

JURISDICTION

The material sources on this subject are the provisions of the Penal Code, the Code of Criminal Procedure, certain British Statutes and the interpretation by the judiciary of these provisions.

I

Territorial Jurisdiction : Section 2 of the Penal Code declares that every person shall be liable to punishment under the code and not otherwise for every act or omission contrary to the provisions of the code of which he shall be guilty within India. A foreigner committing a crime in India cannot plead ignorance of Indian Law.¹ A person who in India instigates the commission of an offence outside India is also liable to punishment under the Penal Code.² It has also been held that foreigners who initiate offences³ abroad that take effect on Indian territory are amenable to Indian jurisdiction. Recently the Supreme Court explained in *Mobarik Ali v. The State of Bombay*⁴ that the basis of jurisdiction under Sec. 2 is the locality where the offence is committed and that the corporeal presence of the offender in India is immaterial. In that case the accused, a Pakistani national, while staying at Karachi made false representations through letters, telephone conversations and telegrams to the complainant at Bombay and induced the latter to part with money at Bombay. When the accused subsequently came to Bombay he was prosecuted for cheating. The Supreme Court held that the offence was committed by the accused at Bombay even though he was not physically present there.

II

Territorial Waters Jurisdiction : It is universally recognised that every State has jurisdiction over the waters adjacent to its land-boundaries called the maritime belt or territorial waters. The territorial waters may be considered as a prolongation of the State territory, as under international law it is recognised that they are subject to the sovereignty of the littoral state. Early Indian decisions⁵ proceeded on

1. *Jitendranath Ghosh v. The Chief Secretary to the Government of Bengal* (1932) 60 Cal. 364.

2. See S. 108A Penal Code.

3. *Chotelal v. Emperor*, 36 Bom. 524; *Wheeler v. Emperor* 29 Cr. L.J. 1089.

4. A.I.R. 1957, S.C. 857.

5. *Reg. v. Irvine* 1st Mad. Sess. 1867 cited in Mayne, *The Criminal Law of India*, Edn. VI p. 28; *R. v. Kastya Rama* (1871) 8 Bom. H.C.R. (Cr.) 63.

this basis and applied the Penal Code to persons committing offences in the territorial waters. In *Kastya Rama's* case⁶ Justice Kembhall said "It is impossible to avoid the conclusion that the territories strictly speaking include not only the compass of land in ordinary acceptation of the term but also that portion of the sea lying along and washing its coast which is commonly called its maritime territory. I fail to discover in the absence of special legislation on the subject any ground, for distinguishing between offences committed on different portions of a State territory.....The venue of the offence was British India and the charge was rightly laid under Sec. 2 Indian Penal Code (.....) such provision superseding the provisions of Sec. 2 of 12 and 13 Vic. ch. 96 if they ever extended within three miles of the shore".

However, consequent on the decision in *R. v. Keyn*⁷ the Territorial Waters Jurisdiction Act⁸ was passed by British Parliament declaring that all offences committed in territorial waters of the Queen's dominions were triable by the local courts.⁹ This Act which is applicable to India defines territorial waters as any part of the sea within one marine league (3 miles)¹⁰ of the coast. Section 7 of the Act defines an 'offence' as follows: "'offence' as used in this Act means any act, neglect or default of such description as would, if committed within the body of a county in England be punishable on indictment according to the law of England for the time being in force". There has not been any Indian case decided under this Act. The following problems arise for consideration.

(A) *Whether the Act is in force now*: As part of the law in force at the time of the commencement of the Constitution it continues to be applicable¹¹ since the Indian Legislature has not replaced it by any other enactment nor has the President of India made any adaptation or modification of it.¹² However, since the Act confers jurisdiction

6. 8 Bom. H.C.R. (Cr.) p. 63 at 68.

7. (1876) 2 Ex. D. 63.

8. 41 and 42, Vic. c. 73.

9. Section 2 of the Act provides "An offence committed by a person whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral although it may have been committed on board or by means of a foreign ship and the person who committed such offence may be arrested, tried and punished accordingly."

10. Section 7 of the Act.

11. See Art. 372(1) Constitution of India.

12. It has also not been repealed by the British Statutes (Application to India) Act 1960, (Act LVII of 1960).

upon the courts in India as part of the Queen's dominions, there arises the legal difficulty of interpreting a British Statute in the light of the fundamental constitutional change that has taken place and the argument may be put forth that the Act can no longer apply to India in view of the change in status of India from a dependency to a sovereign democratic Republic. In *State of Madras v. C. G. Menon*¹³ the Supreme Court held that the provisions of the Fugitive Offenders Act, 1881, which included India into a group with other British possessions for purposes of surrender of fugitive offenders were repugnant to the conception of India being a sovereign democratic Republic and hence no longer law in force.¹⁴ However the English courts held¹⁵ that the same Act continued to operate *vis-a-vis* India by virtue of the India (Consequential Provisions) Act, 1949, until provision to the contrary is made by competent authority. Further the Madras High Court dealing with a case relating to the applicability of the English Copyright Act, 1911, rejected¹⁶ the wide contention that British Statutes which were applicable to India as a British possession would on the ground of the changed political status of India, automatically cease to apply after the coming into force of the Indian Constitution. The reasonable course to adopt would appear to be to regard the Territorial Waters Jurisdiction Act as continuing in force under Art. 372(1) of the Constitution. The Law Commission in its fifth report dealing with British Statutes applicable to India stresses the urgent need for the Indian Parliament to enact self-contained and comparable laws in all matters (including territorial waters jurisdiction) covered by British Statutes.¹⁷

(B) The next question that arises concerns the width of the maritime belt. Under the Territorial Waters Jurisdiction Act the distance up to which jurisdiction may be exercised is a marine league (3 miles)¹⁸ but a recent proclamation¹⁹ of the President of India declares: "Notwithstanding any rule of law or practice to the contrary which may have been observed in the past in relation to India or any part thereof

13. [1955] 1 S.C.R. 280.

14. The court does not appear to have considered sections 22 and 28 of the Adaptation of Laws Order, 1950, which related to the interpretation of such statutes. See T. S. Rama Rao 'Decisions I. Public International Law', The Indian Year Book of International Affairs, 1954, p. 389.

15. *Re: Government of India and Mubarak Ali 1952*, 1, All. E.R. 1060.

16. *Blackwood & Sons v. Parasuraman*, A.I.R. 1959 Mad. 410.

17. Law Commission of India 5th Report, p. 5. The Commission also deems it desirable to preserve any privilege conferred by the British Law.

18. Section 7 of the Act.

19. S.R.O. 689. Gazette of India Part II Section 3 Dt. 22-3-56.

the territorial waters of India extend into the sea to a distance of six nautical miles measured from the appropriate base line." The question arises whether the proclamation which is an executive notification,²⁰ whatever be its significance in the field of international law, can have the effect of altering the provisions of the Territorial Waters Jurisdiction Act, an existing law. Whether the extension of the territorial waters by such proclamation is regarded as a mere acquisition of jurisdiction or as an acquisition of territory—which is an Act of State and cannot be questioned in a municipal court—it is open to debate whether the proclamation will supersede a statute in municipal law.²¹

(C) Two further questions that arise in this connection are: (i) If an offence is committed by an Indian citizen in the territorial waters, will his liability be judged by English law according to the provisions of Sec. 7 (defining the term 'offence') of the Territorial Waters Jurisdiction Act or should he be governed by the Indian Penal Code?²² As there is no decided case under the Territorial Waters Jurisdiction Act, one has to look to the analogy of certain other British statutes conferring jurisdiction on Indian Courts to deal with offences committed on the High Seas. The Admiralty Offences Act²³ which was extended to India in 1860²⁴ while conferring jurisdiction on colonial courts to try offences committed on the high seas provides that the offences should be punished as if they were committed, inquired into, and tried in England. It was therefore held in *R. v. Elmstone*,²⁵ and *R. v. Thompson*²⁶ that the substantive law to be applied by a court exercising jurisdiction under that Act is the English law. However the Bombay High Court in *Kastya Rama's* case²⁷ held

20. Law Commission 5th Report, p. 52.

21. See T. S. Rama Rao, 'Some Problems of International law', The Indian Year Book of International Affairs, 1957; The suggestion that the proclamation is issued by competent authority within the meaning of Art. 372(1) so as to have the effect of altering the existing law and that the words 'Notwithstanding any rule of law' in the proclamation are wide enough to cover the instant case will not be tenable as any such alteration should be made within 3 years of the commencement of the Constitution (Art. 372(3)).

22. By Section 2 if the territorial waters are regarded as part of India, or else by Sec. 4 which provides "The provisions of this Code apply also to any offence committed by (1) any citizen of India in any place without and beyond India".

23. 12 and 13 Vict. ch. 96.

24. Sec. 1 Admiralty Jurisdiction Act, 1860 (23 and 24 Vict. ch. 88).

25. 7 B.H.C.R. (Cr.) 89.

26. 1 B.L.R. (Cr. O.J.) 1.

27. 8 B.H.C.R. (Cr.) 63.

that so far as offences committed in the territorial waters are concerned the substantive law to be applied is the local law (Penal Code) and not the English Law. West J., observed "But suppose the 'offence' is not reckoned such by the colonial law, are the local courts to take cognisance of it as though it were an offence, because it is one in England? This would be to impose a burden on their legal conscience which they could not well bear. Lord Brougham in the case already cited says: "It may safely be asserted that no instance whatever can be given of the criminal law of any country being made to bend to that of any other in any part of its administration". That which it would be improper to enforce internationally it is not to be presumed that a dominant country intended to enforce in the case of a dependency in matters not affecting their political relations to each other. As an English court would not enforce a criminal law of a colony differing from its own, so neither is it likely that it was meant to impose on Colonial Courts an obligation to enforce all the provisions of the English Criminal Law. Suppose, again, the case of a local law of New Zealand, for example, prohibiting the sale of fire arms or of gunpowder to the natives; is it to be said that, because no charge of such an offence could be framed under the English law, the traffic could be carried on with perfect impunity at a hundred yards from the shore? This would be to nullify the local law in most of the instances in which it is specially adapted to local circumstances, and thus to do away with the chief benefit arising from the existence of colonial legislatures. The true intent of the section, I cannot but think is this, that where the law defining an offence in a dependency coincides with that of England in force when the statute became law a person convicted of such offence shall not be subject to a severer penalty than the English law prescribes.....". A subsequent British statute, The Courts (Colonial) Jurisdiction Act²⁸ declared that the punishment in respect of an offence committed on the high seas should be that which is provided in the law of the colony and if no provision for the particular offence is to be found in the local law then it should be such punishment as shall seem to the court most nearly to correspond to the punishment provided in English law. The interpretation of this later Act of 1874 has given rise to a controversy. While the Bombay High Court has taken the view²⁹ that the substantive law to be applied is the Penal Code and not the English law the Calcutta High Court took the view that the substantive law to be

28. 37 and 38 Vict. ch. 27.

29. *R v. Sheik Abdool Rahiman*, 14 Bom. 227; *R v. Chief Officer S. S. Mushtari*, 25 Bom. 636; See also *Po Thaug v. R* 12 Cr. L.J. 198.

applied is the English law.³⁰ In the Calcutta case of *R. v. Salimullah* the Court observed "Reference has been made to Section 4 of the Indian Penal Code. It is possible to give the section a construction which is not inconsistent with the English statute but in any case it could not assuming that the Indian Legislature had jurisdiction in the matter, affect the specific statute of Parliament".³¹ This reasoning becomes unsupportable in view of the plenary powers of the Indian Legislature today. Besides, as a matter of construction³² the provisions of the Penal Code should be applied to the exclusion of any other law in the cases of citizens of India wherever they may be and the high seas are not to be differentiated from any other part of the world outside India. Further, the observations of Lord Brougham quoted by West, J.,³³ also lead to the conclusion that the Penal Code is exclusively applicable to Indian citizens committing offences outside India. The proper view to take seems to be that the Penal Code should govern all cases of offences committed by citizens of India in the territorial waters. To hold otherwise would mean that the offenders can with impunity, as West, J. explained, break the local laws if corresponding provisions do not exist in English law,³⁴ by going a few yards into the waters. (ii) Where the offender is a non-citizen the question again arises whether the Penal Code should apply as the substantive law or the English law should apply according to the Territorial Waters Jurisdiction Act. This is a matter of construction of that statute at the present day.

Judicial opinion has sought, independently of express legislation, to regard territorial waters as being part of the territory of India with the result that municipal law would automatically apply in that area.³⁵

30. *R v. Salimullah*, 39 Cal. 487.

31. 39 Cal. 487 at p. 497. The accused in this case was a native Indian subject (citizen of India) to whom Sec. 4 would apply.

32. Jagannadhadas, J., observes: ". . . It is not necessary and indeed not permissible to construe the Indian Penal Code at the present day in accordance with the notions of criminal jurisdiction prevailing at the time when the Code was enacted. The notions relating to this matter have very considerably changed between then and now during nearly a century that has elapsed. It is legitimate to construe the Code with reference to the modern needs, wherever this is permissible unless there is anything in the Code or in any particular section to indicate the contrary". A.I.R. 1957 S.C. 857.

33. See page 51 *supra*.

34. e.g., *Offence of Adultery* under S. 497, of the Penal Code and Prohibition Offences. See Gupteswar, 'Territorial Waters Jurisdiction' a note in the Journal of the Indian Law Institute, (Jan—Mar. 1961) Vol. 3 No. 1 p. 99.

35. (i) *R v. Irvine and Kastya Rama's* case already noted ;

This attitude would be in consonance with the principles of international law. Commentators on the constitution³⁶ also seem to take the view that the state territory includes the territorial waters. However Mayne was of the view that express legislation conferring jurisdiction was necessary,³⁷ and legislative practice in certain matters³⁸ seems to indicate that the Indian Legislature has acted on the assumption that express provision would be necessary to confer jurisdiction but the evidence is not conclusive. It is desirable that all possible doubts regarding the exercise of criminal jurisdiction in territorial waters be settled by express provision to the effect that the territory of India includes territorial waters.

III

Extra Territorial Jurisdiction: Sections 3 and 4 of the Penal Code provide³⁹ for the liability of offenders committing offences beyond the territories of India. Section 3 of the Penal Code makes not only Indian citizens liable for offences committed abroad (even though their acts may not be punishable at the place where they are committed) but also others who are covered by any special law bringing them under Indian jurisdiction.⁴⁰ Section 4 provides that the provisions of the Code will also

(ii) The Privy Council in *Chelikani Rama Rao v. Secretary of State for India* (1916, L.R. Ind. App. 199) decided that the territory of the maritime belt vested in the Crown. This decision is criticised by D. P. O'Connell in 'Problems of Australian Coastal Jurisdiction'. The British Year Book of International Law, 1954 p. 199 at 222.

(iii) In *A.M.S.S.V.M. & Co. v. The State of Madras* (1953) 2 M.L.J. 587, it was observed "as regards the territorial waters, therefore, the position under the Constitution remains what it was under the Government of India Act". Under the Government of India Act the territory of British India was deemed to extend to the territorial waters whatever the extent of the waters might be (N. Rajagopala Ayyangar, The Government of India Act, 1935, at p. 119).

(iv) In *Ulrich v. The Collector of Customs*, 1959 Ker. L. R. 1326, Raman Nair J. observes "From Sec. 19 of the Sea Customs Act it is clear that importation means bringing into India across any custom frontier as defined by the Central Government under Sec. 3-A of the Act. That apart the Territorial Waters which by a proclamation by the President dated 22-3-1956 have been defined as extending to a distance of six nautical miles measured from the Indian coast line is an integral part of India and in the ordinary sense of the word 'imported' goods are imported into India when they enter the territory of India".

36. N.C. Sen Gupta, Commentary on the Constitution of India, (1950) p. 4. Basu D. Commentary on the Constitution of India Vol. I (1961).

37. Mayne, Criminal Law of India 4th Edn. p. 30.

38. See the Indian Fisheries Act, 1897, and The Sea Customs Act, 1878.

39. See also 188 Code of Criminal Procedure.

40. e.g., Indian Army Act, 1950. See Khader Nawaz, 'Criminal Jurisdiction and International Law,' Indian Year Book of International Affairs, Vol. I (1952), p. 210.

apply to (1) to citizens of India wherever they may be outside India and (2) to all persons on board any ship or aircraft registered in India. Section 4(1) lays down the active Nationality principle.⁴¹

IV

Admiralty Jurisdiction : The admiralty jurisdiction exercised by the English Courts has been conferred upon Indian courts by the charters of the High Courts and certain British Statutes ⁴² viz : Admiralty Offences Act of 1849 extended to India in 1860, Colonial Courts of Admiralty Act 1890 read with the Indian Colonial Courts of Admiralty Act 1891, and the Merchant Shipping Act, 1894. The last mentioned Act has been repealed and replaced by the Indian Merchant Shipping Act, 1958, but the Indian Act of 1958 omits the provisions that confer Admiralty jurisdiction.⁴³ The said Acts empower the local courts to try British subjects as well as others on board British ships committing offences on the high seas. The considerations regarding the applicability of the Territorial Waters Jurisdiction Act at the present day in view of the altered constitutional position of India referred to earlier (see para II(A) supra) are equally pertinent in relation to these British statutes conferring Admiralty jurisdiction on Indian Courts. Again the problem arises as to the substantive law to be applied (whether it is the English law or the Penal Code) by the court exercising jurisdiction conferred by these statutes. The conflict between the Bombay and Calcutta decisions remains.⁴⁴ In the case of Indian citizens and all persons on board a ship registered in India committing offences on the high seas, the case for applying Sec. 4 of the Penal Code seems to be irrefutable in view of the plenary powers of the Indian legislature, but in the case of British subjects and foreigners on board British ships over whom

41. The recent Geneva Conventions (Act VI of 1960) provides for jurisdiction over non-nationals committing offences abroad as well. A trend towards the recognition of the passive nationality principle is reflected in the speech of Krishna Menon. He said "The second chapter is probably the most important because it makes the change in our jurisprudence and our law ; that is to say, until now the jurisdiction of our courts was in regard to our nationals or in regard to offences committed in this country, by the nationals of other countries. This still makes a change ; a change that has been accepted in other countries and it is a change on the older systems of jurisprudence. That is to say, those who are violators of this convention whether they happen to be nationals of this country or not, would be under the municipal and criminal jurisdiction of our courts. This is a departure from our legal system as it stands at present with its consequences" Lok Sabha Debates, Vol. XXXVIII, col. 121.

42. See Law Commission 5th Report p. 56.

43. Sections 686 and 687 of the Merchant Shipping Act, 1894.

44. See page 51 *supra*.

jurisdiction may be claimed the matter is not free from difficulty. Mayne pointed out the difficulty thus ⁴⁵; "If then Parliament directs that an Englishman who commits an offence on the high seas shall be tried for it in a colonial or Indian court at the other end of the world, one would expect that the court should try him for the offence which he committed at the time and place where he committed it. But the offence he committed at such a latitude and longitude at sea was an offence at English law or none at all. Otherwise the remarkable result would follow that if a person committed an improper act at sea its criminality would depend on the direction in which the ship's head was turned. Suppose an English passenger in the Red Sea uses slanderous language which by English law would neither be punishable civilly nor criminally but would be defamation under the Penal Code; or suppose he obtains the property of another by a representation which would not be a false pretence under English law but would be cheating under the Penal Code; if he was tried in the Central criminal court he must be acquitted. Could he be convicted in the High Court of Bombay? Can a man who has committed no offence at all on the 1st July in the Red Sea be convicted on the 1st August in Bombay on the ground that if he had done the same act a fortnight later in a different place he would have been punishable under a code to which he was not subject when he did the act which is complained of? It seems almost a *reductio ad absurdum*". But if the reasoning of the Bombay decisions is to be adopted the Penal Code should apply in such cases. A comprehensive Indian enactment on the topic of Admiralty jurisdiction would be the proper solution.

V

Exemptions from Jurisdiction: There appears to be no statutory provision dealing with the immunity of foreign sovereigns, ambassadors and other diplomatic representatives, and other cases dealt with by text-writers ⁴⁶. It may also be considered whether it would not be appropriate to make statutory provision in this behalf.

45. Mayne Criminal Law of India 4th Edn. p. 75.

46. See Setalvad *Common Law in India* p. 152. Text-writers deal with Alien Enemy, Warships, foreign armies etc.

At present there is statutory provision regarding the President and the Governor (Art. 361 of the Constitution); the former rulers of native States (197A Cr.P.C.) and the U.N. officials under the United Nations (Privileges and Immunities) Act, XLVI of 1947.