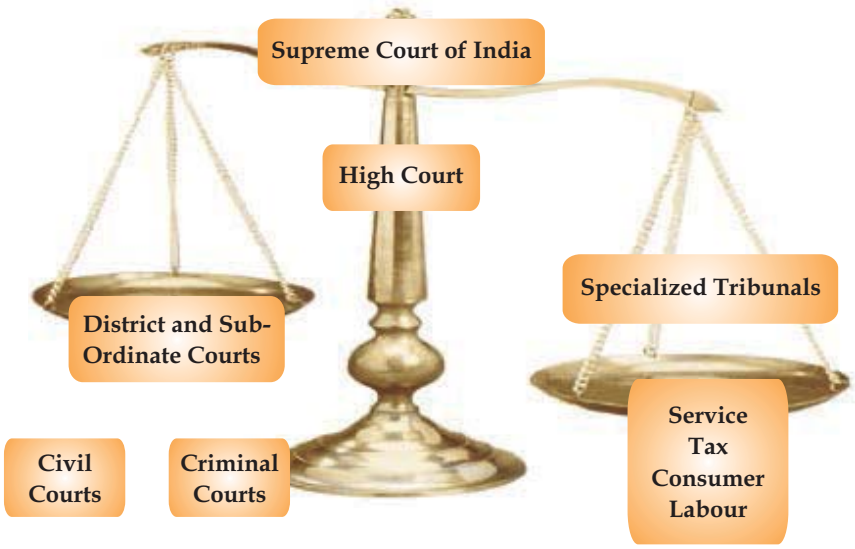
Unit–1: Judiciary

To Understand the Following Concepts

Common law, Adversarial system of law, Due process of law, Public Interest Litigation, Impartiality of judges, Judicial review, Separation of powers, Division of powers, Checks and balances, Basic structure, Collegium system in appointment of judges, Impeachment.



A. Structure, Hierarchy of Courts, and Legal Offices In India

1. Structure & Hierarchy of Courts in India

The Constitution of India lays out the framework of the Indian judicial system. India has adopted a federal system of government which distributes the law enacting power between the Centre and the States. Yet the Constitution establishes a single integrated system of judiciary comprising of courts to administer both Central and State laws. The Supreme Court located in New Delhi is the apex court of India. It is followed by various High Courts at the state level which function for one or more number of states. The High Courts are followed by district and subordinate courts which are known as the lower courts in India. To supplement the functioning of the Courts, there exist specialised tribunals to adjudicate sector specific claims such as labour, consumer, service matter disputes.

Supreme Court of India

The Supreme Court of India came into being on 28 January 1950. It replaced both the Federal Court of India and the Judicial Committee of the Privy Council which were at the apex of the Indian court system, under the colonial era. The Constitution of India

as it stood in 1950 envisaged a Supreme Court with a Chief Justice and 7 Judges. The Parliament was granted the power to increase the number of judges in the coming years. At present, the total strength of the Supreme Court is 31 judges including the Chief Justice of India.

High Courts

India consists of 24 High Courts at the state and union territory level. Each High Court has jurisdiction over a state, a union territory or a group of states and union territories. Below, the High Courts exists a hierarchy of lower courts functioning as civil courts and criminal courts as well as the specialised tribunals. The Madras High Court in Chennai, Bombay High Court in Mumbai, Calcutta High Court in Kolkata and the Allahabad High Court in Allahabad are the first four High Courts in India.

District and Sub-ordinate Courts

The Courts that function below the High Courts are popularly known as the lower Courts. They consist of district and sub-ordinate courts. Each state is divided into judicial districts presided over by a 'District and Sessions Judge'. The judge is known as a 'District Judge' when she/he presides over a civil case and a 'Sessions Judge' when he presides over a criminal case. The district judge is also called a 'Metropolitan Sessions Judge' when she/he is presiding over a district court in a city which is designated as a metropolitan area by the State government. District judges may be working with Additional District judges, depending upon the judicial workload.

The district judge is the highest judicial authority below a High Court judge. The District Court also holds appellate jurisdiction and supervision over all sub-ordinate Courts below it. On the Civil side, the sub-ordinate Courts below the District Court include (in ascending order) - Junior Civil Judge Court, Principal Junior Civil Judge Court, Senior Civil Judge Courts (also called sub-Courts). Sub-ordinate Courts on Criminal side (in ascending order) include- Second Class Judicial Magistrates Court, First Class Judicial Magistrate Court and Chief Judicial Magistrate Court.

Apart from the sub-ordinate Courts, Munsiff Courts also form a part of this hierarchy. They are the lowest in terms of handling matters of civil nature and function below the sub-ordinate Courts. Their pecuniary limits, meaning the Court's ability to hear matters upto a particular claim for money, are notified by respective State Governments.

Points to Note

A group of judges sitting together on a legal matter in the Court constitutes a bench. The lawyers constitute the members at the bar.

A division bench comprises of two or three judges.

A constitutional bench comprises of five or more judges and may even extend to thirteen judges

Tribunals

Apart from these judicial bodies, Indian judiciary is also characterised by numerous semi-judicial bodies involved in dispute resolution. These bodies function as semi or quasi-judicial bodies because they may consist of administrative officers or judges without a legal background. Yet they function in their judicial capacity and hear relevant legal matters and settle claims between the parties.

Tribunals have been constituted under specific constitutional mandate enshrined in the Constitution of India or through legal enactments, e.g. a law passed by the legislature. Their creation aims at increasing efficiency in resolving disputes and reducing the burden on courts. Examples of some of these tribunals include: Central Administrative Tribunal (CAT) for resolving the grievances and disputes of central government employees, and State Administrative Tribunals (SAT) for state government employees; Telecom Dispute Settlement Appellate Tribunal (TDSAT) for resolving disputes in the telecom sector in India; and the National Green Tribunal (NGT) for disputes involving environmental issues. Some of these tribunals function with regulators. Regulators are specialised government agencies that oversee the law and order compliance in the relevant government sectors. For example, one of the tribunals TDSAT functions alongside the regulator, TRAI (Telecom Regulatory Authority of India) in formulating laws and policy for resolving telecom disputes in India. Therefore these tribunals complement and supplement the role of courts in maintaining law and justice in the society.

Let us Ponder

India has no court of appeal unlike the UK. The Law Commission has, in its 227th report, recommended setting up four regional benches of the Supreme Court in Delhi, Chennai/Hyderabad, Kolkata and Mumbai. However, the Full Court of the Supreme Court has rejected the Law Commission's suggestion for establishing a Constitutional Bench in Delhi and Cassation Benches in the four regions.

The Indian Supreme Court hears more than 50,000 cases a year. The UK and US Supreme Courts, on the other hand, hear less than 100 cases a year on average. India, unlike the US, has a unified judicial system. So each State does not have a separate hierarchy of courts that adjudicate state laws.

Discuss the benefits and demerits of having regional benches for Supreme Courts in India.

2. Salient Features of Indian Judiciary

India as a Common Law Jurisdiction

Taking its precedence from the British tradition of 'common law', India has adopted a similar model. Under this scheme of the common law system, the decisions, orders and judgments developed by the judges in India help in the creation and development of laws and legal principles, which becomes binding precedents for all

subordinate courts in the hierarchy. Therefore, courts play a vital role in creating laws, especially where gaps in law exist, and the legislature or executive have failed to enact laws. Thus, apart from administering civil and criminal justice, courts and judges serve a vital function in the federal set up of the country.

Opposed to this model, is a concept of civil law system followed in countries such as Germany, Russia, and Continental Europe. The main difference between common and civil law is with respect to the source of law. Under common law, judiciary can make laws through judicial decisions of courts; however under civil law, only the legislature or executive has the power to create laws and rules. This salient feature of Indian judiciary in following a common law model further strengthens the role of courts in India.

Adversarial Model of Dispute Resolution

Courts in India follow the adversarial system of adjudication as opposed to the inquisitorial model followed in several civil law countries. In an adversarial model, the role of lawyers representing the party becomes vital. Lawyers of the opposing parties present their cases before a neutral judge who in turn provides a decision based on the merits of the case, as presented by the lawyers. In the inquisitorial system of law, on the other hand, judges are more pro-active in adjudicating the matter. Rather than acting as neutral judges, they have rights to inquire and probe into the matter, much like a police. Here the role of lawyers representing the party and the role of judge cumulatively becomes important in determining the manner in which a civil case or criminal trial proceeds.

Let us Ponder

Choose a civil law country in the world that follows an inquisitorial model of legal system. In this context, find out the main differences in the legal systems between India and the chosen country? Discuss your findings in class.

3. Attorney General of India and Law officers in India

The discussion on the structure of Indian judiciary would remain incomplete without an explanation of law offices and officers appointed by the central and state governments in India. Certain law offices at the Union and State level exist to advise the executive wing of the government. These law officers are taken up by law officers, who derive their mandate either from the Constitution or other statutory enactments and rules. The Attorney General is the first legal officer of the country. The Attorney General of India is appointed by the President of India under Article 76 of the Constitution, which states that he can hold the office during the pleasure of the President. The Attorney General must be a person qualified to be appointed as a Judge of the Supreme Court, possessing adequate legal practice or have served as a

judge for a requisite duration as mandated by the Constitution. It is the duty of the Attorney General for India to give advice to the Government of India upon legal matters and to perform other duties of legal character as may be referred or assigned to him by the President. In the performance of his duties, he has the right to appear in the Courts. This is known as a right to audience given to the Attorney General. He may also take part in the proceedings of the Parliament without a right to vote. In discharge of his functions, the Attorney General is assisted by a Solicitor General and four Additional Solicitors General. The position of the Solicitor General and Additional Solicitors General is not recognised in the Constitution. However they are governed through rules enacted by the Parliament.

Similar to the Attorney General of India, the position of Advocate General exists at the state level. An Advocate General is a senior law officer who acts as a legal adviser to the State Government. According to Article 165 of the Constitution, Advocate General is appointed by the Governor of the respective state. The Advocate General is the chief legal advisor of the State and performs duties of a legal character including representing the State before the courts either through himself/herself or through the law officers or pleaders appointed by the State. The qualification required for appointment as an Advocate General is similar to that of a judge of a High Court. The office of an Advocate General is held during the pleasure of the Governor, who also determines the nature of remunerations for the Advocate General. Additional Advocate Generals are also appointed to assist the office of the Advocate General.

Group Activity

"The Judiciary is an important pillar of the Indian judiciary". What is your perception of the Indian judiciary? What do you think is the major role of the judiciary?

B. Constitution, Roles and Impartiality

The judiciary in India derives its powers and functions from the Constitution, which till date remains the fundamental legal text for the functioning of Indian democracy.

1. Independence of Judiciary as a Constitutional Safeguard

As has been discussed in Part I (Legal Studies), Article 50 of the Indian Constitution lays the rule of independence of judiciary. This is understood as judiciary's autonomous status, separate from the executive or legislative wings of the government. Independence of judiciary helps in the maintenance of rule of law, ensuring good governance and creating a free and fair society. The independent status of the judiciary and roles to be performed by it; can be understood as two sides

of the same coin. In this context, one must understand the reasons for granting a special status to the judiciary:

First, Judiciary's independence is linked to its role as the watch-dog in a democracy. It monitors and maintains the checks and balances over the other arms of the government. Thus judiciary emerges as a mediator when any organ of the government exercises 'excess power' which tends to violate the larger societal or individual interest. For instance, the Indian Police has extensive powers for crime detection and gathering evidence for prosecution of criminals. It is common for the police to interrogate suspect criminals in-order to gather the best evidence of the crime. However such powers should not impinge upon the rights of the accused or the suspected criminal. An accused cannot be coerced into giving statement pointing to his/her guilt. This right has been constitutionally guaranteed to the accused under Article 20(3) of the Constitution, which states:

"*No person accused of any offence shall be compelled to be a witness against himself*".

Judiciary steps in when such delicate interests are at loggerheads. Similarly, when there is a thin line of difference as in case of a police exercising their power to gather witness, in the exercise of the 'legitimate' and 'excess' right of a state organ, the role of judiciary becomes vital.

Second, in-order to ensure that constitutionally guaranteed freedoms such as freedom to speak in public or peacefully assemble, are interpreted as per the true constitutional philosophy, judiciary has been kept free from any external pressures. This is particularly useful when judiciary is interpreting a case of conflict between say between the government (political party in power) and certain protesting people of the civil society who have peacefully articulate their opinions on social issues for example, crime against women.

Third, Judiciary acts as a guardian of fundamental rights which are constitutionally granted to every citizen in India. Independence of judiciary was carved out during the formation of Indian Constitution as India was transitioning from a feudal to a democratic order. It was done to fully translate the well-knit provisions of extensive rights guaranteed under the Constitution into the lives of average citizens. Our Constitution grants us unique rights such as:

- Civil and political rights- e.g. the right to life; right to freedom of discrimination based on religion, race, caste, sex or place of birth.
- Economic, social and cultural rights- e.g. freedom to practice any religion; protection of interests of minorities.

An independent and impartial Judiciary has empowered Indian citizens and performed this role. Illustratively, one may look into the role of Court in giving an

expanded meaningto Article 21 of the Indian Constitution which talks about a general right to life and personal liberty. For example, within this freedom, the Supreme Court has held that a street vendor has a right to operate on streets as selling products on street is linked to his livelihood and daily living which is protected under Article 21. Similarly, the Supreme Court has also stated that those who are aged, disabled and destitute in India including men and women have a right to food, which is most essential for their survival. State has a corresponding duty to provide them with food. This right has been read into the general right under Article 21. Therefore, the Court is performing the role which it was granted at the time of the drafting of Indian constitution. Even though the drafters did not include specific rights such as livelihood and food, within the constitutional ambit of enforceable fundamental rights, they are now made available to the citizens of India as matters of rights. This has been possible only by the interpretation and rule making function of the courts in India.

In the domain of criminal law as well, independence of judiciary is linked to the granting of a fair trial to the accused. This becomes extremely important even when the accused are foreign nationals or persons who have committed crimes against the state, e.g. terrorists.

Independence of judiciary is vital for the respect of due-process of law. Due process of law means that the State must respect all the legal rights that are owed to a person and confirm to the norms of fairness, liberty, fundamental rights etc. Only an independent judiciary can make this concept operational. History has evidenced that whenever the independence of judiciary has been disturbed, it has directly impacted upon the due process of governance and rights granted to average citizens.

These lessons teach us that even in grave political circumstances, the rights of citizens should not be compromised and this could only be possible through an independent and impartial judiciary. Therefore independence of judiciary remains a vital and core principle even in the modern democracy.

Let Us Ponder

Are there examples of non-independent judiciaries in the world? Find examples of social or political events and occurrences in newspapers or other sources that suggest some countries may not have independent judiciary.

2. Role of Indian Judiciary

The Role of Courts

Indian judiciary comprises of the Supreme Court, High Court, Sub-ordinate Courts and other Tribunals. The role of these courts along with their composition, powers and procedures for functioning have been elaborated in the Constitution.

Supreme Court


Adjudicator


Interpreter


Advisor


Activist

Different Roles of the Supreme Court of India

The Supreme Court of India primarily exercises the role of an adjudicator and interpreter. This is explained through different jurisdictions vested with the court. Its role as an adjudicator and interpreter can be understood through the original and appellate jurisdiction vested with the Court. Under Article 131 of the Constitution, the Supreme Court is granted original jurisdiction. This power is exercised to adjudicate amongst disputes between Union and one or more states and between two or more states. Such disputes must involve some question of law or fact on which the existence or extent of legal rights can be adjudicated. For example, the dispute between the sharing of river or other natural resources between two states in India can be directly brought to the Supreme Court under exercise of its original jurisdiction.

Article 32 of the Constitution further gives an extensive original jurisdiction to the Supreme Court for the enforcement of fundamental rights of the citizens, through issuing directions, orders and writs (See Part I, Legal Studies Class XI). This is popularly known as the 'Writ Jurisdiction' of the Court.

The appellate jurisdiction of the Supreme Court can be invoked by a certificate granted by the High Court. Appeal to the Supreme Court may be made against any judgement, decree or final order of a High Court in both civil and criminal cases. Like the exercise of original jurisdiction, these cases must involve a substantial question of law as to the interpretation of the Constitution. Substantial questions of law as highlighted above connote questions of law or fact on which the existence or extent of legal rights can be adjudicated.

Apart from the listed appellate powers of the Court, the Supreme Court isalso vested with wide appellate jurisdiction over all Courts and Tribunals as provided in Article 136 of the Constitution. Under its discretion, the Court may grant a special leave to appeal and receive any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or Tribunal in the territory of India.

Besides being an adjudicator and interpreter, Supreme Court also functions as an

adviser. Court's advisory jurisdiction may be sought by the President under Article 143 of the Constitution. This procedure is termed as "Presidential Reference" and is recognised as the 'Advisory jurisdiction' of the Court. Under this scheme, President may refer any question of law or fact of public importance. However, it is not binding on the Supreme Court to answer questions raised in the reference. In the last more than sixty years, only a handful of references have been made. The Supreme Court can refuse to provide its advisory opinion if it is satisfied that the questions are either socio-economic or political in nature.

So far we have seen the constitutional imperatives that permit the Supreme Court to adjudicate and advice on disputes coming from the sub-ordinate courts, individuals exercising writ jurisdiction and the President of India. In the recent years, the Supreme Court has relaxed its locus standi (meaning the right of a party to appear and be heard by a Court) and has permitted public spirited citizens and civil society organisations to approach the Court on behalf of the victims for better administration of justice. On other accounts, the Court has on its own initiative started cases of public importance. For instance, it has summoned and reprimanded state authorities for their apathy and lack of diligence in running child care homes in the states. All, this has been possible through the judicial activism of the Supreme Court through Public Interest Litigation (Janhit Yachika) (PIL). This extra-ordinary jurisdiction has been invoked either through writs or even by writing letters to Judges, whose modalities are maintained under the guidelines for PIL enacted by the Court.

The first ever PIL is listed as Hussainara Khatoon v. State of Bihar and dates back to 1979. A public interest activist lawyer filed this case on behalf of thousands of prisoners of the Bihar jail against the inhuman conditions of the prison. A Supreme Court bench headed by Justice P.N. Bhagwati declared the right for free legal aid and expeditious trial of these prisoners, which ultimately led to their release. Since then, PILs have encompassed several issues including socio-economic rights (freedom from bonded labour), legal entitlements (right to food; right to work), environment issues (clean air and water) and political reforms (disclosure of assets by members of the executive; disbursement of natural resources done by the government).

The progress of PIL has thus seemed to incorporate several issues. Yet common characteristics encompass these litigations. These characteristics include:

i) PILs can be termed as non-adversarial litigation that pits the interest of one party over the other. Rather than focussing on traditional litigation of adversary character, PILs are recognised as tools for social change.

ii) PILs are based on the tenets of citizen standing and representative standing which expands the rights of third-parties to approach the Court.

iii) PIL from its inception is modelled on remedial nature which aims at creating a dynamic, welfare oriented model of judiciary. PIL thus incorporates the Directive Principles whose claims cannot be brought directly to the Courts, into the domain of fundamental rights under Part III of the Constitution, which can be invoked before the Courts as a matter of rights by the citizens of India. Therefore PILs are creating new rights and laws within the realm of the state. These laws are also democratising citizen's access to justice, thereby strengthening the democracy in India.

iv) PIL further strengthens the role of judiciary as a monitor and watch-dog agency. Fear of being dragged to the Court via PIL has improved the quality of several social institutions in the country such as jails, protective homes, mental asylums etc.

However, with the advent and growth of PILs, they have also been misused for private gains, and led to frivolous litigation on unnecessary issues. They have also been criticised for judicial over-reach and stepping into the shoes of legislature.

Let us Ponder

Are PILs replacing or supplementing the role of legislature which is the primary law enacting organ in India?

High Courts and Lower Courts

The High Courts function as the organs of judicial administration at the State-level. Similarly, the lower courts function as centres of civil and criminal justice at the district level. Lower courts as explained above comprise of district and sub-ordinate courts. Districts Courts are usually Courts of first instance, where litigants proceed for their disputes. These Courts have set territorial and pecuniary limits when accepting cases of civil nature. A similar hierarchy exists in the criminal courts at the sub-ordinate level. Once matters are adjudicated by these courts, they proceed to the High Courts on appeal. Thus sub-ordinate courts are mainly vested with the establishment of facts while the appellate courts deal with interpretation of statues the correct application of law.

The High Courts have power to issue within their jurisdiction directions, orders, or writs including writs which are in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for enforcement of Fundamental Rights and for any other purpose. (See, Part I, Legal Studies) This writ jurisdiction is similar to the Supreme Court of India. The role of High Court also becomes similar to the Supreme Court in the exercise of public interest litigation. Furthermore, each High Court has powers of superintendence over all Courts within its jurisdiction. It can call for

records from such courts, make and issue general rules and prescribe forms to regulate their practice and proceedings and determine the manner and form in which book entries and accounts shall be kept.

3. Independence & Impartiality of Indian Judiciary

The meaning and rationale for independence of Indian judiciary has been dealt in the previous section. However we must also understand how the independence of judiciary is ensured and maintained by the Constitution. The theory of 'constituent mechanism' of independence of judiciary defines judiciary's independence in terms of the independence of its judges. Judges ought to function in an unbiased manner and scholars as pointed out by Simon Shetreet (The Culture of Judicial Independence; Judges on Trial).

One must note that, independence of judiciary and impartiality of judges exist as two distinct concepts- the former referring to the institution, and the latter referring to its constituent actors. The concept of impartiality of judges can be understood within the broad framework of independence of judiciary. These concepts must be studied in conjunction as they aim at achieving the same goal of maintaining judicial integrity in the democratic process of the country.

It is important to discuss the constitutional framework for the independence of judiciary. Broadly, the Indian Constitution contains several provisions to serve these twin functions.

Provisions Relating to the Institution of Judiciary

The Constitution recognises that vast powers enjoyed by the courts, especially the Supreme Court cannot be curtailed by the Parliament. In the civil cases, Parliament only has a limited right to change the pecuniary limits for appeal to the Supreme Court. In turn, the Supreme Court has a vast appellate jurisdiction and supplementary powers to enable its efficient functioning. Both the Supreme Court and the High Courts are courts of record and possess the power to punish for contempt against the judiciary or judges.

Provisions Relating to the Judges

Independence of judges is crucial to ensuring independence of judiciary. The following legal provisions mandate judge's independence and impartiality:

i) Once appointed, judges are provided with a security of tenure till they reach a retirement age. This age remains 62 for the High Court judges and 65 for the Supreme Court judges. Judges are not allowed to practice as advocates in the same or equivalent courts, post their retirement. For example, a retired High

Court judge can practice in the Supreme Court, but is prevented from practicing in the same or other High Courts. This ensures that ex-judges practicing at the bar do not influence the decision of the bench, with whom they may have presumed familiarity.

ii) Judges cannot be easily removed from their office except for proven misbehaviour and incapacity. The legal process is kept stringent to ensure security of tenure of the judges.

iii) The salaries and allowances of judges are fixed and not subject to vote of the legislature. Judges derive their salaries from the consolidated fund of India (for the Supreme Court) and consolidated fund of state (in case of High Courts). Their emoluments cannot be altered to their disadvantage except in the event of financial emergency.

Activity

Salary of judges is a constitutionally conferred privilege. Is it a sufficient measure in ensuring independence?

Examine whether the concept of life tenure for judges of Constitutional courts, as in the case of the United States of America, is suitable for judges of the Supreme Court of India and other High Courts?

iv) Even the judicial conduct of the judges has been kept immune from examination by other Constitutional organs. The conduct of judges of both the Supreme Court and High Courts cannot be discussed in Parliament or state legislature, except when a motion for removal of a judge is being presented to the President.

v) Supreme Court of India has been authorized to have its own establishment and to have complete control over it. It is further authorized to make appointments of officers and staff of the court and determine their service conditions.

Therefore, one can conclude that independence of judiciary is a constitutionally conferred protection.

Let us Ponder

Can independence of judiciary ever be achieved through complete impartiality of judges?

Judges are part of the same society that we live in; their inherent sociological and psychological biases impact decision making, thereby affecting the independence of judiciary as a whole? Discuss this Statement.

If you concur with this view, participate in the following activity:

Activity

The following table represents different forms of biases that judges may hold. In your views, would they have any impact on decision making? Based on your views, can you visualise the categories of

disputes (civil- land & property; marriage & divorce, liability claims; civil- murder; sexual offences, constitutional- public interest litigation or any other/all disputes) where the biases would impact the judges. The first illustrated example is drawn from an empirical study conducted by the Harvard Law School in 2005.

Nature of Bias	Impact on Decision Making (Yes/No)	How (in which category of dispute?)
Race of a judge	Yes	Employment Dispute
Judges coming from a poor rural background having witnessed sharp class, religious, caste discrimination		
Gender of the judge in adjudicating heinous crimes		
Judges who have served as government advocates before elevation		
Judges who are strong supporters of economic liberalisation		

C. Appointments, Trainings, Retirement and Removal of Judges

1. Appointment of Judges

Constitutional Mandate

The method of appointment of judges at the Supreme Court, High Court and District Courts has been enshrined in the Constitution of India. According to Article 124 of the Constitution, 'every judge of the Supreme Court shall be appointed by the President after consultation with such of the Judges of the Supreme Court and of the High Courts in the States, as the President may deem necessary'. The Article also provides that in case of appointment of a judge other than the Chief Justice of India, the Chief Justice must be consulted. The Article further provides for the qualifications required to become a judge at the Supreme Court. These qualifications include:

- Citizenship of India, and

- Has been for atleast five years a Judge of a High Court or of two or more High Courts in succession; or
- Has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or
- Is a distinguished jurist in the opinion of the President

Similarly, the procedure for appointment of judges at the High Court has been enshrined in Article 217 of the Constitution. This Article prescribes that every Judge of the High Court shall be appointed by the President after consultation with the Chief Justice of India, the Governor of the State; and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court concerned. The qualifications of a High Court judge includes:

- Citizenship of India, and
- Has for at least ten years held a judicial office in India; or
- Has for at least ten years been an advocate in a High Court or of two or more such Courts in succession.

For the district and sub-ordinate Courts or the lower judiciary in India, the procedure for appointment is mentioned in Article 233 of the Constitution. Appointment of district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. The qualifications for appointment as District Judge include:

- Member of judicial service of the State; or
- Any person who has had a minimum of seven years of practice as a lawyer at bar.

Current Practice in the Appointment of Judges

Despite a clear Constitutional mandate, the appointment of Judges in practice remains a complex process. There has been an extensive debate over the appointment procedure of judges which has seen alterations in actual practice. At present, the appointment at the Supreme Court and the High Court follows a collegium model, which is a judicial creation through case-laws, even though not constitutionally mandated. Under the collegium model for appointment of judges of the Supreme Court, the Chief Justice of India consults four senior most judges of the Supreme Court. The Chief Justice of India sends his recommendations to the Union Minister of Law and Justice, who then puts up the same to the Prime Minister. The Prime Minister will then advise the President. For High Courts, the collegium comprises of the Chief Justice of the High Court and two senior most judges of the High Court. The Chief Justice conveys his recommendations to the Chief Minister of the State and the Governor of the State, who in turn send their views directly to the Union Minster of

Law and Justice. The complete material is then forwarded to the Chief Justice of India, who in consultation with a collegium of two Judges of the Supreme Court, would send his recommendations to the Union Minister of Law and Justice. The Union Minister of Law and Justice then puts up the same to the Prime Minister who will advise the President in the matter of appointment.

The seniority of a Judge plays a vital role in his/her elevation or appointment as Chief Justice. For initial appointment as a Judge in a High Court for those from the lower judiciary inter-se seniority does matter; and for elevation of advocates from the bar, relative merit matters. The collegium model, considers the relative merits of those Judges/advocates in the zone of consideration for elevation with reference to their judgements and cases.

Tracing the Historical Debate on the Issue of Appointment of Judges

The issue of appointment has often been linked to the independence of judiciary and there has been a constant tussle between executive and judiciary over the appointment of judges. As early as the 14th Law Commission Report under the chairmanship of M.C. Setalvad, India's first attorney general in 1958, these concerns were raised. The Commission noted the appointment or rejection of appointment of judges by the executive, in contrary to what the judiciary suggested, creating rather awkward situations. The report highlighted that several appointments were being made on political, regional, communal or other grounds as a result of which the fittest of the lot were never appointed. The Commission thus suggested on strengthening the process of consultation between the executive and the judiciary.

Later, a series of three judicial decisions popularly known as the Three Judges Cases helped in the development of the modern collegium system. This development has been a result of a tumultuous process, but in modern practice governs the rule for judicial appointments. The first Judges case (1981) gave primacy to the Executive and stated that the CJI's recommendation to the President can be refused for cogent reasons. It gave vast powers to the Executive for the next 12 years, in making judicial appointments. This however was modified in the second Judges case (1993). 'The Judgment held that the Chief Justice of India has primacy in the matter of appointments to the Supreme Court and the High Courts, and that an appointment 'has to be in conformity with the final opinion of the Chief Justice of India', while emphasising the desirability of consultation of the Chief Justice with other Judges. The executive element in the appointment process was reduced to a minimum and political influence eliminated. This decision rendered by a nine-judge bench was however supported by only five judges on the bench and the four other judges did not concur with the majority opinion. The years that followed thus witnessed some confusion in the process of appointment as CJI made some unilateral appointments

and the role of the President was reduced to a mere approval. Later in 1998, the Supreme Court in a Presidential reference (1998 advisory decision) emphasized upon the role of 'consultation' and held that the process of appointment of Judges to the Supreme Court and the High Courts is an 'integrated participatory consultative process'. The Chief Justice of India firms up his opinion after consultation with a plurality of judges; his opinion is formed by a body of senior Judges.

As stated before, the collegium system is not constitutionally mandated and thus the legality of such a system invokes certain scepticisms.

To remove these concerns, an amendment has been proposed to the Constitution where the President shall appoint the judges on the recommendation of Judicial Appointments Commission (JAC). The JAC aims to replace the collegium system with a more formal body. This Commission as proposed will be chaired by the Chief Justice of India and will have 2 senior Supreme Court judges, besides the Union Law Minister, the Law Secretary as its convenor, and two 'eminent persons' nominated by a 'collegium' comprising the Prime Minister, Leader of Opposition and the Chief Justice of India. The Bill was introduced in the Rajya Sabha in August 2013. The Bill if legislated will provide a meaningful role to the executive and judiciary, and seeks to broad base the appointment process and make it more participatory to ensure greater transparency and objectivity in the appointments to higher judiciary. The composition and the functions of the JAC in the selection of the judges would be incorporated into the Constitution, once this amendment has been debated and finds enough votes in its favour in the Indian Parliament.

2. Judicial Training

National Judicial Academy is a government funded training institute constituted for the training of Supreme and High Court judges and judicial officers in India. This body was founded in 1993 and is located in Bhopal, with a registered office in New-Delhi. It aims at suggesting judicial reforms and providing research support services for greater efficiency, fairness and productivity in judicial decisions.

As a part of providing judicial training, the National Judicial Education Strategy (NJES) has been established in 2006 to provide judicial education to High Court judges, District Judiciary and State Judicial Academies. The training consists of conferences, orientations, workshops on core judicial skills and administration and seminars on substantive law and justice. The Academy also aims at enhancing the online skills registry of Indian judges to increase their proficiency and making better access to judicial decisions.

3. Retirement of Judges

The retirement age for a Supreme Court judge is 65 years. Similarly, a High Court

judge continues in his office, till the retirement age which is 62 years. The age of retirement of District Court judges is determined by their respective State Government under special service rules.

The retirement age of judges as specified in the Constitution has been subject to intense debate in India. There lies a pending bill in the Parliament (114th Amendment Bill, 2010) which proposes to increase the retirement age of High Court judges from 62 to 65. However, since the bill is still being debated in the Parliament, it has no legal effect. Similarly, the Venkatachalliah Committee formed to review the working of the Constitution (2000) suggested to increase the retirement age of Supreme Court judges from 65 to 68. These proposals have been made in the light of global comparative standards, followed to determine the retirement age for the judges.

For instance, there is no retirement age for Supreme Court judges in the United States. In the High Court of Australia, the retirement age is 70. The Supreme Court of Canada has fixed the retirement age of their judges as 75. Similarly in the UK Supreme Court, the retirement age is 75, while the Constitutional Court of South-Africa follows the age of 70 or after 12 years of the service of the judge.

Source: T.R. Andhyarujina, The Age of Judicial Reform, The Hindu, September 1, 2012

Similarly, Indian proposals focus on enhancing the age of retirement for the judges. It is done in-order to facilitate them excel in their service like their counter-part judges in the foreign jurisdictions. Similarly, several senior lawyers with requisite expertise and experience decline to accept judge-ship due to the lower retirement age of 62, especially in the High Courts. By an enhanced age, this problem could be rectified as advocates would have greater incentive to forego their individual legal practice and function in the role of judges. Further, the relatively early retirement age in India is often linked to the declining quality of judicial service and the inability of a judge to properly effectuate the stipulated judicial work-load. Overall, the proposals mention that such issues could be taken care of, if the retirement age of the judges would be increased.

4. Removal of Judges

Judges of the Supreme Court and the High Courts can be removed through a process called as 'impeachment'. The process for removal of the judges is exactly the same for both the Supreme Court and the High Courts. This has been stated explicitly in the Constitution of India.

As a part of the process of impeachment, an inquiry is made into the grounds of removal of the judges. The grounds for removal include: (i) proven misbehaviour or (ii) incapacity. The inquiry into these grounds is made under the Judges Inquiry Act, 1986. This inquiry is done by a committee of three members, of which two are judges -

one from the Supreme Court and second is the Chief Justice of High Court. If the complaint is against the high court judge then two judges from the Supreme Court constitute this Committee.

Based on the findings, the recommendation to impeach the judge has to be made by the Chief Justice of India to the President of India. If it is accepted then, the proposal of impeachment must be introduced in the Parliament for discussion by 100 MPs in Lok Sabha or 50 MPs in Rajya Sabha. The copy of the proposal is given to the concerned judge before the proceeding starts in the Parliament of India.

The impeachment process in the Parliament is governed under Article 124(4) of the Constitution. Under this scheme, the motion of impeachment has to be passed by the two-third majority members present and voting must be done separately in the each house of the Parliament. If the motion is passed then the formal announcement is done by the President of India. Therefore, the overall process of impeachment is lengthy and complex.

Consequently, in the history of Indian judiciary, this process has been successful only once. Justice Soumitra Sen, the Chief Justice of Calcutta High Court was impeached in 2011 for misappropriation of funds. Previously in 1991, the impeachment process was initiated against Justice V Ramaswamy, Chief Justice of Punjab and Haryana High Court but did not succeed on falling short of the two-thirds voting criteria.

As to the removal of judges in the lower judiciary, a District Judge or an Additional District Judge can be removed from his office by the State Government in consultation with the High Court.

Understanding the linkages amongst appointment of judges, independence of judiciary and Rule of Law in a democracy.

"...The success of a democracy largely depends upon an impartial strong and independent judiciary endowed with sufficient power to administer justice,"

"Although both judicial independence and judicial accountability are vital for maintaining the rule of law, they are sometimes projected as conflicting phenomenon. Judicial accountability has become an indispensable counterbalance to judicial independence.

"In that connection, accountability is fostered through the process of selection, discipline and removal found in the Constitution and the statutes in various judicial systems,"

Stressing the need for an independent judiciary, he said, without it, there is a little hope for the rule of law.

Justice P. Sathasivam, Chief Jusice of India (2014). The views are reproduced from- CJI defends Collegium System of appointment of judges, The Hindu, September 14, 2013.

D. Courts and Judicial Review

1. Introduction

(a) Judicial Review - General

Judicial review is a principle or a legal doctrine or a practice whereby a court can examine or review an executive or a legislative act, such as law or some other governmental or administrative decision, and determine if the act is incompatible with the constitution. In some countries, like the United States, France and Canada, judicial review allows the court to invalidate or nullify the law or the act of the legislature or the executive if they are found to be contrary to the constitution. In the United Kingdom, judicial review powers are restricted; the courts do not have authority to nullify or invalidate legislation of the Parliament. Likewise, there may be other countries where courts may have different kind of restrictions and may review only one branch.

(b) Separation of Powers - General

Although the doctrine of separation of powers have been dealt with in this unit as well as elsewhere in the legal studies course, it will be helpful to have a brief recap of the doctrine as it relates with the topic on judicial review. Most democratic countries have adopted in their Constitutions partial or complete system of separation of powers horizontally among the three branches of the government or of the state-- the legislative, the executive, and the judiciary. The doctrine of separation of powers ensures that each branch has distinct powers and responsibilities, based on organizational scheme of the Constitution. Furthermore, Constitution provides checks and balances so that no one branch exercises its supremacy over the others or misuse the powers provided to them. In this way, each branch puts a check on the other whenever there is an encroachment or conflict of powers among them and thereby preventing any concentration of powers in one branch. It is believed that the system of separation of powers may have few advantages: 1) it allows for liberty as it avoids concentration of powers in one branch; 2) it promotes efficiency; and 3) it facilitates and enriches democratic discussion through the powers of checks and balances of each branch. The powers of judicial review allow judiciary to safeguard the checks and balances and to ensure the separation of powers of the other two branches of the government.

Another related concept is the doctrine of division of powers between the federal or centre and states or provinces. Federal government has law making powers different than that of states or provinces. For example, the subject matters on

national defense and foreign affairs often fall with the federal government, and matters of prisons and direct taxes may fall with the state or provincial governments. The doctrine of division of powers stipulates and delimits subject matters or items on which the federal government and provincial/state governments have powers to make laws. The scheme may also involve common items on which both governments may have powers to make laws. Courts have judicial review powers to declare any law as unconstitutional if it is enacted by breaching the demarcation.

India, which is based on the parliamentary form of government, follows the system of separation of powers among the three branches of the government as prescribed in the Indian Constitution. The executive branch consists of the President, the Prime Minister and the bureaucracy. The legislative branch includes both houses of Parliament: the Lok Sabha and the Rajya Sabha. In the judiciary, the Supreme Court is the final authority for interpreting the constitution; judiciary is quiet independent of the other two branches.

2. Scope of Judicial Review in India

Judicial review is one of the essential features of the Indian Constitution; it has helped preserve the constitutional principles and values and the constitutional supremacy. The power of judicial review is available to the Supreme Court and the High Courts in different states in the matters of both legislative and administrative actions. Largely, this power has been applied for the protection and enforcement of fundamental rights provided in the Constitution. To a lesser extent, judicial review has also been used in matters concerning the legislative competence with regards to the Centre-State relations. With respect to judicial review on matters of executive or administrative actions, courts have employed doctrines such as 'proportionality', 'legitimate expectation', 'reasonableness', and the 'principles of natural justice'. Essentially, the scope of judicial review in courts in India has developed with respect to three issues: 1) protection of fundamental rights as guaranteed in the Constitution; 2) matters concerning the legislative competence between the centre and states; and 3) fairness in executive acts. Discussed below are some of the salient features, issues, as well as examples of the ways in which judicial review is practiced by the Supreme Court of India.

(a) Individual and Group Rights

Article 13(2) of the Constitution of India provides that: "The State shall not make any law which takes away or abridges the rights conferred by this Part (Part III - Fundamental Rights) and any law made in contravention of this clause shall, to the extent of the contravention, be void." B. R. Ambedkar, the chairman of the

Constitution drafting committee of the Constituent Assembly, has termed this provision as the 'heart of the Constitution'. This Article provides explicitly the powers of judicial review to the courts in the matters of fundamental rights. Furthermore, Article 32 offers the Supreme Court the power to enforce fundamental rights, and provides one the right to move the Supreme Court for the enforcement of those rights. From this article, the Supreme Court derives authority to issue directions or order or writs in the nature of: 1) habeas corpus, i.e., to order the release of person is unlawfully detained; 2) mandamus, i.e., to order to a public authority to do its duty; 3) prohibition, i.e., to prevent a subordinate court from continuing on a case; 4) quo warranto, i.e., to issue directive to a person to vacate an office wrongfully occupied; and 5) certiorari, i.e., to remove a case from a subordinate court and get the proceedings before it.

Like Article 32, Article 226 is a parallel provision for High Courts in states and allows one to institute similar writs in the High Courts for the enforcement of fundamental rights.

Courts, through its judicial review practice, have liberalized the doctrine of locus standi (right to appear before or petition the court) for the enforcement of fundamental rights of those who lack access to courts due to the reasons of poverty or social and economic disabilities. This method led to the development of Public or Social Action Litigation (PIL or SAL) whereby any public spirited person can petition or write letters to courts on behalf of the human rights violation victims or aggrieved parties. This topic has already been dealt with elsewhere in this Unit; students may refer to the relevant section for more on this topic.

(b) Centre-State Relations

Judicial review has also been used in matters concerning the legislative competence with regards to the Centre-State relations. Article 246 of the Constitution provides that the Parliament has exclusive powers to make laws with respect to matters itemized in the 'Union List' (List 1 of the Seventh Schedule of the Constitution). It provides further that both the Parliament and the Legislature of any State have powers to make laws with respect to matters enumerated in the 'Concurrent List' (List III of the Seventh Schedule of the Constitution). With respect to the States, it provides that the Legislature of any State has exclusive power to make laws with respect to matters listed in the 'State List' (List II of the Seventh Schedule). This Article delivers clear division of law-making powers (division of powers) as well as room for intersection between the Centre and the State. Judicial review helps demarcate the legislative competencies and ensures that Centre does not exert its supremacy over the state

matters and likewise states do not encroach upon matters within the ambit of the Centre.

(c) Fairness in Executive Actions

In matters of executive or administrative actions, judicial review practice of courts have often employed doctrines like 'principles of natural justice', 'reasonableness', 'proportionality', and 'legitimate expectation'; discussed below are few examples.

There is a Latin phrase audialterampartem, which literally means 'listen to the other side'. This phrase is an established principle in the Indian law practice and was applied by the Supreme Court in several cases including the landmark decision of Maneka Gandhi v. Union of India. Her passport was confiscated by the governmental authorities without giving her any chance of prior hearing. Invoking its judicial review powers in administrative matters, the Supreme Court held that in the matter of confiscation of passport a hearing should have been given to the petitioner in the interest of the principles of natural justice. Consequently, a hearing was given and the passport was returned to her. This is an example where the court adopted the principle of post decision-hearing, in situations of urgency where prior hearing is not feasible, and recognized that a chance of hearing cannot be debarred completely.

To deal with the questions of secrecy and related inefficiency and corruption in the administration, courts have adopted the judicial method of requiring disclosure of reasons in support of any order or decision delivered by the administration. This requirement holds good even when a statue or legislation does not provide for this requirement. Courts have emphasized that the right to provide reasons is an inherent part for justice delivery. Furthermore, judicial method of disclosure requirements deters the practice of arbitrary action by the officials and offers legal safeguard to the victims. Also, by notifying the aggrieved about the reasons, such disclosure satisfies the requirements of the principles of natural justice.

The courts have often used the principle of reasonableness in most cases that involve state action. The realm of contract law offers an example. Whenever states are parties to any contract, the courts attempt to distinguish such contracts with that of contracts entered between private individuals or parties. In that, private contracts concern personal interest; state contracts concern public good and public interest and is expected to act reasonably and not with freedom of discretion.

Another principle frequently utilized by courts in administrative law, especially

in service matters, is the principle of proportionality. Essentially, judicial review offers safeguards to the aggrieved against any sentence or punishment that is disproportionate and burdensome. For example, Supreme Court, in a case, has held that the quantum of penalty or punishment sentenced by a court martial on any army persons should not be disproportionate to the offence.

(d) Basic Structure

The Supreme Court has extended the practice of judicial review to the matters concerning the constitutional amendments by developing the doctrine of the basic structure of the Constitution. Article 368 confers power to the Parliament to amend the Constitution: "…by way of addition, variation or repeal any provision of this Constitution…" This Article in its wordings does not provide any limitation on the power of the Parliament to amend the Constitution. And as discussed earlier, Article 13(2) states that "the State shall not make any law which takes away or abridges the rights conferred by this Part (Part III - Fundamental Rights)." Article 13(2) limits Parliament's amending authority in matters of fundamental rights. In order to overcome this restriction, in 1971, the Parliament adopted the 24th Amendment to the Constitution altering Articles 13 and 368 in a way that allowed itself with unlimited powers of amendments including authority to amend the fundamental rights provisions.

The landmark 1973 Supreme Court case of Keshavanda Bharathi v. State of Kerela discussed the question about the unlimited constitutional amendment powers of the Parliament and established the doctrine of the basic structure or feature of the constitution. This doctrine invalidates any constitutional amendments that destroys or harms a basic or essential feature of the Constitution, like secularism, democracy and federalism. Supreme Court has also held judicial review to be the basic structure or feature of the Constitution; as a result, it can nullify any constitutional amendment that abolishes or disregards judicial review in issues concerning to fundamental rights of citizens.

E. Exercise

I. True/False

1. The Supreme Court of India came into being in 1947.
2. The law declared by the Supreme Court of India is binding on all courts.
3. India has an integrated system of judiciary.
4. The judges of the Supreme Court of India have life tenure.
5. Sub-ordinate Courts are superior to District Courts in the order of their hierarchy.

6. India is a civil law jurisdiction.
7. The office of Solicitor General and Additional Solicitor General is governed by the Indian Constitution.

II. Questions

1. How is the concept of independence of judiciary linked to the doctrine of separation of powers?
2. How does independence of judiciary relate to due process of law?
3. What are the benefits of independence of judiciary?
4. What are the main roles of the Supreme Court of India?
5. Comment on the types of jurisdictions that are vested with Courts in India?
6. What are the common elements in public interest litigation cases?
7. Differentiate between independence of judiciary and impartiality of judges.
8. What are the existing Constitutional mandates for the appointment of Judges in India?
9. Provide examples of how judges are trained once appointed? What are the benefits of such trainings?
10. Discuss the retirement age of judges in India. In the light of global comparison, provide your views regarding extending the retirement age.
11. Discuss in detail the procedure for impeachment. How many times has this process been successful in the history of Indian judiciary?
12. Define the concept of judicial review?
13. Explain the concept of separation of powers under the Indian Constitutition? How does it relate with the concept of checks and balances? What are the advantages of having a system of separation of powers?
14. What are the ways in which the scope of judicial review has evolved in courts in India?
15. What are the different kinds of writs Supreme Court can issue under Article 32 of the Indian Constitution?
16. Discuss how judicial review is used for the enforcement of fundamental rights.
17. Define division of powers in the context of the Indian Constitution.
18. Give few examples to show that judicial review ensures fairness in executive actions.
19. What is doctrine of basic structure of the Constitution?

III. Essay Questions

Write a long essay based on your understanding of the following concept and issues:

i) Appointment of judges

ii) Independence of judiciary

iii) The role of independence of judiciary in Indian democracy

iv) Impartiality of judges and procedure to safeguard and remove them from their office.

Draw possible linkages amongst the concepts discussed above.

IV. Activity Based Learning

Activity based learning provides opportunities to students with direct observation and learning about some aspect of the practice of law.

In this activity, students are required, in groups or individually, to visit any of the places given below to observe the practice of law. Students could watch how transactions are conducted and understand the key players. For example, a court room will have a judge, lawyers, parties, witnesses, advocate clerks, police men, and other court officers and staff. Understand the role of each person. After this visit, each student is required to write one page essay on any one or more aspects of the law practice that they have observed and/or just a summary of the visit. Students are then required to share and discuss what they have written with the entire class.

1. Court
2. Lawyer's chamber/office
3. Law office in corporation/company
4. Non-Governmental Organization (any NGO that is involved with some law related work, for e.g., advocacy on human rights)
5. Tribunal
6. Prison
7. Police Station
8. Commission on Women / Children / Human Rights / Minorities / Scheduled Caste / Scheduled Tribe
9. Any administrative office involved with quasi legal work
10. Parliament or legislative assemblies


Unit–2: Topics of Law

UNIT-2: (A) LAW OF PROPERTY

To Understand the Following Concepts

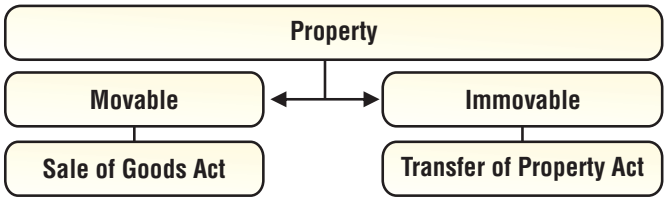
Property, Movable property, Immovable property, Persons competent to transfer, Essentials for a valid transfer, Doctrine of election, Sale, Lease, Exchange, Gift.

A. Introduction to Property Law

Matters relating to property are governed by the Transfer of Property Act, 1882 in India. The object of the Transfer of Property Act (called the "TPA" under the unit of Property Law) is to regulate the transfer of property between living persons. It shall also serve as the code of contract law governing immovable property.

The Transfer of Property Act, 1882 provides clarity on the subject: it is a systematic and uniform law on the transfer of immovable property in India.

B. Types of Property: Movable and Immovable



The term 'Property' or the term 'Transfer of Property' are not defined in the Act. Though not defined, the word 'property' has been used in a broad sense throughout the Act. Every interest or right that has an economic value denotes property. Property is of two kinds - movable and immovable. Movable property is one which can be transferred from one place to another and is governed by the Sale of Goods Act. Immovable property governed by the Transfer of Property Act is not defined in the Act. However, under Section 3, immovable property does not include standing timber, growing crops or grass. Immovable property includes lands, buildings and benefits arising out of land and things attached to the earth. In simple words, any property that is attached to the earth and cannot be transferred from one place to another is called immovable property.

In *Shanta Bai v. State of Bombay* (1958 SC 532), the distinction between movable and immovable property was observed. If the intention is to reap fruits from the trees, then it is regarded as an immovable property. But if the intention is to cut down the tree and use it as timber, it would be regarded as movable property.

In *Marshall v. Green* (33 LT 404), there was sale of trees wherein the trees were cut and taken away. The Court held that the sale was not that of immovable property.

C. Transfer

Who can transfer property?

Any person who is competent to contract (person above 18 years of age, having sound mind and not disqualified by any law in force) and authorized to dispose off property viz., owner of the property or any person authorized to sell the property, can make a transfer. The person who Transfers the property is called the Transferor and the person to whom the transfer is made is called the Transferee.

How can property be transferred?

The mode of transfer of property varies according to the value of the property. If the value of the property is more than ₹ 100/-, then transfer has to be made only by a registered instrument. If the property is tangible and the value of the property is less than ₹ 100/-, irrespective of the value of the property, then transfer has to be made only by delivery; whereas for intangible property, irrespective of the value of the property, transfer has to be made only by registered instrument. (A registered instrument contains the records of the owner of the property- for example: shares, bonds, etc.)

A registered instrument has to be attested at least by two persons who are parties to the transfer. Attestation means affixing the signature in the registered instrument. The witnesses should mark their signature too on the instrument with an intention to attest. Registration of the instrument is an essential legal formality. During registration, the parties to the transfer must be present to affix their signatures in the document and complete the transaction with regard to immovable property. While doing so, the document containing the rights, obligations and liabilities of the parties should be clearly mentioned in the document which is registered. Registration shall take place by affixing a seal of the Registrar office which shall be subsequently included in the official records.

D. Essentials for a Valid Transfer

The following are the essentials for a valid transfer:

- In a transfer of property, the transfer should be between two or more living persons.
- The property that is going to be transferred should be free from encumbrances (hindrances of any form) and be of a transferable nature.
- The transfer should not be:
  - for an unlawful object or an unlawful consideration (*for a detailed understanding, refer the chapter on Contracts*);

- involving a person legally disqualified to be a transferor or transferee.

- The transferor who transfers the property must:
  - be competent to make the transfer;
  - be entitled to the transferable property;
  - be authorized to dispose off the property if the property is not his own property.
- The transfer should be made according to the appropriate mode of transfer. Necessary formalities like registration, attestation, etc. should be complied with.
- In the case of a conditional transfer, where an interest is created on the fulfillment of a condition, the condition should not be illegal, immoral, impossible or opposed to public policy.

E. Doctrine of Election

According to the principle of Doctrine of Election [Section 35 of the TPA], a party to the transfer cannot accept as well as reject in a single transaction. In other words, while claiming advantage of an instrument, the burden of the instrument should also be accepted.

If a person to the transfer gets two selections (a benefit and a burden), then he has to accept both the benefit and the burden or none. He cannot accept the benefit and reject the burden in a single transaction.

Illustration: *A sells his garden as well as his house through one instrument to B. Whereas, B wants to retain only the house and wants to cancel the transfer regarding the garden. According to the Doctrine of Election, B has to retain the garden if he wants to retain the house, or cancel the whole transaction. B cannot retain the house and cancel the transfer regarding the garden.*

In *Cooper v. Cooper* 1874, LR 7 HL 53, the Court held that the doctrine of election applied on every instrument and all types of property.

Activity

Try and locate a property that is owned by someone you know.
List all the elements of a transfer that you can find through that transaction. See if the Doctrine of Election exists within this transaction. If so enumerate its applicability.

F. Doctrine of Lis Pendens

The Doctrine of lis pendens emerged from the Latin maxim '*ut lite pendent nihil innoveteur*' meaning 'nothing new should be introduced in a pending litigation'.

When a suit or litigation is pending on an immovable property, then that immovable property cannot be transferred.

To constitute lis pendens, the following conditions should be satisfied:

- A suit or proceeding involving the immovable property should be pending;
- The right to the immovable property must be in question in the suit or proceeding;
- The property in litigation should be transferred;
- The transferred property should affect the rights of the other person to the transfer.

Illustration: *A has a litigation in determining the title of the property with X. During the period of litigation, A initiates a sale of the property in favour of B. According to the Doctrine of Lis Pendens, the property cannot be sold because the property is involved in litigation.*

G. Sale

Sale means a transfer of ownership (right to possess something) of the property in exchange for a price (money) [Section 54 of the TPA]. Seller is the person who transfers the property and buyer is the person to whom the property is transferred. The consideration in a sale is usually money (*for a detailed understanding, refer the chapter on Contracts*).

Illustration: *A sells his house for Rs. 2 lakhs to B. This is called sale. Here, A is the seller and B is the buyer. Rs. 2 lakhs is the consideration which is money.*

The following are the essentials for a sale to be valid:

- There should be two different parties- the seller and the buyer;
- Both the parties should be competent to transfer;
- The property to be transferred should be in existence;
- Consideration for the transfer should be money;
- The contract should be in accordance with law.

Rights and Liabilities of Buyer and Seller

Liabilities sf Seller:

- Disclose defects of the property which is known to the seller and is not known to the buyer;
- Produce to the buyer all documents of title (documents regarding ownership) relating to the property;

- Answer all the questions put to him by the buyer in relation to the property;
- Take care and preserve the property and the documents of title between the date of the contract of sale and the delivery of the property;
- Bear all public charges and rent with regard to the property up to the date of sale;
- To give the buyer possession of the property.

Rights of Seller:

- Collect the rents and profits of the property till the ownership passes to the buyer;
- When ownership has passed on to the buyer from the seller before payment of money in full, claim the amount from the buyer that is due to him.

Liabilities of Buyer:

- Disclose to the seller any fact with regard to the property that will increase the value of the property that is known to him;
- Pay to the seller purchase money at the time of completing the sale;
- To bear any loss that arises from the destruction, injury or decrease in value of the property after the ownership has passed to the buyer;
- To pay all public charges and rent that becomes payable after the ownership passed to the buyer.

Rights of Buyer:

- After the ownership has passed to the buyer, perform any lawful action to increase the value of property and the rents and profits with regard to the property;
- Where the buyer has paid the purchase money, he can compel the seller for registration of sale.

In *Madam Pillai V. Badar Kali* (45 Mad 612 (FB), the plaintiff being the first wife made a claim for maintenance to her husband. The husband orally transferred his lands of the value of Rs. 100/- to the plaintiff. Later, he executed an instrument of sale in favour of the defendant for the same property. The plaintiff initiated a suit stating that the transfer was initially made in her favour and the subsequent sale to the defendant was not valid. The defendant stated that the transfer in favour of the plaintiff failed for want of a registered instrument. The Court held that - the plaintiff acquired a title by way of oral transfer and she is entitled to the property though the instrument of sale was not registered.

H. Lease

We must have observed some people in our locality give possession of the property to another for some period of time for money but does not constitute sale. It is called lease.

Lease is a transfer of right to enjoy a property for a specific period of time in consideration for a price. Lessor is the person who lets out the property for lease or transferor, and lessee is the person to whom the property is leased or the transferee in a lease. The lessee can also sub-let the lease and the relation between the lessee and the sub-lessee will be that of lessor and lessee.

Illustration: *A for a period of 3 years lets out his property for use to B for a sum of Rs. 50,000/- This is called lease. A is the lessor and B is the lessee. If B sub-lets the property to C, then B will be the lessee and C will be the sub-lessee. The relation between B and C will be of that relation that is between A and B.*

Rights and Liabilities of Lessor and Lessee

Rights and Liabilities of the Lessor

- Disclose defects of the property which is known to him and is not known to the lessee;
- Give possession of the property to the lessee;
- The lessor shall let out the property for lease to the lessee and make sure the lessee enjoys the property without any interruption upon payment of money.

Rights and Liabilities of the Lessee

- If any addition is made to the lease property during the lease period, then the addition can be comprised in the lease;
- If any part of the lease property is destroyed or made unfit by flood, fire, etc., then the lease shall be voidable by the lessee (the lessee gets a right to accept or reject depending on his wish);
- If the lessor fails to make repairs to the leased property, the lessee may make the repairs himself and recover the amount for the repairs from the lessor;
- If the lessor fails to make any payment with respect to the property and is recovered from the lessee, the lessee shall get it reimbursed from the lessor;
- At the time of completion of the lease, the lessee should hand over the property to the lessor in the state in which it was received;
- The lessee may transfer, rent or sub-let the leased property with the consent of the lessor;

- Disclose to the lessor any fact that lies in the property that will increase the value of the property;
- The lessee should pay rent at a proper time and place as specified by the lessor;
- The lessee is bound to keep the leased property in good condition when he is in possession of the property.
- When notice of any defect is given to the lessee, he is bound to rectify it within a period of three months;
- The lessee may use the property and its products and must not do anything that is destructive to the property;
- The lessee should not erect any permanent structure in the property without the consent of the lessor;
- The lessee is bound to put the lessor in possession of the property for determination of lease.

In *Gajadhar v. Rombhaee* 1938 Nag. 439, a theatre was sub-leased and the sub-lessee was prevented from using the theatre by the original lessor on the ground that a notice was served on the lessee for determining the lease. The sub-lessee had to pay an additional amount to the proprietor (the original lessor) and then take the lease. It was held that there is violation on the part of the original lessor and the sub-lessee can sue the original lessor for damages for violation of quiet enjoyment of the property.

I. Exchange

When two persons transfer ownership of one thing for the ownership of another, it is called exchange [Section 118 of the TPA]. Transfer of property by exchange can be made only by way of sale. The rights and liabilities of the parties to exchange shall be that of the rights and liabilities of the buyer to the extent of receiving and that of the seller to the extent of giving.

Illustration: *A offers to sell his cottage to B. B in consideration of the cottage sells his farm to A. Instead of getting money for his cottage, A has received a farm from B. This is an example for Exchange. The rights and liabilities of A will be that of seller towards the sale of the cottage and will be that of buyer towards the sale of the farm. Similarly, the rights and liabilities of B will be that of buyer towards the sale of the cottage and that of seller towards the sale of the farm.*

J) Gift

A transfer of ownership of property that is made voluntarily and without consideration is called Gift [Section 122 of the TPA]. The person making the transfer is called the donor and the person to whom it is made is called the donee. If the donee expires before accepting the gift, it becomes void.

Illustration: *A gives his car to B. B accepts the car. But B does not pay anything in return for the car. This is known as Gift. In this case, A is the donor and B is the donee.*

Sale, Lease, Exchange and Gift

Basis	Sale	Lease	Exchange	Gift
Transfer	Transfer of ownership for price	Transfer of limited owner-ship for rent	Transfer of ownership for some other property	Transfer of ownership without consideration
Consideration	Price	Rent	Another Property	No consideration
Mode	Sale deed should be registered	Lease deed should be registered	Sale deed should be registered	Gift of immovable property should be registered.

Activity

Pretend you are a property owner. Based on the information provided in the lesson, create an agreement in terms of responsibility for the lesse. Now do the same in terms of the lessor or owner. Highlight the applicable terms of lease relationship from the lessees point of view.

K. Intellectual Property

Intellectual property is another kind of property which does not involve movable or immovable property. Any work such as invention, artistic work or literary work, design, symbol, name, image, etc. created by the knowledge or intellectual capacity of a person is called intellectual property. Such intellectual property can be protected by law.

The following are the types of intellectual property:

- Trademarks;
- Patents;
- Copyrights;
- Designs;
- Geographical indications.

Trademarks: Any mark put on the product such as the name of a product or service (Brand name) which helps people to distinguish it from other products and services is called a

Trademark. The names of a products, companies, etc. are Trademarks. (Example: Apollo Pharmacy, Titan watches, etc.)

Patents: The right granted over the invention of a product is called Patent. In other words, when a person makes a new product, he can get a patent for the product. The person who made the invention is called patent owner. The patent owner can decide upon the usage of the product and who should use the product.

Copyrights: Copyright is the right obtained over the creation of any literary or artistic work. Books, music, films, paintings, scriptures, etc. are covered under copyright. Any person who wants to write a book or make a film based on the writing or idea of another person should seek his permission for the idea that he has used.

Designs: Any design invented by a person shall be protected by Designs. Shape, colour, line, pattern, etc. are covered under Designs. (Example: Design of the wrapper of a biscuit or chocolate, Design of a car, Design of the shape of a cold drink bottle, etc.)

Geographical Indications: Certain products or goods have a specific geographical origin and possess characteristics that attribute to the place of origin. Such goods and products bear the name of the geographical origin. This is called geographical indication. (Example: Darjeeling tea, Tirupathi laddu, etc.)

Activity

Pick three products (including books) that are in common use around you. Check their packaging for IPR related notices. If you fail to find such, create an IPR statement on any aspect that you feel requires it. Check for patent marks, design /content copyright and make a comparative list, with a column for remarks filled in by you regarding the functionality of that particular IPR/Patent/Indicator.

L. Exercise

I. Questions

1. Write a short note on property and kinds of property.
2. Short note on Doctrine of election.
3. Write a short note on Exchange.
4. Write a short note on gift.

II. Essay Questions

1. What are the essential elements of a transfer? Who can transfer an immovable property? How can an immovable property be transferred?

2. What is sale? What are the rights and liabilities of seller and buyer?

3. Write a brief note on lease and explain the rights and liabilities of lessor and lessee.

4. What is intellectual property? Explain the types of intellectual property.

III. Activity Based Learning

Activity based learning provides opportunities to students with direct observation and learning about some aspect of the practice of law.

- In this activity, students are required, in groups or individually, to provide answers to the questions below to observe their knowledge on the law of property. This is only a learning activity for class discussion.

  - Give examples for movable and immovable property.
  - 'A' transfers two different properties through the same Instrument. Is it valid?
  - X leases his property to Y. Y having the property in his possession makes some alterations. After the lease period, the property goes back to X. What are the remedies available to X as well as Y?
  - Mr. Kan professes to gift his property at Nainital worth ₹ 10000/- to Ms. Mont and by the same instrument another property at Coimbatore for ₹ 5000/-. As Ms. Mont can stay only at one place among the two, wants to retain the property at Nainital and reject the transfer of property at Coimbatore. Can she do it?
  - The property belonging to X is in litigation. X is expecting to get a judgment in his favour. Can he sell the property to Y or any other person before the judgment is given?

UNIT-2: (B) LAW OF CONTRACTS

To Understand the Following Concepts

Agreement, Contract, Offer, Acceptance, Consideration, Capacity, Major, Consent, Unlawful agreement, Wager, Contingent contract, Discharge, Breach, Damages.

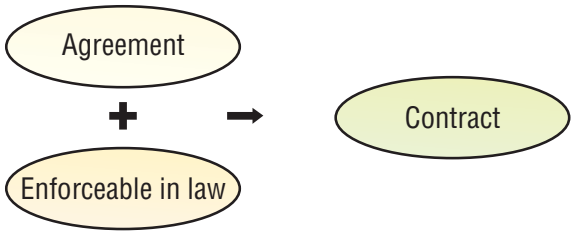
A. Introduction to Contracts

Contracts are an important part of commercial law because all commercial law transactions usually begin with an agreement or a contract.

Business transactions involving sale-purchase or exchange of services have become an integral part in day-to-day activities. In such instances, an agreement or a contract is necessary for determining the rights, obligations and liabilities of parties when they enter into any business transaction. The Indian Contract Act is the law governing contracts in India.

According to the Indian Contract Act, 1872, (referred to as the ICA) an agreement that is enforceable by law is a contract [Section 2(h)]. An agreement, in simple words, is a promise. All agreements are not contracts. Agreements must meet certain criteria - like consideration, parties must be competent, free consent between parties, lawful object, and, not expressly declared void by law, in order to qualify as a contract. It is important that the persons to a contract should also have the intention and mindset to enter into contract.

"All contracts are agreements but all agreements are not contracts"



In a leading case *Balfour v. Balfour* (1919, 5 KB 571), the validity of an agreement entered between a husband and wife was in question. The husband and wife went on leave to England and the wife fell ill in England. The doctors who treated the wife advised her to take full bed rest and remain in England in order to continue the treatment. The wife stayed in England. When the leave was over, the husband went to Ceylone where he was employed and promised to send a sum of £30 to the wife every month for her stay in England. He sent the amount for some time and later on due to differences and misunderstanding between them, the husband stopped sending the amount. The wife initiated action to recover the arrears due to her. The Court dismissed it on the ground that the agreement entered into between the husband and

wife was not a contract. The arrangement between the husband and wife was only a moral obligation and the parties never intended to create any legal relationship.

The decision clearly shows that agreements that create a legal obligation are only contracts and those agreements that do not intend to create legal relationship are not contracts.

B. The Making of an Agreement: General Principles

The following chart depicts the essential elements of a contract:

C. Offer/Proposal and Acceptance

The offer or proposal is the first step in the formation of a contract. When one person signifies to another his willingness to do or not to do certain things, it is called an Offer [Section 2(a) of ICA]. The person making the proposal or offer is called the offeror and the person to whom the offer is made is called the offeree. The offer given must be with an intention to create a legal relationship.

An assent or consent given to an offer by the offeree is known as Acceptance [Section 2(b) of ICA]. By saying 'yes', 'ok' or clicking on 'I agree' on an offer on a website also amounts to acceptance. An offer when accepted becomes an agreement. An agreement is also called as promise.

Illustration: Offer + Acceptance = Agreement

A expresses his willingness to sell his cottage to B for Rs. 5 lakhs. Here, A's willingness is called offer. A is the offeror and B is the offeree. B accepts the offer to purchase the cottage. This is called Acceptance. A's offer when accepted by B becomes an Agreement.

An offer and acceptance must be definite and certain. If the offer or acceptance is not clear enough to conclude a contract, it is considered invalid. Also, an offer and acceptance must be communicated to the other person in order to be valid. A communication in electronic form or over emails also amount to communication of offer and acceptance. An offer lapses by revocation or withdrawal. Any offer can be revoked before acceptance.

In an English case *Carlill v. Carbolic Smoke Ball Co.* (1893, 1 QB 256), the company was the manufacturer of a medicine called smoke ball which was used for the treatment of influenza. The company believed that the medicine completely cured influenza. An advertisement was put up offering a reward of £100 to anyone who got influenza again after using the smoke ball medicine continuously for fifteen days. In the advertisement, it was also stated that £1000 was deposited in a Bank, namely, Alliance Bank for paying the reward if such situation arose. Seeing the advertisement, Mrs. Carlill bought the smoke ball medicine and used it as per the directions provided. Mrs. Carlill got a fresh episode of influenza. Mrs. Carlill sued the company for the reward of £100. The manufacturing company stated that: (1) there was no intention to enter into a legal relationship with anyone through the advertisement, and the advertisement was put up only to boost the marketing of the smoke ball medicine; (2) the advertisement was not an offer as it was not made to any particular person and an offer cannot be made to the public at large or to the whole world; (3) acceptance by the offeree had not been communicated, and so there was no binding contract. The Court rejected these contentions of the company and allowed Mrs. Carlill's claim for £100. The Court also stated that deposit of £1000 in the Alliance Bank by the smoke ball company was evidence that the company had real intention to enter into a legal relationship with anyone who accepted the offer. An offer can also be made to the world at large. It is called a general offer and it is valid. In the case of general offer, there is no need for communicating acceptance to the offeror. Merely fulfilling the conditions of the offer itself is treated as acceptance to create a contract.

D. Consideration

Consideration is an important element in a contract. A contract without consideration is not valid. Consideration means 'something in return' for the offer. Consideration can be in the nature of an act or forbearance. The general rule is that, an agreement without consideration is void and not enforceable by law because in such cases, one party is getting something from the other without giving anything to the other. There should always be a mutual consideration. In other words, each party must give and also take. There are exceptions to this general rule in certain situations such as a written and registered agreement out of natural love is not void, even if it is without consideration. Consideration need not be adequate, but should be real.

Consideration may be past, present or future and should not be illegal, immoral or opposed to public policy.

Illustration: *A offers to sell his car for ₹ 50,000/- to B. B accepts the offer. In this case, the consideration of A is his car and the consideration of B is ₹ 50,000/-.*

Illustration: *A, for natural love and affection, promises to give his son, B, ₹ 1,000/-. A puts his promise to Bin writing and registers it. This is a contract and absence of consideration does not make it void.*

In an Indian case - *Durga Prasad V. Baldeo* (1880, 3All 221), the plaintiff constructed some shops at the request of the District Collector in a town. The constructed shops were given for rent for doing business to the defendant. The defendant, apart from the rent, promised to give 5% commission to the plaintiff on all articles sold through the shop in consideration of the huge amount spent by the plaintiff in the construction of the building. The defendant failed to pay the commission and the plaintiff initiated action to recover the commission. The Court rejected the action of the plaintiff on the ground that the construction of shop was done at the desire of the District Collector and not on the desire of the defendant and hence there was no consideration to give commission. Accordingly, there is no valid contract to pay commission to the plaintiff.

E. Capacity to Contract

Any person who is a major, i.e., above 18 years of age, is competent to enter into a contract and minors are not competent to enter into a contract. The exception to this rule is that, if a minor enters into a contract and the enforcement of such contract is beneficial for the minor then it will not be held to be void. Furthermore, a person should also have a sound mind and should not be disqualified by any law in force. At the time of making the contract, if the person is capable of understanding the contract and making a rational judgment, he is said to have a sound mind. The following persons are not competent to enter into a contract:

- Minor - Persons who are less than 18 years of age;
- Persons with unsound mind - (a) Idiots, (b) Lunatics, (c) Drunkards;
- Persons disqualified by law - (a) Alien enemies, (b) Foreign sovereign, (c) Insolvents, (d) Convicts, (e) Corporation, (f) Barristers.

Illustration: *A (major) offers to sell his coat for ₹ 3000/- to B (minor). B accepts the offer and pays ₹ 3000/-. A states that the contract is entered into with a minor and hence void. In this case, even if the contract is entered into with a minor, it is enforceable because it is beneficial to the minor and the minor has performed his part of the obligation in the contract.*

F. Consent

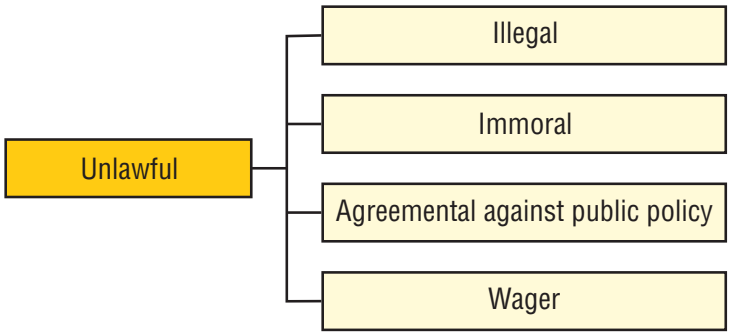
Consent is an important criterion while entering into a contract. When two persons agree on the same thing in the same sense, it is termed as consent [Section 13]. Consent should be free and not caused by coercion, undue influence, misrepresentation, fraud or mistake. If consent is obtained by the influence of any one of the above said, then the consent so obtained is not free. It becomes voidable (avoid enforcement of contact) for the person whose consent is not free.

Illustration: A threatened to kill B if he does not sell his house to A. B out of fear signs the contract for selling his house to A. Here, the consent of B is not free. B can later avoid the sale on the ground that he was compelled to agree to the sale and the consent given was not free consent.

Activity

We live in a world where we constantly engage in contractual offers and agreements. From your own interactions with family, friends, teachers, neighbours, traders and general public, identify and tabulate ten instances, clearly indicating the incidence of *offer, acceptance, consideration, contract and consent*.

G. Unlawful Agreements



If the object of the agreement is to perform an unlawful act, then the contract is unenforceable. The object of the agreement should not be illegal, immoral or opposed to public policy.

Illustration: *A enters into an agreement with B to share the profits by giving false assurance to the public to get them a job in Singapore. The agreement involves cheating which is a fraudulent act. The agreement is unlawful and hence it is void.*

As per the Indian Contract Act, agreements entered into which are against public policy of the State are said to have an unlawful object and hence are unlawful agreements making them unenforceable.

Illustration: *A agrees to give ₹ 1000/- to B as penalty if minor daughter is not given to A in marriage. This agreement is opposed to public policy and not enforceable.*

As per the Indian Contract Act, agreements entered into by way of wager are not enforceable. Wager is a contract where one person promises to pay the other money on the happening of an uncertain future event and the other person promises to pay on the non-happening of the event. There is a reciprocal promise involved in a wager. Wager is like a bet where the happening of an uncertain event is the condition on which the promise depends.

Illustration: *A agrees to give Rs. 1000/- to B if India wins the match on 24th August. B agrees to pay A the same amount if India does not win the match. The agreement is a wager and it is void.*

H. Contingent Contract

Contingent contract, also called as Conditional contract, is a contract to do something or not to do something on the happening or non-happening of an event, which is collateral to the contract. Contingent contracts cannot be enforced until the uncertain future event happens. If the uncertain future event becomes impossible, contingent contracts become void.

Illustration: *A agrees to sell his farm land to B if he wins the case involving his farm land. This is a case of contingent contract because the performance of the contract is based on the happening of an uncertain event. The uncertain future event is winning the case.*

Differences Between Wager and Contingent Contract:

Wager	Contingent Contract
Wager is an invalid contract.	Contingent contracts are valid.
In wager, there is always a reciprocal promise.	In contingent contract, there is no reciprocal promise.
Third parties do not have interest in wager.	Third parties may have an interest in contingent contract.
Wager is contingent in nature.	Contingent contracts are never wagering.

Activity

All contracts, no matter whom they are contracted between, are admissible for jurisdiction. Identify three instances from within your own experience of *conditional contract* that is a part of normal interactions between you and your parents, your friends and your teachers. Identify also the validity of the contract (even if it is not clearly stated) and present your case for any *one* of them in class.

I. Discharge of Contract

Mutual obligations of parties are created in a contract. When the mutual obligations of the parties are fulfilled, the contract comes to an end. When the contract is ended, it is said to be discharged. In other words, Discharge means termination of the contractual relations of the parties to the contract.

Discharge of a contract may be done by the following ways:

- Discharge by Performance;
- Discharge by Agreement or Consent;
- Discharge by Impossibility of Performance;
- Discharge by Lapse of time;
- Discharge by Operation of law;
- Discharge by Breach of contract.

⇒ Discharge by Performance

When parties to a contract perform their obligations and fulfil their promises, the contract gets discharged by performance.

Illustration: *An offer to sell his dining set to B for Rs. 10,000/-. B pays Rs. 10,000/- to A and A delivers his dining set to B. Here the contract gets discharged by performance as both the parties fulfilled their promises.*

⇒ Discharge by Agreement or Consent

(a) Novation - A new contract is substituted for an old contract.

(b) Rescission - Certain terms or all terms of a contract are cancelled.

(c) Alteration - When certain terms of a contract are altered or modified with the mutual consent of the parties.

(d) Remission - Acceptance is made to a promise but not on the complete terms of the promise but to a lesser fulfilment of the promise.

(e) Waiver - Parties to a contract abandon their mutual rights.

(f) Merger - Certain terms of a contract or all the terms of a contract are merged into another contract with the consent of the parties.

Illustration: A enters into an agreement with B for buying certain machine parts for their project. Before the agreement ends, A and B change certain terms of the

agreement and include those terms in the agreement. This is a case of Discharge by agreement.

⇒ Discharge by Impossibility of Performance

Performance of a contract can become impossible with or without the knowledge of the parties to the contract. It can also become impossible subsequently after the parties have entered into a contract. It can also happen by Supervening impossibility [Section 56]. Supervening impossibility takes place by the following:

- Destruction of the subject matter;
- Death or incapacity;
- Non-existence of state of things having an effect directly or indirectly on the contract;
- Outbreak of war;
- Change or amendments in law.

Illustration: *X agreed to sell his car to Y for Rs. 1 lakh and deliver it after two months. After a week, X met with an accident and car got completely destroyed. The contract gets discharged by impossibility of performance as the car was completely destroyed.*

⇒ Discharge by Lapse of Time

Time is very significant while entering into a contract. According to the Limitation Act, a contract should be performed within a specified time called period of limitation. If the contract is not performed within the specified time and the other party does not resort to any action within the limitation period, then he is deprived of his remedy and the contract gets discharged by lapse of time.

⇒ Discharge by Operation of Law

The following are instances where a contract gets discharged by operation of law:

- Death of either of the parties;
- Insolvency;
- Merger;
- Unauthorized alteration of the terms of the agreement.

⇒ Discharge by Breach of Contract

Breach means failure to perform the obligation by a party. When a party to a contract does not perform his part of the obligation due to which the contract becomes broken, the person who suffers because of the breach is entitled to receive compensation or damages from the party who has breached the contract [Section 73].

Illustration: *A agrees to supply 20 litres of oil to B on 1st June 2014. On 1st June 2014, A does not supply the oil. Then A has breached the contract. Suppose A has supplied the oil but B does not accept the oil, then B has breached the contract. In the first instance, B is entitled to receive compensation from A. In the latter instance, A is entitled to receive compensation from B.*

J. Damages

Remedy is a means given by law for the enforcement of the right of a person. A common remedy for breach of contract is awarding damages to the affected party. Monetary compensation given to the affected party for the loss or injury caused to him due to the breach is called damages. The objective of awarding damages by the court is to put the injured party in the same position as he would have been if the contract had not been breached. This, under the contract law, is called the Doctrine of Restitution. The basis of this Doctrine is awarding damages for the pecuniary loss incurred by the party to the contract.

Illustration: *A agrees to deliver 40 bags of rice to B for Rs. 20,000/- on 15th July 2014. On 15th July 2014, A delivers only 20 bags of rice to B. B is entitled for damages from A for the loss that he suffered because of A (non-delivery of 20 bags of rice).*

Activity

Do a roleplay in class in five groups and work out arguments from both parties in all instances of discharge of contract (Other than discharge by lapse of time). Create elaborate scenarios to explore the aspects. Evaluate each group's performance.

K. Exercise

I. Questions

1. What is a contract and what are the components that a contract should have?
2. Elaborate on the statement 'All contracts are agreements but all agreements are not contracts'.
3. Short note on Consideration.

4. Short note on capacity to contract.
5. What is Consent? What are the elements that consent should be free from?
6. Give a brief note on Unlawful Agreements.
7. Short note on Wager.
8. Short note on Contingent contract.
9. What are the differences between Wager and Contingent contract?
10. Short note on Discharge by Agreement or Consent.
11. Write notes on Discharge by Impossibility.
12. Write a brief note on Damages.

II. Essay Questions

1. Write an essay on Offer and Acceptance along with case law.
2. Discuss in detail how Discharge of Contract takes place.

III. Activity Based Learning

Activity based learning provides opportunities to students with direct observation and learning about some aspect of the practice of law.

⇒ In this activity, students are required, in groups or individually, to provide answers to the questions below to observe their knowledge on the law of contracts. This is only a learning activity for class discussion.

- A sells his dog to B for Rs. 4,000/-. Unfortunately, the dog died after a few hours. Discuss the rights and liabilities of A and B - (a) if the dog died before the transaction took place; (b) if the dog was seriously ill during the transaction and died subsequently after the transaction.
- M tells N to retire from service and pave way for the appointment of M for the post that N was serving. In return of that, M promises to pay Rs. 10,000/- Is this a valid agreement?
- X promises to supply 20 bags of sugar to Y, a sweet shop proprietor, for making ladoos for a marriage on 15th September 2014. X does not supply sugar on 15th September 2014 but supplies it on 20th September 2014. What remedy does Y have against X?
- X promises to supply 10 kgs of wheat and 3 packets of heroin to Y for a sum of Rs. 10,000/-. Y pays Rs. 10,000/-. Is this agreement enforceable?
- A sells his jeep to B for a consideration of Rs. 7,000/- whereas the price of the jeep is Rs. 10,000/-. Is this a valid consideration?

UNIT–2: (C) LAW OF TORTS

A. Introduction

⇒ Functional Definition

'Tort' essentially means a 'wrong' and originates from the Latin word 'tortum', which means 'twisted' or 'crooked'. In law, tort is defined as a civil wrong or a wrongful act, of one, either intentional or accidental, that results in the injury or harm to another who in turn has recourse to civil remedies for damages or a court order or injunction. The definitional features of tort are that it is a civil wrong as distinguished from criminal wrong; both the procedures and remedies are different in civil law and criminal law. In a criminal case, the state initiates legal proceedings in a criminal court on behalf of the victim and is punished when found guilty by the court. A civil action, like the tort suit, is pursued in a civil court where the victim or victim's representatives or survivors prosecute the wrong-doer usually for compensation in the form of money payment and also at times for other liability or injunction. Generally, tort cases result in compensating the victim and criminal lawsuits are about punishments. Injunctions are court orders that, for example, may prohibit the wrong-doer from harming the victim or prevent the former from trespassing the latter's property. Occasionally, courts may also grant punitive damages, which are costs or damages in excess of the compensation. Tort can be intentional or accidental and include wrongful acts of the kinds of battery and assault (physical or mental injury to the claimant), nuisance (intrusion with one's enjoyment), defamation (where claimant's reputation is injured), property damage, trespass (to claimant's land or property), negligence (careless behavior), and others; some of these are discussed in the paras below. These wrongs may also have aspects and overlaps with other areas of law like the criminal law and the contract law, examples of which may be found in the chapters on criminal law and contract law elsewhere; here, we are concerned only with the some of the basic features of tort law in relation to these wrongs. Also, as is the case with the CBSE legal studies course generally, law is a complex field of study but our aim with this course is to provide only the basic understanding of the language of law without getting into the comprehensive complexities of rules and exceptions.

⇒ Sources of Tort Law - common law versus statute law

Torts are mostly a common law subject; it is common law in the sense that tort law or the rules of tort law developed not from a statute or an act passed by the

Parliament, but from centuries of judicial decisions - case by case in English courts as well as in courts of other countries following common law system like India and the United States of America. In other words, for example, in India, both criminal law and contract law are based on statute laws like the Indian Penal Code and the Indian Contract Act respectively; however, there are no statutes that comprehensively deal with tort law as a separate area of law. A contract lawyer would look up the Contract Act to look for rules to be applicable in a given fact situation. A tort lawyer would look for rules as developed by courts in similar cases.

However, there are couples of areas of tort law where countries have enacted statute laws. In India for instance, automobile accidents as well as harms caused to consumers of goods and services are covered by the Motor Vehicle Act of 1988 and the Consumer Protection Act of 1986 respectively. What this means is that if a case involves a car accident or injury due to defective products or deficiency in services the set of rules of the respective statutes apply.

B. Kinds of Wrongful Acts

In tort cases, the victim or the claimant claims that the defendant or the wrong-doer has conducted the wrongful act or is liable for injury incurred by the claimant. Primarily, there are three kinds of wrongs in tort law - the wrongful acts can occur either **intentionally** or **negligently** on part of the wrong-doer, or the defendant is **strictly liable** for the wrongful act. These three are considered here.

1. Intentional Tort

An intentional tort requires the claimant to show that defendant caused the injury on purpose. Furthermore, the claimant must show that he or she suffered a particular consequence or injury, and that the defendant's actions caused the consequence or injury. Different intentional torts deal in different consequences and intents. So depending on the contexts and situations, there are various kinds of intentional torts; they include assault, battery, false imprisonment, unlawful harassment, invasion of privacy and so on. These may also have aspects of criminal law, but treating them also as torts increases the possibility of higher compensation. The kinds of intentional torts are explained below.

- **Battery and Assault**

  The intentional tort of battery occurs when the defendant causes the touching of the claimant with the intent to cause harm or offense. Both

'intent' and 'causation' are required for the tort of battery to occur. For example, if the defendant intends to commit battery by hitting the claimant in the head but ends up killing him, this amounts to battery as his intentional act (intention to commit harm) caused the death. The act of touching doesn't necessarily have to be done with defendant's fist always, it could be anything touching plaintiff like throwing hot water at someone.

The intentional tort of assault occurs when the defendant intends to cause in the claimant a reasonable apprehension (feeling of anxiety or fear) of an imminent harmful or offensive touching to the claimant; and when this causes the claimant to suffer a reasonable apprehension of an imminent harmful or offensive. In other words, assault is when the defendant intends to make claimant think that he is about to suffer a battery and as a result the claimant does think that he is about to suffer a battery. Imminent means imminent and "in your face"- assault is about thinking that you are about to be touched. For example, if the defendant throws an iron ball at the claimant and misses his head as the claimant moves his head away from the direction of the iron ball, this amounts to assault. The perception of the claimant is important. So if the defendant points an unloaded gun at the claimant who does not know that it is unloaded and he thinks he is about to get shot, this amount to assault, which can take place without battery. Likewise, battery can take place without assault; for example, someone may hit another person from behind.

- **False Imprisonment**

The intentional tort of false imprisonment is satisfied whenever there is intent to unlawfully confine or restrain the claimant in a bounded area and when this actually causes the claimant to be knowingly confined or restrained in a bounded area unlawfully. For example, the defendant intentionally locks the claimant in the classroom without having the legal authority to do so, and the claimant knows he is trapped. Sometimes courts allow the actual harm to substitute for the awareness of the imprisonment - so even if the claimant is unaware that he is trapped but suffers injury, the tort of false imprisonment is satisfied. However, the claimant should not be trapped willingly and consensually.

- **Trespass to Land**

  The tort of trespass to land occurs when the defendant has the intent to physically invade real property of the claimant and does invade physically without the claimant's approval or consent. The invasion can happen with objects or by people and includes invasion of some area of air above the land and some area below the land. For example, the defendant may litter the claimant's land, or may create a drainage outlet below the land of the claimant.

- **Trespass to Chattels**

  When the defendant has the intent to use or intermeddle with a chattel (moveable personal property), which was in the possession of the claimant and when this actually happens and causes significant or perpetual dispossession, deprivation of use, or damage as to condition, quality, or value of the chattel, or causes some other harm to claimant's legally secured interest, it amounts to the trespass to chattels. For example, if the defendant paints the car of claimant that was parked on the side of the street, without the consent of the claimant while the claimant was away, this amounts to trespass to chattels.

- **Conversion**

  The tort of conversion is somewhat related with the tort of trespass to chattels. Conversion occurs when the defendant intentionally uses or intermeddles with the chattel of the claimant in such a serious way that it becomes fair to ask for compensation or money payment for the total prior value of the chattel. In other words, the defendant is forced to buy the chattel for a purchase price based on the original value. So the remedy in conversion is forced sale. Conversion is applicable in many situations including where the chattel is taken, transferred to someone else, changed, misused or damaged.

- **Unlawful harassment**

  Defendant may be held liable for any act of deliberate physical harm to the victim even where no battery or assault is involved. For example, if the defendant lies to the claimant that the latter's son met with a road accident, which causes nervous shock to the claimant resulting in illness, this

constitutes tort of unlawful harassment. Sexual harassment may also amount to tort of unlawful harassment. For example, if one follows another person, sends unwanted messages or phone calls; although there is no violence or threat of violence involved, this act amounts to a tort of harassment.

- **Invasion of privacy**

  Tort law with respect to invasion of privacy as a distinct entity is still underdeveloped. However, as many academics hold the view, there is potential for the development of tort of invasion of privacy. For example, one's right to personal life and family may fall under this category of tort law and may attract any deliberate invasion of privacy like, photographing the personal lives of the claimant without the latter's consent.

2. Negligence

The basic understanding of negligence is that wrong-doer or the defendant has been careless in a way that harms the interest of the victim or the claimant. For example, when the defendant carries out an act of constructing something on her premises, she owes a duty of care towards the claimant and that the standard of duty of care depends on whether the claimant was on the site or in the neighborhood as well as whether the claimant was a lawful visitor or a trespasser. Generally, in order to argue successfully that the defendant has been negligent, the victim or the claimant must establish three elements against the defendant in a tort of negligence case - 1) the defendant owes a duty of care to the victim; 2) there has been a breach of duty of care on part of the defendant; and 3) the breach of the duty to care resulted in the harm suffered by the claimant. Let's consider these elements here.

- **Duty of Care**

  The duty of care principle can be explained by citing an actual case law. In a 1932 English case of *Donoghue v Stevenson*, the claimant Donoghue drank a soft drink manufactured by the defendant Stevenson. The drink had a decomposed snail in the bottle that made the claimant ill. The court held that the manufacturer owed duty of care to those who are 'reasonably foreseeable' to be affected by the product. So the duty of care is owed to those whom one can reasonably foresee as being potentially harmed. This

principle is applicable to numerous fact situations; as another example, a landlord owes a duty of care with reasonable foresight to his tenants and should ensure that no hazardous substance like petrol is stored by him in the basement of the apartment being dwelt by the tenants.

- **Breach of Duty of Care**

  Once the duty of care is proven the claimant then must establish that the duty of care was broken; i.e., the defendant was unsuccessful in fulfilling the duty of care in accordance with the standard of 'reasonableness'. The standard is that of 'reasonable conduct' or 'reasonable foresight', however, the act need not be flawless. In the case of *Donoghue v Stevenson* above, the court held that the manufacturers of products owe a duty of reasonable care to the consumers who use the products. Similarly, the standard of duty of reasonable care will vary based on the peculiar fact situation of every case.

- **Harm to the Claimant**

  In the case of *Donoghue v Stevenson*, the negligence on part of the manufacturer of the soft drink resulted in the illness or injury to the claimant. Or, in the second example, the apartment catches fire because of petrol being stored in the basement causing damage to the tenants.

3. Strict Liability

Strict liability torts do not care about the intention or carelessness of the defendant when the defendant caused the injury. The claimant does not have to establish any sort of or level of blame attributable to the defendant based on the intention or the degree of carelessness. Strict liability is available in a very limited context. For example, where the defendant's animals may cause an injury to the claimant or where the defendant is involved in an unusually hazardous activity like blasting dynamite. Let's elaborate these two examples. If the defendant possesses an animal with a known and unusual dangerous tendency, say a dog that bites, the defendant is strictly liable for the harm resulting from the dangerous tendency of the dog. But in the case of the defendant possessing a bull that harms the claimant is not strictly liable as the act of the bull is considered as, not unusual, rather a normal dangerous tendency.

The general rule with respect to ultra-hazardous activity is that when the defendant carries out or keeps an unusually hazardous situation or activity on

his or her building or involves in an activity that offers an inevitable danger of injury to the claimant or his or her property, the defendant could be responsible for the damage caused even if the defendant has exercised reasonable care to prevent the harm.

In India, a related principle of **Absolute Liability** was introduced by the Supreme Court in the aftermath of the two instances of gas leaks from factories injuring many. The first case was about the infamous Bhopal gas leak disaster of 1984 where a factory of the Union Carbide Corporation located in Bhopal had a major leakage of the gas mythyl isocynate that killed 2260 and injured around 600,000 people. In the second incident of 1985 in Delhi, a factory of the Shri Ram Foods and Fertilizer Industries leaked oleum gas that killed one person that had few others hospitalized and created huge panic among the residents. The then Chief Justice of India P.N Bhagwati, in the famous 1987 case of M.C. Mehta v. Shri Ram Foods and Fertilizer Industries, held: "We are of the view that an enterprise, which is engaged in a hazardous or inherently dangerous industry, which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to any one on account of hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm is done on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part."

C. Summary of the Kinds of Harms

Here is the summary of the examples of the many ways in which the claimant may suffer injuries that have been discussed in this chapter.

⇒ Property interests in land

The law of tort protects the claimant's interests in her landed property by preventing intentional intrusions or trespass of the property by the defendant or the wrong-doer. The claimant may also suffer harm by the damage caused due to careless or negligence of the defendant. When the defendant interferes with the claimant's right to enjoy his/her land, the defendant commits the tort of nuisance.

⇒ Other types of Property

Tort law prohibits taking away of tangible property deliberately, which amounts to the tort of 'conversion'. The damage to the property may also occur due to carelessness or negligence.

⇒ Bodily Injury

Tort law protects the claimant against any harm to his/her interests of bodily integrity. Tort of battery and assault applies to any intentional harm caused to the body. Harm may also be caused by negligence as well as any breach of statutory duty like, traffic laws, health laws and so on. Mental distress is an element in bodily injury which raises any compensation to the victim.

⇒ Economic Interests

To a lesser extent, the economic interests are also protected by the law of tort. Injury caused by both intentional as well as negligence can cause economic harm to the claimant.

D. Purpose of Tort Law

Three important objects of tort law are - deterrence, fair and just response, and loss-spreading.

Purpose of Tort Law	Explanation
1. Deterrence	Tort law ensures that the defendant compensates the victim for a wrongful act. This deters one from injuring others as it encourages defendants to be mindful and careful.
2. Fair and just response	Tort law ensures that the victim is compensated by the defendant to satisfy the demands of justice. The defendants are made liable for their wrongful act.
3. Loss-spreading	Tort law can be used as a tool to spread loss to a wider community. For example, where the manufacturer of a product has to pay compensation, the manufacturer may recover the costs by transferring this to the consumers by increasing the price of the product. In another example of automobile insurance, all drivers are

	required to pay auto insurance premiums, which are then used by the insurance companies to compensate the victims.

Activity

Read the newspaper every day for the period of two weeks and identify five cases of tort, tabulate them by action, rationalization and type. Put up a chart in the class and mark areas of commonality of assessment. Discuss corrective measures/punishment.

E. Exercise

Questions

1. Define what is law of tort? What is the difference between tort law and criminal law?
2. What are the sources of tort law?
3. What is intentional tort? Explain at least three different kinds of intentional tort?
4. What is tort of negligence and how do duty of care relate with negligence?
5. What is strict liability principle? Give one example.
6. What are the objectives behind having tort law?

UNIT–2: (D) INTRODUCTION TO CRIMINAL LAWS IN INDIA

A. What do we understand by Crime?

The term 'Crime' denotes an unlawful act and this unlawful act is punishable by a state. Crime as a concept is so broad that there is no single, universally accepted definition to it. But, for the sake of convenience, several countries provide statuary definitions of various kinds of unlawful activities, which can be identified as crimes.

A common principle about Criminal Law is that, unless an activity is prohibited by law, it does not qualify as a crime. Incidents of crime hurt not only the individual, but also the state. Therefore, such acts are forbidden and punishable by law. The body of laws which deals with imposing punishments on crimes is known as Criminal Law.

Broadly, crimes can be segregated under the following categories:

Categories of Crime:

Crimes against Persons: Crimes against persons (also called personal crimes) include murder, aggravated assault, rape, and robbery.

Crimes against Property: Property crimes involve theft of property without bodily harm, such as burglary, larceny, auto theft and arson.

Crimes against Morality: There are several crimes where there is no bodily harm or any kind of harm to the property as well. Yet, these Crimes are deemed as immoral activities and hence are unacceptable. Prostitution, illegal gambling, and illegal drug use are all examples of such crimes. Also, Crimes against morality are also called victimless crimes because more than often there is no complainant or victim and it is generally the State which takes suo motu cognizance of these offences.

White-Collar Crime: White-collar crimes are generally economic offences that are committed by people of high social status. They commit these crimes in their respective occupations. Examples are embezzling (stealing money from one's employer), insider trading, and tax evasion and other violations of income tax laws. Instance of corruption, bribery and large-scale scams fall in the category of white collar crimes.

Organized Crime: Organized crime is crime committed by structured groups typically involving the distribution of illegal goods and services to others.

Organized crime is just not restricted to Mafias, as is shown in various movies and television series, but the term can refer to any group that exercises control over large illegal enterprises (such as the drug trade, illegal gambling, prostitution, weapons smuggling, or money laundering). Betting on sports, illegal sale of firearms and *Hawala* transactions are all examples of Organized Crime.

1. Stages of Crime

- Intention
- Preparation
- Attempt
- Commission

Any Crime has a few key stages to it, as indicated in the box alongside. Ordinarily, the first two stages (intention and preparation) do not give rise to any form of criminal liability. This implies that merely having an intention to commit a criminal act is not punishable, nor is making preparation for the same. Liability in criminal law arises when one goes beyond the stage of preparation and attempts to do the forbidden act.

What constitutes attempt is again a tricky and complicated question which is an area of intense study. However, it can be stated that save in some exceptional circumstances, criminal liability arises only when the crime has reached the stage which is gone beyond preparation and has entered into the domain of attempt.

2. Elements of Crime: Guilty Act and Guilty Mind

To be classified as a crime, the act of doing something bad (*actus reus*) must be usually accompanied by the intention to do something bad (*mens rea*). A crime is said to exist usually when both these elements are present. The principle of *actus reus and mens rea* are embedded in a Latin maxim, which is:

"actus non facit reum, nisi mens sit rea"

This latin maxim means that an act does not make one guilty unless the mind is also legally blameworthy.

In other words, for a physical act to be termed a crime, it must be accompanied by the necessary mental element. Unless this mental element is present, no act is usually criminal in nature. So, all crimes have a physical element and a mental element, usually called ***actus reus*** and ***mens rea*** respectively.

What is actus reus?

- the word ***actus*** connotes a 'deed' which is a physical result of human conduct.
- the word ***reus*** means 'forbidden by law.

actus reus in common parlance means a 'guilty act'. It is made up of three constituent parts, namely: -

1. An action or a conduct
2. The result of that action or conduct
3. Such act/conduct being prohibited by law

Therefore, one can say that ***actus reus*** is an act which is bad or prohibited, blameworthy or culpable. Now, there are certain unique situations when the act in itself may appear to be a criminal act, yet it cannot be termed as '***actus reus***'.

Illustrations:

An executioner's job is to hang (no actus reus)

An army man kills as a part of his duty (no actus reus)

Does an act in actus reus include omissions?

An omission is nothing but inaction or not doing something. Section 32 of the Indian Penal Code (IPC) clarifies that acts which may be considered as Crime include "illegal omissions". But mere moral omissions of not doing something would not complete the requirement of *actus reus*.

Illustration : A man is sinking in the swimming pool of a resort. A boy who is beside the pool does not make any attempt to save this man. This is a moral omission of not saving someone's life. The boy cannot be held criminally liable for such an omission.

But in the same scenario, if there is a lifeguard on duty at this resort, and if he does not make any attempt to save the man sinking in the pool, then he can be held criminally liable for such omission.

Mens Rea: guilty mind/ intent

mens rea generally means 'ill intention'.

The constituents of ***mens re***a are:

1. There must be a mind at fault/intention to constitute a crime.
2. The act becomes criminal when the actor does it with a guilty mind.

Note: causing injury to an assailant in self-defense is not a crime, but the moment injury is caused with intent to take revenge, the act becomes criminal.

Therefore for any crime to exist, the physical element of crime needs to be complemented by the mental element. The concept of *mens rea evolved* in England during the 17th Century. During this period, the judges began to hold that an act alone could not create criminal liability unless it was accompanied by a guilty state of mind.

In India, the word *mens rea*, as such, is not defined in the IPC, but its essence is reflected in almost all the provisions of the Code. For framing a charge for an offence under the IPC, the traditional rule of existence of *mens rea* is to be followed. This rule

has been reiterated by the Supreme Court of India in *State of Maharashtra v. Mayor Hans George, AIR 1965 SC 722*. It was held in this case that, "Mens rea by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law."

Further, in *Kartar Singh v. State of Punjab, 1994 (3) SCC 569*, the Supreme Court held that the element of *mens rea* must be read into a statutory penal provision unless a statute either expressly or by necessary implication rules it out.

Strict Liability

There are some exceptions to the thumb rule of *mens rea* to be present for an act to be considered as crime. These are generally the offences which arise due toa '*strict liability*'. These offences are also termed vicarious or deemed liability offences. Examples of such offences can be found in Special Acts such as the Negotiable Instruments Act, 1881, the Customs Act, 1962, and the Information Technology Act, 2000, which provide for deemed offences by directors / responsible officers of a company, if a company has committed a contravention / offence. Such deemed liability disregards whether there was actually any *mens rea* or not on the part of the person concerned.

3. Distinction between Intention and Motive

As we have seen, intention or mental element is one of the foremost requirements in order to make someone liable for a crime. But a common misconception is that motive and intention are the same concepts when it comes to Crime. Thus, it is important to understand the fine distinction between these two terms.

> In Re Sreerangayee case (1973) 1 MLJ 231, the woman in sheer destitution and impoverishment attempted to kill herself after failing in all the ways to arrange for food for her starving children, but since she knowingly (mens rea) did a prohibitive act of attempting suicide(actusreus), she was held guilty by the court.

The meaning of doing an act *intentionally* in criminal law means something that is done wilfully and not accidentally or mistakenly. The person doing the act is well aware of the consequences or the outcomes of his action or omission. That is all what is required for affixing criminal liability. It does not matter, as we say in ordinary language, whether an act was done with good intent or bad intent. If the act which is

prohibited (*actus reus*) is done wilfully, knowingly or with awareness of the resulting consequences then the same will cause liability in criminal law.

Motive, on the other hand, is the ulterior objective behind doing an act. It is the driving force behind intention or commission of an act. The criminal law does not take into account motive in affixing criminal liability or in determining criminal culpability. This is the reason why the criminal law does not care whether one has stolen a loaf of bread to fed a starving person or stolen medicine to save someone's life, as long as it is a prohibited act, done knowingly.

B. Criminal Law in India

1. Objectives of Criminal law:

Five objectives are widely accepted for enforcement of the criminal law by punishments: *retribution, deterrence, incapacitation, rehabilitation and restoration*. These objective vary across jurisdictions.

Retribution - This theory basically deals with 'righting of balance'. If a criminal has done a wrong towards a person or property he needs to be given a penalty in a manner which balances out the wrong done. For example, if a person has committed murder, he can be delivered capital punishment to balance out the suffering caused to the victim and his or her family.

Deterrence - Deterrence serves as a major tool in maintaining the general law and order in the society, especially from the perspective of Crime. Criminal acts are penalized so as to deter individuals from repeating it or even entering into it in the first place.

Incapacitation - The objective of this theory is to segregate the criminals from the rest of the society. For the crimes committed, they suffer a kind of banishment by staying in prisons and in some cases they are also subject to capital punishment.

Rehabilitation - Aims at transforming an offender into a valuable member of society. Its primary goal is to prevent further offense by convincing the offender that their conduct was wrong.

Restoration - This is a victim-oriented theory of punishment. The goal is to repair, through state authority, any injury inflicted upon the victim by the offender. For example, one who embezzles will be required to repay the amount improperly acquired. Restoration is commonly combined with other main goals of criminal

justice and is closely related to concepts in the civil law, i.e., returning the victim to his or her original position before the injury.

2. What is Criminal Law?

The purpose of Criminal Law in India is

First, to define a variety of crimes e.g. theft, cheating, murder, etc.

Second, to prescribe appropriate punishment for each crime e.g. imprisonment or fine, and

Third, to lay down suitable investigation and trial procedures.

3. Sources of Criminal Law

There are several legislations dealing with Criminal Law. However, two important sources are:

- The Indian Penal Code, 1860, which defines various crimes such as murder, theft, etc.
- Code of Criminal Procedure, 1973, which lays down the procedure for both the police to investigate crimes and for trial of offences.

In addition the following legislations are important:

- The Indian Evidence Act, 1872, which stipulates the kind of evidence admissible in court.
- Special Criminal Laws passed by the Parliament or State Legislatures such as the Prevention of Corruption Act, Food Adulteration Act, Dowry Prevention Act, Commission of Sati Act etc. Each of these laws defines crimes that are in addition to those defined under the IPC.

We will now take a closer look at each of these sources:

4. Indian Penal Code, 1860

The Indian Penal Code was passed in 1860 and came into force in 1862. It is the main criminal code in India. It was drafted after consulting various existent criminal codes in the world such as the French Penal Code as well as the Code of Louisiana in the US. It is uniformly applicable in all the states of the country except Jammu and Kashmir where, due to the special constitutional status of that state, a separate Penal Code called is in operation.

The Indian Penal Code is divided into twenty three chapters, comprising over 500 sections. The Code starts with an Introduction, provides explanations and exceptions used in it, and then lists a wide range of offences. Given below is a broad classification of crimes defined under the IPC.

Broad classification of crimes under the Indian Penal Code (IPC)

Crimes Against Body	Murder, Culpable Homicide not amounting to Murder, Kidnapping & Abduction, Assault etc.
Crimes Against Property	Dacoity, Robbery, Burglary, Theft
Crimes Against Public order	Riots, Arson
Economic Crimes	Cheating, Counterfeiting
Crimes Against Women	Rape, Dowry Death, Cruelty by Husband and Relatives, Molestation, Sexual harassment and Importation of Girls
Crimes Against Children	Child Rape, Kidnapping & Abduction of Children, Selling/Buying of girls for Prostitution, Abetment to Suicide, Infanticide, Foeticide;
Other IPC crimes	

As mentioned above, the Indian Penal Code (IPC) covers the *substantial* part of criminal law in India. It defines various common criminal offences. For example, it defines murder, theft, assault and a number of other offences and also stipulates appropriate punishments for each offence. For instance, the offence of "theft" is defined in the following language in Section 378 of the IPC:

Whoever, dishonestly [intends to take] any movable property out of the possession of any person without that person's consent, [and with that intention] moves that property in order to [commit] such taking, is said to commit theft.

In other words, a crime of theft is committed if someone intends to take someone else's property and indeed takes that property without the other person's consent. Merely intending to take somebody's property, without actually going ahead with the act, does not amount to theft.

The Punishment for theft is stipulated in the following Section 379 which states:

Whoever commits theft shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

Different crimes carry different punishments according to the severity of the offence. For instance the punishment for murder is either death or life imprisonment.

This is the way that most of the IPC is organized: first, a definition of an offence is provided, and next the punishment for that offence is stipulated.

In addition to the IPC, other special legislations such as the Information Technology Act, the Prevention of Corruption Act, etc. also help in classifying and punishing criminal acts.

Note, however, that this definition only tells us what the offence is. It does not tell us about what we should do if someone has stolen our property, or to whom should we complain to? What can the police do? In other words, the IPC deals only with *substantive criminal law* and not with *procedural criminal law*. These procedures are set forth in detail in the Criminal Procedure Code. Let's look briefly at what this code deals with?

5. Criminal Procedure Code, 1973 (CrPC)

The object of the Criminal Procedure Code is to provide a mechanism for the investigation and trial of offenders.

It lays down the rules for conduct of investigation into offences by the police proceedings in court against any person who has committed an offence under any Criminal law, whether it is IPC or a 'Crime' classified under any other law.

Types of Offences Covered:

All such offences are covered by CrPC which are mentioned in Indian Penal Code. As already seen, the legal meaning and whether an act will constitute a criminal offence or not is provided in the IPC. The procedure of initiating proceeding/prosecution for a criminal offence is provided in Criminal Procedure Code (CrPC). CrPC provides the manner and place, where investigation inquiry and trial of an offence shall take place.

Classification of Offences

Depending on the nature and gravity of an offence's the CrPC classifies them under the following heads:

1. **Bailable and non-bailable offences:** In certain minor offences, it is the right of the accused to obtain bail while the trial is pending. These are bailable offences. On the other hand there are more serious offences where the accused do not have a right to obtain bail; in such cases, bail can be granted only on the court's discretion. These are *non-bailable* offences.

2. **Cognizable and non-cognizable offences:** Certain offences are so serious that any police officer can investigate and arrest an accused person without obtaining a warrant from a court. For example, murder. These are *cognizable* offences. In other cases, such as criminal defamation, the police must wait for the order of a magistrate before investigating and arresting the accused. These are *non-cognizable* offences.

3. **Compoundable and non-compoundable offences:** In certain offences, the State which conducts the prosecution and the accused can come to an arrangement where, instead of being imprisoned, the accused can pay a fine. These are *compoundable* offences. The most common example of this is where you get caught without a ticket on a bus or a train and have to pay a fine. In this case, the officer fining you is in fact compounding your offence. Of course not all offences are compoundable; it would not be desirable that murderers should be able to compound their offences.

The CrPC lists various offences under the Indian Penal Code which are compoundable. Of these 21 offences may be compounded by the specified aggrieved party (victim) without the permission of the court and 36 can be compounded only after securing the permission of the court.

Stages in the prosecution of an offence: Prosecution of an offence is usually a two-step process. Firstly, the police investigates into a complaint made usually by a victim. Secondly, based on the report of the police, the state prosecutes the accused at a criminal trial where the accused may either be convicted (found guilty), or acquitted (found not-guilty). We will briefly examine both the Investigation and the Trial in the paragraphs that follow.

Investigation of offences: Investigation is a preliminary stage conducted by the police and usually starts after the recording of a First Information Report (FIR) in the police station. Anyone - not only the victim - can notify the police about the commission of an offence by recording an FIR.

If, from the FIR, the officer-in-charge of a police station suspects that an offence has been committed he/she is duty-bound to investigate the facts and circumstances of the case and if necessary, takes measures for the arrest of the offender.

> The CrPC contains elaborate details about the procedure to be followed in every investigation, inquiry and trial, for every offence under the Indian Penal Code or under any other law. It divides the procedure to be followed for administration of criminal justice into three stages: investigation, inquiry and trial.

Investigation primarily consists of ascertaining facts and circumstances of the case. It includes all the efforts of a police officer for collection of evidence:

- Proceeding to the spot;
- Ascertaining facts and circumstances;
- Discovery and arrest of the suspected offender;
- Collection of evidence relating to the commission of offence, which may consist of the examination of various persons including the accused and taking of their statements in writing and the search of places or seizure of things considered necessary for the investigation and to be produced at the trial;
- Formation of opinion as to whether on the basis of the material collected there is a case to place the accused before a magistrate for trial and if so, taking the necessary steps for filing the charge-sheet.
- Investigation ends in a police report to the magistrate.

What happens if the police refuse to investigate an offence? In all cases a person can proceed directly to file a complaint with the Magistrate who may either proceed to try the case or order the police to investigate the offence and file a police report.

Trial of an offence: Trial is the judicial adjudication of a person's guilt or innocence. Under the CrPC, criminal trials have been categorized into three divisions each having distinct procedures, called warrant, summons and summary trials.

A **warrant case** relates to offences punishable with death or imprisonment for a term greater than two years.

The CrPC provides for two types of procedure for the trial of warrant cases by a magistrate viz.

- those instituted upon a police report
- those instituted upon complaint.

In respect of cases instituted on police report, the magistrate may "discharge" the accused upon consideration of the police report and documents sent with it. The Magistrate need not hear the prosecution or record further evidence.

In respect of the cases instituted otherwise than on police report, however, the magistrate is bound to hear the prosecution and record evidence. If there is no case made out, the accused is discharged.

In both cases, if the accused is not discharged, the magistrate holds a regular trial after "*framing the charge*".

In respect of offences punishable with death, life imprisonment or imprisonment for a term exceeding seven years, the trial is conducted in a Sessions Court after being committed or forwarded to the court by a magistrate.

A **summons case** means a case relating to an offence that is not a warrant case, i.e. cases relating to offences punishable with imprisonment of less than two years. In respect of summons cases, there is no need to frame a charge. The court gives the substance of the accusation, which is called "notice", to the accused when the person appears before the court. The court has the power to convert a summons case into a warrant case, if the magistrate thinks that it is in the interest of justice.

The CrPC also provides that certain petty offences may be tried in a **summary** way. In a summary trial, no sentence of imprisonment for a term exceeding three months can be passed in any conviction. Usually in such cases, a special summons is sent to the offender requiring him to either attend court and defend himself or admit guilt and pay a fine by post. If a fine of Rs. 200 or less is imposed in such trials, then the accused has no right of appeal.

The common features in all three of the aforementioned trials may be roughly broken into the following distinct stages:

- **Framing of charge or giving of notice** This is the beginning of a trial. At this stage, the judge is required to weigh the evidence gathered by the police during investigation to ascertain whether or not a prima facie (on the face of the record) case against the accused has been made out.

  In case the material placed before the court is sufficient, the court **frames the charge** and proceeds with the trial.

  If, on the contrary, the judge considers the materials insufficient for proceeding

against the accused, the judge discharges the accused and records reasons for doing so. The charge is read over and explained to the accused who may plead guilty or not-guilty. If the accused pleads guilty, the judge shall record the plea and may convict him. If the accused pleads not guilty and claims trial, then trial begins.

You may note that the actual trial starts only after the charge has been framed and the stage preceding the trial is called inquiry. After the inquiry, the charge is prepared and after the formulation of the charge, trial of the accused starts. A charge is nothing but formulation of the accusation made against a person who is to face trial for a specified offence. It sets out the offence that was allegedly committed.

- **Recording of prosecution evidence**

After the charge is framed, the prosecution is asked to examine its witnesses before the court. This is called examination-in-chief. The accused has a right to cross-examine all the witnesses presented by the prosecution. The CrPC provides that when the examination of witnesses has once begun, it shall be continued day-to-day until all the witnesses in attendance have been examined.

Plea Bargaining

It refers to the negotiations between the prosecution and defendant in which defendant agrees to plead guilty in return of less harsh punishment than what is to be delivered normally.

- **Statement of accused**

The court has powers to examine the accused at any stage of inquiry or trial for the purpose of eliciting any explanation against incriminating circumstances appearing before it. However, it is mandatory for the court to question the accused after examining the evidence of the prosecution if it incriminates the accused. This examination is without oath and before the accused enters a defence. The purpose of this examination is to give the accused a reasonable opportunity to explain incriminating facts and circumstances in the case.

- **Defence evidence**

  If after taking the evidence for the prosecution, examining the accused and hearing the prosecution and defence, the judge considers that there is no evidence that the accused has committed the offence, the judge is required to record the order of acquittal.

  However, when the accused is not acquitted for absence of evidence, a defence must be entered and evidence adduced in its support. For this purpose, the defence may examine witnesses including the accused. The witnesses produced by the defence are cross-examined by the prosecution.

  Most accused persons do not lead defence evidence in India. One of the major reasons for this is that in India, the burden is cast on the prosecution to prove the offence and the degree of proof required in a criminal trial is "proof beyond reasonable doubt". This is quite a high standard that the prosecution must meet. It is not enough for the prosecution to assert that the accused has committed the offence. The judge must be convinced beyond reasonable doubt that it was in fact the accused who committed the offence.

- **Final arguments**

  This is the final stage of the trial. The provisions of the CrPC provide that when examination of the witnesses for the defence (if any) is complete, the prosecutor shall sum up the prosecution case and the accused is entitled to reply. These are the final arguments.

- **Judgment**

  After the final arguments by the prosecutor and defence, the judge pronounces his judgment in the trial.

  Under the CrPC, an accused can be withdrawn from prosecution at any stage of trial with the permission of the court. If the accused is allowed to be withdrawn from prosecution prior to framing of charge, this is a discharge, while in cases where such withdrawal is allowed after framing of charge, it is acquittal.

6. Indian Evidence Act 1872

The Indian Evidence Act stipulates how facts can be proved through evidence.

The Evidence Act helps the judges to separate the 'wheat from the chaff' and plays a crucial role in the establishment of facts during the court proceedings. What evidence can be admitted, how it can admitted, how the burden of proof has to be discharged, etc, are matters governed by the Evidence Act.

- The main principles which form the foundation of Law of Evidence are-
- evidence must be confined to the matter at hand
- hearsay evidence must not be admitted
- best evidence must be given in all cases.

One of the main objectives of the Evidence Act is to prevent the inaccuracy in the admissibility of evidence and to introduce a more correct and uniform rule of practice.

The Act is divided into three parts:

- **Part I -** Relevancy of facts or what facts may or may not be proved. These are dealt with in detail in **(Sections 5 to 55)**.
- **Part II -** How the relevant facts are to be proved? The part deals with matters, which need not be prove under law and also how facts-in-issue or relevant facts are proved through oral and documentary evidence **(Sections 56 to 100)**.
- **Part III -** By whom and in what manner must the evidence be produced. It deals with the procedure for production of evidence and the effects of evidence **(Sections 101 to 167)**.

Confession: The word "*confession*" *appears for the first time in Section 24 of the Indian Evidence Act. This section comes under the heading of Admission so it is clear that the confessions are merely one species of admission. Confession is not defined in the Act. Justice Stephen in his Digest of the law of Evidence states, "confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime."*

Admission and confession: *Sections 17 to 31 deals with admission generally and include Sections 24 to 30 which deal with confession as distinguished from admission.*

Difference between Confession and Admission

Confession	Admission
1. Confession is a statement made by an accused person which is sought to be proved against him in criminal proceeding to establish the commission of an offence by him.	1. Admission usually relates to civil transaction and comprises all statements amounting to admission defined under section 17 and made by person mentioned under section 18, 19 and 20.
2. Confession if deliberately and voluntarily made may be accepted as conclusive of the matters confessed.	2. Admissions are not conclusive as to the matters admitted it may operate as an estoppel.
3. Confessions always go against the person making it	3. Admissions may be used on behalf of the person making it under the exception of section 21 of evidence act.
4. Confessions made by one or two or more accused jointly tried for the same offence can be taken into consideration against the co-accused (section 30)	4. Admission by one of the several defendants in suit is no evidence against other defendants.
5. Confession is statement written or oral which is direct admission of suit.	5. Admission is statement oral or written which gives inference about the liability of person making admission.

If the conviction can be based on the statement alone, it is confession and where some supplementary evidence is needed to authorize a conviction, then it is an admission.

Forms of confession: A confession may occur in many forms. When it is made to the court itself then it will be called judicial confession, and when it is made to anybody outside the court, it will be called extra-judicial confession. It may even consist of conversation to oneself, which may be produced in evidence if overheard by another. For example, in *Sahoo v. State of U.P.* the accused who was charged with the murder of

his daughter-in-law with whom he was always quarreling was seen on the day of the murder going out of the house, saying words to the effect, "I have finished her and with her the daily quarrels." The statement was held to be a confession relevant in evidence, for it is not necessary for the relevancy of a confession that it should be communicated to some other person.

Judicial confessions are made before a magistrate or in court in the due course of legal proceedings. A judicial confession has been defined to mean "plea of guilty on arrangement (made before a court) if made freely by a person in a fit state of mind.

Extra-judicial confessions are made by the accused elsewhere than before a magistrate or in court. It is not necessary that the statements should have been addressed to any definite individual. It may have taken place in the form of a prayer. It may be a confession to a private person. An extra-judicial confession has been defined to mean "a free and voluntary confession of guilt by a person accused of a crime in the course of conversation with persons other than judge or magistrate seized of the charge against himself".

For example, a man after the commission of a crime may write a letter to his relative or friend expressing his grief over the matter. This may amount to confession.

Extra-judicial confession can be accepted and can be the basis of a conviction only if it passes the tests of credibility as laid down in the procedural laws.

7. Crimes under the Special and Local Laws

Certain acts are to be considered criminal acts even when they are not to be found in IPC. This is because they have been identified as crimes in Special and Local Laws. An illustrative list of such statues is in the table below.

I.	Arms Act, 1959;
II.	Narcotic Drugs & Psychotropic Substances Act, 1985;
III.	Gambling Act, 1867;
IV.	Excise Act, 1944;
V.	Prohibition Act;
VI.	Explosives & Explosive substances Act, 1884 &1908.
VII.	Immoral Traffic (Prevention) Act, 1956;
VIII.	Railways Act, 1989;
IX.	Registration of Foreigners Act, 1930;
X.	Protection of Civil Rights Act, 1955;
XI.	Indian Passport Act, 1967;

XII.	Essential Commodities Act, 1955;
XIII.	Terrorist & Disruptive Activities Act;
XIV.	Antiquities & Art Treasures Act, 1972
XV.	Dowry Prohibition Act, 1961;
XVI.	Child Marriage Restraint Act, 1929;
XVII.	Indecent Representation of women (Prohibition Act, 1986;
XVIII.	Copyright Act, 1957;
XIX.	Sati Prevention Act,1987;
XX.	SC/ST (Prevention of Atrocities) Act,1989;
XXI.	Forest Act, 1927;
XXII.	Other crimes (not specified above) under Special and Local Laws including Cyber Laws under Information Technology Act (IT), 2000.

Activities

- Write a note on White Collar crimes and Juvenile under Criminal Law in India.
- Read on the concept of Capital Punishment with respect to India, US, UK and the Middle East. Share the findings with the class.
- Attend a court proceeding in a city or town close to your school and prepare a short report.
- Take any of the most spoken of criminal cases in the country in the past year and create a tabular representation of the category, stages and elements of the case.

C. Exercise

Questions

1. What are the various kinds of crime under the IPC?
2. Is defamation a crime? If so, under which body of law?
3. How is a summons case different from a warrant case?
4. What is the concept of plea bargaining?
5. What does compounding stand for?

UNIT–2: (E) ADMINISTRATIVE LAW

A. Background

History tells us that societies and civilizations can survive without science and technology but not without administration. Administrative Law aims to ensure that the *policies, rules, regulation and legislation formulated for public good are not misused*.

B. Administrative Law and Constitutional Law: Key Differences

Before the 21st century, administrative law was considered a part of Constitutional Law. However, there has been a clear distinction in the subject matter of their respective studies in recent times. **Administrative law** aims to keep a **check on the actions of the Government when dealing with the procedures affecting the rights of citizens**. On the other hand, Constitution law clarifies the scope of ***rights and duties of citizens and the Government***.

> For example, how elections are held, Parliament is formed, the powers of the Parliament and of the different branches of the State -these are essentially the key questions in the scheme of any democratic constitution. Whereas, when a Minister is finally appointed and his actions affect the general public good, then we can categorize the study of these actions as a core constituent of Administrative Law.

C. Objections to the Growth of Administrative Law

Throughout the growth of the human civilization post 16th century, in the times when the laissez faire *(French term, meaning "allow to do"), policy of minimum governmental interference in the economic affairs of individuals and society)* economy had just entered and in the golden Victorian era, the scope of the Government intervention has always been in question.

One line of argument was that the Government should not merely watch the plight of its citizens and instead come forward and **protect** the less privileged. This was the era of **paternalism**.

Another line of thought was that it is not just protection which is the dharma of the Government. As the mother takes care of her child, the State must take care of its citizens and with this evolved the era of **maternalism**.

In the 21st century, another shade of opinion evolved, which suggested that the people must be left free as the importance was given to 'individual freedom'. It was expected that the Governmental administration will recede. While the State's function as a

businessman/entrepreneur has decreased but the State's function as a provider, facilitator, regulator still occupies a very high position in public order especially in the context of developing and least developed countries. A two-fold criticism with the aid of philosophical concepts was directed against the growth of administrative law. In England, while rule of law was the weapon used, in the United States, the doctrine propounded to check the growth of Administrative Law was separation of powers.

D. Reasons for Growth, Development and Study of Administrative Law

In the 21st century, developing countries like India expect a very proactive State for their own welfare. The welfare quotient in the administration cannot solely be vested in the legislature. This is impossible in practical terms as Governance as a whole will be cease to function if for all kinds of administrative action, the sanction of the legislature is compulsorily required.

This need for delegation is often pointed out as the single most important factor which has led to the growth of Administrative Law. Moreover, if we were to examine the scheme of our Constitution, while defining 'State', Article 12 of the Constitution of India mentions "any other authority". Hence, authorities created by law, authorities which are agencies and instrumentalities of the State or authorities which are essentially discharging public functions which have an impact on the common people are all part of the State.

> For example, an NGO: - being funded by the Government- whose control vests with the Government- its functions are akin to the Government's functions; in all of these cases such an NGO would be considered as "State" for the purposes of Article 12 of the Constitution.

E. Types of Administrative Action

Administrative action can be of four types:

Administrative Legislative Action

Wherein the administration puts on the hat of the legislature simply because it is not practically possible for any legislature in the world to legislate so perfectly that their laws are able to cover the possibility of all kinds of conflicts which can arise out of a decision even if the Members of Parliament sit for all days in a year. Administrative legislative action includes rule-making action as well as delegated legislation. As explained in the section above many decisions can be taken only by the grass root

authorities and there are practical limitations on every legislative organ, making it impossible to legislate on all kinds of possibilities.

Quasi-judicial action or administrative adjudicatory action

In these cases, the administration performs functions which can be put under the judicial domain as there is some adjudication on legal rights of the individuals involved in the matter.

Simply Administrative Action

Of all the actions undertaken by administrative authorities, other than the two types of actions mentioned before, the rest are called 'Administrative Actions' which essentially deal with execution of crucial administrative decisions.

Ministerial Action

In administrative action, there is discretion to the administrative authority (that is, the authority has the right to exercise his/her own understanding and discretion in dealing with the matter) but in those actions which are copybook action and no discretion is vested with the authority (that is there is only one way of performing that action), such action will be called purely administrative action or ministerial action.

> For example, the statute which created a University mandates that the University open a bank account with a given Bank Y. This is a purely administrative action or a ministerial action as there is no scope of any discretion in its performance.

Hence, as is clear from the aforesaid classification, *it would be wrong to say that Administrative Law deals only with the execution of policies or that it is only procedural in nature*. In contemporary times, it can be called **a full-fledged discipline which is very substantive in nature**.

> For example, suppose there is a dispute regarding the grant of scholarship to a person A over B. B thinks he deserved the scholarship and he goes to court. The court will not ask the university 'Why did you grant the scholarship to A'. On the other hand it will only ask 'how and on what grounds have you given the scholarship to A'. If the University argues that the grant has been given just like that and does not show the rationale (refer to the principle of reasoned decisions), such administrative action is bad in law and deserves to be set aside. However, if it is shown that it was given on the basis of academic merit, the Court is unlikely to interfere.

Did You Know?

In India, there is no legislation for basic and standard administrative procedure, whereas in England, there is the Tribunals and Inquiries Act, 1956, which was subsequently amended in 1998. Similarly, the United States has an Administrative Procedure Act, 1946. Despite the Law Commission's recommendation of framing some minimum administrative contours, there is no such legislation in India.

F. The Scope of Administrative Law

Administrative Law deals with how the administration exercises its powers. What are the strategies to keep the administration within its defined limits, what are the remedies in cases of administrative inaction or wrong administrative action etc., - these issues form the basis of Administrative Law. Hence, Administrative Law must not only be interpreted in the negative sense or in some vacuum. It is essentially the sociology of law and not philosophy of law.

Note that it is only Administrative Action (as discussed above in **Types of Administrative Action**) that is regulated, governed and checked by Administrative Law.

Following are examples of Administrative and Non-Administrative Actions.

Administrative Action	Non-Administrative Actions
Government Officer's decision to compulsorily acquire land	Legislative decisions (e.g. the making of laws; however, delegated legislation may be reviewable on a similar basis to administrative decisions)
Government Officer's decision to declare a person not fit and proper to hold a financial services license	Broad policy decisions (e.g. deciding to reduce a grants program)
	Government Officer's decision not to grant a visaEmployment decisions (e.g. decisions to hire an employee; however, administrative law may apply to public service misconduct decisions)

Government Officer's decision to cease paying a benefit	Criminal cases (e.g. decisions to prosecute; however, administrative law does apply to investigations)
Government Officer's decision to impose conditions on a license	Contract decisions (e.g. decisions by government to enter into a contract; however, tender processes may be subject to some administrative law principles)

G. Fundamental Principles of Administrative Law: Rule of Law, Separation of Powers and Principles of Natural Justice

In a democratic society, fundamental principles of Administrative Law are: transparency or openness, the principle of participation, of impartiality and objectivity, reasoned decisions, legality, effective review of administrative rules and administrative decisions, accountability and non-arbitrariness. All these principles are broadly encompassed under the rule of law, doctrine of separation of powers, and principles of natural justice.

Rule of Law

It essentially deals with the doctrine of constitutional morality which says that *even in doing something legal, an administrative action must always be fair and reasonable.*

For example, University guidelines read that you can appoint any person as the Professor of Law. No other qualification as such is laid down. University appoints a person who has no qualification of Law and has no teaching experience. Hence in this case, it is the principle of administrative morality which operates and vitiates the said appointment.

Rule of law is an essential tool to protect the freedom and dignity of individuals against organized powers. In the landmark ruling by the Supreme Court of India in the *Keshavananda Bharti v. State of Kerala*, 'rule of law' was categorized as a 'basic structure' of the constitution.

Basic structure means those basic characters/attributes which are enshrined in the heart of the Constitution and which cannot be repealed/ replaced by any Parliament. Hence, it is a bundle of characteristics of the Indian Constitution which can never lose their relevance and can never be derogated.

There was opposition to the doctrine in the days of monarchy as it limits the powers of the monarch or king to change laws and rules according to his own fancy. Hence, rule of law as a principle is essentially based only in democratic societies and is not a known feature of monarchies.

Did You Know?

India's vedas, smritis and upanishads are all texts which perpetuate the idols of fair administration (dharma) and hence, rule of law!

'Rule of Law' essentially means that **law carries supremacy over all individuals, even those in the position of power**. The notions of **equality and non-arbitrariness are also important and non-detachable components of rule of law**. When Administrative Law was growing as a separate discipline, Professor Dicey had objected to its expansion stating that the doctrine of rule of law was being violated given that most administrative procedures and mechanisms are their resultant follies being addressed internally (reference to the Droit system as discussed below).

However, the checks and balances which the different principles of rule of law brought within the fold of the principle, completely blunted the criticism of Dicey and only made a stronger case for the continuation of the growth trajectory of Administrative Law. Hence, rule of law can be best understood by these three expressions: *rule **by** law, rule **under** law and rule **according** to law*.

Doctrine of Separation of Powers

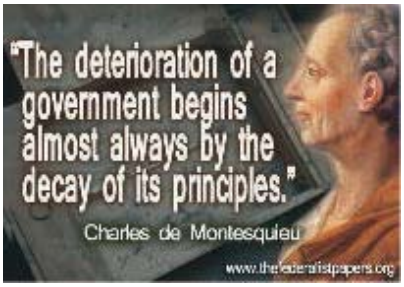
Ever since the dawn of civilization, most struggles in history have been between disempowered citizenry and the organized power of the Government structure. Freedom requires constant safeguarding and that is the price we pay for liberty. 'Separation of powers' was meant to create divisions within the Government setup to create partition within the State. Separation aimed not only at efficiency alone, but also at dividing power against itself, as power can be countered only with power. In this struggle to balance power, the liberty of citizens is expected to be safe, for separation serves as a guarantee of protecting the life and liberty of people. When power and control lies with more than one center, the opportunity for it to be misused is reduced.

Illustration: How The Different Forces Of The State Interact In A Single Administrative Action

A person can be in jail only when he has violated the law (made by the legislature). The executive implements the law (the prosecution who charged the person with the crime). The judiciary (the magistrate who decides on the person's arrest) must also agree that there are reasons to curtail this person's liberty. Hence, all three forces have to mutually interact for any kind of an outcome.

Montesquieu gave separation of powers a socio-scientific and structured meaning.

Montesquieu's theory has three aspects:



- Institutional separation or structural separation means that members of one *organ of the State must not be the members of another organ*. In the United States of America, the President does not sit in the Congress. However, in the Republic of India, the Prime Minister and his cabinet also participate in the legislature. **Can we say that India follows a 'flexible' principle of 'separation of powers'?**
- One organ of the State should not exercise the functions of the other organs.
- One organ of the Government should not interfere in the function of the other organs.

The aforesaid points can be fully implemented only in an idealistic circumstance. Hence, *the doctrine of separation of powers in the classical sense is not applicable to any modern Government and some overlapping among different organs is inevitable*. Hence, the doctrine of separation of powers has adapted to the relative circumstances of a polity in different ways than Montesquieu envisaged.

Both the 'rule of law' and the 'separation of powers' together establish that *Administrative Law is not an exclusive domain of the executive*. In fact, such is applicable to each branch of the State.

Role of Principles of Natural Justice: No bias and right to fair hearing

Principles of natural justice are not fixed rules. They are flexible and can be molded to suit the requirements of a situation or a specific purpose to do justice in any particular case.

For centuries, courts have developed two principles of natural justice, namely the '*rule against bias*' *and the* '*rule of fair hearing*'. These principles are not written in any Act. In fact, they are derived from the law of nature. Such has been the evolution of Administrative Law that a *third rule of transparency* and reasons can also be added to the above two. Reasons alone show the application of mind in decision making.

> These different shades of natural justice can be best explained through examples: If a workman assaulted a manager in a factory and the same manager is appointed as the enquiry officer, such an administrative action is clearly hit by the rule against bias.

The administrative officials are required to act under the consideration of principles upheld by the Constitution-and not to act with prejudice. In a case where bias is alleged, there must be a real likelihood of such or actual bias and not mere baseless suspicion of bias. Even in cases when there is a necessity and the bias has a reason given the circumstance, the administrative action is not vitiated. Bias can be of many types, such as *pecuniary bias, subject-matter bias, personal bias, departmental bias* etc. While there may be significant overlapping in their shades and kinds, there are certain guidelines which must always be followed.

> For example, every aggrieved person first has a right of notice as regards his own wrongdoing and the material which proved the same on the basis of which action is taken against him.

Similarly, there is a right of cross-examination which also accrues to the parties whenever the veracity(verification of truth) of the evidence presented is put to question.

Likewise, a party always has a right to present his case or to go for legal representation and then there are constitutional safeguards in place which further govern administrative action such as Article 311 in the Constitution of India which protects the Civil Servants.

H. Delegated Legislation: The Hotspot of Administrative Law Studies

To put it simply, when legislation proceeds from an authority other than the Supreme Authority and is dependent for its continued existence as well as the validity on the supreme authority, it is called 'delegated legislation' or 'subordinate legislation'. It is a natural companion of intensive form of Governance, meaning that *when a governance setup is so spread out that it is not possible for the top legislative authority to directly reach out to the grassroots on its own strength, it can be legitimately expected that rule-making would*

vest in the appropriate and corresponding administrative authority. This also opens the avenues of specialization of law where regulation can be more aptly framed for the specific need of different regions in a diverse land like India. Moreover, *crisis/emergency legislation is also possible in such a situation*. However, it must be remembered that no delegation must be unfettered as no democratic society can ever afford an unaccountable authority to govern against the popular will of the people. Hence, delegation of law-making power to the administrative authorities as has been shown in a welfare State is often controlled. In view of our written constitution, **such delegation cannot be unlimited and must always conform to the basic features of the Constitution as well as the ambit which is given for the delegation by the corresponding legislation**. Moreover, essential legislative functions cannot be delegated. While appreciating the doctrine of delegation of powers, care must be taken in not reading too much into it.

For example, the Parliament cannot be called the delegate of the people as the people have given to themselves, the constitution. Within that particular limit, the Parliament as an organ is supreme and not a legislative agent.

I. Administrative Law in Ascertaining the Policy of Any Given Legislation

Principles of Administrative Law set the benchmark of interpreting, understanding and practicing the underline themes of all legislations and judicial decisions. The first step to find out the policy of any law is to see the plain meaning of the words in a statute through which the power has been delegated. Then, reference can be made to the 'object & reason clause'. Moreover, the 'head notes' and section-names of statutes can also be used and if need be, external sources of interpretation like Parliamentary debates can also be used for ascertaining the purpose of law.

J. Mechanisms of Control Against Illegitimate Administrative Processes

In the United States of America, the procedural control is effective within the prescribed guidelines. In the United Kingdom, Parliamentary control is extremely strong and effective given that theirs is an unwritten constitution with the supremacy of Parliament. In India, it is neither the procedural control nor the Parliament which has an absolute power. Hence, Indians turn to the judiciary to frame the scope of administrative anomalies and privileges of the Parliament. In such cases, the Court starts with a presumption of constitutionality. If for a law/rule/regulation, two interpretations are possible, the court will follow the one which makes the law

constitutional. The Court may also read down or read up the law in order to uphold the constitutionality. Hence, a balanced and holistic approach is adopted while assessing and adjudicating upon administrative matters since the court has to always aim at delivering justice and at the same time ensure that it does not transcend its own domain and pose a part of the legislature.

K. Grounds of Challenge of Rules and Regulations

Rules and regulations framed by administrative authorities can always be challenged on the grounds of uncertainty and vagueness. Arbitrariness is in the presence of non-causality between the rule and the object sought to be achieved by the said rule. It is also clear that when there is a patent denial of equality, arbitrariness will be in force.

Furthermore, reasons form an essential aspect of administrative action as dearth of reasons reflects the non-application of mind. The value of 'reasonableness' in Administrative Law has increased manifold times especially in the post-Renaissance period. To decipher the reasonableness one needs to pay attention to the prevalent customs, traditions and practices while acting under the ambit of Administrative law.

L. Control Over Administrative Discretion and Rule-making

Under the Constitution of India, the general Parliamentary control in the form of debates, notices, adjournments etc., operate as a potent weapon. Special controls such as the 'lay in' provisions and consideration for special committees are also of prime significance. Lay in provisions refers to delegated administrative rules that are laid on the table of the house and only on the approval of the Parliament or the respective legislature will those rules said to have the power of law.

'Lay in' in turn, can be of two kinds - recommendatory or mandatory. While in the former, affirmative Parliamentary approval may not be required, in the latter, such approval is non-negotiable and vital. Delegated legislation is always subject to judicial review on the standards of the Constitution, the parent Act and others.

M. Remedies Under Administrative Law

The Government machinery cannot be excused under the statutory immunities against any wrongs on the people. Administrative Law provides various remedies which a citizen can seek against a wrongful administrative commission or omission.

For example, the Government grants a construction contract to A. After A has begun operations, the contract is revoked on the grounds that the Government changed its policy. A, in this case, has a remedy against the Government's high handedness.

There are different kinds of remedies available against wrongful actions. Different statutes provide for guidelines and benchmarks which are to be adhered to by the administration. For example, the Indian Evidence Act deals in detail with when and how can public officers be compelled to disclose information. Apart from constitutional and statutory remedies; control over the administration can also be exercised by non-constitutional and non-statutory means, wherein the media and the social media assume an important role.

N. A Comparative Analysis: Droit System

Droit Administrative Law

Under the French system of administration of justice a landmark event occurred when Napoleon took over the power of administration and became the Consul General in the late Eighteenth Century. To exercise the judicial powers, there existed the King's court called Conseil Du Roi. This Court only played an advisory role to the King. Ordinary Courts on the other hand were much neglected and their salary was dependent on the fee collected.

As a competitor to the King's court, they started developing an attitude of putting breaks on schemes and programmes of the Government. Hence, the reforms brought about by the Napoleon had two objectives, namely to usher in as quickly as possible, socio-economic movements in the country and in this process, if there is any dispute between an individual and the Government departments, it should be decided as quickly as possible. Hence, the Court was disallowed from putting a spanner in the wheels of administration.

Likewise, the King's powers were also curtailed and the King's court was abolished. The new system evolved a paradigm shift from conventional judicial decision-making. Special Courts had been established to expeditiously dispose the matter pending by this system. France had evolved a dual system of justice operating on the same land, governing the same set of people in the same constituency. While an all-private parties' dispute found its way in the civil court, a dispute between a private individual and Government departments nearly always went to the administrative courts.

The highest administrative court was Counseil de' Etat. Initially, when this system was established, direct filing of cases was not allowed. The court could only entertain the petition when the Minister had forwarded the same to the court and the decision of the court could have only been of advisory value for the minister.

Criticism of the Droit System

Prof. A.V. Dicey denounced the Droit system of administration as being a system where no justice was possible while in theory Dicey's renunciation appeared reasonable; in practice it is often rightly pointed out that this system of justice was far more efficient than its contemporary common law systems. Moreover, in 1872, the Government passed a decree known as the Blanco decree by which this Counseil de' Etat was made an independent system of court where direct filing of cases as well as open hearings were allowed. Hence, speedy administration was a characteristic of Droit and an institution was created by the name of Tribunal Desk Conflict which was to decide where different types of cases were to go - whether to the civil law court or to the administrative law court.

Effectiveness of Droit

Notwithstanding the legitimate theoretical objections to the Droit system, it cannot be denied that this system gave some of the most revered doctrines of Administrative Law.

- **Doctrine of legitimate expectation -** wherein, the Court recognized due Governmental liability in case the promises to the citizens were not honored. Legitimate expectation may arise-
  - If there is an express promise given by a public authority; or
  - Because of the existence of a regular practice which the claimant can reasonably expect to continue;
  - Such an expectation must be reasonable.
- Doctrine of proportionality - The classical definition of proportionality has been given by Lord Diplock in *R V. Goldsmith* (1983) 1 WLR 151 when his Lordship rather ponderously stated "you must not use a steam hammer to crack a nut if a nut cracker would do". Hence, proportionality broadly requires that government action must be no more intrusive than is necessary to meet an important public purpose.

For example, the law mandates the University to take action against the employees who absent themselves from the duty without application. There is a person A, who is not coming since one month and did not respond to show cause notice. His services are terminated. Another person B was absent for one day and the next day when he reported for service, he was issued a show cause notice. The relationship between the fault and the action taken in both cases explains the doctrine of proportionality.

- **Doctrine of Governmental liability-** This basically determines that on what basis the Government will be held responsible for the violation of another's right. Such liability is based on the twin assessment of fault and risk.

Conclusion

After a holistic understanding of this discipline which pertains to the administration and its functioning, it can be concluded that in the modern time it is absolutely essential to constantly analyze and check the administrative processes to ensure that it does not fall prey to deviance from prescribed guidelines and established practice. We have seen that the study of administrative law is an appreciably substantive addition to the study of the Constitution. Moreover, concepts like the Rule of Law and Separation of Powers are the basis of advanced legal study today. In addition to the same, principles of natural justice ensure that Administrative Law becomes a bridge which connects the bare text of law with justice and fairness.

O. Exercise

I. Questions

Short Answer Questions

1. Distinguish the discipline of Administrative Law from Constitutional Law.
2. What is the scope or purpose of Administrative Law?
3. List the different types of administrative actions and give examples.
4. Explain the need of having the doctrine of separation of powers in the scheme of most constitutions across the globe.
5. What has the Kesavananda Bharati v. State of Kerala case stated about the Basic Structure Doctrine?
6. Explain some of the remedies available in the gambit of administrative law against the State.
7. Outline the positive and the negative features of the Droit system of Administration.

Long Answer Questions

1. Can the two disciplines of Administrative Law and Constitutional Law be studied completely separately in watertight compartments? Validate with examples.
2. Can a system like the Droit system of administration be successful in a country like India?
3. Separation of powers, as illustrated by Montesquieu is impossible to be achieved. Give reasons.
4. Do you think that delegated legislation as a phenomenon should be discouraged due to lack of accountability? Give reasons.
5. How can the policy of any given law be assessed from its bare text?
6. Discuss the role of principles of natural justice in Administrative Law?

True/False

1. The study of administrative law must always limit to the domain of Constitution.
2. The Droit administrative system is a classic example of how even theoretically bad systems can become practically sound, if operated with sincerity.
3. Delegated legislations are permissible in the Indian judicial system but only with checks and balances.
4. Principles of natural justice are applicable only when incorporated in a statute.
5. The rule of law is only a philosophical concept with no statutory basis.
6. No country in the world operates on the classical idea of separation of power as visualized by Montesquieu.
7. Administrative law continues to hold its relevance even as the State's role as an entrepreneur is receding.

II. Activity Based Learning

1) Find out the hierarchy of posts of administrative officers in your home district/ state.
2) Plan a visit to the court of your local SDM. Observe the proceedings. List the matters which may be heard by the court of SDM/ Executive Magistrate.

   Find out how these proceedings differ from proceedings conducted in a court of law.

Unit-3: Arbitration, Tribunal Adjudication and Alternative Dispute Resolution

Objective: To understand the following concepts: Adversarial System; Investigative System; Alternative Dispute Resolution; Arbitration Agreement; Setting Aside of an Arbitral Award; Enforcement of Arbitral Award; Evaluative & Facilitative Mediation; Conciliation; Administrative Tribunal; Lok-Adalat; Lokpal; Lok-Ayuktas.

A. Adversarial and Inquisitorial Systems

Every legal system in this world can be broadly classified into two models: Adversarial and Inquisitorial. Both the systems aim at dispensing justice, but they differ in their techniques of adjudication and justice delivery mechanisms. Therefore, this classification becomes important.

Let us understand the meaning of each of the systems and the main differences between them.

In an adversarial system, the parties in a legal proceeding develop their own theory of the case and gather evidence to support their claims. The parties are assisted by their lawyers who take a pro-active role in delivering justice to the litigants. The lawyers gather evidence and even participate in cross-examination and scrutiny of evidence presented by the other disputing party. The role of the judge/decision maker is rather passive as the judge decides the claims based solely on the evidences and arguments presented by the parties and their lawyers.

In an inquisitorial system, the judge/decision maker takes a centre-stage in dispensing justice. The role of the judge/decision maker is active as he/she determines the facts and issues in dispute. The judge/decision maker also decides the manner in which the evidence must be presented before the court. For example, the judge may decide for presentation of a specific form of evidence, i.e. oral (witness statement) or documentary (correspondence between the parties through letters/emails) or a combination of both. The judge then evaluates the evidence presented before him/her and decides upon the legal claims. Therefore, this model of adjudication is also known as the interventionist/investigative model. Furthermore, in such a system, less reliance is placed on cross-examination and other techniques often used by lawyers to evaluate evidences of their opposing counsel.

The adversarial system is generally adopted in common law countries. Major common law jurisdictions include the UK, U.S, Australia and India. On the other hand, continental Europe which follows the civil law system (i.e. those deriving from Roman law or the Napoleonic Code) has adopted the inquisitorial system.

Having understood the basic framework of functioning of the two models of legal systems, let us analyse their advantages and disadvantages.

The main advantages of an adversarial system include:

- The use of cross-examination can be an effective way to test the credibility of witnesses presented;
- The parties may be more willing to accept the results when they are given effective control over the process.

The disadvantages of an adversarial system are the following:

- The cost of the justice system falls upon the parties. This creates an in-built discrimination amongst the litigants. Parties with better resources are able to access justice by hiring competent lawyers and presenting sophisticated evidences which may not be immediately available for parties that lack these resources. Accessibility and affordability to justice are important challenges for the adversarial system of dispute resolution.
- The role of lawyers and the procedural formalities, e.g. cross examination may prolong the trial and lead to delays in several matters.
- Judges play less active role; a judge is not duty bound to ascertain the truth but only to evaluate the matter based on the evidences presented before him/her.

Peter Murphy in his book, **Practical Guide to Evidence** recounts an instructive example. A frustrated judge in an English (adversarial) court finally asked a barrister after witnesses had produced conflicting accounts, 'Am I never to hear the truth?' 'No, my lord, merely the evidence', replied counsel.

On the other hand, the advantages of an inquisitorial model include:

- The system offers procedural efficiency as the active role of judges prevents delays and prolonged trials.
- The system preserves equality between the parties as even the stronger party with more resources and expert lawyers may not be able to influence the judges.

The disadvantages of this model include:

- In an inquisitorial system, since the judge steps into the shoes of an investigator, he/she can no longer remain neutral to evaluate the case with an open mind.
- There may be a lack of an incentive structure for judges to involve themselves in proper fact finding.

Activity

- Evaluate the features of the Indian legal system- Is it adversarial or inquisitorial?
- Take four case studies and see if the model would/should change with the change in nature of the case such as civil, criminal. public interest litigation etc.

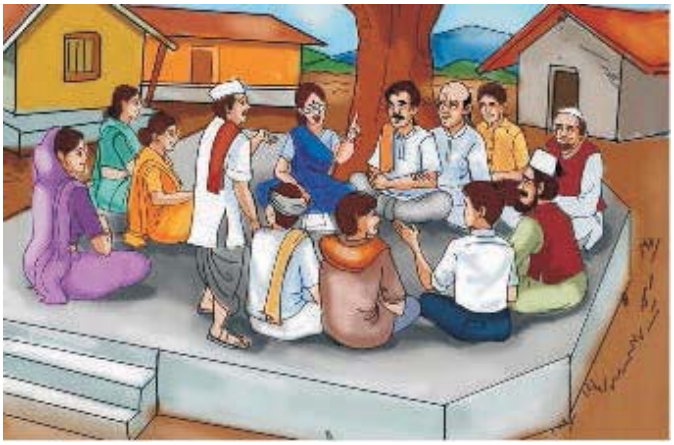
B. Introduction to Alternative Dispute Resolution

Meaning and Scope:

Alternative Dispute Resolution (ADR) system refers to the use of non-adversarial techniques of adjudication of legal disputes.

The history of ADR in India pre-dates the modern adversarial model of Indian judiciary. The modern Indian judiciary was introduced with the advent of the British colonial era, as the English courts and the English legal system influenced the practice of Indian courts, advocates and judges. Courts in India were established to have in place a uniform legal system on the lines of the English Courts. However, even before the advent of such formalistic models of courts and judiciary, Indian legal system was characterised by several native ADR techniques.

The Vedic age in India, witnessed the flourishing of specialised tribunals such as Kula (for disputes of family, community, tribe, castes, races), Shreni (for internal disputes in business, corporation of artisans) and Puga (for association of traders/commerce branches). In these institutions, interest-based negotiations dominated with a neutral third party seeking to identify the underlying needs and concerns of the parties in dispute. Similarly, 'People's courts' or 'Panchayat' continued to be at the centre of dispute resolution in villages.



A typical view of village panchayat in India

Did you Know?

The ancient position of ADR outside India was akin to the submission of disputes to the decision of private persons - recognised under the Roman Law by the name of Compromysm (compromise). Arbitration was a mode of settling controversies much favoured in the civil law of the continent. The Greeks attached particular importance to arbitration. The attitude of English law towards arbitration fluctuated from stiff opposition to moderate welcome. The Common Law Courts looked jealously at agreements to submit disputes to extra-judicial determination.

Source: Russell on Arbitration, 22ndEdn., 2003, p. 362, para 8-002

In the modern era, several new and sophisticated forms of ADR techniques have developed. The different forms of ADR models/techniques are discussed in the subsequent parts of the chapter.

Benefits of ADR

The ADR methods are speedier, informal and cheaper modes of dispensing justice when compared to the conventional judicial procedure. ADR provides a more convenient forum to the parties who can choose the time, place and procedure, for conducting the preferred dispute redressal process. Furthermore, if the dispute is technical in nature, parties have an opportunity to select the expert who possesses the relevant legal and technical expertise. It is interesting to note that ADR provides the flexibility to even refer disputes to non-lawyers. For example, several disputes of technical character e.g. disputes pertaining to the regulation of the construction industry are usually referred to engineers rather than lawyers.

ADR is also encouraged amongst the disputants to reduce delays and high pendency of court cases. The rise of ADR is further supported, as the law courts are confronted with following problems, such as:

1. The lack of number of courts and judges which creates an inadequacy within the justice delivery system;
2. The increasing litigation in India due to increasing population, complexity of laws and obsolete continuation of some pre-existing legal statutes;
3. The increasing cost of litigation in prosecuting or defending a case, increasing court fees, lawyer's fees and incidental expenses;
4. Delay in disposal of cases resulting in huge pendency in all the courts.

In the light of the apparent need and benefits provided by ADR, it has emerged as a successful alternative to court trials. Further, the rise of the ADR movement in India

indicates that it is contributing tremendously towards reviving the litigant's faith in justice delivery mechanisms.

Activity

'Any settlement before the estate was exhausted-would have provided greater benefit to the parties than interminable litigation'

Excerpt from- Jarndyce v. Jarndyce (a fictitious legal case in Charles Dickens' novel, The Bleak House).

Does ADR create a better model of dispute resolution than the adversarial techniques such as litigation? Analyse with reasons.

C. Types of ADR

1. Arbitration

Meaning:

Arbitration is a term derived from the nomenclature of Roman law. Arbitration is a private arrangement of taking disputes to a less adversarial, less formal and more flexible forum and abiding by judgment of a selected person instead of carrying it to the established courts of justice.

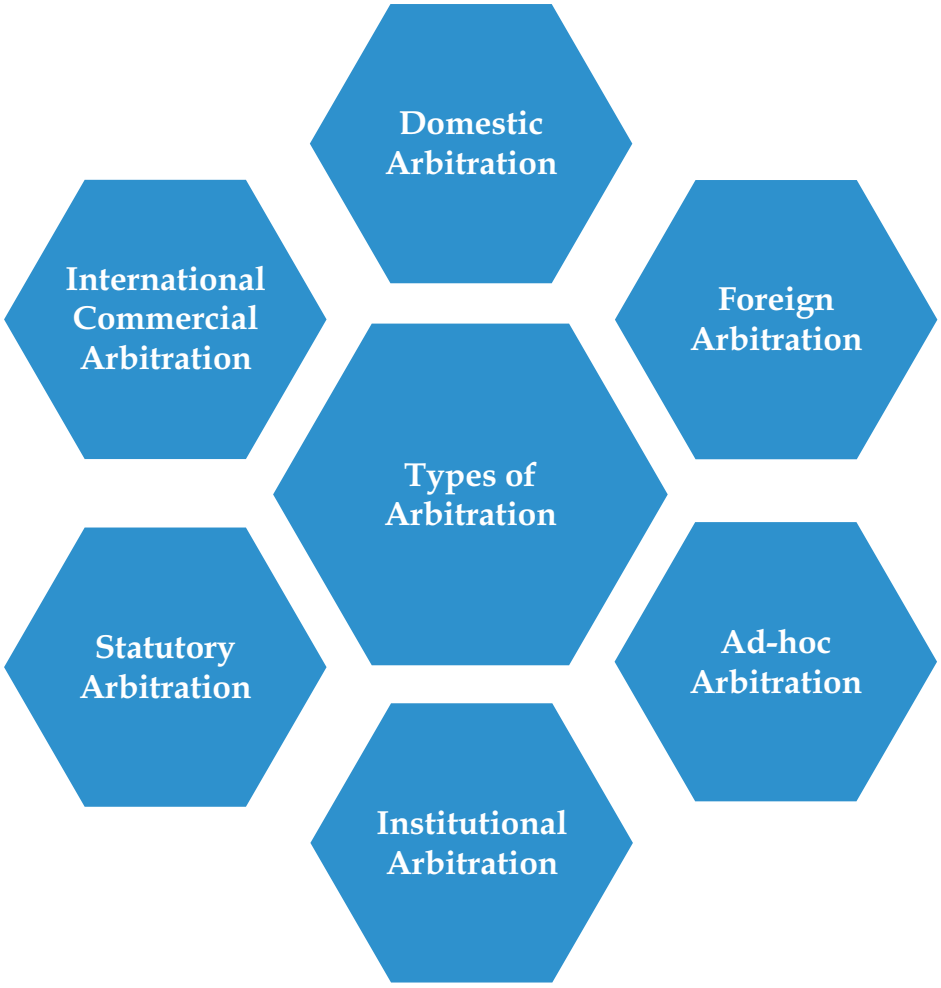
Process of arbitration

Arbitration can be chosen by the parties either by way of an agreement (Arbitration Agreement) or through the reference of the Court (Court Referral of Arbitration- See Glossary). The parties in an arbitration have the freedom to select a qualified expert known as an arbitrator. The process of dispute resolution through arbitration is confidential, unlike the court proceedings which are open to the public. This feature of arbitration makes it popular especially for commercial disputes where business secrets revealed during the process of dispute resolution are protected and preserved. Similarly companies can maintain their commercial reputation, as they can prevent the general public or their customers from discovering the details of their on-going legal disputes.

The decision rendered by an arbitrator is known as an arbitral award. Similar to a judgment given by a judge, the arbitral award is binding on the disputing parties. Once an arbitral award is rendered, it is recognised and enforced (given effect to) akin to a court pronounced judgment or order. In addition to an arbitral award, the arbitrator also holds power and authority to grant interim measures, like a judge in the court. These interim measures are in the nature of a temporary relief and may be

granted while the legal proceedings are on-going in order to preserve and protect certain rights of the parties, till the final award is rendered. Therefore, an arbitral award holds several similarities with a court order or judgment. However, unlike a judgment rendered by a judge in the court, the award does not hold precedential value (see the doctrine of stare decisis which means "stand by the decision") for future arbitrations. Arbitrators are free to base their decisions on their own conception of what is fair and just. Thus unlike judges, they are not strictly required to follow the law or the reasoning of earlier case decisions.

Types of Arbitration



- **Domestic Arbitration -** An arbitration with Indian parties, where the place of arbitration is in India and rules applicable are Indian.

- **Foreign Arbitration** - An arbitration where proceedings are conducted in a place outside India and the award is required to be enforced in India.
- **Ad-hoc Arbitration -** An arbitration which is governed by parties themselves, without recourse to a formal arbitral institution. It may be domestic or international in character.
- **Institutional Arbitration -** An arbitration where parties select a particular institution, which in turn takes the arbitration forward by selecting an arbitrator and laying out the rules applicable within an arbitration, e.g., mode of obtaining evidence, etc. There are several institutions to govern arbitration. Examples of prominent institutions of arbitration include, The London Chamber of International Arbitration (LCIA) which has its offices across the world, including New-Delhi, India.
- **Statutory Arbitration -** An arbitration which is mandatorily imposed on the parties by operation of a particular law or statute, applicable to them. For example, the Defence of India Act, 1971 is one such legislation that mandates a recourse to arbitration in case of any dispute arising within the Act.
- **International Commercial Arbitration -** An arbitration in which at-least one of the disputing parties is a resident/body corporate of a country other than India. Arbitration with the government of a foreign country is also considered to be an international commercial arbitration. This form of arbitration has been defined specifically under section 2(1)(f) of the Arbitration and Conciliation Act, 1996.

An overview of the laws on arbitration

The Arbitration and Conciliation Act of 1996 is the relevant legislation that governs the process of arbitration in India. The statute provides for an elaborate codified recognition of the concept of arbitration, which has largely been influenced by significant movements of judicial reforms and conflict management across the world. In this regard, a special reference must be made to an international convention entitled, United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985. After the birth of this international treaty, the United Nations General Assembly, recommended that all countries must give due consideration to the said Model law, in-order to bring uniformity in the law and practice of international arbitration. The Indian Arbitration and Conciliation Act of 1996 is similarly modelled on the UNCITRAL model law.

Did you know?

The Arbitration and Conciliation Act, 1996 repealed several pre-existing Arbitration statutes such as The Arbitration Act, 1940; The Arbitration (Protocol and Convention) Act, 1937 and The Foreign Awards (Recognition and Enforcement) Act, 1961. Thus, arbitration has for long been a part of the Indian legal system.

The Arbitration and Conciliation Act, 1996 has ushered a new era of dispute resolution for domestic and commercial legal issues. On these lines, the Supreme Court of India has also affirmed that the Arbitration and Conciliation Act, 1996 was introduced in order to attract the 'international mercantile community'. The Supreme Court has thus emphasised that the Act should be interpreted and applied, keeping the commercial sense of the dispute in mind (Konkan Railways Corp. Ltd. v. Mehul Construction Co. (2000) 7 SCC 201).

Glossary of Terms

Arbitration agreement - An agreement whereby parties agree to submit their present or future disputes/differences to arbitration. This may be in writing or via other means of communication.

Court referral to arbitration - If a party to the dispute approaches the Court despite the presence of an arbitration agreement, the other party may raise a claim before the Court. The Court then must refer the dispute back to arbitration, if it has been previously agreed by the parties. This method of initiating arbitration is known as court referral to arbitration.

Statement of claim - The initial documents filed by the claimants enlisting the issues raised to be resolved in an arbitration.

Counter-claim/defense-Respondent's reply to the claim presented by the claimant.

Setting aside of an arbitral award - An arbitral award rendered in an arbitration may be struck down or invalidated by the courts. The grounds of such invalidation are limited to: incapacity of a party to enter into arbitration agreement in the first place, improper appointment of arbitrator, dispute falling outside the terms of the arbitration agreement, bias on the part of arbitrator, award violating public policy at large.

2. Administrative Tribunals

The 42nd Amendment Act, 1976 added Articles 323-A and 323-B to the Constitution of India. These articles empower the Parliament to set up tribunals for adjudication of specialised disputes. The range of disputes mentioned in the Constitution refers to:

- disputes pertaining to service conditions of the government officers,
- collection and enforcement of tax,
- industrial and labour disputes,
- matters concerning land reforms,

- elections disputes,
- ceiling on urban property, and
- production, procurement, supply and distribution of food-stuffs or other essential goods.

Thus the 42nd Amendment Act ushered the era of 'tribunalisation of Indian judiciary'. Further, the enactment of Administrative Tribunals Act, 1985 took the constitutional objective further and set-up the Central Administrative Tribunal (CAT) and State Administrative Tribunals.

The CAT was set up pursuant to the Act of the Legislature in 1985. The tribunals exercise jurisdiction of service matters of employees covered by it. The appeals against the orders of the administrative tribunals lie before the Division bench of the concerned High Court.

The tribunals are procedurally flexible and this flexibility increases their efficiency. For example, The Administrative Tribunals Act, 1985 allows the aggrieved persons to appear directly before the tribunals. The overall objectives of the tribunals are to provide speedy and inexpensive justice to the litigants. Since government is a major litigant in the courts and government related litigation has increased in the delay and pendency of litigation, such tribunals over the past two decades have significantly contributed in supplementing the role of the courts in adjudication of service disputes. The tribunals however are not meant to replace the Courts. This has been explained by the seven judge bench of the Supreme Court in L Chandra Kumar case [JT 1997 (3) SC 589]where it was held that tribunals would not take away the exclusive jurisdiction of the courts, and their decisions could be scrutinised by the Division bench of the High Courts.

One may also note that these administrative and state tribunals are not an original invention of the Indian political and legal system. Such tribunals are now well established in the member countries of the European Union and the United States.

Did you know?

- Today, CAT has 17 regular benches, 15 of which operate at the principal seats of High Courts and the remaining two at Jaipur and Lucknow.
- The tribunal consists of a Chairman, Vice-Chairman and Members.
- The members of the tribunal are drawn both from judicial as well as administrative streams so as to give the tribunal the benefit of expertise both in legal and administrative spheres.

Source: http://www.archive.india.gov.in/knowindia/profile.php?id=36

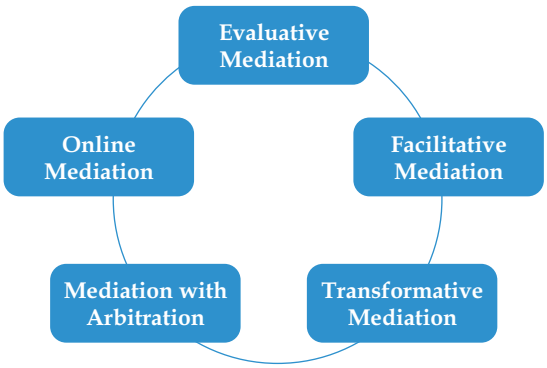
D. Mediation and Conciliation

Mediation: Meaning and Types

Mediation is a method of ADR in which parties appoint a neutral third party who facilitates the mediation process in-order to assist the parties in achieving an acceptable, voluntary agreement. Mediation is premised on the voluntary will of the parties and is a flexible and informal technique of dispute resolution.

Mediation is more formal than negotiation but less formal than arbitration or litigation. Unlike litigation and similar to arbitration, mediation is relatively inexpensive, fast, and confidential. Further, mediation and arbitration differ on the grounds of the nature of an award rendered. The outcome of mediation does not have similar binding like an arbitral award. However, though non-binding,these resolution agreements may be incorporated into a legally binding contract, which is binding on the parties who execute the contract.

Mediation can be classified into the following categories:



Evaluative mediation - Evaluative mediation is focused on providing the parties with an evaluation of their case and directing them toward settlement. During an evaluative mediation process, when the parties agree that the mediator should do so, the mediator will express a view on what might be a fair or reasonable settlement. The Evaluative mediator has somewhat of an advisory role in that s/he evaluates the strengths and weaknesses of each side's argument and makes some predictions about what would happen should they go to court.

Facilitative mediation - Facilitative mediators typically do not evaluate a case or direct the parties to a particular settlement. Instead, the Facilitative mediator facilitates the conversation. These mediators act as guardian of the process, not the

content or the outcome. During a facilitative mediation session the parties in dispute control both what will be discussed and how their issues will be resolved. Unlike the transformative mediator, the facilitative mediator is focused on helping the parties find a resolution to their dispute. The facilitative mediator further provides a structure and agenda for the discussion.

Transformative mediation - Transformative mediation practice is focused on supporting empowerment and recognition shifts, by allowing and encouraging deliberation, decision-making, and perspective-taking. A competent transformative mediator practices with a micro-focus on communication, identifying opportunities for empowerment and recognition as those opportunities appear in the parties' own conversations, and responding in ways that provide an opening for parties to choose what, if anything, to do with them.

Mediation with arbitration - Mediation has sometimes been utilized to good effect when coupled with arbitration, particularly binding arbitration, in a process called 'mediation/arbitration'. The process begins as a standard mediation, but if mediation fails, the mediator becomes an arbiter.

This process is more appropriate in civil matters where rules of evidence or jurisdiction are not in dispute. It resembles, in some respects, criminal plea-bargaining and Confucian judicial procedure, wherein the judge also plays the role of prosecutor.

Despite their benefits, mediation/arbitration hybrids can pose significant ethical and process problems for mediators. Many of the options and successes of mediation relate to the mediator's unique role as someone who wields no coercive power over the parties or the outcome. The parties' awareness that the mediator might later act in the role of judge could distort the process. Using a different individual as the arbiter addresses this concern.

Online Mediation - Online mediation employs online technology to provide disputants access to mediators and each other despite geographic distance, disability or other barriers to direct meeting.

Process of Mediation

The neutral third party facilitating the process of mediation is known as a mediator. Mediation does not follow a uniform set of rules, though mediators typically set forth

rules that the mediation will observe at the outset of the process. Successful mediation often reflects not only the parties' willingness to participate but also the mediator's skill. There is no uniform set of rules for mediators to become licensed, and rules vary by state regarding requirements for mediator certification.

Broadly speaking, mediation may be triggered in three ways:

(i) Parties may agree to resolve their claims through a pre-agreed mediation agreement without initiating formal judicial proceedings (pre-litigation mediation).

(ii) Parties may agree to mediate, at the beginning of formal court proceedings (popularly known as court referrals).

(iii) Mediation may be taken recourse of, after formal court proceedings have started, or even post trial, i.e. at the appellate stage.

Under the Indian law, contractual dispute (including money claims), similar disputes arising from strained relationships (from matrimonial to partnership), disputes which need a continuity of relationship (neighbour's easement rights) and consumer disputes, have been held to be most suited for mediation.

For example, a suburban homeowner might find that the formal legal system offers no realistic way to deal with his neighbour's overly bright driveway lights that shine in his bedroom window. Such disputes however can be mediated. Mediation gives the participants an opportunity to raise and discuss any issues they might wish to settle. For example, it might turn out that the neighbour lit his driveway because the homeowner's dog went on his lawn, or because the homeowner's tree was encroaching upon his property. Because mediation can handle any number of outstanding gripes or issues, it offers a way to discuss (and solve) the problems underlying a dispute and create a truly lasting peace.

The Supreme Court of India in its judicial decision has expressly clarified the ambit of mediation. According to Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., [(2010) 8 SCC 24] representative suits, election disputes, criminal offenses, case against specific classes of persons (minors, mentally challenged) have been excluded from the scope of mediation.

Activity

Identify a situation in which you would choose mediation as your preferred method of dispute resolution. Why is mediation the best method in this situation? What are the potential benefits and drawbacks of mediation in this situation?

Conciliation: Meaning

Conciliation is a process similar to mediation as parties out of their own free will appoint a neutral third party to resolve their disputes. The key difference between mediation and conciliation lies in the role of the neutral third party. A mediator merely performs a facilitative role and provides platform for the parties to reach a mutually agreeable solution. The role of a conciliator goes beyond that of a mediator. A conciliator may be interventionist in the sense that he/she may suggest potential solutions to the parties, in-order to resolve their claims and disputes.

Laws on Mediation and Conciliation

Both Mediation and Conciliation are governed by Section 89, a provision inserted by the 2002 amendment of the Civil Procedure Code, 1908 (for short, "CPC"). The Code is the primary legislation governing the method, procedure and legal practice of civil disputes. Section 89 of the Code only deals with court referred mediation. Pre-litigation mediation is not yet governed by any law in India.

Similarly, conciliation only finds a reference in Section 89, Civil Procedure Code, 1908. The process and methods within conciliation have been described in the Arbitration & Conciliation Act, 1996. Further, the Industrial Disputes Act, 1947 also provides for conciliation as a viable means of resolving disputes in the labour sector.

E. Lok Adalat

The concept of Lok Adalat (People's Court) is an innovative Indian contribution to the global legal jurisprudence. The institution of Lok Adalat in India, as the very name suggests, means, People's Court."Lok" stands for "people" and the term "Adalat" means court. India has a long tradition and history of such methods being practiced in the society at grass roots level.

In ancient times the disputes were referred to "panchayats" which were established at village level. Panchayats used to resolve the dispute through arbitration. It has proved to be a very effective alternative to litigation. This very concept of settlement of dispute through mediation, negotiation or through arbitral process known as decision of "Nyaya-Panchayat" is conceptualized and institutionalized in the philosophy of Lok Adalat. It involves people who are directly or indirectly affected by dispute resolution. The evolution of movement called Lok Adalat was a part of the strategy to relieve heavy burden on the Courts with pending cases and to give relief to the litigants who were in a queue to get justice.

The modern institution of Lok Adalat is presided over by a sitting or retired judicial officer such as the chairman, with usually two other members- a lawyer and a social worker. A Lok Adalat has jurisdiction to settle any matter pending before any court, as well as matters at pre-litigative stage, i.e. disputes which have not yet been formally instituted in any Court of Law. Such matters may be in the nature of civil or non-compoundable criminal disputes. The salient features of Lok Adalat are participation, accommodation, fairness, voluntariness, neighbourliness, transparency, efficiency and lack of animosity.

The benefits of Lok Adalat include:

- There is no court fee and even if the case is already filed in the regular court, the fee paid will be refunded if the dispute is settled at the Lok Adalat.
- There is no strict application of the procedural laws and the disputing parties can directly interact with the judges.
- The decision of Lok Adalat is binding on the parties and its order is capable of execution through legal process.

Did you know ?

The first Lok Adalat was held on March, 14, 1982 at Junagarh in Gujarat. Lok Adalats have been very successful in settlement of claims including- motor accident claims, matrimonial/family disputes, labour disputes, disputes relating to public service such as telephone, electricity, bank recovery cases etc.

An overview of laws on Lok Adalat

Pursuant to Article 39-A of the Constitution of India, the Parliament has enacted The Legal Services Authorities Act, 1987. The Act provides for various provisions of dispute settlement through Lok Adalat. The Act constitutes legal services authorities to provide free legal aid and competent legal services to the weaker sections of the society. In 2002, the Act was amended to establish permanent Lok Adalats for public utility services.

Furthermore, the National Legal Services Authority (NALSA), a statutory body constituted under the National Legal Services Authorities Act, 1987 is responsible for laying down policies and principles for making legal services under the Act and frame the most effective and economical schemes for legal services. NALSA is engaged in providing legal services, legal aid and speedy justice through Lok Adalats. It also disburses funds and grants for implementing legal aid schemes, literacy camps

and programs. Similarly, the State Legal Services Authorities and District Legal Services Authorities have been constituted in every state capital and districts respectively.

Activity

'I had learnt the true practice of law. I had learnt to find out the better side of human nature, and to enter men's heart. I realised that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that the large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby- not even money, certainly not my soul' (Gandhi)

In the light of the aforesaid quote, evaluate the role of lawyers as social engineers. What role do ADR techniques and institutions such as Lok Adalat play in this respect?

F. Ombudsman

Meaning and Role

An indigenous Swedish, Danish and Norwegian term, Ombudsman is etymologically rooted in the word *umboðsmaðr,* essentially meaning "representative".

Whether appointed by a legislature, the executive, or an organization, the typical duties of an ombudsman are to investigate complaints and attempt to resolve them, usually through recommendations (binding or not) or mediation. Ombudsmen sometimes also aim to identify systemic issues leading to poor service or breaches of people's rights. At the national level, most ombudsmen have a wide mandate to deal with the entire public sector, and sometimes also elements of the private sector (for example, contracted service providers). Further redress depends on the laws of the country concerned, but this typically involves financial compensation.

The Government of India has designated several ombudsmen (sometimes called Chief Vigilance Officer (CVO)) for the redress of grievances and complaints from individuals in the banking, insurance and other sectors being serviced by both private and public bodies and corporations. For example, the CVC (Central Vigilance Commission) was set up on the recommendation of the Santhanam Committee (1962–64). CVC has been conceived to be the apex vigilance institution, free of control from any executive authority, monitoring all vigilance activity under the Central Government and advising various authorities in Central Government organizations in planning, executing, reviewing and reforming their vigilance work.

The major advantage of an ombudsman is that he or she examines complaints from outside the offending state institution, thus avoiding the conflicts of interest inherent in self-policing. However, the ombudsman system relies heavily on the selection of an appropriate individual for the office, and on the cooperation of at least some effective official from within the apparatus of the state.

G. Lokpal and Lokayukta

Meaning and Origin

A Lokpal (caretaker of people) is an ombudsman in India. The Lokayukta (appointed by the people) is a similar anti-corruption ombudsman organization in the Indian states.

The institutions of Lokpal and Lokayukta were given formal recognition by the passing of The Lokpal and Lokayukta Act, 2013. The legislation aims to combat acts of bribery and corruption of public-servants—a term that has been given a fairly wide interpretation in the Act. The Act applies to the public servants in and outside India. It is important to note that the Act includes in its purview even the current and ex-prime ministers of India except in matters pertaining to international relations, external and internal security, public order, atomic energy and space. At least two-thirds of the members of Lokpal must approve of such inquiry. It further provides that any such inquiry shall be held in camera and if the Lokpal comes to the conclusion that the complaint deserves to be dismissed, the records of the inquiry shall not be published or made available to anyone.

Besides the Prime Minister, it brings within its purview any person who is or has been a Minister of the Union and any person who is or has been a Member of either House of Parliament. The Lokpal shall not inquire into any matter involved in, or arising from, or connected with, any such allegation of corruption against any Member of either House of Parliament in respect of anything said or a vote given by him/her in Parliament or any committee thereof covered under the provisions contained in clause (2) of Article 105 of the Constitution.

With respect to bureaucracy, it includes any Group 'A', 'B','C' or 'D' official or equivalent from amongst the public servants defined in the Prevention of Corruption Act, 1988 when serving or who has served in connection with the affairs of the Union.

The Act also provides for the manner in which the public-servants must declare their assets.

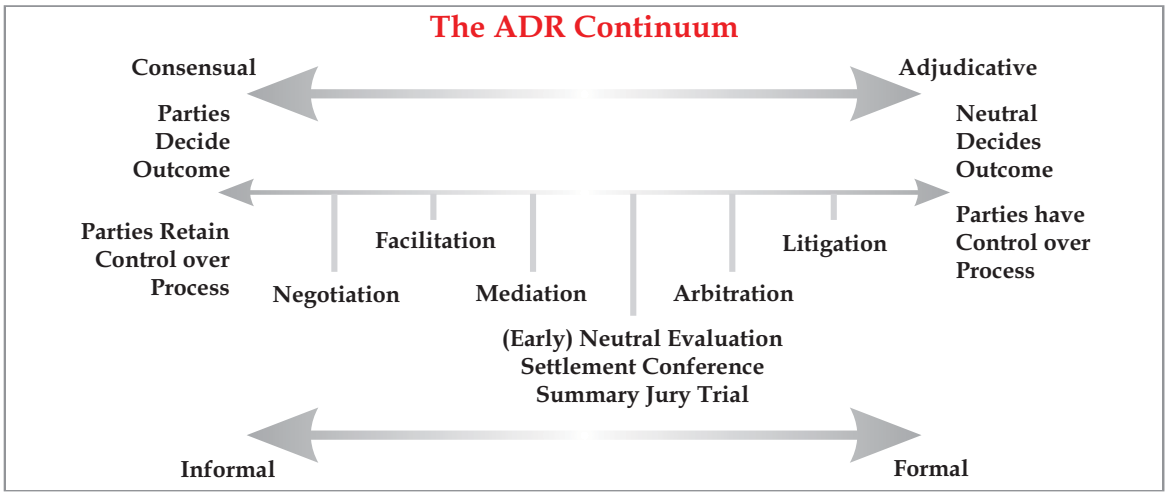
According to the Act, the Lokpal shall consist of:

- A chairperson who has been a Chief Justice of India or is or has been a Judge of the Supreme Court or is an eminent judicial member of impeccable integrity and outstanding ability having special knowledge and expertise of not less than 25 years in matters relating to anti-corruption policy, public administration, vigilance or finance.
- Further, the total members of Lokpal shall not exceed 8, out of whom 50% shall be Judicial Members.

Furthermore, the powers of the Lokpal are extensive, and equivalent to the superintendence, inquiry and investigative powers of the police and the Central Vigilance Commission. The Lokpal shall consist of an inquiry and prosecution wing to take necessary steps in prosecution of public servants in relation to offences committed under the Prevention of Corruption Act, 1988. Further, Lokpal can even recommend the government to create special courts to decide cases arising from the Prevention of Corruption Act, 1988.

Likewise, the Lokpal and Lokayuktas Act, 2013 provides for the establishment of Lokayukta at every state in-order to deal with complaints of corruption against public functionaries. The Act provides that all states must institute Lokayuktas within one year of from the date of the commencement of The Lokpal and Lokayuktas Act, 2013.

It is important to note that even before the enactment of this Act, some states in India, for example, Delhi, Karnataka, Kerala, etc had the institutions of Lokayuktas in place.



Source: Adapted from New York State Unified Court System, http://www.nycourts.gov/ip/adr/images/continuum2.jpg

Did you know?

Only 19 Indian States have Lokayukta. Maharashtra was the first State to introduce the institution of Lokayukta in 1971. There are no Lokayuktas in Arunachal Pradesh, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tamil Nadu, Tripura and West Bengal. The process to set up Lokayukta in Goa is in progress.

Activity

1. Analyse the picture above. Based on your learnings in the module, compare and contrast the features of different ADR techniques.
2. Learn more about the following techniques:
   - Med-Arb;
   - Early neutral evaluation;
   - Mini-trials, and
   - Summary jury trials

H. Exercise

I. Questions

1. T&F
   a) The adversarial system of adjudication is interventionist in nature.
   b) The judge/decision maker assumes a police-like role in an inquisitorial model.
   c) Judges may be more influenced by parties in an adversarial rather than an inquisitorial system of adjudication.
2. What is arbitration? Describe its types.
3. Define the following terms: arbitration agreement; enforcement of arbitral award; setting aside of arbitral award.
4. Define Mediation. What are its types?
5. What are the key differences between mediation and conciliation?
6. What are the different ways in which mediation can be triggered in a given dispute/legal claim?

II. Essay Questions

1. Discuss the advantages and disadvantages of the two models of adjudication within a legal system? Which model do you favour? Explain with reasons.

2. What are the advantages of ADR over traditional forms of dispute resolution? Discuss the similarities and differences between arbitration and litigation.

3. Compare and Contrast the processes of Arbitration, Mediation and Conciliation. Highlight the salient similarities and differences amongst them. Which ADR method appeals to you the most- Explain with reasons?

4. What is the meaning of Ombudsman? Can you identify equivalent institutions within India? Discuss their roles and limitations.

5. Trace the progress and development of the contemporary Lokpal movement in India.

Unit-4: Human Rights in India

In-class Activity

At the very beginning of this Unit, students must share their views on the different ways they see or understand human rights. They need not limit their thoughts to the issues below which may also be used to guide discussions.

- What do you mean by 'human rights'?
- Do criminals have human rights?
- Are human rights anti-majoritarian (protection of minorities from the domination of the majority)?
- Are human rights a moral demand to resolve the various kinds of injustices?
- Are human rights a tool for sloganeering and disruptions?

A. Introduction

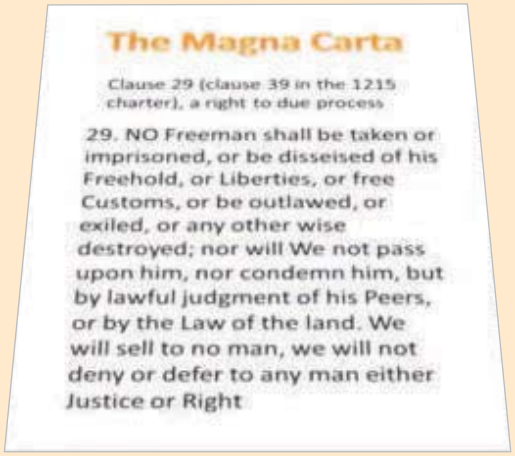
The focus of this Unit is on the human rights laws in India and it consists of two main chapters, one on the Indian Constitution and statute laws, and the other on the complaint mechanisms and human rights commissions. The chapters and topics covered in this Unit are not arranged based on themes like children, women, dalits and adviasis, religious minorities, environment, or citizens generally, but are arranged on the basis of legal framework and provisions. And, these and many other themes are embedded in the discussions on the relevant topics of legal framework and provisions of human rights laws in India. For example, the sub-theme of child marriage and dalits find reference also under the topic of 'right to equality' provision of the Constitution.

This Unit will provide students with – 1) the understanding of the words 'human rights'; 2) some historical and international developments about human rights; 3) the discussion about various kinds of human rights that are safeguarded by several laws in India; 4) examples of various themes with the corresponding laws; and 5) role of various human rights commissions in India and related complaint mechanisms. Human rights field is expansive and this Unit merely provides some basic examples of those laws, themes and complaint mechanisms to give students a general knowledge sense of human rights commonly and in India. This introduction covers briefly few developments in the international historical context and the international practice of human rights; the introduction is followed by the two main chapters on Indian laws and practice, which is the main focus of this Unit.

1. Historical Context

Historically, varied religious and social traditions as well as philosophical writings have recognized in different ways and with diverse perspectives the inherent rules of being humans, particularly the principles that ensure respect for human dignity. Such principles have commonly been understood as basic and unalienable. For example, traditions like Christianity, Islam, Hinduism, Buddhism, and Confucian have made reference to 'respect' and 'well-being' for others, which mean that human beings must conduct themselves in particular ways. The modern society, also, has recognized certain rules of respecting human dignity and their well-being and formulated them in the form of human rights. Generally, the word 'rights' denote that these rules are entitlements or claims of all to be recognized and protected through duties and obligations, and the State ensures that human rights of all are guaranteed.

The modern concept of human rights emerged from the Western politics and philosophy. The English legal documents of *Magna Carta* of 1215 and *The English Bill of Rights* of 1689 are some of the earliest examples of the human rights laws. The *Magna Carta* of 1215 was an agreement between the English King John and the barons who were unhappy about the taxation policies of the Monarch. The *Magna Carta* included clauses in the form of rights language; it granted the barons the right to legal trial and prevented their arrest or imprisonment or outlawing or abuse or denial of ownership of property without legal trial.



Magna Carta Clause 29. Digital image. *Source: Kentfreedommovement.com*.

The English Bill of Rights of 1689 was an agreement between the Parliament and the King that prevented the latter from abusing the Protestants. It included clauses

that prohibited levying of money by the Crown, and provided right to petition the King, right to fair trial, right against cruel and unusual punishments or excessive fines, and right to parliamentary privileges (speech, vote, etc.) to the members of Parliament. Besides these laws, the late 17th and18th century writings of many

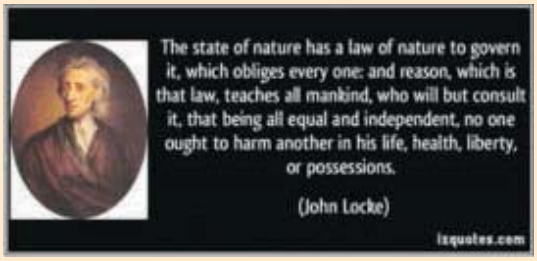
The Bill of Rights 1689: An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown

Rights include

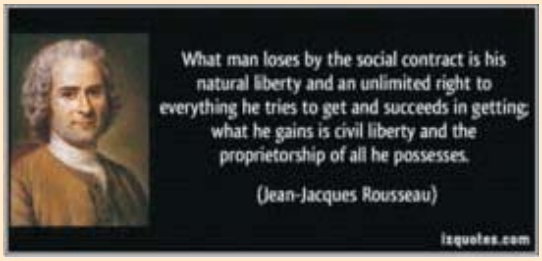
- Parliamentary privileges – free elections and freedom of speech in the Parliament
- Right not to be taxed without the approval of the Parliament
- Freedom from intrusion of the Government
- Right to petition in courts
- Right to fair treatment in courts

The Bill of Rights 1689: An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown. Digital image. Source: Parliament.uk.

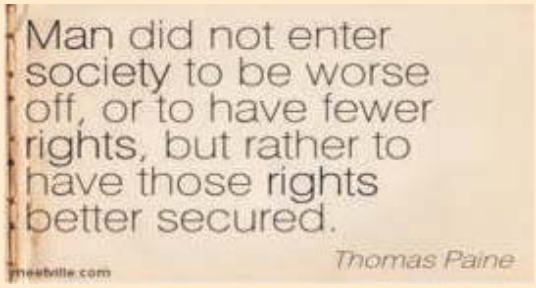
Western thinkers influenced the definition of human rights like, John Locke, Jean-Jacques Rousseau, and Thomas Paine. Any discussion on their high theories and philosophical debates is beyond the scope of this Unit; by way examples, given below are the image sand quotes of these scholars.



John Locke Quote. Digital image. *Source: Izquotes.com.*



Jean-Jacques Rousseau Quote. Digital image. *Source: Izquotes.com.*



Thomas Paine Quotes and Sayings. Digital image. *Source: Meetville.com.*

Thomas Paine. Digital image. *Source: En.wikipedia.org.*

Modern Constitutions of most democratic countries have recognized and adopted similar ideals of human rights as guiding principles. The two earliest and influential examples are that of the United States of America and France. In 1776, when United States of America was formed as a new nation, it adopted the 1776 *American Declaration of Independence* which included in its preamble the human rights values and stated:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

Again in 1789, at the beginning of the French Revolution, the National Constituent Assembly of *France adopted the French Declaration of the Rights of Man and of the Citizen,* which, drawing upon the United States ideals of human rights, laid the foundation of human rights principles still valid in the present French Constitution. The French Declaration stated in its first two clauses:

"Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good. The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression."

These declarations recognize the inherent dignity and the equal and inalienable rights of human beings, and they form the basis of achieving freedom, justice and peace in a modern democratic State.

2. International Human Rights

In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) as "a common standard of achievement for all peoples and nations." The Universal Declaration of Human Rights provides and defines the various kinds of human rights that are applicable to all human beings. They include the fundamental civil, political, economic, social and cultural rights, for example – freedom of speech, assembly, conscience and religion; right to education; right to livelihood and decent standard of living; right to life, liberty and security of person; right to equality; freedom from all forms of discriminations including based on gender and race; and so on. The Declaration has been embraced by almost all member States of the United Nations to respect and protect the basic human rights values provided therein.

From the Preamble of Universal Declaration of Human Rights

…….THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Pursuant to this Declaration, the United Nations adopted a series of international human rights laws on a wide range of themes as well as those with regional specifics that bind signatory countries with obligations and duties provided in these laws to protect and respect human rights. In order to operationalize these rights, many countries have incorporated them in their Constitutions and other domestic legislations.

"The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights."

"International Human Rights Law." www.ohchr.org. Office of the High Commissioner for Human Rights, Web.

The international human rights practice also provides for complaint mechanisms and procedures for receiving complaints or communications ensuring that these rights are respected, protected, implemented, and enforced within each party State.

Few examples of international human rights treaties are –	
International Covenant on Civil and Political Rights, 1976	Based on the ideals of free human beings enjoying civil and political freedom and freedom from fear and want. E.g., freedom of speech, assembly, conscience and religion;

	right to life, liberty and security of person; right to equality; freedom from all forms of discriminations including based on gender and race; and so on.
International Covenant on Economic, Social and Cultural Rights, 1976	Examples – right to education; right to livelihood and decent standard of living; right to health, right to shelter, and so on.
Convention on the Rights of the Child, 1990	The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection.
Convention on the Elimination of All Forms of Discrimination Against Women, 1979	Discrimination against women is defined as "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."
Convention Relating to the Status of Refugees, 1954	It provides legal safeguards to a refugee/a person who is granted asylum/shelter in another country –"A refugee is a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his

	nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.."

B. Constitutional Framework and Related Laws in India

Like in many other countries (e.g., US, South Africa, and so on), in India too human rights are rooted in the Constitution. The Indian constitutional human rights framework involve the following parts – 1) the Preamble, 2) Part III of the Constitution containing the Fundamental Rights provisions, 3) Part IV offering the Directive Principles and 4) Part IV(A) consisting of the Fundamental Duties.

1. The Preamble

The Constitution of India begins with the Preamble affirming its aims, objectives, and the guiding principles. The principles laid out in the Preamble are used for interpreting provisions of the Constitution that are vague and ambiguous; and as discussed in an earlier Unit, Preamble is the 'basic structure' of the Constitution. In that, the doctrine of 'basic structure' takes away the amendment power of the Parliament with regards to certain features of the Constitution such as democracy, rule of law, secularism, separation of powers and judicial review. Some of these features appear in the Preamble. The Preamble states as follows:

> "WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:
>
> **JUSTICE**, social, economic and political;
>
> **LIBERTY** of thought, expression, belief, faith and worship;
>
> **EQUALITY** of status and of opportunity and to promote among them all;
>
> **FRATERNITY** assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

The Preamble proclaims the rights and freedoms, provisions of which are contained in the Constitution in various parts and clauses aimed "to secure to all its citizens" those rights and freedoms.

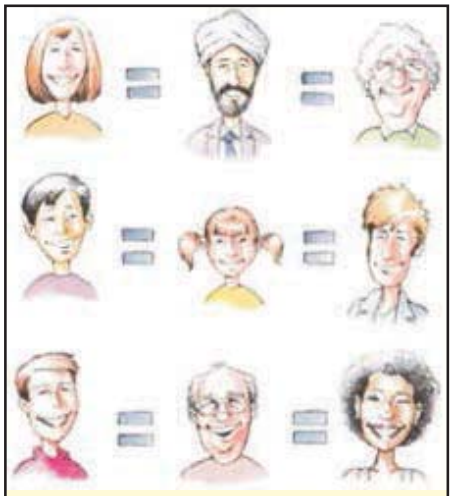
2. Part III – Fundamental Rights

Articles 12-35 in Part III of the Constitution contain the provisions on fundamental rights. Before we discuss what rights constitute fundamental rights, it is important to note some of the salient features of fundamental rights that are spelt out here:

- They are enforceable by the higher courts in India.
- Article 32 provides the right to the aggrieved ones, whose fundamental rights have been violated or denied, to petition the Supreme Court for the enforcement of fundamental rights.
- Article 13 elevates the authority of fundamental rights. It ensures that the State or other competent authority do not make laws including ordinances, orders, bye laws, rules, regulations, notifications, customs or usages that contradicts or takes away or breaches the fundamental rights.
- Fundamental rights are mostly enforceable against the State and in some cases against private persons. An example of the former is the right to freedom of speech and expression; for the latter is the prohibition of employment of children below the age of fourteen years in factories, mines, and in places of hazardous activities.
- The term 'State' includes the Government, Parliament, State Legislatures, District Boards, Panchayats, Municipalities, and other authorities or organizations that are an instrument or agency of the state like, the Indian Oil Limited, Karnataka State Road Transportation Authority, Delhi Jal Board, and so on.

Fundamental rights are largely civil and political rights and consist of the right to equality (Articles 14-18), right to freedom (Arts. 19-22), right against exploitation (Arts. 24 and 25), right to freedom of religion (Arts. 25-28), Cultural and Educational rights (Arts. 29-30), and right to constitutional remedies (Arts. 32-35).

(i) Right to Equality



What Is Equality. Digital image.
Source: Http://my.englishclub.com.

Equality Principle – Article 14 provides to all the right to equality before law and equal protection of the law. It prohibits discrimination on grounds of religion, race, caste, sex or place of birth. It means that law treats everyone equally without consideration of their rank or status or other backgrounds. The principle of equality means that one uniform law cannot be applied to all equally as some may not be similarly placed as others. So 'equality' treats equals similarly and unequals differently. For example, the Prohibition of Child Marriage Act 2006 prescribes the marriage age of girl as 18 years and that of boy as 21 years; this restricts a minor from getting married. This example draws a distinction based on age in relation to the question of the prohibition of child marriage. However, if the marriage between two parties were to be disallowed based on the classification of religion, race, caste, sex or place of birth, it would amount to discrimination and breach of the right to equality.

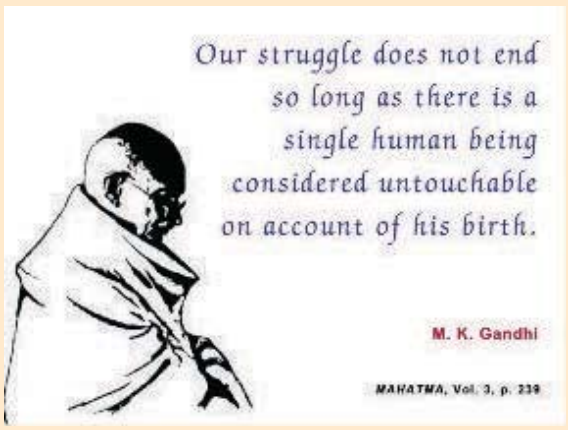
Discrimination & access to public places – Article 15 is based on the equality principle. It prohibits State from discriminating anyone based on grounds of religion, race, caste, sex or place of birth. Also, it prohibits anyone and the State from using these grounds to restrict any citizen from entering shops, public restaurants, hotels and places of public entertainment; or the use of wells, tanks, bathing ghats, roads and places of public resort.

Reservation and affirmative action – Article 16 is also based on the equality principle of Article 14. It provides for equality of opportunity in matters of public or State employment and bars any discrimination to any citizen on grounds of religion, race, caste, sex, descent, place of birth, or residence. However, this article allows State to provide reservation or affirmative action programs for government jobs to backward classes like Schedule Castes and Scheduled Tribes who because of historical and continued

disadvantages based on caste status and otherwise have not been adequately represented in the services under the State.

Abolition of untouchability – Under Article 17 "Untouchability" is abolished and its practice in any form is forbidden. This article can be enforced against both the State as well as private individuals and the offence is punishable in accordance with special laws like the Protection of Civil Rights Act, 1955 and the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989. The abolition of untouchability in article 17 is made operationalized by these two special laws that attempt to remove any form of harassments and abuses to 'Dalits' and 'Adivasis' by the State or private individuals.

Chhuwachhut Pratha (Untouchability). Digital image. Source: Http://socialwrite.blogspot.com



Thought For The Day (UNTOUCHABILITY). Digital image. Source: Http://mkgandhi-sarvodaya.blogspot.com

(ii) Right to Freedom

Freedoms – Article 19 prescribes and protects the following kinds of freedoms to all citizens:

a) Freedom of speech and expression.

b) Freedom to assemble peaceably and without arms.

c) Freedom to form associations or unions.

d) Freedom to move freely throughout the territory of India.

e) Freedom to reside and settle in any part of the territory of India; and

f) Freedom to practice any profession, or to carry on any occupation, trade or business.

Reasonable Restrictions – However, Article 19 also provides 'reasonable restrictions' on these freedoms, which means that these rights are conditional. The State can 'reasonably' limit or take away the right to 'freedom of speech and expression' when there is a threat to the sovereignty and integrity of India, or the security of the State, or friendly relations with foreign States, or public order, or decency or morality, or in relation to contempt of court, or defamation, or incitement to an offence. For example, the State can prohibit someone from making inciting speeches that may provoke others to commit violence. The chart below presents the various conditions under which State can limit or take away the freedoms.

Freedoms	Restrictions (grounds)
Freedom of speech and expression	Sovereignty and integrity of India, or the security of the State, or friendly relations with foreign States, or public order, or decency or morality, orcontempt of court, or defamation, or incitement to an offence
Freedom to assemble peaceably and without arms	Sovereignty and integrity of India, or public order
Freedom to form associations or unions	Sovereignty and integrity of India, or public order or morality
Freedom to move freely throughout the territory of India	Interests of the general public, or for the protection of the interests of any Scheduled Tribe
Freedom to reside and settle in any part of the territory of India	
Freedom to practice any profession, or to carry on any occupation, trade or business	Interests of the general public; or the State prescribed professional or technical qualifications; or Staterun trade, business, industry or service, that excludes participation of citizens or others either completely or partially.

However, at times Supreme Court can invalidate State's restrictions if it finds them to be unreasonable. As an instance, State cannot put restriction as an excuse because it is unable to maintain public order, e.g., application of aforementioned restrictions on the sale of a book because of a few unruly protesters; such restrictions are unreasonable and breach the right to freedom of speech and expression of the author.

Rights of persons accused of crimes – Article 20 provides for safeguards to persons who are accused of having committed crimes. This article provides the human rights framework to the criminal justice system, which was discussed in an earlier Unit in grade IX. The rights of persons accused of crimes are – firstly, article 20 provides that no person can be convicted for the commission or omission of an act that does not amount to an offense by any law in force at the time of such act. For example, odomy law in section 377 of the Indian Penal Code (IPC)treats consensual homosexual conduct between same-sex adults as a criminal offense. In 2009, Section 377 was declared invalid and unconstitutional by the Delhi High Court to protect rights to privacy, non-discrimination, and liberty of lesbian, gay, bisexual and trans gender people. But in 2013, the Supreme Court reversed the High Court's decision. In this example, sodomy law will not apply to any consensual homosexual conduct committed in 2011, but will apply to commissions that take place post-Supreme Court judgment of 2013. Article 20 prohibits application of laws retrospectively and prospectively.

Secondly, article 20 provides that any person who is convicted of a crime should not receive a penalty greater than what is provided in the law in force at the time of the act of offence.

Thirdly, it provides for another important right – "no person shall be prosecuted and punished for the same offence more than once." This means that if someone commits an offence, that person should not be harassed and punished repetitively (more than once) for the same offence.

Fourthly, it states that – "no person accused of any offence shall be compelled to be a witness against himself." This provision safeguards the accused's right against self-incrimination. An accused may give information based on own knowledge if he or she chooses to, but cannot be forced to be self-witness against himself or herself. Every accused has a right to fair trial.

Right to life and personal liberty – Article 21 states as follows – "No person shall be deprived of his life or personal liberty except according to procedure established by law."

This article is most fundamental; it is expansive and covers many other rights and is applicable to both the citizens as well as non-citizens.The meaning of 'right to life' includes right to human dignity, right to basic requirements of life, right to participate in activities and expression, right to tradition, heritage, and culture, and so on.'Personal liberty' means various rights that provide for personal liberty of a person, i.e., everyone has right to do his or her will freely. The meaning of 'right to life and personal liberty' is broad and embraces many aspects including….. see the table below.

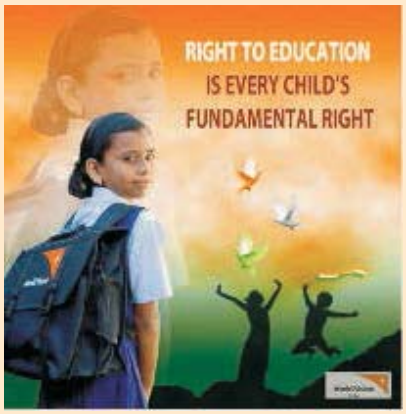
Opponents of the Right to Life Use Judge in Wisconsin to Stop Legal Protection of Children and Women - Texas Is Next. Digital image. *Source: www.catholic.org*

'Right to Life & Personal Liberty'

human dignity. basic necessities of life. engaging in activities and expression. tradition, heritage, and culture. privacy. pollution free environment. livelihood. against sexual harassment. against solitary confinement. legal aid. speedy trial. against delayed execution in capital punishment. against custodial violence. shelter. healthcare and medical provisions. against bonded labor. against cruel and unusual punishment

The second part of the article describes how one's right to life and personal liberty be taken away. A person can be deprived of his or her 'right to life or personal liberty' only by *procedure established by law*. This means that any law that limits or takes away one's right to life and personal liberty must contain a procedure that is fair and reasonable and not arbitrary. For example, the Indian Penal Code prescribes death penalty for certain crimes. This involves established procedures like, 1) death penalty is awarded only in 'rarest of rare' cases, and 2) there should not be delay in executing the prisoner waiting in death row. Also, Indian Penal Code allows for appeal where the wait period is longer than five years. Of course, it's a different debate whether 'death penalty' should be abolished.

Right to education – Article 21A states that—"The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."This article provides for right to education to all between the age of six and fourteen and obligates State to implement this.



Right to Education Is Every Child's Fundamental Right Source: Digital image. *Source: Peopleint.wordpress.com*

A Child's Right To Education Source: Digital image. Source: Selwood.com

Prior to 2002, the Indian Constitution considered elementary education for children between age six and fourteen as a policy goal provision in the Directive Principles of State Policy; a more detailed discussion on the topic of Directive Principles of State Policy is covered in a subsequent part of this Unit. Briefly put, Directive Principles of State Policy are not enforceable in a court of law as they are as pirational goals to be achieved over a period of time. In 1992-93, however, the Supreme Court affirmed that depriving one from education amounts to depriving one's right to life. This meant that elementary education was raised to the status of fundamental right from that of a policy goal (directive principles) and hence enforceable. Accordingly, in 2002, Article 21A providing the right to elementary education was created as a fundamental right. However, implementing this right requires State's financial and budgetary expenditures of enormous amount to meet the demand of a high illiteracy rate, which so far has been inadequate.

Protection against arrest and detention – Article 22 provides safeguards against of arrest and detention in following ways:

- No one can be detained in custody without providing grounds for arrest.

- The arrested and detained person has a right to consult and to be defended by a legal practitioner of his or her choice.
- A person who is arrested and detained in custody should be produced before the nearest magistrate within a period of twenty-four hours. The travel time is not counted towards the twenty-four hours time frame.
- No such person can be detained in custody beyond twenty-four hours without the authority of a magistrate.

The above safeguards do not apply to a person from an enemy country. Also, they do not apply to persons arrested or detained under preventive detention laws. Generally, preventive detention laws allows for detaining persons on suspicion who have not been found guilty of any crime but their release may be detrimental to society like, they may commit more crimes if released or affect adversely investigations by State or they are mentally ill and so on. However, preventive detention laws can be misused resulting in violations of human rights of the person detained. For example, the Maintenance of Internal Security Act of 1971 was enacted during the Indira Gandhi administration, popularly known as "emergency", and many political opponents were detained without safeguards again starrest and detention and other human rights.

(iii) Right against exploitation

Prohibition of traffic in human beings and forced labor – Article 23 prohibits human trafficking, beggar and forced labor.

Prohibition of employment of children in factories, etc. – Article 24 prohibits employment of children below the age of fourteen years in factories, mining, and other hazardous employment.

Human Trafficking involves the following

ACT		**Means**		**Purpose**		
Recruitment Transport Transfer Harbouring Receipt of	+	Threat or use of force Coercion Abduction Fraud	+	Exploitation including Prostitution of others Sexual		**= Trafficking**

persons	+	Deception Abuse of power of vulnerability Giving payments or benefits	+	exploration Forced labour Slavery or similar practices Removal of organs Other types of exploitation

Human Trafficking. Digital image. *www.unodc.org. Web.*

Top 10 Countries Infamous for Human Trafficking. Digital image. *Source: www.Listdose.com*

Other Examples of Human Trafficking

- forced labor
- forced sex workers
- forced organ transplantation
- forced surrogacy
- forced to work in factories of hazardous activities
- forced into begging

(iv) Right to Freedom of Religion

Freedom of conscience and free profession, practice and propagation of religion – Under article 25, all persons have the right to freedom of conscience, and freedom to profess, practice and propagate religion as long as their acts do not threaten public order, morality and health. For example, on the issue concerning use of loudspeakers for religious purposes, Supreme Court has stated that – "no religion prescribed that prayers should be performed by disturbing the peace of others nor does it preach that they should be through voice-amplifiers or beating of drums. In the name of religion nobody can be permitted to add to noise pollution or violate noise pollution norms. Even if there be religious practice to use voice amplifiers, it should not adversely affect rights of others including that of being nor

disturbed in their activities. Noise Pollution (Regulation and Control) Rules, 2000 should be followed."

Also, State may regulate or restrict economic, financial, political or other secular activities that are associated with a religious practice. State can also provide social welfare and reforms in Hindu, Sikh, Jain, or Buddhist religious institutions as well as the State can throw open their religious institutions like temple to all classes and sections of that religious society. The wearing and carrying of kirpans is part of the profession of the Sikh religion and do not threaten public order, morality or health.

Freedom to manage religious affairs – Article 26 provides the right to every religious denomination, including their sub-sections or sects, to

- establish and maintain institutions for religious and charitable purposes;
- manage their own matters of religious affairs;
- own and acquire movable (e.g., vehicles, furniture) and immovable (e.g., house, trees) property; and
- administer such property in accordance with law.

These rights are conditional; they should not endanger public order, morality and health.

Freedom as to payment of taxes for promotion of any particular religion — Article 27 prohibits forcing anyone to pay any taxes on revenues that are used in payment of expenses for the promotion or maintenance of any religion or section. For example, donations in temples that are used for the upkeep of the temple cannot be taxed.

Freedom as to attendance at religious instruction or religious worship in certain educational institutions — Article 28 prohibits religious instructions in educational institution that are wholly maintained out of State funds. For example, government run schools like Sainik Schools and Kendriya Vidyalaya schools cannot impart religious instructions to students. However, some educational institutions are exempted from this rule, those which are administered by State but are established by endowments or trusts that require religious instruction in such educational institutions.

Furthermore, State recognized or State aided educational institutions cannot force any student to take part in any religious instruction or to attend any religious worship conducted in such institutions.

These provisions and others make India a secular state.

(v) Cultural and Educational Rights

Protection of interests of minorities — Article 29 provides minority sections of citizens who have distinct language, script or culture the right to conserve the same. It also prohibits educational institutions, maintained by the State or receiving aid out of State funds, from denying admissions to any citizen on grounds of religion, race, caste, or language.

Right of minorities to establish and administer educational institutions — Article 30 provides all minorities, whether based on religion or language, the right to establish and administer educational institutions of their choice. It also prohibits State from discriminating educational institutions, while granting them aid, on grounds of religion or language.

(vi) Right to Constitutional Remedies

Remedies for enforcement of fundamental rights — Article 32 guarantees the aggrieved ones, whose fundamental rights have been violated or denied, to petition directly to Supreme Court for the enforcement of fundamental rights. Unlike cases of other matters where one has to exhaust remedies of lower courts, in matters of fundamental rights violation one can approach the Supreme Court directly. Similarly, Article 226 authorizes High Courts to take up matters of fundamental rights violations directly for their enforcement.

Public Interest Litigation – Also known as Social Action Litigation. Article 32 allows for the practice of Public Interest Litigation, which is a process by which letters written to Supreme Court or High Courts by public-spirited persons or organizations alleging fundamental rights violations are converted into petitions. The author of the letter alleges violations of fundamental rights of the weaker sections of Indian society who are unable to approach the court; they include people in custody, victims of police violence, forced bonded laborers, migrant and contracted laborers, child workers, rickshaw pullers, hawkers, pensioners, pavement dwellers, and

slum dwellers. Courts can also act upon newspaper reports alleging fundamental rights violations of victims.

3. Directive Principles

Articles 36-51 in Part IV of the Constitution lay down the guiding principles of governance for the State are called the 'Directive Principles of State Policy'. Given below are few salient features of the directive principles.

- It is the duty of the State to apply these principles in making laws and policies on social and human development.
- These principles are largely of the nature of economic and social rights.
- The provisions of directive principles are not enforceable by any court of law, but they provide guidance in carrying out and drafting laws and policies regarding human and social development.
- Supreme Court has raised the status of many provisions of directive principles to that of fundamental right by suggesting they violate one's right to life (Art. 21).
- Directive principles aim at promoting the welfare of the people. They intend to secure and protect social, economic and political justice of its citizens.
- These principles endeavor to minimize income inequalities and to eliminate inequalities based on status, facilities, and opportunities amongst both individuals and groups of people.

Directive principles of policies guide State to achieve various goals as given in the table below.

'Directive Principles'
Right to adequate means of livelihood for both men and women.
Equal pay for equal work for both men and women.
Right to healthy working conditions for men, women and children.
Protection to children against exploitation and against moral and material abandonment.
Legal aid for securing justice - for those with economic or other disabilities.

Village panchayats vested with powers and functions as units of self-government.
Right to work, to education, and to public assistance in cases of unemployment, old age, sickness and disablement, etc.
Provision for just and humane conditions of work and for maternity relief.
Living wage and conditions of work to agricultural, industrial or other workers that ensures a decent standard of life and full enjoyment of leisure and social and cultural opportunities.
Promoting cottage industries on an individual or co-operative basis in rural areas.
Participation of workers in management of industries.
Uniform civil code for the citizens - one uniform law for family law matters.
Provision for early childhood care and education to children below age of six years.
Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections and protection from social injustice and all forms of exploitation.
Raising level of nutrition, standard of living and improving public health and prohibition of the consumption of intoxicating drinks and drugs injurious to health.
Organization of agriculture and animal husbandry in modern and scientific way and preserving and improving the breeds, prohibiting the slaughter of cows.
Protection and improvement of environment and safeguarding of forests and wild life.
Protection of monuments and places and objects of artistic or national importance.
Separation of judiciary from executive in the public services of the State.
Promotion of international peace and security, maintaining just and honorable relations between nations, fostering respect for international law and treaty obligations, and encouraging settlement of international disputes by arbitration.

Supreme Court has raised the status of many provisions of directive principles to that of fundamental rights by suggesting they also violate one's right to life (Art. 21). For example, and as discussed earlier, prior to 2002, elementary education for children between age six and fourteen was a policy goal provision in the Directive Principles of State Policy, which the Supreme Court raised to the status of fundamental right affirming that depriving one from education amounts to depriving one's right to life (Art. 21 Fundamental Right). Accordingly, right to education for ages six to fourteen is now part of the fundamental rights chapter, refer to the earlier discussion. Other prominent example is the right to livelihood, which is a directive principle often read with right to life as fundamental right. Supreme Court has often directed State to rehabilitate slum dwellers whenever they are evicted on grounds of encroachments. Eviction without rehabilitation closer to their work place amounts to violation of their right to livelihood and in turn the right to life.

4. Fundamental Duties

Part IV(A) – Article 51A of the Constitution prescribes fundamental duties of every citizen. In that, certain conduct and behavior are expected of the citizens. The salient features of fundamental duties are given below.

- The fundamental duties cannot be enforced in a court of law for violation of the duties, and no one can be punished for the violation.
- Fundamental duties contain standards to be followed by the citizens.
- They remind citizens not to behave irresponsibly but help building a free, democratic and strong society.

It may be possible that, just like some provisions of the directive principles, courts may raise the status of these duties in future.

Fundamental Duties
Respecting the Constitution and institutions, the National Flag and the National Anthem.
Cherishing and following the noble ideals of the national struggle for freedom.
Upholding and protecting the sovereignty, unity, and integrity of India.
Defending the country and rendering national service when called upon to do so.

Promoting harmony amongst religious, linguistic and regional diversities and renouncing practices derogatory to women's dignity.
Valuing and preserving the rich heritage and culture.
Protecting natural environment including forests, lakes, rivers and wild life.
Developing the scientific temper, humanism and the spirit of inquiry and reform.
Safeguarding public property and abjuring violence.
Striving for excellence and raising the nation to higher levels of endeavor and achievement.
Providing opportunities for education to children by their parents between the age of six and fourteen years.

C. Complaint Mechanisms of Quasi-judicial Bodies

The quasi-judicial bodies typically are public administrative agencies under the realm of the executive branch and are largely bestowed with authority similar to courts. These bodies have the power to resolve disputes and also impose punishments. Examples of quasi-judicial institutions include, national and state human rights commissions, central and state information commissions, consumer redressal forums and commissions, income tax tribunals, and so on. Some of these bodies relating specifically to human rights are discussed in this chapter. The most fundamental ones are the national human rights institutions that include, the National Human Rights Commission, National Commission for Minorities, National Commission for Women, National Commission for Scheduled Castes, and the National Commission for Scheduled Tribes. These commissions are independent or autonomous and transparent bodies that are created under specific legislations to promote and protect human rights; for example, the National and State Human Rights Commissions are governed by the Protection of Human Rights Act, 1993. National commissions have jurisdiction over the entire nation and the parallel state commissions take matters of human rights violations from the respective states.

1. National Human Rights Commission

The specific legislation called the Protection of Human Rights Act was enacted by the Parliament in 1993, which in turn established the National Human Rights Commission as an independent institution with powers and functions to promote

and protect human rights. This act also provides for the constitution of State Human Rights Commissions at state levels for access to complaint mechanisms at the state level. The National Commission is headed by the Chairperson who is a former Chief Justice of the Supreme Court. The other members of Commission are – one member who is a former judge of the Supreme Court, another member who is present or former Chief Justice of a High Court, and two other members with knowledge or experience in matters relating to human rights. Besides, there is a Secretary-General who is the Chief Executive Officer of the Commission who largely discharges administrative duties of the Commission. The Chairperson and the members are appointed by the President of India on recommendation of a committee consisting of the Prime Minister, the Speaker of the House of the People (Lok Sabha), Minister of Home Affairs at the center, Leader of Opposition in the Lok Sabha, Leader of Opposition in the Council of States (Rajya Sabha), and Deputy Chairman of the Rajya Sabha. The committee is required to consult the Chief Justice of India whenever a sitting judge of the Supreme Court or sitting Chief Justice of a High Court is appointed to the Commission. The government also appoints police officers and investigative staff and other administrative, technical and scientific personnel for the efficient functioning of the Commission. The National Commission is based in New Delhi and the State Commissions also complement the working of the National Commission.

a) Powers and Functions of the Commission

The Commission is vested with the functions as given below.

Inquiry and Investigation – One of the Commission's roles is to conduct inquiry and investigation into the alleged violation of human rights or abetment (aiding or supporting) or negligence in the prevention of such violation by a public servant. The complaint can be filed by the victim or his or her representative, or the court may direct the Commission with a complaint, and at times the Commission may initiate inquiry and investigation on its own (sou motu). For example, the Commission may inquire sou motu based on some human rights violations news or report published through the media. Sou motu inquiry is especially useful when the victims belong to weaker section of the society and have limited access to justice delivery mechanisms.

The Commission has the powers of a civil court and in conducting an inquiry or investigation it can utilize various powers including the following –

- summon and enforce the attendance of witnesses and examine them on oath;
- ask for production of any document before itself;
- receive evidence on affidavits;
- request public record from any court or office; and
- examine witnesses or documents.

Once the inquiry is completed, the Commission can make recommendations to governmental authority in cases where any public servant is the perpetrator of human rights violation. The recommendation may include payment of compensation to the victims or suggest initiation of proceedings for prosecution of the public servant. The Commission can also approach the Supreme Court or the High Court for directions and orders. The Commission may also ask the State authority to provide immediate interim relief to the victim.

Intervening in court proceedings – The Commission may with the permission of the court intervene in court proceedings concerning human rights violations. For example, the Commission can request the Supreme Court to transfer pending riot cases out of a state in which the riots had happened to ensure the witnesses are not threatened in any manner and that evidences are not damaged.

Inspection of jails, etc.– The Commission may also visit any jail or other governmental institutions, where prisoners are lodged or detained, to study the living conditions of the inmates and make recommendations to the government.

Awareness and Sensitization – The Commission can review various human rights laws either in the Constitution or other statutes and recommend measures to the government for their effective implementation.The Commission can also evaluate various factors, including acts of terrorism, whichpreventtheenjoymentofhumanrightsandrecommendappropriatereme dial measures to the government. The Commission's role includes studying various international human rights laws and make recommendations for their effective implementation at the domestic level (within the State). Furthermore, the Commission can undertake and promote research in the field of human

rights as well as spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, media, seminars, and other available means. Lastly, the Commission can encourage and support the efforts of non-governmental organizations and institutions involved with human rights work.

b) Complaint Mechanism

The complaint mechanism procedure with the National Human Rights Commission is easy and straight forward. Any one aggrieved of human rights violation or their representatives can lodge a complaint with the Commission in any language. The complaint can be filed online at www.nhrc.nic.in or by paper petition using the complaint format provided on the website. The complaint can be sent either by Post or Fax or through E-mail. There if no fee for filing a complaint. The complaint must be filed within a year of the occurrence of the human rights violation. Once the complaint is pending before the commission, one can check the status of the complaint online.

In-Class Exercise

National Human Rights Commission of India has prescribed a complaint format as given below. Use the format and prepare a complaint on any human rights violation either hypothetical or real that you may be aware of, or you may have read/heard in the news and so on. The NHRC guidelines given below in row three are for reference purpose. This complaint must be used for **classroom exercise only** and be submitted to the course instructor for evaluation.

Format for filing a complaint with the NHRC

A. Complainant's Details

1. Name:
2. Sex: Male / Female
3. State:
4. Full Address:
5. District:
6. Pin Code:

B. Incident Details

1. Incident Place(Village/Town/City):
2. State:
3. District:
4. Date of Incident:

C. Victim's Details

1. Name of the victim:
2. No. of victims:
3. State:
4. Full Address:
5. District:
6. Pin Code:
7. Religion:
8. Caste (SC/ST/OBC/General):
9. Sex:
10. Age:
11. Whether Disabled person:

D. Brief summary of facts/allegations of human rights involved:

E. Whether complaint is against Members of Armed Forces/ Para-Military:Yes/No

F. Whether similar complaint has been filed before any Court/State Human Rights Commission:

G. Name, designation & address of the public servant against whom Complaint is being made:

H. Name, designation & address of the authority/officials to whom the public servant is answerable:

I. Prayer/ Relief if any, sought:

Guidelines on how to file complaint with the NHRC

1. Complaint may be made to the Commission by the victim or any other person on his behalf.
2. Complaint should be in writing either in English or Hindi or in any other language included in the eighth schedule of the Constitution. Only one set of complaint needs to be submitted to the Commission.
3. Complaint may be sent either by Post or Fax or E-mail.
4. No fee is chargeable on such complaints.
5. The complaint shall disclose
   (i) violation of human rights or abetment thereof; or
   (ii) negligence in the prevention of such violations, by a public servant
6. The jurisdiction of the Commission is restricted to the violation of human rights alleged to have been committed within one year of the receipt of complaint by the Commission.
7. Documents, if any enclosed in support of the allegations in the complaint must be legible.
8. Name of the victim, his/ her age, sex, religion/ caste, State and District to which the incident relates, incident date etc. should invariably be mentioned in the complaint.
9. Please submit the complaint preferably in the enclosed format.
10. Following types of Complaint(s) are not ordinarily entertainable:
    (i) Illegible
    (ii) Vague, anonymous or pseudonymous.
    (iii) Trivial or frivolous in nature.
    (iv) The matters which are pending before a State Human Rights Commission or any other Commission.
    (v) Any matter after the expiry of one year from the date on which the act constituting violation of human rights is alleged to have been committed.
    (vi) Allegation is not against any public servant.
    (vii) The issue raised relates to civil dispute, such property rights, contractual obligations, etc.
    (viii) The issue raised relates to service matters.

(ix) The issue raised relates to labour/industrial disputes.

(x) Allegations do not make out any specific violation of human rights.

(xi) The matter is sub-judice before a Court/ Tribunal.

(xii) The matter is covered by judicial verdict/decision of the Commission.

As far as possible complainants are encouraged to make use of the format given above to file their complaints. The guidelines indicate the kind of information, which would facilitate in processing a complaint.

2. National Commission for Minorities

a) Introduction

National Commission for Minorities Act, 1992 was enacted by the Parliament to create the National Commission for Minorities to safeguard the human rights of minorities including protection against inequality and discrimination. Minorities' human rights are enshrined in the Constitution as well as other laws enacted by Parliament and the State Legislatures. The minorities here are referred to religious minorities of Muslims, Christians, Sikhs, Buddhists, Jains, and Zoroastrians (Parsis). Many states also have instituted the State Minorities Commissions and are located in the respective state capitals. Persons who belong to the minority communities can approach the State as well as National Minorities Commission for remedying human rights violations. The National Minorities Commission consists of a Chairperson, a Vice-Chairperson and five other members who are nominated by the Central Government from amongst the minority communities who are persons of eminence, ability and integrity.

b) Functions of the Commission

The functions of the Commission include the following –

- evaluating the progress of the development of Minorities;
- monitoring the working of the safeguards provided in the Constitution and in other laws enacted by Parliament and the State Legislatures;
- making recommendations for the effective implementation of safeguards for the protection of the interests of Minorities by the Central Government or the State Governments;

- looking into specific complaints regarding deprivation of rights and safeguards of the Minorities and taking up such matters with the appropriate authorities;
- initiating studies on problems arising out of any discrimination against Minorities and recommending measures for their removal;
- conducting studies, research, and analysis on the issues relating to socio-economic and educational development of Minorities;
- suggesting appropriate measures in respect of any Minority to be undertaken by the Central Government or the State Governments; and
- making periodical or special reports to the Central Government on any matter pertaining to Minorities and in particular the difficulties confronted by them

Like the National Human Rights Commission, the National Commission for Minorities is vested with powers of a civil court. When the Commission tries any suit or hears a complaint, it has the powers to 1) summon and enforce the attendance of any person and examine him or her on oath, 2) require the discovery and production of any document, 3) receive evidence of affidavits, 4) request any public record or copy from any court or office, and 5) issue commissions for the examination of witnesses and documents.

c) Complaint Mechanism

There are many grounds on which the Commission typically declines admitting the complaint. Firstly, it does not entertain or admit cases or complaints that do not relate to Minority status or rights. Secondly, the complaint should not be pending before another court or commission, i.e., matters that are sub judice. Thirdly, where the complainant has not availed of other ordinary judicial/quasi-judicial/administrative institutions that are available for redressal, the Commission does not admit such matters unless the complainant has reasonable justification. Fourthly, the complaint should not relate to events that are more than one-year old. Fifthly, complaint should not be vague, anonymous, pseudonymous or frivolous. Lastly, Commission does not entertain complaints that are not directly addressed to it.

Like, the NHRC, the National Commission for Minorities can also take action *sou motu* based on newspaper reports or other findings. Applications of

complaints are required to be sent to the Commission and addressed directly to the Secretary, National Commission for Minorities, New Delhi. It does not charge any fee for lodging a complaint. The updated contact details are available on the Commission's website at www.ncm.nic.in.

3. National Commission for Women

a) Introduction

In 1992, the National Commission for Women was established under the National Commission for Women Act, 1990. The Commission consists of a Chairperson and five Members who are nominated by the Central Government from amongst persons of ability, integrity, and standing who have had experience in any one of these areas– law or legislation, trade unionism, management of an industry potential of women, women's voluntary organizations (including women activist), administration, economic development, health, education, or social welfare. At least one member each belongs to the Scheduled Castes and Scheduled Tribes communities. The member-secretary takes care of the administrative matters.

b) Functions and powers

The commission has been charged with the following functions –

- to investigate and examine matters relating to the safeguards provided for women under the Constitution and other laws;
- to present annual and other reports to the Central Government about the working of the safeguards;
- to make recommendations to Central and states for the effective implementation of safeguards for improving the conditions of women;
- to review provisions of the Constitution and other laws affecting women and make recommendations about remedial legislative measures required to address inadequacies or shortcomings in the laws;
- to take up cases with the appropriate authorities about violation of women human rights as provided in the Constitution and other laws;
- to look into complaints and also take *suo moto* notice of matters on deprivation of women's rights; non-implementation of laws required to achieve equality and development; and non-compliance of policy decisions, guidelines or instructions pertaining to women welfare;

- to initiate special studies or investigations into specific problems or situations arising out of discrimination and atrocities against women and to identify the constraints and to recommend strategies;
- to undertake promotional and educational research and to suggest ways for ensuring due representation of women in all spheres and to identify factors responsible for impeding women's advancement, such as, lack of access to housing and basic services, inadequate support services and technologies for reducing drudgery and occupational health hazards, and for increasing their productivity;
- to participate and advice on the planning process of socio-economic development of women;
- to evaluate the progress of the development of women under the Union and any State;
- to inspect a jail, remand home, women's institution, or other place of custody where women are kept as prisoners or otherwise and take up with the concerned authorities for remedial action, if found necessary;
- to fund litigation involving issues affecting a large body of women; and
- to make periodical reports to the Government on any matter pertaining to women and in particular various difficulties under which women toil.

The Commission has investigating powers similar to that of a civil court; in that, the Commission can do the following –

- summon and enforce the attendance of any person and examining him or her on oath;
- require the discovery and production of any document;
- receive evidence on affidavits;
- request any public record or copy from any court or office; and
- issue commissions for the examination of witnesses and documents.

About working of the National Commission for Women

"In keeping with its mandate, the Commission initiated various steps to improve the status of women and worked for their economic empowerment during the year under report. The Commission completed its visits to all the States/UTs except Lakshadweep and prepared Gender Profiles to assess the

status of women and their empowerment. It received a large number of complaints and acted *suo-moto* in several cases to provide speedy justice. It took up the issue of child marriage, sponsored legal awareness programs, Parivarik Mahila Lok Adalats and reviewed laws such as Dowry Prohibition Act, 1961, PNDT Act 1994, Indian Penal Code 1860 and the National Commission for Women Act, 1990 to make them more stringent and effective. It organized workshops/consultations, constituted expert committees on economic empowerment of women, conducted workshops/seminars for gender awareness and took up publicity campaign against female foeticide, violence against women, etc. in order to generate awareness in the society against these social evils."

India. National Commission for Women. www.ncw.nic.in. Web

4. National Commission for Scheduled Castes & Scheduled Tribes

a) Introduction

Article 338 of the Constitution of India provides for establishing a Special Officer for the Scheduled Castes and Scheduled Tribes to investigate all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes in the Constitution and report to the President. The two commissions, the National Commission for Scheduled Castes and the National Commission for Scheduled Tribes were instituted in fulfillment of Art.338 of the Constitution to protect their human rights and prevent their exploitation, and to encourage and defend their social, educational, economic and cultural securities as provided in the Constitution and other legislations. For example, State provides reservation or affirmative action programs for government jobs to backward classes like Schedule Castes and Scheduled Tribes who because of historical and continued disadvantages based on caste status and otherwise have not been adequately represented in the services under the State. Examples of special laws include the Protection of Civil Rights Act, 1955 and the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989.

b) Powers and functions

Both Commissions have similar powers and functions as provided in Art. 338- to investigate and monitor all matters relating the safeguards provided for the

Scheduled Castes and Scheduled Tribes in the Constitution and other laws;

- to evaluate the working of the safeguards;
- to inquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled Castes and Scheduled Tribes;
- to participate and advise on the planning process of socio-economic development of the Scheduled Castes and Scheduled Tribes and to evaluate the progress of their development under the Union and any State;
- to present to the President, annually and periodically, reports on the working of the safeguards and recommendations for the effective implementation of the safeguards and protection, as well as welfare, and socio-economic development of the Scheduled Castes and Scheduled Tribes.

Just like the other human rights commissions, the two commissions for Scheduled Castes and Scheduled Tribes have the powers of a civil court in trying a suit and commissions can do the following –

- summon and enforcing the attendance of any person from any part of India and examining him on oath;
- require the discovery and production of any document;
- receive evidence on affidavits;
- request any public record or copy from any court or office; and
- issue commissions for the examination of witnesses and documents.

Art.338 also mandates the Union and every State Governments to consult the Commissions on all major policy matters affecting Scheduled Castes and Scheduled Tribes.

c) Complaint Mechanism

The Commissions receive complaints from an individual or group of persons alleging denial of the safeguards provided in the Constitution by an authority or an organization. The Commissions follow up with the authorities and organizations against whom the complaint is lodged. The websites of the Commissions are www.ncsc.nic.in for the Scheduled Castes and www.ncst.nic.in for the Scheduled Tribes.

D. Exercise

Questions

1) Describe any two examples of historical developments on human rights that occurred in the Western world.
2) In two to three sentences, describe any two international human rights laws or treaties or declarations.
3) Explain what you understand by states' obligations to respect, protect and fulfil human rights?
4) Identify any two features in the Preamble of the Indian Constitution that indicate its objective of protecting human rights.
5) Describe in two to three sentences any three salient features of fundamental rights in the Indian Constitution.
6) What is right to equality? How is a reservation or affirmative action for government jobs to Schedule Castes and Scheduled Tribes protected by the right to equality?
7) Why do you think the practice of untouchability was abolished, explain in one to two sentences?
8) Identify any two kinds of right to freedoms along with any two grounds of restrictions that take away these freedoms.
9) Explain any one fundamental right of a person who is either accused or convicted of a crime.
10) In one or two sentences, explain what is 'right to life and personal liberty' as given in the Indian Constitution.
11) Explain in two to three sentences what is meant by 'right to education' provided in the fundamental rights chapter of the Constitution.
12) Identify in any one safeguard provided to someone is arrested and detained.
13) What is meant by human trafficking, which is prohibited by the Indian Constitution?
14) Explain in two to three sentences what is 'right to freedom of religion' as provided in the Indian Constitution.
15) In one or two sentences explain what judicial remedies are available for the enforcement of fundamental rights?

16) In one or two sentences explain what is meant by Public Interest Litigation.

17) In one or two sentences, describe any one salient feature of the Directive Principles of State Policy? Give one example of directive principle.

18) Give any one example of fundamental duties provided in the Constitution.

19) Explain any one power or function of the National Human Rights Commission.

20) Who are minorities whose interests the National Commission for Minorities intend to protect?

21) Give one ground that disqualifies one's complaint from being admitted by the National Commission for Minorities.

22) Explain any one power or function of the National Commission for Women.

23) Why were the National Commission for Scheduled Castes and the National Commission for Scheduled Tribes created? Explain any one power or function of the National Commissions for Scheduled Castes and Scheduled Tribes.

CBSE
CONTINUOUS AND COMPREHENSIVE EVALUATION
KNOW - AS YOU GROW

Unit-5: Legal Profession in India

A. Introduction

The modern legal profession in India has colonial roots, emerging with the advent of Mayor's Courts in Madras and Calcutta in 1726. However, it was not until 1846, through the Legal Practitioner's Act, that the doors of profession were thrown open to all those duly qualified, certified and of good character, irrespective of nationality or religion. Women were still excluded from the profession at this stage, to be thereafter admitted through the Legal Practitioner's (Women) Act, XXIII of 1923.

The legal profession in India, which includes both the practice of law as well as professional legal education, is regulated by the Advocates Act, 1961.The Bar Council of India (BCI) is envisaged under the Advocates Act as a body for regulating the minimum standards to be maintained by institutions imparting legal education in India. The reformation of legal education in India undertaken since the late 1980s at the initiative of the BCI, the University Grants Commission (UGC), the Law Commission of India and various state governments has led to the establishment of various national law schools in India in the last two decades. This movement which was pioneered by Professor N. R. Madhava Menon (who was instrumental in the setting up of the first National Law School in Bangalore) and other leading academicians in India has resulted in the establishment of around 17 national law schools and a few other new generation law schools in the public as well as the private sector.

India has the second largest population of lawyers in the world, second only to the United States. The number of persons admitted to practice law in India has increased from about 70,000 at time of Independence in 1947 to some 1.25 million in 2014.

B. History of the Legal Profession in India

The timeline given below provides an overview of the history of the legal profession in India leading upto the enactment of the Advocates Act in 1961:

- **1726 and later, 1753:** Mayor's Courts- There was no established legal profession until the establishment of the Mayor's Court. Those who practised law were devoid of legal training and some of the functionaries under the Mayor's courts were dismissed servants of the British East India Company.
- **1774:** Supreme Court of Judicature established by a Royal Charter at Calcutta-

Similar courts were established in Madras (1801) and Bombay (1823). The Regulating Act of 1773 empowered the Supreme Court to "approve, admit and enrol" Advocates and Attorneys-at-Law. "Attorneys of Record" were authorized to "appear, plead and act for the suitors". Attorneys were not admitted without a recommendation from high officials in England or a Judge in India. The term "Advocate" at that time was extended only to the English and Irish Barristers and members of the Faculty of Advocates in Scotland. "Attorneys" similarly referred to British attorneys and solicitors only. The Calcutta Supreme Court therefore appeared to be the exclusive bastion of British Barristers, Advocates and Attorneys. The Charter introduced in India the British system of legal practice and profession. Indians had no right to appear before the Supreme Courts (this trend continued in Bombay and Madras as well although both these courts were established much later).

- **1793:** The Bengal Regulation VII of 1793 created for the first time, a regular legal profession in the Company's Courts. The Regulation was one "for the appointment of vakils or native pleaders in the Courts of Civil Judicature (Sadar Diwani Adalat) in Bengal, Bihar and Orissa. Only Muslims and Hindus could be enrolled as pleaders. The Regulation also provided for a Vakalatnama (a party would execute a Vakalatnama in favour of a pleader, authorizing him to represent the party, and act on his behalf in a matter). This was the genesis of the "Vakalatnama" as we know today. The Bengal Regulation XXVII of 1814 consolidated the law on the subject. The pleaders were empowered to act as arbitrators and to give legal opinions on payment of fees. Thereafter, in 1833, The Bengal Regulation XII modified the provisions of earlier regulations regarding selection, appointment and remuneration of these pleaders. It permitted any qualified persons of any nationality and religion to be enrolled as a pleader in the Sadar Diwani Adalat.

- **1846:** The Legal Practitioners Act of 1846, was the first pan-India law concerning the regulation of the Indian legal profession. A religious test for enrolment as a pleader was abolished, and persons of any nationality and religion could be enrolled as a pleader. Every Barrister enrolled in any of Her Majesty's Courts in India became eligible to plead in the Sadar Adalats subject to the rules of those Courts applicable to pleaders as regards language or any other matter. The Legal Practitioners Act also permitted Vakils to enter into agreements with their clients for their fees for professional services.

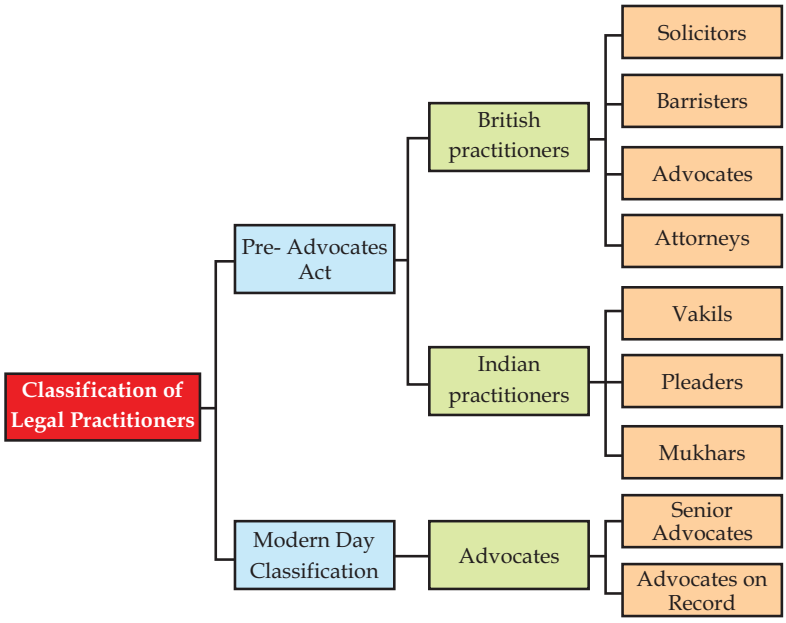
- **1879:** The Legal Practitioners Act of 1879 repealed the Pleaders, Mukhtars and Revenue Agents Act, 1865. During this time in British India, there were six grades of practitioners- Advocates, Solicitors (Attorneys) and Vakils of the High Court and Pleaders, Mukhtars and Revenue agents in the lower courts. Vakils became a distinct grade above the Pleader. The Act brought all six grades of legal practitioners into one system. .

- **1923:** Barristers of England had come to occupy a predominant position in the legal profession. The Government of India in 1923 appointed the Indian Bar Committee, popularly known as the Chamier Committee to address the existing disparities in the Legal profession. It was chaired by Sir Edward Chamier, a retired Chief Justice of the Patna High Court). The Committee in its report stated that it was not practical at that time to organize the Bar on an all-India basis. However, the Committee suggested the establishment of Bar Council for each of the High Courts. The Committee suggested that a Bar Council should have power to make rules in matters such as qualifications and admission of persons to be Advocates of the concerned High Court, legal education, discipline and professional conduct of Advocates, terms on which Advocates of another High Court could appear occasionally in the concerned High Court or any other matter prescribed by the High Court.

- **1926:** Giving effect to the Chamier Committee recommendations, the Central Legislature enacted the Indian Bar Councils Act, 1926. The Act was to provide for the constitution and incorporation of Bar Councils, to confer powers and impose duties on the Bar Councils and to consolidate the regulations pertaining to the legal profession. The Bar Councils could, with the consent of the High Court, make rules for: a) the rights and duties of Advocates of High Court and professional conduct; and b) legal education and examinations. The Act eliminated the two grades of practitioners, the Vakils and the Pleaders by merging them in the class of Advocates who were "entitled as of right to practice" in the High Court in which they were enrolled and in any other Court in British India, subject to certain exceptions. The High Courts occupied considerable influence in these matters and the Legal Practitioners Act, 1879 remained intact. Pleaders, Mukhtars etc. who were practicing in mofussil courts remained out of the scope of the Act.

Classification of Lawyers: Roles and Functions

Legal practitioners in India were segregated into different categories under the British India. The following chart illustrates the different classes:



- **Attorneys:** Attorneys previously only referred to British attorneys or solicitors but now this definition is sometimes used to refer to advocates.
- **Solicitors:** Prior to the enactment of the Advocates Act, solicitors referred to British solicitors who were permitted to practise in the High Courts in pre-Independence India. Today, in the Bombay and Calcutta High Courts there is a separate class of legal practitioners, known as solicitors, who prepare the case, but do not argue in court.
- **Barristers:** Barristers of England had come to occupy a predominant position in the legal profession in the British India . On the Original Side of the Calcutta High Court, only Barristers could practice even though the distinction between Barristers and Vakils had been removed by other High Courts.
- **Pleaders:** Law graduates who did not possess the additional qualification for enrolment as vakil of the High Court and non- law graduates who could pass the pleadership examination held by the High Court were given certificates enabling them to act and plead as pleaders in the district and subordinate Courts. The pleaders had entry into the High Court only after gaining an experience of a

certain number of years as pleaders. There were different grades of pleaders as well. This class of practitioners also does not exist today in Indian courts.

- **Vakil:** Vakils were native practitioners who were qualified to appear and practise in the High Courts of pre- Independence India. The Legal Practitioners Act had laid down additional requirements for a law graduate to be eligible to qualify as a vakil. This class of practitioners does not exist now.

- **Mukhtars:** Mukhtars were another class of practitioners in the subordinate courts. They were persons who had after passing the Entrance Examination corresponding to the Matriculation Examination of the later times passed the Mukhtarship Examination held by the High Court. Although their sanads or licences permitted them to practise in all subordinate courts, they were by reason of the High Court Rules and Orders, mainly confined to acting and pleading in the criminal courts in the mofussil. These mukhtars were not permitted to plead in any subordinate civil court.

- **Revenue Agents:** Revenue Agents were certificated and enrolled under rules made by the Chief Controlling Revenue Authority under section 17 of the Legal Practitioners Act, 1879. Their practise was confined to revenue offices mentioned in their certificates and other offices subordinate to them.

- **Advocates:** Prior to the enactment of the Advocates Act, the term "advocates" referred only to English and Irish barristers and members of the Faculty of Advocates in Scotland. This class was permitted to practise in the Supreme Court of Judicature in Bengal, to the exclusion of native practitioners. However, today this term is used to refer to lawyers qualified to practise in the Courts of India. An advocate is a person authorized to appear in a legal matter on behalf of a party. An advocate possesses a law degree and is enrolled with a Bar Council, as prescribed by the Advocates Act, 1961. Advocates are the only class of persons legally entitled to practise law or to provide legal advice. After being authorized to appear in a case by a client who has signed a vakalat, advocates prepare cases and argue them in Court. When appearing in a courtroom, an advocate usually dresses in black and white, and wears a band and gown.

  Advocates will have to enrol with a state Bar Council. In addition to advocates, lawyers with special knowledge or ability are designated as Senior Advocates. A Senior Advocate, is an advocate who has been officially designated as such by

either the Supreme Court or the High Court. A Senior Advocate cannot file a vakalathnama, appear in the Court without another advocate or advocate-on-record, cannot directly accept an engagement to appear in a case or draft pleadings. A Senior Advocate argues cases in court upon instructions from another advocate. Senior Advocates wear gowns that have flaps on the shoulders. An Advocate on Record (AOR) is an advocate who has passed a qualifying examination conducted by the Supreme Court. The examination is taken by an advocate who has been enrolled with a Bar Council for at least five years and has completed one year training with an AOR of not less than five years standing. Only an AOR can file a vakalath, a petition, an affidavit or any other application on behalf of a party in the Supreme Court. All the procedural aspects of a case are dealt with by the AOR, with the assistance of a registered clerk. It is the AOR's name that appears on the cause list. The AOR is held accountable, by the Supreme Court, for the conduct of the case. Any notice and correspondence from the Supreme Court are sent to the AOR, and not to the party. AORs can argue matters, but frequently they serve in a solicitor like role.

Legal officers who act as advisors to the Central Government include the Attorney General of India, the Solicitor General of India and the Additional Solicitor General of India. The state government similarly has Advocate Generals. The office of the Attorney General for the Union of India and the Advocate General for the concerned States are Constitutional offices. The Constitution of India has also laid down the qualifications necessary for being considered for the position of the Attorney General and the Advocate General.

The Advocates Act, 1961

After the enactment of the Advocates Act ,1961 all the old categories of practitioners (vakils, barristers, pleaders of several grades, and mukhtars) were abolished and consolidated into a single category called "advocates" who enjoy the right to practice in courts throughout India. The Advocates Act also established an All India Bar Council for the first time, with the Attorney-General and Solicitor General of India as ex- officio members of the Bar Council. The All India Bar Council has one member elected to it by each State Bar Council and it elects its own Chairman and Vice Chairman. The Act has created a State Bar Council in each State with the Advocate General of the State as an ex- officio member, and 15-25

Advocates elected for a period of five years. The State Council's main functions include: admitting law graduates on its Roll, determining cases of misconduct against Advocates on the Roll and organizing legal aid, among other functions. Application for enrolment is therefore made to the State Bar Council. The Bar Council of India regulates the content, syllabus, duration of the law degree, subject to which every University can lay down its own provisions. The Council has a Legal Education Committee for this purpose. State Council rules need to be approved by the Bar Council, however the Central Government has overriding power to make rules.

In order to be eligible for enrolment, an Advocate must be: a citizen of India, atleast 21 years of age and must have an LLB degree from an Indian University. A foreign national may be enrolled on a reciprocal basis with the country of his citizenship, and his foreign degree may be recognized by the Council for the purpose. In the absence of such reciprocity, foreign nationals cannot practice law in India. The Council has released a list of foreign degrees that it recognizes. There is an additional requirement of an All India Bar Examination since 2010, which Advocates must clear in order to be able to start practice.

The Act recognizes only one class of practitioners, that is, Advocates. An Advocate on the State Rolls is entitled to practice as of right before any tribunal, or authority of India, or any court including the Supreme Court. Advocates have been classified as Senior Advocates and other Advocates. The designation of an Advocate as a Senior Advocate is the responsibility of the Supreme Court or High Court based on the ability, experience and standing in the Bar of the Advocate in question. In 1977, the provisions relating to dual system (Advocates and Attorneys) in the Bombay and Calcutta High Courts were deleted. Any advocate enrolled in the State Rolls is entitled to practice in the Supreme Court. The Advocate- on- Record (AOR) is another category of Advocate in the Supreme Court.

The Bar Council of India

The Bar Council of India was established by Parliament under the Advocates Act, 1961. It performs the regulatory function by prescribing standards of professional conduct and etiquette and by exercising disciplinary jurisdiction over the bar. It also sets standards for legal education and grants recognition to Universities whose degree in law will serve as qualification for enrolment as an advocate.

In addition, it performs certain representative functions by protecting the rights, privileges and interests of advocates and through the creation of funds for providing financial assistance to organise welfare. The regulatory and representative mandate of the Bar Council for the legal profession and legal education in India is reflected by its statutory functions which are as follows -

- To lay down standards of professional conduct and etiquette for advocates.
- To lay down procedure to be followed by its disciplinary committee and the disciplinary committees of each State Bar Council.
- To safeguard the rights, privileges and interests of advocates.
- To promote and support law reform.
- To deal with and dispose of any matter which may be referred to it by a State Bar Council.
- To promote legal education and to lay down standards of legal education. This is done in consultation with the Universities in India imparting legal education and the State Bar Councils.
- To recognise Universities whose degree in law shall be a qualification for enrolment as an advocate. The Bar Council of India visits and inspects Universities, or directs the State Bar Councils to visit and inspect Universities for this purpose.
- To conduct seminars and talks on legal topics by eminent jurists and publish journals and papers of legal interest.
- To organise legal aid to the poor.
- To recognise on a reciprocal basis, the foreign qualifications in law obtained outside India for the purpose of admission as an advocate in India.
- To manage and invest the funds of the Bar Council.
- To provide for the election of its members who shall run the Bar Councils.

Lawyers and Professional Ethics

The Bar Council of India Rules encompass professional standards for lawyers, as laid down by the Bar Council. The key duties and responsibilities of an Advocate can be summarised as follows:

Professional Duties of an Advocate

An Advocate has a duty to act in a dignified manner, to respect the court, not to

communicate with a judge in private and impair impartiality, not to act in an illegal manner towards the opposition, to refuse to represent clients who insist on adopting unfair means. In addition, being an office of the Court, an Advocate is expected to uphold and maintain the values of the profession.

Furthermore, an Advocate's duty towards the client include being bound to accept briefs, not to withdraw from service, not to appear in matters where he/she is a witness, not to suppress material or evidence. An Advocate also had to maintain client confidentiality and not to instigate litigation or to charge contingency fee (fee depending on success or favourable result of matters). There is a general duty to ensure that his/her duties do not conflict with the client's interests. An Advocate is also expected not to negotiate directly with the opposing party (only through the opposing advocate) and to carry out legitimate promises made. Breach of these rules and standards of conduct lead to disciplinary action against advocates which may result in suspension or debarment. *(Source: Bar Council of India)*

Advertising by Lawyers

The right of advocates to advertise their services or solicit clients has been a controversial issue in the field of legal ethics and professionalism. In India advertising by lawyers has been strictly restricted by the Bar Council of India. An advocate is prohibited from promoting himself through circulars, advertisements, touts, personal communications, interviews other than through personal relations, furnishing or inspiring newspaper comments or producing his photographs to be published in connection with cases in which he has been engaged or concerned. An amendment to this rule allows advocates to furnish certain information on their websites after intimating and taking approval from the Bar Council of India. However, only 5 pieces of information can be put up on the internet, i.e., (i) the name of the advocate or the firm, (ii) the contact details, (iii) details of enrolment with the Bar, (iv) his professional and academic qualification and (v) the areas of practice. However, different countries across the world allow advertising by lawyers to varying degrees. The position in the USA is different from that in India, where lawyers have a right to advertise but subject to reasonable restrictions. There are different rules of professional ethics for different states and there is also the Model Rules of Professional Conduct which serves as an indicative reference point. Rule 7.1 of the Model Rules prohibits false and misleading communication about services, rule 7.2 addresses advertising and referrals, rule 7.3 articulates no- solicitation periods (e.g. families and victims of mass disasters are off

limits for 30-45 days). Lawyers in the US can provide information about class actions, can approach clients by handing out business cards and can advertise on internet forums. For class actions, solicitation through referrals is permissible, newspaper and magazine ads and even mass emails are permitted as long as they are not misleading, and no financial incentive is promised. Personal injury ads are commonplace in the USA. Often known as 'ambulance chasers', these personal injury lawyers are robust in their advertising- on billboards, newspapers, flyers, and even distasteful ads on the television. However, ambulance chasing is not representative of professional practice in India since these class of lawyers are the sort who solicit business by lurking around hospitals or by ads in newspapers and in Yellow Pages with toll free numbers and "free" consultations. However, it is a matter of debate whether the Victorian tradition (UK has itself done away with the prohibition) should be retained within which law was considered to be a noble profession and hence advertising was prohibited so as to not tarnish the image of lawyers. The issue of allowing advertising and solicitation by lawyers requires balancing the interest of the public which includes getting information on legal rights and services through advertisements and enhancement of access to justice and the legal profession on one hand and the possible misuse of advertising techniques by lawyers which may lead to a loss of credibility of the profession as a whole. Countries like USA, UK and France are more flexible with granting permission for legal ads whereas Hong Kong, Singapore and Malaysia are moving towards progressive relaxation. In Malaysia, for example, the Legal Profession (Publicity Rules), 2001, is a simple, comprehensive code that regulates ads in legal and non- legal directories, controls publication of journals, magazines, brochures and newsletters and interviews in the media, bars publicity through clients and even regulates greeting cards. In Hong Kong, lawyers are forbidden to advertise on television, radio and in the cinemas but are permitted to advertise in print media.

Opportunities for Law graduates

Law is an exciting and challenging profession. Law graduates in India have various options and opportunities open to them after their graduation. A law degree, in addition to being a professional degree, is now considered to be training in a discipline which trains the mind to think analytically and communicate systematically. Following are some of the opportunities available (and opted for by law graduates) to graduates after they obtain their degrees in law:

Legal Education in India

Legal education in India is regulated by the Bar Council of India. There are two ways to obtain a degree to practice law and enrol with the Bar Council: (1) a 3-year LL.B. program which requires a prior undergraduate degree and (2) a 5-year integrated B.A., LL.B./BBA.,LL.B./B.Sc., LL.B program which commences immediately after secondary school. Some universities offer both the five-year and the three-year degree programs. There are over 900 law colleges in India. However, not many match up to the standards required by a changing and increasingly competitive legal market. In 1987, the first National Law School- National Law School of India University (NLSIU) was set up in Bangalore. Its establishment marked the beginning of the reform of legal education in India. There are now 17 National Law Schools in India, with more being planned. 14 of these now have a common entrance test- CLAT (Common Law Admission Test) which tests logical reasoning, legal reasoning, English and comprehension, legal knowledge and general knowledge. Preparatory institutes for law entrances have also been set up such as the Law School Tutorials (LST). National Law School University, Delhi conducts a separate entrance test called the AILET- All India Law Entrance Test, while a number of others law schools in India have adopted the Law School Admission Test (LSAT) conducted by the Law School Admission Council (LSAC), USA. Some other institutions conduct their own separate entrance tests.

- **Litigation:** Graduates may practice as an advocate in a court of law. This can be achieved by working under experienced advocates or being attached to litigation departments of law firms or companies in order to practice in the Courts of India.
- **Law Firm Practice:** Law firms vary in size and practice areas. Law firms may range from boutique law firms specializing in specific areas of law (such as Intellectual Property Rights and Tax law), to mid- sized law firms as well as large law firms which are full service law firms with different practice groups such as general corporate, mergers and acquisitions, employment law, taxation, international trade, insurance, intellectual property, and project finance and infrastructure. Transactional law at law firms typically involves practicing in commercial and economic laws and advising on issues pertaining to a commercial transaction between two or parties. This would usually include advising on the laws applicable to the transaction, drafting contracts and other documents and helping clients with the commercial negotiations and the management and execution (i.e. successful completion) of the transaction. Corporate lawyers

would also advise on regulatory issues and legal compliance. Centres for Legal Process Outsourcing (LPOs) also have a lot of transnational transactional work.

- **Corporate Sector:** Large corporations often have an in-house legal practice. An in-house counsel will give legal advice to the company, have expertise in the business of the company and be responsible for ensuring that the business of the company is being run in compliance with applicable laws and when required will bring in external lawyers. Several organisations such as commercial banks, multi-national companies, investment firms, insurance companies, e-commerce ventures, media houses are hiring law graduates for managing their legal departments.
- **Public Policy:** Lawyers have an important role in formulating and advising on public policy. Several organizations employ law graduates for policy making and have institutionalized fellowships where law graduates can be Research Assistants. For example, a law graduate interested in public policy can apply to serve as a Legislative Assistant under the Legislative Assistants to Members of Parliament (LAMP) Fellowship programme run by PRS Legislative Research. Institutions such as Competition Commission of India and Securities Exchange Board of India also employ law graduates for policy making in the respective fields. Law firms have established Government Policy Departments where they employ law graduates for policy research.
- **Legal Research and Academia:** Graduates may attach themselves with Research Centres and think tanks. Law graduates may take up teaching and research as a profession. At least a post graduate degree in Law or related disciplines is expected to build a career in academics. Universities employ postgraduates in law as lecturers/Assistant Professors at the beginning of their careers. Short term positions and opportunities as Visiting Professors/Adjunct professors are also available in academia.
- **Non-Governmental Organizations:** Not-for-profit organizations, especially organizations with a social justice orientation have positions for law graduates. These range from small grass-root level organizations to large well-funded organizations. They may be general in nature providing free legal aid, legal education and legal awareness to more specialist organizations involved in areas such as women and child right, environmental law, employment laws, consumer rights and public health.

- **Government Institutions:** Government departments, statutory authorities, public sector undertaking and regulatory bodies also provide interesting opportunities to lawyers. Graduates may opt for jobs in the government sector in institutions such as National Human Rights Commission, Law Commission of India, and National Commission for Women etc.
- **Further study:** Law is an interdisciplinary subject and graduates may opt for further studies in related disciplines such as Business, Economics, Anthropology and Sociology. Traditionally, law graduates pursue Master of Laws (LL.M) degree followed by research degrees such as M.Phil or Ph.D. A variety of opportunities are available in India and abroad for advanced studies in law.
- **Judicial Services/clerkships:** The court system provides several avenues to law graduates. The higher judiciary, that is judges of the High Courts and Supreme Courts have law clerks cum research assistants who assists a judge in researching for cases, maintaining paperwork etc. Judicial clerks often sit in court hearings with the judges. Graduates may write the All India Judicial Services Examination to avail of positions in the Indian Judiciary. Qualifying candidates start in subordinate courts and may then progress to hold offices in the High Courts and even the Supreme Court of India.
- **Other avenues:** Law graduates may opt for different career paths such as politics, journalism (legal journalism at places such as Bar and Bench and Legally India as well as in media houses), legal publishing, Fellowships (such as the Teach for India Fellowship), civil services etc.

Liberalization of the Legal Profession

There is an ongoing debate about the issue of liberalization of legal service sector in a growing economy. Given that India had signed the WTO Treaty in the 1990s leading to economic liberalization, it is also expected to liberalize the legal services sector under the GATS (General Agreement on Trade and Services) and services negotiations under various free trade agreements/ economic partnership agreements. The Bar Council of India has consistently passed several resolutions between 2002 and 2007 opposing the opening up of the Indian legal profession to foreign lawyers or foreign law firms. In 2011, in a judgment delivered by the Bombay High Court on a public interest litigation (PIL) was filed by Lawyer's Collective, a non-profit organization, the High Court held that foreign law firms could not be permitted to set up liaison offices in India. Contrary to this position, the Madras High Court, in response to a PIL filed by

A.K. Balaji, permitted foreign lawyers to practice in India on a "fly in and fly out" basis. The Law Commission of India, in a working paper in 1999, raised pertinent issues and concerns while recommending amendments to the Advocates Act to prepare a level-playing field for Indian lawyers. There is no resolution in sight regarding this issue. *(Source: Ministry of Commerce)*

C. Legal Profession in other Jurisdictions

Globalisation of Legal Profession

As globalization increases the flow of people and information across borders, there are increasing opportunities for trained lawyers. Typically, the opportunities are available in Common Law based jurisdictions such as the United States and the United Kingdom and to an extent Australia and Canada. However, unlike many other professions, lawyers trained and licensed in one jurisdiction may not be licensed to practice in other jurisdictions. Lawyers trained in other jurisdictions will have to requalify in order to practice in the foreign jurisdictions. Given the globalisation of legal profession, a number of lawyers have dual qualifications.

- **Legal Education in the United States**

  In the United States, students after completing a four- year undergraduate degree in any discipline, write the Law School Admission Test (LSAT) exam. Thereafter, they can apply to a law school and enrol in a three- year J.D. (Juris Doctor) programme. The pedagogical method adopted in law schools involves the case study method as well as the Socratic Method.

- **Licensing Requirements**

  Each state in the United States separately administers a mandatory Bar Exam. Typical first- time passage rates are: 72% (New York, 2009), 50% (CA, 2010), and 88% (MA 2008). Bar applicants must also satisfy the character and fitness requirements of the state. Most states also have mandatory or minimum continuing legal education (CLE) requirements. CLE is professional education of lawyers that takes places after they are admitted to the Bar and entails minimum hourly commitments which lawyers must undertake in order to maintain their license.

  Nearly all states require candidates to pass the Multistate Bar Examination (MBE) and the Multistate Professional Responsibility Examination (MPRE). Some states also require the passing of the Multistate Essay Examination (MEE) and/or the Multistate Performance Test (MPT).

- **Foreign Lawyers and Practicing in the US**

  As mentioned before, law graduates need to meet all requirements, including writing the Bar Examination of a particular State to be eligible to practice in that State. Foreign lawyers may appear for Bar Examinations in the US; however, laws from state- to state vary in this matter. Students who have completed an LLM may qualify to sit the bar exam in California, New Hampshire, New York, Virginia, North Carolina. The criteria for eligibility to take the bar examination or to otherwise qualify for bar admission are set by each state's bar association. Interestingly, some states may allow some foreign-educated lawyers to take the bar examination without earning their degree locally. In such a case, however, foreign-educated lawyers must begin the process by getting their law degree reviewed and analysed by the American Bar Association (ABA). Once reviewed, the application is either accepted or deferred. If accepted, foreign lawyers are allowed to sit for that state's bar exam in much the same way a domestic applicant would. In New York, one of the jurisdictions most open to foreign lawyers, this would allow foreign lawyers to sit for the bar without being required to complete any further law school study in the US. Even if deferred, applicants may be asked to complete course work at an ABA-approved college before sitting for the bar exam. This course work usually takes the form of a one-year LL.M program at an ABA accredited school.

  New York and California are the most popular states for foreign lawyers to give the Bar Examination owing to the presence of large number of international law firms involving transnational work, for which an international lawyer's expertise is useful. These are also two of the most difficult bar Examinations to clear. Foreign Lawyers may also take up work as a Foreign Legal Consultant (FLC). As an FLC, it is possible to advise on home country law and international law but not to appear in court. FLCs are recognised in Alabama, Arizona, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Michigan, Minnesota, Missouri, New Jersey, New York, Ohio, Oregon, Texas and Washington. California does not allow FLCs.

- **The American Bar Association (ABA)**

  At a federal level, the American Bar Association acts as a voluntary professional body for US lawyers. With over 400,000 members it is the largest voluntary professional body in the world and has a significant international profile.

Members of the legal profession in other countries can become international associates of the ABA. Founded in 1878, the ABA supports the legal profession with practical resources for legal professionals while improving the administration of justice, accrediting law schools, establishing model ethical codes, and more. Membership is open to lawyers, law students, and others interested in the law and the legal profession. Its goals include, serving the members, improving the profession, eliminating bias and enhancing diversity and advancing the rule of law. One of its most important responsibilities is the creation and maintenance of a code of ethical standards for lawyers. The Model Code of Professional Responsibility, 1969 and the newer Model Rules of Professional Conduct, 1983 have been adopted in 49 states, D.C. and in the Virgin Islands. The only exception is state of California. The ABA has been accrediting schools since 1923 and even publishes the internationally reputed ABA Journal.

- **Regulation of Legal Profession by State Bar Associations**

Lawyers are regulated at state, not federal, level by the state bar or the highest court. Bar associations in the US are divided into two categories: unified and non-unified:

- In states with a unified bar, the responsibilities of regulating lawyers (admission, discipline and so on) with activities to support their members as a professional body. Membership is mandatory in order to practice in such states. There are 32 states with unified bars, including California, Texas and Florida.
- In states with a non-unified bar, responsibility for admitting and regulating lawyers lies with the state Supreme Court or board of bar examiners. In such states, the state bar is a voluntary professional body with activities that can include professional development, lobbying, networking and charitable programmes. States with non-unified bars include New York, Washington D.C. and Illinois.

Legal Profession in the UK

- **Legal Education**

Legal education in the UK consists of a three-year LL.B., directly after secondary school. Graduates from fields other than law and non-graduates can become solicitors, but the LL.B. is the most straightforward path. Clinical education

continues after the LL.B., through the Legal Practice Course (LPC) and training contracts.

To become a Barrister, graduates are required to complete the Bar Vocational Course (BVC) instead of the LPC and then seek a "pupillage" instead of a training contract. Though there are a number of differences between barristers and solicitors, the most significant one is that barristers can appear in all courts while solicitors can only appear in higher courts if they qualify to become solicitor-advocates.

Legal education in Scotland is slightly different than the rest of the UK, and LL.B. degrees awarded in other parts of the UK are not recognized as part of the qualification process in Scotland (and vice versa).

As stated, the most conventional route to becoming a lawyer is by reading law as an undergraduate. To qualify as a barrister or solicitor students are required to obtain a 'qualifying law degree'. For an LLB to meet the requirements of a 'qualifying law degree' the course must cover legal research skills and the seven foundation subjects:

- Obligations I (Contract Law)
- Obligations II (Tort Law)
- Foundations of Criminal Law
- Foundations of Equity & the Law of Trusts
- Foundations of the Law of the European Union
- Foundations of Property Law
- Foundations of Public Law

The requirement for completion of the academic stage is a lower second class UK Honours degree. Students who have not taken an undergraduate degree in law can still become lawyers. For students with undergraduate degrees in subjects besides law, it is possible to enrol in the Graduate Diploma in Law course (GDL), which is commonly known as Common Professional Examination (CPE) or a conversion course. This is a one year full-time or two years part-time course, which covers the seven foundation subjects, and results in an LLB on passing. Law firms do not look unfavourably on students with non-Law undergraduate degrees when recruiting trainees.

- **Solicitors**

To become a solicitor, it is necessary to take the Legal Practice Course (LPC), which is a one year full-time or two years part-time course. In some cases, students may be fortunate enough to have a training contract offer from a law firm at this stage. The LPC is a vocational course tailored to prepare students for a career in a law firm. Customarily, students will have completed at least one vacation scheme at a solicitors' firm, during their academic or vocational training, prior to applying for a training contract. Following the LPC, students must obtain a training contract; this is two years spent in an authorised training establishment, usually a solicitors' firm, under the supervision of a training principal. Solicitors are organized through the Law Society of England and Wales. From negotiating with and lobbying the profession's regulators, government and others, to offering training and advice, the Society helps, protects and promotes solicitors across England and Wales.

- **Barristers**

With far fewer spaces for potential barristers, this route is more competitive than that of a solicitor. Chambers often require first class degrees from students. All barristers must be a member of one of the four Inns of Court (Lincolns Inn, Gray's Inn, Middle Temple and Inner Temple) as one can only become a barrister if one has been 'called to the bar' by an Inn of Court. Before students can be 'called to the bar' by their Inn they are expected to complete 12 qualifying sessions at their Inn, which consist of collegiate and educational activities such as dinners, moots, lectures, and residential courses. The Inns can provide financial support through scholarships, as well as providing important help and advice to aspiring barristers. All students are expected to join an Inn before commencing their Bar Professional Training Course. Graduates must complete the Bar Professional Training Course (BPTC) - formerly the Bar Vocational Course (BVC) - which is a one year full-time or two years part-time course. Only 67% of applicants obtain a place at 'Bar School', while only 76% of enrolees were successful in passing the course in 2009. Customarily students will have completed a number of 'mini-pupillages' during their academic and vocational training, and possibly have carried out some marshalling (which involves shadowing a judge), prior to applying for pupillage. After successfully passing the BPTC, prospective barristers are expected obtain pupillage, which is one year spent in an authorised pupillage training organisation, usually a barristers' chambers, being trained by

their pupil master. Finally, one must obtain tenancy in a set of barristers' chambers, or go into employed practice with an organisation which employs barristers.

- **Foreign Lawyers and Practicing in the UK**

  For qualified lawyers coming from outside England and Wales, it is still possible to practice. The Solicitors Regulation Authority (SRA) does not impose any formal experience requirements in order to re-qualify as solicitors in England and Wales. Some law firms may express their own requirements which can differ from the SRA guidelines. Candidates can take the Qualified Lawyers Transfer Scheme in order to qualify under this jurisdiction. Lawyers coming from EU Member States can rely on EU Directive 77/249 in this area. European lawyers can practice to the same level as they could in their own country. However, it is not possible to be a barrister and solicitor simultaneously.

Legal Profession in other Countries

- **France**

  The French legal profession (advocates) includes over 51,800 lawyers as of 2010. Almost half of the profession practise in the Paris region. Notaries (civil law notaries) play an important role to play in the French legal system for conveyancing, probate and related family matters. Regulation of the profession lies with the 181 Barreaux (local bar associations). Registration is mandatory to be able to practice. The Paris Bar, with over 21,000 advocates, is by far the most influential bar association of all French bars. The 180 provincial bars have organised themselves into the representative Conférence des Bâtonniers to exert some influence on the evolution of the profession. The Conseil National des Barreaux, created in 1990, is the overarching national body for all French bars. Solicitors of England and Wales as well as European/EEA/Swiss lawyers may apply for registration as European lawyers. France implemented the Establishment Directive 98/5/EC. Establishment is permitted for EU, EEA and Swiss nationals who are qualified in these countries. It allows them to give advice in international law, the law of their home country as well as French law.

  Foreign lawyers can requalify in France, under conditions of reciprocity, by sitting the relevant equivalence examination administered by the Conseil National des Barreaux.

- **Germany**

  German legal education consists of a four-year undergraduate degree completed following completion of secondary school and passage of the university entrance exam. Students then take the First Examination, a comprehensive set of exams that emphasizes academic knowledge of the law. This is followed by a two-year practical training period (Referendarzeit). Students then must pass the Second Examination, a comprehensive set of exams that emphasizes practical legal skills. Upon passage, students are entitled to work in any legal profession German legal education has a strong practical emphasis. Students are qualified to work in any legal profession once they pass both the First Examination and the Second Examination. To practice as a private attorney (Rechtsanwalt), a student must apply to join a state branch of the Federal Chamber of Lawyers (Bundesrechtsanwaltskammer). However, there is no separate bar exam, and an applicant can only be rejected under a narrow set of circumstances (primarily ethical or criminal grounds). European attorneys may requalify either by continually practicing in Germany for three years, or by sitting the relevant equivalence exam.

- **Singapore**

  Singapore has a fused legal profession of 'advocates and solicitors'. Admission to the Singapore Bar is governed by the Legal Profession Act and determinations of admission are made by the Board of Legal Education. The Law Society of Singapore determines fitness of character for admission after applications have been filed. The Law Society is the representative body for lawyers in Singapore. Foreign lawyers practicing in Singapore are regulated by the Legal Profession (International Services) Secretariat of the Attorney-General's Chambers. Foreign lawyers may work as employees, partners or directors in one of the following practice vehicles:

  - As a Qualifying Foreign Law Practice
  - As a foreign law firm
  - A Joint Law Venture
  - A Formal Law Alliance
  - As a foreign lawyer in a Singapore law firm

Registration in each case is required with the Attorney General's Chambers. In some cases, a non-Singapore citizen can qualify as Singapore advocate and solicitor, as long as he or she meets the requirements under the Legal Profession Act.

- **People's Republic of China**

Students complete an integrated four-year bachelor of law (LL.B.) course directly after secondary school. Graduates holding bachelor's degrees in fields other than law may also sit for the PRC national judicial examination. The national core curriculum consists of 14 courses: legal theory, Chinese legal history, constitutional law, administrative law, criminal law, law of criminal procedure, civil procedure, civil law, commercial law, economic law, intellectual property, private international law, international law, and international economic law. Three additional degrees are offered, but the completion of an LL.B. is sufficient to become a practicing attorney. The Master of Law (L.L.M.) degree may be completed in two or three years, depending on the school. A three-year Juris Master (J.M.) course is also available for graduates who have obtained bachelor's degrees in other fields. Subject to the completion of an L.L.M or J.M., students may pursue a Juris Science Doctor degree (L.L.D.), which is completed in three to six years depending on the school. Since 2002, the PRC Ministry of Justice, in consultation with the Supreme People's Court and the Supreme People's Procuratorate, has administered a "uniform national judicial examination" on an annual basis. Anyone who wishes to become a judge, procurator, lawyer, or notary public must pass such examination. Average passage rate between 2002 and 2010 was 18.3%. Candidates must also be willing to uphold the constitution of the PRC, complete a one-year internship with a law firm, and be a person of good character and conduct. Generally, foreign nationals cannot be admitted to practice in the P.R.C. Mainland. However, foreign law firms can establish a representative office to provide legal advice concerning: the legislation in its admitted jurisdiction, and the application of international treaties and practices. They can also represent clients from their admitted jurisdiction in transnational cases, etc. According to the regulations, the chief representative, the representative and the resident foreign lawyers (a consecutive stay for at least 90 days) of the firm need to register with the All China Lawyers Association (ACLA).

- **Australia**

  Legal education in Australia first requires the completion of an integrated Bachelor of Laws (LL.B.) degree, often conferred along with a post-secondary degree. This degree requires a minimum of four years' coursework, although most students complete a five-year program including study of another discipline (such as business, engineering, or medicine). Some law schools have begun to offer a three-year J.D., available only to those with prior four-year university degrees. Some top schools, such as the University of Melbourne, have ceased offering the LL.B., and now offer only the J.D.Completion of the LL.B. is followed by a period of practical legal training (PLT) that may take the form of a practical training course at a law school, an apprenticeship with a legal practitioner (known as "articles of clerkship"), or a combination of the two. Licensing requirements are enacted by each state or territory, although the Law Council of Australia's model professional rules have been adopted by nearly every jurisdiction. There is general reciprocity throughout Australia (and often New Zealand). There is a two-step process for admission to practice. Graduates must first obtain admission as a lawyer in the state/territory, which requires both possession of a recognized law degree and good character, plus completion of a post-graduate PLT course. Lawyers then apply to the applicable state private legal organization for certificates of practice as either solicitors (requiring nothing further, beyond the application) or barristers (requiring a passing score on the state bar exam). Barristers, who are traditionally sole practitioners, serve as advocates for clients in court, and generally obtain work through references from solicitors. Solicitors may perform a wide variety of functions, from advising clients to negotiating, and may work in a range of settings, from large firms to government offices to solo practice. Although there is a nominal distinction between solicitors and barristers, today the professions are largely fused. Where the distinction persists in practice (e.g., New South Wales), solicitors who wish to appear in court must meet the same requirements as barristers. Initial admission is usually on a restricted basis, requiring supervision by a senior practitioner for up to 24 months English law degrees are generally recognized in Australia; however, each state may have its own additional requirements.

Women and the Legal Profession in India

Legal practice in India, as in most other countries, is a male dominated profession. I n 1916, the Calcutta High Court, and in 1922, the Patna High Court had held that

women otherwise qualified were not entitled to be enrolled as Vakil or Pleader. In the Patna High Court case, Ms. Hazra, the petitioner, secured a B.L. degree from Calcutta University. She was refused enrolment as a Pleader. She challenged this in the High Court of Patna. The Court rules that the sections of the Legal Practitioner's Act referred to males and not females. Since 1793, no woman had ever been admitted to the roll of pleaders. To remove doubts about the eligibility of women to be enrolled and to practise as legal practitioners, the Legal Practitioners (Women) Act, XXIII of 1923, was enacted to expressly provide that no woman would by reason only of her sex disqualified from being admitted or enrolled as a legal practitioner or from practising as such. The Allahabad High Court took the lead by enrolling Ms. Cornelia Sorabji as the first Indian lady Vakil of Allahabad High Court on 24 August, 1921 by a decision of the English Committee of the Court (as the Administrative Committee was then called), consisting of Chief Justice Sir Grim Wood Meers. Since then, although the number of women entering into the profession has increased gender bias still pervades the profession. A recent survey found that the percentage of successful women candidates for the Common Law Admission Test was 47%, however 36% of women lawyer in another survey stated that they had faced some sort of gender bias at work. There have been only 5 women Senior Advocates since 1962 of the 397 designated Senior Advocates. However, recent studies have indicated that gender-based disadvantages are gradually being eliminated, especially in the corporate law sector.

D. Exercise

I. Find Out

- Can you name any renowned senior advocates currently in practice? Do you know what leading cases they are associated with?
- Who is the current- Attorney General of India, Solicitor General of India and Additional Solicitor Generals of India?

II. Debate/Discuss

- Should lawyers in India be allowed to advertise? What is your general view in allowing professionals to advertise? What are the moral and ethical arguments involved in this debate?
- Should foreign law firms be allowed to establish offices and practice in India? How will that decision impact the legal profession in India?

III. Write short notes on the following

- Women and the Legal Profession
- Professional Ethics for lawyers
- Eligibility and qualification to practice as an Advocate in India
- Legal Education in India
- Difference between barrister and solicitor

IV. Fill in the blanks

- Ms. Hazra challenged the rules against enrolment of _____as _____ in the High Court of _____
- Eligible graduates are enrolled in the Rolls of _____
- Bar Council of India laws down standards for _____
- Advocates are not permitted to _____ in _____, television and other media
- Person must be atleast _____ years of age and a _____ of India to be able to practice as an advocate in India
- The _____ is the organization that represents and acts for solicitors in the UK.

V. Long Questions

- What changes did the Legal Practitioners Act and the Advocates Act bring about in India?
- What were the different classes of practitioners who were permitted to practice in Indian courts prior to the Advocates Act and after the Advocates Act?
- How is the Bar Council of India organized? What are its roles and functions? Trace the history of the Bar Council.
- Compare the rules regarding advertising by legal professionals in India and other countries.
- Compare the rules regarding entry of foreign lawyers in the United States and the UK.

Unit-6: Legal Services

In the state of nature, indeed, all men are born equal, but they cannot continue in this equality. Society makes them lose it, and they recover it only by the protection of the laws.

- Charles de Montesquieu

A. Introduction

According to the Encyclopedia Britannica, 'legal aid' is giving to persons of limited means, grants or for nominal fees, advice or counsel to represent them in court for civil and criminal matters. It aims to create a bridge between the poor and rich in the society in order to provide equality to seek justice in the court of law.

Rawls first principle of justice is that each person should have an equal right to the system of equal basic liberties. Legal Aid is to ensure that no one is debarred from legal advice and help because of lack of funds. Thus, the provision of legal aid to the poor is based on humanitarian consideration and the main aim of these provisions is to help those who are socially and economically backward.

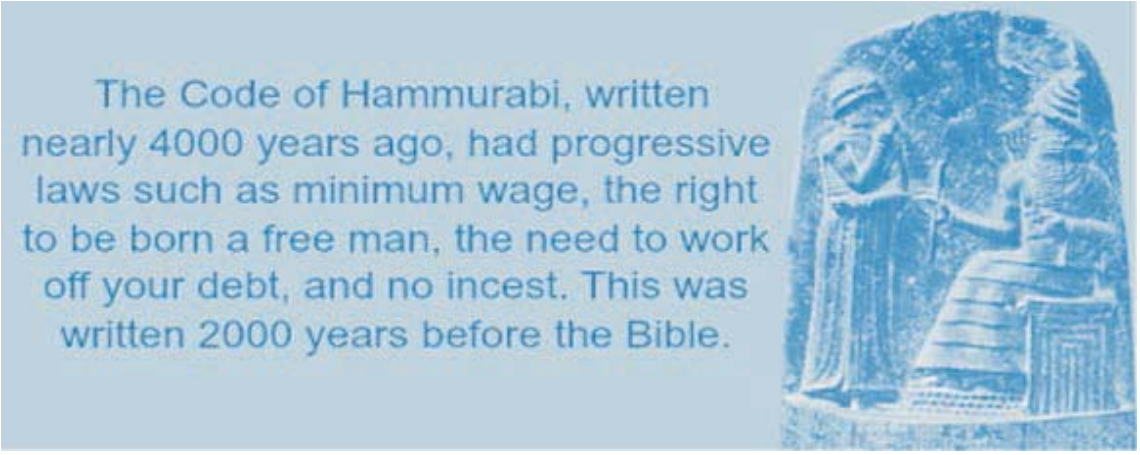
Reinald Heber Smith in his 1919 book, *Justice and the Poor*, promoted for the first time, the concept of free legal assistance for the poor. Smith challenged the legal profession to consider it an obligation to make sure that justice was accessible to all, without regard to the ability to pay. "Without equal access to the law", he wrote, "the system not only robs the poor of their only protection, but it places in the hands of their oppressors the most powerful and ruthless weapon even invented".

B. Brief History of Legal Services

The growth of legal aid movement is seen as one of the late conscious attempts in social adjustment that followed the slow and often unconscious process of social engineering. The real problem of social engineering was stated clearly when *Hammurabi*, the King of Babylon, announced his purpose in promulgating the code which he set up in the early years of the 20th century B.C. That purpose was "to establish justice in the earth… to hold back the strong from oppressing the weak".

Such social adjustment is also referred to as social engineering. Social engineering may be defined as the science and art of making appropriate adjustments to human relationships as well as to promote the welfare of the community as a whole. In the savage struggle for existence, it is natural for the strong to take advantage of their

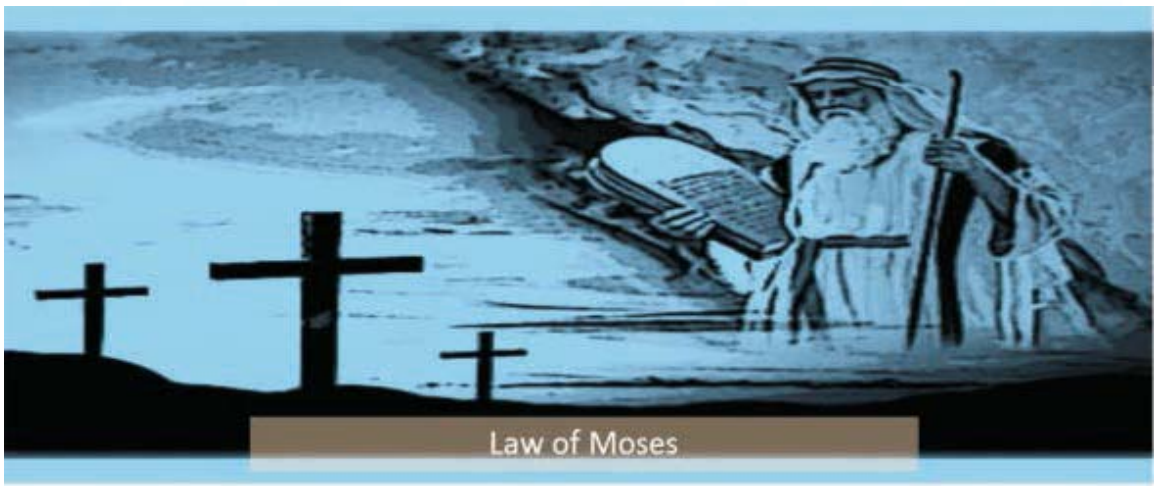
strength. Of these adjustments, the most necessary as well as the most difficult is clearly indicated by the words of the wise autocrat of Babylonia: "It is to prevent the strong from oppressing and exploiting the weak".



There were three processes whereby the developing civilization progressively moved towards social engineering through free legal aid. The first was to grant aid to vulnerable communities; the second was to put restrictions upon the exercise of privileges accorded by law to those well-off; and the third was to strip those fortunate of their privileges and place the strong and weak on an equal footing before the law. But these three steps did not ultimately bring the society towards realizing its goal. There is one kind of weakness that is not adequately protected by restraints or by taking away the privileges from the fortunate. As law is not self-executing, the power of the society which gives sanction to law must be brought to bear upon the law-breaker before a wrong done is made right.

The process of setting the machinery of the law in motion involves effort as well as expense. Those economically weak cannot bear this expense and hence we are to ask ourselves: what does it profit a poor and ignorant man that he is equal to his strong antagonist before the law? Or are the courts open to him on the same terms as to all other persons when he has not the wherewithal to pay the fee?

From the earliest times, there is evidence that law-makers had sensed the disability of the poor. They had addressed that the disability must be taken into account in any sound scheme of social engineering. Thus the *Code of Hammurabi* attempts to limit the charges made for the services to poor men providing an instance wherein a surgeon can exact subjectively from the poor and the rich.



Mosaic law (Law of Moses) gave to the poor man many privileges intending to aid him to escape from the bonds of debt and servitude. If the creditor took his poor debtor's cloak in pledge, he must return it by nightfall, for instance otherwise he would have no covering for the night. So prompt payment of wages to the poor was enjoined for he was poor.

According to *Herodotus*, justice in Egypt was administered without cost in order to give the greatest relief possible to those who were wronged. It is evident that court costs constitute the most obvious obstacle to the poor man seeking justice. Despite *Herodotus*' statement with respect to Egypt, it is probable that costs in some form have always been required of litigants. It may be that in early times when the *Hebrew* courts sat by the city gate, there was free and easy access to all suitors, but the fierce charges of the sale of justice made by the prophets suggests the toll of heavy costs.

Under the peculiar procedure before the praetor at Rome, costs took the form of *vodimonium*, security for appearance by the defendant, and the *sacramentum* which was in the form of a wager laid by each party, but in substance security to abide by the judgment of the court. No evidence is found of any special procedure by which a person too poor to bear these charges could secure the adjudication of his claims.

In the early years from 1876-1965, Civil legal assistance for poor people in the United States began in New York City in 1876 with the founding of the Legal Aid Society of New York. The legal aid movement caught on in urban areas. By 1965 virtually every major city had some kind of programme. One hundred and fifty-seven organizations had employed over 400 full time lawyers with an aggregate budget of nearly $4.5 million. There was no national programme as such.

Since 1952, the Government of India also started addressing the question of legal aid for the poor in various conferences of Law Ministers and Law Commissions. In 1960, some guidelines were drawn by the Government for legal aid schemes. In different states, legal aid schemes were regulated through Legal Aid Boards, Societies and Law Departments. Although all are equal before the law, in practice some seem to be more equal than others, and this resulted in the denial of easily available opportunities to access justice.

Article 39A of the Constitution - inserted by the 42nd Amendment Act in 1976 - offered a remedy to this problem by directing the state to provide free legal aid by suitable legislation or schemes or in any other way, to ensure that opportunities to secure justice are not denied to any citizen by reason of economic or other disabilities. Legal aid schemes were floated across states through legal aid boards, societies and law departments thereafter.

C. Legal Background

In a participatory democracy, it is essential that citizens have faith in their institution. A judiciary that is as fair and independent is an important component in sustaining their trust and confidence. An impartial independent judiciary is the guardian of the individual rights in a democratic society. In order for citizens to have faith in their court system, all people must have access to the courts when necessary.

Citizens agree to a limitation on their freedom in exchange for peaceful coexistence, and they expect that when conflicts between citizens or between the state and citizens arise, there is a place that is independent from undue influence, that is trustworthy,

and that has an authority over all the parties to solve the disputes peacefully. It is also the responsibility of the State to ensure that fair and impartial justice is made available at the door steps of the poor and economically weaker sections irrespective of their caste, creed, religion, geographical position at free of cost.

The fundamental value of Indian system of justice is that the stability of our society depends upon the ability of the people to readily obtain access to courts, because the court system is the mechanism recognized and accepted by all to peacefully resolve disputes. Denying access to the courts forces dispute resolution into other arenas and results in vigilantism and violence. As envisaged under ***Article 15 of the Constitution of India***, the State shall not discriminate against any citizen on grounds of religion, race, caste, sex, place of birth or any of them. Based on this cardinal principle, no citizen shall on the grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability. ***Article 14 of the Constitution of India*** provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Human rights and human dignity form the premises for socio-legal foundations of free legal aid. As part of the human rights, it is necessary to recognize the principle of equality and ensure access to justice. These foundations reflect the incorporation of legal obligation in the international treaties, regional treaties, the working of monitoring bodies under these treaties or in the national legal systems.

I. Free legal aid under International Law

International law addresses the provision for free legal service from the perspective of human rights. An explicit provision for legal services is incorporated in the International Covenant on Civil and Political Rights (ICCPR).

Article 14(3) (d) of the International Covenant on Civil and Political Rights outlines the requirement for free legal assistance as follows: *In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed if he does not have legal assistance, of this right and to have legal assistance assigned to him, in any case where the interests of justice require, and without payment by him in any such case if he does not have sufficient means to pay for it.

India has ratified the International Covenant on Civil and Political Rights which came into force in 1976 and is bound by the International obligation to provide free legal assistance as per the requirements of the Covenant. The Supreme Court of India has adopted the method of giving effect to international legal obligations when these obligations exist in the Indian legal system expressly. The Court also recognized international legal obligations as part of the law of the land when Indian law can be harmoniously interpreted as in conformity with international law.

A number of international treaties like International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on Elimination of Discrimination Against Women (CEDAW) and International Convention on Elimination of All Forms of Racial Discrimination may be interpreted as implicitly referring to the need for free legal services while aiming at effective legal remedy and access to justice.

There are a number of declarations and principles adopted by the UN which refer to effective legal remedy, of which free legal services (in genuine cases) form an essential component. For instance, Article 8 of the Universal Declaration on Human Rights (UDHR) provides that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the Constitution or by the law. Being a General Assembly resolution, some international law scholars describe UDHR as a soft law in terms of declaration, encapsulating lofty idealistic notions about human rights. Still, it creates right centric obligations of norm creating character for the members of the international community.

II. The Indian Legal System

The adversarial system that the colonial era brought in, made access to justice difficult because it ended the era of informal dispute settlement prevalent in the Indian society

leaving aside the quality of justice dispensation in the indigenous mode. The pre-British system was accessible as it was not technical or formal and was conducted in a language known to parties. The Supreme Court in the *M.H. Hoskot v. State of Maharashtra ([1978] 3 SCC 544) observed: Our judicature moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power or steering the wheels of equal justice under the law.*

The adversarial system is characterized by the technical nature of law, and been called as formal because it requires pleadings and court fees. Added complexities like bribery and poverty among the Indian masses makes access to justice highly problematic. In the words of B Sivarammaya, the observation of Anatole France that the majesty of law treats a millionaire and a pauper sleeping under the bridge alike held good in the case of dispensation of justice by the courts modeled on adversary system.

III. Free Legal Aid under Criminal Law

Section 340(1) of the Code of Criminal Procedure, 1898, provided that if a man was charged with an offence punishable with death, the court could provide him with a counsel upon his request. This was subjected to a twisted interpretation by the Supreme Court by classifying it as a privilege rather than the duty of the magistrate in *Tara Singh v. State* (1951 AIR 441). However, India in the Code of Criminal Procedure, 1973, facilitated statutory implementation of free legal aid subsequently. Section 304(1) provides that: In a trial before the sessions judge, if the accused has not sufficient means to engage a pleader, the court should assign a pleader for his defense at the expense of the State.

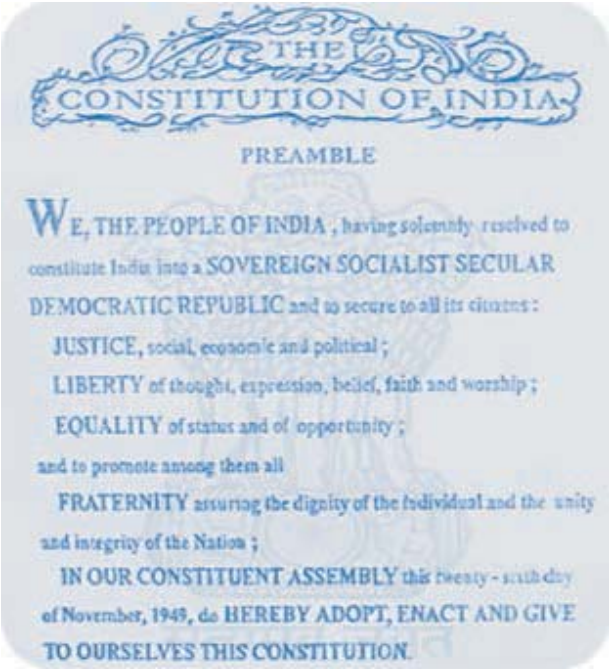
IV. Legal Aid by the State

The 14th Report of the Law Commission of India mooted the idea of providing free legal aid to the poor by the State. The Report highlighted the responsibility of the legal community to administer legal aid scheme and the State to fund legal representation

to the accused in criminal proceedings, appeals and jails. In 1960, the Union Government initiated the national legal aid scheme which faced financial shortages and died a natural death. In 1973, in the second phase, the Union Government constituted a committee under the chairmanship of Justice Krishna Iyer to develop a legal aid scheme for states. The Committee devised a strategy in a decentralized mode with legal aid committees in every district, state and the centre. A committee on judicature was set up under the chairmanship of Justice P N Bhagwati to implement the legal aid scheme. This Committee suggested legal aid camps and nyayalayas in rural areas and recommended the inclusion of free legal aid provision in the Constitution. In 1980, the Committee on National Implementation of Legal Aid was constituted with Justice Bhagwati was its head. Subsequently, the Parliament enacted the Legal Services Authorities Act, 1987.

V. Legal Aid under the Indian Constitution

The 1976 amendment of the Constitution inserted Article 39-A in the Constitution which is as follows: *Equal Justice and free legal aid: The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.*


THE CONSTITUTION OF INDIA

PREAMBLE

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

As pointed out by *Granville Austin*, the portions of the Constitution detailing the fundamental and directive principles of state policy are meant for social revolution. The revolution intends to bring about social justice based on equality. The wording of Article 39-A reiterates that kind of an equality which shall promote access to justice for all by creating equal opportunity. That this constitutional guarantee that was often violated than observed is visible in many of the cases brought before the courts including the apex court. Among many crucial

reasons for this, it is evident that a technical application of statutory law or constitutional obligation is inadequate. Only a fair procedure can ensure the concept of equality and access to justice.

Maneka Gandhi v. Union of India (AIR 1978 SC 597) provided clarity on what procedure means under Article 21. The right to life or liberty could be violated only by a fair, just and reasonable procedure. In the adversarial system, the fairness requires legal representation. Creation of equal opportunity for accessing the courts is a dimension of the equality clause in Article 14. Denial of opportunities in public employment or education to different classes is not the only occasion when considerations about retaining equality go missing; the inadequacy of the legal system to provide an effective forum to the indigent in another. In the *M H Hoskot* case, the court observed: Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; a failure of equal justice under the law is on the cards where such supportive skills is absent for one side.

VI. NALSA Regulations, 2010

In 2010, the National Legal Services Authority (NALSA) of India adopted the National Legal Services Authority (Free and Competent Legal Services) Regulations in exercise of its power under Section 29 of the Legal Services Authorities Act, 1987. The Regulations are applicable to the Legal Service Committees of the Supreme Court, High Courts, the States, districts and taluks. Some broad features of the Regulation relevant in the context of the paper are as follows:

- **Selection of Panel Lawyers**

  The legal services institution is vested with the authority to invite applications from legal practitioners with requisite professional experience to indicate the types of cases as they may be entrusted with. The panel shall be prepared by the Executive Chairman of the legal service institution in consultation with the Attorney-General (for Supreme Court), Advocate-General (for High Courts), Government pleader (for districts/Taluks) and the Bar Association President. The legal practitioner shall have three years or more of experience at the bar for being considered for empanelment. The personal traits like competence, integrity, suitability and experience shall be given due consideration. Separate panels shall be maintained for different types of cases. The Regulations also

provide for retainer lawyers. The Panel has to be reconstituted every three years without disturbing the work of panel lawyers already representing on-going cases. In such cases where the panel lawyer wishes to withdraw from a case entrusted to him shall communicate this to the Member Secretary and the latter may permit him to do so. The panel lawyer is barred from taking any fee, remuneration or other valuable consideration from any person for whom legal services are rendered under the Regulation or Act. The panel lawyer may be withdrawn from a case or his name removed from the panel on account of non-performance of duties satisfactorily or for actions against the object and purpose of the Act or Regulations.

- **Payment of Fee**

  The Regulations specify the rules regarding the payment of fees for panel lawyers which shall be in accordance with the State regulations without any delay on receipt of completion of proceedings for them. It suggests periodic revision of honorarium for the different types of services provided by panel lawyers in legal aid cases.

- **Senior Advocates**

  The services of senior advocates may be availed if the Chairman of the legal services institution forms an opinion to that effect in cases of great public importance and where serious threats to life and liberty of the applicant exists.

The Legal Services Authorities Act of 1987 provides free legal aid to certain categories of citizens. The preamble of the Act says: "An Act to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize lok adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity."

The society is rapidly progressing and the reflections of the same can be found on all fronts. Given the socio-economic changes in the last decade, the Preamble sets forth the need to address the grievances of weaker sections of the society. None should be denied justice for being a poor or being disabled, the evils in social hierarchy should also not affect anyone seeking justice.

D. Criteria for Giving Free Legal Services

Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is-

(a) A member of a Scheduled Caste or Scheduled Tribe;

(b) A victim of trafficking in human beings or beggar as referred in article 23 of the Constitution;

(c) A woman or a child;

(d) A person with disability as defined in clause (i) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996);

(e) A person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood drought, earthquake or industrial disaster; or

(f) An industrial workman; or

(g) In custody, including in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act, 1956, or in a Juvenile home within the meaning of clause (j) of section 2 of the Juvenile Justice Act, 1986, or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987.

The Act renders a helping hand to all those categories of citizens mentioned in the above. Now the larger question arises whether an economically sound person who falls into these categories should he/she be allowed to seek free legal aid. If they are allowed to seek free legal assistance then such an approach and its ramifications on the system should be carefully analyzed. Thus, the million dollar question arises whether the wealthy and affluent in the society needs to be provided legal aid? The economically sound who falls into these categories, whose income runs into crores of rupees make use of the free legal aid. Thus, in a way they are hijacking the real sufferers for whom this enactment was made.

Those who have the financial means, who can afford to have a lawyer, should desist from taking the help of legal aid institutions. As far as the above scenario is concerned, the achievement of one is always at the expense of the other. Why the public treasury is being exhausted for providing legal assistance to a cross section which goes against the basic spirit of the said statute. Flaws in the system can only be identified when the

system turns fully functional; once such flaws are identified there should not be any delay in plugging the same.

Legal services

Legal services are of two types:

- Pre-litigation legal services, and
- Post-litigation legal services.

Pre-litigation legal services

It is rightly said that prevention is better than cure. In these days, the number of litigations is increasing day by day which is against smooth administration of justice. So far emphasis was given only on post litigation assistance or help but now it is being realized that pre-litigation legal services are more useful than post-litigation legal services. The pre-litigation legal services include:

- Legal education
- Legal advice
- Legal awareness
- Pre-litigation settlement etc.

Litigation is not a luxury but it should be used as a last resort. In criminal cases, prosecution is initiated by the State and when legal aid is provided to the accused, the expenditure of both the parties is managed by the State. Sometimes, it is criticized that legal aid in criminal cases is encouraging litigation.

E. Hierarchy of Legal Aid Service Authorities

I. The Central Authority

The Central Government constitutes the National Legal Services Authority (NLSA) and the Supreme Court Legal Services Committee (SCLSC) for exercising powers and functions as determined by the Central Authority. The NLSA consists of - the Chief Justice of India (CJI) as the Patron-in-Chief, a Judge of the Supreme Court nominated by the President as Executive Chairman, and other members nominated by the Government in consultation with the CJI. The SCLSC consists of - Judge of the Supreme Court as the Chairman, and other members prescribed by the Government and nominated by the CJI.

II. Functions of the Central Authority

The Central Authority shall perform all or any of the following functions, namely-

a) Lay down policies and principals for making legal services available under the provisions of this Act.

b) Frame the most effective and economical schemes for the purpose of making legal services available under the provisions of this Act.

c) Utilize the funds at its disposal and make appropriate allocation of funds to the State Authorities and District Authorities.

d) Take necessary steps by way of social justice litigation with regard to consumer protection, environment protection or any other matter of special concern to the weaker sections of the society.

e) Organize legal aid camps, especially in rural areas, slums or labour colonies.

f) Encourage the settlement of disputes by way of negotiations arbitration and conciliation.

g) Undertake and promote research in the field of legal services with special reference to the need for such services among the poor.

h) To do all things necessary for the purpose of ensuring commitment to the fundamental duties of citizens under Part IV A of the Constitution.

i) Monitor and evaluate implementation of the legal aid programmes at periodic intervals.

j) Provide grants-in-aid for specific schemes to various voluntary social service institutions and the State and District Authorities.

k) Develop, in consultation with the Bar Council of India, programmes for clinical legal education and promote guidance.

l) Take appropriate measures for spreading legal literacy and legal awareness amongst the people and, in particular, to educate weaker sections of society.

m) Make special efforts to enlist the support of voluntary social welfare institutions working at the grass-root level.

n) Coordinate and monitor the functions of State Authorities, District Authorities, Supreme Court Legal Services Committee, High Court Legal Services Committees, Taluka Legal Services Committees and voluntary social service

institutions and other legal services organizations and give general directions for the proper implementations of the legal service programmes.

III. The High Court Legal Services Committee

Section 8A of the Legal Services Authorities Act provides details of the High Court Legal Services Committee. The State Authority shall constitute a High Court Legal Services Committee for every High Court for the purpose of exercising such powers and performing such functions as may be determined by regulations made by the State Authority. The Committee shall consist of a sitting judge of the High Court as a Chairman; and such number of other Members as may be determined by regulations made by State Authority to be nominated by Chief Justice of the High Court. The Chief Justice of the High Court shall appoint a Secretary to the Committee possessing such experience and qualifications as may be prescribed by the State Government. The terms of office and other conditions relating thereto, of the Members and Secretary of the Committee shall be such as may be determined by regulations, made by the State Authority.

The Committee may appoint such number of officers and other employees as may be prescribed by the State Government in consultation with the Chief Justice of the High Court for the efficient discharge of its functions. The officers and other employees of the Committee shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

IV. The State Authority

Every State Government constitutes the State Legal Services Authority (SLSA) and the High Court Legal Services Committee (HCLSC) for exercising powers and functions as determined by the State Authority. The SLSA consists of - the Chief Justice of High Court as the Patron-in-Chief, a Judge of the High Court nominated by the Governor as Executive Chairman, and other members nominated by the State Government in consultation with the Chief Justice of High Court. The HCLSC consists of - Judge of the High Court as the Chairman, and other members prescribed by the State Authority and nominated by the Chief Justice of High Court.

V. Functions of the State Authority

The State Authority is responsible for giving effect to the policy and directions of the Central Authority. It provides legal services like the Central Authority and conducts

Lok Adalats. While undertaking legal aid programmes, it also performs other functions of the State Authority fixed by way of regulations.

It shall be the duty of the State Authority to give effect of the policy and directions of the Central Authority. Without prejudice to the generality of the functions referred to in sub-section (1), the State Authority shall perform all or any of the following functions, namely-

a) Give legal service to persons who satisfy the criteria laid down under this Act.

b) Conduct Lok Adalats, including Lok Adalates for High Court cases,

c) Undertake preventive and strategic legal aid programmes; and

d) Perform such other functions as the State Authority may in consultation with the Central Authority, fix by regulations.

VI. The District Authority

The State Government constitutes the District Legal Services Authority (DLSA) for every district for exercising powers and functions as determined by the District Authority. The DLSA consists of - the District Judge as Chairman, and other members nominated by the State Government in consultation with the Chief Justice of High Court. The District Authority is responsible for performing functions of the State Authority in the District as delegated by the State Authority. It coordinates the activities of the Taluk Legal Services Committee and other legal services in the District. It organizes Lok Adalats within the District. The District Authority also performs other functions fixed by way of regulations by the State Authority.

The State Authority constitutes the Taluk Legal Services Committee (TLSC) for every taluk or mandal. The TLSC consists of - senior most Judicial Officer as the ex-officio Chairman, and other members prescribed by the State Government in consultation with the Chief Justice of High Court. The TLSC is responsible for organizing Lok Adalats within the taluk. It coordinates the activities of legal services in the taluk. It performs other functions as assigned by District Authority.

Section 9-11 of the Legal Services Authorities Act deal with the District Legal Services Authority. The State Government shall, in consultation with the Chief Justice of the High Court, constitute a District Authority for every district in the State to exercise the powers and perform the functions conferred on, or assigned to the District Authority under the Act.

VII. Functions of the District Authority

It shall be the duty of every District Authority to perform such of the functions of the State Authority in the District as may be delegated to it from time to time by the State Authority. Without prejudice to the generality of the functions referred to in sub-section (1) the District Authority may perform all or any of the following functions, namely-

a) Co-ordinate the activities of the Taluk Legal Services Committee and other legal services in the District,

b) Organized Lok Adalats within the District; and

c) Perform such other functions as the State Authority may fix by regulations.

VIII. Taluk Legal Services Committee

Section 11A and 11B of the Legal Services Authorities Act deal with Taluk Legal Services Committee. The State Authority may constitute a Committee, to be called the Taluk Legal Services Committee, for each Taluk or Mandal or for a group of Taluk or Mandals. The Committee shall consist of the senior Civil Judge operating within the jurisdiction of the Committee as an ex-officio chairman and such number of other Members as may be prescribed by the State Government, to be nominated by that Government in consultation with the Chief Justice of the High Court. The Taluk Legal Services Committee may perform all or any of the following functions, namely-

a) Co-ordinate the activities of legal services in the Taluk;

b) Organize Lok Adalats within the Taluk; and

c) Perform such other functions as the District Authority may assign to it.

Entitlement to Legal Services

Section 12 and 13 of the Legal Services Authorities Act, deal with the criteria of eligibility to the legal services and its procedure. Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is-

a) A member of a Scheduled Caste or Scheduled Tribe;

b) A victim of trafficking in human beings or beggar as referred to in Article 23 of the Constitution;

c) A women or a child;

d) A mentally ill or otherwise disabled person;

e) A person under circumstances of under circumstances of underserved want such as being a victim of a mass disaster, ethic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or

f) An industrial workman; or

g) In custody, including custody in protective home within the meaning of clause (g) of Section 2 of the immoral Traffic (prevention) Act, 1956 (104 of 1956); or in a Juvenile Justice Act, 1986 (53 of 1986); or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of Section 2 of Mental Health Act, 1987 (14 of 1987); or

h) In receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case if before a court than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court.

IX. Lok Adalats

Every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committees or, as the case may be, Taluk Legal Services Committees may organize Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit. A case may be referred to Lok Adalat when the parties thereof agree or one of the parties thereof makes an application to the court for referring the case to the Lok Adalat for settlement.

1. Powers of Lok Adalats

The Lok Adalat shall for the purpose of holding any determination under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit in respect of the following matters, namely:

a) The summoning and enforcing the attendance of any witness and examining him on oath.

b) The discovery and production of any document.

c) The reception of evidence on affidavits;

d) The requisitioning of any public record or document or copy of such record or document from any court or office; and

e) Such other matters as may be prescribed.

2. The Legal Services Authorities (Amendment) Act, 2012

The Parliament of India realized that litigation oriented legal services cannot bring out desired result, therefore, for encouraging pre-litigation legal services specially in public utility service, the Parliament has made certain amendments in Legal Services Authorities Act by passing an Act known as the Legal Services Authorities (Amendments) Act, 2002. The purpose of this amendment is to bring out certain changes in the Legal Services Act, 1987 (hereinafter referred to as the principal Act) especially for the establishment of permanent Lok Adalats to settle disputes concerning public utility services at pre-litigation state.

Chapter VIA provides certain provisions dealing with pre-litigation conciliation and settlement pertaining to public utility services. Section 22A provides that in this Chapter and two the purpose of section 22 and 23 unless the context otherwise requires: "permanent Lok Adalant" means a permanent Lok Adalat established under sub-section (1) of Section 22 B. "Public utility service" means any-

1) Transport service for the carriage of passengers of goods by air, road or water; or

2) Postal, telegraph or telephone service; or

3) Supply of power, light or water to the public by any establishment; or

4) System of public conservancy or sanitations; or

5) Service in hospital or dispensary; or

6) Insurance service.

It also includes any service which the Central Government or the State Government, as the case may be, may in the public interest, by notifications, declare to be a public utility service.

F. Legal Aid in Context of Social Justice and Human Rights

There are millions of people who are denied human rights only because, they cannot afford the cost required for the enforcement of their rights. Merely to talk about

human rights from an elitist platform is not sufficient. In order to do social justice to them and to make human rights meaningful, legal aid becomes essential. The Human Rights which cannot be enforced due to poverty are meaningless and worthless. A right to access to justice is sine-qua-non for social justice. The access to justice itself is one of the most basic human rights, and without it, the realization of many other human rights may become difficult. Indeed, the right to assess to justice or Legal Aid is evolved by judicial creativity for the benevolence of poor persons. Now, neither is it possible nor is it proper to isolate the right to legal aid from range of human right.

The reason is obvious, mere declaration and passing of resolutions about human rights are not enough, the guarantee for the enforcement of these rights is equally essential. Hence, it will not be incorrect to say that right to legal aid stands first in the specie of human rights. Human rights are only mere pious declaration without legal aid. They become lucrative only when they are enforced. The right to legal aid enables accomplishment of these human rights and makes them worthwhile for the poor masses in the world.

In the present legal system of most of the countries, justice is not given but sold. The consumers of justice have to pay the counsel for representing them, bear expenditure for court fees and also other contingent charges. Indeed, the poverty is an obstacle in the way of getting justice and due to this reason the poor becomes the sufferer of social injustice. Legal aid is only a way for providing social justice to all. Legal aid indeed, is an integral part of human rights and it requires urgent considerations, otherwise there is an apprehension that someday the patience of the poor may be exhausted and that will endanger the world peace.

G. Funding

The Central Government by way of grants provides funding to the Central Authority for providing legal services. Similarly, the State Government by way of grants provides funding to the State Authority and the District Authority for providing legal services.

I. The National Legal Aid Fund

The National Legal Aid Fund established by the Central Authority includes sums of money given as grants by the Central Government, any grant or donation made to the Central Authority by any other person for the purpose of legal services, and amounts

received by the Central Authority under the orders of any court.

The National Legal Aid Fund shall be utilized towards the cost of legal services provided by the SCLSC, grants made to the State Authorities, other expenses of the Central Authority.

II. The State Legal Aid Fund

The State Legal Aid Fund established by the State Authority includes sums of money given as grants by the Central Authority, any grant or donation made to the State Authority by any other person for the purpose of legal services, and amounts received by the State Authority under the orders of any court.

The State Legal Aid Fund shall be utilized towards the cost of functions of State Authorities, cost of legal services provided by the HCLSC, other expenses of the State Authority.

III. The District Legal Aid Fund

The District Legal Aid Fund established by the District Authority includes sums of money given as grants by the State Authority, any grant or donation made to the District Authority by any other person for the purpose of legal services, and amounts received by the District Authority under the orders of any court.

The District Legal Aid Fund shall be utilized towards the cost of functions of District Authorities and Taluk Legal Services Committee, and other expenses of the District Authority.

H. Exercise

Activity Based Learning

Activity based learning provides opportunities to students with direct observation and learning about some aspect of the practice of law.

In this activity, students are required, in groups or individually, to provide answers to the questions below to observe their knowledge on the functioning of legal services in India. This is only a learning activity for class discussion.

- Make a chart as to how legal aid camps are organized in your area and how frequent are they organized. List out different organizations that provide legal aid camps. See the people who come for these camps. Make a note of their problems and the remedies available to them through the legal aid camps.

- Go to the Court and see if there is any lawyer specifically appointed for giving legal services. Schedule a meeting to see how legal services are provided. Does the lawyer get paid for the free legal services that he provides?
- Apart from free legal aid, list out the other legal services provided by different organizations in your area.

Unit - 7: International Context

A. Introduction to International Law

1. What is international law?

Every state has their own respective laws (domestic laws) which regulate the conduct of its citizens. These laws regulate the private, social, commercial and other activities of the individuals. These internal laws also help in regulating the conduct and affairs of the state machinery. But, what happens when there is a dispute between two or more state parties? Which body of law governs their conduct? Which jurisdiction is to be applied in case of disputes related to private parties across different jurisdictions? The answer to these situations lies in International Law.

2. History and Meaning

Many scholars have traced the history of international law back to concepts or systems prevalent in different periods in history such as the European Renaissance, or in different civilizations such as the Roman Empire or the ancient Middle East, International law, as we know it today, took its form in the mid-19th century during the expansionist and industrial eras, when concepts such as state sovereignty gained increasing prominence, alongside ideas such as exclusive domestic jurisdiction and non-intervention in affairs of other states. These ideas were then spread throughout the globe by the imperial European powers through colonization. Subsequently, international law ended up becoming truly 'international' in the initial decades after World War II, owing to the rapid decolonization that took place then, leading to the formation of numerous independent states which infused the European dominated ideas and practices of international law with their own diverse cultures and influences. At the same time, international organizations such as the League of Nations and the United Nations came into existence in the aftermath of World War I and World War II respectively, thus marking an era of a new form of international law in which organizations such as UN along with its organs would have a significant role.

International law hence came to be a framework of rules and principles binding the relations between states and governing their conduct amongst themselves. It

is a form of law which relies on consent-based governance to a great extent, as states are not ordinarily obliged to abide by it, unless they expressly consent to a particular course of conduct, though certain aspects are exceptions to the consent requirement, such as principles of customary international law and peremptory norms or jus cogens.

International Law can be further categorized into:

- Public International Law
- Private International Law and

3. Public International Law

Public International Law is the law that regulates relations between states. Public International law is different from other types of laws because it is concerned with interstate regulation, i.e. it deals in regulating the conduct of one state with another and is not concerned with the relations between private entities (legal and natural persons) and even the domestic laws of any country.

The primary objective of Public International law is to provide for a framework of rules and regulations which help in fostering stable and organized international relations.

Some key areas where public international law is applicable:

Peace and security	Human rights	Finance	Airspace
Trade	Intellectual Property	Development	Sea
Weapons	Bio-diversity	Science and security	Fisheries
International Crimes	Climate change	Extradition	Natural resources

Public International Law is further classified into fields such as law of the seas, international humanitarian law, the law of treaties, and so on.

4. Private International Law

Private International Law, often referred to as "Conflict of Laws", is a set of rules and principles that govern interstate interactions and transactions of private parties. It is a body constituted of conventions, model laws, domestic laws of states and secondary legal sources. It commonly involves issues like which

- Jurisdiction should be permitted to hear the case, and
- Jurisdiction's law should be applied.

It is different from Public International Law, as the latter is a set of rules which governs the intercourse between nations through determining the rights and obligations of the governments of the nations, while the former comprises of certain rules and regulations which are established or agreed upon by private citizens from different nations who enter into transactions and that would govern them if a dispute were to arise.

There are certain international bodies which have been working towards harmonizing private laws of different countries and bringing uniformity in their application. The bodies include organizations such as the Hague Conference on Private International Law, the International Centre on the Settlement of Investment Disputes (ICSID), the International Institute for Unification of Private Law (UNIDROIT), the United Nations Commission for International Trade Law (UNCITRAL), and so on. The Hague Conference, convened by the government of Netherlands, originates back in 1893, and focuses on developing conventions on a wide array of aspects of private law. The UNCITRAL works towards developing model laws and guides, related to international trade and commercial laws, including the UNCITRAL Arbitration Rules.

Some of the international conventions/model laws in the sphere of private international law which have gained more traction in recent times are, the United Nations Convention on Contracts for the Sale of International Goods (CISG), the UNCITRAL Model Law on International Commercial Arbitration, the Geneva Convention on the execution of foreign arbitral awards, and so on.

The CISG, also referred to as the Vienna Convention on sale of goods, is a multilateral treaty which provides options for avoiding choice of law issues by providing a framework of accepted substantive rules with respect to contract disputes. It is considered one of the most influential documents in private international law, and nowadays is deemed to be incorporated into any otherwise applicable domestic laws, unless expressly excluded.

The UNCITRAL Model Law has provided a framework for domestic laws on international arbitration and is being adopted by an increasing number of countries, with India joining the list in 1996.

B. Sources of International Law

A source of law within a domestic legal system is easier to determine. Within the domestic system it is considered as something which is not too difficult a process, where one may look at the various legislations or statutes provided for by the legislature and if there is a lacunae in the statute then decisions of the domestic courts.

But, it is not so easy to pinpoint the sources of International law. Yet, the most authoritative source of international law is Article 38(1) of the Statute of the International Court of Justice, which provides that when a court which deals with disputes relating to international law, it shall apply:

"*International conventions, whether general or particular, establishing rules expressly recognized by the contesting states,*

a) *International custom, as evidence of general practice accepted by law*

b) *The general principles of law recognized by civilized nations*

c) *Subject to provisions of Article 59, judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of international law"*

Though Article 38(1) is technically limited in application to the International Court of Justice ("ICJ"), since the function of the court is to decide disputes submitted to it in accordance with international law and all members of the United Nations are ipso facto members, it is widely accepted that this is considered as enumerating the general norm on sources of international law. Although the provisions of the Statute of the ICJ do not suggest any hierarchy, they are generally applied in the following order in case of disputes.

Treaties

A Treaty/International Convention/Charters refers to legally binding, written, agreements in which states agree to act in a particular manner as specified in the agreement. Treaties are often complex documents, particularly with regards to those involving more than two parties as they are binding upon them and are to be entered in to in good faith. Agreements which are between different nations but without the intention of creating binding obligations are not considered treaties, however they may have political effects. A treaty need not be one consolidated document but may consist of more than one related documents.

Treaties may be drafted between states by their leaders or government departments depending on the circumstances. However there are a number of stages that are involved in order to convert a final draft into a binding treaty. The final text has to be 'adopted' in an international conference by way of two-thirds majority. A state may express its consent to be bound by a particular treaty in certain cases, the most common of which are:

Consent by signature

In certain cases, treaties may be given force by way of signatures of representatives who have been given the full powers, i.e. authorization in writing from their state to be able to take decisions on its behalf.

Consent by exchange of Instruments

In some scenarios, consent may be recorded by way of exchanging certain instruments, i.e. documents which contain the terms agreed to by both sides, when these instruments provide that on such exchange they will be in effect.

Consent by Ratification

Ratification is simply understood to be the act by which a State establishes its consent to be bound by a treaty on the international plane. This was initiated as a measure to ensure that the representative who signed a treaty had due authority, by seeing whether the state agrees to 'ratify' the same. Ratification differs from country to country but usually requires a sign that the state consents to follow the provisions of the treaty i.e. could be assent by the President of the State or require a vote of a majority in the legislature. In multilateral treaties, involving a number of countries, ratification is usually the most preferred method of expressing assent where one party collects the ratification of the others.

They are generally considered to be the most accepted as they are in a written form and have been explicitly assented to by the states party to the dispute.

Customs

An observed custom could be derived from the law of nature or mutual consent and is extremely fluid. Custom is usually derived by sifting through many layers and evidences of state practice and opinion juris. Many other sources such as unsigned treaties and United Nations declarations have been included to identify and cover more and more customs and practices in the international domain.

International Court of Justice (ICJ) decisions

Article 59 of the Statute of the ICJ states that decisions of the ICJ have no binding force except on the parties to the dispute, however the ICJ tends to examine its previous decisions, determine which cases should not be applied and rarely departs from the relevant case law.

There are many who feel a departure from the current system is necessary as these are outdated. However, and for the time being, these are the prevalent sources for the purpose of international law.

C. International Institutions

UN General Assembly Hall

The growth in the number of sovereign nations and increasing international relations gave rise to notions of international co-operation. The 19th Century saw the commencement of international non-governmental associations such as the International Law Association, in 1873, and the International Committee of the Red Cross, in 1863. These institutions paved the way for the formation of the League of Nations in 1919 which was the predecessor to the United Nations in 1945.

Today, there are numerous organizations established by inter-governmental agreement and having a large number of social, economic and cultural influences which have been facilitated by the United Nations. Some of the key organizations that have been set up with the aid of the League of Nations and the United Nations are mentioned below.

International Labour Organization (ILO)

It was set up post the First World War as a part of the Treaty of Versailles, in 1919 to achieve social justice. It was aimed at improving the conditions of labour in various countries in the world to help achieve humane conditions for such labourers by providing for various regulations and agreements on the conditions of labourers.

United Nations Educational, Scientific and Cultural Organization (UNESCO)

Formed in 1945, UNESCO was set up to promote coordination between members keeping in mind the fact mere economic and political arrangements are not enough to ensure growth and stability in member states. By promoting culture, preserving the heritage, sharing knowledge and understanding that are beneficial for the whole of mankind, UNESCO aims to aid sustainable development and foster greater cooperation between nations.

World Bank and the International Monetary Fund (IMF)

The World Bank was instituted as the International Bank for Reconstruction and Development (IBRD-the World Bank) and along with the IMF were dubbed the Bretton Woods Twins in 1944. These two sister institutions were started in order to aid the economies of various nations which had suffered immense losses subsequent to the Second World War. The World Bank aids member states by providing loans to member states for the purpose development and raises its funds by way of the world's financial markets.

World Health Organization (WHO)

The WHO was formulated in 1948 to set up an agency that would move towards aiding member states with regards to health concerns. WHO has been a core agency for setting up of norms and standards to be followed with regards to human health and research regarding the containment of diseases as well assessing worldwide health trends. It coordinates with various agencies in different countries to facilitate greater knowledge and awareness of health issues in various countries.

These organizations, and their counterparts, are aimed to promote international cooperation between member states on a large number of issues from rights of

labourers, redevelopment of countries and economies as well as monitoring health trends across the world.

After the end of the Second World War, these institutions have flourished and provided exceptional coordination among various departments of governmental and non-governmental organizations to fulfill their goals.

D. International Human Rights

International Human Rights pose a variety of question under the framework of international law. There are various problems related to enforcement and sanctions with regards to human rights. The Second World War had a profound impact on the development of human rights law as there was a need for a system to give rise to protection of human rights. This led to a wide spurt of activism and literature on the same. We will quickly look into some of the key conventions and treaties promoting and protecting Human Rights in the international sphere.

Article 4 of the International Covenant on Civil and Political Rights **("ICCPR")** states that there are certain rights such as the right to life, freedom of thought, prohibition of slavery, etc. that are said to be non-derogable and constitute a special place in the hierarchy of rights. Also, there are certain rights that have also entered the framework of customary international law like the prohibition of torture, genocide and slavery and the principles of non-discrimination.These have become certain inalienable rights that do not require any specific treaty to be given effect to.

One of the most influential documents in this regard is the **Universal Declaration of Human Rights** which deals with various provisions, a few of them being:

- liberty of a person (Article 3)
- equality before law (Article 7)
- prohibitions on torture (Article 5)
- socio-economic rights such as right to work and equal pay (Article 23)
- right to social security (Article 25)

While it is not a binding document, per se, there have been many instances where it has been referred to by cases of the International Court of Justice and is an extremely important document for the purpose of international human rights.

Another such arrangement was **The Vienna Declaration and Programme of Action** (1993). It emphasized that all human rights were universal, indivisible, inter-

dependent and interrelated. This led to the creation of the post of the UN High Commissioner for Human rights who would principally be responsible for UN human rights activities. The High Commissioner can make recommendations to other UN bodies and can also coordinate between them.

There are several other key legislations and arrangements such as the **Convention on the Prevention and Punishment of the Crime of Genocide, The International Convention on the Elimination of All Forms of Racial Discrimination** which read with provisions of the Universal Declaration of Human Rights give rise to a host of enforceable rights in both treaty and customary international law.

There are various bodies such as the **Commission on Human Rights,** which is known as the **Human Rights Council** since 2006.It looks into matters of human rights issues. However, it has faced criticisms on its political selectivity and failure to objectively review the issues in certain countries. The Human Right Council is continuing the work of the previously set up Commission by broadening its framework by spreading its area over a wider framework.

Generally human rights violations are dealt with by the state in which they occur. However, there are certain human rights, established under treaty that may constitute *ergaomnes* obligations for the state parties. This means that there are some violations that are so grave, that any state may take action against such crimes, regardless of whether they occurred in their jurisdiction or not. All states have a shared interest in elimination of such grave violations. This is one of the most empowering features of international human rights law where it does away with the borders and limitations of a domestic body and allows the international community to also seek an active role to protect the rights of citizens of other countries.

Given the primacy of human rights even in domestic legislatures all over the world, it is almost no surprise that international human rights law is possibly given such a high degree of importance in the world of international law.

E. Customary International Law

According to Article 38 of its Statute, the International Court of Justice 'whose function is to decide in accordance with international law such disputes as are submitted to it,' has to apply, *inter alia*, 'international custom.' This source of public international law is described, in the same Article, as 'evidence of a general practice accepted as law.'

This description of international custom, even though it has been criticized for its exact formulation, at least makes clear that international custom generally refers to a description State practice, but only such practice as is accepted by the States themselves as legally required. Once a certain practice is understood to be customary law, States are obliged to act as the rule of customary international law prescribes.

A proceeding at ICJ, Hague

International customary law is probably the most disputed and discussed source of international law. For example, it is not clear when a particular State practice becomes a *legally binding* State practice. It is also unclear how one can identify a rule of international custom, or how one can *prove* its existence.

F. International Law & Municipal Law

Can International law be directly applied in the domestic jurisdiction?

The interplay between municipal and international law is complex. Some authors believe that international law and the law of the domestic jurisdiction, also referred to as the municipal law of the country, do not intersect and are completely different entities which cannot affect or overrule each other. However in practice it seems that this does not hold true. There are some principles that are clear as this conflict between international law and domestic law is concerned.

Municipal law cannot serve as a defense to a breach of international law, i.e. you cannot use a domestic law to justify the breach of an international one. Neither can one say that their consent to a treaty has been invalidated by way of a change of its municipal law. Similarly, the International Court of Justice has also stated that the lack of domestic legislation cannot be brought up as a defense if there is an international obligation on the state not to do a certain act. There have been various cases on points that state that international law is prevalent over the domestic law however that does not mean that domestic legislations carry no force.

Some international treaties require that countries adopt domestic legislation in line with the international obligations it has already agreed to. Owing to such

requirements there is a blurring of the distinction between international and municipal law and domestic courts have also started analyzing international obligations of states in domestic disputes. In countries such as the United Kingdom, there is a doctrine of transformation that states that before any international agreement can be considered applicable domestically it must be transformed into municipal law. This means that the provisions of the treaty need to be transformed into local law, passing a domestic legislation with concurrent provisions as the international obligations.

Similarly in the United States of America, the position is that customary international law is federal law and if the federal courts in the US determine it to be binding then it's binding on the state courts as well. However, no act of legislature may be invalidated merely on the basis of a violation of customary international law. The US Supreme court believes that there should be respectful consideration to be given to the interpretation of international treaties however a domestic rule to the contrary would be given supremacy over those provisions.

Thus, it is to be understood that each country has their own method of dealing with the application of international law to its jurisdiction. The provisions of international law are often used to supplement various propositions of the domestic law when they are both concurrent with each other. However, whenever there is a dispute between international and domestic law, supremacy of either depends mainly on the forum, i.e. where the case is being contested. International forums generally give preference to treaty law and other international sources whereas domestic forums give preference to statutes of the jurisdiction.

G. International Law & India

Article 51 of the Indian Constitution specifically states that the State shall endeavor to '*foster respect for international law and treaty obligations in the dealings of organized peoples with one another*'. Under Article 253 of the Constitution of India, the Parliament and the Union of India have the power to implement treaties and can even interfere in the powers of the state government in order to give power to provisions of an international treaty.

India generally follows that merely affirming a treaty by way of ratifying it by the assent of the executive unless the treaty requires ratification by way of an act of the legislature. In the land mark case of *Kesavananda Bharti v. State of Kerala*, it was

observed that the court must interpret the provisions of the constitution in light of Charter of the United Nations.

There has been an evolution of the philosophy of the role of international treaties to which India is party to with relation to the Indian Constitution. In the case of *Magan Bhai Patel v Union of India*, the court held that if a treaty or international agreement restricts the rights of the citizens or modifies the laws of the state would require to have a legislative measure. E.g. If India is a party to an international agreement to stop the killing of a species of turtle, it restricts the right to trade of certain fishermen by prohibiting killing of the turtle. If this treaty is to be enforced in India, the Indian Parliament needs to pass a domestic legislation regarding prohibition of the killing of such turtle species.

If no such right is restricted then it does not need to have a legislative measure to enact it or give rise to some weight in domestic law in the treaty. It is also a very clear of Indian law that international treaties cannot on their own override domestic law. Hence, these treaties which are not enabled by the legislature will not have the same force in law if there is a contradictory law provided for. However, in the case of *Sheela Barse v Secretary Children's Aid Society*, the Supreme Court held that India had ratified conventions regarding the protection of children and this placed an obligation on the State Government to implement these principles. This was a case in which there were no contradictory laws and as they were supplementing the law already in force the court held that the treaty could be applied directly to Indian law.

The most revolutionary of these cases was the case of *Vishaka v State of Rajasthan*, in which the Indian courts used the provisions of the Convention on Elimination of all forms of Discrimination against Women, (CEDAW), to create legally binding obligations regarding sexual harassment.

India has dealt with the interplay of international law as fits the need of the day. While any restriction of rights requires the need for an amendment by legislature, enhancing or broadening the scope of such rights is allowed as long as there is nothing to the contrary or similar in domestic law.

H. Dispute Resolution

In the domestic scenario disputes may be resolved by way of various methods by way of application to court, mediation, conciliation or even arbitration. In international

law there may be disputes regarding a large number of issues relating to treaties or some basic covenants of international law. In the event such disputes arise between states or even between individuals and the state, there are certain institutions and mechanisms in place to resolve such disputes.

International Court of Justice

The International Court of Justice **('ICJ')** is termed as the main judicial branch of the United Nations. In 1946, the General Assembly of the United Nations, enacted the Statute of the ICJ which gave rise to the institution of the International Court of Justice at The Hague, Netherlands. All members of the UN are party to this statute, by default owing to Article 93 of the United Nations Charter, and non-members may also become parties under this Article.

ICJ at Hague

The court may have jurisdiction to decide cases in which the parties agree to appear before the court, on their own behest, and agree to be bound by the decision of the ICJ. The court may also be a forum if provided for in a treaty between parties and in certain cases it is compulsory to refer to the court with regards to certain disputes.

The court may also give advisory opinions under Articles 65-68 of the Statute of the ICJ to countries. These are not binding but are merely referrals to the ICJ to understand the point of law on the matter. The ICJ is thus, one of the primary sources of dispute resolution available with regards to international disputes when parties are agreeable to settle them on their own accord.

International Criminal Court

The International Criminal Court **(ICC)** is a tribunal set up through the Rome Statute in 2002 with the purpose of prosecuting criminals for 4 major crimes:

- Crimes against Humanity
- Genocide

- War Crimes
- Crime of Aggression

The ICC may prosecute criminals for crimes committed in a country which accepts the jurisdiction of the court. Thus, only if countries agree to submit to the jurisdiction can the ICC take up certain cases in which the person who has committed the crime is a national of the country or if it was committed in the territory of that country. The cases may be referred by the country directly to the ICJ or though the Prosecutor of the ICC, who is the person appointed to try cases on behalf of the ICC.

The ICC has limited jurisdiction over the ICJ with regards to certain issues pertaining to criminal matters listed under the Rome Statute. The divide is similar to the divide of civil and criminal courts in the domestic context however, the jurisdiction of the ICC is more restricted than that of ordinary criminal courts.

Other Dispute Resolution Mechanism

Often the treaties entered into by the States themselves lay down the procedure to be followed in case of a dispute. For instance, the General Agreement on Trade and Tariffs provides for a dispute resolution panel within its own provisions. Treaties often employ mediation, arbitration and other such dispute resolution mechanisms to arrive at an agreeable decision. The United Nations has even created its own forum to deal with issues related to investment disputes in association with the World Bank.

These are some of the dispute resolution mechanisms available with regards to international disputes available to resolve disputes in international law. There are numerous other forums that can be created which are all dependent on agreements between parties and the provisions of the treaties. The ICJ's enabling provisions are also wide enough to deal with most disputes that may arise between member states.

I. Exercise

I. Questions

- Name a few key international organizations and state their areas of work
- Distinguish between Public International Law and Private International Law
- What is the role of the UN High Commissioner for Human Rights?
- What is the treatment of human rights in International Law?

- State the various sources of International Law.
- What happens in case of conflict between a treaty provision and a domestic law?
- Explain the existing dispute resolution mechanism in International Law.

II. Class activities

- Organize a session of Model United Nations (MUN) in your class.
- Prepare a report (1000 words) on the relation between International Trade and International Law
- Emulate a Human Rights Tribunal/ War Tribunal in your class.
- Find out whether there is any difference between International Humanitarian Law and Human Right Law.
- Explore the online services of the Peace Palace Library.

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