to protect citizens from what is offensive or injurious and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are young, weak in body or mind, in experienced or in a state of physical official or economic dependence.
It is not the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour further than is necessary to carry out the above purposes.” *33. Cyber crimes being an addition to the traditional crimes all the general rules and principles equally become applicable to it also. The peculiar nature of cyberspace however demands some new methods and rules to manage the various issues relating to the crimes and criminal here.

The IT Act has provided the cyber wrongs in two groups to be tried differently one through special cyber adjudicating body and the other through the prevailing criminal courts and the infrastructure for crime management.

4.3.1 APPROACHES TO MANAGEMENT OF CRIMINALS

The management of crime necessarily focuses on the treatment with the accused persons i.e. criminals. Elmer Hubert Johnson in his book, “Crime Correction and Society” observed that “he (criminal) may be described as a monster or be pictured as a hunted animal or as the helpless victim of brutality.” *34 However with the advancement of criminal Science the severe attitude towards the accused persons and criminals has been changed by slow degrees. So far three modes of administrative actions have been developed. The first one is the most prominent and traditional one that is punitive approach. (This view upholds the need of punishment pain and sufferings to stop the criminal activity and thereby to protect the society)”. But the recent approach is called the therapeutic view, where the accused criminal is considered as a sick person who needs care and sympathetic treatment for reformation. This view holds that the offender, is a victim of hostile circumstances which led him to the commission of crime. The other view is known as the preventive approach which takes care to remove the causes of crime.

The first and natural social reaction to crime was passion for revenge. The punishment was very crude and inhuman in the early age. Gradually however it was rationalized and reduced. The concept of retribution was advanced by jurists and thinkers like sir James Stephens, Immanuel Kant. They explained that the offender should suffer as much pain and suffering as was inflicted by him on the victim. The need of punishment was also upheld by the theory of utilitarianism which explained that punishment ultimately reduces the criminal activities in a society.

One judicial pronouncement explained that a thief would be hanged not because the offence of theft committed by him but because it would restrain others from committing theft. The deterrent effect of punishment has been upheld until recent years. The form of punishment in this regard has also undergone great changes. Before the rise of new concepts of criminal justice, crude form of punishments like flogging, mutilation, branding hanging were the recognized mode of corporeal punishments. In India the Whipping Act 1864 (1909) was abolished only in 1955.

Other forms of punishments like forfeiture, confiscation of property, heavy fines were also used. And the latest reform of punishment system has given rise to the imprisonment of the person concerned. And the object here remains to deprive the offender of his right to liberty to do all kinds of social activities and interactions with relations, friends and known or unknown persons.

33 * Sup – 8 1983 P – 6
34 * Sup – 8 1983 P – 63
With the very much revolutionary changes in the form of punishment, the system of capital punishment has also been abolished in many European countries.

In India the bill to abolish the capital punishment was rejected by the Lok Sabha in 1956. And the 35th Law commission also failed to propose and recommend the abolition of it.

In the case:-

Jagmohan Sing
-Vs-

the Supreme Court rejected the contention of the accused, declared that capital punishment was constitutionally valid, and not violative of A/21 the right to life. And also that the capital punishment was not unreasonable per se.

The second or modern approach to the treatment of criminals is the therapeutic approach. In this theory the offender is considered as a normal human being but is suffering from some cultural and moral defects. And this lack of balance in his mind thus can be corrected through suitable process treatment and environment. And hence the theory of punishment underwent serious changes under this concept and reform of prison was taken up in various countries. “since penal reforms are mostly reflected in prison reform during the last two centuries or so, the study of the therapeutic approach can be taken up beginning with prison reforms”. *35. In India the prison reform was seriously taken up in 1950s.

Dr. W. C. Reckless an expert of the UNO was invited in India to make his recommendations on this issue. And the All India Jail Manual was prepared in 1957 on the basis of his observations. This new approach i.e. therapeutic view was given importance in his recommendations, some of which were correctional services, probation system, abolition of solitary confinement, and periodic revision of the Jail Manuals in each state.

The cruel treatment inside prison has been denounced by the Supreme Court in different cases. *Sunil Batra(II) Versus Delhi Administration (1980) 3 SCC. 488: 1980 SCC (cri )777.

* Dharmbir v State of Uttarpradesh –
(1979) 3 SCC 645; 1979 SCC (Cri) 862.

Some other soft mode of alternative punishments were introduced like probation and parole. The purpose of probation is to protect an offender from the influence of hardcore criminals in prison life.

In *Abdul Qayum Vs state of Bihar (1972) Scc103 it was observed by the Supreme Court that there was no previous conviction prior to this case and also there was no report against his character, the accused (16 years of age )might be released on probation against his imprisonment for the commission of theft of Rs. 561 only by pick pocketing. United Nations Economic and Social Council in 1951 had recommended for adoption of probation system generally by all member countries. And in 1958 India passed the Probation of Offenders Act 1958 to provide for alternative system in suitable cases of conviction.

The other system of parole was also introduced to remove the harmful effects of imprisonment upon the convicted person and this system provides better opportunity to reform himself and to lead a normal life.

*In the case : Hiralal Mallick Vs State of Bihar (1997)4 SCC. 44 1977 SCC 538 - the accused (12 yr) a boy was convicted for causing grievous hurt and

*35 Sup ---- 8 ---- 1983 -------- P ---- 96
awarded 8 years imprisonment. The supreme Court allowed parole (subject to suitable safeguards) in order to have frequent visit to his family.

The Juvenile delinquency also has been treated with the new approach with reformatory view. The irregular conducts like indecent behaviour, habitual absence from schools, doing illegal acts, traveling without ticket, smoking or drinking, using vulgar and obscene materials, joining criminal gangs etc. The United Nations in its London congress in 1960 provided a guideline to deal with the juvenile delinquency. In UK and USA the Juvenile courts have been established to give special treatment to these minor offenders.

In India the Children Act 1960 defined a delinquent child to be a boy under 16 years of age and a girl under 18 years of age. And the offence under this Act meant any act or omission punishable under any law in force for the time being. The Act includes neglected child who is found begging, or being without any shelter or home or having no parents or parents incapable to maintain him or a boy or girl living in a brothel or with a prostitute. In India as a whole the therapeutic view has found wide application with success along with punitive measures as well. In case of cyber criminals also the notion of reformation has been recognized in western countries. The courts in US in many cyber trials provide for alternative and corrective methods like community service, parole and probation. Case: Carlos (SMAK) Salgado (37 year) of California was convicted in 1997 for credit card theft and was sentenced to two and a half years of imprisonment and five years of probation during which he was prohibited from having access to any computers.

In India, however the cyber trials being very few till now, the scope of such reformatory measures are quite possible in law and in equity in appropriate cases.

4.3.2 SUBSTANTIVE AND PROCEDURAL LAWS

The very essential criteria of a crime has remained to be the willful and deliberate violation of some established norms, values or moral sentiment of the society. Paul Tappan has defined crime to be an intentional act or omission in violation of criminal law, committed without defense or justification. So for the purposes of legal control of crime-clear legal provisions are necessary to hold a person liable for it.

Hence systematic codification of criminal law has been an essential feature in modern societies for criminal administration through police and criminal courts. The Government enforces its criminal policy through the criminal laws – comprising both the substantive and procedural provisions. In England however, no exhaustive code provides for a systematic arrangement of criminal acts, still however there are either declaratory statutes or common law rules sand authoritative judgments. “Our system of criminal law is not as is the case in some countries contained in a single code promulgated by a legislative body. It is, on the contrary, a conglomerate mass of rules based upon the ancient common law of England as modified and extended by the authoritative decisions of the judges in the long passage of history and vastly enlarged by the addition of statutory enactments made by Parliament from time to time, to meet the needs of the moment. For a proper understanding of our criminal system, it is therefore necessary to begin with a study of the common law, for as Blackstone wrote: ‘Statutes also are either declaratory of the common law, or remedial of some defects therein.’” * 36. By now, it has been an established universal principle of criminal Jurisprudence that no person can be charged with any offence which has no mention in law ‘nullum peona sine lege’.
In states other than UK, the legislative enactments provide the basis of criminal law, which include and describe different types of crimes along with the nature and extent of punishments in the form of imprisonment and/or fine. And the rules of procedure as to the application of the law like investigation search, seizure, prosecution, arrest trial evidence, witnesses, punishment and appeals have been framed and codified for the convenience of the administration of criminal justice.

**INDIA**

In India the administration of criminal justice was modernized by the British Jurists. “The general substantive criminal law, operative throughout the country, is laid down in the Indian Penal Code enacted in the year 1860. The Code, well known for its' skilful drafting, was the creation of Macaulay and his colleagues, some minor changes have been made in the code since then but by and large, it has retained its - original form and content. The Penal code incorporates various theories and principles of the common law of England with some modifications here and there to suit the Indian condition.” *37. The code thus provides a general guideline for code of conduct of the citizens in the negative sense.

So the IPC-1860 has been the general code of criminal law but many other statutes have been enacted from time to time to form the general body of substantive criminal law in the country. The subsequent statutory provisions relate to various social and economic, legislations as to food adulteration, dowry prohibition, narcotics, corruption, untouchability foreign exchange, environment, human right, domestic violence, etc. A hierarchy of criminal courts and procedural rules had been framed and codified through the Code of Criminal Procedure –1898 and then revised and updated in 1973. the procedural laws incorporate various universal rules and principles of criminal law like presumption of innocence, double jeopardy, self-incrimination, etc. and also the law of Jurisdiction. The rules of evidence at the same time during 19th Century law reform in India, were codified in The Indian Evidence Act – 1872. The Indian evidence Act – 1872 in reality accommodated all the universal principles of evidence, necessary in both civil and criminal proceedings.

In Cyber space also the legal community can’t but apply the apply the same rules and principles as well, though with much reservation and anomaly "Hackers, as pioneers on the digital frontier, find themselves at the limits of the law, in a space where commonly accepted notions of law and order become complex and uncertain. The most basic example that of trespass, is utterly confounded by notions of virtual space. How can a hacker be accused of trespassing on someone else's property when his or her physical presence is located hundreds or even thousands of miles away?" *38.

But USA the motherland of cyber space along with some European countries were compelled to fight the battle of Don Quixote. And under the legal principle of nullum peona Sine Lege - the Legal provisions prohibiting activity related to Computer crime - were enacted like US Federal Criminal Code Related to Computer crime, UK computer Misuse Act – 1990, German Criminal Code-1998, Anti Corruption Law on Preventing and Fighting Cyber Crime (Romania) Cyber Crime Act 2001. (Australia) etc. But existing principles and rules on criminal liability, jurisdiction and evidence can’t be applied in virtual space without some necessary modifications (yet to be made). In Minnesota V Granite Gate Resorts Inc 65 USLW, 1996 – the Minnesota A G asserted the right to regulate (to find Jurisdiction) On Line gambling service based in another state Nevada in the case.

Again, in*Playboy Enterprises Inc. Vs. Chuckleberry Publishing Inc. 989F-Supp. 1032

37 * Sup – 8 --------------- 1983 ----------- P – 256
38 * Sup – 25 --------------- 2000 ----------- P – 15
the Court observed that the defendant could not be prohibited from operating its Web site merely because the site was accessible from within a country, which had banned its product.

In *Digital Equipment Corporation. v. Altavista Technology Inc.* Civ Action 96-121292 NG (D. Mass. Mar 12, 1997), the Court raised the question whether any web activity done without commercial intent would be sufficient to permit the assertion of jurisdiction over a foreign defendant. The Law on Cyber crime in India is comprised of the Information Technology Act – 2000, the Indian Penal Code – 1860 the Indian Evidence Act-1872, the Criminal Procedure Code –1973 along with all the IT rules regulations and orders UN guidelines, and relevant amendments in different other Acts, Rules and Regulations. All the basic guidelines emanating from the Constitution of India, UN Declarations on Human rights, provisions of the International Covenant on Civil and Political Rights -ICPR -1966, and the Universal Principles of Criminal law equally apply to the subject of cyber-crime management in India – just as they apply to the area of traditional crime. “Indian legal response to cyber crime as well as the IT revolution is mainly limited to this Act and Rules and Regulations made there under.”

A group of Cyber-wrongs in Chapter-IX attracting civil liabilities have been placed under adjudicating officer (U/s-46), then Cyber Regulation Appellate Tribunal (U/s-48-57) and then High Court (U/s-62) for some reasons, not clarified in the Act. But some others as in Chapter – XI have been placed under the existing criminal courts and the criminal law.

4.3.2a – SOME RULES & PRINCIPLES OF CRIMINAL LAW

(a) The beginning of criminal trial or prosecution can take place only where there is a clear violation of some Law, “The fundamental principle of criminal law is that no one can be found guilty of an offence without his having violated some predetermined Law defining a prohibited conduct. The principle is expressed by the maxim-nullum peona sine lege”.

The same rule has been incorporated in the constitution of India in part – III Article – 20 (1) – which provides that “ No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.”

(b) In common law countries like India where the accusatorial system is followed in criminal trials – the accused person is presumed to be an innocent person and he is given due protection and status as a law abiding citizen. And this protection continues till the charges against him are proved beyond all reasonable doubts. And in no way the life and liberty of the accused is disturbed or attacked only for the reason of allegations made against him. This rule of presumption of innocence is very vital for all criminal trials and as such has been incorporated in international documents. The International Covenant on Civil And Political Rights – 1966 provides under Article – 14(2) that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

(c) One important rule of criminal law is that a person can’t be tried and punished twice for one and the same offence. The constitution also provides the same rule U/A-20 (2) “No person shall be prosecuted and punished for the same offence more than once.”
The same rule has been incorporated in the International Covenant on Civil and Political Rights 1966 -- U/Article 14(7) -- No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. The criminal procedure code also provides the same u/s 300 in India.

The rule of 'no self-incrimination' is another vital measure against interested and superior forces operating upon any accused person. A cardinal principle of English criminal law is that the accused can't be compelled to give evidence against himself. The Constitution provides the same rule u/Article-20(3)-No person accused of any offence shall be compelled to be a witness against himself. And the rule is also provided in the I C P R - 1966 u/Article - 14 (3) g - Not to be compelled to testify against himself or to confess guilt.

One important rule, “the rule of ex-post facto law” provides that no person shall be punished, if lawfully proved guilty, by a term more than the quantum provided in the law in force at the time of the commission of the offence. This rule is provided in the Constitution of India u/Article-20 (1) – No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence.

4.3.2 b RULES ON EVIDENCE

The main thrust of the criminal trial is directed to protect the innocent from false charges made by one shrewd and powerful person in-collaboration with corrupt people. So this spirit is better explained by the saying “it is better that ninety nine guilty men should escape than that one innocent person should be unjustly convicted”. And it is observed by one famous English Jurist. “Moreover the constitutional value of our stringency is great. For it has done much towards producing that general confidence in our Criminal Courts which has kept popular feeling in full sympathy with the administration of the criminal law and has there by facilitated the task of government to an extent surprising to some foreign observers.” *42. According to Prof. Kenny, some presumptions are applied to decide any Questions of fact, as an alternative to actual evidence. Some of these presumptions are presumption of innocence, all things are presumed to have been done in the due and wanted manner, everyman is presumed to be sane until the contrary is proved.

In addition to the usual presumptions – the tribunal mostly depends on the evidence which are grouped into three classes as oral evidence, documentary evidence and non-documentary evidence (like-blood stains, smell, finger prints, footmarks, noise, hair or piece of thread. But in another way, evidence has been divided into two parts – direct and indirect evidence. Direct evidence is the testimonial evidence relating to the fact in issue. And the indirect evidence or circumstantial evidence has been known to be all other evidence-comprising documentary, non-documentary evidence-comprising documentary, non-documentary evidence-and some oral evidence relating to some fact in issue like evidence given by handwriting expert. All the circumstantial or indirect evidences are considered full of risks due to various reasons as veracity, accuracy of observation, mistake, forgetfulness, falsehood of the witness concerned.
SOME GENERAL RULES OF EVIDENCE

In the seventeenth century, the rules of evidence were gradually formed for the first time in the civil litigation and then these were accepted in criminal trials. And by now these rules are followed more strictly in criminal trials than in civil cases. Burden of proof - The general rule is that any person making a positive assertion as to fact or right must prove his case. This burden of proof of the main issue is much heavier in a criminal case than in a civil litigation.

The chapter – VII under –part – III of the Indian Evidence Act-1872 provides for the general rules on the issue of burden of proof in a trial. The relevant provisions u/s – 101 and 102 provide the universal rules on the issue 8/101 – Burden of Proof – whoever desires any court to give Judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove the existence of any fact, it is said that the burden of proof lies on that person.

Best evidence rule says that the content of a document or letter may be proved only by the production of it and not by an oral evidence of a witness exceptions however to prove as its existence or where about. “The best evidence must be given or its absence must be accounted for. The rule is still usually stated in this traditional and general form, but its actual application is nowadays, limited to one particular case Viz., the proof of the contents of a written document.” * 43.

The rule of exclusion of “hearsay evidence” says that a person can’t give another persons direct evidence. The oral hearsay evidence may be relevant but excluded on the ground of unreliability. “It is a fundamental rule of English law (with a few exceptions) that such second hand direct evidence is not permitted to be given in court for the purpose of establishing the facts alleged by the person who uttered it at first hand’ – *case :- Samson Yardley Vs Tottill (1667) 2 keble 223-* 44. The rule has been incorporated in the Indian Evidence Act. 1872 through the section-60, providing for oral direct evidence and , statement of facts contained in newspaper has no independent evidentiary value. It can support substantive evidence AIR 1969 SC 1201; (1969) 3 SCC 238.

The rule ‘res gestae’ provides that some accompanying facts forming the part of the same transactions or fact-in-issue – may be admitted as evidence. “Res gestae therefore comprise all relevant facts all events which either are in issue or though not themselves in issue. yet accompany some fact which is in issue so as to constitute circumstantial evidence which goes to explain or establish that fact.” * 45. The rule of res gestae has been included in the Indian Evidence Act 1872 u/Sect-6 as follows. Relevancy of facts forming part of same transaction- Facts which though not in issue, are so connected with a fact in issue, as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places.

*Case : Sukher V state (1999) 9. See 50, where the accused fired at the victim when he raised an alarm, The witnesses hearing the alarm rushed to the spot when the victim fell down and the accused fled away. The witnesses stated that the injured told them that the accused (by name) fired at him. Their evidence was admitted as res gestae.
The Indian Evidence Act – 1872 was drafted by the then English Jurist and accommodated all the basic rules of evidence there in. In India the rules of English law of evidence have been codified in the Indian Evidence Act – 1872. The main principles underlying the law of evidence are the following:

1. Evidence must be confined to the matters in issue.
2. Hearsay evidence must not be admitted.
3. The best evidence out of what is available must be given in all cases. *46

One important deviation from the general rule of evidences is the evidence of an accomplice. This rule has been accepted in both in English and Indian Evidence laws. The Indian Evidence Act- 1872 provides this rule u/s-133 subject to s/114 (b) of course which states. The court may presume…. (b) That an accomplice is unworthy of credit unless he is corroborated in material particulars.

The rule on confession made by the accused person is that such statement is relevant and admitted as valid evidence against him subject to however some safeguards. The rule has been included in Evidence Act- 1872 u/s-24, 25, 26, 28, and 29. The confession made by one accused person is valuable evidence provided it has been made voluntarily before the magistrate – not before any police officer while in custody.

4.3.2b(1)- EVIDENCE IN CYBER SPACE

The law of evidence applied in real space has been the basis of criminal trials in cyber space as well. Because the purpose of the law of evidence is to provide some rules as admission and the analysis of evidences there from. And it is also true in cyberspace crimes as well that “the prosecution must adduce prima facie evidences of the accused guilt for otherwise there is no case to answer and the judge declares an acquittal, this means only that the prosecution must adduce sufficient evidence of the actus reus and mens rea mentioned in the definition of the offence charged.” *47 The proof of some fact of offence may be aided by some presumptions such as presumption of fact and presumption of law, the presumption of law may be one that a boy under 14 years is incapable of committing rape or like unlawful intercourse. This is ir-rebuttable presumption of law.

In real space the rules of evidence and rules of presumptions are based on physical presence, participation and trespass. But in cyber wrongs involving access to other networks or data bases – the traditional concepts of physical contact and presence can’t be proved. So in electronic space – criminals enjoy great privacy and secrecy and very little movement (actus reus) of his physical person.

The mens rea alone is not punishable at all in law and the actus reus through an electronic medium can’t be proved unless a wholesale monitoring of the transactions in cyber space is arranged. But this wholesale monitoring is an uphill task. “All I P packets include I P addresses for the sender and the receiver of the packet. Packets travel through a series of routers as they progress from sender to receiver in I P networks. The destination I P address in each packet is used by the routers to determine what path each packet should take on its way toward the receiver.

Because the forwarding decision is made separately for each packet, the individual packets that make up a single data transmission may travel different path through the

46* sup-8------1983------p-563
47*sup-9-------------1976-------------------p-53
network. For this reason, someone monitoring the Internet at an arbitrary point, even a point located between a sender and receiver, might not be able to collect all of the packet that make up a complete massage. As monitoring takes place closer to the end user's computer or the source of the transmission, the probability of collecting all of the packets of a given message increases. Thus monitoring the Internet to steal content or to see what content is being transferred for rights enforcement purposes can be difficult."

The collection of evidence to prove the actus reus (its actual conduct) and the mens rea (evil intention) is the primary task to prove the crimes in the cyber space.

This presupposes the admissibility and recognition of electronic record and data kept in suitable digital forms in suitable devices like floppy CD etc. Employing necessary safeguards against any alteration addition or dilation of the data. In this regard the doctrine of chain-of custody is applied.

"In order to prove the crime, evidence must be submitted to the court. The process of gathering this evidence by official is known as a search and seizure and is governed, by the Fourth Amendment. Under the Fourth Amendment, government in general is prohibited from conducting a search and seizure is done unless pursuant to search warrant. Those warrants must be ‘narrowly drawn’ stating with particularly the items to be searched or seized. Should these rules not be observed, evidence from the defective search may not be admissible in court, Furthermore, in such a case the government may be liable for civil damages under the privacy protection. Act.*-- United States Vs Hunter, 13F supp. 2d, 574 (D.Vt, 1998).*49.

The legal recognition of electronic data- was the first step towards this through various legislations including UN guideline in UNICITRAL – Model law. The UN model law – 1998 –

provides as follows: -

Article-5 - Legal Recognition of data messages – Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message. Article -9- admissibility and evidential weight of data messages – (1) In any legal proceedings nothing in the application of the rules of evidence shall apply so as to deny the admissibility of data message in evidence.

(a) on the sole ground that at is a data message : or
(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain on the grounds that it is not in its original form.

(2) Information in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated to the reliability of the manner in which the integrity of the information was maintained to the manner in which its originator was identified, and to any other relevant factor.

And the Singapore electronic transactions Act—1998 provides for legal recognition of electronic data- as follows S/6-legal recognition of electronic records :- for the avoidance doubt it is declared that information shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic record. And the same Act provides for proper retention of electronic records (u/s-9) subject to some precautionary rules.

And the Singapore electronic transactions Act—1998 provides for legal recognition of electronic data- as follows S/6-legal recognition of electronic records :- for the avoidance doubt it is declared that information shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic record. And the same Act provides for proper retention of electronic records (u/s-9) subject to some precautionary rules.

Many other national legislation- provides for the legal recognition and admissibility of the electronic record in any civil or criminal trials.

49* G.R Ferrera & others – Cyberlaw: your right in cyber space-2005

In India, the Information Technology Act also provides for the same u/s-

Legal Recognition Of Electronic Records

Where any law provides that information or any other matter shall be in the typewritten or printed form, then notwithstanding anything contained in such law such requirement shall be deemed to have been satisfied if such information or matter is-

(a) Rendered or made available in an electronic form and

(c) Accessible so as to be usable for a subsequent reference. And S/6 of the IT Act provides for some standard rules as to the retention of the same electronic records, to make it admissible in any subsequent litigation. The Indian Evidence Act 1872 after amendment also provides for the necessary recognition of the electronic record.

U/S. 2 - Evidence - Evidence - means and includes-

All statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry.

Such statements are called oral evidence

(a) All documents including electronic records produced for the inspection of the court

Such documents are called documentary evidence.

The data collected through monitoring the victim computer or that of the accused raises two legal questions. The first is the violation of the right to privacy and the second is the non-admission of the data information collected by law enforcing agencies with or without permission of the court of law. Further the data information so collected requires to be corroborated by appropriate witness. The problem however stands solved where the accused makes a valid confession admitting the guilt which is a very remote possibility. In some cases in US the accused confessed his guilt of course there were already strong evidence collected by the investigating officers against the accused.

The Indian Evidence Act 1872 has accommodated through amendments the necessary provisions relating to evidence in electronic form such as S/22A - When oral admission as to contents of electronic records are relevant, S/47A - Opinion as to digital signature when relevant, S/65A- Special provisions as to evidence relating to electronic record; S/65 B Admissibility of electronic records S/67 A - Proof as to digital signature S/73A - Proof as to verification of digital signature, S/81A - Presumption as to electronic agreements; S/85B- Presumption as to electronic records and digital signature S/85c- Presumption as to digital signature certificate S/88A Presumption as to electronic messages, S/90A - Presumption as to electronic records five years old.

In addition to IT Act, some more rules and regulations have been framed for the purposes of the management of cyber crime. These are the IT (certifying Authority) Rules-2000.

\[1^\text{st} \text{IT security guideline -- 2000 U/r-19}\]

\[\text{Security guide line for certifying authority -- 2000}\]

\[\text{The IT (other standard) Rules -- 2003}\]

\[\text{The IT (use of electronic records and digital signature ) Rules -- 2004}\]

\[\text{* Then IT (security procedure) Rules - 2004}\]
Whenever a person is arrested or any criminal allegation is made against him and then prosecuted and a charge is framed against him, he is entitled to the right under the rule of the presumption of innocence which continues till the end of the proceedings. So the accused person also enjoys all the rights status and honour of citizen in the eye of law. And again after the conviction if any, he comes back to normal life of the society. So any allegation and prosecution should not be used to take away the vital human rights of the accused. Hence some universal rules have been framed in criminal law to protect innocent persons from false allegations and malicious persecutions. And even if a person is convicted, he does not lose the membership of the society, the right to life and liberty and also the right to get reformed and start fresh social life.

"Criminal law and its process can't be appreciated without some understanding of the rights and protections given to the accused person not only during his trial but also before and after the trial. These rights and protections aim at providing a fair trial to an accused person so as to eliminate any possible abuse of process resulting miscarriage of justice" * 50.

(a) A person under arrest loses most vital rights protected under the law of the right to life and personal liberty under Article – 21 of the Constitution part III of Fundamental Rights. Hence this injury can't be allowed to continue without due process of law.

Any person arrested by the police U/s. 41 (of the criminal procedure) without warrant or with warrant U/s.76 must be produced before the law for careful judicial scrutiny of the justification of such arrest and the need, if any at all, to keep him under arrest for a period as short as possible. The Constitution of India in the Part III (Fundamental Rights) provides U/Article 22 very clear mandate against every arrest made with or without warrant Article 22(2) provides “Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty – four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of magistrate.”

And this rule of law operates as the supreme mandate of the Constitution to check arbitrary arrest detention of the citizens and to protect the most valuable Fundamental Right (U/A. 21) of the human being. In response to this dictate of the constitution the same principle has been corroborated in the criminal procedure code U/s. 56, 57 & 76.

Various international documents on criminal law also provide for the same principle for the protection of the most valuable right (right to life and personal liberty) of the civilians against every arbitrary invasion by any superior criminal force and the power.

(b) The most important right of the accused person after the accusation directed against him; is the right to engage one defense counsel of his choice. “A person facing a trial must have a counsel in order to be defended effectively.” * 51.

50 * Sup – 8 -------- 1983 ----------- 267.
51 * Sup – 8 -------- 1983 ----------- 270
This universal rule of law to protect any and every accused person from malicious prosecution; and miscarriage of justice has been corroborated in the Constitution the Supreme Law of the Land under Article 22(1) – as follows ‘ No person who is arrested shall be detained in custody without being informed as soon as may be of the grounds for such arrest nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice.’ The criminal procedure code – 1973 U/s. 303 & 304 has necessarily echoed the same rule of law as dictated by the Supreme Law, the constitution of India.

The free legal aid to an accused unable to bear the expense of engaging a defense lawyer has been recognized as a right of the weak and poor people. The Cr. P.C. 1973 however U/s. 304 provides for a defense lawyer at the cost of the state in sessions trial. But as a whole in all criminal proceedings generally there is no provision in Indian Legal system to provide defense counsel to defend the accused persons who are poor and unable to engage defense pleader, though it is provided for U/A. 39A.

In *Husainara Khatoon
Vs –
Home Secretary (1980) I SCC 108

1980 SCC (Cri) 50. The Apex Court observed that it is the Constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of such reasons as poverty ......... to have free legal services provided to him by the state and the state is under Constitutional mandate to provide a lawyer to such accused person ... if free legal services are not provided to such an accused ... the trial itself may run the risk of being vitiated as contravening Article – 21 ......

Unlike India, in western countries like UK, USA ... free legal aid in criminal cases to the defendant / accused persons are arranged as a general rule. “Public Defenders - often the person charged with violating a state or federal criminal statute is unable to pay for the services of a defense attorney. In some areas a government official known as a public defender bears the responsibility for representing indigent defendants. Thus the public defender is a counterpart of the prosecutor.” * 52. The inherent characteristic of complete justice will demand the rule of equality before law’ to be observed in all litigations and hence legal representations of both the sides, rich or poor, to be made available to both the prosecution and defense sides. In addition to these rules for the protection of the accused person during trial some specific right have been made available to the person under arrest.

The person taken under arrest has the right, at the time of arrest, to inform one relative, friend or reliable person the information about the arrest and related matters. The official making such arrest is also under legal duty through Constitutional mandate U/A - 22(1) to inform the person concerned the ground of such arrest. The constitutional mandate runs as follows -- A/22(1) : No person who is arrested shall be detained in custody without being informed as soon as may be of the grounds for such arrest nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

This constitutional mandate has been incorporated in the Cr PC - 1973 U/s. 75. The right to bail has been an established rule based on the cardinal principle of the presumption of innocence of the accused person during trial. "According to the policy laid down in various Judicial decisions in India, releasing a person on bail should be the normal practice and refusal to do so an exception. The policy besides accepting the basic principle that there is no justification in depriving a person of his liberty unless his guilt is proved, has the side advantage that overcrowding in the jails, to some extent can be avoided by making a liberal but judicious use of the bail technique." *53.

*53 * Sup - 8 --------- 1983 --------- P - 268.
4.4 LAW OF JURISDICTION

In addition to the Substantive law and law of Evidence, the rules of procedure are important for the purposes of administration of criminal justice. The rules of Jurisdiction relates to the territory under the control of the sovereign. “Hence the activity of a nation's criminal courts is mostly confined to those persons who have committed offences on its own soil or in one of its own ship.* 54 Some rules also have been framed to limit the lapse of time to start the prosecution. And generally the crimes are considered as matters to be decided locally. So crimes in general are local matter.

The general rule is that the place of offence will have local jurisdiction to try the offence. “A person although himself abroad, may by the hands of an innocent agent-commit a crime in England e.g. by posting in France a libelous letter or a forged telegram, which the postman will deliver for him in London. If the Frenchman come to England he may be tried here …. It is, however, necessary, before the English courts can claim Jurisdiction, either that the direct result of the crime take place in England or that an overt act be committed in England.” * 55. And it is also observed as a general rule that homicide is committed in the place where the attack takes effect. Thus A standing on a ship of UK may fire at and kill a man on the shore of Japan it is Japanese Law should find jurisdiction to try the offence. But in case of piracy (armed violence on the high seas) any country can try it. And in case of crime committed in foreign countries the law of extradition is applied to try the accused in a foreign land, the place of the commission of crime.

However the general rules of criminal jurisdiction had been formulated by British Jurists as have been reflected in the Criminal Procedure Code 1898 (1973) for territorial application.

Case :-

M N Adhikary
Vs –
Food Inspector AIR 1965 Ker 295

The forum is determined by the place in which the offence may have been committed.

Chapter XIII of the code provides for Jurisdiction of the Criminal Courts in Inquires And Trials. S/177 - Every offence shall ordinarily be inquired into and tried by a court within whose local Jurisdiction it was committed.

S/178 - (a) When it is uncertain in which of several local areas an offence was committed or (b) Where an offence is committed partly in one local area and partly in another , or (c) Where an offence is a continuing one and continues to be committed in more local areas than one, or

54 * Sup – 1 --------- 1966 -------- P - 549
55 * Sup – 1 --------- 1966 -------- P - 552
(d) Where it consists of several acts done in different local areas, it may be inquired into or tried by a courts having Jurisdiction over any of such local areas. S/179 - Provides that the place of trial will be either where act is done or where the consequence takes effect.

S/180 - Provides that in case an offence committed is related to another offence the place of trial may be either of the two places of commission of offences.

S/181 - Provides a new rule for some specified offences such as the offence of thug, dacoity with murder, or belonging to the gang of dacoits or one escaping from custody the case may be tried either at the place of commission of the concerned offence or wherever the accused is found and apprehended. The rule equally applies to the offence of kidnapping or abduction of a person. In case of stolen property the place of recovery may be a place of trial.

S/182 - Provides the rule that in case of any offence (including a cheating) committed involving a communication by postal or telecommunication services, the same may be tried by any court within whose local jurisdiction such letter or messages were sent or were received and incase of delivery of some goods under fraudulent transaction, the place of delivery or place where it is received will have the jurisdiction to try the offence.

S/183 – Provides the rule that if any offence is committed in the course of performing a journey or voyage the offence may be tried by any of all the local jurisdictions through which the person or thing passed in the course of that journey or voyage.

S/188 – Provides the rule that in case of any offence committed outside India by a citizen of India or by a person not being Indian citizen, commits the offence on any ship or aircraft registered in India the accused may be tried at any place where the accused may be found in Indian territory (as if the offence was committed in India).

Thus the general rules of jurisdiction in criminal law are applied along with the rules of extradition and international co-operation in case of crimes involving two or more national territories.

But the problem of cyber crimes raised many new questions on jurisdiction, applicable law and rules of procedure.
The most controversial issue in the subject of jurisdiction in cyber space is the question of accountability of a Website to the rest of the world. A website once opened becomes accessible from any place in the earth and as such materials placed or uploaded in the site raises the questions of legality of use by others.

So far no consistent principle has been framed in this regard. “The discussion of jurisdiction in the Internet context involves, in a simplistic sense, the question of whether the law should view cyber space as a place, a means of communication or a technological state of mind. How that question is answered, to some degree, affects how concepts of jurisdictions should be evaluated.” *56

The traditional offences like theft, gambling, fraud, pornography, Intellectual property infringements involving cyber space medium – can reasonably attract the traditional rules of criminal jurisdictions, both in national and international context. In these cases the general rules of place of commission or the person affected will have jurisdiction over the person committing it. But in the case of some offences like hacking, denial of service attack, malicious code (worm or virus), and some like others the traditional rules of jurisdictions can’t be applied so easily “The physical constraints (e.g. traditionally a criminal could only steal that amount that he or she could carry away) do not exist in the commission of cyber crime. The lack of boundaries and physical constraints combined with the speed in which these transactions take place, have changed many of the traditional paradigms of criminal law.” *57 But through legal adventure and judicial activism and legislative misadventure – the person sitting hundred of miles away (even thousands of miles) – is held liable for trespass (accessing the data base). The person on the other hand keeping his data reserve online, can’t in any sense of legal reasoning, avoid the liability for his own contributory negligence or the rule of Volunti non fit injuria.

So far however different cases have been decided mostly on the basis of public policy, social values and traditional rules of Jurisdictions in absence of consistent Jurisdictional rules for cyber space. Some of the early cyber crime cases:-

ACLU - Vs - Reno ----- 1996
US - Vs - Thomas ----- 1996
*Minnesota Vs Granite Gate, Resorts Inc 65 USLW
2440, 1996 WL 767431 ( W. Minn. Dec 10, 1996)

Attorney general of Minnesota – asserted the right to regulate on line gambling service run from Nevada website inviting people to bet on sporting-events. The court dismissed the defendants contention of lack of Jurisdiction and held that Internet advertising is a direct contention to all including Minnesota residents to participate in the gambling and end users of Minnesota can assert Jurisdiction and the website was declared illegal.

In 1878 case - *Pennoyer Vs Neff 95 US 714-the US Supreme Court had ruled that a non-resident defendant can’t be sued due to lack of his physical presence in the state. This law continued till 1945 the case of International Shoe Co. A new role of Personal Jurisdiction gradually has been recognized in this regard in foreign trade and commerce on the last quarter of 20th Century.

57 * Sup - 49 --------- 2001 ----------- P – 301
The law of Personal Jurisdiction was applied in civil cases-like (1) International Shoe Co. Vs Washington State (1945) 326 US 310.

The Company having office in Missouri maintained business relation with the market in Washington State. The State imposed some taxes (unemployment) on the Shoe company who contended that it has no physical presence by way of registered office etc. in the state and hence not liable to state laws. But the Court found it reasonable just and fair to apply Personal Jurisdiction upon the Company on the basis of minimum contact and rules of fair play and substantial justice. The company during business in the state enjoyed privileges and protection extended by the State and hence accountable to the state forum. This case decision formed the basis to collect taxes from out of state business by passing long arm statutes to apply Personal jurisdiction over non-resident defendants.

This concept of Personal Jurisdiction for non-resident defendants – has been extended to e-business as well Case:-

*Burger King Corporation Vs
Rudzewick 1985

The US Supreme Court stated that “when non-resident defendants reach out beyond one state and create continuing relationships with the citizens of other states, they are subject to regulations in that state and sanctions for the consequences of their actions. This case and other .................. laid the ground work for personal jurisdiction over a non-resident e-business resulting from electronic transactions that create continuing business relationships with citizens of other states ..........An on-line company doing business in foreign –states (e.g. e.Bay) could be subject to the laws where the customers reside. An e-business could be accountable to its customers under the laws in all fifty states and numerous countries.” *58. The e-business thus become accountable to all customers in any state subject to the rules of (1) minimum contact and (2) fair play and substantial justice under the Due Process clause of the 5th and 14th Amendment of the US Constitution.

The rule of minimum contact of e-business has been further clarified in a subsequent case:-

*Zippo Mfg. Co. Vs
Zippo Dot Com Inc – 1997 952 F. Supp. 1119

The plaintiff Co. of Pennsylvania sued one California News service (Zippo Com.) for Trade Mark dilution. The trial court developed this Sliding Scale standard to hold a e-business liable to the state of the plaintiff. The trial could observed that in case of passive website, the personal Jurisdiction can't be applied but in case of interactive website interacting with customers-the Company will be liable to the customer's State. And in the case of mixed websites the jurisdiction will be dependent on the degree of interactivity and on commercial activity. Thus simple on line presence can't attract personal jurisdiction of any state simply on the ground of the website –being accessible from the state.

58 * Sup – 49 -------------- 2001 --------------- P – 19
This law of Personal Jurisdiction has, obviously been relevant in prosecuting non-resident cyber criminals." Mode and extent of regulative legislation is only one side of the problem. How to enforce them is another major issue that needs -consensus among nations. There are different stands adopted by courts as to their Jurisdiction in Cyber Matters. The Principles are yet to be finalized and become acceptable globally." * 59

The Information Technology Act – provides U/s-1 as to the extent and Jurisdiction of the Act as follows – This Act shall extend to the whole of India and save as otherwise provided in this Act, it applies also to any offence or contravention there under committed outside India by any person.

Again the Act provide U/s. 75 as follows – "Act to apply for offence or contravention committed outside India – (1) Subject to the provisions of sub-section(2) the provisions of this Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality.(2) For the purposes of sub-section (1) this Act shall apply to an offence or contravention which involves a computer computer system or computer network located in India." These two IT Act-provisions along with the rules of criminal Jurisdiction provided in the code of Criminal Procedure – 1973 – under chapter XIII – on Jurisdiction of The Criminal Courts In Inquiries And Trials – U/s-177 to 189.

Where S/188 provides for “When an offence is committed outside India – but by a Citizen of India on the High Seas or elsewhere or by any person not being citizen of India, offence being committed on any ship or aircraft registered in India may provide for criminal Jurisdiction for cyber crimes.


In the case of IT Act-crime mentioned in chapter-XI-U/s.65-the provisions and Cr. P. C. provisions appear to be insufficient to hold good for cyber-crime management mainly because of its borderless nature and virtual involvement “Provisions of this nature are unlikely to be effective for a number of reasons.

Firstly, it is unfair to suggest that the moment an Indian computer system is used, an action defined by Indian Laws as an ‘offence’ would be subject to the Jurisdiction of Indian Courts. To illustrate, let us consider a website located in a foreign country. The site may host content that would be perfectly legal in its home country, but may be considered offensive or illegal in India. If an Indian, chooses to view this site on a computer situated in India does that mean that the site can be prosecuted in an Indian Court? This would appear to violate the principles of Justice. As explained earlier, the judicial trend of examining the amount of activity that a site undertakes in a particular jurisdiction is a far more equitable method to determine Jurisdictions.

Further even if Indian Courts are to claim Jurisdiction and pass – Judgments on the basis of the principle expostulated by the IT Act, it is unlikely that foreign courts will enforce these Judgments since they would not accept the principles utilized by the Act as adequate to grant Indian Courts Jurisdiction. This would also render the Act ineffective.” * 60

59 * Sup 3 ------- 2004 -----P 46
60 * Sup 4 ------- 2001----- P 53
In fact, the lack of universal definition of a crime as well as that of cyber crime has been a barrier to adopt uniform criminal law in the cyber space. And the IT Act – has kept some cyber wrongs as malicious code (worm virus), access and downloading data disruption to computer etc U/s-43- Outside the scope of criminal liability and made to be dealt with under rules of civil law. And this civil wrongs-in cyber space may be tried as cyber torts based on the law of civil Jurisdiction applied to e-commerce. In this regard the rules of Choice of Law, Minimum-contact and due process of law are applicable.

As to the provisions U/s.75 - of the IT Act- “It is observed that, this section extends Jurisdiction to acts committed out side India ---It is not going to be easy to acquire Jurisdiction over a person not resident in India if a foreign country is the scene of the crime and the criminal is not even an Indian citizen, merely because a computer or a computer system or a computer net work in India has been utilized in some way or the other in connection with the crime. Nevertheless if software or hardware in India is damaged by a hacker from a location in a foreign Jurisdiction there can be no dispute about India’s right to reach him/her and make him/her accountable for the crime committed in India. Having said this, the problem of enforcement remains.”* 61.

The effectiveness of law of Jurisdiction, as usual, depends – upon the enforcement of the trial court order. And this can only be made possible through – international understanding – co-operation and law of extradition being made more extensive and universal.

4.5 **LEGAL MANAGEMENT OF CRIME**

The crime according to criminal law has been understood to mean a particular group of wrongs committed by member of the society . This type of wrongs which are un apprehended, sudden and very much uncommon to social life, produces a panic and disorder in normal social life, security of person, property and dignity of the victim. Hence in the early age this class of wrongs attracted special attention of the society demanding immediate and careful control. The state power under the monarchs took this subject under the direct control of the sovereign “For although the wide extension of the kinds’ peace nominally brought all minor transgressions within the orbit of the crowns criminal jurisdiction, the practice developed of leaving these less harmful offences to be dealt with by tribunals which awarded damages assessed in accordance with the facts of the case”* 62

Thus the serious wrongs came under the direct control of the state and crimes are considered as offence against individual as well as against the state. So state takes it as a duty to control and manage the crime in society and hence creates the control mechanism by making criminal laws, establishing criminal courts, police and prison. “ Law is an instrument of social control and is part of the total system of control in society. Law is not only based on the values of society but is also based on the perceived need to maintain conformity to society ’ s rules and regulations.* 63

61 * Sup 56 -------- 2001 ----- P 545
62 * Sup 1 ----------- 1966 ----- P 10
63 * Sup 18 --------- 1971 ----- P 57
Thus the state decides the criminal policy and makes exhaustive list of criminal acts & modifies the list from time to time to implement own policy. The wrongs which creates panic and trauma in normal social life are enlisted as crime. And the criminal law operating as an aggressive force creates counter trauma and panic against the criminals subject to checks and balances against misuse of the state power upon the innocent.

The modern concept however is changing where the state need not be a party to the criminal litigation between the wrong doer and the victim but to take a neutral unbiased stand to ensure impartial trial in the interest of complete justice.

4.5a PROSECUTION

In the present system, government is under duty to prosecute the persons committing crimes i.e. violation of criminal law. Every state provides a code of criminal acts or omissions as a negative code of conduct for the citizens. The prosecution is started by the state according to the code of crimes and the law of procedure or criminal procedure code. The public prosecutor has the following functions, "To institute, undertake and carry on criminal proceedings (i) in cases of murder, (ii) in all cases which are referred to him by a government department in which he considers criminal proceedings should be instituted (iii) in any other case which appears to him to be of importance or difficulty or which for any other reason require his intervention.* 64 A separate system of criminal courts along with procedure has been set up to hear and decide criminal formal accusations where the state always remains a party or prosecution side represented by the public prosecutor“. Government attorneys work at all levels of the judicial process, from trial courts to the highest state and federal appellate courts. However the bulk of the cases never move beyond the trial courts. Federal Prosecutors. Although the exact origins of the public prosecutors are uncertain the prosecution of criminal cases in colonial America became the responsibility of a district attorney appointed by the governor and assigned to a specific region ... Since these beginnings the prosecutor has become the most powerful figure in the criminal justice system... given the US attorneys and judges within a district must work together on an ongoing basis their relationship is extremely important.” * 65

In some countries, however like USA the government under a constitutional duty to give access to justice to all, appoint public defenders to defend accused persons unable to engage own counsel. “ In some parts of the country there are statewide public defender systems in other regions the public defender is a local official usually associated with a country government. In New York City and independent organization known as the Legal Aid Society represents all indigent criminal defendants except those charged with murder” * 66 The prosecution needs material evidence to prove the act and intent of the offender. The criminal act and the criminal intent of the person concerned are to be proved beyond a reasonable doubt.

64 * Sup 9 -------- 1976 --------- 401
65 * Sup 52 ------ 2001 --------- 114
66 * Sup 52------- 2001 --------- 117
The other problem of the prosecution is to establish jurisdiction over the alleged offender and identity of him and also to establish the link between the alleged criminal acts and the accused persons beyond doubt. In cyberspace, the prosecution naturally is started by the state, cyber crime being a part of criminal law. And also that "The advent of networked computers has created unprecedented opportunities for the anonymous perpetration of crimes. In fact, law enforcement experts perceive that the two most difficult problems they encounter are (1) establishing the identities of the alleged perpetrators, and (2) establishing the identities of the alleged perpetrators". *67

The cyber space being a global electronic phenomenon, the management needs undivided global level system to investigate detect and to prosecute.

The IT Act provides for the investigation, search and arrest by a senior police officer u/s. 78 and s/80 of the Act and the officer concerned will start the prosecution process by sending report U/S.157 & 158 of the or P.C or U/S. 155 for non – cognizable offences. The nature of the crime under IT Act chapter XI however attracts the rule of cognizable offence. And the criminal law is set in motion through the cognizance taken by the competent magistrate U/S. 190 or U/S 193 by the court of session in appropriate cases (e.g. offence U/S. 67 attracting 10 years of imprisonment).

The offences U/S . 65 and U/S.66 attracting three years of imprisonment being cognizable offences can be taken up directly by the DSP concerned for investigation and report.

INVESTIGATION

The Law Enforcement Authorities (LEA) take up investigation either suo-motu upon information of cognizable offence or under order by the magistrate of competent jurisdiction. Investigation is necessarily conducted by the LEA to collect evidence as to the commission of the offence and to identify the criminal through search and seizure. "Criminal investigation commences when the police comes to know of the commission of a crime". *68 The search for collecting evidence by the LEA however has been provided under the procedural laws and it requires that the LEA must obtain the warrant for search from the Magistrate of competent jurisdiction. And the articles seized are preserved and produced before the trial court following specified procedure in the procedural law.

EVIDENCE

Ref. 4.3.2.b------P-----133

THE POLICE

In management of crime, as a whole – the police system is very crucial. The police has to take up a range of duties starting from prevention of crime, detection investigation reporting to conduct search and seizure, arrest and initiate prosecution and co-operate with the Public Prosecutor to carry on the prosecution to the end. In addition to these many other duties are entrusted with the police from time to time by the Government. As a whole the police operate as the most effective tool of the Government to maintain law and order in society.

67 * Sup 49 --------2001 --------P 302
68 * Sup 8 -------- 1983 -------- P 229
In the International code of Enforcement Ethics it is observed that “As a law enforcement officer, my fundamental duty is to serve mankind, to safeguard lives and property to protect the innocent against deception, the weak against oppression or intimidation, and the peace lover against violence and disorder and to respect constitutional rights of all men to liberty, equality, and justice.” * 69. The Police in fact stands as the living symbol of the government to the people and hence a potential and rich target of corruption.

It is also observed that the police force operate as the most effective crime controlling instrument as alert combat force to handle routine assignments as well as emergencies. But the weaknesses of the police service if not attended to, may affect the crime-management and hence affect the health of social life as well. “Police have been unusually susceptible to being influenced by corrupt politicians, underworld interests and organized crimes when police departments operate under corrupt conditions. law-enforcement suffers and police service becomes a defensive maneuver rather than an alert striking force to combat crime.” * 70. The possibility of abusing the police power increases with the corruption in political life and criminalization of politics. The function of the police is to start investigation upon information from concerned persons and then the police exercises the power of investigation, search and seizure, arrest and reporting to the magistrate of Competent Jurisdiction.

In view of the vital role of the police the uncertain and unusual working hours, and lack of sufficient number of police personnel etc. are article problems in many countries. In India there were one police personnel for every 800 persons in 1971. But the 1961 report shows that there were one police personnel for about 550 persons in UK and 520 persons of USA. In Cyber space the function of the police has been much complicated and required appropriate training & knowledge in Information and Communication Technology (ICT). And the traditional tools, weapons and methods are not sufficient to make investigation search and seizure, to collect preserve and produce electronic evidence before the trial court.

The instruments used as tools and weapons are all of high tech devices such as Intrusion Detection System (IDS), hacking tools, Sniffer programs, cookies, intercepting devices, access devices etc. The method of collecting and preserving the evidence i.e. data record requires complicated formalities like the chain of custody, computer-forensics web-monitoring encryption and decryption, searching computer database, seizing the materials both hardware and software. Under the IT Act the power of investigation, search and seizure etc. has been entrusted with the police U/s. 78 and 80 of the Act. The Controller of Certifying Authorities – also can exercise the power to investigate, and to access Computer data etc. U/s 28 and S/29 of the Act.

69 * Sup – 8 ------ 1983 --------- 215
70 * Sup – 18 ------------ 1971 -------- 585
S/78 - of the Act provides – as follows – “Power to investigate offences – Notwithstanding anything contained in the Code of Criminal Procedure, 1773 (207 of 1974), a police officer not below the rank of Deputy Superintendent of Police shall investigate any offence under this Act S/80 Power of police officer and other officers to enter, search etc. – provides that a Police Officer not below the rank of DSP may enter any public place and search and arrest without warrant any person found there – if subject to reasonable apprehension of the commission (or attempted to commit) an offence under this Act. The public place includes any public conveyance, any hotel, any shop or any other place intended for use by or accessible to the public.

And the officer concerned shall produce the arrested person before the magistrate (or Officer–in charge of the Police Station) without delay.

In India the separate cyber police cell is being established in different metro-cities like Mumbai, Chennai, Delhi and Kolkata to deal with the growing cyber-crimes in the country.

**PRISON**

The prison is a part and parcel of crime management in all civilized countries for long time past. Imprisonment of offenders has been the modern form punishment as it takes away one vital right, the right to personal liberty to move and to do things and to live as a free citizen. This deprivation of the right to free movement is a form of punishment imposed by the criminal law “The fact that almost million citizens reside in Jail or prison on any given day is seen not as evidence that society is lawless but a proof that in the United States respect for the Law is paramount and disobedience to the law is punished.” * 71. The previous system of corporeal punishment (like whipping) has been reformed to detention only and this provides the accused to reform himself or herself. The concept of therapeutic treatment with the accused and convicted persons has changed the mode of punishment to reform the criminal. “Since penal reforms are mostly reflected in prison reform during the last two centuries or so, the study of the therapeutic approach can be taken up beginning with prison reform .... with the gradual reduction in the number of capital offences and the transportation of convicts falling in disuse, imprisonment as a mode of punishment was bound to gain more eminence.” * 72. And thereafter softer modes like probation and parole systems were introduced. And special treatment for Juvenile or young offenders were introduced. In India different Jail Committee Reports 1836, 1864, 1877, 1889 and 1892 recommended for prison reforms. The probation of offenders Act – 1958 and S/562 of the Cr. P. C. 1898 provided for softer mode of treatment with the offenders. The soft mode like parole is also applied in India.

Hiralal Mallick- Vs -State of Bihar (1977) 4 Sec. 44.

Where the accused a boy of 12 years old was convicted U/s. 326 IPC and sentenced to 8 years’ imprisonment. The Supreme Court recommended for parole in the case. In the subject of Juvenile offenders, The children Act 1960 was passed and amended from time to time to deal with, Juvenile delinquency with motherly care and sympathy.
In cyber crime management as well the prison—sentence has been a form of punishment. The other forms of punishment in western countries have been community service, good behaviour bond, undertaking as to keep away from computer, and modern, electronic devices (as in the case of Chris Goggan, a hacker), not to attend Conferences on digital technology etc. are followed. There is strong opinion however not to send the expert cyber offenders to the Jail which may be used by them to start a training school for other inmates. “I guess just about every criminal element is looking to use hacking techniques to further their goals. Jails are the perfect venue for transferring hacking knowledge. Inmates have a lot of spare time on their hands, and a patient teacher can teach just about anyone anything, given enough time. And they do. Instead of jailing hackers perhaps they should do “community service” by using their skills to make systems more secure. This would be a good start. This approach has worked on some occasions and jailing hackers is just going to make things worse.” * 73. In several cases the accused has been turned good security officers in different ICT companies. The IT Act however provides for imprisonment for cyber criminals and the law however can provide for softer mode under existing law on probation and Juvenile offences. The provision for community service for a no. of hours may as well be included in the Act.

73 * Winn Schwartau – Cyber Shock – 2000
Thunders’ Mouth Press - NY - Foreword.- XVIII