Legal Studies

Class XII

CENTRAL BOARD OF SECONDARY EDUCATION

LEGAL STUDIES

Class 12

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LEGAL STUDIES FOR CLASS XII

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भारत का संविधान

उद्देशिका

हम, भारत के लोग, भारत को एक सम्पूर्ण [1]प्रभुत्व-संपन्न समाजवादी पंथनिरपेक्ष लोकतंत्रात्मक गणराज्य बनाने के लिए, तथा उसके समस्त नागरिकों को:

सामाजिक, आर्थिक और राजनैतिक न्याय,
विचार, अभिव्यक्ति, विश्वास, धर्म
और उपासना की स्वतंत्रता,
प्रतिष्ठा और अवसर की समता
प्राप्त कराने के लिए
तथा उन सब में व्यक्ति की गरिमा
[2]और राष्ट्र की एकता और अखंडता
सुनिश्चित करने वाली बंधुता बढ़ाने के लिए

दृढ़संकल्प होकर अपनी इस संविधान सभा में आज तारीख 26 नवम्बर, 1949 ई॰ को एतद्द्वारा इस संविधान को अंगीकृत, अधिनियमित और आत्मार्पित करते हैं।

1. संविधान (बयालीसवां संशोधन) अधिनियम, 1976 की धारा 2 द्वारा (3.1.1977) से "प्रभुत्व-संपन्न लोकतंत्रात्मक गणराज्य" के स्थान पर प्रतिस्थापित।
2. संविधान (बयालीसवां संशोधन) अधिनियम, 1976 की धारा 2 द्वारा (3.1.1977) से "राष्ट्र की एकता" के स्थान पर प्रतिस्थापित।

भाग 4 क

मूल कर्त्तव्य

51 क. मूल कर्त्तव्य – भारत के प्रत्येक नागरिक का यह कर्त्तव्य होगा कि वह –

(क) संविधान का पालन करे और उसके आदर्शों, संस्थाओं, राष्ट्रध्वज और राष्ट्रगान का आदर करे;

(ख) स्वतंत्रता के लिए हमारे राष्ट्रीय आंदोलन को प्रेरित करने वाले उच्च आदर्शों को हृदय में संजोए रखे और उनका पालन करे;

(ग) भारत की प्रभुता, एकता और अखंडता की रक्षा करे और उसे अक्षुण्ण रखे;

(घ) देश की रक्षा करे और आह्वान किए जाने पर राष्ट्र की सेवा करे;

(ङ) भारत के सभी लोगों में समरसता और समान भ्रातृत्व की भावना का निर्माण करे जो धर्म, भाषा और प्रदेश या वर्ग पर आधारित सभी भेदभाव से परे हों, ऐसी प्रथाओं का त्याग करे जो स्त्रियों के सम्मान के विरुद्ध हैं;

(च) हमारी सामासिक संस्कृति की गौरवशाली परंपरा का महत्त्व समझे और उसका परिरक्षण करे;

(छ) प्राकृतिक पर्यावरण की जिसके अंतर्गत वन, झील, नदी, और वन्य जीव हैं, रक्षा करे और उसका संवर्धन करे तथा प्राणिमात्र के प्रति दयाभाव रखे;

(ज) वैज्ञानिक दृष्टिकोण, मानववाद और ज्ञानार्जन तथा सुधार की भावना का विकास करे;

(झ) सार्वजनिक संपत्ति को सुरक्षित रखे और हिंसा से दूर रहे;

(ञ) व्यक्तिगत और सामूहिक गतिविधियों के सभी क्षेत्रों में उत्कर्ष की ओर बढ़ने का सतत प्रयास करे जिससे राष्ट्र निरंतर बढ़ते हुए प्रयत्न और उपलब्धि की नई उंचाइयों को छू ले;

[1](ट) यदि माता-पिता या संरक्षक है, छह वर्ष से चौदह वर्ष तक की आयु वाले अपने, यथास्थिति, बालक या प्रतिपाल्य के लिये शिक्षा के अवसर प्रदान करे।

1. संविधान (छयासीवां संशोधन) अधिनियम, 2002 द्वारा प्रतिस्थापित।

THE CONSTITUTION OF INDIA

PREAMBLE

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a [1]**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[2] 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.**

1. Subs, by the Constitution (Forty-Second Amendment) Act. 1976, sec. 2, for "Sovereign Democratic Republic" (w.e.f. 3.1.1977)
2. Subs, by the Constitution (Forty-Second Amendment) Act. 1976, sec. 2, for "unity of the Nation" (w.e.f. 3.1.1977)

THE CONSTITUTION OF INDIA

Chapter IV A

FUNDAMENTAL DUTIES

ARTICLE 51A

Fundamental Duties - It shall be the duty of every citizen of India-

(a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;

(b) to cherish and follow the noble ideals which inspired our national struggle for freedom;

(c) to uphold and protect the sovereignty, unity and integrity of India;

(d) to defend the country and render national service when called upon to do so;

(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

(f) to value and preserve the rich heritage of our composite culture;

(g) to protect and improve the natural environment including forests, lakes, rivers, wild life and to have compassion for living creatures;

(h) to develop the scientific temper, humanism and the spirit of inquiry and reform;

(i) to safeguard public property and to abjure violence;

(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement;

[1](k) to provide opportunities for education to his/her child or, as the case may be, ward between age of 6 and 14 years.

1. Subs, by the Constitution (Eighty-Sixth Amendment) Act. 2002.

Preface

CBSE first published the textbooks of legal studies in the year 2014 and since then numerous feedback and suggestions from both teachers and students have been received invariably underlining the need to bring out a revised edition to provide up-to-date information reflecting the current state of the law and legal policies in the country.

The aim of the present edition is, therefore, to improve the content in terms of clarity, structure, presentation and relevance. Content has been reorganised in a more logical and intuitive way, and most recent topics such as Intellectual Property Rights, Legal Entities, etc have been added to give it a contemporary and more relevant look. We have also taken special care to take into account the feedback of teachers and students to make this edition even more student-friendly and accessible.

The newly added chapter on Intellectual Property Rights explains the various forms of intellectual property, their purpose, and benefits as well as the requirements for obtaining and maintaining protection. It also discusses the international considerations governing IP rights. The chapter on Sustainability and Law deals with the inclusion of international provisions in municipal law in India and the legal framework for preserving the environment. Similarly, the chapter on Legal Entities explains different types of entities such as sole proprietorships, partnerships, limited liability partnerships , private and public limited companies serving as a valuable resource for the legal requirements associated with each type of entity, and their advantages and liabilities.

Our hope is that this edition will meet the expectations of teachers and provides students with the tools and knowledge necessary to succeed in their legal studies and beyond.

Special thanks are due to Prof. James J Nedumpara for guiding the team with academic input, editing, and overall coordination. We also place on record our appreciation for the efforts put in by Ms. Disha Grover, Ms. Neelu Sofat, Ms. Sabrina Bansal, Ms. Geetika Aggarwal, Ms. Charu Tiwari, and Ms. Sanah Batta and for demonstrating exemplary commitment to providing high-quality educational resources and revising it multiple times. Their collaboration and coordination and attention to detail have resulted in a comprehensive and updated textbook that will undoubtedly benefit countless students and teachers. We are grateful for the time and energy they have invested in making this textbook an even more valuable learning tool.

We would appreciate comments and feedback on this book and they would be considered for future editions.

Team CBSE

Acknowledgement

Guidance and Support

- Ms Nidhi Chibber, IAS, Chairperson, Central Board of Secondary Education.
- Dr. Joseph Emmanuel, Director (Academics), Central Board of Secondary Education.

Material Production for the First Edition

- Prof. James J. Nedumpara, Professor, Jindal Global Law School, OP Jindal Global University, Sonepat, Delhi
- Mr. Sandeep Kindo, University of Wisconsin - Madison, USA
- Mr. Vinay Kumar Singh, Indian Society of International Law, New Delhi
- Dr. Anil Kumar Thakur, Panjab University, Chandigarh
- Ms Anjali Bansal, Panjab University, Chandigarh
- Mr. Ram Shankar, Assistant Professor & Joint Director (GA&E), CBSE.

Content Updation Group (Second Edition)

- Prof. James J. Nedumpara, Head of the Centre for International Trade and Investment Law, Indian Institute of Foreign Trade (IIFT),New Delhi
- Ms. Disha Grover, Delhi Public School, Mathura Road, New Delhi
- Ms. Neelu Sofat Whig, Suncity School, Gurugram
- Ms. Charu Tiwari, Sanskriti School, New Delhi
- Ms Sanah Batta, Bloom Public School, New Delhi
- Ms. Sabrina Bansal, Delhi Public School, R K Puram
- Ms. Geetika Aggarwal, Delhi Public School, Sec-45, Gurugram

Legal Inputs and Book Review

- Akshay Chitkara, Advocate, Delhi High Court

CBSE Coordinator

- Mr. Al Hilal Ahmed (Joint Secretary)

Contents

Unit 1

JUDICIARY

केन्द्रीय माध्यमिक शिक्षा बोर्ड
भारत
असतो मा सद्गमय

UNIT
1

Judiciary

Learning Outcomes :

Students will be able to:

I. trace the history of the origin and development of Indian Judicial System in India;

II. know the structure of Judiciary in India;

III. explain the Jurisdiction of the Supreme Court of India;

IV. explain the Jurisdiction of the High Courts;

V. understand the working of Subordinate Courts;

VI. identify the Hierarchy of Judicial System in India;

VII. discuss the role of Tribunals in complementing and supplementing the role of judiciary in India

VIII. explain the concept of Judicial Review in India

IX. understand the scope of Judicial Review in India

A. STRUCTURE, HIERARCHY OF COURTS, AND LEGAL OFFICERS 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 popularly 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.

A. I. i. 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 34 judges including the Chief Justice of India.

The Supreme Court (Number of Judges) Amendment Bill, 2019

- The Supreme Court (Number of Judges) Amendment Bill, 2019 was introduced in Lok Sabha on August 5, 2019. The Bill amends the Supreme Court (Number of Judges) Act, 1956.
- The Act fixes the maximum number of judges in the Supreme Court at 30 judges (excluding the Chief Justice of India). The Bill increases this number from 30 to 33.

Sources: https://prsindia.org/billtrack/the-supreme-court-number-of-judges-amendment-bill-2019

A.I.ii. High Courts

India consists of 25 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. The Andhra High Court and Telangana High Court are the newest high courts, established on 1 January 2019 according to Andhra Pradesh Reorganisation Act, 2014.

A. I.iii. District and Sub-ordinate Courts

The Courts that function below the High Courts are popularly known as subordinate judiciary. They comprise 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 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 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, District Munsiff Courts also form a part of this hierarchy. They are the lowest in order of handling matters of civil nature and function below the sub-ordinate Courts. Usually, these are controlled by the District Courts of the respective district.

Their pecuniary limits, meaning the Court's ability to hear matters upto a particular claim for money, are notified by respective State Governments.

A.II. Salient Features of Indian Judiciary

a. India as a common law jurisdiction

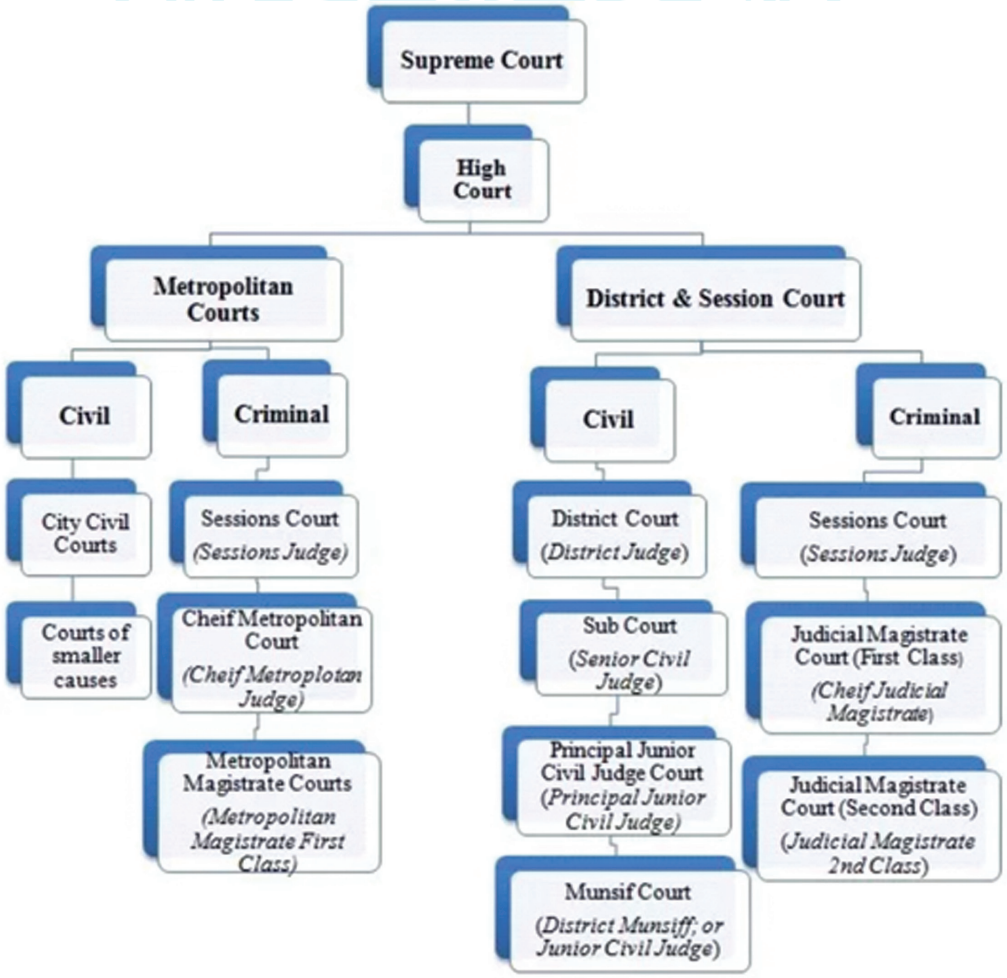
Taking its precedence from the British tradition of 'common law', India has adopted a similar model. Under this scheme of the common law system, the decisions, orders and judgments

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.

b. 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.



A.III. Legal officers in India

Certain legal offices at the Union and State level exist to advise the executive wing of the government. These law officers derive their mandate either from the Constitution or other statutory enactments and rules.

a. Attorney General of India

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. The first Attorney General of India was **M. C. Setalvad**.

Attorney General gives advice to the Government of India upon such legal matters, which are referred or assigned to him by the president. Also, he performs such other duties of a legal character that are referred or assigned to him by the president or conferred on him by or under the Constitution or any other law.

In the performance of his official duties, he has the right to audience in all courts in the territory of India. He has the right to speak or to take part in the proceedings of both the Houses of Parliament and their joint sittings but without a right to vote. He has the right to speak or to take part in the meeting of any committee of the Parliament of which he is named as a member but without a right to vote. He enjoys all the privileges and immunities that are available to a member of parliament.

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.

b. Advocate General

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.

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.

B.I.i Independence of Judiciary as a Constitutional Safeguard

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 meaning to 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.

Fourthly, 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. 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.

Therefore independence of judiciary remains a vital and core principle even in the modern democracy.

B.I.ii 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.

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.

B.II. Role of Indian Judiciary

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.

B.II.i. 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.

A. Supreme Court's 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.

Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute

(a) between the Government of India and one or more States; or

(b) between the Government of India and any State or States on one side and one or more other States on the other; or

(c) between two or more States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends: Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagements, and or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute.

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. This is popularly known as the 'Writ Jurisdiction' of the Court. Article 32 of the Constitution gives an extensive original jurisdiction to the Supreme Court in regard to enforcement of Fundamental Rights. It is empowered to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari to enforce them. 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.

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.

Appeal in Constitutional Matters: Under Article 132 (1) of the Constitution of India, an appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court whether in civil, criminal or other proceedings, if the High Court certifies under Article 134-A that the case involves a substantial question of law as to the interpretation of this Constitution.

Appeal in Civil cases: Article 133 provides that an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court only if High Court certifies under Article 134-A - (a) that the case involves a substantial question of law of general importance; and (b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.

Appeal in Criminal Cases: Article 134 provides that an appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court. This appeal can be in two ways: without a certificate of High Court and with a certificate of the High Court. An appeal lies without the certificate if the High Court: (i) has on appeal reversed an order of acquittal of an accused person and sentenced him to death. (ii) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death.

Special Leave to Appeal: Under certain special circumstances, an appeal may lie directly to the Supreme Court from any Court in India under Article 136 of the Constitution. This is Special Leave Petition or Special Leave to appeal. According to Article 136, an appeal can be made to the Supreme Court directly from any order, decision, decree, judgment, etc given by any court or tribunal in India. This power of the Supreme Court is discretionary and Hon'ble Court may or may not allow special leave to appeal to any person.

B. Advisory Jurisdiction

Supreme 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. Article 143 reads if at any time it appears to the President that - (a) a question of law or fact has arisen or is likely to arise and (b) the question is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he/she may refer the question for the advisory opinion of the Court and the Court may after such hearing as it thinks fit, report to the President its opinion thereon.

In re Kerala Education Bill case (1958), the Supreme Court laid down the following principles:(a) The Supreme Court has under clause (1) a discretion in the matter and in proper case and for good reason to refuse to express any opinion on the question submitted to it; (b) It is for the

President to decide what question should be referred to the Court and if he does not entertain any serious doubt on the other provisions it is not for any party to say that doubts arise also out of them; (c) The advisory opinion of the Supreme Court is not binding on courts because it not a law within meaning of Article 141.

But In re Special Court Bill case (1979), the Supreme Court held that its advisory jurisdiction are binding on all courts in the territory of India. It also held that the Supreme Court is under duty under Article 143 to give its advisory opinion if question referred to it are not vague and of a political nature.

C. Supreme Court as an activist:

The Supreme Court of India is considered the sentinel qui vie and protects the fundamental and constitutional rights of the people. There have been several instances where the Higher Courts have taken cognizance of any matter of social, political and economic importance on its own behest or on the basis of a letter or any submission before the court .

Public Interest Litigation: 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 called suo moto actions. 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 (JanhitYachika) (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 HussainaraKhatoon 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 focusing 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 democratizing 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 criticized for judicial over-reach and stepping into the shoes of legislature.

Public Interest Litigations- A powerful tool for judicial activism

Given below are a few of many instances where the PIL admitted by the Hon'able Supreme Court added a new dimension to the Indian judicial system.

GANGES POLLUTION CASE:

Three landmark judgments and a number of Orders against polluting industries numbering more than fifty thousand in the Ganga basin passed from time to time. A substantial success has been achieved by way of creating awareness and controlling pollution in the river Ganges. In this case, apart from industries, more than 250 towns and cities have been ordered to put sewage treatment plants.

Six hundred tanneries operating in highly congested residential area of Kolkata have been shifted out of the City and relocated in a planned Leather Complex in the State of West Bengal. A large number of industries were closed down by the Court and were allowed to reopen only after these industries set up effluent treatment plants and controlled pollution. As a result of these directions millions of people have been saved from the effects of air and water pollution in Ganga basin covering 8 states in India.

VEHICULAR POLLUTION CASE:

Against vehicular pollution in India the Supreme Court delivered a landmark judgment in 1992. A retired Judge of the Supreme Court was appointed along with three members to recommend measures for the nationwide control of vehicular pollution.

Orders for providing Lead free petrol in the country and for the use of natural gas and other mode of fuels for use in the vehicles in India have been passed and carried out. Lead-free petrol had been introduced in the four metropolitan cities from April 1995; all new cars registered from April 1995 onwards have been fitted with catalytic convertors; COG outlets have been set up to provide CNG as a clean fuel in Delhi and other cities in India apart from Euro 2 norms. As a result of this case, Delhi has become the first city in the world to have complete public transportation running on CNG.

Oleum Gas Leak Case

This is a landmark judgment in which the principle of Absolute Liability was laid down. The fertilizer plant was situated very close to human habitation and the court held that the carrying on of a hazardous industry in such proximity to population could not be permitted and the factory was relocated. The deep pocket principle was also laid down in the instant case. This judgment also ushered in a period of dramatic legislative progress in India. The Parliament added an entirely new chapter to the 1948 Factory Act, incorporating sections almost verbatim from the Judgment. The Public Liability Insurance Act was passed and the policy for the abatement of Pollution Control was established. Moreover, the Environment Protection Act was passed and the Policy for the Abatement of Pollution Control was established.

Supreme Court's Guidelines for Public Interest Litigation

No petition involving individual/ personal matter shall be entertained as a PIL matter except as indicated hereinafter.

Letter-petitions falling under the following categories alone will ordinarily be entertained as Public Interest Litigation:-

1. Bonded Labour matters.
2. Neglected Children.

3. Non-payment of minimum wages to workers and exploitation of casual workers and complaints of violation of Labour Laws (except in individual cases).
4. Petitions from jails complaining of harassment, for (pre-mature release) and seeking release after having completed 14 years in jail, death in jail, transfer, release on personal bond, speedy trial as a fundamental right.
5. Petitions against police for refusing to register a case, harassment by police and death in police custody.
6. Petitions against atrocities on women, in particular harassment of bride, brideburning, rape, murder, kidnapping etc.
7. Petitions complaining of harassment or torture of villagers by co- villagers or by police from persons belonging to Scheduled Caste and Scheduled Tribes and economically backward classes.
8. Petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture, antiques, forest and wild life and other matters of public importance.
9. Petitions from riot -victims.
10. Family Pension.

Cases falling under the following categories will not be entertained as Public Interest Litigation and these may be returned to the petitioners or filed in the PIL Cell, as the case may be:

(1) Landlord-Tenant matters.
(2) Service matter and those pertaining to Pension and Gratuity.
(3) Complaints against Central/ State Government Departments and Local Bodies except those relating to item Nos. (1) to (10) above.
(4) Admission to medical and other educational institution.
(5) Petitions for early hearing of cases pending in High Courts and Subordinate Courts.

In regard to the petitions concerning maintenance of wife, children and parents, the petitioners may be asked to file a Petition under sec. 125 of Cr. P.C. Or a Suit in the Court of competent jurisdiction and for that purpose to approach the nearest Legal Aid Committee for legal aid and advice.

Source: https://main.sci.gov.in/pdf/Guidelines/pilguidelines.pdf

'Suo moto' action: 'Suo motu' is a Latin term which means 'on its own motion'.

'Suo moto' power allows the Court to initiate legal action on their cognizance of a matter without any petition being filed, or interest being brought before them. Courts have initiated legal proceedings on their own based on media reports, telegrams and letters received by aggrieved people, taking a Suo Moto cognizance of the issue.

One of the most prominent forms of India's suo moto power is to punish for contempt of court under Article 129 of the Constitution of India and the Contempt of Courts Act 1971.

In 1994, a newspaper report on pollution in the Yamuna led the Court to take up the issue suo moto.

During Covid Pandemic, a 3- Judge bench of Hon'ble Supreme Court took suo motu cognisance of nonavailability of mid-day meals for children due to the closure of schools due to coronavirus spread and issued notices to all state governments and union territories. The Court noticed that non-supply of nutritional food to the children as well as lactating and nursing mothers may lead to large-scale malnourishment. Particularly, the children and the lactating and nursing mothers in rural as well as tribal area are prone to such mal-nourishment. Such mal-nutrition may affect their immunity system and as such, such children and lactating and nursing mothers would be more prone to catch the infection.

In order to take control of the situation, the Court, hence, issued directions to the competent authorities to do the needful.

The Court have increasingly used this power to intervene in instances of fundamental rights violations or to scrutinise government (in)action.

D. PROVISION OF LEGAL AID

If a person belongs to the poor section of the society having annual income of less than Rs. 18,000/- or belongs to Scheduled Caste or Scheduled Tribe, a victim of natural calamity, is a woman or a child or a mentally ill or otherwise disabled person or an industrial workman, or is in custody including custody in protective home, he/she is entitled to get free legal aid from the Supreme Court Legal Aid Committee. The aid so granted by the Committee includes cost of preparation of the matter and all applications connected therewith, in addition to providing an Advocate for preparing and arguing the case. Any person desirous of availing legal service through the Committee has to make an application to the Secretary and hand over all necessary documents concerning his case to it. The Committee after ascertaining the eligibility of the person provides necessary legal aid to him/her.

Persons belonging to middle income group i.e. with income above Rs. 18,000/- but under Rs. 1,20,000/- per annum are eligible to get legal aid from the Supreme Court Middle Income Group Society, on nominal payments.

E. AMICUS CURIAE- Amicus Curiae literally translated from Latin is "friend of the court".

If a petition is received from the jail or in any other criminal matter if the accused is unrepresented then an Advocate is appointed as amicus curiae by the Court to defend and argue the case of the accused. In civil matters also the Court can appoint an Advocate as amicus curiae if it thinks it necessary in case of an unrepresented party; the Court can also appoint amicus curiae in any matter of general public importance or in which the interest of the public at large is involved.

B.II.ii. High Courts and Lower Courts

The High Courts function as 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.

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.

LET US PONDER

What is a court of record?

A court whose judgments and proceedings are kept on permanent record and that has the power to impose penalties for contempt.

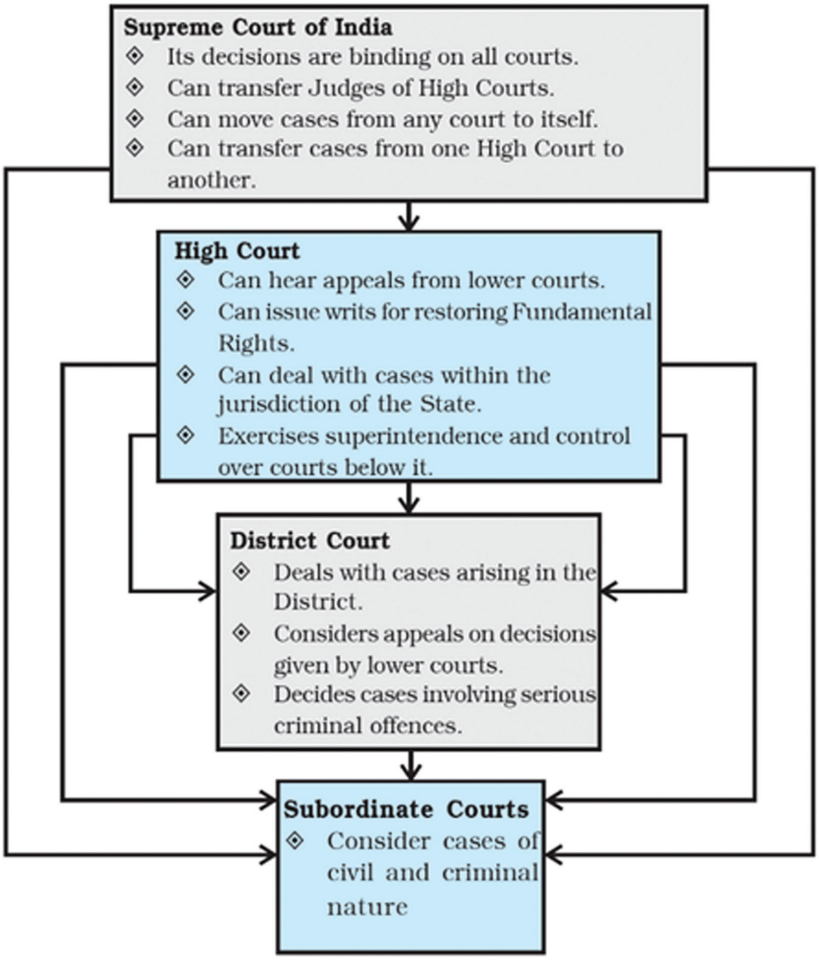
The Supreme Court and High Courts are called a court of record.

As a Court of Record, the Supreme Court has two powers:

- The judgements, proceedings and acts of the Supreme Court are recorded for perpetual memory and testimony. These records are admitted to be of evidentiary value and cannot be questioned when produced before any court. They are recognised as legal precedents and legal references.
- It has the power to punish for contempt of court, either with simple imprisonment for a term up to six months or with a fine or with both.

As a Court of Record, the High Court has two powers:

- The judgements, proceedings and acts of the High Courts are recorded for perpetual memory and testimony. These records are admitted to be of evidentiary value and cannot be questioned when produced before any subordinate court. They are recognised as legal precedents and legal references.
- It has the power to punish for contempt of court, either with simple imprisonment or with a fine, or with both.



Source: https://blog.ipleaders.in/judicial-system-in-india/

C. APPOINTMENTS, RETIREMENT AND REMOVAL OF JUDGES

C.I. 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 at least 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.

C.I.i. Current Practice in the Appointment of Judges

Despite a clear Constitutional mandate, the appointment of Judges in practice remains a complex process. 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.

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, noted that 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 emphasizing 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.

a. The Collegium System for Supreme Court Judges:

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.

b. The Collegium System for High Court Judges:

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.

Appointment of the Chief Justice of India: The Chief Justice of India is the senior-most judge of the Supreme Court . Seniority is determined on the basis of the date of their appointment to the Supreme Court & if two Judges are appointed to the Court on the same day, the Judge who takes the oath first is the Senior Judge.

Seniority principle in appointment of CJI: According to this principle, the senior-most Judge of the Supreme Court is appointed as the Chief Justice of India. The principle is an unwritten convention called the' seniority principle' in legal, academic and judicial parlance. It aims to safeguard the judiciary's independence from any sort of political interference.

The Constitution of India under Article 124(2), grants power to the President Of India to appoint in consultation with the outgoing chief justice, the next chief justice, who will serve until they reach the age of sixty-five or are removed by impeachment. As per convention, the name suggested by the incumbent chief justice is almost always the next senior most judge in the Supreme Court. The suggestion is forwarded by the Union Law Minister to the Prime Minister, who then advises the President.

Appointment of Chief Justice of High Courts: The Chief Justice of the High Court is appointed as per the policy of having Chief Justices from outside the respective States. The Collegium takes the call on the elevation. High Court judges are recommended by a Collegium comprising the CJI and two senior-most judges. The proposal, however, is initiated by the outgoing Chief Justice of the High Court concerned in consultation with two senior-most

colleagues. The recommendation is sent to the Chief Minister, who advises the Governor to send the proposal to the Union Law Minister.

C.II. RETIREMENT AND REMOVAL OF JUDGES IN INDIA:

C.II.i. 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 **Venkatachaliah Report (Report of the National Commission to review the working of the Constitution, 2002)** recommended that the retirement age of the Judges of the High Court **should be increased** to 65 years and that of the Judges of the Supreme Court should be increased to 68 years.
- The **Constitution (114th Amendment) Bill** was introduced in 2010 to increase the retirement age of High Court judges to 65. However, it was not taken up for consideration in Parliament and lapsed with the dissolution of the 15th Lok Sabha.

The Case in Western Democracies

- A **retirement age of around 70** for judges is commonplace in **most Western liberal democracies**. Some of them even opt for **tenures for life**. E.g.:
- In the Supreme Court of the **United States**, and in constitutional courts in **Austria and Greece**, judges are **appointed for life**.
- In Belgium, Denmark, Ireland, the Netherlands, Norway and Australia, the retirement age for **judges is 70 years**.

Rationale behind suggesting for the increasing the retirement age of Judges in India:

- The **judge-population ratio in India is among the lowest** in the world. It is also necessary to increase the number of judges in the pool to enable the judiciary to **deal with the enormous pendency of cases**.
- Moreover, legislations provide for retired High Court and Supreme Court judges to **man tribunals till the age of 70 as chairman and 65 as members**. There is no reason why these judges should be retired so early.
- One aspect which has not been factored in is that as the **Indian economy grows**, the ratio of litigation to population will increase exponentially. Advanced economies such as Australia, Canada, France, the U.S., the U.K., and Japan have much **higher litigation-to- population ratios**.
- 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.

Positive Consequences

- This will have significant benefits. Senior serving judges will bring with them **years of experience**.
- It will ensure the continued presence of a **strong talent pool of experienced judges**.

- New judges can be appointed without displacing existing judges.
- It will address the **problem of mounting arrears**.
- It will be a buffer against **impending litigation explosion**.
- It will render **post-retirement assignments unattractive** and, as a consequence, **strengthen the rule of law and the independence of the judiciary**, both of which are crucial to sustain democracy.

Way Forward

- India faces the **perennial issue of backlog of cases**. Increasing the age of Judges will certainly help in addressing this issue. The retirement age of judges of the Supreme Court and High Courts could be increased, but with the **option of quitting before reaching the age of superannuation -- a practice prevailing in Zimbabwe**, where a top court judge is appointed to retire at 65 years but can opt to continue till 70.
- Moreover, merely increasing the retirement age of the Judges is **not a solution for problems** in Indian Judiciary. Other issues like lack of transparency **(particularly in the appointment of judges), under trials of the accused, lack of information and interaction among people and courts must also be addressed.**

Fill in the blanks.

1. The Judges of the High Court are appointed by the ..... .

   (Governor/President/Prime Minister)

2. At present there are ..... High Courts in India. (20, 21, 18)
3. The retirement age of the Judges of a High Court is ..... years. (60, 65, 62)

C.II.ii. 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 the same for both the Supreme Court and the High Courts. Article 124(4) enshrines the guidelines for the removal of a sitting Supreme Court judge. The procedure for removal of the Supreme Court judge is guided by Article 124(4) of the Constitution of India and the Judges (Inquiry) Act, 1968. Article 218 of the Constitution of India provides for the impeachment of High Court judges.

The judges can be removed on two grounds, (i) Incapacity and (ii) Proven misbehaviour.

The procedure is explained below

Step 1. Notice of motion for removal of a judge

Removal proceedings against a Supreme Court or a High Court judge can be initiated in any of the houses of Parliament. For this:

1. A minimum of 100 members of Lok Sabha may give a signed notice to the speaker, or
2. A minimum of 50 members of Rajya Sabha may give a signed notice to the Chairman.

The speaker or chairman may consult individuals and examine relevant content related to notice and according to that, he or she may decide to either admit or refuse to admit it.

Step 2. Constitution of an Inquiry Committee

After the motion is admitted, the Speaker of the Lok Sabha or Chairman of the Rajya Sabha will form an Inquiry Committee as per Article 3(2) of the Judges (Inquiry) Act, 1968 to start investigating the

complaint. It will consist of the following members:

- A Supreme Court judge,
- A High Court Chief Justice, and
- A distinguished jurist, as per the opinion of the Speaker/Chairman.

If such notices have been admitted in both the Houses of Parliament, the Inquiry Committee will be formed together by the Speaker and the Chairman of the respective houses. In this scenario, the notice that has been on a later date will stand rejected. If such notices have been passed by both the Houses of Parliament on the same day, the Inquiry Committee will not be formed.

Step 3. Submission of the inquiry report

After concluding its investigation, the Inquiry Committee will put down its findings in a formal report and submit it to the Speaker or Chairman. If the report finds misbehaviour or incapacity which makes the judge guilty, the motion for removal has to be put to vote in both The Lok Sabha and Rajya Sabha. As per Article 124(4) of the Constitution, the motion is required to be adopted in each house by:

- A majority of the total membership of the House, and
- A majority of not less than two-thirds of members present and voting.

If the motion is adopted by this majority in one house, the motion will be sent to the other house.

Step 4. Order by the President

As per Article 124(4), after the motion is adopted in both the houses by the required majority, it is placed before the President of India, who will issue an order for the removal of the judge.

Removal of judges at District Level:

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.

Number of Times Impeachment Proceedings were Initiated against a SC or HC Judge

Impeachment proceedings against SC or HC judges initiated a total of 5 times in Indian history.

1. V. Ramaswami J was the first judge against whom impeachment proceedings were initiated. In 1993, the motion was brought up in Lok Sabha but failed to secure the required two-thirds majority.
2. Soumitra Sen J of the Calcutta High Court resigned in 2011 after the Rajya Sabha passed an impeachment motion against him. He was the first judge to have been impeached by the Upper House for misconduct.
3. In 2015, 58 members of the Rajya Sabha moved an impeachment notice against J.B. Pardiwala J of the Gujarat High Court for his "objectionable remarks on the issue of reservation."
4. In 2017, Rajya Sabha MPs moved a motion to initiate impeachment proceedings against C.V. Nagarjuna Reddy J of the High Court for Andhra Pradesh and Telangana.
5. In March 2018, opposition parties signed a draft proposal for moving an impeachment motion against Dipak Misra CJI.
6. Amidst charges of corruption, land-grab, and abuse of judicial office, P.D. Dinakaran J, Chief Justice of the Sikkim High Court, against whom the Rajya Sabha Chairman had set up a judicial panel to look into allegations of corruption, resigned in July 2011, before impeachment proceedings could be initiated against him.

D. Tribunals

What are Tribunals?

- Tribunals are semi-judicial bodies involved in dispute resolution. They function as semi or quasi-judicial bodies as they 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. They complement and supplement the role of courts in maintaining law and justice in the society.
- Tribunals were not part of the original constitution, it was incorporated in the Indian Constitution by 42nd Amendment Act, 1976. Article 323-A deals with Administrative Tribunals and Article 323-B deals with tribunals for other matters. 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.
- Under Article 323 B, the Parliament and the state legislatures are authorised to provide for the establishment of tribunals for the adjudication of disputes relating to the following matters:
  - Taxation
  - Foreign exchange and export
  - Industrial and labour disputes
  - Land reforms laws
  - Ceiling on urban property
  - Elections disputes of members of Parliament and State legislatures
  - Production, procurement, supply and distribution of food stuffs and essential goods
  - Rent and tenancy issues
- Articles 323 A and 323 B differ in the following three aspects:
  - While Article 323 A contemplates the establishment of tribunals for public service matters only, Article 323 B contemplates the establishment of tribunals for certain other matters (mentioned above).
  - While tribunals under Article 323 A can be established only by Parliament, tribunals under Article 323 B can be established both by Parliament and State legislatures with respect to matters falling within their legislative competence.
- 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 [IT 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.
- 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.

Did you know?

There are 19 Benches and 19 Circuit Benches in the Central Administrative Tribunal all over India. The Government of India has notified 215 organizations including Ministries and Departments of Central Government, under section 14 (2) of the Administrative Tribunals Act, 1985 to bring them within the jurisdiction of the Central Administrative Tribunal, from time to time. In addition, the Central Administrative Tribunal, Principal Bench is dealing with the matters of Govt. of National Capital Territory of Delhi.

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://wwwarchive.irzdiagoo.irz/krzowirzdia/profilephp ?id=36

E. COURTS AND JUDICIAL REVIEW

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. Courts have judicial review powers to declare any law as unconstitutional if it is enacted by breaching the demarcation.

This concept dates back to 1800 and the Landmark case of Madison V Marbury , Justice Willaims applied this principle for the first time and later became one of the most important judicial principles.

Madison V Marbury

Facts of the case

Thomas Jefferson defeated John Adams in the 1800 presidential election. Before Jefferson took office on March 4, 1801, Adams and Congress passed the Judiciary Act of 1801, which created new courts, added judges, and gave the president more control over appointment of judges. The Act was essentially an attempt by Adams and his party to frustrate his successor, as he used the act to appoint 16 new circuit judges and 42 new justices of the peace. The appointees were approved by the Senate, but they would not be valid until their commissions were delivered by the Secretary of State.

William Marbury had been appointed Justice of the Peace in the District of Columbia, but his commission was not delivered. Marbury petitioned the Supreme Court to compel the new Secretary of State, James Madison, to deliver the documents. Marbury, joined by three other similarly situated appointees, petitioned for a writ of mandamus compelling the delivery of the commissions.

Question

1. Do the plaintiffs have a right to receive their commissions?

2. Can they sue for their commissions in court?

3. Does the Supreme Court have the authority to order the delivery of their commissions?

Conclusion

The Court found that Madison's refusal to deliver the commission was illegal, but did not order Madison to hand over Marbury's commission via writ of mandamus. Instead, the Court held that the provision of the Judiciary Act of 1789 enabling Marbury to bring his claim to the Supreme Court was itself unconstitutional, since it purported to extend the Court's original jurisdiction beyond that which Article III, Section 2, established.

Marshall expanded that a writ of mandamus was the proper way to seek a remedy, but concluded the Court could not issue it. Marshall reasoned that the Judiciary Act of 1789 conflicted with the Constitution. Congress did not have power to modify the Constitution through regular legislation because Supremacy Clause places the Constitution before the laws.

In so holding, Marshall established the principle of judicial review, i.e., the power to declare a law unconstitutional.

Source: https://www.oyez.org/cases/1789-1850/5us137

Meaning: 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.

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. 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.

E.1 Doctrine of Basic Structure

The doctrine of Basic Structure is an evolution of judiciary and has been regarded as an important element of Judicial review.

Basic Structure 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. This concept was introduced by judiciary in order to tide over the spate of amendments which were eroding into the basic elements of the Indian constitution. This doctrine comes into play when it is felt that the executive and legislature transgress the boundary defined by the Constitution underlying the spirit of separation of powers.

E.1.(i) Evolution of the Basic Structure Concept

The concept of the basic structure of the constitution evolved over time. We shall discuss the evolution of the concept with the help of some landmark judgement related to this doctrine.

Shankari Prasad Case (1951)

- In this case, the SC contended that the Parliament's power of amending the Constitution under Article 368 included the power to amend the Fundamental Rights guaranteed in Part III as well.

Golaknath case (1967)

- In this case, the court reversed its earlier stance that the Fundamental Rights can be amended.
- It said that Fundamental Rights are not amenable to the Parliamentary restriction as stated in Article 13 and that to amend the Fundamental rights a new Constituent Assembly would be required.
- Also stated that Article 368 gives the procedure to amend the Constitution but does not confer on Parliament the power to amend the Constitution. This case conferred upon Fundamental Rights a 'transcendental position'.
- The majority judgement called upon the concept of implied limitations on the power of the Parliament to amend the Constitution. As per this view, the Constitution gives a place of permanence to the fundamental freedoms of the citizens.
- In giving to themselves the Constitution, the people had reserved these rights for themselves.

Kesavananda Bharati case (1973)

- This was a landmark case in defining the concept of the basic structure doctrine.
- The SC held that although no part of the Constitution, including Fundamental Rights, was beyond the Parliament's amending power, the "basic structure of the Constitution could not be abrogated even by a constitutional amendment."
- The judgement implied that the parliament can only amend the constitution and not rewrite it. The power to amend is not a power to destroy.
- This is the basis in Indian law in which the judiciary can strike down any amendment passed by Parliament that is in conflict with the basic structure of the Constitution.

Indira Nehru Gandhi v. Raj Narain case (1975)

- Here, the SC applied the theory of basic structure and struck down Clause(4) of Article 329-A, which was inserted by the 39th Amendment in 1975 on the grounds that it was beyond the Parliament's amending power as it destroyed the Constitution's basic features.
- The 39th Amendment Act was passed by the Parliament during the Emergency Period. This Act placed the election of the President, the Vice President, the Prime Minister and the Speaker of the Lok Sabha beyond the scrutiny of the judiciary.
- The 39th Amendment was upheld by four of the five judges on the bench, but only after they overturned the portion of the amendment that aimed to limit the judiciary's ability to rule in the present election dispute.

Minerva Mills case (1980)

- This case again strengthens the Basic Structure doctrine. The judgement struck down 2 changes made to the Constitution by the 42nd Amendment Act 1976, declaring them to be violative of the basic structure.
- The judgement makes it clear that the Constitution, and not the Parliament is supreme.
- In this case, the Court added two features to the list of basic structure features. They were: judicial review and balance between Fundamental Rights and DPSP.
- The judges ruled that a **limited amending power** itself is a basic feature of the Constitution.

Indra Sawhney and Union of India (1992)

- SC examined the scope and extent of Article 16(4), which provides for the reservation of jobs in favour of backward classes. It upheld the constitutional validity of 27% reservation for the OBCs with certain conditions (like creamy layer exclusion, no reservation in promotion, total reserved quota should not exceed 50%, etc.)
- Here, 'Rule of Law' was added to the list of basic features of the constitution.

S.R. Bommai case (1994)

- In this judgement, the SC tried to curb the blatant misuse of Article 356 (regarding the imposition of President's Rule on states).
- In this case, there was no question of constitutional amendment but even so, the concept of basic doctrine was applied.
- The Supreme Court held that policies of a state government directed against an element of the basic structure of the Constitution would be a valid ground for the exercise of the central power under Article 356.

It can be concluded that the Supreme Court's judgments frequently mention the sovereign, democratic, and secular nature of the rule of law, the judiciary's independence, fundamental rights of citizens, etc. as crucial components of the Constitution. One certainty that emerged out of this tussle between Parliament and the Judiciary is that all legislations and constitutional amendments are now subject to judicial review, and laws that violate the fundamental framework are likely to be overturned by the Supreme Court. In essence, Parliament's ability to alter the Constitution is limited, and all constitutional amendments are ultimately decided upon, scrutinised and interpreted by the Supreme Court.

Thus, after the decisions of the Supreme Court in Kesavananda Bharati case, Indira Gandhi Election case and Minerva Mills case, it can be concluded that the Parliament's power to amend the Constitution is limited and in the exercise of its constituent power, the Parliament cannot violate the Basic Structure of the Constitution.

E.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. 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.

1. 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.

2. 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.

3. 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 conclude,

Judiciary in India enjoys a very significant position since it has been made the guardian and custodian of the Constitution. It not only is a watchdog against violation of fundamental rights guaranteed under the Constitution and thus insulates all persons, Indians and aliens alike, against discrimination, abuse of State power, arbitrariness etc. but borrowing the words of one of the founding fathers of the American Constitution, James Medison, "I would say that the Judiciary in India is truly the only defensive armour of the country and its constitution and laws. If this armour were to be stripped of its onerous functions it would mean, the door is wide open for nullification, anarchy and convulsion".

Exercise

1. Besides being an adjudicator and an interpreter, the Supreme Court performs another function under Article 143 of the Indian Constitution. Identify and explain this function of the Supreme Court of India.
2. The power of Judicial Review is available to the Supreme Court and High Courts of States in the matters of both administrative and legislative actions. How far has the Judicial Review principle been successful in ensuring the fairness in executive actions? Discuss by referring to a decided case law.
3. Can 'Impeachment' proceedings be initiated against this sitting judge? If yes, Explain the grounds and procedure for 'Impeachment'. How many times has this process been successful in the history of Indian Judiciary?
4. What are Tribunals? How do they play an instrumental role in rendering more effective dispute resolution mechanism?
5. Elucidate on the current practice for the appoint of members of Higher Judiciary in India.
6. List any 2 constitutional offices endowed with the function to advice and represent the government on legal matters.

Supplementary Reading Material

Case 1: HUSSAINARA KHATOON VS STATE OF BIHAR

BACKGROUND

A well- known landmark judgement case which gave wider interpretation of Article 21 and held that speedy trial is that the fundamental right of every citizen. This landmark case emphasized upon speedy trial and free legal aid for the effective administration of justice and equality among the citizens. Article 21 of the Indian Constitution states that "no person shall be bereft of his life and personal liberty except according to the procedure established by law". within the absence of speedy trial, justice can't be administered.

FACTS OF THE CASE

A writ petition habeas corpus was filed before the court under Article 32 of the Indian Constitution. This writ petition was also filed before the court. because it was for the release of 17 under trial prisoners. It depicted a sorrowful picture of the administration of justice within the state of Bihar. an outsized number of persons which even included mainly the categories like women, children, and other deprived categories of poor section and that they all were locked behind the bars and were seeking for the trial as well as their release. Thus, the State of Bihar was advised to file a revised chart which was focused in clearly mentions the year- wise break- from the under- trial prisoners after segregating the prisoners into two categories that is ones charged with minor offences and others who have been charged with major offences, but although this direction was not carried by the state. The petition acknowledged that the under- trial prisoners who have done minor offences as they were imprisoned for quite 10 years. Those people were considered to the poorest strata who weren't even able to afford an advocate and also, they were refused to grant bail.

ISSUES RAISED ARE

The issues raised in this case were:

1. Whether the supply of free legal aid be enforced by law?
2. Whether right to speedy trial come within the ambit of Article 21?
3. what's the essence of speedy trial under criminal justice?

PROVISIONS

- Article 21, of the Indian Constitution
- Article 39A, of the Indian Constitution

CONTENTIONS OF COUNSELS OF BOTH THE PARTIES

In the counter- affidavit the respondents submitted that many under trial prisoners, petitioners etc. herein confined within the Patna Central Jail, Muzaffarpur Central Jail and Ranchi Central Jail as they need been produced before the Magistrate and were given judicial custody again and again. However, the honorable court didn't find this averment to be true on the respondents who were not able to produce or present those dates on which these under- trial prisoners who were made to be remanded. To justify the increasing number of pending cases, many arguments and counter questions were raised before the honorable court. Respondents contended that it mainly occurred due to the happening of delay in receipt of opinions from the experts. There occurs delay in receipt of opinions from the experts. The court rejected this contention because State can always introduce and amend new and best alternative methods for the effective administration of justice. the opposite reason of their contention was their poverty, due to that they could not even seek for their bail, just like the rich men in the society. However, the honorable court rejected the contentions on the grounds that State can employ alternative methods for the identical .

JUDGEMENT

The court observed the above case and also directed that the under -trial prisoners whose name and

particulars were filed by Mrs. Hingorani should be released. it had been because imprisonment like false imprisonment were considered to be an illegal and also violative of their Fundamental Rights enshrined under Article 21 of the Indian Constitution. The court also mandated that in the time of charging bailable offences, they need to be produced before the Magistrate on remand dates. The government ought to name a legal advisor at their own expenses for making an application for bail. a quick trial is much required for securing justice. The court also ordered both the government as well as High Court to display the particulars regarding the location of the courts of magistrate and court of sessions in the State of Bihar along with the cases pending in each court on 31st December, 1978. They were also asked to state the rationale of pendency of cases. On next remand dates the under- trial prisoners should be produced before the court in order that the state government must ought to designate a lawyer of its own expense. The state cannot avoid its constitutional obligation to supply speedy trial to the accused by the way of pleading. Free legal service to the poor and therefore the needy people is an essential elementary factor of legal aid. Another direction by the honorable court was to supply the under- trial prisoners charged with bailable offences, free legal aid by the state, on their next remanded dates before the Magistrates. The court further observed that detaining them for any long would be illegal and is clearly against the elemental rights under Article 21 as these prisoners are behind the bars. Although nowadays human rights are being demanded for everyone in this world but are these under- trial prisoners not to be protected from such harm or even torture, in fact they too are human rights hence their rights must not be denied. Equal access to justice must be central point which has to be given due recognition.

RATIONALE BEHIND THE JUDGEMENT

As per Article 21 of the Indian Constitution states that "no person shall be bereft of his life or liberty except in accordance with the procedure established by law which ought to be reasonable, fair and just". Here the State cannot deny the constitutional rights even all the humans do have their own human rights to be preserved. Article 39A may be a constitutional directive that stress upon free legal service. it's depicted as an inalienable element regarding reasonable, just and fair procedure. within the absence of, it'll result in denial of justice among the poor sections of the society.

The court realized the plight of under- trial prisoners whose denial of rights. Court gave stress upon unable to interact a lawyer and disregarding human rights were the main issues which have focused and also to be solved. The court realized the denial and disregarding nature of private liberty. The court also found that the under - trial prisoners of whose list which was filed before the court, they need been in jail for a longer period. Even the period of time was too long enough than the prescribed time range that they could have been sentenced to jail if convicted.

The court recommend the State also as Central Government, by directing them to list out the entire number of cases, location of courts of magistrates and courts of session. Mainly the Articles include Article 14, Article 39A and Article 21. Honorable Supreme Court of India held that the State cannot deny the constitutional right of speedy trial and equal access to justice shouldn't be denied on any grounds. This, case motivated various lawyers to boost their voice against the denial of rights which are fundamental in nature.

CASE ANALYSIS

As per Article 21 speedy trial is taken into account as fundamental right and basic right. although the Article 3 of European Convention on Human Rights also provides that a person arrested and detained shall be entitled to a trial within a reasonable period. Speedy trial is constitutionally guaranteed right when it involves United States also. Just locking them behind the bar wouldn't serve justice. during this current scenario human rights have to be given primarily importance. But the rights available to prisoners are denied, it must even be ensured at right time. By the way of amendment procedures and also mentioning of an effective judiciary, justice are often served at the utmost level.

CONCLUSION

Justice served for several under- trial prisoners and who were released after this judgement. Even the importance of Public Interest Litigation (PIL) was also highlighted and got priority. Lawyers, scholars and other legal authorities expanded the scope of PIL. Voices were raised against the deprived categories of the society. it's very much possible that these prisoners may be acquitted or be imprisoned for a lesser time period but all this is only possible if they are subjected to free legal

aid. Just locking them behind the bars would no serve any justice to them. These prisoners too are humans and now the govt as well as judiciary should realize and recognize their rights. Hence the petitions served their purposes and stand disposed of leaving the further implementations to the supreme court.

Source: https://articles.manupatra.com/article-details/HUSSAINARA-KHATOON-V-Home-Secretary-STATE-OF-BIHAR

Case 2: MANEKA GANDHI V UNION OF INDIA

Case Summary – Maneka Gandhi (Petitioners) V Union of India (Respondents)

The landmark ruling in Maneka Gandhi versus Union of India, which stands as a bulwark of the Right of Personal Liberty granted by Article 21 of the Constitution, started when the passport of the petitioner in this case, was impounded by the authorities under the provisions of the Passport Act. This arbitrary act of impounding the passport eventually led to the pronouncement of a unanimous decision by a seven-judge bench of the apex court comprising M.H. Beg (CJI), Y.V. Chandrachud, V.R. Krishna Iyer, P.N. Bhagwati, N.L. Untwalia, S. Murtaza Fazal Ali and P.S Kailasam.

Brief Facts

The petitioner Maneka Gandhi's passport was issued on 1st June 1976 as per the Passport Act of 1967. On 2nd July 1977, the Regional Passport Office (New Delhi) ordered her to surrender her passport. The petitioner was also not given any reason for this arbitrary and unilateral decision of the External Affairs Ministry, citing public interest.

The petitioner approached the Supreme Court by invoking its writ jurisdiction and contending that the State's act of impounding her passport was a direct assault on her Right of Personal Liberty as guaranteed by Article 21. It is pertinent to mention that the Supreme Court in Satwant Singh Sawhney v. Ramarathnam held that right to travel abroad is well within the ambit of Article 21, although the extent to which the Passport Act diluted this particular right was unclear.

Issues Before the Court

- Are the provisions under Articles 21, 14 and 19 connected with each other or are they mutually exclusive?
- Should the procedure established by law be tested for reasonability which in this case was the procedure laid down by the Passport Act of 1967?
- If the right to travel outside the country is a part of Article 21 or not?
- Is a legislative law that snatches away the right to life reasonable?

Arguments of the petitioners:

- Through the administrative order that seized the passport on 4th July 1977, the State has infringed upon the Petitioner's Fundamental Rights of freedom of speech & expression, right to life & personal liberty, right to travel abroad and the right to freedom of movement.
- The provisions given in Articles 14, 19 & 21 should be read together and aren't mutually exclusive. Only a cumulative reading and subsequent interpretation will lead to the observance of principles of natural justice and the true spirit of constitutionalism.
- India might not have adopted the American concept of the "due process of law", nevertheless, the procedure established by law should be fair and just, reasonable, and not be arbitrary.
- Section 10(3)(c) of the Passport Act violates Article 21 insofar as it violates the right to life & personal liberty guaranteed by this Article.
- Audi Altrem Partem i.e. the opportunity of being heard is invariably acknowledged as a vital component of the principles of natural justice. Even if these principles of natural justice are not expressly mentioned in any of the provisions of the Constitution, the idea behind the spirit of

Fundamental Rights embodies the very crux of these principles.

Contentions of the respondents:

- The respondent stated before the court that the passport was confiscated since the petitioner had to appear before a government committee for a hearing.
- The respondent asserted that the word 'law' under Article 21 can't be understood as reflected in the fundamental rules of natural justice, emphasising the principle laid down in the A K Gopalan case.
- Article 21 contains the phrase "procedure established by law" & such procedure does not have to pass the test of reasonability and need not necessarily be in consonance with the Articles 14 & 19.
- The framers of our Constitution had long debates on the American "due process of law" versus the British "procedure established by law". The marked absence of the due process of law from the provisions of the Indian Constitution clearly indicates the constitution-makers' intentions.

Judgement

This immensely important judgment was delivered on 25th January 1978 and it altered the landscape of the Indian Constitution. This judgment widened Article 21's scope immensely and it realized the goal of making India a welfare state, as assured in the Preamble. The unanimous judgement was given by a 7-judge bench.

The Supreme Court held that the scope of personal liberty given under Article 21 of the Constitution of India is very wide. The right to travel abroad comes with the definition of personal liberty given under Article 21.

However, the court agreed that impounding the passport by the passport authorities under section 10(3) of the Passport Act is not unconstitutional because the passport authority has the power to grant suspension and cancel the passport, which can be important for national security.

But, here, in this case, Maneka Gandhi was not given an opportunity of being heard, and no valid reasons for impounding her passport were given to her by the passport authority. The maxim of **Audi Alteram Partem**, which means **let the other side be heard**, was not followed in this case. Maneka Gandhi was allowed 'post decisional hearing'.

Moreover, the Supreme Court stated that Article 14 (Right to Equality), Article 19 (Right to Freedom) and Article 21 (Right to Life and Personal Liberty) form the Golden Triangle of the Constitution. At any time, if a law deprives a person of his personal liberty, it has to meet the criteria as specified in Article 14 and Article 19. Therefore, the passport authority can impound the passport of any citizen only after giving valid reasons for the same.

Effects of the Maneka Gandhi Judgement

After this judgement, the doctrine of **'post decisional theory'** was evolved.

The court also ruled that the mere existence of law is not enough. Such law should also be just, fair and reasonable. So, a liberal interpretation given by the court for Article 21 results in making **"procedure established by law"** along with **"due process of law."**

"Procedure established by law" means that any law made by the legislature or any such body will be valid only if the correct procedure has been followed while making the law. "Due process of law" means that a government must protect and respect the legal rights of an individual.

(Adapted from: India Kanoon; Writinglaw.com; Legalservicesinid.com)

Unit 2

ALTERNATIVE DISPUTE RESOLUTION IN INDIA (ADR)

केन्द्रीय माध्यमिक शिक्षा बोर्ड
भारत
असतो मा सद्गमय

UNIT 2

Alternative Dispute Resolution in India (ADR)

Learning Outcomes

Students will be able to:

- Analyze and compare the adversarial and inquisitorial systems of justice dispensation
- Explain the meaning and scope of ADR
- Evaluate the benefits of ADR
- Identify and explain the various types of ADR- Arbitration, Mediation, Conciliation, Lok Adalat and Tribunals
- Evaluate and explain the role of various Ombudsman- CVC, Lokpal and Lokayukta, Banking Ombudsman and Insurance Ombudsman

I. 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 proactive 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 evidence 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 evidence 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.

II. Advantages and Disadvantages of Adversarial and Inquisitorial System

The main advantages of an adversarial system include:

i. The use of cross-examination can be an effective way to test the credibility of witnesses presented;

ii. 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:

i. 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 evidence 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.

ii. The role of lawyers and the procedural formalities, e. g. cross examination may prolong the trial and lead to delays in several matters.

iii. Judges play a less active role; a judge is not duty bound to ascertain the truth but only to evaluate the matter based on the evidence 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.

The main advantages of an inquisitorial system include:

i. The system offers procedural efficiency as the active role of judges prevents delays and prolonged trials.

ii. 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:

i. 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.

ii. 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.

III. Introduction to Alternative Dispute Resolution

Meaning and Scope:

Alternative Dispute Resolution (ADR) is an attempt to devise a machinery which should be capable of providing an alternative to the conventional methods of resolving disputes in the court system. ADR 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, the 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.

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-O02

Alternative Dispute Resolution (ADR) which at one point of time was considered a voluntary action on the part of the parties has now obtained statutory recognition with the enactment of Arbitration and Conciliation Act, 1996 and The Legal Services Authority Act, 1987. The incorporation of ADR mechanisms under Section 89 of Code of Civil Procedure,1908 is one more radical step taken by legislature for promoting ADR in India.

Section 89 CPC - Settlement of disputes outside the Court

(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for: --

(a) arbitration;

(b) conciliation;

(c) judicial settlement including settlement through Lok Adalat: or

(d) mediation.

The purpose of this section is to enable the Courts to legally refer the matters to ADR to dispose of the cases expediently and to reduce the backlog.

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.

IV. Problems faced by Courts

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.

V. Benefits of ADR

The ADR techniques are a speedier, informal and cheaper mode of dispensing justice when compared to the conventional judicial procedure. Following are the benefits of ADR:

- It is less time consuming as people resolve their disputes expeditiously in a short period as compared to courts.
- It is less costly than litigation.
- It is free from technicalities of courts as informal ways are applied in resolving disputes.
- It can be used at any time, even when a case is pending before a court of law, though recourse to ADR as soon as the dispute arises may confer maximum advantages on the parties.
- It provides a more convenient forum to the parties who can choose the time, place and procedure for conducting the preferred dispute redressal process.
- 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 based on more direct participation by the disputants rather than being run by lawyers and Judges. This type of involvement is believed to increase people's satisfaction with the outcome as well as their compliance with the settlement reached.

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.

VI. Types of ADR

A. ARBITRATION

A.1 Introduction

The law relating to arbitration is contained in the Arbitration and Conciliation Act, 1996. It came into force on the 25th day of January, 1996. But it goes much beyond the scope of its predecessor, the Arbitration Act of 1940. It provides for domestic arbitration, international commercial arbitration and also enforcement of foreign arbitral awards. It also contains the new feature on conciliation.Recently, the Arbitration and Conciliation Amendment Act, 2015 has come into force to meet the requirements of alternative resolutions.

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 the Conciliation Act of 1996 is similarly modelled on the UNCITRAL model law.

A.2 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.

A.3 Process of Arbitration

STEP 1 : **NOTICE - the party aggrieved will send a notice to the defaulting party initiating arbitration.**

STEP 2 : **Choose an Arbitrator -** The parties in an arbitration have the freedom to select a qualified expert known as an arbitrator.

- **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.

STEP 3 : **Statement of CLAIM -** The initial documents filed by the claimants enlisting the issues raised to be resolved in an arbitration.

STEP 4 : **Statement of COUNTER-CLAIM -** Respondent's reply to the claim presented by the claimant.

STEP 5 : **Proceedings start (decide the place and time to meet)**

- 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.

STEP 6 : **AWARD**

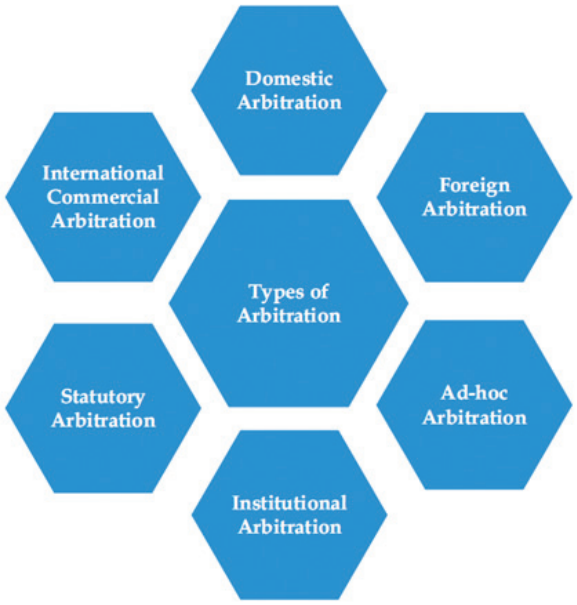
- The decision rendered by an arbitrator is known as an arbitral award.
- Similar to a judgment given by a judge, the arbitral award is binding on the disputing parties. Once an arbitral award is rendered, it is recognised and enforced (given effect to) akin to a court pronounced judgment or order.
- 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.

A.3.1 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.

A.4 Types of Arbitration



- **Domestic Arbitration** - The arbitration in which the arbitral proceedings are held in India and both the parties to the dispute also belong to India and the dispute is decided in accordance with the substantive and procedural laws of India.
- **Foreign Arbitration** - An arbitration where arbitral proceedings are conducted in a place outside India but the arbitral 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. Ad Hoc Arbitration means that the arbitration should not be conducted according to the rules of an arbitral institution. Since, parties do not have an obligation to submit their arbitration to the rules of an arbitral institution; they are free to state their own rules of procedure.
- **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** - This type of arbitration emanates from an enactment of the Parliament or State Legislature. In such a case parties have no option as such but to abide by the law of the land. The consent of parties is not necessary and is a compulsory form of arbitration. 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.

Bharat Aluminum Company Limited ("BALCO") V/s. Kaiser Aluminum Technical Service, Inc. ("Kaiser") (2012 SC)

In Bhatia International v Bulk Trading S.A & Anr. ("Bhatia International") (2002), the Supreme Court had held that Part I of the Arbitration and Conciliation Act, 1996 ("Act") setting out the procedures, award, interim relief and appeal provisions with respect to an arbitration award, would apply to all arbitrations held out of India, unless the parties by agreement, express or implied, exclude all or any of its provisions. The Supreme Court set aside the doctrine in Balco V. Kaiser.

Brief Facts

1. An agreement dated 22 April, 1993 ("Agreement") was executed between BALCO and Kaiser, under which Kaiser was to supply and install a computer based system at BALCO's premises.
2. As per the arbitration clause in the Agreement, any dispute under the Agreement would be settled in accordance with the English Arbitration Law and the venue of the proceedings would be London. The Agreement further stated that the governing law with respect to the Agreement was Indian law; however, arbitration proceedings were to be governed and conducted in accordance with English Law.
3. Disputes arose and were duly referred to arbitration in England. The arbitral tribunal passed two awards in England which were sought to be challenged in India u/s. 34 of the Act in the district court at Bilaspur. Successive orders of the district court and the High Court of Chhattisgarh rejected the appeals. Therefore, BALCO appealed to the Supreme Court ("Court").
4. Another significant issue to be adjudged was applicability of section 9 (interim measures) of the Act.
5. During the pendency of arbitration proceedings in London, an injunction application was made by appellants, Bharti Shipyard Ltd., before the District Judge at Mangalore, against the encashment of refund bank guarantees issued under the contract (u/s 9 of the Act). The applications were allowed and were consequently challenged in the High Court of Bangalore. The Bangalore High Court set aside the application so allowed on the

grounds that the appellants had an alternative remedy (u/s 44 of the Act, being interim reliefs for international arbitration) in the courts of London and further since the substantive law governing the contract, as well as the arbitration agreement, is English law, the English courts should be approached. This was also challenged in this petition to the Supreme Court.

Held:

The judgment in detail analyses the provisions of various sections in the Act and applicability of Part I of the Act to international commercial arbitrations. Some significant issues dealt with in the judgment are as follows:

1. It was observed that the object of section 2(7) of the Act is to distinguish the domestic award (Part I of the Act) from the 'foreign award' (Part II of the Act)
2. It was held that there is a clear distinction between Part I and Part II as being applicable in completely different fields and with no overlapping provisions.
3. The Court has also drawn a distinction between a 'seat' and 'venue' which would be quite crucial in the event, the arbitration agreement designates a foreign country as the 'seat'/ 'place' of the arbitration and also select the Act as the curial law/ law governing the arbitration proceedings. The Court further clarified that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings. It would, therefore, follow that if the arbitration agreement is found or held to provide for a seat / place of arbitration outside India, then even if the contract specifies that the Act shall govern the arbitration proceedings, Part I of the Act would not be applicable or shall not enable Indian courts to exercise supervisory jurisdiction over the arbitration or the award. Therefore, it can be inferred that Part I applies only to arbitrations having their seat / place in India.
4. The Court dissented with the observations made in Bhatia International case and further observed on a logical construction of the Act, that the Indian Courts do not have the power to grant interim measures when the seat of arbitration is outside India.
5. The Court further held that in foreign related international commercial arbitration, no application for interim relief will be maintainable in India, either by arbitration or by filing a suit.

Conclusion of the Balco case:

The Court in this case also drew a distinction between a 'seat' and 'venue'. The arbitration agreement designates a foreign country as the seat/place of the arbitration and also selects the Act as the law governing the arbitration proceedings. The Court also clarified that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings. Therefore, it can be understood that Part I applies only to arbitrations having their seat / place in India.

However ,the 2015 Amendment Act has compensated for some of the shortcomings in BALCO by adding a provision to S.2(2) of the Act which laid down that the provision for interim relief by the court (S.9) shall be applicable to even foreign seated arbitrations.

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'.

In *Konkan Railways Corp. Ltd. v. M/s Mehul Construction Co. (2000) 7 SCC 201*), the Hon'ble Supreme Court has emphasised that the increasing growth of global trade and the delay in disposal of cases in Courts under the normal system in several countries made it imperative to have the perception of an Alternative Dispute Resolution System, more particularly, in the matter of commercial disputes. When the entire world was moving in favour of a speedy resolution of commercial disputes, the United Nations Commission on International Trade Law way back in 1985 adopted the UNCITRAL Model Law of International Commercial Arbitration and since then, a number of countries have given recognition to that Model in their respective legislative system. With the said UNCITRAL Model Law in view the present Arbitration and Conciliation Act of 1996 has been enacted in India. The Arbitration Act of 1996 provides not only for domestic arbitration but spreads its sweep to International Commercial Arbitration too. All these aim at achieving the sole object to resolve the dispute as expeditiously as possible with the minimum intervention of a Court of Law so that the trade and commerce is not affected on account of litigations before a court. With that objective when the UNCITRAL Model has been prepared and the Parliament in our country enacted the Arbitration and Conciliation Act of 1996 adopting UNCITRAL, it would be appropriate to bear the said objective in mind while interpreting any provision of the Act.

In **Fuerst Day Lawson Ltd v Jindal exports Ltd, (AIR 2001 SC)** the Supreme Court observed that the object of the Arbitration and Conciliation Act of 1996 is to provide speedy and alternative solution to the dispute and avoid protraction of litigation. The provisions of the Act have to be interpreted accordingly.

B. MEDIATION

B.1 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.

B.2 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). Pre Litigation mediation is not yet governed by any law in India.

(ii) Parties may agree to mediate, at the beginning of formal court proceedings (popularly known as court referrals). This is governed by Section 89 of the Code of Civil Procedure.

(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 home owner '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 creating 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?

C. CONCILIATION

C.1 Concept

- Part III of the Arbitration and Conciliation Act, 1996 deals with conciliation. Conciliation means "the settling of disputes without litigation".
- Conciliation is a process by which discussion between parties is kept going through the participation of a conciliator.
- 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 a 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.
- If the parties reach agreement on the settlement of a dispute, a written settlement agreement will be drawn up and signed by the parties. If the parties request, the conciliator may draw up or assist the parties in drawing up the settlement agreement. [Section 73(2) of the Arbitration and Conciliation Act, 1996].
- When the parties have signed the settlement agreement, it becomes final and binding on the parties and persons claiming under them respectively. [Section 73(3) of the Act].
- The settlement agreement shall have the same status and effect as an arbitral award. This means it shall be treated as a decree of the court and shall be enforceable as such. *[Haresh Dayaram Thakur v. State of Maharashtra (AIR 2000 SC 2281]*

- Conciliation is also 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. 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.

D. 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 compoundable criminal disputes. The salient features of Lok Adalat are participation, accommodation, fairness, voluntariness, neighbourliness, transparency, efficiency and lack of animosity.

D.1 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 Adalat's 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.

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 hearts. 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

An indigenous Swedish, Danish and Norwegian term, Ombudsman is etymologically rooted in the word "umboosrnaor", 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.

About Banking and Insurance Ombudsman

- What is the Banking Ombudsman Scheme?

  The Banking Ombudsman Scheme is an expeditious and inexpensive forum for bank customers for resolution of complaints relating to certain services rendered by banks. Presently the Banking Ombudsman Scheme 2006 (As amended up to July 1, 2017) is in operation.

- Who is a Banking Ombudsman?

  The Banking Ombudsman is a senior official appointed by the Reserve Bank of India to redress customer complaints against deficiency in certain banking services covered under the grounds of complaint specified under the Banking Ombudsman Scheme 2006 (As amended up to July 1, 2017).

- Who is an Insurance Ombudsman?

  The Insurance Ombudsman are appointed by the Council for Insurance Ombudsman in terms of Insurance Ombudsman Rules, 2017 (as amended from time to time) and

empowered to receive and consider complaints alleging deficiency in performance required of an insurer (including its agents and intermediaries) or an insurance broker,

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.

G. LOKPAL AND LOKAYUKTA

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 an 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 Iudicial 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 in 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 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.

Did you know?

Maharashtra was the first State to introduce the institution of Lokayukta in 1971.

Conclusion : The ADR or "Alternative Dispute Resolution" is an attempt to devise a machinery which should be capable of providing an alternative to the conventional methods of resolving disputes. Courts have become overcrowded with litigants. Due to the large pendency of cases in the Courts, litigants have to face so much loss of time and money that at long last when a relief is obtained, it may not be worth the cost. A large number of quasi-judicial and administrative tribunals have been created for quicker relief.All these tribunals and forums are in a way an alternative method of dispute redressal. But even such tribunals and forums have become overcrowded with the result that they are not able to provide relief within good time. Many tribunals in service matters have been able to provide relief only when the aggrieved employee has already retired from his position. Relief in terms of money which he may ultimately get may not be worth the service period lost. Consumer Forums came into being to provide quick, effective and costless relief to buyers of goods and hirers of services. Persons suffering from poor quality of merchandise and services in the market turned out to be so great in number that Consumer Redressal Forums and Commissions have proved to be inadequate to the volume of complaints. Heavy pendency causes long delays. In a large number of cases a delayed consumer remedy serves no purpose. Thus official consumer remedies have also lost their swiftness. Furthermore, they are not able to provide any remedy for non-consumer matters.

There thus remains the need for an alternative remedy which will not be bogged down by costs and delays. The institutional framework for providing the area services is not yet fully developed. All that can be said is that "Now the ADR is rapidly developing its own national institutions, experience, and theoretical and practical development, and at the same time offering a simpler cross border dispute resolution approach"

Exercises

Based on your understanding, answer the following questions:

1. Ram and Sikander agreed in writing to resolve the disputes arising out of their contract by way of arbitration. A dispute arose between Ram and Sikander. Ram filed a case in the court. Will the court stay the legal proceedings filed by Ram? Discuss.
2. Mr Hari and his friend, Mr Suresh entered into a partnership deed to carry on the business of creative designing. After a year of starting a successful partnership firm, creative differences arose between Mr Hari and Mr Suresh, which created a rift between them.

To help resolve the dispute, Mr Sharma, the secretary of a reputed firm, is facilitating them to help them achieve an acceptable agreement. Which dispute resolution method is Mr Sharma resorting to? Explain.

3. Sita and Reena are business partners. After sometime a dispute arose between them. Both of them agreed to submit the dispute between them to Mr Bajaj, a senior member of a law firm. Sita subsequently came to know that Reena and Mr Bajaj are related to each other. Can Sita challenge the authority of Mr Bajaj as an arbitrator? Discuss.

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

5. A dispute arose between Rakesh and his employer regarding some incident of injustice to Rakesh by some senior members of the management during the course of his employment. They appointed Mr Kumar to resolve the dispute. Mr Kumar not only facilitated the conversation but also suggested potential solutions. Identify and explain the role played by Mr Kumar.

6. A Lokpal is an ombudsman in India while a Lokayukta is a similar anti-corruption ombudsman organization in the Indian States.

   (a) Elaborate on the scope of The Lokpal and Lokayukta Act, 2013.

   (b) Explain the composition of Lokpal under the Act.

7. The concept of Lok Adalat is an innovative Indian contribution to the global legal jurisprudence. Analyse the features of Lok Adalat that make it a suitable forum for alternative dispute resolution.

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Unit 3

LAW I
(BUSINESS LAW)

केन्द्रीय माध्यमिक शिक्षा बोर्ड
भारत
असतो मा सद्गमय

CHAPTER

3(A) Law of Contracts

Learning Outcome

Students will be able to

- Understand the formation of agreements and contracts.
- Understand the essential elements of a contract.
- Distinguish between the types of contracts based on enforceability
- Understand and analyse illegal, void and voidable agreements.
- Elaborate the process of discharge of contract.
- Critically analyse the remedies awarded for Breach of Contract as Damages.

Amritlal was in need of 5 kg rice and exchanged them for 10 kg mangoes with his next-door neighbour to avoid going to the market. He soon realised that he has given a rare commodity, as it was not the mango season, at a cheap exchange. It has been a common practice to exchange things of utility in the ancient times. However, with the advent of money as a common medium of exchange that is fair and uniformly valued at a given place, it has become easy to enter into transactions that are definite. In the modern times, these definite transactions are known as 'contract'. The contracts regulate the business transactions among parties placed both domestically and internationally.

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. To understand the concept, we may take example of some of our everyday activities like buying groceries, booking a cab, eating at a restaurant, paying for internet, purchasing clothes in a sale or otherwise and likewise.

These business transactions involving sale-purchase or exchange of services have become an integral part in day-to-day activities that involve contracts. 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.

B. Formation of Contract

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)]. This implies, all agreements *per se* are not contracts. Agreements must meet certain criteria stated as under- An agreement is the result of a proposal or an offer by one party and its acceptance by the other.

1. **Competent parties:** the parties to the agreement must be competent to enter into a contract.
2. **Lawful consideration and lawful object:** There must be lawful object and lawful consideration in respect of the agreement.
3. **Free consent:** there must be free consent of the parties that is free from coercion, undue

influence, fraud, misrepresentation and mistake, when they enter into the agreement.

4. **Not expressly declared as void by the law:** the agreement must not be the one, which has been declared as void by the law in force at the time of entering into the agreement.

It is therefore true by virtue of provisions of section 10 I CA that all contracts are enforceable agreements while the vice-versa may not be true when an agreement is not enforceable by law for want of lawful consideration or lawful object. Thus it is correct to generalise that:

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

C. Intention to Contract

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.

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.

Offer + Acceptance = Agreement

Illustration

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.

General offer

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. It 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/- 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 on rent for doing business to the defendant, the shopkeeper. 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

One of the essentials of a valid contract as mentioned under section 10 ICA is that the parties must be competent to contract. Following are not competent to contract :

- Minor - Persons who are less than 18 years of age;
- Persons with unsound mind
- Persons disqualified by law - Alien enemies, Foreign sovereign etc.

Who is a minor under Indian Law?

It was the Indian Majority Act that laid down the age of majority as 18 years except in cases where guardian has been appointed by the Court, it was 21 years. An amendment to the said Act has amended the majority age to 18 years for all cases.

Illustration:

A (major) offers to sell his coat for ₹ 3,000/- to B (minor). B accepts the offer and pays ₹ 3,000/-. 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.

Interesting Facts

A minor is incompetent to contract because he is below 18 years of age. Indian Contract Act does not answer whether an agreement by a minor is void or voidable? Nature of minor's agreement has been analyzed by the courts from time to time based on the facts and circumstances of the case in light of general principles of equity and natural justice. Initially, the controversy was set at rest by the decision of Privy Council in **Mohori Bibee v Dharmodas Ghose**. The minor Plaintiff mortgaged his property in favour of the defendant who was a money lender, to secure his loan. The money lender had knowledge about the minority of the Plaintiff. The court held against the contentions of the defendant that no estoppel could apply against the Plaintiff as both the parties were aware of the minor's minority. Also, the defendant asked for the refund of loan taken under the provisions of ICA if mortgage is cancelled. Court held that an agreement by a minor is *void ab initio*.

In another case, **Kalus Mittelbachert v East India Hotels Ltd.**, there was a contract between Lufthansa, a German airline and Hotel Oberoi, New Delhi that crew of the airline will stay in latter's hotel. The plaintiff, a co-pilot of the airline stayed in the hotel and sustained serious head injuries on diving in the swimming pool of the hotel. This resulted in paralysis and after a battle of 13 years with his health conditions he died. Though he had no direct contract with hotel but he succeeded as a beneficiary and was awarded compensation for the damage caused. Being a 5-star hotel extra care and caution was expected out of the hotel and thus exemplary damages of 50 lac were awarded.

F. Consent

Consent is an important criterion while entering into a contract. When two persons agree on the same thing in the same sense (*consensus ad idem*), 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.

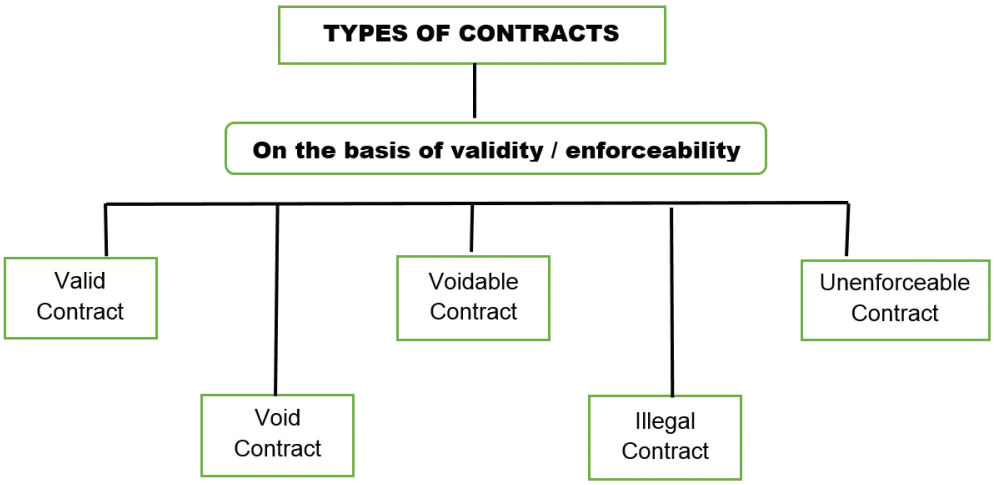
Illustration:

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.

G. Types of Contracts/ Agreements

As discussed above, all agreements may not be contracts and vice versa. There are situations when agreements turn into contracts at their inception but at a later stage due to change in any of the essential conditions of a contract, a contract ceases to be enforceable under the law and thus becomes void at the option of any of the parties to the contract. Also, when the consent obtained for the agreement is not free, it is voidable.

The concept of validity or enforceability of a contract is not defined in Indian Contract Act however, it



is through the various judgements of the courts that enforceability of contracts was decided based on their validity. Some important valid and enforceable contracts are explained as under:

a. Void and Voidable Contracts

BASIS OF DIFFERENCE	VOID CONTRACT	VOIDABLE CONTRACT
LEGAL PROVISION	Section 2(j) ICA	Section 2(i) ICA
MEANING	A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable	It is a contract which may either be affirmed or rejected at the option of one of the parties to the contract on ground of coercion, undue influence, fraud or misrepresentation.
NATURE	It is valid at its inception but later culminates into a void contract	It remains enforceable till it is not declared void by a competent court
CLAIM FOR DAMAGES	It is allowed only to the extent to restore any benefit received by the party, on the grounds of equity	The injured has the right to initiate action for damages
VALIDITY	Any contract when turns void, cannot thereafter become valid	A voidable contract may become valid upon lapse of time, affirmation, ratification, waiver of right, acquiescence of the party whose consent was not free

b. Contingent and Wagering

BASIS OF DIFFERENCE	CONTINGENT CONTRACTS	WAGERING AGREEMENTS
LEGAL PROVISION	Contingent contract is defined under section 31 of ICA.	ICA does not define wagering agreements.
MEANING	A contingent contract is a contract to do or not to do something depending upon the happening or non-happening of a future uncertain event.	Section 30 ICA does not define wagering agreements but declares them to be void. The parties have opposite views regarding an uncertain event and equal chances of gain or loss. There is no other interest of the parties in the agreement except for winning or loosing it.
ENFORCEABILITY	A contingent contract is enforceable under the law	A wagering agreement is not enforceable under the law
UNCERTAIN FUTURE EVENT	The uncertain future event does not determine the outcome of the contract. It is only collateral to the contract.	The uncertain future event decides who wins the wager.
RECIPROCAL PROMISE	There may or may not be reciprocal promise.	It is a bet and is thus based on reciprocal promise.
EXAMPLE	For example, A promises to buy B the Indian cricket team's jersey, if they win the match today. Now, this is a contingency as there's no guarantee whether India will win the match. In the same example, A promises to buy B the jersey if he pays him the money, then this will be a promissory condition that depends on the performance of a duty.	For example, X enters into a wager with Y. If X's food tech start-up gains at least 50,000 customers in 6 months, then Y shall pay X a certain monetary sum, and if it doesn't hit the target, then X shall pay Y the same amount.

c. Illegal / Unlawful Agreements

According to section 10 ICA, a contract must be made for a lawful consideration and lawful object. If either the consideration or the object is an action or omission prohibited by law, it results into an illegal contract. The agreements entered into for any unlawful or illegal object or consideration cannot be enforced under the law and are thus void (sec. 24 ICA). However, there is a possibility that the object or the consideration with which the contract was formed initially later turns unlawful or illegal, in which case it becomes void.

Ilustration:

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.

Illustration:

A agrees to give Rs 1,000/- to B as penalty if minor daughter is not given to A in marriage. This agreement is opposed to public policy and not enforceable.

H. 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.

a. 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.

b. Discharge by Agreement or Consent

When parties to the contract do not perform their obligations and fulfil their promises in full or in part, as the case may be, the contract gets discharged by novation, rescission, alteration, merger, waiver and remission.

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

Illustration:

A is indebted to B and B to C. By mutual agreement B's debt to C and A's debt to B is cancelled and C accepts A as his debtor. This is new contract substituting the old one and hence, novation.

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

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.

(iii) Remission - Acceptance is made to a promise but not on the complete terms

Illustration:

A owes B Rs 5,000/-. A pays to B and B accepts Rs 2,000/- in full satisfaction to the whole debt. The old debt is discharged but to a lesser fulfilment of the promise.

(iv) 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 a contract with B for the supply of 50 bags of wheat on a specified date. Later it was realised by A that he needs 10 bags of mixed pulses also at the same time. A and B merge the two contracts to supply 50 bags of wheat and 10 bags of mixed pulses on the same date and at the same place.

(c) Discharge by Impossibility of Performance

Performance of a contract can become impossible with or without the knowledge of the parties to the contract. A contract may later become unenforceable under the law due to impossibility of performance.

It can become impossible to perform the contract subsequently after the parties have entered into the contract, this is known as supervening impossibility [Section 56 ICA]. 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.

(d) Discharge by Lapse of Time

Time is very significant while entering into a contract. 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.

(e) 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.

(f) 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.

I. REMEDIES IN CASE OF BREACH

A remedy implies a relief given by law to ensure the enforcement of contractual rights or to provide sufficient compensation for the non-performance. In the matters of breach of contract, the remedies available are:

- Damages
- Specific performance

Damages are the most common remedy available to the injured party. It entitles them to recover the money compensation for the losses suffered due to the breach. In India it is covered in section 73 ICA.

The purpose of a contract is to enforce the rights of parties, in event of breach the promisee can request the performance of specific obligations.

Illustration:

A agrees to deliver 40 bags of rice to B for Rs. 20,000/- on 15th July 2022. On 15th July 2022, 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).

Illustration:

A contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house but not according to the contract. B is entitled to recover from A the cost of making the repairs conform to the contract.

Exercise

Based on your understanding, answer the following questions:

1. Ramesh sells his bike to his friend Suresh for a consideration of Rs. 50,000/-, whereas the market price of the said bike is Rs. 65,000/-. Examine if the agreement is enforceable under Law of Contrcat.
2. 'D' , a minor borrowed a sum of money from M by executing a mortgage of his property in favour of M. Subsequently, D sued for cancellation of mortgage. Is the contract of mortgage valid? Can M recover the sum advanced to D?
3. Apexx Chemicals entered into an agreement with Moonled Pharma ltd. to supply them with 16units calcium and 8 units of magnesium powder for its medicine unit. By the time Apexx Chemicals supplied 12 units of calcium and 4 units of magnesium the government restricted free sale of chemicals for life saving drugs. Every dealer was supposed to get his supply sanctioned from the government to a maximum of 10 units of each chemical. Apexx chemicals found it difficult to complete the order of Moonled Pharma Ltd., Moonled Pharma Ltd. brings a suit for breach of contract against Adarsh Chemicals. Will it succeed? Analyze by referring to relevant provisions.
4. X enters into a contract with Y to pay him 10000 rupees if the books are delivered to him by Friday. This is an example of contingent contract. Explain why?

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CHAPTER

3(B) Law of Torts

Learning Outcomes:

Students will be able to

- Understand the meaning of Torts
- Differentiate between civil and criminal laws
- Differentiate between Tort and Breach of Contract
- Identify the sources of Tort law
- Explain the different types of wrongful acts in Torts
- List the types of Intentional Torts
- Explain the components of the Tort of Negligence
- Understand the concept of Strict Liability and its components
- Differentiate between Strict liability and Absolute liability
- . Summarise the different types of harm in torts

A. Introduction

Concept

'Tort' essentially means a 'wrong'. It is derived 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 injury or harm to another who in turn has recourse to civil remedies for damages or a court order or injunction.

According to Sir John Salmond, an English legal scholar, Tort is a civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively a breach of contract, or a breach of trust, or other merely equitable obligation In the words of M.C. Setalvad, the first Attorney General of India, "law of torts is an instrument for making people adhere to standards of reasonable behaviour and respect the rights and interests of one another.

Damages under law of torts are essentially compensatory and seek to place the defendant in the position that he would have been had the wrongful act not been performed. The remedy is often in the nature of 'unliquidated damages'. Unliquidated damages can be defined as **the sum of money that cannot be foreseen or assessed by a fixed or predecided formula.** Damages may be categorised as unliquidated when the amount of damages is unidentifiable or subject to an unforeseen event that makes the amount not calculable.

It must be mentioned that tort is a civil wrong as distinguished from criminal wrong; both the substantive elements and the procedures 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 if found guilty by the court. A civil action, like the tort suit, is pursued in a civil court where the person aggrieved or his representatives or survivors prosecute the wrong-doer usually for compensation in the form of monetary damages and also at times for other relief or injunction. Generally, tort cases aim at compensating the victim while criminal lawsuits often result in punishments, for example, prison sentences. 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.

It is also important to mark the distinctions between tort and breach of contract.

Tort	Breach of Contract
A Tort is a civil wrong in which the remedy is action for damages.	Breach of contract is a breach of a promise the primary remedy of which is performance of the contract.
Damages are always unliquidated.	In breach of contract the damages are liquidated.
In tort motive may be taken into consideration	In breach of contract the motive is irrelevant.
In tort duty is bound towards the persons generally.	In breach of contract the duty is bound towards a specific person or persons.
In tort the damages may be compensatory or even exemplary damages may also be awarded.	In breach of contract, nature of damages is compensatory

A tort can be intentional or accidental. It includes wrongful acts such as battery and assault (physical or mental injury to the claimant), nuisance (an act which is harmful or offensive to the public or an individual), defamation (where claimant's reputation is injured), property damage, trespass (to claimant's land or property), negligence (careless behaviour), and others; some of these are discussed below.

The three fundamental elements of a tort are:

1. Wrongful act;
2. Damage;
3. Remedy.

These tortious wrongs may also have aspects which overlap with other fields of law like criminal law and contract law, examples of which may be found in the chapters on criminal law and contract law. In this chapter, we are concerned only with some of the basic features of law of torts in relation to these wrongs.

Sources of Law of Torts

Tort is mostly a Common Law subject. The law of torts did not develop from a statute or an act passed by the Parliament, but from centuries of judicial decisions – based on case decisions in English courts as well as in courts of other countries following the Common law system such as that of India, Canada, Australia or the United States of America.

In India as well as in other jurisdictions both criminal law and contract law are based on statutes, for example, the Indian Penal Code and the Indian Contract Act respectively. However, there is no single statute or a group of statutes that comprehensively deal with tort law as a separate area of law.

It is easy to explain this difference. A lawyer focusing on contract matters would ordinarily look at the Contract Act or the Sale of Goods Act to find out the rules which might apply to a given fact situation. On the other hand, a tort lawyer cannot merely look at the statute to find out the law that could apply to a given fact situation. A tort lawyer has to pore through the case law including the applicable precedents in other jurisdictions to examine the existence of a tortious wrong. To summarise, the law of torts includes both statutes and case laws and cannot be traced to a single source.

However, in many jurisdictions, including in India, there is a move to enact statutes concerning tortious wrongs which were hitherto governed only by case laws. In India, for instance, automobile accidents as well as harm caused to consumers of goods and services are covered by the Motor Vehicle Act of 1988 (as amended) and the Consumer Protection Act of 1986(as amended) respectively.

B. Kinds of Wrongful Acts

In tort cases, the victim or the plaintiff claims that the defendant or the wrong-doer has conducted a wrongful act or is liable for injury incurred by the plaintiff. Primarily, there are three kinds of wrongs in tort law. The wrongful act can occur:

1. either intentionally, or
2. negligently on part of the wrong-doer, or
3. the defendant is strictly liable for the wrongful act.

B.1 Intentional Tort

An intentional tort requires the claimant to show that the defendant caused the injury on purpose. The claimant must also 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. Depending on the contexts and situations, there are various kinds of intentional torts. These 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 tort of battery occurs when the defendant shows an intentional and direct application of physical force of the claimant with the intent to cause harm or offense. Both 'intent' and 'causation' are required for the tort of battery to occur.

The act of touching doesn't necessarily have to be done with the defendant's hands always, it could be anything touching the plaintiff such as throwing hot water at someone.

The tort of assault occurs when the defendant intends to cause in the claimant's mind 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 harm.

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.

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 amounts 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 an 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. This leads to the total restraint of liberty of a person. 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 interfere with the possession of land belonging to the claimant.

This is done by physically invading property of the claimant without the claimant's approval or consent. The invasion can happen with objects or by people. It 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

The tort of trespass to chattel occurs when the defendant has the intent to and does interfere with the lawful possession of goods belonging to the claimant.

This is done when the defendant uses or intermeddles with a chattel (moveable personal property), which was in the possession of the claimant 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.

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 is defined as an act of wilful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it.

It 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. Thus, 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 and Intentional Infliction of Emotional Distress

Defendant may be held liable for any act of deliberate physical harm to the victim even when 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.

Defamation

Defamation is defined as the publication of a statement which tends to lower a person in the estimation of the right-thinking members of society generally, and tends to make them shun or avoid that person. It can be defined as any intentional false communication, either written or spoken, that harms a person's reputation; decreases the respect, regard, or confidence in which a person is held; or induces disparaging, hostile, or disagreeable opinions or feelings against a person.

It is interesting to note that Defamation can be both a tort as well as a crime.

Criminal Defamation: The act of offending or defaming a person by committing a crime or offence. For criminal defamation, the liable person can be prosecuted. It is studied in IPC as a criminal act.

Civil Defamation: Civil defamation involves no criminal offence, but the claimant can sue the wrongdoer for compensation. It is studied under law of torts as a civil wrong.

English law divides actions for defamation into Libel and Slander.

Libel refers to causing defamation in a permanent form, i.e. writing or pictures. It is recognized as an offence under the English Criminal Law.

On the other hand, slander refers to causing defamation in a transient form such as spoken words or gestures. Slander is actionable under law of torts in the English law.

B.2 Negligence

Negligence is defined as the breach of the duty to take care which results in damages. Basically, it can be said that the 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 anyone in proximity) and the standard of duty of care depends on whether the claimant was on the site or in the neighbourhood 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 us consider these elements here.

Duty of Care

The duty of care principle can be explained by citing an actual case. In **Donoghue v Stevenson**, a case decided in England, the plaintiff Donoghue drank a soft drink (ginger beer) 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.

> *"In a case like the present, where the goods of the defenders are widely distributed throughout Scotland, it would seem little short of outrageous to make them responsible to members of the public for the condition of the contents of every bottle which issues from their works. It is obvious that, if such responsibility attached to the defenders, they might be called on to meet claims of damages which they could not possibly investigate or answer."*

Thus, 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. To give 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 where tenants stay.

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 discussed 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.

In **MacPherson v. Buick Motor Co. (1914)**, a famous American case, the Plaintiff bought a car from a retail dealer, and was injured when a defective wheel collapsed. The Plaintiff sued the Defendant, Buick Motor Co. (Defendant), the original manufacturer of the car, for negligence. The wheel was not made by the defendant; it was bought from another manufacturer. The Defendant, however, failed to inspect the wheel.

It was observed by the court that the defendant was responsible for the finished product. It was not at liberty to put the finished product on the market without subjecting the components to tests.

In order to establish duty of care in relation to ultimate purchasers, it must be proved that-

a. nature of the product must be such that it is likely to place life and limb in danger if negligently made. This knowledge of danger must be probable, not merely possible.

b. there must be knowledge that in the usual course of events, the danger will be shared by people other than the buyer. This may be inferred from the nature of the transaction and the proximity or remoteness of the relation.

The court held that the manufacturer of the product placed this product on the market to be used without inspection by its customers. If the manufacturer was negligent and the danger could be foreseen, a liability will follow.

What is No-Fault Liability?

In fault-based liability, the legal right of the claimant is violated due to a mistake of the defendant, and the defendant is liable to pay compensation. However, there are certain situations where the defendant is liable to pay compensation even if the violation of the claimant's right is not done by the defendant, but there is a violation of the claimant's right. This is known as no fault liability. In short, liability arising without any fault is a no-fault liability. It covers two kinds of liability:

- Strict Liability
- Absolute Liability

Strict Liability

Strict liability is a standard of liability under which a person is legally responsible for the consequences

of an activity even in the absence of fault or criminal intent from the defendant. Under the strict liability law, if the defendant possesses anything that is inherently dangerous, as specified under the 'ultrahazardous' definition, the defendant is then strictly liable for any damages caused by such possession, no matter how careful the defendant is in safeguarding them. 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

The rule of strict liability evolved in the year 1868, in the case of **Rylands Vs. Fletcher** which took place in England. Rylands and Fletcher were neighbours. Rylands owned a mill for whose energy requirement he constructed a water reservoir on his land. The work of construction was done by an independent contractor who was negligent in his work. Due to this negligence, the water escaped and leaked into Fletcher's mines, causing heavy losses to him. Fletcher sued Rylands for the damage caused.

Rylands took the defence that the construction work was carried out by an agency and was inspected by an engineer. It was contended that Rylands was not a part of the work and was also not informed about the security regarding the construction. The court held that it does not matter what care the appellant took but he was responsible for the damage as he brought such an article to his premises which could be dangerous if it escapes.

Rylands was thus held liable for the loss incurred by Fletcher and had to pay compensation.

In the above case, three basic principles regarding strict liability were established:

1. DANGEROUS THING - non-natural use of the land
2. ESCAPE - the escape of water from Rylands land
3. LIABILITY -as the thing escaped, it caused damage

*If someone brings on his land something that is dangerous and **it escapes and because of this escape damage is caused,** the person is strictly liable.*

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.

Exceptions to Strict Liability:

1. **Plaintiff's Own Fault:** When the cause of the damage is an act or default of the claimant himself, no remedy would be available to the plaintiff in that case.
2. **Act of God:** When the escape is caused directly by natural causes without any human intervention, then the defendant can use 'act of God' as a defence.
3. **Mutual Benefit:** When there is express or implied consent of the plaintiff to the presence of the source of damage or danger. Also, there is no negligence on the part of the defendant. In such a case the defendant will not be held liable.
4. **Act of Stranger:** When the cause of harm is the act of a stranger or third party. Here, it should be noted that this third party is neither the servant of the defendant nor he is having any control over that person.
5. **Statutory Act:** If it is an act of the government or corporation, then it is also a defence.

Absolute Liability

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 killing thousands and injuring lakhs.

The first case was 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 methyl isocyanate 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."

If an industry/enterprise is engaged in some inherently dangerous activity from which it is deriving commercial gain and that activity is capable of causing catastrophic damage then the industry officials are absolutely liable to pay compensation to the aggrieved parties. The industry cannot plead that all safety measures were taken care of by them and that there was no negligence on their part. They will not be allowed any exceptions neither can they take up any defence like that of 'Act of God' or 'Act of Stranger'.

The basic principles of absolute liability as emerged above are:

1. Enterprise (commercial objective)
2. Hazardous or inherently dangerous activity
3. Escape is not necessary

Differences Between Strict Liability and Absolute Liability

1. Strict Liability arises in cases in which the court holds the defendant liable to pay compensation for the loss incurred by the claimant, even if such losses are neither intentionally nor negligently suffered. However, when there is an injury caused to a workman in the course of employment, the court holds the employer responsible for providing compensation. Here it is immaterial who caused the injury. In most cases, the employer has to pay the liability. This is called absolute liability.
2. Strict liability is applicable to persons whereas absolute liability is applicable to enterprises, i.e., commercial undertakings.
3. In strict liability, the escape of hazardous or dangerous components from the premises of the owner is necessary. But escape is not necessary in absolute liability.
4. In the case of strict liability, the defendant has got certain exceptions that he/she can use to prevent himself from the liability. But no exceptions are provided in the case of absolute liability to the defendant. This means that, if any person faces damages due to the hazardous element, then the defendant would be absolutely liable for the same.

5. The compensation is as per the nature and quantum of damages incurred in case of strict liability. In absolute liability, the quantum of damages relies on the magnitude and financial capability of the organization.

BASIS FOR COMPARISON	STRICT LIABILITY	ABSOLUTE LIABILITY
Meaning	Strict Liability implies the legal responsibility of a person for compensating the injured or aggrieved, even when he or she was not at fault or negligent.	Absolute Liability arises from inherently hazardous activities like keeping dangerous animals or using explosives.
Talks about	Person	Enterprise
Escape	Necessary	Not Necessary
Exceptions	Yes	No
Payment of compensation	Nature and quantum of damages	Exemplary in nature

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.

a. **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 carelessness 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.

b. **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.

c. **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.

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

Conclusion

To conclude, it can be said that unlike a crime, law of torts does not aim to punish the wrongdoer. Rather, it aims to help the aggrieved person reach the position he/she was in before the cause of action arose.It thus seeks to provide restorative justice.

Exercise

Based on your understanding, answer the following 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 does duty of care relate with negligence?
5. What is strict liability principle? Give one example.
6. Some basic principles regarding strict liability were established in Ryland V Fletcher. Discuss these principles.
7. There are certain exceptions to strict liability which are not available in a case of absolute liability. List these exceptions.
8. Discuss the main differences between strict liability and absolute liability, with the help of relevant case law.
9. What are the objectives behind having tort law?
10. Explain the meaning of the following terms:
    a. Unliquidated damages
    b. Defamation
    c. Conversion

CHAPTER 3(C)

Property Law

Learning Outcomes :

Students will be able to

- Understand the meaning of the term property and transfer of property
- Understand the types of property under the Transfer of Property Act 1882 and Sale of goods Act 1932
- Distinguish between the types of property and its transfer
- Describe the Doctrine of Election and Doctrine of Lis pendense
- Elaborate the process of transfer of property
- Explain the different modes in which an immovable property can be transferred

I. INTRODUCTION

Before the advent of the British kingdom, each community in India was governed by its respective customary law in matters relating to transfer of property. With the establishment of the formal litigation system and in absence of any legislation in this area, to begin with, the English judges applied the common law of England and the rules of equity, justice and good conscience with respect to disputes relating to transfer of property. The unsuitability of these provisions to the Indian conditions; the resulting conflict and the need for clarity of rules relating to this important branch of law necessitated the enactment of legislation. Drafted in 1870, the Transfer of Property Act saw the light of the day in 1882 and provided the basic principles for transfer of both movable and immovable properties. Based primarily on the English law of 'Real Property', it attempted to mould these principles to suit the Indian conditions , moreover, a separate enactment titled the 'Sale of Goods Act, 1930' was passed to deal with transfer of movable property by sale. The Transfer of Property Act, 1882 contains the general principles of transfer of property and detailed rules with respect to specific transfer of immovable property by sale, exchange, mortgage, lease and gift.

II. TYPES OF PROPERTY

The word **property** has not been defined in the Act, but it has a very wide meaning and includes properties of all descriptions. It includes movable properties such as cases, books, etc., and includes immovable properties also such as lands or houses. It also includes intangible properties such as ownership, tenancy, copyrights, etc.

As per Section 3, the immovable property does not include standing timber, growing crop and grass.

Standing timbers: standing timbers are trees fit for use for building or repairing houses. The word standing timber includes Babool Tree, Shisham, Peepal, Banyan, Teak, Bamboo, etc. The fruit-bearing trees like Mango, Jackfruit, Jamun, etc., are not standing timber, and they are immovable properties (**Fatimabibi v. Arrfana Begum**, AIR 1980 All 394).

Growing Crop: It includes all vegetable growths which have no existence apart from their produce such as pan leave, sugarcane etc

Grass: Grass is a movable property, but if it is right to cut grass it would be an interest in land and hence forms immovable property.

Whether trees can be regarded as movable or immovable depends upon the circumstances of the case. If the intention is that trees should continue to have the benefit of further sustenance or nutriment by the soil (land), e.g., enjoining their fruits, then such tree is immovable property. But if the intention is to cut them down sooner or later for the purpose utilizing the wood for building or other industrial purposes, they would be timber and accordingly be regarded as movable property (**Shantabai v. State of Bombay**, AIR 1958 SC 532)

As per Section 3(25), General Clauses Act, 1897 Immovable property shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth.

In the case of **Sukry Kurdepa v. Goondakull** (1872) court has explained that movability may be defined to be a capacity in~ a thing of suffering alteration. On the other hand, if a thing cannot change its place without injury to the quality it is immovable.

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

Section 2(c) of the Benami Transactions (Prohibition) Act, 1988 defines property as:

"Property" means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property.

Section 2 (11) of the Sale of Good Act, 1930 defines property as:

"Property" means the general property in goods, and not merely a special property.

Basis	Movable Property	Immovable Property
(a) Movement of property	The movable property can easily be transported from one place to another, without changing its shape, capacity, quantity or quality.	The immovable property cannot easily be transported from one place to another.
(b) Transfer	Mere delivery with intention to transfer the movable property completes the transfer	Mere delivery does not sufficient for a valid transfer. The property must be registered in the name of the transferee
(c) Registration	Registration of movable property is optional under the Registration Act 1908	Registration of immovable property is compulsory/ mandatory under the Registration Act 1908, subject to the condition that its value exceeds Rs.100
(d) Legal provision	Transfer of movable property is regulated by Sales of goods Act 1932	Transfer of immovable property is regulated by Transfer of Property Act 1882

III. TRANSFER

Transfer of property is an act of conveying property from one person to another, in the present or future. Matters relating to the property are governed by the Transfer of Property Act, 1882 in India. The object of the Transfer of Property Act 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.

The transfer of property may also take place by inheritance and succession. The laws relating to such transfer are governed by the respective religious laws or practices, as the case may be.

Who can transfer property?

Any person who is competent to contract (person above 18 years of age, having a sound mind and not disqualified by any law in force) and authorized to dispose of 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. According to section 8 of the Transfer of Property Act 1882 (The Act), by transferring property, the transferor transfers all rights in a property.

Essentials of a valid transfer

With regard to the law of property, a transfer is a process of conveying the rights and liabilities with respect to a property by one person to another. It is therefore with the formation of an agreement culminating into a contract that the transfer of property takes place.

(Transfer may be by agreement between parties i.e. by contract- explained in upcoming chapter of contracts- transfer by will or succession- here in this chapter we are dealing with transfer by agreement between parties)

The following are the essentials for a valid transfer of property:

- 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.

How can property be transferred?

1. Mode of transfer:

The mode of transfer of property varies according to the value of the property. If the value of the property is more than Rs. 100/-, then transfer has to be made only by a registered instrument. If the property is tangible where the value of the property is less than Rs. 100/-, then transfer has to be made only by delivery, whereas for intangible 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.)

2. Attestation:

A registered instrument must be attested at least by two witnesses to the transfer. The definition of attestation is given in section 3 of the Transfer of Property Act 1882. Attestation means affixing the signature to the instrument for the transfer of property. The witnesses should mark their signature too on the instrument with the intention to attest. The intention behind including this provision was to ensure that transfer was done with the free will of the executant.

3. Registration:

Registration of the instrument is an essential legal formality. During registration, the parties to the transfer must be present to affix their signatures to the document and complete the transaction with regard to immovable property. While doing so, the document for transfer must mention clearly the rights, obligations and liabilities of the parties to the transfer.

Registration shall take place by finally affixing a seal of the Registrar's office which shall be subsequently included in the official records.

Indian Registration Act is an act to consolidate the enactments relating to the registration of documents. Registration means recording of the contents of the document. Section 17 of the Indian Registration Act 1908, deals with the documents that are compulsory to be registered.

4. Mutation:

Once a property has been transferred by way of relinquishment, sale, or gift deed in the "name" of the recipient. It is also important to have the transfer recorded in the municipal records by way of mutation.

5. Payment of fee:

Stamp duty on transfer is payable as per applicable state laws.

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.

IV. DOCTRINE OF ELECTION

According to the principle of Doctrine of Election [Section 35 of the TPA], 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. In other words, while claiming advantage of an instrument, the burden of the instrument should also be accepted.

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.

The doctrine of election is based on the principle of equity that one cannot take what is beneficial to him and disapprove that which is against him under the same instrument. The Latin maxim "quod approbo non reprobo" means that 'no one can approbate and reprobate.' In other words, a person cannot accept a thing and reject another in the same instrument. This maxim is one of the underlying principles of doctrine of election. In simple words, where a person takes some benefit under a deed or instrument, he must also bear its burden.

"quod approbo non reprobo" - Approbate and reprobate means to approve and disapprove. This principle is based on the maxim 'quod approbo non reprobo' which translates to **'that which I approve, I cannot disapprove'**. Therefore, an individual has to either accept the whole contract, order etc. or reject the whole thing.

The principle of the doctrine of election was explained by the House of Lords in the leading case of **Cooper vs. Cooper**. In Cooper v. Cooper, Lord Hather explained the principle underlying the doctrine of election in the following words, " …. there is an obligation on him who takes a benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit ; and if it be found that instrument purports to deal with something which it was beyond the power of the donor or settlor to dispose of , but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect ." Section 35 of the Transfer of Property Act, 1882 embodied the doctrine of election. The Court also held that the doctrine of election applied on every instrument and all types of property.

V. DOCTRINE OF LIS PENDENS

Doctrine of *lis pendens* is embodied in Section 52 of the Transfer of Property Act, 1882. *Lis pendens* literally means a pending suit.

The doctrine states that a property under a pending suit should not be transferred to a third-party during a pending suit in such a way it affects the rights of any party concerned with the property. That means, no new interest should be created by way of transfer of a property during the pendency of a suit relating to it.

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'.

The objective of the doctrine of *lis pendens* is to subjugate all parties to a pending litigation of a property, to the authoritative decision of the Court. The doctrine reflects the control which a court acquires over property involved in a pending suit until its final judgment.

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 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.

The Supreme Court (SC) in Dev Raj Dogra and others v Gyan Chand Jain and others interpreted the meaning of the Section 52 of the T P Act and laid down the pre-conditions as follows:

1. A suit or a proceeding in which any right to immovable property must be directly and specifically in question, must be pending;
2. The suit or the proceeding shall not be a collusive one;
3. Such property during the pendency of such a suit or proceeding cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the right of any other party thereto under any decree or order which may be passed therein except under the authority of Court. In other words, any transfer of such property or any dealing with such property during the pendency of the suit is prohibited except under the authority of Court, if such transfer or otherwise dealing with the property by any party to the suit or proceeding affects the right of any other party to the suit or proceeding under any order or decree which may be passed in the said suit or proceeding.

(source: India kanoon)

The SC observed that Section 52 of the Act does not declare a *pendente lite* transfer by a party to the suit as void or illegal, but only makes the pendente lite purchaser bound by the decision of the pending litigation. (Hardev Singh V Gurmail Singh)

Thus, if during the pendency of any suit in a court of competent jurisdiction, in which any right of an immovable property is in question, such immovable property cannot be transferred by any party to the suit *so as to affect the rights of any other party to the suit* under any decree that may be made in such a suit.

VI. MODE OF TRANSFER

VI.1.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.

VI.2. Lease

A lease under the transfer of property act, is a contract by which one party transfer the right to enjoy the land, property, services, etc. to another for a specified time, usually in return for a periodic payment. but does not constitute a sale. It is called a lease. [Section 105 of the TPA]. A lease can be done only of immovable property.

A lease is a transfer of the right to enjoy a property for a specific period of time in consideration of a price. The lessor is the person who lets out the property for lease or transferor, and the 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 the lessor and lessee.

A sublease is the renting of property by a tenant to a third party for a portion of the tenant's existing lease contract. Even if a tenant subleases a property, the original tenant is still liable for the obligations stated in the lease agreement, such as the payment of rent each month. Subleasing with the consent of the Landlord is legal in India. If the agreement allows the tenant to sublease it, the tenant can sublease a portion of the property to a third party. When a tenant whose name is on the lease rents a room, a portion of the property, or all of the property to another, it is referred to as subleasing (or subletting). The subtenant must pay rent and comply with the lease terms, but the principal tenant remains ultimately responsible for the lease.

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 a 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 relationship that is between A and B.

VI.3. 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.

VI.4. 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.

Exercise

1. X is an owner of mango groves where exceptional quality of mangoes are produced by hybrid mode. He is one of the largest exporters of mangoes. Till the year 2020, he has been into exporting mangoes. Due to setback to his business because of covid, from 2021 he shifted to selling mango wood in local markets. Identify if there is any difference in the type of property he has been dealing with in the year 2020 and in 2021 respectively.
2. A has a matter pertaining to the title of immovable property situated at Bangalore with B. the matter is subjudice in the court of Civil Judge at Bangalore. During the period of pendency of suit, A's mother was to be operated for open heart surgery and to accommodate the financial need, he sold this property situated at Bangalore to C. Decide the validity of the transfer made by A to C. Explain the requisites of principle of law involved.
3. Manan and Ketan enter into an agreement of lease of property for a tenure of 24 months at a consideration of Rs 9000/- per month. Ketan is expected to return the property at the expiry of this term in the condition in which he received it. Ketan was transferred to another city but for a short span. He sub-lets the property to Manoj for a sum of Rs 10,000/-. Manoj carries ou such alterations as would depreciate the property. Decide if Ketan is authorised to make such transfer by sub-lease. Also highlight the remedy available to Manan.
4. Elucidate on the importance of Attestation as an important step preceding Registration.

CHAPTER 3(D)

Intellectual Property Law

Learning Outcomes

Students will be able to:

- Explain the nature and meaning of Intellectual Property
- Explain the meaning of Intellectual Property Rights
- Explain the importance of international conventions on Intellectual Property Rights
- Recall the historical perspective of Intellectual Property
- Analyse the importance of different types of Intellectual Property Rights and its importance in the commercial world
- Appreciate the rights granted to the holder of intellectual property rights

I. Meaning of Intellectual Property

Intellectual property is an intangible property that comes into existence through human intellect. It refers to the creation of the mind or products of human intellect such as inventions, designs, artistic work, names, symbols, images etc.

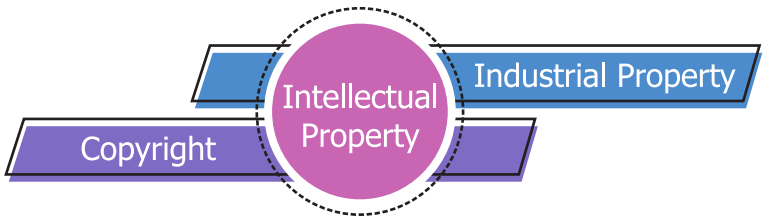
II. Intellectual Property Rights

The term "Intellectual Property Rights" (IPR) refers to the bundle of rights conferred by law on a creator/owner of intellectual property. These rights are the rights given to persons over the creations of their minds. They usually give the creator an exclusive right over the use of his/her creation for a certain period of time.

They seek to protect the interests of the creators by rewarding their mental labour and allowing them to retain property rights over their creations. The creators/ inventors are thus allowed to benefit from their creations.

The main reason for granting these rights is to encourage inventions and creations that promote social, economic, scientific and cultural development of society.

Intellectual property is divided into two categories:



1. **Industrial property -** this includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and
2. **Copyright -** this includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs.

III. What are the international obligations that have shaped Indian IPR?

Treaty	Year	Principles and Objectives
The Paris Convention for the Protection of Industrial Properties	The Paris Convention was adopted on *20 March, 1883 in* Paris and was enforced on *7 July, 1884.*	**1. National Treatment** In the context of legal protection for industrial property, the principle of National Treatment requires each member country of the Paris Convention to provide equal legal protection for the inventions of nationals from other member countries, as it would for its own nationals. **2. Framework of Priority** The Paris Convention also upholds the principle of "priority framework," allowing an inventor to protect their invention simultaneously in various countries.
The Berne Convention for the Protection of Literary and Artistic Works	The Berne Convention was adopted on *9 September, 1886* and came into force on *4 December, 1887.* The Berne Convention was originally signed in 1886 at Berne in Switzerland.	**1. National Treatment** Stipulated that any work originating in a contracting state, including works of authors who are nationals of that state or works first published in that state, should receive the same legal protection in every other contracting state as the latter state grants to its own nationals. **2. Automatic Protection** Mandated that legal protection should not be subject to compliance with any formalities. **3. Independence of Protection** decreed that legal protection should be independent of the existence of protection in the country of origin of the work.
The Universal Copyright Convention (UCC)	Established in the year 1952.	**1. National Treatment** The UCC adheres to the principle of national treatment rather than automatic protection, which implies that contracting countries are not obligated to provide foreign works with automatic protection if the national requirements are not met.

		2. The term of the Work Under the UCC, original literary, artistic, and scientific works are eligible for protection. To provide reasonable notice of the copyright claim, a copyright notice should accompany the work. The UCC stipulates that protection for a work lasts for the duration of the author's lifetime and an additional 25 years following the author's death. **3. Minimum Rights** As per the UCC's provisions, the contracting countries must provide a specific set of "minimum rights" to the lawful owner of the work, provided they do not create any conflict with the "spirit" of the convention.
World Intellectual Property Organisation (WIPO)	The WIPO Convention, which is the primary instrument of the World Intellectual Property Organisation, was signed on July 14, 1967, in Stockholm. It came into effect in 1970 and was subsequently amended in 1979. In 1974, the WIPO became one of the specialized agencies of the United Nations (UN) system.	The WIPO had two primary objectives, which were: 1. To promote the legal protection of intellectual property worldwide. 2. To facilitate administrative cooperation between the intellectual property unions created by treaties administered by the WIPO.

IV. Brief Historical Perspective

With the establishment of the World Trade Organization (WTO), the importance and role of intellectual property protection was crystallized in the Trade-Related Intellectual Property Systems (TRIPS) Agreement. It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) treaty in 1994.

The TRIPS Agreement came into effect on 1 January 1995 and is the most comprehensive multilateral agreement on intellectual property. It encompasses all forms of intellectual property and aims at harmonizing and strengthening standards of protection and providing effective enforcement of intellectual property rights at both national and international levels.

India being signatory to the TRIPS Agreement has passed several legislations for the protection of intellectual property rights to meet the international obligations. Some of these legislations are listed below:

Trade Mark Act, 1999, Designs Act, 2000, Copyright Act, 1957 (as amended), Patents Act, 1970 (as amended), Geographical Indications of Goods (Registration and Protection) Act, 1999, Protection of Plant Varieties and Farmers' Rights Act, 2001.

The history of Patent law dates back to 1911. Around this time the Indian Patents and Designs Act, 1911 was enacted. The present act governing patents law in India, the Patents Act, 1970 came into force in 1972. It amended and consolidated the existing law relating to Patents in India. The Act, went through an amendment in 2005 to be compliant with the TRIPS agreement and is now known as the

Patents (Amendments) Act, 2005. Through this amendment product patent was extended to all fields of technology including food, drugs, chemicals, and micro-organisms.

V. Copyright

What is copyright?

Copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. It is a bundle of rights including, rights of reproduction, communication to the public, adaptation and translation of the work. This protection is automatic (upon creation of the work) and does not depend on registration.

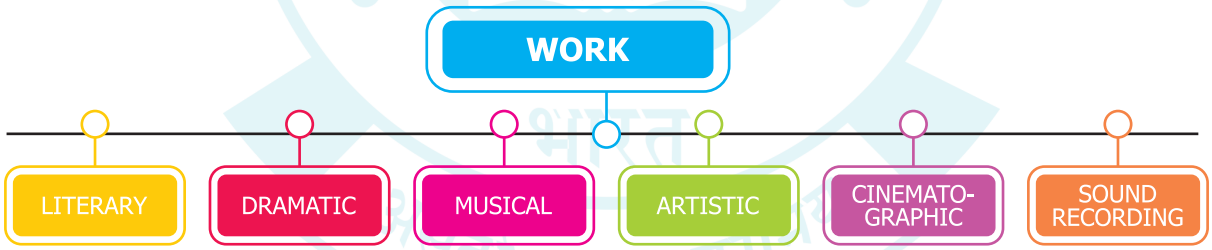
What is the scope of protection in the Copyright Act,1957?

In India, the law relating to copyright is governed by the Copyright Act, 1957. To get the protection of copyright a work must be original. Mere ideas, knowledge or concepts are not copyrightable. Having said that, copyright protects the original expression of information and ideas. Copyright can be claimed by either the creator or the person who has inherited the rights of ownership from the original creator or an agent who is allowed to act on behalf of the creator.

WORK

What is a work?

All subject matters protected by copyright are called protected **works**. Section 2(y) of the Act defines 'work'. It includes the following:



When is a work protected by Copyright?

A work is protected by copyright when:

1. It falls within the category of 'work' under the Act;
2. The work must be recorded/ fixed in material form (tangible form); and
3. The work must be original.

REGISTRATION OF COPYRIGHT

Is it necessary to register a work to claim copyright?

No. Acquisition of copyright is automatic and it does not require any formality. However, certificate of registration of copyright and the entries made therein serve as prima facie evidence in a court of law with reference to dispute relating to ownership of copyright.

What is the procedure for registration of a work under the Copyright Act,1957?

Copyright comes into existence as soon as a work is created and no formality is required to be completed for acquiring copyright. However, facilities exist for having the work registered in the Register of Copyrights.

TERM OF COPYRIGHT

Is copyright protected in perpetuity?

No. It is protected for a limited period of time.

What is the term of protection of copyright?

The general rule is that copyright lasts for 60 years. In the case of original literary, dramatic, musical and artistic works the 60-year period is counted from the year following the death of the author. In the case of cinematograph films, sound recordings, photographs, posthumous publications, anonymous and pseudonymous publications, works of government and works of international organisations, the 60-year period is counted from the date of publication.

RIGHTS OF THE OWNER OF A COPYRIGHT

Economic rights – This allows the rights' owner to derive financial reward from the use of their works by others. Within this category are other rights such as:

1. **Right to reproduce the work -** Reproduction is an act of copying from the previously finished works or giving it a differential form by adding, editing or modifying the same. Such right shall exclusively be exercised by the owner of the work and shall not be infringed by any other person since the act of reproduction of the work may economically make benefits to its owner.
2. **Right to distribute in market -** the owner of the copyrighted work also has a right to distribute in the market and make money out of it. The act of distribution may be in the form of sale, lending for free or for a consideration, rental, or free distribution by the way of gift.
3. **Right to communication to the public -** It means letting or making the product/work available to the public by way of broadcasting, simulcasting or webcasting.

4. **Right of adaptation -** Conversion, alteration, transcription or rearranging a copyrighted work means and includes the right of adaptation.

5. **Right to translate -** The owner of the copyrighted work has a right to translate his work to any other languages.

Moral rights - A moral right would stand a step ahead of an economic right. Moral rights are personal ties between an author and their work. They afford control over the creation and protect against modification or alteration, preserving the work's integrity. It includes the following:

1. **Right of paternity -** The right of an owner of copyright to claim and prevent others to claim the ownership of his copyrighted work is said to be a right of paternity.

2. **Right of integrity -** The right of the owner of the copyright to protect the reputation of his own work from exploitation is the right of integrity.

3. **Right to retraction -** Retraction is an act of taking back the previous assertion made.

Case discussion: ***Amarnath Sehgal v. Union of India, 117 (2005) DLT 717***

Amarnath Sehgal, a renowned sculptor, was commissioned to create a mural for the Indian Government at Vigyan Bhavan. He spent 5 years creating the work and it was displayed in 1962. Without notification or consent, the Government of India removed the mural during renovations and stored it, causing some damage. Amarnath sued the Government for violating his moral rights by mistreating his work.

The Hon'ble Delhi High Court stated that moral rights, which define the essence of an author's work, cannot be taken away from the author, even if the work is sold. Destroying or altering the work was deemed a violation of the author's moral rights.

Why is this protection required in modern society?

Copyright is required in modern society to provide legal protection for creators of original works, such as literature, music, software, and art. This protection helps to ensure that creators are fairly compensated for their work and that their work is not used or copied without permission. Copyright also promotes creativity and innovation by giving creators the exclusive right to control the use and distribution of their works.

Copyright plays a role in stopping plagiarism by providing legal protection for original works and giving the creators exclusive rights to control the use and distribution of their work. This protection helps to ensure that creators are fairly compensated for their work and that their work is not used or copied without permission. When someone is found to have plagiarized, they can be held liable for copyright infringement, which can result in legal action, fines, and other consequences. However, it is important to note that not all instances of plagiarism are necessarily copyright infringement, as copyright law only applies to original works that are fixed in a tangible form.

Case discussion: ***Eastern Book Company & Others V. D.B. Modak & Another, AIR 2008 SC 809***

The extent of originality necessary to obtain copyright protection was the subject of inquiry. The Eastern Book Company brought a case to court against the defendants, Spectrum Business Support Ltd and Regent Datatech Pvt Ltd, for alleged infringement. The plaintiff, a renowned publisher, alleged that the aforementioned defendants had infringed its work, a publication of supreme court orders and judgments, known as SCC, in a substantial manner. The defendants, in turn, argued that there is a minimal level of creativity involved in such work, thus it is not eligible for copyright protection. Therefore, the respondent argues that the petitioner cannot bring legal proceedings based on copyright protection. The Supreme Court held that "the inputs put in the original text by the appellants in (i) segregating the existing paragraphs in the original text by breaking them into separate

paragraphs; (ii) adding internal paragraph numbering within a judgment after providing uniform paragraph numbering to the multiple judgments; and (iii) indicating in the judgment the Judges who have dissented or concurred by introducing the phrases like concurring, 'partly concurring', 'partly dissenting', 'dissenting', 'supplementing', 'majority expressing no opinion', etc., have to be viewed in a different light. The task of paragraph numbering and internal referencing requires skill and judgment in great measure. The editor who inserts para numbering must know how legal argumentation and legal discourse is conducted and how a judgment of a court of law must read…. In these inputs put in by the appellants in the judgments reported in SCC, the appellants have a copyright and nobody is permitted to utilize the same."

VI. Patent

What is a Patent?

A patent is a legal document which is issued by the government to the inventor. The patent grants an inventor absolute and exclusive ownership right over the invention, the freedom to use and sell the invention for a stipulated time period. It is a statutory right for an invention granted for a limited period of time to the patentee by the Government, in exchange of full disclosure of his invention for excluding others, from making, using, selling, importing the patented product or process for producing that product for those purposes without his consent.

What is the term of a patent in the Indian system?

The term of every patent granted in India is 20 years from the date of filing of application.

Which Act governs the patent system in India?

The patent system in India is governed by the Patents Act, 1970 (No.39 of 1970) as amended by the Patents (Amendment) Act, 2005 and the Patents Rules, 2003.

What can be patented?

Before getting an idea patented, the inventor must ensure its patentability. There are three requirements which are required to be fulfilled for an idea to qualify as a patentable matter:

a. **Novelty –** the invention must contain one or more unique and new elements;

b. **Non-obviousness -** Simple or obvious changes to an existing invention cannot be called an invention. The invention must be a notable change in the field. The particular feature must add to existing technical knowledge that is, in terms of uniqueness and commercial viability; and

c. **Industrial application -** The invention must have some utility. The invention is patentable if it is capable of commercialization.

The purpose of patent law is to encourage scientific research, new technology, and industrial progress.

Here are a few interesting patents granted in India

Memory cells, semiconductor devices, and methods of fabrication - This is a remarkable achievement by Gurtej Sandhu. His numerous inventions in the field of semiconductor devices and fabrication methods demonstrate his expertise and creativity in this area. He has filed over 1170 patent applications and is known as the Indian owning the highest number of patents. His recognition as one of the most prolific inventors in the world is a testament to his contributions to the field of semiconductor technology and his impact on the industry.

Susant's breathing sensor apparatus - This is an interesting invention and highlights the potential of technology to improve the lives of people with disabilities. The Breathing Sensor Apparatus is a unique solution that allows people with disabilities to perform tasks independently, using only their breath. The successful pilot testing and commercialization of the device demonstrate the potential for this technology to have a real impact on people's lives. The collaboration between Susant Pattnaik and the National Innovation Foundation is also noteworthy, as it highlights the importance of partnerships between inventors and organizations in bringing innovative ideas to market.

These patents showcase India's innovation and creativity in a variety of fields and demonstrate the importance of intellectual property protection in promoting and rewarding innovation.

VII. Trademark

What is a trademark?

A 'Mark' is a distinguishing symbol which any person can use to exert public attention or to create some kind of impression in the minds of the people. Trademark is a brand entity which has a capability to distinguish one's goods and services from another person's goods and services. Trademark includes word, design, logo, shape of goods, their packaging and combination of colours. Trademark rights in India are statutorily protected by the Trademark Act, 1999.

What is the function of a trademark?

a. It identifies the goods or services and its origin.

b. It guarantees its unchanged quality.

c. It advertises the goods or services.

d. It creates an image for the goods or services.

Who benefits from a trademark?

The Registered Proprietor of a trademark can create, establish and protect the goodwill of his products or services, he can stop other traders from unlawfully using his trademark, sue for damages and secure destruction of infringing goods and or labels.

Trade name

A trade name is the official name under which a company operates and is also known as a "doing business as" name or assumed name. On the other hand, a trademark is the name, symbol, logo, slogan or sound that a business uses to market its products and services. It is a unique identifier that helps consumers differentiate the products and services of one company from those of another. Both trade names and trademarks are important elements of a company's brand and play a crucial role in building and protecting the company's reputation and identity.

The difference between a trade name and a trademark

A trade name does not provide brand name protection on its own, but registering it is an important step in protecting the name. On the other hand, a trademark provides protection for a brand name and helps to distinguish a company's products and services from those of others. In many cases, a company's trade name becomes its trademark, such as the example of Google. Registering a trademark offers additional protection and helps to secure the brand's identity.

Trade secret

Trade secrets can include a wide range of confidential information that is important for the success and survival of a business. This information can be in the form of strategies, designs, client databases, formulas, programs, or any other confidential information that must be kept secret to maintain the competitive advantage of the business. As per a landmark decision by the Delhi High Court of **Burlington Home Shopping Pvt. vs Rajnish Chibber (1995 (35) DRJ 335)** in 1995, a trade secret is defined as any information with commercial value, which is not available in the public domain and the disclosure of which would cause significant harm to the owner. The Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement from the same year defines trade secrets as information which is kept secret, has a commercial value and the owner of the information takes reasonable steps to keep it secret.

There is no specific legislation that provides protection for trade secrets, but they can be protected under various provisions of different statutes, such as Section 272 of the Contract Act, 1872. Indian courts have also recognized trade secret protection based on equity principles and common law remedies for breach of confidence and breach of contract. To ensure the protection of trade secrets, it is important for businesses to include restrictive clauses in their service contracts. This helps to secure the confidentiality of the firm's trade secrets and prevent unauthorized disclosure.

VIII. Geographical Indication

What is a Geographical Indication?

A geographical indication (GI) is a legal designation that identifies a product as originating from a specific region or geographical location and having certain qualities, characteristics, or reputation that are unique to that place. GI protects the product's authenticity and quality and helps consumers identify the product's origin and reputation. It is a name or sign used on certain products which corresponds to a geographic origin of the product. The relationship between objects and place becomes so well known that any reference to that place is reminiscent of goods originating there and vice versa. The Geographical Indications of Goods (Registration and Protection) Act, 1999 provides for registration and better protection of geographical indications relating to goods in India.

Examples-

Product	Geographical Origin
Phulkari Handicraft	Punjab, Haryana, Rajasthan.
Warli Painting	Maharashtra, Gujarat, Daman & Diu
Malabar Robusta Coffee	Kerala & Karnataka
Darjeeling Tea	West Bengal
Pochampally Ikkat	Telangana

Geographical Origin

Geographical origin refers to the specific place or region where a product or item originates from. This can include the location where raw materials are sourced, where production takes place, or where a particular process or technique is used to create the product. Geographical origin can have a significant impact on the quality, reputation, and cultural identity of a product and is often used as a way of distinguishing and promoting products with unique characteristics and qualities. In some cases, geographical origin is also protected by intellectual property laws, such as geographical indications.

IX. Designs

What is a Design?

Design intellectual property refers to original and unique creations of the mind that can be used commercially. The Designs Act, 2000 is the law relating to the protection of designs in India. The law help creators earn recognition and financial benefits for their products, and also help prevent others from using their creations without permission.

A design right protects the original and aesthetically unique appearance of a manufactured item, as long as it is new and not obvious. This type of protection only covers the ornamental aspects and does not extend to the functional or structural elements. Any design invented by a person shall be protected by Designs. Shape, colour, line, pattern, etc. are covered under Designs.

A design may not be eligible for registration if it lacks individual character, is considered offensive, or if its appearance is solely dictated by its function. These criteria are used to assess the registrability of a design and ensure that it meets the necessary standards for protection under intellectual property law.

Example - Design of the wrapper of a biscuit or chocolate, design of a car, design of the shape of a cold drink bottle, etc.

X. Conclusion

Intellectual property rights (IPR) are exclusive rights to individuals for a limited time period, allowing them to exploit income from cultural expressions and inventions. Proponents of IPR provide three commonly accepted reasons for society to grant such privileges.

When someone creates a new product, it takes a lot of time, money, and effort. It's only natural for the inventor or organization to want to own exclusive rights to the invention, so that others can't benefit from it without permission.

It encourages creativity and innovation by granting economic benefits to the creator

It promotes economic growth through competition and protection of rights.

These rights are necessary to protect the global intellectual property rights in today's world. The management of intellectual property (IP) and intellectual property rights (IPR) is a complex task that requires a combination of functions and strategies, aligned with both national laws and international agreements. It can no longer be solely approached from a national perspective.

Forms of IPR can vary and require varying approaches, including specialized knowledge in areas such as science, engineering, medicine, law, finance, marketing, and economics.

The handling and management of these forms of IPR involve different strategies and require consideration of their social, economic, technical, and political impacts.

The rapid pace of technological advancement, globalization, and intense competition have made it necessary to protect innovations through IPRs like patents, trademarks, copyrights, and trade secrets. Despite these measures, infringement of intellectual property rights still occurs. The government has laws in place to prevent such violations and is taking action to enforce them.

Exercises

Based on your understanding, answer the following questions:

1. What is meant by Intellectual Property? Why does intellectual property need to be promoted and protected?
2. Discuss the concept of National Treatment and its evolution through the various international Conventions on Intellectual Property Rights.
3. Describe Copyright and the works protected under copyright act.
4. You are an author who has written a novel in Hindi. The novel has become immensely popular and now podcasters, serial producers and Youtubers are trying to adapt the story to be telecast on various forms of media. There are some authors who also want to translate your novel into English. Discuss how you will negotiate in this situation given that you have certain economic rights as a copyright owner.
5. There was a recent tiff between the States of Odisha and West Bengal over the origin of the ever-popular sweet dish- 'Rasgulla'. Both states argued that the 'Rasgulla' had been invented in their respective states. However, the Registrar of the Chennai GI office gave the GI tag to the Banglar Rasogulla of West Bengal. This caused a rift between the states as both were competing to get the GI tag for rasgulla for their respective states. In light of the above case discuss:
   a) What rights does a geographical Indication provide? How would Orissa be adversely affected by the order of the Chennai GI office?
   b) For which types of products can GI tags be used?
6. Valganciclovir hydrochloride is a medicine that is stable when stored as a solid-state under normal conditions. The applicant tried to make a liquid form of the medicine, but it was unstable for the required shelf life. Therefore, they focused on a powder form that could be mixed with water to make a liquid form. The powder form was very similar to the solid form and their patent claim was rejected. Discuss why the patent claim was rejected in view of the essential ingredients of a successful patent claim.

Activity based questions:

1. When we eat a burger from a renowned chain or drink a bottle of branded cola, we're consuming IP. From trade secrets like the Coca cola's original recipe to registered designs like Nike's tick mark, IP protects products, ideas and experiences that we consume everyday.

   Inorder to show students that IP is all around us , the students can conduct an IP treasure hunt. The teacher will set a timer and have students look around the class room for brand names, trademarks, registered designs or patents. If they read a book, watched a video or listened to a song today, even then they have interacted with IP. Award a prize to the student with the most surprising discovery or the highest number of discoveries.

2. You are setting a new cold drink manufacturing company with new and innovative machineries and recipes. You plan to use your knowledge of IPR to safeguard your new company from old bigshot companies as well as new budding companies. Describe in details, what all rights you will register and how you will benefit out of it.

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Unit 4

Law II
(General Laws)

केन्द्रीय माध्यमिक शिक्षा बोर्ड
भारत
असतो मा सद्गमय

CHAPTER 4(A)

Law and Sustainable Development

A. Introduction

What is Sustainable Development?

Sustainable Development is defined as economic development that meets the needs of the present without compromising the ability of the future generations to meet their own needs. (United Nations General Assembly, 1987)

The aim of sustainable development is to achieve long term economic growth by lowering the impact on the environment by reducing air, water and soil pollution, so that a better life is ensured for the future generations.

Few examples of sustainable practices are harnessing solar energy to reduce pollution in the environment and planting different types of crops on the same land on a rotational basis for improving soil fertility.

What is Sustainable development in law?

Sustainable development is **an approach to economic planning that attempts to foster economic growth while preserving the quality of the environment for future generations.**

What are Sustainable Development Goals (SDGs)?

The Sustainable Development Goals (SDGs) are a collection of 17 interlinked goals that provide a shared blueprint for peace and prosperity for people and the planet, now and into the future. SDGs are also known as Global Goals.

The SDG framework was adopted by the United Nations in 2015 as a universal call for action to:

- protect the planet,
- end poverty, and
- ensure that all people enjoy peace and prosperity by 2030.

To achieve SDGs, the creativity, knowhow, technology and financial resources from all of society are necessary.

The 17 sustainable development goals (SDGs) to transform our world are:

GOAL 1: No Poverty	GOAL 2: Zero Hunger	GOAL 3: Good Health and Well-being	GOAL 4: Quality Education	GOAL 5: Gender Equality	GOAL 6: Clean Water and Sanitation
GOAL 7: Affordable and Clean Energy	GOAL 8: Decent Work and Economic Growth	GOAL 9: Industry, Innovation and Infrastructure	GOAL 10: Reduced Inequality	GOAL 11: Sustainable Cities and Communities	GOAL 12: Responsible Consumption and Production
GOAL 13: Climate Action	GOAL 14: Life Below Water	GOAL 15: Life on Land	GOAL 16: Peace and Justice Strong Institutions	GOAL 17: Partnerships to achieve the Goal	

Stockholm Declaration, 1972- The Stockholm Convention is a global treaty that aims to **protect human health and the environment from the effects of persistent organic pollutants** (POPs). It was the first convention to discuss environmental issues on a global scale. The declaration **proclaims truths relating to man and the environment such as man is the creator and moulder of his surroundings**. The declaration also reiterates the importance of preservation of the environment.

B. Initiatives Under International Scenario

(a) Rio Declaration 1992- Agenda 21

The United Nations Conference on Environment and Development (UNCED), also known as the 'Earth Summit' was held in Rio de Janerio, Brazil in 1992. The Conference marked the 20th anniversary of the first ever International Human Environment Conference in Stockholm, Sweden, 1972. The Conference was attended by representatives from 179 countries to discuss the impact of human socio-economic activities on the environment.

The objective of Rio 'Earth Summit' was to formulate a blueprint for global action on environment and development issues. It recognised that integrating and balancing the economic, social and environmental concerns in meeting our needs is vital for sustaining human life on the planet Earth. This triggered action on part of governments from across the globe on how to ensure sustainability with development.

The Earth Summit resulted in some major actions by countries from across the globe in the form of conventions and resolutions. To name a few:

- Agenda - 21
- UNFCCC - United Nations Framework Convention on Climate Change
- Convention on Biological Diversity
- The Declaration on the Principles of Forest Management
- Commission on Sustainable Development

(b) Agenda 21

Agenda 21 was one of the most daring programs calling for action strategies. It focussed on new methods of education, new ways of preserving natural resources and new ways of participating in a sustainable economy. The implementation of Agenda -21 was reaffirmed in the World Summit on Sustainable Development held in Johannesburg, in 2002.

Agenda 21 focuses on Community Participation as one of the major prerequisites for sustainable development. Attaining sustainability therefore requires addressing the fundamental issues and challenges pertaining to development at local, regional and global levels simultaneously by all segments of society. Thus the key objective of sustainable development being, to improve human well-being and to sustain these improvements over a period of time, remains the focus of Agenda - 21.

C. Provisions Under Indian Constitution:

(a) Constitution of India:

The Constitution of India under Article 21 enshrine the 'Right to Life'. This article in its wider interpretation encompasses 'Right to clean environment' as an important facet of 'life'.

Further, Article 38 shoulders the State with the responsibility of maintaining social order for ensuring a welfare state. This is only possible with the people living in a pollution free environment.

Article-48A, inserted by the 42nd amendment to the Constitution of India, states "Protection and improvement of environment and safeguarding of forests and wild life- The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country'.

It requires the State to adopt the Protectionist policy as well as Improvinistic Policy. ***Protectionist policy*** imposes ban on those things which lead to environmental degradation, e.g. ban on use of leaded petrol, ban on use of plastic bags etc. ***Improvinistic policy*** refers to alternatives that can be used for improvement of environment, e.g. use of CNG or low sulphur fuel, tree plantation in industrial areas etc.

A duty has also been imposed on all citizens to protect our environment. Article-51A(g) of the Indian Constitution says: "It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures."

(b) Legal Mechanism

The Constitution of India clearly endows a duty on the State to "protect and improve the environment and to safeguard the forests and wildlife of the country". To strengthen environment protection at grassroot level it further imposes fundamental duty on every citizen "to protect and improve the natural environment including forests, lakes, rivers, and wildlife". The State, indispensably has been directed by way of provision under Part III and Part IV to ensure the protection of environment by suitable legislations, regulations and otherwise. The Honorable Supreme Court in *K. M. Chinnappa v. Union of India* defined "**Environmental Law**" as an instrument to protect and improve the environment and control or prevent any act or omission polluting or likely to pollute the environment.

It is with the enactment of Environment Protection Act, 1986 that a concrete step has been taken

for combating modern day challenges in environment protection and improvement. Prior to the enactment of the Act, environment protection regime was more 'regulatory' in nature. At present, environment protection in India comprises of the following legislations and regulatory bodies.

(c) Legal Framework

1. Environment Protection Act, 1986
2. Air (prevention and control of Pollution) Act, 1981
3. Water (prevention and control of Pollution) Act, 1974
4. The Noise Pollution (Regulation and Control) Rules, 2000
5. National Green Tribunal Act, 2010
6. Energy Conservation Act, 2001

D. Environment Protection Act, 1986

In the wake of the Bhopal Tragedy, the Government of India enacted the Environment Protection Act of 1986 under Article 253 of the Constitution. The purpose of the Act is to implement the decisions of the United Nations Conference on the Human Environment, relating to the protection and improvement of the human environment and the prevention of hazards of human activities for economic development to human beings, other living creatures, plants and property. The Act is an "umbrella" legislation designed to provide a framework for the central government to coordinate the activities of various central and state authorities established under previous laws, such as the Water Act and the Air Act. India, like any other developing nation, is facing an alarming concern in environmental degradation due to economic activities. Control mechanisms to guard against slow, insidious build up of hazardous substances, especially new chemicals, in the environment are weak.

E. Pollution Control Board

(a) The Central Pollution Control Board:

The Central Pollution Control Board is a statutory organisation under The Ministry of Environment and Forest Protection. It is constituted under the Water (Prevention and Control of Pollution) Act, 1974.

Principal Functions of the CPCB have been spelt out in the Water (Prevention and Control of Pollution) Act, 1974, and the Air (Prevention and Control of Pollution) Act, 1981. Its broad functions include promoting cleanliness of streams and wells in different areas of the States by prevention, control and abatement of water pollution, and by improving the quality of air and to prevent, control or abate air pollution in the country. However, if we analyse the functions in detail, they may be summarised as follows:

- Advise the Central Government on any matter concerning prevention and control of water and air pollution and improvement of the quality of air;
- Plan and cause to be executed a nation-wide program for the prevention, control or abatement of water and air pollution;
- Coordinate the activities of the State Board and resolve disputes among them;

- Provide technical assistance and guidance to the State Boards, carry out and sponsor investigation and research relating to problems of water and air pollution, and for their prevention, control or abatement;
- Plan and organise training of persons engaged in programme on the prevention, control or abatement of water and air pollution;
- Organise through mass media, a comprehensive mass awareness programme on the prevention, control or abatement of water and air pollution;
- Collect, compile and publish technical and statistical data relating to water and air pollution and the measures devised for their effective prevention, control or abatement;
- Prepare manuals, codes and guidelines relating to treatment and disposal of sewage and trade effluents as well as for stack gas cleaning devices, stacks and ducts;
- Disseminate information in respect of matters relating to water and air pollution and their prevention and control;
- Lay down, modify or annul, in consultation with the State Governments concerned, the standards for stream or well, and lay down standards for the quality of air; and
- Perform such other functions as may be prescribed by the Government of india.

(b) The State Pollution Control Boards

State Pollution Control Board is a statutory organisation established under the Water (Prevention and Control of Pollution) Act 1974, which works under the supervision of the Central Pollution Control Board to implement the environmental laws and rules within the respective state for the protection of the environment.

It is mandatory for every business, either new or existing, to obtain necessary authorization from the respective State Pollution Control Board in order to carry out the activities of the business in a State.

Objectives:

- Preservation of natural resources
- Promotion of sustainable development for economic growth of the nation along with environmental protection and social equity.
- Effective waste management for the protection of the environment.
- Spreading Awareness about the protection of the environment among the consumers
- Encouraging the general public for the use of environment-friendly products like paper bags, public transport, CFL, etc. to help reduce the environmental pollution

Functions of the Board

The broad functions of the Board are in line with the functions of the Central Board and aimed at the prevention, abatement, and control of air and water pollution. Moreover, the primary motive is to assist the entrepreneurs and industries in the fulfilment of Corporate Environmental Responsibility (CER). The functions of the Board can be detailed as follows for further understanding:

- Issue NOC (No-Objection Certificates) from the perspective of the environmental pollution, including the adequacy of the site from the environmental angle.

- Assessment of quality ambient air.
- Assessment of inland surface waters' quality
- Issuance of the Consent under provisions of Section 21 of the Air (Prevention and Control of Pollution) Act, 1981.
- Issue of Consent under provisions of section 25/26 of the Water (Prevention and Control of Pollution) Act, 1974.
- Collection and assessment of Water Cess, under the provision of Water (Prevention and Control of Pollution) Cess Act, 1977.
- Assessment and Identification of municipal and industrial pollution sources and control.
- Conducting Mass Awareness Programmes.
- Development of Pollution Control technologies.
- Notification of emission and effluent standards.
- Instituting legal action against defaulters.
- Implementing Biomedical Waste Rules, 1998.
- Issuance of Authorization under the Hazardous Waste Management Rule, 1989.
- Identifying the onsite crisis management plans, isolated storage, etc., under the Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989.

SDGs can be the most useful weapons to build the economies in such a way that they can provide for the future generations in a sustainable way. All countries must work together to achieve these goals and create a sustainable world. India has put together a legislative framework for the attainment of these goals. What is needed now is a strong implementation of these laws to achieve a better relationship between the society and environment.

Exercises

Based on your understanding, answer the following questions:

1. What is the meaning of sustainable development? What does it aim to achieve?
2. When and why was the SDG Framework adopted? How can these SDGs be achieved?
3. Identify the SDG goals which provide for protection of environment.
4. Describe the legal framework in India for environment protection
5. What are the main functions of
   a. Central Pollution Control Board
   b. State Pollution Control Board

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CHAPTER 4(B)

Forms of Legal Entities

Learning Outcomes:

Students will be able to:

- Identify different forms of business entities/ organisations
- Explains features, merits and limitations of different forms of business entities/ organisations
- Distinguish between various forms of business entities/ organisations
- Discuss the factors determining choice of an appropriate form of entity/ organisation

I. Introduction

If one is planning to start a business or is interested in expanding an existing one, it is important to understand the different forms of organisations. Choosing the right legal structure is aligned to the goals of the entity and the local and central laws where it desires to establish its base.

In India, there are 3 major types of business frameworks – sole proprietorship, partnership and company (public or private). Over the years, hybrid and newer versions of the same have arisen such as limited liability partnerships. Each form of business has its own pros and cons.

Objective of Law Regulation of Legal Entities

The purpose of law regulation of forms of legal entities is to provide a framework for the creation, management, and dissolution of different types of organizations, such as corporations, partnerships, and sole proprietorships. These regulations aim to protect the rights and interests of stakeholders, including shareholders, employees, customers, and creditors, and to ensure the fair and transparent functioning of these entities within the legal and economic system. Additionally, law regulations of legal entities may also promote competition, prevent fraud and misconduct, and provide a clear understanding of responsibilities and liabilities.

II. Types of legal entities in India

1. Sole Proprietorship

Sole proprietorship is a popular form of business organisation and is the most suitable form for small businesses, especially in their initial years of operation. Sole proprietorship refers to a form of business organisation which is owned, managed and controlled by an individual who is the recipient of all profits and bearer of all risks.

The word "sole" implies "only", and "proprietor" refers to "owner". Hence, a sole proprietor is the one who is the only owner of a business.

It is the easiest type of business to establish or take apart, due to a lack of government regulation.

As such, these types of businesses are very popular among sole owners of businesses, individual self-contractors, and consultants. Most small businesses start as sole proprietorships and either stay that way or expand and transition to a limited liability entity or corporation. This form of business is particularly common in areas of personalised services such as beauty parlours, hair salons and small scale activities like running a retail shop in a locality.

Salient features of a sole proprietorship are as follows:

S.No.	Feature	Details
1.	No separate entity	No difference in the eyes of the law between the owner and business.
2.	Formation	a) No specific law b) Business is owned by single person c) No formal registration
3.	No. of members	Minimum – 1 Maximum - 1
4.	Liability	a) Unlimited liability b) Owner is responsible for all losses, debts and liabilities.
5.	Profit	If the business is successful, the owner enjoys all the profits.
6.	Control & decision making	The right to run the business and make all decisions lies absolutely with the sole proprietor.
7.	Limited life of the business	As the business is owned and controlled by one person, death, insanity, imprisonment, physical / mental incapacity or bankruptcy will have a direct impact on the business and lead to its closure.
8.	Confidentiality	Sole decision making authority enables the proprietor to keep all information related to business operations confidential and maintain secrecy.

Advantages and disadvantages of Sole Proprietorship

There are several benefits as well as limitations of running a sole proprietorship. Some of those points are discussed below.

Advantages

- Quick decision making
- Confidentiality of information
- Owner receives all the profits
- Owner makes all decisions and is in complete control of the company
- Easiest and least expensive form of ownership to organize
- Easy of formation and closure
- The business does not pay separate taxes. All income passes directly to the owner and is taxed at the owner's personal tax rate.

Disadvantages

- Unlimited liability if anything happens in the business
- Limited in raising funds
- No separate legal status
- Limited funds and resources
- Limited skills and managerial ability of the proprietor

2. Partnership

The Indian Partnership Act, 1932 defines partnership as "*the relation between persons who have agreed to share the profit of the business carried on by all or any one of them acting for all.*" Persons who have entered into partnership with one another are called individually, "*partners*" and collectively "*a firm*" and the name under which their business is carried on is called the "*firm-name*".

The inherent disadvantage of the sole proprietorship in financing and managing an expanding business paved the way for partnership as a viable option. Partnership serves as an answer to the needs of greater capital investment, varied skills and sharing of risks.

A successful partnership can help a business thrive by allowing the partners to pool their labor and resources. But there is also an additional risk in joining a partnership. In addition to sharing profits, the partners may also assume responsibility for any losses or debts from the other partners.

Strategic partnerships are formed when two or more businesses or individuals come together to achieve mutual goals and enhance their respective brands. By co-branding and combining resources, strategic partnerships can provide benefits such as increased brand awareness, improved brand trust, and access to new markets and customers. Some well-known examples of successful strategic partnerships include Spotify and Google, Sherwin-Williams and Pottery Barn, and McDonald's and Coca-Cola. These partnerships have helped both companies to grow and succeed in their respective markets.

In the case of law firms and medical practice often individuals who are experts in their field join together to form partnerships with other experts to enhance knowledge, greater reach, joining of several sub specialisations, more trustworthiness and for all round solutions to their clients.

Salient features of a partnership are as follows:

S.No.	Feature	Details
1.	No separate entity	A partnership firm has no separate legal existence of its own i.e., the partnership firm and the partners are one and the same in the eyes of law.
2.	Formation	a) There are two types of partnership firms – registered and unregistered. It is not compulsory to register a partnership firm. b) Registration by the Registrar of Firms under the Indian Partnership Act, 1932. c) In order to enter into partnership, a clear agreement with respect to the terms, conditions and all aspects concerning the partners is essential so that there is no misunderstanding later among the partners. This written agreement is called a Partnership Deed.

3.	No. of partners	Minimum – 2 Maximum - 50
4.	Liability	a) Unlimited liability b) Partners are jointly and severally liable for the liabilities of the firm
5.	Profit	Partners share profits in a mutually agreed ratio.
6.	Control & decision making	Partners enjoy shared responsibility amongst each other. This may sometimes raise conflicts in decision making.
7.	Dissolution	Partnership firm can be dissolved by way of compulsory dissolution or by way of agreement.
8.	Funds	Capital is contributed by the partners. This makes it possible to use larger amounts of funds.

Partnership Advantages

- Easy to establish (with the exception of developing a partnership agreement)
- Separate legal status to give liability protection
- Partners may have complementary skills
- Start up cost is low
- More capital is available for business

Partnership Disadvantages

- Partners are jointly and individually liable for the actions of the other partners
- Profits must be shared with the partners
- Divided decision making
- Business can suffer if the detailed partnership agreement is not in place

3. Limited Liability Partnership

A limited liability partnership (LLP) is a body corporate formed and incorporated under the Limited Liability Partnership Act, 2008.

A Limited Liability Partnership (LLP) is a type of business that combines the benefits of limited liability with the flexibility of a partnership. It allows members to organize their internal structure based on an agreement. This type of business is suitable for entrepreneurs, professionals, and enterprises that provide services or engage in scientific and technical disciplines. It is also a good option for small enterprises and for investment by venture capital due to its flexible structure and operation.

The salient features of a limited liability partnership are as follows :

S.No.	Feature	Details
1.	Separate entity	a) LLP is a separate legal entity from that of its partners. b) It shall have perpetual succession. c) Any change in the partners shall not affect the existence, rights or liabilities of the LLP.
2.	Formation	A written agreement known as a 'limited liability partnership agreement' is entered into between the partners of the LLP or between the LLP and its partners which determines the mutual rights and obligations.
3.	No. of partners	Minimum – 2 Maximum – no limit
4.	Liability	a) Liability of the partners is limited to their agreed contribution in the LLP. b) No partner is liable on account of the independent or un-authorized actions of other partners.
5.	Capital	An LLP can be started with no minimum amount of capital contribution.
6.	Less registration cost	The cost of registration is lesser as compared to a private limited company or public limited company.

Advantages of an LLP

There are several advantages to operating as a Limited Liability Partnership (LLP).

- The terms and conditions of an LLP are based on a mutually agreed LLP agreement, providing greater flexibility and ease.
- The cost of registering an LLP is lower than incorporating a public or private limited company.
- Partners are only liable up to their agreed contribution, and there is no joint liability created by the actions of another partner.
- The registration process is simpler compared to that of a company.
- Remuneration, voting rights, and other aspects are clear and defined in the LLP agreement, with no restrictions on partner remuneration as long as it is authorized by the agreement.
- The LLP can sue and be sued in its own name, protecting partners from being personally sued for the LLP's debts.
- There is greater flexibility for becoming a partner, leaving the LLP, or transferring interest in the LLP.
- Partners are free to enter into any contract, and the LLP enjoys higher credit-worthiness compared to a partnership, although lower than a company.
- There is no mandatory requirement for auditing accounts, and the LLP can raise funds from private equity investors and financial institutions.

Disadvantages of LLP

There are some disadvantages to operating as an LLP.

- Actions taken by one partner without the consent of others can bind the LLP. In some cases, partners may also be personally liable for the LLP's debts.
- The winding-up process, as outlined in the Limited Liability Partnership (Winding Up and Dissolution) Rules, 2012, can be lengthy and costly.
- LLPs have lower credit-worthiness compared to companies.
- LLPs are required to file annual statements of accounts and solvency, as well as an annual return with the Registrar of Companies, which is not a requirement for partnerships.

4. Private Limited Company

A Private Limited Company is a popular business structure amongst growing businesses and companies.

A Private Limited Company is a separate legal entity registered under the Companies Act, 2013.

It is a type of business entity that is owned by a small group of individuals and registered for specific business objectives. It is a popular choice for startups and businesses with high growth aspirations due to the limited liability protection it offers to shareholders and the flexibility it provides in terms of ownership and management structure.

The salient features of a private limited company are as follows :

S.No.	Feature	Details
1.	Separate entity	A private limited company is said to be a separate legal entity. Therefore, the company can sue and can also be sued under its name.
2.	Formation	a) The private limited company is to be registered under the Companies Act, 2013. b) Incorporated documents such as Memorandum of Association and Articles of Association are required.
3.	No. of members	Minimum – 2 Maximum – 200
4.	Liability	The liability of each member or shareholder is limited. The personal, individual assets of the shareholders are not at risk.
5.	Capital	It must have a minimum paid-up capital of such amount which may be prescribed from time to time.
6.	Borrowing capacity	A private limited company enjoys the privileges of borrowing more funds.
7.	Easy exit	Private limited companies can be sold or transferred, either partially or in full, to another individual or entity without any disruption to the current business.
8.	Perpetual succession	The company keeps on existing in the eyes of law even in the case of death, insolvency, the bankruptcy of any of its members.

Examples of popular Private limited companies

- Flipkart
- Freecharge
- Café Coffee Day

5. Public Limited Company

As per Section 2(71) of the Companies Act, 2013 a public company means "*a company which is not a private company*".

A public limited company is recognised as a separate entity from its owners and has the ability to enter into agreements in its own name. It operates independently from its owners and has its own set of rules, obligations, regulations and legal rights. The owners run the company but have limited liability for its debts and obligations. This legal separation provides a higher level of protection to the owners and makes it easier for the company to raise capital through the sale of shares to the public.

The owners of a public limited company are referred to as shareholders or stakeholders, and the ownership of the company is divided into units known as shares or equity shares. These units of ownership can be held by multiple individuals or corporations, making it easier for the company to raise capital by selling shares to the public. The shareholders have a right to participate in the decision-making process of the company and receive dividends from the company's profits.

The salient features of a public limited company are as follows :

S.No.	Feature	Details
1.	Separate entity	Public Limited Company is a separate legal entity registered under the Companies Act, 2013.
2.	Formation	a) The public limited company is to be registered under the Companies Act, 2013. b) Incorporated documents such as Memorandum of Association and Articles of Association are required. c) Public limited companies could be listed in the stock market or could be unlisted.
3.	No. of members	Minimum – 7 Maximum – no limit
4.	Limited Liability	The liability of the shareholders is limited to their stake only.
5.	Capital	a) A public limited company is required to have a minimum paid-up capital of an amount as prescribed under the act. b) Public Limited Company can relish an increased ability to raise capital through the stock market by issuing debentures and bonds from the public.
6.	Perpetual succession	The life span of the public limited company is not affected by the death of any member or shareholder.
7.	Strict regulation	A Public Limited Company is strictly regulated and is required to publish its true financial health to its shareholders.

8.	Transparency	All information relating to a public limited company is available to the public including detailed financial statements and structure of the management.
9.	Transferability of shares	The shareholders are free to buy or sell/ trade shares to anyone through the stock market if the the company is listed and through dealers and other platforms if the company is unlisted.

Popular public limited companies in India

- Indian Oil Corporation Ltd.
- Bharat Petroleum Corporation Ltd.
- State Bank of India

In comparison to sole proprietorship and partnership forms of organisations, a company has larger financial resources. Further, capital can be attracted from public as well as through loans from banks and financial institutions. Thus, there is larger scope of expansion.

Difference between Public and Private Company

Basis	Public Company	Private Company
Members	Minimum - 7 Maximum - unlimited	Minimum - 2 Maximum - 200
Transfer of shares	No restriction	Restriction on transfer
Invitation to public to subscribe to shares	Can invite the public to subscribe to its shares	Cannot invite the public to subscribe to its securities

6. One Person Company (OPC)

As per Section 2(62) of the Companies Act 2013, "one person company" means a company that has only one person as a member. This is a recent invention to facilitate entrepreneurs to own and manage companies alone.

The salient features of a one person company are as follows :

S.No.	Feature	Details
1.	Separate entity	a) The OPC receives a separate legal entity status from the member. b) The separate legal entity of the OPC gives protection to the single individual who has incorporated it.
2.	Liability	The liability of the member is limited to his/her shares, and he/she is not personally liable for the loss of the company.

3.	Formation	a) Incorporated by a single person. b) Incorporated as a private company under the Companies Act, 2013. c) Compliance requirements are lesser than that of a private company. d) An individual can form a company with one single member and one director. The director and member can be the same person.
4.	No. of members	Minimum – 1 Maximum – 1
5.	Easy to obtain funds	Since OPC is a private company, it is easy to go for fundraising through venture capitals, angel investors, incubators etc.
6.	Perpetual succession	The OPC has the feature of perpetual succession even when there is only one member. While incorporating the OPC, the single-member needs to appoint a nominee. Upon the member's death, the nominee will run the company in the member's place.
7.	No minimum paid-up share capital	Companies Act, 2013 has not prescribed any amount as minimum paid-up capital for OPCs.

A sole proprietorship form of business might seem very similar to one-person companies because they both involve a single person owning the business, but they're actually exist some differences between them.

The main difference between the two is the nature of the liabilities they carry. Since an OPC is a separate legal entity distinguished from its promoter, it has its own assets and liabilities. The promoter is not personally liable to repay the debts of the company.

On the other hand, sole proprietorships and their proprietors are the same persons. So, the law allows attachment and sale of promoter's own assets in case of non-fulfilment of the business' liabilities.

III. Comparative Evaluation of some forms of Business Entities

Basis of comparison	Sole Proprietorship	Partnership	Company
Formation	Minimum legal formalities; easy formation	Registration is optional, easy formation	Registration compulsory; lengthy and expensive formation process
Members	Only one owner	Minimum - 2 Maximum - 50	Minimum Private - 2 Public - 7 Maximum Private - 200 Public - Unlimited

Capital contribution	Limited finance	Funds can be raised / contributed by partners	Large financial resources
Liability	Unlimited	Unlimited and joint	Limited
Control & Management	Owner takes all decisions; quick decision making	Partners take decisions; consent of all partners is needed	Separation between ownership and management
Continuity	Unstable; business and owner regarded as one	More status but affected by status of partners	Stable because of separate legal status

IV. Conclusion

A legal entity refers to any business or organization that has legally recognized rights and obligations, such as the obligation to file taxes. These entities have the capacity to enter into agreements as either a vendor or supplier, and can initiate or be a party to lawsuits in a court of law.

The choice of business structure has a major impact on taxes, funding, required paperwork, and personal responsibility. It's crucial to make this decision before registering a business.

Exercises

Based on your understanding, answer the following questions :

1. State the differences between a private limited company and a public limited company.
2. Ajay and Nilam decide to contribute Rs. 10000 and Rs.20000 respectively in order to start a partnership firm selling saris. Since they are good friends they forgo registering the partnership and have only a verbal agreement to share profit and losses. In the first year itself due to Covid the firm suffered a loss of Rs. 30000. Now Ajay insists that the losses should be borne in the same ratio as the initial contribution i.e. he should bear Rs 10000 of loss and Nilam should bear Rs.20000 of loss. Whereas Nilam wants them to bear the losses equally. In this regard discuss the nature and essential characteristics of partnership firms, types of partnership firms and why it is important to have a written agreement or Partnership deed between partners.
3. The people of a village in India make a special kind of silk dress. Due to social media's influence the dress has become immensely popular in India and abroad and designers are willing to pay crores of rupees for bulk orders. Since it is not possible for the individual weavers to handle such large orders, they sought the help of a benevolent lawyer who belonged to their village. They want to form a legal entity to enter into the supply business formally. They are also aware that if they come together, their bargaining power will increase. They are ready to contribute a fixed amount initially.They also realize that they will require to raise capital from investors in order to fulfill their orders. A few of them have adult educated children who are ready to take up the management of the formal entity. There are about hundred weavers who are willing to come together to form the entity. If you are the lawyer they have approached, suggest which will be the best form of legal entity in this case and why.
4. Raj owns a small provisions store. He has borrowed a sum of Rs 70000 from a moneylender to run his business. Raj dies from Covid before returning the amount. Can the moneylender recover his money? Discuss the liabilities of a sole proprietorship firm and its advantages and

disadvantages.

5. A giant cola company wants to enter the Indian market. They have a huge market in foreign countries. They also want to raise more funds from the public in India. What is the best way for them to enter the markets? What legal entity should they form to be able to do business in India? Discuss the characteristics of such an entity.

Activity Based Question:

1. Two friends Tanmay and Pinaki decide to start a business. They have five thousand rupees each to contribute towards the business. They want to share the profits equally. But in case of a loss Tanmay has agreed to bear 60 per cent of the loss. They have decided to conduct the business using Tanmay's commercial property at 1, Mango Lane, Bangalore - 2, as the registered address. Also if they ever wind up the business, the liabilities and assets existing at that point , will be shared equally between the partners. Draft a partnership agreement between the two partners. Add any other details you think are necessary for the conduct of the business.

2. Identify one partnership firm, one proprietorship firm, one Private limited company and one Limited liability partnership functioning in your city/town/country. Discuss how their products/ services are used by you and what is the extent of liabilities of their stakeholders spending on their form of business.

OR

Research/Identify and discuss the legal forms of the following entities

a. Coca Cola , India

b. KFC India

c. An e commerce giant that started as a sole proprietorship firm in India

d. A law firm that is a partnership

e. The first Limited Liability Partnership firm of India

CHAPTER 4(C)

Criminal Laws in India

Learning Outcomes

Students will be able to:

- Define the term "crime"
- Identify and explain the objectives of criminal law
- Explain the fundamental elements of crime
- Distinguish between intention and motive
- Identify and analyze the various stages of crime
- Distinguish between admission and confession
- Analyze and explain the various forms of confession
- Evaluate the relevance of Dying Declaration

I. 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 deal with imposing punishments on crimes is known as Criminal Law.

II. Objectives of Criminal Law

With the change in the social structure, society has witnessed various punishment theories and the radical changes that they have undergone from the traditional to the modern level and the crucial problems relating to them. Kenny wrote: "it cannot be said that the theories of criminal punishment current amongst our judges and legislators have assumed...."either a coherent or even a stable form. Malinowski believes all the legally effective institutions.... are.... means of cutting short an illegal or intolerable state of affairs, of restoring the equilibrium in the social life and of giving the vent to the feelings of oppression and injustice felt by the individuals.

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

IGNORANTIA JURIS NON EXCUSAT

If a wrongdoer says that he was ignorant of the consequences of the act done by him, he would not be excused. Because everybody is supposed to know the law of the land, which is guided by the maxim 'Ignorantia juris non excusat' means ignorance of law is no excuse It is a Latin maxim meaning ignorance of law or lack of knowledge or mistake of law about legal requirement is not an excuse and hence liability arises in such cases.

III. Criminal Laws in India are broadly covered by the following legislations:

1. Indian Penal Code, 1860
2. Criminal Procedure Code 1973
3. Indian Evidence Act, 1872

1. Indian Penal Code, 1860

1.1 Fundamental elements of a crime

a. Mens rea or guilty intention

b. Actus reus or illegal act or omission

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 in The Indian Penal Code

32. *Words referring to acts include illegal omissions*. —In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.

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 boy is drowning in the swimming pool of a resort. A man who is beside the pool does not make any attempt to save this boy. This is a moral omission of not saving someone's life. The man 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 boy drowning in the pool, then he can be held criminally liable for such omission.

What is Mens Rea?

Mens rea generally means 'ill intention', guilty mind/ intent. The constituents of ***mens rea*** 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-defence 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 17 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. Mayer Hans George, AIR 1965 SC 722.***

Facts of the case

The respondent, Mayer Hans George, a German smuggler, left Zurich by plane on 27th November 1962 with 34 kilos of gold concealed on his person to be delivered in Manila. The plane arrived at Bombay on 28th of November. The Customs Authorities, as a part of their duties, inspected to check if any gold was dispatched by any traveller and looked through George, seized his gold and accused him of the offence under sec 8(10) and 23(1-A) of the Foreign Exchange Regulation Act. This section is read with a notification dated November 8, 1962, of the RBI which was published in the Gazette of India on 24th of November. George was initially acquitted by the High Court, but the further appeal was made by the state in the court of law.

Issues presented before the court

Whether the respondent is guilty of bringing gold in India under sec 8(1) and 23(1-A) of the FERA which was published in the Gazette of India on 24th November 1962?

The State of Maharashtra contended that the act was passed keeping in mind the pirating of gold since it has become the major financial concern of the nation. Moreover, looking at the importance of the act it can be inferred that the mens rea is an irrelevant element in assuming the culpability of the offender. The strict adherence of the act refutes such assumptions and demonstrates that mens rea is not a fundamental element of the offence.

However, *the respondents* were of the view that mens rea is a fundamental element of any criminal offence and George was not aware of the notification published by the Reserve Bank. It was contended that a person who was not aware of the Indian Provision and has no intention to bring gold in India cannot be said to possess the intent to break the law and hence should not be prosecuted under the act.

Decision- 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."

The court said that even though mens rea is an essential requirement to commit a crime but regardless of that the statutory provision can exclude the mental element. The express words of the statute can exclude the mens rea as an essential ingredient of the crime. This may be done for various reasons, for instance, to promote public welfare and activities or to eradicate social evils. The statute which complies strict liability helps the offender to assist the state in the enforcement of the law.

1.2 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 (actus reus), 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.

In *Nathuni Yadav and Ors vs State of Bihar and another 1997 SC (34) ACC 576,* the Court held that "Motive for doing a criminal act is generally a difficult area for prosecution. One cannot normally see into the mind of another. Motive is the emotion which impels a man to do a particular act. Such impelling cause need not necessarily be proportionally grave to do grave crimes. Many a murder have been committed without any known or prominent motive". The Court further stated that Motive is a psychological phenomenon. Merely because failing to translate the mental state of the accused does not mean that no such mental condition existed in the mind of the assailant. The motive for an offence need not be necessarily proportionately grave to commit the grave offence. Therefore, establishing a sufficient motive for committing the offence is not a prerequisite for conviction.

1.3 Stages of Crime

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. The stages can be explained as under-

- **Intention -** The first stage in committing a crime is to have criminal intent and this is known as mental stage. The law does not take notice of an intention, mere intention to commit an offence not followed by any act, cannot constitute an offence. The obvious reason for not prosecuting the accused at this stage is that it is very difficult for the prosecution to prove the guilty mind of a person.
- **Preparation –** The second stage refers to arranging all the essential steps to carry out the intended criminal act. Preparation is not unlawful in itself since it is difficult to prove that the essential preparations were made for the commission of the crime. However, in some exceptional circumstances, mere preparation is also punished.

- Intention – First stage of crime
- Preparation- Second stage of crime
- Attempt- Third Stage of crime
- Commission- Final stage of crime

Preparation When Punishable

When the offence is regarded as a serious offence, preparation to commit offences is penalised under the Indian Penal Code. A few of them are mentioned below:

- Collecting arms etc., with intention of waging war against the Government of India (Section 122 of IPC).
- Preparing Indian coins or Government stamps for counterfeiting (Sections 233 to 235, 255, and 257 of IPC).
- Possession of counterfeit coin, Counterfeit Government stamp or false weight or measure (Sections 242, 243, 259, 266 of IPC).
- Making preparations to commit dacoity (Section 399 of IPC).

- **Attempt -** The third stage in the conduct of a crime is "attempt", and it is punishable. The criminal liability arises only when the crime has reached the stage which is gone beyond preparation and has entered into the domain of attempt. Section 511 of the IPC does not define the term "attempt", although it does impose a penalty for attempting to commit an offence. After making necessary preparations, an attempt is defined as a direct step towards the commission of a crime.
- **Commission of Crime** – Committing the crime is the final step in the process. If the accused succeeds in his attempt, he commits a crime and will be found guilty of it. If he fails, he will only be charged with attempting. If the crime is complete, the offender will be tried and punished as per the specific provisions provided in the Indian Penal Code.

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.

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 statutes 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.

2. 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. (See Part I, Legal Studies Class 11)

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.

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. This was known as the "golden thread principle of criminal law." This idea is currently recognized in the criminal law of several common law nations, including the United Kingdom, Canada, South Africa, the United States of America, and India. Reverse onus clauses shift the burden of proof from the prosecution to the defendant when the prosecution has shown certain essential facts.

While the presumption of the accused's innocence is a long-standing principle enshrined in common law and upheld by Indian law as well, jurists have developed a rebuttal to the presumption of innocence under which an accused may be presumed guilty at first instance and the burden of proof is on the defence to establish the accused's innocence or raise a reasonable doubt as to his guilt. The definition of a reverse onus provision is "one that shifts the burden of proof from the prosecution to the accused once the prosecution establishes a fundamental truth that justifies the shift in burden." Although it isn't expressly stated in any laws, the presumption of innocence is an accepted concept in Indian criminal law.

There are certain categories of infractions as well to the existence of the golden rule. In certain situations, the burden of proof is placed on the accused to present evidence supporting his innocence or to raise a plausible doubt about his guilt. The accused is prima facie considered guilty. In India, the presumption of innocence is overturned in two situations: first, when a specific statute explicitly reverses the burden of proof, and second, when the accused files an appeal against a lower court's decision in which his assumption is guilt rather than innocent. Dowry Death is the most well-known instance of a reversal onus provision in our nation. In dowry death cases, the accused is believed to be in a guilty mental state, establishing a presumption of guilt rather than the ordinary presumption of innocence.

3. The Indian Evidence Act, 1872

The Indian Evidence Act stipulates how facts can be proved through evidence. The function of the law of evidence is to lay down rules according to which the facts of a case can be proved or disproved before a court of law. The Evidence Act lays down the rules of evidence for the purposes of the guidance of the courts.

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 admit, 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).**

3.1. Admission and confession

Sections 17 to 31 deal with admission generally and includes Sections 24 to 30 which deal with confession as distinguished from admission. Section 17 0f The Indian Evidence Act defines that an admission is a statement either oral or documentary or contained in electronic form which suggests an inference as to: -

(a) any fact in issue or

(b) relevant fact

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. The term "Confession" is not defined in the Evidence Act. -Justice Stephen in his Digest of the Law of Evidence states, "a 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."

Difference between Confession and Admission

CONFESSION	ADMISSION
1. Sections 24 to 30 of Indian Evidence Act deal with confession. A confession is only a species of admission.	1. Sections 17 to 31 of Indian Evidence Act deal with admission. Since the provisions relating to confessions occur under the heading "admission", it follows that the word "admission" is more comprehensive and includes a confession also.
2. If a statement is made by a party charged with crime, in criminal proceeding it will be called confession.	**2.** If a statement is made by a party in civil proceeding it will be called admission.
3. The expression 'Confession' means a statement made by an accused admitting his guilt. 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.	**3.** The expression 'Admission' means "voluntary acknowledgment of the existence or truth of a particular fact".
4. If the Confession made is free and voluntary then it may be accepted as conclusive proof of the matters confessed.	4. Admissions are not conclusive proof as to the matters admitted.

5. Confessions always go against the person making it.	**5.** Admissions may be used on behalf of the person making it.
6. By virtue of the provision in Section 30 the confession of an accused person is relevant against all his co-accused who are being tried with him for the same offence.	6. In admission, statements of a co-plaintiff or those of a co-defendant are no evidence against the others.

3.2 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. A.I.R 1996 SC 40* the accused who was charged with the murder of his daughter-in-law with whom he was always quarrelling 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 in a fit state of mind, 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.

3.3. Dying declaration – Statements by Persons who cannot be called as Witnesses

Dying Declaration is a legal concept that refers to the statement which is made by a dying person explaining the circumstances of his death. It is a statement by a person who is conscious and knows that death is imminent concerning what he believes to be the cause or circumstances of his death. It is also considered credible and trustworthy evidence based upon the general belief that most people who know that they are about to die "do not lie".

Section 32 of the Indian Evidence Act deals with the admissibility of dying declaration. It deals with cases in which statements of relevant fact by person who is dead or cannot be found etc. is relevant.

(1) **When it relates to cause of death**: - When the statement made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases, in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made,

under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

In K.R. Reddy v. The Public Prosecutor SC 1976 AIR 1994 the evidentiary value of dying declaration was observed as under: -

The dying declaration is undoubtedly admissible under Section 32 of the Evidence Act and not being a statement on oath so that its truth could be tested by cross-examination, the Courts have to apply the strictest scrutiny before acting upon it. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person yet the Court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination.

1. The Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence.
2. Once the Court is satisfied that the dying declaration is true and voluntary it can be sufficient to found the conviction even without any further corroboration.

The Court laid down the following general propositions:

1. If the dying declaration is coherent, consistent and trustworthy and appears to have been made voluntarily, conviction can be based on it even if there's no corroboration (R. Mani v. State of T.N. 2006 SC).
2. Each case must go by its own facts.
3. A dying declaration is not a weaker kind of evidence than any other piece of evidence.
4. A dying declaration which has been properly recorded by a competent magistrate, in the form of questions and answers, and as far as practicable in the words of the maker of the declaration is reliable.

Exercises

Based on your understanding, answer the following questions:

1. A, an alleged offender of rape, while in police remand felt pain in his chest. He was admitted in a hospital, where a police constable was kept on the gate to keep a watch on him. A, confessed his guilt before another patient X, who was also in the same room. The statement was overheard by police man also. Prosecution wants to make this statement of A as "confession".
2. Vijay is accused of murder of his friend, Ajay. Vijay, who was missing since the death of Ajay is alleged to have phoned the police, in a repentant mood after consuming some liquor from a hotel nearby city, confessing his crime. Prosecution wants to prove the alleged murder on the basis of this statement. Can the prosecution do so? Discuss.
3. State the correct proposition of law together with precautions that courts should take in dealing with Dying declarations.
4. X was convicted under section 302 of IPC for having committed murder of his wife Y. The judgement of trial court is based on the dying declarations made by Y to the police officer and Metropolitan Magistrate who visited the hospital later on. Can the accused be convicted solely on the basis of the dying declaration given by Y? Explain with the help of relevant case.
5. "Crime is a revolt against whole society and an attack on the civilisation of the day "Elucidate and discuss the essential elements of crime.
6. Explain mens rea as an element of criminal liability. Is mens rea relevant in crimes of strict liability? Discuss with the help of decided case law.

Activity

Make a brief study on the following questions by gathering opinions of at least five of your classmates, friends or family members:

1. Do you think imposition of capital punishment in the rarest of the rare cases justified?
2. Is death penalty an effective crime deterrent?

Mention their responses in the given table below and draw conclusions on the basis of those responses. What is your opinion regarding these issues?

Questions			Responses of Persons		
	Respondent1	Respondent2	Respondent3	Respondent4	Respondent5
Question 1					
Question 2					

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Unit 5

Concept of Human Rights

केन्द्रीय माध्यमिक शिक्षा बोर्ड
भारत
असतो मा सद्गमय

CHAPTER 5(A)

Human Rights in India

Learning Outcomes :

Students will be able to:

- understand the meaning of rights and human rights
- differentiate between human rights and fundamental rights
- appreciate the significance of Universal Declaration of Human Rights
- understand the link between Sustainable Development Goals and Human Rights
- understand how human rights laws are rooted in its constitution in India
- discuss various kinds of human rights that are safeguarded by laws in India

This Unit consists of two main chapters, one on the Human Rights laws in India, Indian Constitution and Statute Laws, and the other on the Human Rights commissions and their complaint mechanisms.

The focus of this Sub -unit is on Human rights laws in India.

A. Introduction

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.

Human rights are standards that recognize and protect the dignity of all human beings. Human rights govern how individual human beings live in society and with each other, as well as their relationship with the State and obligations that the State has towards them.

Human rights are based on values that keep society fair, just and equal. They include the right to life, the right to health and the right to freedom from torture etc.

i. How did the story of Human Rights begin?

The origin of Human Rights began in the year 539 BC when troops of Cyrus the Great, conquered Babylon. After winning the war, Cyrus did something unexpected! He freed the slaves to return home. He also declared that all people had the right to choose their own religion.

The Cyrus Cylinder- ***It is a clay tablet containing statements of Cyrus, the Great. It is the first human rights declaration in history.***

In the 20th century, during the Second World War, the world saw barbarous acts that outraged the conscience of mankind. In December 1948, this resulted in the adoption of Universal Declaration of Human Rights (UDHR) by the then newly established United Nations that recognized human rights to be the foundation for freedom, justice and peace.

ii. What is a Right?

A 'Right' is a moral or legal entitlement to have or do something. A right is a justified claim on others. In other words, Rights are reasonable privileges or claims of people which are accepted by society and affirmed by statute.

Rights include human rights and fundamental rights.

iii. What are Human Rights?

Human Rights Logo

- Human rights are basic rights that we have because we exist as human beings. These are not granted by any state.
- Human rights belong to all human beings irrespective of their nationality, race, caste, creed, gender, etc. All individuals enjoy same human rights, without any discrimination.
- Human rights are safeguards that a human being seeks in order to live with dignity and equality. Therefore, human rights are **universal** and **inalienable** rights.
- The principle of **universality** of human rights means that we are all equally entitled to our human rights.
- Human rights are **inalienable**; therefore, these should not be taken away, except in specific situations and according to due process. For instance, the right to liberty may be restricted if a person is found guilty of a crime by a court of law.
- A few examples of human rights are those basic rights that ensure fairness, equality, freedom and respect to all people. These rights abolish various unjust practices like exploitation, discrimination and inequality.
- Human rights include most fundamental rights like right to life, rights to food, education, work, health, and liberty etc.

iv. International Human Rights

- In 1948, the United Nations General Assembly adopted 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 various kinds of human rights that are applicable to all human beings.
- These 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 principle of universality of human rights is the cornerstone of international human rights law.
- The Universal Declaration of Human Rights has been embraced by almost all member States of the United Nations. All members states have committed to respect and protect the basic human rights values provided therein.

v. What are Fundamental Rights?

Fundamental Rights are basic rights of the citizens of a country. Fundamental Rights are enshrined in the Constitution and they are enforceable in the court of law. If there is any kind of violation of fundamental rights, one can approach the court for protection of such rights.

Difference between Fundamental Rights and Human Rights

The main difference between fundamental rights and human rights is that the fundamental rights are specific to a particular country, whereas human rights have worldwide acceptance.

BASIS FOR COMPARISON	FUNDAMENTAL RIGHTS	HUMAN RIGHTS
Meaning	Fundamental Rights are the basic rights of citizens of a country which are stated in the constitution and enforced by law. These may slightly vary from country to country.	Human Rights are the basic rights that all human beings can enjoy, regardless of their nationality, ethnicity and religion etc.
Scope	It is country specific.	It is universal.

Fundamental Rights and Human Rights are important to create a better environment for people and to help them preserve their dignity.

vi. Sustainable Development Goals and Human Rights

The Sustainable Development Goals (SDGs) and human rights are interlinked. Over 90 percent of the goals of the SDGs relate to human rights obligations When a State makes progress towards achieving SDGs they move forward to fulfil their human rights obligations. Few SDGs that are linked to human rights are:

No Poverty

Gender Equality

Zero Hunger

B. Indian Constitutional framework on Human Rights and related Laws in India

In India, human rights are rooted in its Constitution just like the US, South Africa, and many other countries. The Indian constitutional human rights framework involves the following parts:

1. **The Preamble**
2. **Fundamental Rights:** Part III of the Constitution contains the Fundamental Rights
3. **Directive Principles:** Part IV of the Constitution contains Directive Principles and
4. **Fundamental Duties:** Part IV(A) contains 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.

The Preamble is the '**basic structure**' of the Constitution. 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 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. Fundamental Rights - Part III of the Constitution

(i) **Articles 12-35** in **Part III** of the Constitution contain the provisions on **fundamental rights**.

Fundamental rights are largely **civil and political rights**.

The fundamental rights in India consists of the following rights:

a) **Right to equality- Articles 14-18**
b) **Right to freedom- Articles 19-22**
c) **Right against exploitation- Articles 23-24**
d) **Right to freedom of religion- Articles 25-28**
e) **Cultural and educational rights- Articles 29-30**
f) **Right to constitutional remedies- Articles 32**

(ii) **Some of the salient features of Fundamental Rights are listed below:**

- Fundamental rights 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

What is a State?

Article 12 defines the term State.

Article 12 of the Indian Constitution states that: "*Definition in this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.*"

For the purposes of Part III of the constitution, the state comprises of the following:

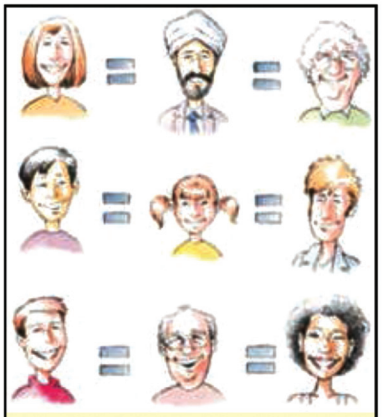
- Government and Parliament of India i.e the Executive and Legislature of the Union
- Government and Legislature of each State i.e the Executive and Legislature of the various States of India
- All local or other authorities within the territory of India
- All local and other authorities who are under the control of the Government of India

(iii) Let us now understand various fundamental rights in detail :

a) Right to Equality - Articles 14-18

Article	Brief description
Article 14	The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India, on grounds of religion, race, caste, sex or place of birth.
Article 15	The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
Article 16	There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
Article 17	Abolition of untouchability
Article 18	Abolition of all titles except military and academic

➢ Article 14



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

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.

Equality Principle - 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.

Although Article 14 states equality before law, that does not mean absolute equality. The application of the equality principle cannot be universal or general in character. This means that the same law cannot apply to every person equally and similarly; different situations may require different treatment.

Therefore, the same law may not apply to everyone but only to a class of people. The State is entitled to make a reasonable classification for purposes of legislation and treat all in one class on an equal footing.

For example, the Prohibition of Child Marriage Act, 2006 prescribes the marriageable age of girls as 18 years and that of boys 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 right to equality.

➢ Article 15

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.

➢ Article 16

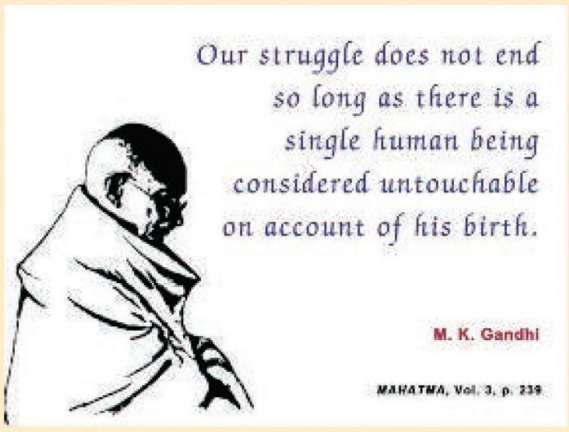
Reservation and affirmative action - Article 16 is also based on the equality principle of Article 14. It provides for equality of opportunity in matters of public or State employment and bars any discrimination to any citizen on grounds of religion, race, caste, sex, descent, place of birth, or residence.

However, this article allows the 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.

➢ Article 17

Abolition of Untouchability - Under Article 17 ´Untouchability' is abolished and its practice in any form is forbidden.

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



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

This article can be enforced against both the State as well as private individuals.

The offence of untouchability is punishable in accordance with special laws like the:

- Protection of Civil Rights Act, 1955 and

- Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989.

The abolition of untouchability in Article 17 is made operational by these two special laws that attempt to remove any form of harassment and abuses to 'Dalits' and 'Adivasis' by the State or private individuals.

➢ **Article 18**

Abolition of Titles - Article 18 talks about the abolition of titles. It states:

- No title, not being a military or academic distinction, shall be conferred by the State.
- No citizen of India shall accept any title from any foreign State.
- No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.
- No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

b) Right to Freedom- Articles 19-22

➢ **Article 19**

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 on freedoms under Article 19

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 the State can limit or take away freedoms.

Fredoms	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, or contempt 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 State run trade, business, industry or service, that excludes participation of citizens or others either completely or partially.

However, at times the Supreme Court can invalidate State's restrictions if it finds them to be unreasonable.

As an instance, the 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.

Point to ponder!

Do criminals have human rights?

Human rights framework to the criminal justice system

➢ Article 20

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.

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, sodomy law under section 377 of the Indian Penal Code (IPC)treated 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.

However, in 2018 the Supreme court overturned its 2013 judgment and struck down Section 377 of the IPC as unconstitutional.

In this example, sodomy law will not apply to any consensual homosexual conduct committed in 2011 but will apply to commissions that took place post-Supreme Court judgment of 2013 till 2018 (when the law again changed).

Therefore, 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.

Last, every accused has a right to fair trial.

➢ Article 21

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 the right to do as per 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.

'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 can 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 a 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**.

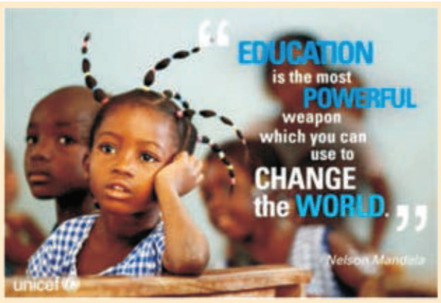
Class Activity:
Conduct a class debate on whether 'death penalty' should be abolished in India.

➢ Article 21A

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 the right to education to all between the age of six and fourteen and obligates the 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, which Supreme court raised to the status of fundamental rights affirming depriving one from education amounts to depriving one's right to life (Article 21 - Fundamental Right). Accordingly right to education for the children of ages of 6 to 14 is now part of the fundamental rights.

Briefly put, Directive Principles of State Policy are not enforceable in a court of law as they are aspirational 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 under Article 21, which is a fundamental right. This meant that elementary education to the status of fundamental right from that of a policy goal (directive principles) and hence made it enforceable.

Accordingly, in 2002, Article 21A providing right to elementary education was created as a fundamental right by **the Constitution (Eighty-sixth Amendment) Act, 2002.** The aim is to provide free and compulsory education to all children in the age group of six to fourteen years in such a manner as the State may, by law, determine.

The Right of Children to Free and Compulsory Education (RTE) Act, 2009

The Right of Children to Free and Compulsory Education Act 2009, also known as the **RTE Act**, was enacted by the Parliament of India in 2009 and it provides that every child has a right to **free and compulsory education till completion of elementary education in a neighborhood school**.

This Act places a legal obligation on the state and central governments to implement the fundamental rights of a child in accordance with the provisions of the RTE Act.

However, implementing this right requires State's financial and budgetary expenditures of enormous amounts to meet the demand of a high illiteracy rate, which so far has been inadequate.

➢ Article 22

Protection against arrest and detention - Article 22 provides safeguards against 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
- to persons arrested or detained under preventive detention laws

Generally, preventive detention laws allow for detaining persons on suspicion; who otherwise 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 the 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.

Detention and Arrest:

Ordinarily, you may think that being arrested is the same as being detained but there is a difference between detention and arrest.

A person is arrested when she/ he is charged with a crime whereas if the police have reasonable suspicion against a person that she/he may have engaged in a crime or may commit crime, they may detain that person for questioning.

When a person is detained for questioning, she/he is not charged with a crime. The main difference between detention and arrest is whether the accused is charged with a crime or not.

c) Right against exploitation- Articles 23 and 24

➢ Article 23

Prohibition of traffic in human beings and forced labor - Article 23 prohibits human trafficking, begar and forced labor.

Begar- Begar is a Persian word. It is a practice where the worker is forced to give service to the master free of charge or at a nominal remuneration. It is a form of forced labor.

➢ Article 24

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 Recruitment Transport Transfer Harbouring Receipt of persons	+	**Means** Threat or use of force, coercion Abduction, Fraud Deception, Abuse of power of vulnerability, Giving payments or benefits	+	**Purpose** Exploitation including Prostitution of others, Sexual exploitation, Forced labour, Slavery or similar practices, Removal of organs, Other types of exploitations	=	**Trafficking**

Top 10 Countries Infamous for human Trafficking.

Digital image. Source: www./istdose.com

Other Examples of Human Trafficking

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

d) Right to Freedom of Religion - Articles 25-28

➢ Article 25

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 is 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, the wearing and carrying of kirpans is part of the profession of the Sikh religion and do not threaten public order, morality or health.
- 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.
- State can throw open their religious institutions like temples to all classes and sections of that religious society.

• Article 26

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

- establish and maintain institutions for religious and charitable purposes;
- manage their own affairs in matters of religion;
- 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.

➢ Article 27

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 sect.

For example, donations in temples that are used for the upkeep of the temple cannot be taxed.

➢ Article 28

Freedom as to attendance at religious instruction or religious worship in certain educational institutions – Article 28 states that:

(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

Trust- is a body registered under the Trust Act, 1882, now 1961 and is run on the basis of no profit no loss.

Article 28 prohibits religious instructions in educational institutions 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 the 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 unless he/she has given consent for the same. In the case of minors, the guardians should have given consent for the same.

wholly funded by state	recognized by state	aided by state	administered by state but established under a trust
Institutions whose entire expenditure is borne by the state/ government.	Institutions that are recognized by the state for imparting instruction or awarding degrees under the state laws.	Institutions that are receiving aid out of the state funds.	Institutions whose day-to-day administration is in the hands of government
Government educational institutions -for instance Government schools and colleges	Without recognition the degree of such institutions shall not be recognized for the public employment.		
Religious instruction cannot be imparted in the educational institutions that are **wholly funded by state**	Cannot force students to take part in religious instruction/ religious worship. In the case of minors, consent of the parent is required.	Cannot force students to take part in religious instruction/ religious worship. In the case of minors, consent of the parent is required.	Institutions that were originally established by a trust which required religious instructions to be imparted, **the religious instructions may be imparted in such institution irrespective of the fact that it is administered by the state.**

These provisions and others make India a secular state.

e) Cultural and Educational Rights – Articles 29-30

➢ **Article 29**

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.

➢ **Article 30**

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.

f) Right to Constitutional Remedies - Articles 32

Remedies for enforcement of fundamental rights - Article 32 guarantees the aggrieved ones, whose fundamental rights have been violated or denied, to petition directly to the 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 - is also known as **Social Action Litigation.**

Article 32 allows for the practice of Public Interest Litigation, which is a process by which even 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 - Part IV - Articles 36-51

Articles 36-51 in Part IV of the Constitution lays 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.
- The 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 the 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 a modern and scientific way and preserving and improving the breeds, prohibiting the slaughter of cows.
Protection and improvement of the environment and safeguarding of forests and wildlife.
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).

Directive Principle	Raised to Fundamental Right as violates one's right to life (Art. 21).
Elementary education for children between age six and fourteen was a policy goal provision.	Right to education for children between age six and fourteen is now a fundamental right under Article 21A.

The Supreme Court in the case of **Mohini Jain case** ruled that right to education is a fundamental right that flows from right to life in Article 21 of the constitution.

Another example is that of right to livelihood, which is a directive principle often read with right to life, as a fundamental right. The Supreme court has often directed States to rehabilitate slum dwellers whenever they are evicted on grounds of encroachment.

Eviction without rehabilitation closer to their workplace amounts to violation of their right to livelihood and in turn the right to life. Livelihood can include basic shelter, food, education, occupation and medical care.

The Supreme Court in **Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors.,** popularly known as the 'Pavement Dwellers Case' held that 'right to livelihood' is borne out of 'right to life', as no person can live without means of living, that is, means of livelihood. It recognized right to livelihood to be part of Article 21.

The court also held that it is the duty of the authorities to provide slum dwellers with an alternative if their house is to be demolished.

4. Fundamental Duties- Part IV(A) - Article 51A

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 violation.
- Fundamental duties contain standards to be followed by the citizens.
- They remind citizens not to behave irresponsibly but help build 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 the natural environment including forests, lakes, rivers and wildlife.
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.

Class Activities

Activity 1

There are different ways in which one can see or understand human rights. Write your views in 200 words on any one of the following:

- Are human rights anti-majoritarian (protection of minorities from the domination of the majority)?
- Are human rights a moral demand to resolve various kinds of injustices?
- Are human rights a tool for sloganeering and disruptions?

Activity 2

- Watch this 2016 award winning video on human rights from India by Anuj Ramachandran.

  https://developmenteducation.ie/feature/6-quick-activities-for-human-rights-day-december-10th/

  How after watching this video made you sensitive towards human rights?

  After watching this video, write in 100 words how it has made you sensitive towards human rights?

Activity 3

- Go to the website of UN High Commissioner for Human Rights. Write a review of the site. You may include following points in the review:
  - What is it that you found interesting about the site?
  - What content on the site surprised you?
  - What information was useful to you?
  - Was there any idea or information that was missing that you want to be included on the site?

Exercise

Based on your understanding, answer the following questions:

1. 'Human rights and SDGs are two sides of the same coin.' Explain.
2. Explain states' obligations to respect, protect and fulfil human rights.
3. Identify any two features in the Preamble of the Indian Constitution that indicates its objective of protecting human rights.
4. Describe any three salient features of fundamental rights in the Indian Constitution.
5. What is right to equality? How is reservation or affirmative action for government jobs to Schedule Castes and Scheduled Tribes protected by the right to equality?
6. Why do you think it was necessary to abolish the practice of untouchability?
7. Identify any two kinds of right to freedoms along with any two grounds of restrictions that take away these freedoms.
8. Explain any one fundamental right of a person who is either accused or convicted of a crime.
9. Explain 'right to life and personal liberty' as given in the Indian Constitution.
10. Explain 'right to education' provided in the fundamental rights chapter of the Constitution.
11. Identify any one safeguard provided to someone if s/he is arrested and detained.
12. What is meant by human trafficking, that is prohibited by the Indian Constitution?
13. Describe 'right to freedom of religion' as provided in the Indian Constitution.
14. Explain judicial remedies that are available for the enforcement of fundamental rights.
15. What is meant by Public Interest Litigation (PIL)? Find out one PIL that was initiated on the basis of a letter written to the Supreme Court or on the basis of a newspaper report?
16. Describe any one salient feature of the Directive Principles of State Policy. Give one example of directive principle that has been elevated to fundamental rights.
17. Give any one example of fundamental duties provided in the Constitution.

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CHAPTER 5(B)

Human Rights Violations - Complaint Mechanism (Quasi - Judicial Bodies)

Learning Outcomes :

Students will be able to:

- name the various Human Rights Commissions in India
- identify the functions and powers of various Human Rights Commissions in India
- discuss the complaint mechanism of these Human Rights Commissions

The focus of this chapter is on the Human rights commissions and their complaint mechanisms.

A. What are 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.

The most fundamental human rights bodies are the national human rights institutions that include the following:

- National Human Rights Commission (NHRC)
- National Commission for Minorities
- National Commission for Women (NCW)
- National Commission for Scheduled Castes
- National Commission for Scheduled Tribes, and
- National Commission for Protection of Child Rights (NCPCR)

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 whereas the parallel state commissions take matters of human rights violations from the respective states.

B. Various Human Rights Commissions

1. NATIONAL HUMAN RIGHTS COMMISSION (NHRC)

1.1 Introduction

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.

1.2 Constitution

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. The State Commissions also complement the working of the National Commission.

1.3 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 (**Suo motu**).

> Suo Motu means 'on its own motion' and relates to an action taken by a court of its own accord. without any request by the parties involved.

For example, the Commission may inquire suo motu based on some human rights violations news or report published through the media.

Suo motu inquiry is especially useful when the victims belong to weaker sections of the society and have limited access to justice delivery mechanisms.

1.4 Powers of the Commission

The Commission has the powers of a civil court.

In conducting an inquiry or investigation, the commission 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.

On completion of Enquiry:

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, which prevent the enjoyment of human rights and recommend appropriate remedial 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.

It can promote awareness of the safeguards available for the protection of human 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.

1.5 Complaint Mechanism

The complaint mechanism procedure with the National Human Rights Commission is easy and straightforward.

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

2.1 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.

2.2 Constitution

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.

2.3 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.

2.4 Powers

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.

2.5 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.

Sub judice

Sub judice in Latin stands for 'under a judge'.It means that a particular case or matter is under trial or being considered by a judge or court.

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 (NCW)

3.1 Introduction

In 1992, the National Commission for Women was established under the National Commission for Women Act, 1990.

3.2 Constitution

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.

3.3 Functions

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.

3.4 Powers

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.

Class Activity

Go to www.ncw.nic.in Write a report about the working of national commission for women. Examine the role of NCW in eradicating social evils against women and steps it has taken towards women empowerment.

4. NATIONAL COMMISSION FOR SCHEDULED CASTES & SCHEDULED TRIBES

4.1 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 instituted in fulfillment under Article 338 are:

- the National Commission for Scheduled Castes, and
- the National Commission for Scheduled Tribes

These are instituted to protect the human rights of Schedule Castes and Scheduled Tribes, 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 for protection of minorities include the:

- Protection of Civil Rights Act, 1955, and
- Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989.

4.2 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.

4.3 Powers

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.

4.4 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.

5. NATIONAL COMMISSION FOR PROTECTION OF CHILD RIGHTS (NCPCR)

5.1 Introduction

The National Commission for Protection of Child Rights is an Indian statutory body established by an Act of Parliament, the Commission for Protection of Child Rights Act, 2005.

NCPCR logo

The National Commission for Protection of Child Rights (NCPCR) emphasises the principle of universality and inviolability of child rights and recognises the tone of urgency in all the child related policies of the country.

For the Commission, protection of all children in the 0 to 18 years age group is

Thus, policies define priority actions for the most vulnerable children. This includes focus on regions that are backward or on communities or children under certain circumstances, and so on.

The NCPCR believes that while in addressing only some children, there could be a fallacy of exclusion of many vulnerable children who may not fall under the defined or targeted categories.

In its translation into practice, the task of reaching out to all children gets compromised and a societal tolerance of violation of child rights continues. This would in fact have an impact on the program for the targeted population as well. Therefore, it considers that it is only in building a larger atmosphere in favour of protection of children's rights, that children who are targeted become visible and gain confidence to access their entitlements.

- For the Commission, every right the child enjoys is seen as mutually-reinforcing and interdependent. Therefore the issue of gradation of rights does not arise.
- A child enjoying all her rights at her 18th year is dependent on the access to all her entitlements from the time she is born. Thus policies interventions assume significance at all stages. For the Commission, all the rights of children are of equal importance.

5.2 Functions

The Functions of the National Commission for Protection of Child Rights are laid out in the Commission for Protection of Child Rights (CPCR) Act, 2005. The Commission shall perform all or any of the following functions:

1. Examine and review the safeguards provided by or under any law for the time being in force for the protection of child rights and recommend measures for their effective implementation;
2. Present to be central government, annually and at such other intervals, as the commission may deem fit, reports upon working of those safeguards;
3. Inquire into violation of child rights and recommend initiation of proceedings in such cases;
4. Examine all factors that inhibit the enjoyment of rights of children affected by terrorism, communal violence, riots, natural disaster, domestic violence, HIV/AIDS, trafficking, maltreatment, torture and exploitation, pornography and prostitution and recommend appropriate remedial measures;
5. Look into the matters relating to the children in need of special care and protection including children in distress, marginalized and disadvantaged children, children in conflict with law, juveniles, children without family and children of prisoners and recommend appropriate remedial measures;
6. Study treaties and other international instruments and undertake periodical review of existing policies, programmes and other activities on child rights and make recommendations for their effective implementation in the best interest of children;
7. Undertake and promote research in the field of child rights;
8. Spread child rights literacy among various section of society and promote awareness of the safeguards available for protection of these rights through publications, the media, seminar and other available means;
9. Inspect or cause to be inspected any juveniles custodial home, or any other place of residence or institution meant for children, under the control of the Central Government or any State Government or any other authority, including any institution run by a social organization; Where children are detained or lodged for the purpose of treatment, reformation or protection and take up with these authorities for remedial action, if found necessary;
10. Analyse existing law, policy and practice to assess compliance with Convention on the rights of the Child, undertake inquiries and produce reports on any aspects of policy or practice affecting

children and comment on proposed new legislation related to child rights.

11. Present to the Central Government annually and at such other intervals as the Commission may deem fit, reports upon the working of those safeguards.
12. Undertake formal investigation where concern has been expressed either by children themselves or by a concerned person on their behalf.
13. Promote, respect and serious consideration of the views of children in its work and in that of all Government Departments and Organisations dealing with Child.
14. Produce and disseminate information about child rights.
15. Compile and analyse data on children.
16. Promote the incorporation of child rights into the school curriculum, training of teachers or personnel dealing with children.

5.3 Powers

Inquire into complaints and take suo moto notice of matters related to:

1. Deprivation and violation of child rights.
2. Non implementation of laws providing for protection and development of children.
3. Non compliance of policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of the children and to provide relief to such children or take up the issues arising out of such matters with appropriate authorities.

Such other functions as it may consider necessary for the promotion of child rights and any other matter incidental to the above functions.

The Commission shall not enquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force.

5.4 Complaint Mechanism

One of the core mandates of the Commission is to inquire into complaints of violations of child rights. The commission is also required to take suo moto cognisance of serious cases of violation of child rights and to examine factors that inhibit the enjoyment of rights of children.

Complaints may be made to the Commission in any language listed in the 8th Schedule of the Constitution.

a. No fee shall be chargeable on such complaints.

b. The complaint shall disclose a complete picture of the matter leading to the complaint.

c. The Commission may seek further information/affidavit as may be considered necessary.

While making a complaint, please ensure that the complaint is:

- Clear and legible, not vague, anonymous or pseudonymous.
- Genuine, not trivial or frivolous.
- Not related to civil disputes such as property rights, contractual obligations and the like.
- Not related to service matters.

- Not pending before any other commission duly constituted under the law or sub-judice before a court/ tribunal.
- Not already decided by the Commission.
- Not outside the purview of the Commission on any other grounds.

Complaints may be addressed to:

National Commission for Protection of Child Rights

5th Floor , Chanderlok Building,36 Janpath, New Delhi-110001

Phone:011-23478200

Fax:011-23724026

For Complaint: www.ebaalnidan.nic.in

Source:

https://www.ncpcr.gov.in/about-commission

https://vikaspedia.in/education/child-rights/national-commission-for-protection-of-child-rights-ncpcr

Exercise

Based on your understanding, answer the following questions:

1. Explain any one power or function of the National Human Rights Commission.
2. Who are minorities whose interest the National Commission for Minorities intends to protect?
3. Ms. Bagchee is a jewish woman who has married outside her community, because of which she is disallowed to perform certain religious customs. What could be the grounds of disqualification of her complaint to the National Commission for Minorities?
4. Ms. Nisha Joseph is a christian and her services were terminated by a school managed by State run non-governmental organization without any substantial reasons. What is the remedy available to her for redressal of this issue?
5. Smt. Savitri is troubled by the exploitation that is being faced by her deaf and dumb daughter who has been abandoned by her husband and in laws, allegedly due to her disabilities. Which forum can she approach for redressal of issues being faced by her? State its powers and functions.
6. Why were the National Commission for Scheduled Castes and the National Commission for Scheduled Tribes created?
7. Ravi avails benefits of being a member of scheduled caste in his service under the Central Government. In a matter of promotion with his department he moved to the Central Administrative Tribunal. As the matter is pending for a long time, he decides to obtain a speedier redressal of his cause and moves to the National Commission for Scheduled Castes. Decide if the matter will be entertained by the Commission. Also set out the various grounds on which the Commission can reject a complaint made to it.

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Unit 6

INTERNATIONAL LAW

केन्द्रीय माध्यमिक शिक्षा बोर्ड
भारत
असतो मा सद्गमय

UNIT 6

International Law

Learning Outcome :

Students will be able to:

- trace historical evolution of international law
- explain international law
- differentiate between Public and Private International Law
- understand the sources of international law- Customs, Treaties and ICJ (International Court of Justice) Decisions
- appreciate the role of various international human rights conventions, treaties and agreements
- understand the interplay between international and municipal laws of India
- identify the role of International Court of Justice and International Criminal Court in dispute resolution

A. Introduction

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 individuals. These internal laws (Municipal 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 world requires a framework through which interstate relations can be developed. The answer to these situations lies in International Law.

B. Historical Evolution of International Law

Hugo Grotius

The term '**International Law**' was first coined by the English philosopher, Jeremy Bentham in 1780. The Dutch jurist Hugo Grotius (1583–1645) is considered to be the **founding father of modern international law** and has greatly influenced the development of this field.

Grotius emphasized the freedom of the high seas (1625; *On the Law of War and Peace*), an idea that rapidly gained acceptance amongst northern European powers that were on a mission to explore the world and colonize it.

The origin of international law is embedded in history and can be traced to cooperative agreements between peoples in the ancient Middle East but the essential structure of international law was mapped out during European Renaissance.

(i) International Law vs. Domestic Law

International law is an independent system of law that exists outside the legal orders of particular states. International law differs from domestic (Municipal) legal systems in a number of respects:

- United Nations (UN) General Assembly consists of representatives of around 190 countries. Although it has an outward appearance of a legislature but it has no power to issue binding laws.
- The resolutions passed by UN General Assembly serve merely as recommendations except in certain cases, such as to determine the UN budget, while admitting new members of the UN, and electing new judges to the International Court of Justice (ICJ) along with the Security Council.
- The international court system does not have absolute jurisdiction in international law. In contentious cases, the ICJ's jurisdiction requires the consent of the particular states that are involved.
- Also, there is no international police force or system of law enforcement, and there is no supreme executive authority.
- The UN Security Council may authorize the use of force in specific cases to compel states to comply with its decisions only where there is a prior act or threat of aggression. Any such enforcement action can be vetoed by any of the Security Council's five permanent members (China, France, Russia, the United Kingdom, and the United States). The forces involved must be assembled from member states on an ad hoc basis as there is no standing UN military.

Therefore, international law is a weak law as compared to municipal law. But unlike municipal law, international law functions in a decentralised manner. All States consider themselves independent and sovereign. The rules of conduct that exists between nations are based on customs of hundreds of years, international agreements and treaties. There is common consent of the community of nations for the enforcement of the rules and principles for international conduct.

As per Oppenheim's view, International Law is a true law. But according to Austin's View, International law is not a true law as any rule which is not enacted by any superior or legislative authority, cannot be regarded as a law.

(ii) International Law and International Relations

International law is a distinct part of international relations.

States normally conform to relevant rules and principles of international laws while responding to any international situation, if and when it arises. The states are conscious to not be negatively viewed by the international community.

The rules of international law are based on reciprocity or self-interest. Breach in international rules by a State may result in loss of its credibility and that may affect it in future relations with other states.

For instance, if a State violates a treaty to its advantage, it may induce other states to breach other treaties. This may ultimately cause harm to the state that first violated the treaty.

When international rules and principles are followed by States it creates value of certainty, predictability, and sense of common purpose in international affairs.

Globalization in the 1980's resulted in increase in international and regional organizations both in number and influence. This has resulted in expansion of international law to cover the rights and obligations of international organisations. New international law is now frequently created through

processes that require near-universal consensus.

For instance, in the area of environment, bilateral negotiations have been supplemented and at times been replaced by multilateral ones, transforming the process of individual state consent into community acceptance. This consensus-building process has resulted in various environmental agreements and Law of the Sea treaty (1982).

> The Kyoto Protocol is an international treaty aimed at combating global warming. The Kyoto Protocol was adopted in Kyoto, Japan, in 1997 and took effect in 2005. It called for participating countries to reduce their emissions of greenhouse gases and carbon dioxide emissions.

International law as a system is complex. Although in principle it is 'horizontal,' being founded upon the concept of equality of states, which is one of the basic principles of international law but in reality, some states continue to be more important than others in creating and maintaining international law.

C. What is international law?

Every **country** is referred to a 'state' in International Law.

According to Bentham's classic definition, international law is a collection of rules governing relations between states. This original definition omits two vital elements of modern international law i.e. individuals and international organizations.

International law is also called **law of nations.** International Law is a framework of rules and principles binding the relations between states, governing their conduct amongst themselves and other international entities that are legally recognized and between citizens of other nations. It is a system of treaties and agreements between nations that governs how nations interact with other nations, citizens of other nations, and businesses of other nations**.**

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. *Although certain aspects are exceptions to the consent requirement, such as principles of customary international law* or Jus cogens.

> 'Jus cogens' is a latin phrase that means 'compelling law.' It designates norms from which no derogation is permitted by way of particular agreements. Jus cogens are norms of customary international law which are so important, it cannot be changed through treaties.

International Law is therefore categorized into:

a. Public International Law

b. Private International Law

The study of public international law, is distinguished from the field of conflict of laws, or private international law, which is concerned with the rules of municipal law or domestic law of states of different countries where foreign elements are involved.

a. 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

Now, the range of subjects concerned with international law have widened considerably.

One of the global international organisation that deals with trade between nations is the World Trade Organisation (WTO).

The World Trade Organization (WTO)

From the early days of the Silk Road to the creation of the General Agreement on Tariffs and Trade (GATT) and the birth of the WTO, trade has played an important role in supporting economic development and promoting peaceful relations among nations.

(https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm)

The World Trade Organisation (WTO) was established in 1995 and is located in **Geneva, Switzerland**. WTO has 164 members representing 98 percent of the world trade.

The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. It is an intergovernmental organization that regulates and facilitates international trade. At its heart are the WTO agreements, negotiated and signed by bulk of world's trading nations and ratified in their parliaments. The goal is to help producers of goods and services, exporters, and importers conduct their business.

There are a number of ways of looking at the World Trade Organization. It is an organization for trade opening. It is a forum for governments to negotiate trade agreements. It is a place for them to settle trade disputes. It operates a system of trade rules.

Essentially, the WTO is a place where member governments try to sort out the trade problems, they face with each other.

b. 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.

Private international law commonly involves issues like:

- which jurisdiction should be permitted to hear the case, and
- the law concerning which Jurisdiction should be applied to the issues in the case.

For example, in marriage laws, there is conflict of laws with respect to marriage related issues between couples belonging to different jurisdictions. The questions about which legal system and norms should apply forms part of private international law.

Public International Law	Private International Law
It is a set of rules which governs the intercourse between nations through determining the rights and obligations of the governments of the nations.	It 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.

International bodies harmonizing private laws of different countries:

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- It is convened by the government of the Netherlands, originates back in 1893, and focuses on developing conventions on a wide array of aspects of private law.
- International Centre on the Settlement of Investment Disputes (ICSID)
- International Institute for Unification of Private Law (UNIDROIT)
- United Nations Commission for International Trade Law (UNCITRAL)-It works towards developing model laws and guides, regarding international trade and commercial laws, including the UNCITRAL Arbitration Rules, and so on.

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)- It is also referred to as the **Vienna Convention on sale of goods**. It 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.
- UNCITRAL Model Law on International Commercial Arbitration-It 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, and
- Geneva Convention on the execution of foreign arbitral awards, and so on.

Class Activity on International law and Current events:

The aim of this activity is to foster an understanding of the importance of international law to day-to-day international events that appear in newspapers. Students will learn from concrete examples of how people's lives are impacted by international law.

- Ask students to bring newspapers. They will look through the newspapers to find at least three articles/issues/stories/photos/words etc. related to international law. For instance, topics could be related to International business deal, Environmental protection, Human rights, War or conflict, Refugees and so on.
- Students will write a summary of the articles/issues/stories/photos/words that they were chosen.

- They can refer to the law, convention, act, or statute that would apply to the issue. Example- An article related to racism can be linked to international law i.e. Convention on the Elimination of all forms of Racial Discrimination (CEDAW). Students can use Wikipedia, Google, or UN.org to find relevant conventions or acts.

No.	Article/Issue/Story/Photo/Word related to following topics	Summary	International law applied
1	Children or youth		
2	International business deal		
3	Environmental protection		
4	Human rights		
5	War or conflict		
6	Refugees		

- Each student will present on any one of the Article/Issue/Story/Photo/Word etc she or he found interesting and identify the international law that applies to that issue. They will also answer following questions:
  - Why some international laws apply to the issue at hand while others might be ignored?
  - How do countries enforce international law in their country, e.g., Canada, India etc?
  - Do all countries enforce international law?
  - Why some countries might choose not to enforce international law?
  - What happens if international law is not applied by the countries?
  - Why is international law needed?
  - Do you think international law helps to resolve the issues it is supposed to?

D. 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. One may look at the various legislations or statutes provided for by the legislature and if there is a lacunae in the statute then one may look at the 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 the following:

Article 38(1) of the Statute of the International Court of Justice

1. *The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*

   a. *international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*

   b. *international custom, as evidence of a general practice accepted as law;*

   c. *the general principles of law recognized by civilized nations; subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

Article 38(1) of the ICJ divides the sources of international law into those of a **primary** and **secondary** nature.

The primary sources, which the Court will consider in its decisions, include conventions (or treaties), customary law, and general principles recognized by civilized nations. Therefore, **Treaties**, **customs**, and **principles of law** are the '**primary sources**' of international law.

Judicial decisions and the **teachings of publicists** are sometimes referred to as 'secondary sources or evidence of international law.

As per Article 38 (1) the **third source** of international law are 'general principles of law' recognized by 'civilized' nations'. General principles of law are used primarily to fill gaps when treaties or customary international law do not provide a rule of decision, although it is unclear what these general principles of law are. They could be general principles of justice, natural law, analogies to private law, principles of comparative law, or general conceptions of international law.

The general principles of law are also found in textbooks, general surveys or manuals, treatises, encyclopedias.

It has been suggested by scholars that as new treaties and customary law develop to address areas of international concern not previously covered, the significance of general principles will fade as these gaps in international law are filled.

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.

> ***Ipso facto*** is a Latin phrase, which means 'by the fact itself', It means that a specific phenomenon is a *direct* consequence, a resultant *effect*, of the action in question.

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.

1. 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 into 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 document.

Treaties may be drafted between states by their leaders or government departments depending on the circumstances.

How to adopt a final draft into a binding treaty?

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.**

Methods to express consent to be bound by a treaty:

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. This could be established by:

- ✓ 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.

2. Customary International Law

The second source of international law is international customs. Along with general principles of law and treaties, custom is considered as the primary source of international law.

According to Article 38(1) of the Statute of the International Court of Justice:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international custom, as evidence of a general practice accepted as law;

Customary International law consists of rules that come from 'a general practice accepted as law and exists independent of treaty law. **Customary international law** refers to **binding legal rules** that have developed on global or regional levels through **continued practice.**

Customary International law is important in current times when there is armed conflict because it fills gap in treaty law and thus strengthens the protection offered to victims.

From where is an observed custom derived and how?

An observed custom is extremely fluid and could be derived from the:

- ✓ law of nature or
- ✓ mutual consent of states.

Custom is usually derived by sifting through many layers and evidences of:

- ✓ **state practice** and
- ✓ **opinio juris**

opinio juris

Opinio juris is a shortened form of the Latin phrase ***opinio juris sive necessitatis***, which means '**an opinion of law or necessity**. 'It is the States' subjective understanding of their legally binding obligations. Opinio juris is the belief that an action was carried out as a legal obligation.

Opinio juris serves an important function. It prevents generally unwanted general practice from becoming customary law.

Customary international law is comprised of two elements:

(1) consistent and general international practice by states- it is the widespread repetition of similar international acts over time by states (**State practice**) and

(2) a subjective acceptance of the practice as law by the international community - the requirement that the acts must occur out of a sense of obligation (**opinion juris**)

International custom generally refers to a description of State practice, but only such practice as is accepted by the States themselves as legally required. It develops from a general and consistent practice of states followed by them from a sense of legal obligation. Once a certain practice is understood to be customary law, States are obliged to act as the rule of customary international law prescribes.

The test of the existence of a customary rule of law is the extent to which it is observed in the practice and behaviour of states**.**

In nutshell, to determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the states concerned that is accepted by them as law (opinion juris) among themselves.

The ***North Sea Continental Shelf cases*** confirmed that both State practice (the objective element) and opinio juris (the subjective element) are essential pre-requisites for the formation of a customary law rule. This is consistent with Article 38 (1) (b) of the Statute of the ICJ.

North Sea Continental Shelf cases

Germany Vs Denmark & the Netherlands [1969] ICJ 1 (also known as The North Sea Continental Shelf cases) were a series of disputes that came to the International Court of Justice in 1969. This case is regarding claims of three parties with regard to a Continental Shelf in North Sea, wherein both Denmark and Netherlands submitted individual disputes with Germany to the International Court of Justice. The case involved agreements among Denmark, Germany, and the Netherlaends regarding the 'delimitation' of areas, rich in oil and gas, of the continental shelf in the North Sea.

The jurisprudence of the North Sea Continental Shelf Cases sets out the dual requirement for the formation of customary international law: (1) State practice (the objective element) and (2) opinio juris (the subjective element). In these cases, the Court explained the criteria necessary to establish State practice – widespread and representative participation. It highlighted that the practices of those States whose interests were specially affected by the custom were especially relevant in the formation of customary law. It also held that uniform and consistent practice was necessary to demonstrate opinio juris – opinio juris is the belief that State practice amounts to a

legal obligation. The North Sea Continental Self Cases also dispelled the myth that duration of the practice (i.e. the number of years) was an essential factor in forming customary international law.

https://ruwanthikagunaratne.wordpress.com/2014/02/28/north-sea-continental-shelf-cases-summary/

Many other sources have been included to identify and cover more and more customs and practices in the international domain such as:

- Unsigned treaties and
- United Nations declarations.

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.

3. International Court of Justice (ICJ) decisions

***Article 59 of the Statute of the ICJ states that* the decision of the Court has no binding force except between the parties and in respect of that particular case.**

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.

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, therefore, past decisions of the ICJ are not binding.

A proceeding at ICJ, Hague

However, ICJ does refer to its past opinions when deciding new cases. The ICJ tends to examine its previous decisions, determine which cases should not be applied and rarely departs from the relevant case law.

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.

Also, Article 38 of the Statute of the International Court of Justice (ICJ) mentions **Judicial decisions** as a '**subsidiary means for the determination of rules of 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.

E. International Human Rights

International Human Rights pose a variety of questions 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.

Peace Palace Library

Peace Palace Library is located in The Hague, Netherlands and is one of the oldest libraries dedicated to international law. It has collected international law publications since 1913. The main objective of Peace Palace Library is to service the institutions residing in the Peace Palace, including the International Court of Justice, the Permanent Court of Arbitration, and The Hague Academy of International Law. The library is open to all scholars and students of international law.

Let us 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 that are said to be **non-derogable** and constitute a special place in the hierarchy of rights such as:

  the right to life, freedom of thought, prohibition of slavery, etc.

  Also, there are certain rights that have also entered the framework of customary international law like:

  the prohibition of torture, genocide, slavery and the principles of non-discrimination

  These have become **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 the **Universal Declaration of Human Rights** 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.

The Human Rights Council is continuing the work of the previously set up Commission by broadening its framework by spreading its area over a wider framework.

However, **the Human Rights Council** has faced criticisms on its political selectivity and failure to objectively review the issues in certain 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.

What are ergaomnes?

Generally human rights violations are dealt with by the state/country 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/ country 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.

One of the most empowering features of international human rights law is that 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.

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**, that is **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.

Some principles with respect to conflict between international law and domestic law:

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 breach of international law, i.e. you cannot use a domestic law to justify 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 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 the 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 blurring of distinction between international and municipal law and domestic courts have also started analyzing international obligations of states in domestic disputes.

Application of international law by countries to its jurisdiction:

- ✓ 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 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.

United Kingdom

Doctrine of transformation

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 by passing a domestic legislation with concurrent provisions as the international obligations.

United States of America

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 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.

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.

Application of international law in India to its jurisdiction:

- ➢ 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 landmark ***case of Kesavananda Bharti v. State of Kerala***, it was observed that the court must interpret the provisions of the constitution in light of the Charter of the United Nations.

Evolution of the role of international treaties with relation to the Indian Constitution:

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. 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.

  ➢ 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, it would be required 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 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.

Therefore, India has dealt with the interplay of international law as fits the need of the day.

F. 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 large number of issues relating to treaties or some basic covenants of international law.

Treaties often employ mediation, arbitration and other such dispute resolution mechanisms to arrive at an agreeable decision.

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 (ICJ) or World Court

The International Court of Justice, also known as the World Court, is the principal judicial organ of the United Nations. It settles legal disputes submitted to it by states in accordance with international law and gives advisory opinions on international legal issues from U.N. bodies and agencies.

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 the statute of the ICJ by default owing to **Article 93 of the United Nations Charter**, and non-members may also become parties under this Article.

The judgment by the ICJ is final, binding on the parties to a case and without appeal.

The ICJ has no enforcement powers, but if states don't comply, the Security Council, the organ of the UN primarily responsible for maintaining peace and security, may take action.

Jurisdiction of ICJ:

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.

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.

ICJ at Hague

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.

International Criminal Court

The International Criminal Court (ICC) is a tribunal set up through the Rome Statute in 2002 and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern and shall be complementary to national criminal jurisdictions.

The ICC has been setup with the purpose of prosecuting criminals for four major crimes :

- Crimes against Humanity
- Genocide
- War Crimes
- Crime of Aggression

Genocide

Genocide means the deliberate killing of a large number of people from a particular nation or ethnic group with the aim of destroying that nation or group.

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 ICC or through 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 Mechanisms

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 to resolve international 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.

Exercise

Based on your understanding, answer the following questions:

1. Distinguish between Public International Law and Private International Law.
2. What is the role of UN High Commissioner for Human Rights?
3. Explain the various sources of International Law.
4. What happens in case of conflict between a treaty provision and a domestic law?
5. Explain the existing dispute resolution mechanism in International Law.
6. In an international conference, aimed at formulating a resolution on an environment issue between the member countries, Indian representative headed for a consent, subject to approval by Indian Parliament. The Parliament, on considering the matter, refused to give assent and thus the terms of resolution were not implemented in India.
   a. Identify the mode of entering into the treaty opted in the given condition.
   b. Analyze the situation when it would be binding on the Indian representative to give assent to the resolution.

II. Class activities

1. Organize a session of Model United Nations (MUN) in your class.
2. Prepare a report (1000 words) on the relation between International Trade and International Law
3. Emulate a Human Rights Tribunal/ War Tribunal in your class.
4. Find out whether there is any difference between International Humanitarian Law and Human Rights Law.

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Unit 7

Legal Profession in India

केन्द्रीय माध्यमिक शिक्षा बोर्ड
भारत
असतो मा सद्गमय

UNIT 7

Legal Profession in India

Learning Objectives:

Students will be able to:

- Trace the history of Legal Profession in India.
- Describe the main changes brought about by the Advocates Act, 1961.
- Explain the professional duties of an advocate
- Elucidate on women in the Legal profession
- Understand the legal Profession and legal education in India, USA and UK
- Enumerate the opportunities available to Law graduates

A. Brief history

The modern legal profession has its roots in the colonial period where it emerged with the advent of Mayor's court in Madras and Calcutta in 1726 under the Charter of 1726. However, it was only after the passing of Legal Practitioner's Act in 1846 that the doors of legal profession were thrown open to the duly qualified, certified practitioners bearing good character. The practitioners could now practise irrespective of nationality and religion. Women were still excluded from the legal profession. It was through the Legal Practitioner's (Women) Act, XXIII of 1923 that they were allowed to practise in courts.

The Advocates Act, 1961

With an objective to amend and consolidate the law relating to legal practitioners and to provide for the constitution of the Bar Councils and an All-India Bar, The Advocates Act was passed in 1961. The main provisions of the Act are;

1. One category of practitioners- ADVOCATE

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 Act recognizes only one class of practitioners, that is, Advocates. Advocates have been classified as Senior Advocates and other 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: 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. Any advocate enrolled in the State Rolls is entitled to practice in all courts of India including the Supreme Court. 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.

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 Bar Council has released a list of foreign degrees that it recognizes.

Senior Advocate and Advocate on record: The Advocates Act makes a provision for two kinds of advocates i.e. Senior Advocates and advocates. However, the Supreme Court of India has, in exercise of its rule making power, made a provision for advocate on record. The distinction amongst them is as follows:

(i) **SENIOR ADVOCATES :** Senior Advocates are designated as such by the Supreme Court of India or by any High Court. The Court can designate any advocate, with his consent, as Senior Advocate if in its opinion by virtue of his ability and standing at the Bar or special knowledge or experience in law, the said advocate is deserving of such distinction (Section 16, Advocates Act, 1961). A Senior Advocate is not entitled to appear without an Advocate-on-record in the Supreme Court or without a junior in any other court or tribunal in India. He is not entitled to file a vakalatnama in any court or tribunal, or accept instructions to draft pleading or affidavits, advice on evidence or to do any drafting work of an analogous kind in any Court or Tribunal. A designated senior advocate wears a gown with a "flap" at the back.

(ii) **ADVOCATES-ON-RECORD :** Only these advocates are entitled to file any matter or document before the Supreme Court. They can also file an appearance or act for a party in the Supreme Court. No other High Court in India has a similar provision.

If one wants to practice as an Advocate-on-Record (AOR) in the Supreme Court he or she needs to practice for 4 years as an advocate and thereafter must intimate to the Supreme Court that he has started taking training with a Senior Advocate on record because he intends to become an Advocate-on-record. After completion of one year's training, he has to appear for an examination conducted by the Supreme Court itself. After an advocate passes this examination he must have a registered office within a radius of 10 miles from the Supreme Court building and a registered clerk. Only an AOR can file a vakalatnama in the Supreme Court on behalf of a client. Any correspondence by the Supreme Court is sent to the AOR.

2. State Bar Councils

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 members elected for a period of five years. Two members are to be nominated by the Bar Council of India from amongst advocates on the electoral roll of the State Bar Council, to discharge the functions of the State Bar Council.

Application for enrolment is made to the State Bar Council. Every State Bar Council shall prepare and maintain a roll of advocates in which shall be entered the names and addresses of all who are admitted to be advocates on the roll of the State Bar Council under this Act on or after the appointed day.

Functions of State Bar Councils —

The functions of a State Bar Council are—

a. to admit persons as advocates on its roll;

b. to prepare and maintain such roll;

c. to entertain and determine cases of misconduct against advocates on its roll;

d. to safeguard the rights, privileges and interests of advocates on its roll;

e. to promote the growth of Bar Associations for the purposes of effective implementation of the welfare schemes

f. to promote and support law reform;

g. to conduct seminars and organise talks on legal topics by eminent jurists and publish journals and paper of legal interest;

h. to organise legal aid to the poor in the prescribed manner;

i. to manage and invest the funds of the Bar Council;

j. to provide for the election of its members;

k. to visit and inspect Universities

l. to perform all other functions conferred on it by or under this Act;

m. to do all other things necessary for discharging the aforesaid functions.

In addition, a State Bar Council may constitute one or more funds in the prescribed manner for the purpose of—

(a) giving financial assistance to organise welfare schemes for the indigent, disabled or other advocates;

(b) giving legal aid or advice in accordance with the rules made in this behalf;

(c) establishing law libraries.

A State Bar Council may receive any grants, donations, gifts or benefactions for all or any of the purposes specified above which shall be credited to the appropriate fund or funds constituted under that sub-section.

3. The Bar Council of India

The Indian legal profession includes both the practice of law and legal education. To regulate both, The Advocates Act established an All India Bar Council, 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.

History of Bar Council of India

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. 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 Bar Council of India was established under the Advocates' Act 1961.

The Bar Council of India 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. It 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 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 the 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.

B. 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 duties 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 has to maintain client confidentiality and not to instigate litigation or 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)

Recommended Reading: http://www.barcouncilofindia.org/about/professional-standards/rules-on-professional-standards/

C. 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.

Recommended Reading: https://articles.manupatra.com/article-details/Rethinking-the-Prohibition-on-Advertising-for-Advocates

D. Liberalization and Globalization of legal profession

D.i. Liberalization of Legal profession in India

It is the era of globalisation that called for removal of barriers in trade and services to liberalise economies. It was in 1990's that for the first time ever, RBI granted permission to three law firms to establish their liaison offices in India. Later, in 1995, the General Agreement on Trade in services (GATS) under World Trade Organisation (WTO) came into force. Under GATS a credible and reliable system for liberalising legal services was created that applies to the liberalising the legal profession and Corporate Legal Services also. It is therefore that the legal advisory, legal documentation services,

legal certification services, legal advisory and information services and other legal services were liberalised. 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 judgement delivered by Bombay High Court on a PIL filed by a non-profit organisation, Lawyers Collective, it was held that Foreign Law Firms could not be permitted to set up liason Offices in India. However, contrary to this position, the Madras High Court, in response to a PIL filed by A.K. Balaji, permitted foreign lawyers give advice to Indian clients in India on a "fly in and fly out" mode.

D.ii. Globalisation of legal profession

'Globalization' in its literal sense connotes the integration of economy and legal structure of a nation with the world order. The term 'globalization of law' refers to a utopian condition in which the whole world lives under a single set of legal rules, such rules might be imposed by an international body, adopted by global consensus, or arrived at by parallel development in all parts of the globe. In today's world of increasing international trade and inter-dependence the need for transnational law has increased many folds. Since more and more countries open their economy, either partially or completely, there is a growing need to recognize and work towards a uniform system of law.

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. A simple reason for this is that different countries have different legal systems and laws are framed according to the social, political and civil conditions of the country.

E. Women and the legal profession in India

Indian women were granted the right to take up the legal profession and practice as Advocates in the courts of law after the passing of the Legal Practitioners' (Women) Act, XXIII of 1923 abolishing the bar on women from practising law.

However, this right did not come easily to women in British India. In 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 ruled 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.

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.

After the passing of the Legal Practitioners' (Women) Act, XXIII of 1923, women finally were able to practice as lawyers in India.

Since then, although the number of women entering into the profession has increased, gender bias still pervades the profession. According to data tabled by the Law ministry in Parliament in 2022, only 15.3 percent of lawyers in India are women. However, recent studies have indicated that gender based disadvantages are gradually being eliminated, especially in the corporate law sector.

F. Legal Education

F.1. India

Legal Education in India

Legal education in India is regulated by the Bar Council of India. The Bar Council of India prescribes the minimum standards of imparting legal education in India. Preceeding the liberalisation, in 1980, the BCI, University Grants Commission, Law Commission of India and various state governments have led to the establishment of various law schools in India. This revolution in legal education was pioneered by Prof. N.R. Madhava Menon, who was instrumental in setting up the first law school in India, the National Law School Bangalore. At present there are 24 National Law Schools in 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.

The Bar Council of India recognises Universities whose degree in law shall be a qualification for enrolment as an advocate. It visits and inspects Universities, or directs the State Bar Councils to visit and inspect Universities for this purpose. The Bar Council releases a list of foreign degrees that it recognizes.

Presently, there are around 1,721 law schools 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 was pioneered by Professor N. R. Madhava Menon, who was instrumental in the setting up of the first National Law School- National Law School of India University (NLSIU) was set up in Bangalore in 1987. Its establishment marked the beginning of the reform of legal education in India. There are now 24 National Law Schools in India, with more being planned. 22 of these now have a common entrance test- CLAT (Common Law Admission Test). 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) . Some other institutions conduct their own separate entrance tests.

F.2. United States of America (U.S.A)

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 a 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 nonunified.

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 lies with the State Bar Association. 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.

F.3. United Kingdom (U.K)

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 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.

Foreign Lawyers and Practicing in the U.K

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.

G. 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:

i. **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.

ii. **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 more 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.

iii. **Corporate Sector:** Large corporations often have an in-house legal practice. An inhouse 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, multinational companies, investment firms, insurance companies, e-commerce ventures, media houses are hiring law graduates for managing their legal departments.

iv. **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 and 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.

v. **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.

vi. **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 rights, 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.

vii. **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.

viii. **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.

ix. **Judge Advocate General (JAG) Officer:** The Judge Advocate General's (JAG) Department is the legal branch of the Indian Army. It deals with military related disciplinary cases and litigation and assists in providing legal assistance to the army in human rights matters and the rule of law among other things.The department consists of legally qualified Army officers who are educated in military law and provide legal help to the military in all aspects. The department supports the Judge Advocate General who is the legal and judicial chief of the army and advises the Chief of the Army Staff of legal matters. The JAG's Department is also responsible for emerging fields of military law such as those related to cyber laws, space laws, terrorism and human rights violations.The service rendered in the JAG's Department are considered to be Judicial service as per the regulations for the Indian Army.

Exercises:

Based on your understanding, answer the following questions:

1. Write short notes on the following:
   a. Women and the Legal Profession
   b. Professional Ethics for lawyers
   c. Eligibility and qualification to practice as an Advocate in India
   d. Legal Education in India
2. What changes did the Advocates' Act bring about in India?
3. Discuss the main points of difference between Senior Advocate and Advocate on record.
4. Compare the rules regarding advertising by legal professionals in India and other countries.
5. How is the Bar Council of India organized? What are its roles and functions? Trace the history of the Bar Council.
6. Compare the rules regarding entry of foreign lawyers in the United States and the UK.

Unit 8

Legal Services

केन्द्रीय माध्यमिक शिक्षा बोर्ड
भारत
असतो मा सद्गमय

UNIT
8

Legal Services

Learning Outcomes:

Students will be able to:

- Trace the history of Legal Aid in India
- Describe main legislations that govern legal aid in India and abroad
- Explain the main provisions of NALSA Regulations, 2010
- Elucidate the importance of legal aid as an element of human rights
- Explain the provisions of Legal Services Authorities Act, 1987 and Legal Services Authorities (Amendment) Act, 2002

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

According to 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 society in order to provide equality to seek justice in the court of law.

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 considerations and the main aim of these provisions is to help those who are socially and economically backward.

A. Legal Background

In a participatory democracy, it is essential that citizens have faith in their judicial institution that ensures appropriate representation in the court of law and settles the need for equality principle. An impartial and independent judiciary is the guardian of individual rights in a democratic society. For citizens to have faith in their court system, all people must have access to the courts when necessary. Making arrangements to ensure adequate representation in the court of law, for the masses, is an indispensable facet of principles of equality.

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 of 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 doorstep of the poor and economically weaker sections irrespective of their caste, creed, religion, or geographical position, free of cost.

The fundamental value of the 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.

Human rights and human dignity form the premises for the socio-legal foundations of free legal aid. As part of 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 international treaties, regional treaties, and the working of monitoring bodies under these treaties or in the national legal systems.

B. 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 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 bases itself on the Anglo-American model of dispensing justice. The system compels to collaborate lawyer-power thereby steering the wheels of equal justice under the law by providing free legal aid to certain categories of persons. It is due to the formal nature of proceedings in an adversarial system, requiring pleadings and court fees, that makes access to justice, a dream, for poor masses in India.

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 the dispensation of justice by the courts modeled on adversarial systems.

It is therefore, that in an adversarial system, the poor are represented by the advocates appointed by the government to ensure equal representation in the court of law, which forms one of the most important facets of a true democracy.

B.i. Legal Aid under the Indian Constitution

The Constitution (Forty-second amendment) Amendment Act, 1976 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 wording of Article 39-A reiterates that kind of equality which shall promote access to justice for all by creating equal opportunity. That this constitutional guarantee was more 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.

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.

B.ii. 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 counsel upon his request. However, an amendment in the Code of Criminal Procedure, 1973 facilitated the statutory implementation

of free legal aid. Section 304 (1) of CrPC provides that - In a trial before the sessions judge, if the accused does not have sufficient means to engage a pleader, the court should assign a pleader for his defence at the expense of the State.

B.iii. Free Legal Aid under International Law

International law addresses the provision for free legal services from the perspective of human rights. An explicit provision for legal services is incorporated in the International Covenant on Civil and Political Rights (ICCPR).

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 Indian Supreme Court 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 the 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 of 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 the declaration, encapsulating lofty idealistic notions about human rights. Still, it creates right-centric obligations of norm creating a character for the members of the international community.

C. The Legal Services Authorities Act of 1987

C.i. Brief History

The 14th Law Commission of India Report on Reform of Judicial Administration, 1958 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 schemes 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 center.

In 1980, a committee was constituted at the national level to oversee and supervise legal aid programmes throughout the country under the Chairmanship of Justice P.N. Bhagwati, then a Judge of the Supreme Court of India. This Committee came to be known as CILAS (Committee for Implementing Legal Aid Schemes) and started monitoring legal aid activities throughout the country.

In 1987, the Legal Services Authorities Act was enacted to give a statutory base to legal aid programs throughout the country on a uniform pattern. Subsequently, the Parliament enacted the Legal Services Authorities Act, 1987 to provide free legal aid to certain categories of citizens.

The preamble of the Legal Services Authorities Act, 1987 states: '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 introduction of Lok Adalats added a new chapter to the justice dispensation system of this country and succeeded in providing a supplementary forum to the litigants for conciliatory settlement of their disputes.

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 society. None should be denied justice for being poor or disabled, the evils in the social hierarchy should also not affect anyone seeking justice.

C.ii. Entitlement to Legal Services

Section 12 and 13 of the Legal Services Authority Act, 1987 deals with the criteria of eligibility for legal services.

Section 12 -Criteria for giving 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 begar as referred to in article 23 of the Constitution;

(c) a woman or a child;

(d) a person with disability as defined in clause (i) of section2 of the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996);

(e) a person under circumstances of underserved 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 custody in a 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 home within the meaning of clause (j) of section 2 of the 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 the 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 is before a court other 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.

Senior citizens' eligibility for free legal aid depends on the Rules framed by the respective State Governments in this regard.

In Delhi for example, senior citizens are eligible for free legal aid subject to the prescribed ceiling of annual income. Any individual above the age of 60 can apply for free legal aid/services.

D. Legal Services- Meaning and types

D.i. The Free Legal Services include-

1. Payment of court fee, process fees and all other charges payable or incurred in connection with any legal proceedings;

2. Providing service of lawyers in legal proceedings;
3. Obtaining and supply of certified copies of orders and other documents in legal proceedings;
4. Preparation of appeal, paper book including printing and translation of documents in legal proceedings.

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 encourages litigation. Therefore, pre litigation services were introduced as a category of legal services provided to eligible people.

Free Legal Services also include provision of aid and advice to the beneficiaries to access the benefits under the welfare statutes and schemes framed by the Central Government or the State Government and to ensure access to justice in any other manner.

D.ii. Legal services can be broadly categorized into the following two types:

- Pre-litigation legal services, and
- Post-litigation legal services.

E. Pre-litigation legal services

These days, the number of litigations is increasing day by day, which is against the smooth administration of justice. So far, emphasis was given only on post-litigation assistance or help. 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

Post Litigation services include all those services that are required to be rendered by an Advocate to his client.

E.i. National Legal Services Authority

Article 39A of the Constitution of India provides free legal aid to the poor and weaker sections of society and ensures justice for all. Articles 14 and 22 (1) of the Constitution also make it obligatory for the State to ensure equality before the law and a legal system that promotes justice on the basis of equal opportunity for all.

In the year 1987, the Legal Services Authorities Act was enacted by the Parliament which came into force on 9th November 1995, to establish a uniform nationwide network for providing free and competent legal services to the weaker sections of society on the basis of equal opportunity.

The National Legal Services Authority (NALSA) has been constituted under the Legal Services Authorities Act, 1987 to monitor and evaluate the implementation of legal aid programs and to lay down policies and principles for making legal services available under the Act.

In every State, a State Legal Services Authority and in every High Court, a High Court Legal Services Committee have been constituted. District Legal Services Authorities, Taluk Legal Services Committees have been constituted in the districts and most of the taluks to give effect to the policies and directions of the NALSA and to provide free legal services to the people and conduct Lok Adalats in the State.

Supreme Court Legal Services Committee has been constituted to administer and implement the

legal services programme insofar as it relates to the Supreme Court of India.

NALSA lays down policies, principles, and guidelines and frames effective and economical schemes for the State Legal Services Authorities to implement the Legal Services Programmes throughout the country.

Primarily, the State Legal Services Authorities, District Legal Services Authorities, Taluk Legal Services Committees, etc. have been asked to discharge the following main functions on regular basis to:

1. Provide Free and Competent Legal Services to the eligible persons;
2. Organize Lok Adalats for amicable settlement of disputes; and
3. Organize legal awareness camps in rural areas.

E.ii. 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 the 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 relevant regulation 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. Personal traits like competence, integrity, suitability, and experience shall be considered. 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 ongoing 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 a 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 threat to the life and liberty of the applicant exists.

F. The Legal Services Authorities (Amendment) Act, 2002

The Parliament of India realized that litigation-oriented legal services cannot bring out desired results, therefore, for encouraging pre-litigation legal services especially in public utility service, the Parliament

has made certain amendments in the Legal Services Authorities Act by passing an Act known as the Legal Services Authorities (Amendment) 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:

i. the establishment of permanent Lok Adalats to settle disputes concerning public utility services at pre-litigation state;

ii. **pre-litigation conciliation and settlement pertaining to public utility services**

F.i. 'Public utility service' means any-

(i) transport service for the carriage of passengers or goods by air, road or water; or

(ii) postal, telegraph or telephone service; or

(iii) supply of power, light or water to the public by any establishment; or

(iv) system of public conservancy or sanitation; or

(v) service in hospital or dispensary; or

(vi) insurance service, and includes any service which the Central Government or the State Government, as the case may be, may, in the public interest, by notification, declare to be a public utility service for the purposes of this chapter.

F.ii. Permanent Lok Adalat- Important Provisions

Permanent Lok Adalat- Important Provisions:

1. The Permanent Lok Adalat shall, during conduct of conciliation proceedings assist the parties in their attempt to reach an amicable settlement of the dispute in an independent and impartial manner.
2. It shall be the duty of every party to the application to cooperate in good faith with the Permanent Lok Adalat and to comply with the direction of the Permanent Lok Adalat to produce evidence and other related documents before it.
3. In case the parties reach at an agreement on the settlement of the dispute, they shall sign the settlement agreement and the Permanent Lok Adalat shall pass an award in terms thereof.

   Where the parties fail to reach at an agreement, the Permanent Lok Adalat shall decide the dispute.
4. Procedure of Permanent Lok Adalat - The Permanent Lok Adalat shall, while conducting conciliation proceedings or deciding a dispute on merit under this Act, be guided by the principles of natural justice, objectivity, fair play, equity and other principles of justice, and shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) and the Indian Evidence Act, 1872 (1 of 1872).
5. The Award of Permanent Lok Adalat shall be final and deemed to be a decree of a civil court.

Other Initiatives

- **Legal Service Mobile App:**
  - To enable equitable access to justice, NALSA has launched **Legal Services Mobile App** on Android and iOS versions to **enable easy access to legal aid to common citizens.**
- **DISHA Scheme:**
  - The Department of Justice (DoJ) has launched a comprehensive, holistic, integrated and systemic solution on access to justice at pan India level through a scheme titled

'Designing Innovative Solutions for Holistic Access to Justice (DISHA)' being implemented from 2021-26.

- All 'Access to Justice Programmes' have been merged under the DISHA scheme and upscaled to all India levels.

G. When can Legal Aid be denied or withdrawn?

Legal Aid can be denied at the initial stage before the application for legal aid is accepted. It can also be withdrawn at the later stage after the application has been accepted. Legal aid can be denied or withdrawn in the following circumstances:

1. Legal aid can be denied if a person is found ineligible under Section 12 of the Legal Services Authorities Act, 1987;
2. Legal aid can be withdrawn if the aided person who applied under the income category is found to possess sufficient means;
3. Legal aid can be withdrawn where the aided person obtained legal services by misrepresentation or fraud;
4. Legal aid can be withdrawn where the aided person does not cooperate with the Legal Services Authority/Committee or with the legal services advocate;
5. Legal aid can be withdrawn where the person engages a legal practitioner other than the one assigned by the Legal Services Authority/Committee;
6. Legal aid can be withdrawn in the event of death of the aided person except in the case of civil proceedings where the right or liability survives;
7. Legal aid can be withdrawn where the application for legal service or the matter in question is found to be an abuse of the process of law or of legal services.

(https://nalsa.gov.in/services/legal-aid/post-application-procedure) make the link click.

H. 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 talking about human rights from an elitist platform is not sufficient. In order to do social justice for them and to make human rights meaningful, legal aid becomes essential. 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. 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 access 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 a range of human rights.

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 the right to legal aid stands first in the specie of human rights. Human rights are only mere pious declarations without legal aid. They become lucrative only when they are enforced. The right to legal aid enables the accomplishment of these human rights and makes them worthwhile for the poor masses in the world. In the present legal system of most countries, justice is not given but sold.

In the present legal system of most countries, justice is not given but sold. The consumers of justice have to pay the remuneration of counsel, and bear expenditures for court fees, and also other contingent charges. Indeed, poverty is an obstacle in the way of getting justice and due to this reason, the poor become a 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 poor persons may be exhausted and that will endanger world peace.

Exercise

1. Discuss the main provisions for free legal aid under the Indian Constitution.
2. Mention any four categories of persons entitled to free legal aid under the Legal Services Authority Act by the Central Authority.
3. How has the amendment of the Legal Services Authorities Act in 2002 widened its scope by establishing Permanent Lok Adalats?
4. Discuss three main provisions of National Legal Services Authorities Regulations 2010.

Central Board of Secondary Education
Shiksha Kendra 2, Community Centre, Preet Vihar, Delhi-110092