98th FOUNDATION COURSE

Table of Contents

S. No.	Topic	Page No.
	SUGGESTED READINGS	6-7
	ABBREVIATIONS	8
1.	GENERAL PRINCIPLES OF LAW	9-47
1.1	General Principles of Law – Concept & Sources	9-17
1.2	Interpretation of Statutes	18-23
1.3	Legal Theory	24-33
1.4	Legal Concepts – Rights & Duties	34-39
1.5	Legal Concepts – Crime & Civil Wrongs	40-41
1.6	Rule of Law	42-47
2.	ADMINISTRATION OF JUSTICE	48-114
2.1	Structure of the Courts-Civil & Criminal (Substantive and Procedural laws)	48-61
2.2	Administrative Law & Tribunals	62-70
2.3	Delegated legislation	71-76
2.4	Principles of Natural Justice	77-84
2.5	Alternate Dispute Redressal Mechanisms- *Lok Adalats*, Conciliation,	85-99

	Arbitration etc	
2.6	Contempt of Court and Judges Protection Act	100-114
3.	LEGAL REMEDIES	115-121
3.1	Civil Legal Remedies-Specific Relief Act and Limitation Act	115-121
4.	COURT PROCEDURE IN CIVIL CASES	122-131
4.1	The Code of Civil Procedure, 1908	122-131
5.	LAW OF CRIMES	132-159
5.1	Indian Penal Code, 1860 – At a glance	132-142
5.1	Theories of Punishment & Punishments under IPC	143-151
5.2	General Exceptions under IPC	152-159
6.	PROCEDURE IN CRIMINAL CASES	160-196
6.1	Arrest, Bail, Search	160-167
6.2	General Provisions of the Code of Criminal Procedure, 1973	168-178
6.3	The Prevention of Corruption Act, 1988 1989 as amended by the 2018 Act, The Central Vigilance Commission (CVC) Act, 2003 and The *Lokpal* and *Lokayuktas* Act, 2013	179-196
7.	LAW OF CONTRACTS	197-207
7.1	Law of Contracts	197-207
8.	OTHER LEGISLATIONS/ LEGAL DEVELOPMENTS	208-235

8.1	The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013	208-214
8.2	Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 as amended by the 2018 Act	215-218
8.3	Information Technology Act	219-230
8.4	Privacy Law	231-235

Introduction

The purpose behind learning Law at the Academy is to be equipped with the basic understanding of Law. By the end of the Foundation course, the Officer Trainees should be able to appreciate and describe the foundational principles of the Indian legal system and have a general understanding of some specific laws that all government servants will be intricately associated with.

You would also need legal knowledge about the various legislations that you would directly implement. However, the foundation course is not the occasion to go into the nitty gritty of the specific legislations relevant to your career. Here, the endeavour is to set the context. By the end of the Course, the you should be able to describe the basic tenets of the major legislations and feel confident to be a continuing student of law.

Course Objectives

The Officer Trainees should be able to understand and apply the basic principles of law, understand the structure and hierarchy of courts and alternate dispute redressal mechanisms, discuss some important social legislations and get introduced to procedural practices under civil and criminal codes in India.

Methodology

Learning the law in the Foundation Course will involve attending lectures and classes organized for this purpose as well as self-study by way of reading this handbook and the major suggested readings. Both together will constitute the law evaluation syllabus. Inside the class, methods of lecture, discussion, case study, problem solving etc. would be used.

Suggested Readings (Latest Edition)

Code of Criminal Procedure

Bare Act: The Code of Criminal Procedure, 1973
Ratanlal Dhirajlal, The Code of Criminal Procedure (Student Edition), Lexis Nexis Publishers, Delhi

R.V. Kelkar's Lectures on Criminal Procedure (2015), Eastern Book Company, Delhi

The Code of Criminal Procedure Revised by M. Hidyatullah (Ratanlal and Dhirajlal) & S.P. Sathe

Code of Civil Procedure

Bare Act : Code of Civil Procedure, 1908
Vinay Kumar Gupta, Mulla The Key to Indian Practice, A Summary of Code of Civil Procedure (Abridged) (2012), Student Edition, Eighth Edition, LexisNexis, Delhi

Mulla's Code of Civil Procedure by P.M. Bakshi (Abridged edition for Students)

Law of Limitation by Hari Dev Kohli

Indian Penal Code

Bare Act: Indian Penal Code, 1860 with 2013 and 2018 amendments.
Ratanlal Dhirajlal, The Indian Penal Code as amended by Criminal Law Amendment Act (2013) & (2018), (Student Edition), Lexis Nexis, Delhi
K.D. Gaur, Textbook on Indian Penal Code, Universal Law Publishers, Delhi
The Indian Penal Code Revised by M. Hidyatullah (Ratanlal & Dhirajlal) and R. Deb

Law of Contract

Law of Contract and Specific Relief Act by Avtar Singh
Mulla's Law of Contract by J.H. Dalal
Moitra's Law of Contract

Jurisprudence

Introduction to Jurisprudence by Avtar Singh
Jurisprudence and Legal Theory by V.D.Mahajan
Jurisprudence (Legal Theory) by Dr S.R.Myneni
Salmond on Jurisprudence

Administrative Law

Administrative Law by I.P. Massey
Administrative Law by SP Sathe
Principles of Administrative Law by M.P.Jain
Lectures on Administrative Law by C.K.Takwani

Contempt of Court

Law of Contempt of Court by B.R. Verma

Legal Remedies

V.M. Shukla's Legal Remedies by Avtar Singh

Indian Legal System

Crisis of Indian Legal System by Prof. Upendra Baxi

Miscellaneous (Relevant Books)

Indian Justice- Perspective and Problems by Justice V.R. Krishna Iyer

Law, Society and Collective Consciousness of Law and Life by Justice V.R. Krishna Iyer

Law and the People by Justice V.R. Krishna Iyer

What next in the Law by Lord Denning

Discipline of Law by Lord Denning

IMPORTANT WEBSITES

(a) http://livelaw.in
(b) http://indiacode.nic.in
(c) http://nalsa.gov.in
(d) http://supremecourtofindia.nic.in
(e) http://www.cvc.nic.in
(f) www.manupatra.com (Within the Academy, IP access is available to Officer Trainees)
(g) http://www.scconline.com (Within the Academy, IP access is available to Officer Trainees)

Abbreviations

AIR	All India Reporter
Cr.LJ	Criminal Law Journal
Cr.PC	Criminal Procedure Code
I.E.A	Indian Evidence Act
ILR	Indian Law Reporter
IPC	Indian Penal Code
M.V. Act	Motor Vehicles Act
PW	Prosecution Witness
QB	Queens Bench
SC	Supreme Court
SCR	Supreme Court Reports
Sec. / S.	Section
SS.	Sections
v.	Versus
O.	Order (in CPC)
R.	Rule (in CPC)

1: GENERAL PRINCIPLES OF LAW

1.1 GENERAL PRINCIPLES OF LAW – CONCEPT & SOURCES

(A) Jurisprudence – An Introduction

Jurisprudence is the theory or philosophy of law. It tries to answers of 'what', 'where from','why' and 'how' regarding the present legal system. Jurisprudence literally means the knowledge of law and study of fundamental legal principles . Literally, it is a compound of two Latin terms.

"Juris" → Law

"Prudentia" → Knowledge

Jurisprudence has been extensively written upon by lawyers, thinkers and academicians. As such what it stands for and covers has been extensively debated and disputed. Nuanced and complex debates apart, the term "Jurisprudence" is a body of knowledge which answers the following questions about law which would interest even generalists like us.

(I) What is law? Why is there a law? (Nature and purpose of law)

(II) Where is law (coming from)? (Sources of law)

(I) Nature and Purpose of Law

Administrators, policy makers and even ordinary citizens (at one point of time or the other) faces the question of 'what is law' or 'why is this law there'. In other words, what is the nature and purpose of law? Even as law operates as a platform of foundation for the provision of freedom to citizens collectively, it operates as restrictions to a few. These restrictions prompt these fundamental questions in the modern society, which is born into this framework.

The answer to the questions above is not simple. All through history, philosophers and thinkers have sought to answer the question in different ways depending on the dominant ideological trend. Even today, the field is evolving with scholars putting forth new ideas or theories regarding the nature and purpose of law. Nevertheless, an examination of views on the subject reveals that there are certain broad categories in which the ideas on the subject can be grouped. Our discussion is confined to historically two main dominant strands of thinking on law—Positive law and Natural law.

General sense of law denotes uniformity and regularity of action. According to Dr. Salmond "In its widest sense the term law includes rule of action.". Generally, laws may fall into three classes.

- Divine Laws – relating to will of the supernatural power - part of the science of theology.
- Physical Laws - expressions of the uniformities found in nature, such as law of motion
- Human Laws -laws analogous to above

Some of you may argue that practitioners like administrators, policy makers and even judges need not waste time over what and why of law. It is sufficient for them to know the law and simply put it in practice.

While this approach would actually cover many of the situations in the life of most of us, there will occur instances when this approach would not suffice. In certain situations, the 'where from' and 'why' are central issues. e.g., were the Nazi social laws targeting Jews "laws"? Did those public officials who acted in accordance with them act legally? Even in situations which are not as drastic as the above suggested example, a disregard for jurisprudence forces a divorce between justice and the legal system. Thus, a solid understanding of the basics would be required to keep checking if we are meeting the end of justice, by means of law.

Perhaps the following imaginary scenario can provoke some thoughts on the issue. Imagine that the country is faced with intense internal disturbance in a particular region. The government chooses to respond by imposing a state of emergency. The Parliament and the normal judicial processes are suspended. The government then promulgates an Ordinance that all people supportive of ideology X should be rounded up. They are to be arrested and then to be hanged without a trial. As senior civil servants, some of you are simply asked to prepare a list of such people in your office. Others are asked to actually carry out arrests and a select few are chosen to carry out the executions. Given the scenario try to answer the following questions.

- Will you prepare such a list?
- Will you oversee the arrest of such people?
- Will you organize and supervise their execution?
- Why?

The answers need not be the same for all the questions. Even as you arrive at the same answer, you could discover that your reasons are different. The following discussion on issues like nature and purpose of law, sources of law and rule of law will perhaps seem more relevant if we keep in mind that what is being discussed is designed to provide an analytical tool for resolving some real-life problems.

(i) Positive Law

Popular perception of law views it as a list of “dos” and “don’ts” backed by the threat of punishment. Such an understanding would come close to the understanding of law as posited by positivists.

(1) Legal Positivism

Positivism in its earliest version subscribed to the “command theory of law”.

In order to understand the command theory, we have to briefly refer to Hobbes' Leviathan in which he argued that human nature is such that every person shall do what he or she thinks is necessary in order to achieve his/her personal good. This will lead to conflict with others or a "war of all against all". In order to end the war everyone agrees to hand over the right to create, interpret and implement the law to a single, sovereign body. This sovereign is above the law. Law then becomes the command of the sovereign.

Law is distinct from moral obligation since the former is backed by threat of punishment or sanction.

At first glance the view seems to fit in with our conception of law with a few minor modifications. May be the sovereign can be replaced with the will of the people as embodied in the Parliament.

A deeper examination however reveals certain unanswered issues. For instance, do we always follow law because of threat or fear of punishment? While driving in the hills you may have realized that drivers generally follow traffic rules more scrupulously, than they do in the cities or in the plains. This is so even when there are far less traffic police personnel around and fines are unheard of. Are there other grounds for obedience to law than just brute force?

It is this discomfort of equating obedience to law with threat of punishment that led H.L.A. Hart to attempt to understand law as a social tool. He gave a sociological understanding of law. He argued that in primitive simple societies, since people were close to each other and economic differentiation was missing, moral conventions sufficed to achieve coordination and there was no need for law. However, with the passage of time, society became more complex and coordination could not be left to simple shared moral conventions. Law emerged as an efficient tool for addressing problems of order, coordination and conflict resolution that cannot be satisfactorily resolved by appealing solely to moral rules or customary conventions.

Rules that define law may not refer to justice or social good. However, fear of punishment alone is not reason for obedience to law. E.g. traffic laws may be followed to ensure coordination by road users. This might not be due to fear of fine alone.

(ii) Natural Law

All positivists agree that law has nothing to do with morality.

So are we then obligated to obey all laws - whether or not they are morally just? Proponents of natural law would disagree.

Proponents of natural law argue that there are universal principles of justice intrinsic to human nature and human made law must adhere to it.

The idea of natural law goes back to the Greek Civilization. The Stoics were the foremost proponents of natural law and equated it with reason.

In Roman times, Cicero emerged as the chief representative of this thinking. He was the first natural lawyer to propose striking down of positive (man made) laws, which contravened natural law. The distinction between "*jus civile*" and "*jus gentium*" also emerged. 'Jus civile'was that which was peculiar to a set of people. 'Jus gentium' was that which natural reason establishes for all mankind.

Medieval conception of natural law relied heavily on religion and tended to equate natural law with the will of God. The Renaissance saw the secularization of natural law. Grotius inaugurated a new era when he argued that what is right or wrong depends on nature of things and not on the decree of God. Grotius is seen by many as founder of Modern International Law. He advocated that law governs relations between nations even though there is no sovereign or that law is not backed by sanction. The renaissance period saw scholars like Vitoria use natural law as a basis to defend Indians against Spanish colonialists. Thus natural law held up against even the sovereign.

Limitations of Natural Law

(i) While physical facts are verifiable, for instance, water boils at 100^0C, moral judgments cannot be proved in the same way. Thus, for instance, 'whether capital punishment is the right punishment for murder' has no conclusive answer.

In such a scenario, it is impossible to label any particular set of rules as universal in application. This lack of precision and clarity means that natural law is merely moral convention and not law in the true sense.

(ii) Natural law is not backed by coercive power or threat of punishment. As such this makes adherence to it more a matter of individual conscience or social pressure which may not always be effective in ensuring adherence.

The above discussion indicates that law as we most commonly understand and encounter is positive law. However, it would be a fallacy to assume that law is limited to only positive law. Many commonly accepted principles of law, like tortious liability and equity, are rooted in natural law. This will become more evident as you study other more specific topics in this course. In the field of international law, the influence of natural law is even more pronounced.

Sources of Law

Having discussed the nature and purpose of law, the next question which arises is where to seek law or what are the sources of law?

The following are some of the sources of law.

(A) Legislation

Legislation has been described as law made deliberately in a set form by an authority that the courts have accepted as competent to do that function.

To say that legislation is the main source of law in modern day State is to only state part of the fact. As with any text, the precise meaning of a statute may be uncertain. The problem arises as to who is to interpret the statute as enacted by the Parliament and in what fashion statutory interpretation is to be done or whether interpreting legislation is a task performed by the judiciary. In doing so, rules of interpretation are relied upon.

(B) Customs and Usages

Custom and usage is the earliest sources of law. When there was no State, collectivity of people would respond differently to the issues faced in society. Gradually, there emerged a kind of uniformity in these reactions over time. These were called customs and traditions. For

example, there are still certain customs, which are observed by the people so far as their marriage, family relations, and inheritance are concerned. After the emergence of the State, such customs and traditions were formally adopted and these were given the name of laws. These laws which are derived from customs are called customary laws.

(C) Religion

Religions, more often than not, make mandates regarding the behavior of its followers. Divine laws, as enunciated through religious sources, formed the basis for conduct. People believed that the disobedience of such laws would be followed by divine wrath. Thus religious law has also become the source of law e.g. The Holy Quran, the Sunna, Ijma and Qyias are the sources of laws in Islamic countries.

(D) Judiciary

Judges do not, normally, make laws. They only apply and interpret laws. Sometimes when a case is not covered by an existing law, judges extend it by giving new interpretations. These are called judge made laws or precedents to be followed by the lower courts. Sometimes the legislature makes new laws based on such decisions. For this reason, judicial decisions also become a source of law.

(E) Delegated Legislation

Definition

Black's Law Dictionary defines 'Delegation' as 'the act of entrusting another with authority or empowering another to act as an agent or representative'. E.g. Delegation of Contractual Duties.

The Dictionary further defines 'Doctrine of Delegation' as: "The Principle (based on the Separation of Powers Concept) limiting Legislature's ability to transfer its legislative power to another Governmental Branch, especially the Executive Branch." According to M.P. Jain, "the term 'delegated legislation' is used in two senses: (a) exercise by a subordinate agency of the legislative power delegated to it by the legislature, or (b) the subsidiary rules themselves which are made by the subordinate authority in pursuance of the power conferred on it by the legislature."

The concept can be further substantiated with the help of an example. The Parliament of UK itself made the Road Traffic Act, 1930, and so the legislation is original (rather than delegated). Section 30 of that Act provides that, “the Minister [of Transport and Civil Aviation] may make regulations as to the use of motor vehicles, their construction and equipment.” Accordingly, the Minister made the Motor Vehicles (Construction and Use) Regulations, 1955. The regulations were made by someone other than the Parliament and are, therefore, delegated (rather than original) legislation.

Delegated legislation, also referred to as secondary legislation, is legislation made by a person or body other than the Parliament. Parliament, through an Act of Parliament, can permit another person or body to make legislation. An Act of Parliament creates the framework of a particular law and tends only to contain an outline of the purpose of the Act. Delegated legislation provides details to the act made by the Parliament. Parliament thereby, through primary legislation (i.e. an Act of Parliament), permit others to make law and rules through delegated legislation. The legislation created by delegated legislation must be made in accordance with the purpose laid down in the Act.

(F) Equity

“The system of equity includes that portion of natural justice which is judicially enforceable but which for various reasons was not enforced by the courts of common law." “EQUITY is that system of justice which was developed in and administered by the high court of chancery in England in the exercise of its extraordinary jurisdiction. EQUITY, in its technical and scientific legal sense, means neither natural justice nor even all that portion of natural justice which is susceptible of being judicially enforced. It has, when employed in the language of English law, a precise, definition and limited signification, and is used to denote system of justice which was administered in a particular court – the nature and extent of which system cannot be defined in a single sentence, but can be understood and explained only by studying the history of that court, and the principles upon which it acts. In order to

begin to understand what equity is, it is necessary to understand what the English high court of chancery was, and how it came to exercise what is known as its extraordinary jurisdiction. Every true definition of equity must, therefore, be, to a greater or lesser extent, a history."

“In its technical sense, equity may be defined as a portion of natural justice which, although of a nature more suitable for judicial enforcement, was for historical reasons not enforced by the common law courts, an omission which was supplemented by the court of chancery. In short, the whole distinction between equity and law is not so much as a matter of substance or principle as of form and history."

Sometimes a case comes before a judge, which (a) may not be covered by the existing law, (b) where the application of old laws may not meet the demands of justice or (c) when there exists no law at all to decide the case. In such circumstances the judge will decide the case according to his own sense of justice. He will not apply any law. This is called equity. There is difference between judge made law and equity. In the former case the Judge is guided by existing law whereas in the latter case, he is guided by his common sense.

(G) Commentaries

In every field, we find experts whose opinions carry much weight. Same is the case with laws. There are many experts who express their opinions on laws. The experts’ opinions are not laws but they do have some importance because they help and guide the judges in their decisions and also the lawmakers in the making of laws. In England the commentaries of Coke, Hale and Blackstone are such sources for English laws. Among the Muslims, there are the Hedaya, Fatawa-e-Alamgiri and other writings of Fuqaha.

ALSO REFER - https://gyan.lbsnaa.gov.in/mod/scorm/player.php

1.2 INTERPRETATION OF STATUTES

Interpretation means the art of finding out the true sense of an enactment by giving the words of the enactment their natural and ordinary meaning. It is the process of ascertaining the true meaning of the words used in a statute. The Court is not expected to interpret arbitrarily and therefore there have been certain principles which have evolved out of the continuous exercise by the Courts. These principles are sometimes called the 'rules of interpretation'.

(a) The Literal Rule

It states that a statute must be given its "plain and obvious meaning" in the context of the Act. While it is the rule that is most followed and is the most straight forward and simple, the complexity of implementing the literal rule has been brought out in a series of Supreme Court cases involving imposition of sales tax on certain commodities. For instance, in the following case the issue was whether green ginger is a vegetable.

State of West Bengal v. *Wasi Ahmed* (1977)

The petitioner argued that green ginger was exempt from sales tax since it was part of "Vegetable, green or dried, commonly known as *sabji*, *tarkari* or *sak*" and these

were exempted under the law.

(*The court held that a term in the statute must be construed as in common parlance and it must be given its popular sense. Popular sense was defined as "that sense which people conversant with the subject matter with which the statute is dealing would attribute to it")*. It held that since the High Court had held that in Bengali language green ginger falls into the category of "*sabji*, *tarkari* or *Sal"* it saw no reason to overturn the judgment since the HC judges were conversant with the language and usage."

Another rule modifying the literal rule is that in tax statutes wherever two constructions are possible the one in favour of the citizen is to be followed. Not only is the rule of law sometimes difficult to implement, it can lead to ridiculous and unintended results at times.

b) The Golden Rule

When the literal rule would lead to absurd results the courts rejects the narrow meaning of the words/phrase used, in favour of a wider meaning which is in keeping with the intention/purpose of the statute.

A classical case, which expounds this rule is:

Smith v *Hughes* [1960] 1 WLR 830

'Under s. 9(1) of the Street Offences Act, 1959 'It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution.' The defendants in the case had been advertising their services by standing on the balcony or at the windows of their premises and attracting the attention of men passing along the street outside. Although the defendants were not themselves physically present in the street they were nevertheless convicted.

The Judge observed: I approach the matter by considering what is the mischief aimed at by this Act. Everybody knows that this was an Act intended to clean up the streets, to enable people to walk along the streets without being molested or solicited by common prostitutes. Viewed in that way, it can matter little whether the prostitute is soliciting while in the street or is standing in a doorway or on a balcony, or at a window, or whether the window is shut or open or half open; in each case her solicitation is projected to and addressed to somebody walking in the street.'

(c) The Mischief Rule

Under this Rule the Courts do not focus on the words/phrasing of the statute at all. This is not to say that judges are up to any "mischief" ! The mischief rule is so called because the judges look at the mischief (problem) the Act sought to address and the remedy it proposes. The provision is then interpreted so as to fit in with this larger scheme.

An application of the mischief rule in India is evident from the following case-

Utkal Contractors & Joinery (P) Ltd. v. *State of Orissa*

M/s Utkal Contractors & Joinery (P) Ltd had a ten-year lease (from 1979) for collection of Sal seeds from 11 forest divisions.

In 1981, Orissa Forest Produce (Control of Trade) Bill, 1981 was introduced in the Legislative Assembly of Orissa State. The Statement of Objects and Reasons was as follows:

"Smuggling of various forest produces are increasing day by day. The present provisions of the Orissa Forest Act, 1972 for checking, hoarding and transport of forest produce are not adequate to bring the culprits to book. The said Act is not adequate for imposition of any restrictions or control on trade in forest produce by framing rules thereunder. Barring few items like sal seeds, most of the important items of minor forest produce such as Mahua flowers. Tamarind, Charmaji, Karanja and the like are grown in private holdings as well as in the forest areas owned by government. Unscrupulous traders take advantage of this situation and evade the law under the cover that the produce relates to private land and not to forests under the control of government. Instances of smuggling in such cases are too many and the smugglers are escaping with impunity because of absence of any legislation providing for State monopoly in forest produce. Enactment of a separate legislation for the purpose is, therefore, absolutely necessary."

The government rescinded the contract with M/s Utkal Contractors. It relied on sections 5 of the Act.

Section 5: Restriction on purchase and transport and rescission of subsisting contracts.-

(1) On the issue of a notification under sub-section (3) of Section 1 in respect of any area,-

(a) All contracts for the purchase, sale, gathering or collection of specified forest produce grown or found in the said area shall stand rescinded, and

no person other than-

(i) the State Government,

(ii) an officer of the State Government authorized in writing in that behalf, or

(iii) An agent in respect of the unit in which the specified forest produce is grown or found,

Shall purchase or transport any specified forest produce in the said area.

Explanation I.- "Purchase" shall include purchase by barter.

Explanation II.- *Purchase of specified forest produce from the State Government or the aforesaid government officer or agent or a licensed vendor shall not be deemed to be a purchase in contravention of the provisions of this Act.*

Expanation III.- A person having no interest of the holding who has acquired the right to collect the specified forest produce grown or found on such holding shall be deemed to have purchased such produce in contravention of the provisions of this Act.

In deciding the case the Court expounded on the Mischief Rule.

The Supreme Court observed that a statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation. The words of a statute take their colour from the reason for it. How do we discover the reason for a statute? There are external and internal aids. The external aids are Statement of Object and Reasons when the Bill is presented to Parliament, the reports of committees, which preceded the Bill, and the reports of Parliamentary Committees Occasional excursions into the debates of Parliament are permitted. Internal aids are the Preamble, the scheme and the provisions of the Act.

The Court also examined various other provisions to argue that none of these provisions expressly deals with forest produce grown in government land. The scheme of the Act is, therefore, fully in tune with the object set out in the Statement of Objects and Reasons and in the preamble, namely, that of creating a monopoly in forest produce by making the government the exclusive purchaser of forest produce grown in private holdings. It was argued by the learned Additional Solicitor General that Section 5(1)(a) was totally out of tune with the rest of the provisions and, while the rest of the provisions dealt with forest produce grown in private holdings, the very wide language of Section 5(1)(a) made it applicable to all forest produce whether grown in private holdings or government forests. Court held that it is not

permissible to construe Section 5(1)(a) in the very wide terms when the objects and scheme of the Act pointed otherwise.

The court thus overturned the decision of the Government.

(iv) Principles for understanding particular terms in the statute are:

- The *ejusdem generis* rule: Where a specific list of words is followed by general word, the general words will follow the same meaning.

- Expression *unius est exclusion alterius* (English translation: 'the mention of one thing excludes all others'). Where there is a list of words, the Act applies to these words only.

- *Noscitur a sociis* (English translation: 'a word is known by the company it keeps'). Words are looked at in the context of the words surrounding them.

(II) Precedent

When there is no clearly laid down law on an issue the Courts rely on "precedence". Precedents are simply rules that are derived from decision/reasoning in similar situations in the past.

The doctrine of precedence is sometimes referred to as the doctrine of *stare decisis. Stare decisis et non quieta movere* means 'stand by decided cases and do not disturb established practices'. The rule has been self-imposed by the courts in the interests of certainty, predictability and maintaining their own authority.

The essential ingredients of precedent for a court are:

- *The hierarchy of the courts*. If a precedent comes from a decision of a higher court then the lower courts must follow it in the present case (it is a binding precedent). If a precedent is previous decision of a lower court, it will have persuasive force only and the present court is not bound to follow it.

- *Ratio decidendi.* For a precedent to be binding, the principle of law that it establishes must form part of the *ratio decidendi* (the essential reason for the decision) of the

judgment and not be *dictum* (something said 'by the way' that is incidental to the actual decision) i.e. *obiter dicta*.

- *Applicable.* For a precedent to be binding, the principle of law it establishes must be relevant to the facts of the present case (distinguishing the facts of the present case from the previous one- the precedent case- is the standard way of avoiding being bound by a precedent).

- *Valid.* For precedent to be binding, it must not have been repealed or altered by a statute or by the higher court (i.e. a higher court which has power to overrule the decision).

1.3 LEGAL THEORY Definition of Law:

A working definition of law can be said to be 'the binding rules of conduct meant to enforce justice and prescribe duty or obligation, and derived largely from custom or formal enactment by a ruler or legislature.' It is very essential that laws carry with them the power and authority of the enactor, and associated penalties for failure or refusal to obey. Law derives its legitimacy ultimately from universally accepted principles such as the essential justness of the rules, or the sovereign power of a parliament to enact them. Law cannot be static because it has to grow with the development of the society.

A definition which is considered satisfactory today may be found narrow tomorrow. Prof. Keeton rightly points out that "an attempt to establish a single satisfactory definition of law is to seek to confine jurisprudence within a straight-jacket from which it is continually striving to escape." According to Austin, "law is the aggregate of rules set by men as politically superior, or sovereign, to men as politically subject." In other words, law is the command of the sovereign. It imposes a duty and is backed by a sanction. Command, duty and sanction are the three elements of law. Salmond defines law as "the body of principles recognized and applied by the State in the administration of justice."

Legal Sanctions:

The term 'sanction' is derived from the Roman law. '*Sactio*' was originally that part of a statute which establishes penalty or made other provisions for its enforcement. In the ordinary sense, the term sanction means mere penalty. It can also be some motivating force or encouragement for the purpose of better performance and execution of law.

Territorial Nature of Law:

The enforcement of law is territorial in the same way as a State is territorial. The territoriality of law flows from the political divisions of the world. As a general rule, no State allows other

States to exercise powers of government within it. The enforcement of law is confined to the territorial boundaries of the State enforcing it.

The proposition that a system of law belongs to a defined territory means that it applies to all those persons who by residence, domicile or otherwise are sufficiently connected with the territory.

Purpose and Function of Law

There has been a lot of speculation about the purpose and function of law. There is nothing dogmatic about it. Law changes from time to time and from country to country. Law is not static. It must change with the changes in the society. That is the reason why there is no unanimity with regard to the purpose and function of law.

Uses or Advantages of Law

There are many advantages of the fixed principle of law. They provide uniformity and certainty to the administration of justice. The same law has to be applied in all cases. There can be no distinction between one case and another case if the facts are the same. Law does not respect personalities. Law is certain and known. The existence of the fixed principles of law avoids the dangers of arbitrary, biased and dishonest decisions. Therefore, a departure from rule of law by a judge is visible to all. It is not enough that justice should be done, but it is also necessary that it should be seen to be done. If the administration of justice is left completely to the individual discretion of a judge, improper motives and dishonest opinions could affect the dispensation of justice. The fixed principles of law protect the administration of justice from the errors of individual judgment. In most cases, the law on the subject is clear and judges are not expected to twist the same. They are not expected to substitute their own opinion for the law of the country. Experience shows that people have lived happier lives when they are ruled by the fixed principles of law than when there are no laws as such. Another advantage of law is that it is more reliable than individual judgment. Human mind is fallible and judges are no exception. The wisdom of the legislature which represents the wisdom of the people is a safer and more reliable means of protection than the momentary fancy of the individual judge.

Disadvantages of Law

Law has not only advantages but also disadvantages. One disadvantage is the rigidity of law. An ideal legal system keeps on changing according to the changing needs of the people. Law must adjust itself to the needs of the people and cannot isolate itself from them. However, law is not usually changed to adjust itself to the needs of the people. The lack of flexibility in law results in hardship and injustice in several cases. Another disadvantage of law is its conservative nature. Both the lawyers and judges favour the continuation of the existing law. The result is that very often law is static. This is not desirable for a progressive society. Another defect of law is formalism. More emphasis is put on the form of law than its substance. A lot of time is wasted in raising technical objections of law which have nothing to do with the merits of the case in dispute. While an innocent person may suffer, the clever and the crooked may profit thereby. Another defect of law is undue and needless complexity. It is true that every effort is made to make law as simple as possible but it is not possible to make every law simple. That is due to the complex nature of modern society.

Meaning of Sources of Law:

The term “sources of law” has been used in different senses by different writers and different views have been expressed from time to time. Sometimes the term is used in the sense of the sovereign or the State from which law derives its force or validity. Sometimes it is used to denote the causes of law or the matter of which law is composed. It is also used to point out the origin or the beginning which gave rise to the stream of law.

Oppenheim uses the term “sources of law” as the name for a historical fact out of which the rules of conduct come into existence and acquire legal force. According to Prof.Fuller, the problem of “sources” in the literature of jurisprudence relates to the question: “Where does the judge obtain the rules by which to decide cases? In this sense, among the sources of law will commonly be listed statutes, judicial precedents, custom, the opinion of experts, morality and equity”

Legal Sources of English Law:

In general, law may be found to proceed from one or more of the following legal sources: from a written Constitution, from legislation, from judicial precedent, from customs and from the writings of experts. English law proceeds chiefly from legislation and precedent. The *corpus juris* is divisible into two parts by reference to the source from which it proceeds. The first part consists of the statute law to be found in the book and other volumes of enacted law. The second part consists of the common law which is to be found in the volumes of law reports.

Legislation is the making of law by the formal and express declaration of new rules by some authority in the body politic which is recognized as adequate for that purpose.

A precedent is the making of law by the recognition and application of new rules by the courts themselves in the administration of justice. Enacted law comes into the courts *ab extra*. Case law is developed within the courts themselves.

Salmond refers to two other legal sources in addition to legislation and precedent. These are custom and agreement which are the sources of customary law and agreement. Therefore, by reference to their legal sources, there are four kinds of law:

1. Enacted law having its source in legislation

2. Case law having its source in precedent

3. Customary law having its source in custom

4. Conventional law having its source in agreement.

In addition, to the above-mentioned sources of law, professional opinions of eminent jurists may be called juristic law. Juristic writings and professional opinions have played a very important role in the evolution of law.

Legal Theory

i) Analytical Legal Positivism & Pure Theory of Law

The rise of analytical positivism in jurisprudence accompanied the displacement of a loosely organized secular or ecclesiastical international order by the modern national state. The emergence of the modern state as the exclusive repository of political and legal power not only produced a professional class of civil servants, intellectuals and others, which increasingly gave its loyalties and its talents to the modern national state rather than to an international church or to an emperor. It also demanded more organization of the legal system into a hierarchical structure of legal authority.

H.L.A.Hart has differentiated five meanings of "positivism". First, the contention that laws are commands of human beings; second, the contention that there is no necessary connection between law and morals or law as it is and ought to be; third, the connection that the analysis (or study of meaning) of legal concepts is (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes and origins of laws, from sociological inquiries into the relation of law and other social phenomena, and from the criticism and appraisal of law whether in terms of morals, social aims, "functions", or otherwise; fourth, the contention that a legal system is a 'closed logical system' in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards; fifth the contention that moral judgments cannot be established or defended, as statements of fact can, by rational argument, evidence or proof.

ii) Positivism in Law

The separation, in the principle, of the law as it is, and the law as it ought to be, is the most fundamental philosophical assumption of legal positivism. It represents a radical departure from the scholastic hierarchy of values in which positive law is only an emanation of a higher natural law. Separation of "is" and "ought" does not imply any contempt for the importance of values in law, as is evident from the work of Austin, Kelsen and others. With the elimination of values underlying the legal system, essentially irrelevant to analytical jurisprudence, analytical positivists can concentrate their attention on the structure of a "positive" legal system. This leads positivists to the elaboration of the structure of law in the modern state,

from Austin's "command of the sovereign" to Kelsen's hierarchy of norms derived from a hypothetical *Grundnorm.*

H. L .A. Hart (1907)

Prof. Hart's 'Concept of Law' published in 1961 gave a new understanding to analytical jurisprudence. Hart while dealing with perplexities of legal theory as to 'what is law' is more concerned with what is 'about' law. Hart discusses three recurrent issues to show their importance in shaping the definition of law, or an answer to the question, 'what is law'? The first issue, most prominent general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in some sense obligatory. Non-optional obligatory conduct can be distinguished from the conduct which is made obligatory, pure and simple. If a gunman orders his victim to handover his purse or else he will lose his life, and if the victim complies, he was forced to do so and was obliged to do. The second issue by which conduct may be non-optional but obligatory is in relation to moral rules imposing obligations and withdraw certain areas of conduct from the free opinion of the individuals to do so as he likes. The third issue 'what is law' Hart believes that a legal system consists of rules which cannot be doubted. According to Hart, legal rules may have a central core of undisputed meaning and in some cases, it may be difficult to imagine a dispute as to the meaning of a rule breaking out.

iii) Pure Theory of Law, Kelsen (1881-1973)

Hans Kelsen is considered one of the prominent jurists of the 20th century and has been highly influential in Europe and Latin America, although less so in common-law countries. His Pure Theory of Law aims to describe law as binding norms; while at the same time refusing to evaluate those norms.[1] That is, 'legal science' is to be separated from 'legal politics'. Central to the Pure Theory of Law is the notion of a 'basic norm (Grundnorm)', a hypothetical norm, presupposed by the jurist, from which, in a hierarchy, all 'lower' norms in a legal system, beginning with constitutional law, are understood to derive their authority or binding nature.

[1] Kelsen, problem der souveranitat (1920) p 24

iv) Historical School of Law

The genesis of historical school can be traced to the good judgment trends which prevailed in the 17th and 18th centuries. The first trend was that natural law philosophers and their philosophies considered a guide for discerning the ideals and perfection of a legal system.

F.K.Von Savigny (1779-1861)

The historical school of jurists was founded by Friedrich Karl Von Savigny (1779–1861), a German jurist. Its central idea was that a nation's customary law is its truly living law and that the task of jurisprudence is to uncover this law and describe in historical studies its social provenience. As in other schools of thought, acceptance of this approach did not necessarily mean agreement on its theoretical or practical consequences.

Maine (1822-1888)- Sir Henry Maine was the founder and the chief exponent of the English historical school of law. He did support the view of Savigny but he went beyond Savigny in undertaking broad comparative studies of the unfolding of legal institutions in primitive as well as progressive societies.

v) The Philosophical School of Law

The philosophical school is interested primarily in the "development of the idea of justice as an ethical and moral phenomenon and its manifestation in the principles applied by the courts"

According to Salmond, "philosophical jurisprudence is the common ground of moral and legal philosophy, of ethics and jurisprudence." The philosophical school rivets its attention on the purpose of law and the justification for coercive regulation of human conduct by means of legal rules. Kant has shown that the chief purpose of law is the provision of a field of free activity for the individual without interference by his fellow men. Law is the means by which individual will is harmonized with the general will of the community. The philosophical school concerns itself chiefly with the relation of law to certain ideals which law is meant to achieve. It investigates the purpose of law and the measure and manner in which that purpose is

fulfilled. The philosophical jurist regards law neither as the arbitrary command of a ruler nor the creation of historical necessity. Law is the product of human reason and its purpose is to elevate and ennoble human personality.

Hugo Grotius is also regarded as the father of philosophical jurisprudence. In his book, *The Law of War and Peace*, Grotius showed that a system of natural law may be derived from the social nature of man. He defined natural law as "the dictate of right reason which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity."

HEGEL: Hegel was the most influential thinker of philosophical school. His system is a monistic one. The idea unfolds from the simple to the complex by means of a dialectical process. According to Hegel, there can be no dualism of any kind at any phase of reality based on reason. To quote Hegel "what is reasonable is real and what is real is reasonable"

According to Hegel, the constitution of the state embodies the individual's freedom and interest as much as the universal.

The great contribution of Hegel to philosophical jurisprudence is the development of idea of evolution. According to him, the various manifestations of social life, including law, are the product of an evolutionary, dynamic process. This process takes on a dialectal form, revealing itself in thesis, anti-thesis and synthesis. The purpose is the raising of humanity to perfection.

vi) Sociological School

Sociology of law is defined in many ways, but its main difference from functional jurisprudence is that it attempts to create a science of social life as a whole and to cover a great part of general sociology and political science. The emphasis of the study is on society; and law is a mere manifestation.

Auguste Comte (1798-1875)

Isidore Auguste Marie François Xavier Comte (19 January 1798-5 September 1857), better known as Auguste Comte, was a French philosopher. He was a founder of the discipline of

sociology and of the doctrine of positivism. He may be regarded as the first philosopher of science in the modern sense of the term.

Auguste Comte distinguished three stages in the evolution of human thinking. Comte believed that the first stage in the human thinking is theological stage in which all phenomena are explained by reference to supernatural or divine. Theological stage is followed by metaphysical stage, in which human thought takes recourse to ultimate principles and ideas, which are conceived as being beneath the surface of things and as constituting the real moving forces in the evolution of mankind. The third and the last stage, which rejects all hypothetical constructions in philosophy, history, and science and confines itself to the empirical observations and connection of facts under the guidance of methods used in the natural sciences.

Leon Dugit

The French jurist Leon Dugit was a professor of constitution law in the University of Bordeaux in France. He made substantial contribution to the sociological jurisprudence in early twentieth century. Dugit carried forward the belief that scientific progress can be accelerated by individual behavior in order to satisfy common social needs and interests. Dugit was inspired by Durkheim who himself had taken inspiration from Comte. Durkheim's main point, on which Dugit built upon, was that he made a distinction between two kinds of needs of men in society. Firstly, there are common needs of individuals which are satisfied by mutual assistance and secondly, there are diverse needs of individuals which are satisfied by the exchange of services. Therefore, the division of labour was the pre-eminent factor of social cohesion as an indisputable fact beyond ideology, beyond religious or metaphysical speculation. The constant realisation of social fact which is simply inter-dependence of individuals could at least replace ideological quarrels by observable facts

vii) Natural Law

Thomas Hobbes of Malmesbury (5 April 1588 -4 December 1679), was an English philosopher, best known today for his work on political philosophy. His 1651 book *Leviathan* established

the foundation for most of Western political philosophy from the perspective of social contract theory. He is credited with redefining the classical natural law to modern natural rights. Natural law recognizes inherent human rights which can be understood universally by reason.

viii) Realist School

Legal realism implies that judicial decisions must conform to socio-economic factors and questions of policy and values. This school fortifies sociological jurisprudence and recognises law as the result of social influences and conditions, and regards it as judicial decisions.

Oliver Homes (1841-1935) is, in a sense, an exponent of the realist school. “Law is what the courts do; it is not merely what the courts say.” Emphasis is on action. As Holmes would have it, “The life of the law has not been logic; it has been experience.”

1.4 LEGAL CONCEPTS: RIGHTS AND DUTIES

In all civilized societies, law consists of those principles in accordance with which justice is administered by the State. Administration of justice has behind it the physical power of the State for the purpose of enforcing rights and punishing the wrong-doers for violations. It follows, therefore, that every right involves a title of the source from which that right is derived. The word 'title' may be understood as the *de facto* antecedent of which the right is the *de jure* consequence.

Meaning and definition of Right

In an abstract sense right means justice, ethical correctness, or harmony with the rules of law or the principles of morality. In a concrete legal sense right means a power, privilege, demand, or claim possessed by a particular person by virtue of law.

Each legal right that an individual possesses relates to a corresponding legal duty imposed on another. For example, when a person owns a home and property, he has the right to possess and enjoy it free from the interference of others, who are under a corresponding duty not to interfere with the owner's rights by trespassing on the property or breaking into the home.

According to Salmond, right is an interest, recognized and protected by rule of law. It is any interest corresponding to which there is a duty, and the disregard of which is a wrong.

According to Austin, a party has a right when another or others are bound or obliged by law to do or forbear something towards or in regard to him.

According to Holland, a right is the ability possessed by a person to control other's actions and self-protection with the help and assistance of the State. According to Dr.Sethna, a right is any interest either vested or created under a law or under a contract.

The Characteristics of Legal Right

Every legal right possesses the following five characteristics:

i)There is a person who is the owner of the right. He is the subject of the legal right,sometimes also described as the person of inherence.

ii)A legal right accrues against another person/s who are under a corresponding duty torespect that right. Such a person is called the person of incidence or the subject of the duty.

iii)The content or substance of the legal right may be an act which the subject of incidence is bound to do, or it may be forbearance on his part.

iv)Then, there is the object of the right. This is the thing over which the right is exercised. This may also be called the subject-matter of the right.

v)Lastly, there is the title to the right, i.e., the facts showing how the right is vested in owner of the right. This may be by purchase, gift, inheritance, assignment, prescription, etc.

Thus, every right involves a three-fold relation in which the owner of it stands:

i) it is a right against some person or persons.
ii) it a right to some act or omission of such person or persons.
iii) it is right over something to which that act or omission relates.

Meaning and Definition of Duty

Duty means a legal obligation that entails mandatory conduct or performance. With respect to the laws relating to customs duties, a tax owed to the government for the import or export of goods is a duty. A fiduciary, such as an executor or trustee, who occupies a position of confidence in relation to a third person, owes such person a duty to render services, provide care, or perform certain acts on his or her behalf. In the context of negligence cases, a person has a duty to conduct himself or herself in a particular manner with respect to another person.

According to Salmond, a duty is an obligatory act; it is an act, the opposite of which would be a wrong. Duties and wrongs are related. The commission of a wrong is a breach of duty and the performance of a duty is the avoidance of a wrong.

Duties are of two kinds, legal and moral.

Duties may be positive or negative.

Duties can also be primary and secondary.

Meaning of Legal Wrong

Legal wrong means a violation, by one individual, of another individual's legal rights.

The idea of rights suggests the opposite idea of wrongs, for every right is capable of being violated. For example, a right to receive payment for goods sold implies a wrong on the part of the person who owes, but does not make payment. In the most general point of view, the law is intended to establish and maintain rights, yet in its everyday application, the law must deal with rights and wrongs. The law first fixes the character and definition of rights, and then seeks to secure these rights by defining wrongs and devising the means to prevent these wrongs or provide for their redress.

The Criminal Law is charged with preventing and punishing public wrongs. Public wrongs are violations of public rights and duties that affect the whole community.

A private wrong, also called a civil wrong, is a violation of public or private rights that injures an individual and consequently is subject to civil redress or compensation. A civil wrong that is not based on breach of contract is a tort. Torts include assault, battery, libel, slander, intentional infliction of mental distress, and damage to property. The same act or omission that makes a tort may also be a breach of contract, but it is the negligence, not the breaking of the contract, that is the tort. For example, if a lawyer is negligent in representing his client, the lawyer may be sued both for malpractice, which is a tort, and for the breach of the attorney-client contract.

According to Salmond, a wrong is simply a wrong act- an act contrary to the rule of right and justice. A wrong may be described as anything done or omitted contrary to legal duty, considered in so far as it gives rise to liability. Wrongs are of two kinds, legal and moral.

Jural Relations

The four pairs of jural correlatives may be arranged as below:-

Right	Liberty	Power	Immunity
↕	↕	↕	↕
Duty	No-Right	Liability	Disability

The four pairs of jural opposites may be arranged as:-

Right	Privilege or Liberty	Power	Immunity
X		X	
Duty	No-Right	Liability	Disability

Classification of rights according to their objects

1. There can be rights over material things.
2. There are rights in respect of one's own person.
3. There is also the right to reputation.
4. There are rights in respect of domestic relations.
5. There are rights in respect of other rights.
6. There are rights over non-material property.
7. There are rights to services.

Kinds of Legal Rights

(i) *Positive and Negative Rights*: Positive rights provide the right holder with a claim against another person or the State for some good, service, or treatment. A negative right restrains other persons or governments by limiting their actions towards or against the right holder.

(ii) *Real and Personal Rights:* Real rights are rights that a person has over immovable property. It must be registered against the title deed of the property. Personal rights are the rights of a legal subject specified in an agreement or contract.

(iii) *Rights in rem and rights in personam*: A right *in rem* is a right exercisable against the world at large, as contrasted from a right *in personam* which is an interest protected solely against specific individuals.

(iv) *Proprietary and Personal rights*: The aggregate of a man's proprietary rights constitute his estate, his assets, or his property in one of the many senses of that most equivocal

of legal terms. The sum total of a man's personal rights, on the other hand, constitutes his status or personal condition, as opposed to his estate. If he owns land, or chattels, or patent rights, or the goodwill of a business, or shares in a company, or if debts are owed to him - all these rights pertain to his estate. But if he is a free man and a citizen, a husband and a father, the rights which he has as such pertain to his status or standing in the law.

(v) *Inheritable and uninhabitable rights*: A right is inheritable if it survives its owners. It is uninheritable if it dies with the owner.

(vi) *Principal and Accessory rights:* Principal rights exist independently of other rights whereas accessory rights are appurtenant to other rights.

(vii) *Legal and Equitable rights*: Legal right were recognized by common law courts and equitable rights were recognized by the Court of Chancery. In India, there are no separate equity courts and both common law and equity jurisdictions are combined in one court which acts according to justice, equity and good conscience in the absence of specific rules of law.

(viii) *Primary and Secondary rights or Antecedent and remedial rights:* Primary rights are also called antecedent, sanctioned or enjoyment right. Secondary rights are called sanctioning, restitutory or remedial rights. Primary rights are those rights which are independent of a wrong having been committed. They exist for their own sake. They are antecedent to the wrongful act or omission. Secondary rights are part of the machinery provided by the state for the redress of injury done to primary rights.

(ix) *Public and private rights:* A public right is possessed by every member of the public. When one of the persons connected with the right is the state and the other is a private person, the right is called a public right. A private right is concerned only with individuals.

(x) *Vested and contingent rights*: A vested right is a right in respect of which all events necessary to vest it completely in the owner have happened. No other condition remains to be satisfied. In the case of a contingent right, only some of the events necessary to vest the right in the contingent owner have happened.

(xi) *Servient and dominant rights*: A servient right is one which is subject to an encumbrance. The encumbrance which derogates from it may be contrasted as dominant. The land for the beneficial enjoyment of which the right exists is called the dominated heritage and the owner or occupier hereof is called the dominant owner.

(xii) *Municipal and International rights*: Municipal rights are conferred by the law of a country. International rights are conferred by International law.

(xiii) *Ordinary and fundamental rights:* Some rights are ordinary rights and some are fundamental rights. The Constitution of India has guaranteed certain fundamental rights to the citizens of India like the right to life and equality, right to freedom, right against exploitation, and right to freedom of religion, cultural and educational rights, and the right to constitutional remedies.

ALSO REFER - https://gyan.lbsnaa.gov.in/mod/scorm/player.php

1.5 LEGAL CONCEPTS – CRIME & CIVIL WRONGS

Concept of Crimes - An Introduction

1. Crime

The term 'Crime' has not been defined in any statute. No Act of any Indian Legislature gives us a definition of it. It is difficult to define 'Crime'. That does not mean that nobody has attempted any definition. Jurists, social scientists, criminologists and thinkers have no doubt endeavoured and evolved definitions of 'Crime'. Each one of them has emphasised upon a particular aspect. The result is that none of the definitions appears to be very precise and fully satisfactory. 'Crime' is what a particular society at a given time says it is. It reflects the values of the society.

2. Definitions of crimes

Definitions which are founded upon "Law" and adopt those authorities who carry greater weight.

(a) Black stone

"A crime is an act committed or omitted in violation of public law forbidding or commanding it".

(b) Sir James Stephen

"Crime is an act which is both forbidden by law and revolting to the moral sentiments of the society".

(c) Prof. Kenny

"Crimes are wrongs whose sanction is punitive and is no way remissible by any private person but is remissible by the crown alone, if remissible at all".

(d) Halsbury's Laws of England

"A crime is an unlawful act or default which is an offence against the public and renders the person guilty of the act or default liable to legal punishment.

"While a crime is often also an injury to a private person, which has remedy in a civil action, it is an act of default contrary to the order, peace and well-being of society that a crime is punishable by the State".

3. Difference between a Civil Wrong and a Criminal Wrong

A liability means an obligation one is bound by law to fulfil.

A tort is a civil wrong and therefore results in civil liability.

When a person incurs civil liability, s/he ends up paying a type of penalty in most cases. It is a monetary amount which the court thinks is justified for one to pay for their wrong. There is usually no imprisonment.

Criminal liability usually results in either imprisonment or fine, or both. This difference between the two liabilities is determined by the very nature of the wrongs.

Criminal wrongs are considered to be wrongs against the community as a whole, while civil wrongs are considered to be wrong against the individual. A criminal act is also called an 'offence', because such an act offends or challenges the command/authority of the law of the sovereign or the ruler, i.e., the State.

[Note: 'the State' in the legal context, usually means either Central or State Government and not an area within a political boundary.]

Such offences are considered to be a 'greater' wrong and therefore merit a greater punishment.

Civil wrongs and Criminal wrongs are separated according to the degree/severity and nature of the wrongs.

Therefore, you will notice that certain cases in India bear the name "State of Tamil Nadu. v. Suhas Katti" or "Union of India v. Z" because the State itself starts the case, or the prosecution (a criminal proceeding) as it is called in legal jargon, against the accused.

In civil cases, like for Torts, parties bring the "suit" (a civil proceeding) themselves.

1.6 RULE OF LAW

Rule of Law

The phrase “rule of law” is one, which has become central to any discussion on governance. In fact, the recent trend is to view it as a panacea for political and economic problems. While this excessive reliance on the notion may be misplaced, it cannot be denied that “rule of law” is a crucial component of any attempt at good governance. As such, it is a concept, which no civil servant can afford to be ignorant about.

As is the case with all popular terms, the phrase is open to varying interpretations and it is therefore necessary to define the main features of the concept at the outset. The modern conception of rule of law has its starting point in A. V. Dicey’s formulation (Dicey was a British Constitutional expert writer at the end of the 19th century).

Dicey’s conception emphasizes on the following features:

1. Absolute supremacy or predominance of law as opposed to arbitrary power.
2. Equality before law or the equal subjection of all classes and individuals to the law.
3. An independent and impartial judiciary to uphold the law,

Dicey provides the starting point for any discussion on rule of law but his formulation is no longer considered exhaustive. Certain aspects of it have also come in for criticism. For instance, Dicey linked supremacy of law to absence of any discretion with the government. It is now evident that law alone cannot govern a modern state and the complexity of modern day life requires that administrators be granted discretion to meet varying day-to-day situations on the ground. In fact, statutes themselves provide discretion to public officials. However, this discretion is not to be exercised based on personal whims and fancies but on principles of relevant considerations. The chapter on judicial review of administrative actions shows that administrative discretion can be challenged in courts if it is discriminatory, unreasonable, arbitrary or motivated by ill will or based on irrelevant consideration.

Lord Bingham's rule of law

The rule of law is a principle of the Indian constitution that means politicians govern within their powers, the law applies equally to all and that the law is certain. Lord Bingham gave perhaps the clearest statement of these principles in his seminal work, 'The Rule of Law' and identified eight principles to define it.

1. The law must be accessible, clear & predictable.

2. Questions of legal rights should be resolved by the law and not the exercise of discretion.

3. The law should apply equally to all, except where objective differences justify differentiation.

4. Ministers must act within their powers and not exceed their limits.

5. The law must afford adequate protection of fundamental human rights.

6. The law should provide access to justice, especially where people cannot resolve inter-personal disputes themselves.

7. Court and tribunal processes should be fair.

8. The state should comply with international law.

Points to ponder

1. Faced with the social unrest, political bickering and slow economic development and the resultant chaos and relatively slow rate of development, many (including civil servants) are liable to remark how dictatorships are so much more effective in maintaining "rule of law". Do you agree?

2. A drought strikes village X (an imaginary independent unit). The village laws allow for sale of water by those owning wells. One by one all wells dry up and only one well remains. The owner starts charging a huge amount beyond most villagers' capacity to pay. Gradually the villagers start perishing due to thirst but no one breaks the law. Is this village a shining example of rule of law?

Rule of Law and Justice (Rule of Law versus Rule by Law)

If all that was required was that the government function in accordance with law this would mean that the government could do just about anything as long as the law-making body authorized it to do so by making a law to that effect. This would mean that the will of the sovereign would be the law. Such a situation is however seen as anti-thesis of rule of law. It is now recognized that rule of law requires that even the law-making powers of the sovereign be subjected to checks so that it is not arbitrary or whimsical. The doctrine of separation of powers is thus an integral part of rule of law; it is since then that, the various organs of the government act as a check and balance on each other.

In recent years, scholars and policy makers have increasingly applied themselves to the problem that even where societies have adopted many features of rule of law in terms of institutions and processes, this does not lead to any real or long-term adherence to rule of law. There is now an emerging view that such an approach fails because it is formalist or proceduralist in conception. Critics of this approach argue that rule of law cannot be brought about by mere adoption of formal laws and institutions but require a focus on substantive outcomes.

Amartya Sen argues that genuine rule of law seeks to promote justice in the real sense rather than just in a formal way. He uses the Sanskrit terms "*nyaya*" and "*niti*" to distinguish between the two approaches. "*Niti*" refers to organizational propriety while "*nyaya*" refers to overall or realized justice.

Many of us have doubts as to how rule of law is compatible with affirmative action. Is this not a violation of the principle of equality before law? The answer lies in the relation between law and justice referred above. Law to be just should treat equals equally. Thus, rule of law is compatible with treating those different people having varying capabilities differently. Thus, those socially or educationally disadvantaged need to be treated in a manner that offsets the challenges faced by them to provide a level playing field.

A law that favours the strong and dominant is unjust and adherence to law and institutions enforcing it is more rule by law rather than rule of law. For in this situation, the elite rules by law but is itself above the law since the law is shaped by the elite to suit its interests rather than greater common good.

Rule of Law and Democracy

The above discussion also thus highlights the close links which the rule of law has with democracy. It is democracy alone which provides the mechanism for identifying laws for common good. However, this system is imperfect. An authoritarian non-democratic regime may adopt the form of rule of law but always resist the spirit of it since it would not want to make its own interests and power subservient to law. The temptation to change the law that would suit the dominant interests shall always undermine the rule of law.

Concluding Remarks: Features of Rule of Law

The above discussion on both formal, procedural aspects and substantive aspects of rule of law helps bring together the following as the features of rule of law:

1. Law should be:

i. Prospective

ii. Relatively stable

iii. Should be intended to advance the interest of everyone (common good) rather than only dominant groups.

iv. Should not be substantially unjust in as much that they target a group or violate the fundamental rights of a person.

v. Applied by an independent judiciary.

vi. Susceptible to judicial review by higher courts.

Rule of Law in India:

Does the rule of law exist in India?

Let us attempt to briefly answer that question in both its formal and substantive aspects.

In the formal sense, the rule of law is definitely well established in India. This is highlighted by the fact that the Constitution through its various provisions clearly establishes equal protection and equality before law (Article 14). It establishes the independence of the Judiciary and judicial review of law and administrative action. The Constitution protects the Fundamental Rights of the citizens from arbitrary exercise of government power (Article 32).

In its substantive aspect, the rule of law in India does seek to uphold the emphasis on justice. The Constitution contains exceptions to Fundamental Rights in order to allow provisions for socially and educationally backward groups (Article 15, 16). The Directive Principles of State Policy emphasize on the responsibility of the state to ensure all round well-being of citizens. In practice too, the government has initiated multitude of welfare schemes. The courts have mostly been active in their review of law and administrative action to prevent arbitrary exercise of government power or legislative excesses. The basic structure doctrine of the Constitution has ensured that the underlying philosophy behind law as embodied in the Constitution is not tampered with by majoritarianism.

In practice, however, the rule of law is facing increasing challenges. Some of these are briefly mentioned below:

1. Red tape—Excessive and complex rules without a clear purpose slow down decision making and makes the administrative machinery unresponsive. The citizenry and at times public officials themselves feel disillusioned with the rules and follow them more out of habit or fear than genuine obligation. This compliance is therefore more in name than in reality.

2. Corruption—This is partly linked to the earlier point of red tape. Once rules are followed for the sake of it with no genuine appreciation of their purpose or need, the tendency to bypass them increases. When combined with pecuniary greed it leads to corruption. Corruption can

be viewed as the market mechanism for privileged access[2], which is anti-thetical to rule of law.

Internal Conflict and Security Threats—Security threats lead to a situation wherein authorities are tempted to take recourse to drastic measures—torture, extra judicial killing. Such acts shake public confidence and weaken Rule of Law.

ALSO REFER - https://gyan.lbsnaa.gov.in/mod/scorm/player.php

[2] CK Prahlad

2. ADMINISTRATION OF JUSTICE

2.1 STRUCTURE OF THE COURTS - CIVIL & CRIMINAL

(SUBSTANTIVE AND PROCEDURAL LAWS)

Administration of Justice

1. (a) Administration of Justice is a most essential function of the State.

   (b) It means exercise of judicial power to maintain and uphold rights and punish wrongs.

   (c) It consists in the use of Government machinery of the STATE in enforcing rights or redressing wrongs.

   (d) It involves:-

      (i) two parties - plaintiff and defendant (in a civil case) or

      the complainant and the accused (in a criminal case instituted on private complaint). Or the prosecution and the defence (in any criminal prosecution).

      (ii) a right claimed or the wrong complained about by the former against the latter.

      (iii) a Judgement of the Court delivered at the end of the Trial.

      (iv) Execution of the operative part of the Judgement.

   (e) Justice is administered by the Courts according to Law.

2. System of Courts in India

   (a) At the apex, that is, at the national level, there is the Supreme Court of India.

   (b) At the State level, there are High Courts. Each High Court is the head of the Judiciary in the State.

(c) At the district/sub-divisional levels, there is a system of Courts, which Courts may be described as Subordinate Courts, in the sense that they are all subordinate to the High Courts.

3. Jurisdiction of the Supreme Court

(a) It is a Court of record and as such, it has the power to punish for its contempt. (Article 129)

(b) Original Jurisdiction (Article 131).

(c) Writ Jurisdiction for enforcement of the Fundamental Rights (Article 32).

(d) Appellate Jurisdiction in respect of Constitutional, Civil and Criminal matters (Articles 132, 133, 134 and 136).

(e) It is the highest Court of Appeal in the country.

(f) Advisory Jurisdiction (Article 143).

4. Authority of the Supreme Court

(a) The law declared by the Supreme Court is binding upon all the Courts functioning in India (Art. 141).

(b) All authorities - Civil and Judicial, in India must act in aid of the Supreme Court. (Article 144).

5. Jurisdiction of the High Courts

(a) Each High Court is a Court of Record. It has power to punish for contempt of itself (Article 215).

(b) Original jurisdictions in Civil and also in criminal matters. All the High Courts do not possess original jurisdiction; but some of them, for example, Calcutta, Bombay and Madras High Courts have it. Delhi High Court also has original jurisdiction in Civil matters.

(c) Writ Jurisdiction - for enforcement of the fundamental rights and other legal rights (Article 226).

(d) Appellate Jurisdiction in respect of Civil and Criminal cases decided by the subordinate Courts.

(e) Revisional Jurisdiction - particularly what has been conferred under the Civil and Criminal Procedure Codes.

(f) Administrative Jurisdiction over the subordinate Courts, such as superintendence, control and discipline in respect of the subordinate Courts and their Presiding Judges.

6. Administration of Justice - Division

(a) It is divided into two branches - namely, Civil Justice and Criminal Justice.

(b) Civil Justice is concerned with enforcement of the Rights whereas the Criminal Justice aims at punishment of the offenders.

(c) The wrongs which give rise to and form the subject matters of civil proceedings are known as “Civil Wrongs”.

(d) The wrongs which give rise to and form the subject matters of Criminal Proceedings are called “Criminal Wrongs” or “Crimes”.

(e) Civil and Criminal Justices are administered by two different sets of Courts, designated as “Civil Courts” and “Criminal Courts” respectively.

(f) The procedures followed for administration of these two kinds of Justice, Civil and Criminal, are different.

(g) The proceedings in a Civil Court are regulated by the Civil Procedure Code whereas the proceedings in a criminal Court are governed by the Criminal Procedure Code.

(h) Broadly speaking, Civil Justice is remedial whereas Criminal Justice is punitive.

(i) There are different grades of Civil and Criminal Courts.

7. Organisation of the Courts at the district levels

This topic ought to be dealt with under two separate heads, namely Civil and Criminal.

8. Civil Courts subordinate to the High Court

(a) Basically, there are three different grades, as shown below:

First Grade

District Judge

Additional District Judge

Second Grade

Assistant District Judge

Subordinate Judge

Civil Judge, Grade I

Third Grade

Munsif

Civil Judge, Grade II

(b) The District Judge is the Head of the Administration of Civil Justice appertaining to a district.

(c) Additional District Judges are there to assist the District Judge in administering Civil Justice.

(d) Additional District Judges have judicial powers similar to that of a District Judge, but an Additional District Judge does not get authority to hear an appeal or to try a case unless it is assigned to him by the District Judge.

(e) Judges of the 1st Grade and the 2nd Grade possess both original and appellate jurisdictions.

(f) Judges of the 1st Grade may be conferred with revisional powers also.

(g) Judges of the 2nd Grade are original Courts of unlimited pecuniary jurisdiction.

(h) The Judges of the 3rd Grade are Courts of original jurisdictions with limited financial powers.

(i) Different nomenclatures are employed in different parts of the country, as for example, in West Bengal, a Judge of the 2nd Grade is called Assistant District Judge, whereas in Bihar, he is designated as subordinate Judge. In West Bengal, Munsif is a Civil Judge of the lowest grade. He is called Civil Judge - Grade II in some other parts of the country.

9. Small Causes Courts

(a) A "Small Causes Court" means a Court constituted under the Presidency Small Causes Act or the Provincial Small Causes Court.

(b) A Small Causes Court tries suits which are triable only by such a Court.

(c) Matters of small natures, which do not involve complicated questions of title, are generally the subject-matters of proceedings in a Small Causes Court.

(d) The procedure followed by a Small Causes Court for trial is simpler and shorter than that of a Civil Court.

10. Criminal Courts subordinate to the High Court

(a) Court of Sessions

(b) Chief Judicial Magistrate

(c) Judicial Magistrates of the First class and in Metropolitan areas, Metropolitan Magistrates.

(d) Judicial Magistrates of the Second Class.

(e) Executive Magistrates.

(f) Criminal Courts constituted under any law other than Cr. P.C. such as Special Courts under the Essential Commodities Act. 1955.

11. Court of Sessions

(a) Each State is divided into several sessions divisions.

(b) Each sessions division is generally co-extensive with a district.

(c) There is a Court of sessions for each sessions division.

(d) The Judge who presides over the Court of Sessions is called the "Sessions Judge".

(e) The Sessions Judge is assisted by the Additional Sessions Judges and Assistant Sessions Judges.

(f) The Additional Sessions Judge and the Assistant Sessions Judge also exercise jurisdiction over the Court of Sessions, on being assigned to do so by the Sessions Judge, by way of transfer of cases to their respective files.

12. (a) A Chief Judicial Magistrate is a judicial Magistrate, First Class, who has been placed in charge of a district.

(b) A Judicial Magistrate, First Class, who has been placed in charge of a sub-division is called Sub-Divisional Judicial Magistrate (SDJM).

(c) Powers of a Judicial Magistrate, First Class or second class, may be conferred upon any person, who holds or has held any post under the Government, by the High Court at the request of the Central or State Government. Such persons are called Special Judicial Magistrate.

(d) The Chief Judicial Magistrate and all other Judicial Magistrates in a district are subordinate to the Sessions Judge.

13. Offences - by which Court triable

(a) Offences are triable either by a Court of Sessions or by a Court of Judicial Magistrate.

(b) The offences are triable by different Courts are indicated in column number 6 of the First Schedule appended to the Code of Criminal Procedure.

(c) Generally speaking, serious offences are triable by the Court of Sessions, such as murder, dacoity etc. Other offences are triable by the Judicial Magistrates.

(d) Hence, from the point of view of competence of the Courts to try, offences may be divided into two categories, namely,

(i) Exclusively triable by the Court of Sessions.

(ii) Triable by the Court of Judicial Magistrate, First Class.

(iii) Triable by any Magistrate, which also includes Judicial Magistrate, Second Class.

(e) Courts of Judicial Magistrates are not only subordinate to the Sessions Judge but they are also inferior to the Court of Sessions in the hierarchical structure of the Courts.

(f) When a particular offence is triable by a Court of Sessions, which grade of Judge, namely, Sessions Judge, Additional Sessions Judge or Assistant Sessions Judge, should try it, will also depend upon the maximum punishment prescribed for such offence and the sentencing power of that grade. An Assistant Sessions Judge, cannot try a case of murder because he may inflict punishment not exceeding 10 years of imprisonment, whereas the punishment prescribed for murder is either death or imprisonment for life. Hence, it has to be tried either by a Sessions Judge or by an Additional Sessions Judge, who is competent to pass a sentence prescribed by Sec. 302 IPC for the offence of murder.

14. Sentencing Powers of the different Trial Courts are indicated below :-

(a) Sessions Judge Any sentence authorised by law, including death, imprisonment for life and fine of any amount as may be authorised by that particular penal section of Law (no upper ceiling) but a sentence of death shall be subject to confirmation by the High Court.

(b) Additional Sessions Judge - Same as the Sessions Judge.

(c) Assistant Sessions Judge	(i) Imprisonment for a term not exceeding 10 years. (ii) Fine as authorised by Law - no upper ceiling.
(d) Chief Judicial Magistrate	(i) Imprisonment upto seven years. (ii) Fine - as authorised by Law - not upper ceiling for him.
(e) Judicial Magistrate, First Class	(i) Imprisonment up to three years. (ii) Fine not exceeding 5,000/-
(f) Judicial Magistrate, Second Class	(i) Imprisonment up to one year. (ii) Fine not exceeding 1,000/-
(g) Chief Metropolitan Magistrate	Same as Chief Judicial Magistrate.
(h) Metropolitan Magistrate	Same as Judicial Magistrate, First Class.

15. Schemes of Separation of the Judiciary from the executive

In pursuance of the scheme of separation, two categories of Magistrates have been created. They are: -

(i) Judicial Magistrates.

(ii) Executive Magistrates.

16. Broad Division of the Magisterial Functions

Judicial Magistrates are appointed by and they remain under the control of the High Court whereas the Executive Magistrates are appointed by the State Govt. and they are placed under the control of the State Govt.

Broadly speaking, such functions of a Magistrate, as are essentially judicial in nature have been entrusted to the Judicial Magistrates while functions which are executive or administrative in nature have been allotted to the Executive Magistrates.

17. Revised set-up of Criminal Courts

Executive Magistrates are Criminal Courts within the meaning of the Code vide Sec.6 (iv) Cr.P.C.

When an Executive Magistrate acts judicially, say for instance, when he holds an inquiry U/S 116 CrPC in connection with a security proceeding U/S 107 CrPC he functions as a court but when he does something purely administrative or executive in nature, he does not perform the role of a court. When an Executive Magistrate, in exercise of the power vested in him U/S 129 CrPC commands an unlawful assembly to disperse, he does not do so in the capacity of a Criminal Court.

18. Appointment of Executive Magistrates

Executive Magistrates are to be appointed by the State Government.

Executive Magistrates may be appointed not only for every district but also for every metropolitan area vide Sec. 20(1).

19. Absence of gradation amongst the Executive Magistrates

Unlike the Judicial Magistrates, the Executive Magistrates have not been graded as Executive Magistrate, First Class and Executive Magistrates, Second Class.

20. Division of Executive Magistrates

The Executive Magistrates, may, however, be divided under the following five heads :-

(1) District Magistrates - Sec. 20(1).

(2) Additional District Magistrate - Sec. 20(2).

(3) Sub-Divisional Magistrates - Sec. 20(4).

(4) Subordinate Executive Magistrates - Sec. 20(1).

(5) Special Executive Magistrate - Sec.21.

21. Subordination of Executive Magistrates

(a) Executive Magistrates, other than Additional District Magistrate, employed in a district, are subordinate to the District Magistrate.

(b) All Executive Magistrates attached to a Sub-Division are subordinate to the Sub-Divisional Magistrate.

(c) Additional District Magistrates are not subordinate to the District Magistrate. The ADM is, however, an officer below the rank of DM.

REFERENCE: Sec. 23(1)

22. Territorial Jurisdiction of the Executive Magistrates

Their jurisdiction extends throughout the district unless it is restricted. Such restriction may be imposed by the District Magistrate by defining the local limits of each Executive Magistrate. This authority of the District Magistrate is, however, subject to the control of the State Government vide Sec. 22(1) and Sec. 22(2).

23. Distribution and Allocation of Business

District Magistrate is empowered to distribute business among the Executive Magistrates subordinate to him and also to allocate business to the Additional District Magistrates vide Sec.23 (2).

In this context, it may be remembered that all or any of the powers of a District Magistrate under the Code may be conferred upon the Additional District Magistrate by the State Government vide Sec.20(2).

24. Jurisdiction of a Court

(a) It may be of three kinds namely:

(i) in respect of subject-matter

(ii) Territorial

(iii) Pecuniary

(b) A Judicial Magistrate, 1st Class, cannot try a case of dacoity, although the offence has been committed within the local limits of his territorial jurisdiction. This is because the offence of dacoity is exclusively triable by a Court of Sessions.

(c) A suit for recovery of possession of a property valued Rupees one lakh cannot be filed in a Court of Munsif, because it is in excess of his pecuniary jurisdiction.

25. Combination of designations

(a) When we use the term, the "District and Sessions Judge", we imply that the person referred to has combined within himself two different capacities, namely, District Judge and Sessions Judge.

(b) When he deals with Civil matters, he uses the designation "District Judge".

(c) When he deals with criminal matters, he describes himself as "Sessions Judge".

(d) He has two identities, one in relation to his civil jurisdiction and the other in respect of his criminal jurisdiction.

(e) Similarly, when we say "Munsif - Magistrate", it connotes two different identities, "Munsif" for Civil and "Magistrate" for Criminal matters. While trying a civil suit, he should write as Munsif. When he holds a criminal trial, he acts as Judicial Magistrate.

(f) Hence, such mixture in nomenclature should not create any confusion.

Criminal Justice Delivery System

Administration of Justice

(a) It means exercise of judicial power to maintain and uphold rights and punish wrongs.

(b)It consists in the use of Government machinery of the STATE in enforcing rights or redressing wrongs.

Administration of justice involves:

(i) Two parties -

The complainant and the accused (in a criminal case instituted on private complaint). or

The prosecution and the defence (in any criminal prosecution). or

Plaintiff and Defendant (in a civil case)

(ii) a right claimed or the wrong complained of by the former against the latter.

(iii) a Judgement of the Court delivered at the end of the Trial.

(iv) Execution of the operative part of the Judgement.

Material Interest

a. Redress in Civil Cases - COMPENSATION
b. (one party's success means material gain and directly or indirectly material loss to the other party).
c. Criminal Cases - No relief to the victim - Punishment to the criminal
d. NO MATERIAL GAIN OR LOSS TO THE VICTIM[3].

Policy

1. 100 guilty persons can be let free but no innocent shall be punished.
2. The accused is presumed to be innocent till the guilt is proved. (presumptions have evidentiary value).
3. The burden of proof is on the prosecution[4].
4. The accused must be given the BENEFIT OF DOUBT.
5. In Civil cases, decisions are on the basis of preponderance of probabilities. In

[3] Exception when there is victim compensation

[4] Except when defence makes affirmations, like alibi

Criminal cases prosecution must prove beyond reasonable doubt. (from the side of accused, it is enough if he creates a doubt in the mind of the Court as to his innocence).

6. Punishment should reform/cure the offender.

Functionaries

- First stage -

1. Investigating Police Officer

2. Public Prosecutor (normally appointed by Government for 3 years on various considerations). (only Assistant Public Prosecutors are selected by Service Commissions but they are meant for Courts of Magistrates dealing with relatively unimportant cases).

Judge of Trial Court.

- 2nd Stage (Appeal) -

  - Public Prosecutor
  - Judge

PROOF - a difficult question

Proof = conclusion of Court (generally by one presiding officer)

- Enough room for subjective satisfaction wherever there is the condition of mental element.
- Determination of guilt or innocence:

Judge has A LOT OF SCOPE for acquittal, but not for conviction

Other Issues

1. INTENTION as an ingredient for crime.
2. Opportunity for witnesses to turn HOSTILE.
3. Low evidentiary value attached to statements recorded by police.

4. Power of Govt. to withdraw cases.

Conspiracy Angle

- Abettor
- Evidence of co-accused/ accomplice/approver

Factors affecting the Criminal Justice Delivery System

1. Reliance on Oral evidence.
2. Material interest
3. Policy
    (a) Burden of proof.
    (b) Benefit of doubt
    (c) Emphasis on reformative theory of punishment.
    (d) Functionaries:
    (1) The Police
    (2) The Prosecutors
    (3) The Courts
    (e) Difficulty in proving the conspiracy angle.

ALSO REFER - https://gyan.lbsnaa.gov.in/mod/scorm/player.php

2.2 ADMINISTRATIVE LAW & TRIBUNALS

Administrative Law

The most significant and outstanding development in law of the 20th century is the rapid growth of administrative law. It does not, however, mean that there was no administrative law before this century. For many years, in one from or the other, it has very much been in existence. But in this century, the philosophy of role and function of the State has undergone a radical change. The governmental functions have multiplied by leaps and bounds. Today, the State is not merely a police state, exercising sovereign functions, but as a progressive democratic State. It seeks to ensure social security and social welfare for the common man, regulates industrial relations, exercises control over production, manufacture and distribution of essential commodities, initiates enterprises, tries to achieve equality for all and ensures equal pay for equal work. It works to improve slums, looks after the health and morals of the people, provides education to children and undertakes all steps that social justice demands. In short, the modern State takes care of its citizens from "cradle to the grave". All these developments have widened the scope and ambit of administrative law.

Definition of Administrative Law

It is indeed difficult to arrive at a scientific, precise and satisfactory definition of administrative law. Many jurists have made attempts to define it, but none of the definitions have completely demarcated the nature, scope and content of administrative law. Either the definitions are too broad and include much more than is necessary or they are too narrow and fail to include all the essential ingredients. The literature on administrative law presents the reader with considerable diversity of opinion. For some, it is the law relating to the control of powers of the government. The main object of this law is to protect individual rights. Others place greater emphasis upon rules that are designed to ensure that the administration effectively performs the tasks assigned to it. Yet others highlight the principal objective of administrative law as ensuring governmental accountability, and fostering participation by interested parties in the decision-making process.

Administrative Law is that branch of Constitutional Law which deals with powers and duties of administrative authorities, the procedure followed by them in exercising the powers and discharging the duties and the remedies available to an aggrieved person when his rights are affected by an action of such authorities.

Nature and Scope of Administrative Law

Administrative law deals with the powers of the administrative authorities, the manner in which the powers are exercised and the remedies which are available to the aggrieved person, when those powers are abused by these authorities.

As discussed above, the administrative process has come to stay and it has to be accepted as a necessary evil in all progressive societies, particularly in welfare States, where many schemes for the progress of society are prepared and administered by the government. The execution and implementation of thess programmes may adversely affect the rights of citizens. The actual problem is to reconcile social welfare with the rights of individual subjects. As it has been rightly observed by Lord Denning, “Properly exercised, the new powers of the executive lead to the welfare State; but abused they lead to the Totalitarian State.”

The main object of the study of administrative law is to unravel the way in which these administrative authorities could be kept within their limits so that the discretionary powers may not be turned into arbitrary powers.

Historical sketch of the growth of Administrative Law:

i) England: According to Dicey "In England, we know nothing of administrative law and we wish to know nothing about it". Though Dicey had much disregard, Maitland and others were of the view that administrative discretion and administrative justice had already made their way to England. Of course, Dicey changed his view and later admitted that Parliament had conferred quasi-Judicial authority on administrative bodies and hence, there was administrative law-operating. Dicey explain the French "Droit Administratiff (Administrative law) and, compared it, with the "Rule of Law Concept" of England. In his masterpiece "Introduction to the study of the Law of the constitution", he gave a brilliant exposition to the

concept of' Rule of Law' and contrasted that with the Administrative Law of France, and in this exercise 'Administrative Law' became insignificant. Robson's book on Justice and Adm. law Port's book on" Administrative Law", made the study of this subject more interesting in England. Apart from these developments, Lord Hewert's book 'New Despotism' exposed the dangers of delegated legislation and forced the British Govt. to appoint the Donoughmore committee which suggested inter alia, to set up a select Committee on statutory Instruments. This committee published its report in 1932. Allen's book 'Law & Order' (1945) was a critical appraisal of the executive exercise of power. Besides, statutory Instruments Act (1946) and the Crown Proceedings Act 1947 gave the individual, better protection against the arbitrariness of the Executive. Abuse of executive power is another aspect. The "Crichel Down" affair, forced the Govt. to appoint the Franks committee in 1955, and, on the basis of this "The Tribunals and Inquiries Act" was passed in 1958. This deals with the procedures to be followed by every administrative body or agency.

ii) USA: Though the origin of administrative law in the USA can be traced to 1789, still it is with the passing of the Commerce Act of 1877, that it took a definite shape. Authoritative writings like Franks Comparative Administrative law (1911), Fraud's Case book on Administrative law gave much impetus. A special Committee appointed in 1933, Report of Roscoe Pound (1933) & Attorney General's Committee Report 1939, paved the way for the enactment of Administrative Procedures Act 1946. The rules and the procedures provided for in this Act, should invariably followed by all administrative agencies and bodies, as otherwise the act of the agency will be quashed as ultra vires by the courts in the U.S.

iii) France: (i) In France Administrative law is called as Droit Administratiff. French Administrative Law had some peculiar features, alien to the English system of Rule of law, as enunciated by Dicey. It was Dicey who made a reference to the French system in his masterpiece. "Introduction to the study of the constitution" in 1885. He had focused his attention on two peculiarities of the French system : (1) The Govt's special rights & privileges against the individual's rights; and (2) Under separation of powers, it had kept the Government officials free from the Jurisdiction of the courts. The weight was in favour of

administration. The rules of procedure followed by the courts were not followed by the Tribunals. Viewed from Dicey's angle, there was no protection to the ordinary citizen in the French system.

ii) Conseil d' etat. This is the Council of State (This was founded by Napolean in 1799) It is the supreme Administrative court of Appeal. It has certain subordinate administrative courts called 'Conseil de prefecture' (Courts of the prefects). They are adjudicatory and consultative bodies. It has executive officials as presiding officers. They are selected by competitive examinations and are given special training. The Conseil de etat decides its jurisdiction, and procedures are laid down by it in the form of doctrines. It is also an adviser to the Govt. It has developed a spirit of independence. It has powers to execute its judgements directly. According to the Reform of 1900, an aggrieved citizen who receives no reply from Govt., may go in appeal to the Conseil d' etat.

iv) India: Historically it may be possible to trace the existence of and the application of Administrative law to ancient India, and to the concept of Dharma. The King and the administrators followed Dharma which was more comprehensive than Rule of law. During the period of the East India Company and later under British regime many Acts, were made to increase governmental power. The modern system started with the Stage Carriage Act 1861, under which the system of granting license was initiated. Then followed a series of enactments to enlarge the powers of the Executive authorities: Bombay Fort Trust Act (1879), The Opium Act (1878), The Explosives Act 1884 The Arms Act (1878) The Dramatic public performance Act 1876. Companies Act 1850 etc. The era of judicial control started with the establishment of Supreme Court at Calcutta, Bombay, & Madras. Many enactments in the field of health, labour, public safety, and morality, transportation and communication, Defence of India etc, were made before India became Independent.

Difference between Constitutional law and Administrative Law

A table of distinguishable features of both administrative and constitutional law is provided below:

Constitutional Law

1. Constitutional law is its own kind.
2. Constitutional law deals with various departments of the state.
3. It deals with the structure of the state.
4. It is the highest law.
5. It gives the guidelines with regard to the general principles relating to organization and powers of organs of the state, and their relations between citizens and towards the state. It touches almost all branches of laws in the country.
6. It also gives the guidelines about the international relations.

Administrative Law

1. Administrative law is a species of constitutional law.
2. It deals with those organs as in motion.
3. It deals with the functions of the state.
4. It is subordinate to constitutional law.
5. It deals in details with the powers and functions of administrative authorities.
6. It does not deal with international law. It deals exclusively the powers and functions of administrative authorities.

Administrative Tribunals

The term 'Tribunal' is derived from the word 'Tribunes', which means 'Magistrates of the Classical Roman Republic'. Tribunal is referred to as the office of the 'Tribunes' i.e., a Roman official under the monarchy and the republic with the function of protecting the plebian citizen from arbitrary action by the patrician magistrates. A Tribunal, generally, is any person or institution having an authority to judge, adjudicate on, or to determine claims or disputes – whether or not it is called a tribunal in its title. 'Tribunal' is an administrative body established for the purpose of discharging quasi-judicial duties. An Administrative Tribunal is neither a Court nor an executive body. It stands somewhere midway between a Court and an administrative body. The exigencies of the situation proclaiming the enforcement of new

rights in the wake of escalating State activities and furtherance of the demands of justice have led to the establishment of Tribunals *(Source Law Commission Report 272)*

Though the word "Tribunal" has not been statutorily defined, the test for a tribunal was held in Jaswant Sugar Mills v. Lakshmi Chand A.I.R. 1963 S.C. 677 to be whether it was invested with the trappings of a court, such as having the authority to determine matters, authority to compel the attendance of witnesses, the duty to follow the essential rules of evidence and the power to impose sanctions.

In Associated cement companies Ltd. v/s P.N. Sharma AIR 1965 SC 1595, the Supreme Court concluded about the tribunal that it is an adjudicating body which decides controversies between the parties and exercises judicial powers as distinguished from purely administrative functions and possesses some of the trappings of a court, but not all. However, there is basis test within Article 136 or 226 for tribunals that

a) It is an adjudicating authority other than the court

b) The power of adjudicating must be derived from a statute or a statutory rule.

c) The power of adjudicating must not be derived from an agreement between the parties.

Characteristics of Administrative Tribunals

The following are the characteristic of an administrative tribunal:

1. An Administrative tribunal has statutory origin as it is a creature of statute;

2. It has the get –up of a court with having a some of the trappings of a court but not all;

3. It performs quasi-judicial functions as it is entrusted with judicial powers of the State which is distinguished from pure administrative or executive functions;

4. It is a self-styled entity within the ambit of the Act regarding rigid procedures. It means it is not bound by the strict rules which should be followed by the court i.e. rules of evidence;

5. In some aspects of procedural matters such as to summon witnesses, to administer oath, to compel production of documents etc. it possesses power as of the court;

6. Though discretion is conferred on them, it is to be exercised objectively and judicially. It means that most of its decision are recorded after the finding of facts objectively and application of the law without regard to executive policy;

7. It is confined exclusively to resolve the disputes/cases in which government is a party but often it moves to decide the disputes between two private parties for example Election tribunal, Rent Control Board;

8. It enjoys independent status free from any administrative interference in the discharge of their judicial or quasi-judicial functions;

9. The prerogative writs of certiorari and prohibition are available against the decisions of administrative tribunals. Hence tribunal cannot dispose the matters as a final arbitrator;

10. It should act without any bias;

11. Once the issues is settled by the High Court, it cannot be entertained by the administrative tribunal;

12. It is perpetual in nature and tribunal have been established specially to deal with a particular type of case or with a number of closely related types of cases

Today, over and above ministerial functions, the executive performs many quasi-legislative and quasi-judicial functions also. Governmental functions have increased and even though according to traditional theory, the function of adjudication of disputes is the exclusive jurisdiction of the ordinary courts of law, in reality, many judicial functions have come to be performed by the executive, *e.g.* imposition of fine, levy of penalty, confiscation of goods, etc.

The traditional theory of "laissez faire" has been given up and the old "police state" has now become a "welfare state", and because of this radical change in the philosophy of the role to be played by the State, its functions have expanded. Today it exercises not only sovereign functions, but, as a progressive democratic State, it also seeks to ensure social security and social welfare for the common masses. It regulates industrial relations, exercises control over

production, initiates enterprises. The issues arising there from are not purely legal issues. It is not possible for the ordinary courts of law to deal with all these socio-economic problems.

For example, industrial disputes between the workers and the management must be settled as early as possible. It is not only in the interest of the parties to the disputes, but of the society at large. It is, however, not possible for an ordinary court of law to decide these disputes expeditiously, as it has to function, restrained by certain innate limitations. All the same, it is necessary that such disputes should not be determined in an arbitrary or autocratic manner. Administrative tribunals are, therefore, established to decide various quasi-judicial issues in place of ordinary courts of law.

It is not possible to define the word "tribunal" precisely and scientifically. In Administrative law, this expression is limited to adjudicating authorities other than ordinary courts of law.

In *Bharat Bank Ltd.* v. *Employees,* the Supreme Court observed that though tribunals are clad in many of the trappings of a court and though they exercise quasi-judicial functions, they are not full-fledged courts. Thus, a tribunal is an adjudicating body which decides controversies between the parties and exercises judicial powers as distinguished from purely administrative functions and thus possesses some of the trappings of a court, but not all. The status of tribunals has been recognized by the Constitution. Article 136 of the Constitution empowers the Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order passed or made by any tribunal in India. Likewise, Article 227 enables every High Court to exercise power of superintendence over all tribunals throughout the territories over which it exercises jurisdiction.'

According to Wade, the expression "Administrative Tribunals" is misleading for various reasons. *First,* every tribunal is constituted by an Act of Parliament and not by government. *Second,* decisions of such tribunals are judicial rather than administrative. A tribunal reaches a finding of fact, applies law to such fact and decides legal questions objectively and not on the basis of executive policy. Third, all tribunals do not deal with cases in which government is a party. Some tribunals adjudicate disputes between two private parties, *e.g.* disputes between landlords and tenants; employers and employees, etc. Fourth, such tribunals are independent.

"They are in no way subject to administrative interference as to how they decide any particular case." M.P. Jain, therefore, suggests that it is better to designate these bodies as "tribunals" by discarding the word "administrative".

A tribunal is an adjudicating authority. But the power of adjudication of disputes does not ipso facto make the body a "tribunal". In order to be a tribunal, it is essential that such power of adjudication must be derived from a statute and not from an agreement between the parties. Hence, a "Domestic Tribunal" which is a private body set up by the agreement between the parties and designated as "tribunal" is really not a "tribunal". On the other hand, Rent Control Authority or Statutory Arbitrator can be said to be tribunals though not described as such.

Thus, the basic test of a tribunal within the meaning of Article 136 or Article 227 of the Constitution is that "it is an adjudicating authority (other than a court) vested with the judicial power of the State under a statute or a statutory rule".'

ALSO REFER - https://gyan.lbsnaa.gov.in/mod/scorm/player.php

2.3 DELEGATED LEGISLATION

Delegated Legislation

The Constitution of India empowers Legislature to make laws for the country. One of the significant legislative functions is to determine a legislative policy and to frame it as a rule of conduct. Obviously, such powers cannot be conferred on other institutions or authorities. But keeping in mind various multifarious activities of a welfare State, it is not possible for the legislature to perform all the functions. In such situation, the delegated legislation comes into the picture. Delegated Legislation is one of the essential elements of administration whereby the executive has to perform certain legislative functions. However, one must not forget the risk associated with the process of delegation. Very often, an overburdened Legislature may unduly exceed the limits of delegation. It may not lay down any policy; may declare any of its policy as vague and may set down any guidelines for the executive thereby conferring wide discretion to the executive to change or modify any policy framed by it without reserving for itself any control over subordinate legislation. Therefore, even though Legislature can delegate some of its functions, it must not lose its control completely over such functions.

Delegated legislation is used in two different senses;

a) The exercise by a subordinate agency of the legislative power delegated to it by the legislature. This is sometimes referred to as subordinate legislation.

b) The subsidiary rules made in exercise of the powers above. These are variously referred to as rules, regulations, bye laws, orders, etc.

Difference between Rules, Regulations and bye laws: The Ministry of Law, Justice and Company Affairs has attempted to explain the difference between them as follows:

“Generally, the statues provide for power to make rules where the general policy has been specified in the statue but the details have been left to be specified by the rules. Usually, technical or other matters, which do not affect the policy of the legislation, are included in

regulations, byelaws are usually matters of local importance, and the power to make byelaws is generally given to the local or self-governing authorities."

"Orders" are another form of delegated legislation. "Orders" in this context are general in application as distinguished from specific executive orders. E.g the order directed at a specific person or entity asking him to evacuate a property is an executive order whereas an order laying down prices of commodities is a legislative order.

Why do we need Delegated Legislation?

The theory of separation of powers is something we are all familiar with. Simply put, it means that the legislature, executive and judiciary should be independent of each other and perform the tasks assigned to them independent of each other. This would mean that the legislature (In India, the Parliament or State legislature) should alone perform the task of legislation. However, in practice this is not possible as modern state performs such a diverse set of complex, technical tasks that the legislature would be overwhelmed were it to try and frame detailed rules for all of these. Practicality, therefore demands that the power to frame specific guidelines/rules/regulations be left to the specific executive department which is entrusted with the implementation of law.

Reasons for Growth of Delegated Legislation

(a) Pressure upon parliamentary time: The horizons of state activities are expanding. The bulk of legislation is so great. It is not possible for the legislature to devote sufficient time to discuss all the matters in detail. Therefore, legislature formulates the general policy – the skeleton and empowers the executive to fill in the details – thus giving flesh and blood to the skeleton so that it may live- by issuing necessary rules, regulation, bye-laws etc.

In the words of Sir Cecil Carr, 'delegated legislation is a growing child called upon to relieve the parent of the strain of overwork and capable of attending to minor matters, while the parent manages the main business. The Committee on Ministers' powers has rightly observed: "The truth is that if parliament were not willing to delegate law making power, parliament would be

unable to pass the kind and quality of legislation which modern public opinion requires."

(b) Technicality: Sometimes, the subject matter of legislation is technical in nature. So, assistance of experts is required. Members of parliament may be the best politicians but they are not expert to deal with highly technical matters. These matters are required to be handled by experts. Here, the legislative power may be conferred on experts to deal with the technical problems. i.e. gas, atomic energy, drugs, electricity etc.

(c) Flexibility: Parliament cannot foresee all the contingencies while passing on enactment. To satisfy these demands of unforeseen situation some provisions are required to be made. A legislative amendment is a slow and cumbersome process. But by the device of delegated legislation the executive can meet the situation expeditiously, e.g. bank rate, police regulations, export and import, foreign exchange etc. Therefore, in a number of statutes a 'removal of difficulty' clause has been added empowering the administration to overcome such difficulties by exercising delegated power. This Henry VIII clause confers very wide powers on the Government.

(d) Experiment: The practice of delegated legislation enables the executive to experiment. This method permits rapid utilization of experience and implementation of necessary changes in application of the provisions in the light of such experience. As for example, in road traffic matters, an experiment may be conducted and in the light of its application necessary changes could be made. The advantage of such a course is that it enables the delegatee authority to consult interests likely to be affected by a particular law, make actual experiments when necessary and utilize the result of this investigation and experiments in the best possible way. If the rules and regulations are found to be satisfactory, they can be implemented successfully. On the other hand, if they are found to be defective, the defects can be cured immediately.

(e) Emergency: In times of emergency, quick action is required to be taken. The legislative

process is not equipped to provide for urgent solution to meet the situation. Delegated legislation is the only convenient- indeed the only possible remedy. Therefore, in times of war and other national emergencies, the executive is vested with extremely wide powers to deal with the situation. There was substantial growth of delegated legislation during the two world wars similarly in cases of epidemics, floods, inflation, economic depression etc. Immediate remedial actions are necessary which may not be possible by lengthy legislative process and delegated legislation is the only convenient remedy.

(f) Complexity of modern administration: The complexity of modern administration and the expansion of the functions of the state to the economic and social sphere have rendered it is necessary to resort to new forms of legislation and to give wide powers to various authorities on suitable occasions. Where control and regulation over private trade, business or property may be required to be imposed, it is necessary that the administration should be given ample power to implement such policy so that immediate action can be taken. Therefore, there has been rapid growth of delegated legislation in all countries and it becomes indispensable in modern administrative era.

Distinction between Conditional Legislation and Delegated Legislation

The true distinction would be between the delegation of power to make the law (which necessarily involves a discretion as to which the law should be made) and the conferment of an authority or discretion as to the execution of the law (to be exercised under and in pursuance of the law). While objections may be raised in the case of the former, the latter is generally unobjectionable. What has been done so far is to state a number of principles by which the legality of the delegation by the legislature is to be determined. The application of these principles in a given case may not always be easy.

In Vasu Dev Singh v. Union of India & others 2006 (11) SCALE 108., the Supreme Court observed as follows: "The distinction between conditional legislation and delegated legislation is clear and unambiguous. In a conditional legislation, the delegate has to apply the law to an

area or determine the time and manner of carrying it into effect. The legislature in such a case makes the law, which is complete in all respects but the same is not brought into operation immediately.

Delegated legislation, however, involves delegation of rule-making power of legislation. It authorises an executive authority to bring in to force such a law with reasons thereof. The discretion conferred on the executive by way of delegated legislation is much wider. Such power to make rules or regulations, however, must be exercised within the four corners of the Act. Delegated legislation, thus, is a device which has been fashioned by the legislature to be exercised in the manner laid down in the legislation itself.

Limits of Delegated Legislation

However, if all legislation were to be delegated to the executive would it not make the parliament redundant. Just how much of the law making can be assigned to the executive without making the Parliament/ state legislature redundant?

The above and related questions faced the Indian state soon after independence when our constitution came into force. In Re Delhi Laws Act (1951) the opinion of the Supreme Court was sought under Article 143 in a specific case. For the sake of brevity, we will not dwell into the specifics of the case here but only mention what the Court has to say in the context of delegated legislation. The Court broadly noted that:

1) Given the complexity and technicality involved in modern day governance, delegation of legislative powers was essential.
2) However, the powers of delegation are not unlimited.
3) Thus, legislature has to lay down the policy in its Act. Moreover, the power to modify or repeal the law cannot be delegated.
4) Therefore, delegated legislation must be consistent with the parent Act and not violate legislative policy and guidelines.

[That a one page Act can allow for recruitment to and regulation of complex service conditions of All India Services is a result of delegated legislation. Using section 3 of the Act the government has made more than 40 different rules governing the recruitment and various aspects of conditions of service. e.g. The All India Services (Discipline and Appeal) Rules, 1969

Criticism of Delegated Legislation

Delegated legislation apart from having many advantages is criticized on many grounds-

1. It is argued that delegated legislation enables authorities other than Legislature to make and amend laws thus resulting in overlapping of functions.
2. It is against the spirit of democracy as too much-delegated legislation is made by unelected people.
3. Delegated legislation is subject to less Parliamentary scrutiny than primary legislation. Parliament, therefore, has a lack of control over delegated legislation, and this can lead to inconsistencies in laws. Delegated legislation, therefore, has the potential to be used in ways which Parliament had not anticipated when it conferred the power through the Act of Parliament.
4. Delegated legislation generally suffers from a lack of publicity. Since the law made by a statutory authority is not notified to the public. On the other hand, the laws of the Parliament are widely publicised. The reason behind the lack of publicity is the large extent of legislation that is being delegated. There has also been concern expressed that too much law is made through delegated legislation.

2.4 PRINCIPLES OF NATURAL JUSTICE

'Justice should not only be done, but should manifestly and undoubtedly be seen to be done.' Lord Chief Justice Hewart's in R v Sussex Justices; Ex parte McCarthy [1924] 1 KB 256, 259 ('R v Sussex Justices')

Natural justice is another name for common sense justice- Justice Arijit Pasayat in Uma Nath Pandey v. State of U.P., (2009) 12 SCC 40 at page 42

I) Introduction

Principles of natural justice have an important place in modern Administrative Law. They have been defined to mean "fair play in action"[5].

With the expansion in activities of the State, Administrative power/functions have increased manifold. Administrative law seeks to regulate this power. Courts can control the substance of what public authorities do by means of rules relating to reasonableness, improper purposes, etc.

While courts can control what the public authorities do, the question arises whether they can also control how they do it. To put it differently, what is the role of courts in determining administrative procedure?

- Should the courts be allowed to impose their own standards of justice on administration? Would it not be frustrating and self-defeating if administrative action was tied down to complex and slow moving judicial procedure?

- However, if no check regarding procedure was to be imposed, would it not lead to gross abuse of power? Procedure is not a matter of secondary importance. Procedural fairness is essential to observance of substantive law.

The principles of natural justice seek to provide a way out to the aforementioned dilemma. They provide a basic framework for 'procedural fairness' which while not as exacting as judicial procedure impart, a degree of impartiality, fairness to administrative procedure based on universally recognized principles.

[5] Maneka Gandhi v Union of India (1978) 1 SCC 248

- In-fact a majority of Disciplinary proceedings in the government fails because of the lack of familiarity of civil servants with the principles of natural justice. In the haste to achieve results many a times procedural flaws occur which then lead to decisions being overturned by the Judiciary.

II) Principles of Natural Justice

a. *Nemo Judex in Causa Sua*

Literally means, "*no man should be a judge in his own cause*".

In essence, it is the Rule against Bias.

A judge should be unbiased and impartial. The term judge has a wide connotation here and not only refers to people designated as such but all public functionaries.

- Bias is a condition of mind that influences or tends to influence decision.
- Bias may be of several kinds—personal, pecuniary, related to subject matter, etc.

❖ It is significant to note that justice should not only be done but should also seem to have been done. Thus, it is not enough that the decision maker was not actually biased. Bias would be supposed even when there is "reasonable likelihood of bias"

➢ Seminal case:

Dimes v. *Grand Junction Canal (1852)*

- Lord Cottenham in a suit affirmed decrees made by the Vice-Chancellor in favour of a canal company.
- Lord Cottenham was a shareholder in the company.
- The House of Lords set aside his decrees.
- It was not shown that the decision of Lord Cottenham was biased. In fact, the house of Lords also affirmed the decrees of the Vice Chancellor.

b. *Audi Alteram Partem*

Literally means, "*Hear the other side*"

No decision affecting the interest of a party should be made unless he has been given due notice and afforded reasonable opportunity of being heard.

➢ Seminal case:

R v. *University of Cambridge* (1723)

- University of Cambridge had deprived a scholar his degree on account of misconduct.
- Court of King's reinstated him on the grounds that he should have been given notice so that he could have defended himself.
- It was famously noted that even God in the Garden of Eden did not condemn Adam before he was called upon to make his defence.

"*Adam*, says God, *hast thou not eaten of the tree, whereof I commanded thee that thou should not eat*"

Art. 14 of the Constitution guarantee a right of hearing to the person adversely affected by an administrative order. In Delhi Transport Corporation v. DTC Mazdoor Union, SC held that "the audi alteram partem rule, in essence, enforce the equality clause in Art 14 and it is applicable not only to quasi-judicial bodies but also to administrative order adversely affecting the party in question unless the rule has been excluded by the Act in question." Similarly, in Maneka Gandhi v. Union of India, SC opined that Art 14 is an authority for the proposition that the principles of natural justice are an integral part of the guarantee of equality assured by Art. 14. An order depriving a person of his civil right passed without affording him an opportunity of being heard suffers from the vice of violation of natural justice.

c. Requirement of passing speaking/reasoned order

- Committee on Ministers' Powers (Donoughmore Committee) in its report in 1932 recommended that "any party affected by a decision should be informed of the reason on which the decision is based".
- In India, Law Commission in its Fourteenth report noted that administrative decisions should be accompanied by reasons. This would help in testing the validity of these decisions.

- Justice Subba Rao "if tribunals can make orders without giving reasons, the said power in the hands of unscrupulous or dishonest officers may turn out to be a potent weapon for abuses. But if reasons are given it will be an effective restraint on abuse….it discloses extraneous and irrelevant considerations".

➢ Seminal Case

S.N. Mukherjee v. *Union of India* (AIR 1990 SC)

Prior to this case there existed some confusion as to whether reasons have to be recorded in each and every instance.

In *Harinagar Sugar Mills Ltd. Case (1961*) the Constitutional Bench of Supreme Court had overturned the decision of the Deputy Secretary who heard appeals under the Companies Act, 1956. The Court based its decision on the ground that the officer had not given reasons in support of his decision.

In Madhya Pradesh Industries Ltd. Case (1966) the Central Government gave no reasons while agreeing with the decision of the State government. The Court upheld the Central Government's decision on the grounds that no reasons were needed since the Central government was merely agreeing with the State Government.

The Supreme Court held in the Mukherjee case that recording reasons is important not only for judicial review but also because it 1) guarantees consideration by the authority; 2) introduces clarity in the decision making; and 3) minimizes chances of arbitrariness in decision making.

For these reasons, except in cases where the requirement of decision making has been explicitly dispensed with, an administrative authority exercising judicial or quasi-judicial functions must record the reasons for a decision.

d. Right to Rebut Adverse Evidence

i. The right to cross examination

The Supreme Court in Bakshi Ghulam Mohammed's[6] case has held that the denial of opportunity to cross examine witnesses violates the rule of fair hearing.

ii. Legal representation

There is no hard and fast rule regarding right to legal representation. Courts have, however, generally held that where the person is illiterate, the matter is complex, expert evidence is on record, a question of law is involved or the person is facing a trained prosecutor the party must be given professional assistance.

iii. Principles of Natural Justice in Practice—Exceptions and Modifications

Having understood the principles of natural justice conceptually, the next step is to 'complicate' the topic somewhat by demonstrating that in real life complex situations arise which do not allow for neat implementation of theoretical principles. The attempt in this section would be to demonstrate through a couple of Supreme Court cases how the principles have to be implemented in practice so that they do not lose their essence; without rendering implementation impracticable.

Rule against Bias

Ashok Kumar Yadav v. *State of Haryana (1987, SC)*

Facts: Haryana Public Service Commission conducted recruitment for 61 posts. 6000 people applied. 1300 were called for the interview. The interviews lasted 6 months and in the meantime the vacancies rose to 119.

Some of the rejected candidates challenged the recruitment on the grounds that they were not selected in spite of high scores in the written exam. In their contention, they noted that two of the selected candidates were related to a member and one other was related to

[6] State of Jammu and Kashmir v Bakshi Ghulam Mohammed AIR 1967 SC 122

another. While the members did not sit in the interviews of their relatives, it was alleged that they gave other candidates low marks to favour their relatives.

Court observed: Ideally the members should have withdrawn from the entire selection process and not only the interviews of their relatives.

But the HPSC is a Commission set up under Article 316 of the Constitution. It has a Chairperson and a specified number of members. If a member were to withdraw he cannot be replaced. This would adversely affect the functioning of the Commission. Precautions like members not being present for interview of their relatives or getting to know their marks were taken.

Thus, the Supreme Court rejected the challenge to the selection process. This has been referred to sometimes as "*the doctrine of necessity*".

Right to Hearing

Maneka Gandhi v. *Union of India (1978, SC)*

Facts: The petitioner's passport was impounded under the Passport Act in public interest without a hearing. The petitioner held this to be a violation of natural justice.

Court observed: While right to hearing is an established principle, there are exceptions to it. If passport authorities had given an opportunity of a hearing before impounding the passport, they correctly feared that the petitioner might have fled the country. This in effect would have defeated the purpose of the whole exercise.

The court agreed that the purpose is to ensure "fair play". Sometimes, like in this case, a pre-decisional hearing may not be possible. The *Audi Alteram* rule is fairly flexible to meet the various myriad situations life presents.

Court observed that in this case a post decisional hearing could have been accorded. That is after the order to impound the passport an opportunity to present the case could be given. The hearing would then be remedial in nature.

Art. 311 and principles of Natural Justice:

Art 311 deals with dismissal, removal, or reduction in rank of persons employed in civil capacities under the Union or a State, though Art. 310 of the constitution adapts 'doctrine of Pleasure' Art 311 constitution provides sufficient safeguards against misuse of such power. Clause(1) of Art 311 declares that no person who is a member of civil service of the Union or an all-India service of State or holds a civil post under Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed and Clause (2) of Art.311 declares no such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. The word 'reasonable opportunity of being heard' includes all the dimension of principles of natural justice, accordingly no dismissal, removal, or reduction of rank of civil servant can be made without giving reasonable opportunity of being heard.

In Punjab National Bank V. Kuna Bihar Mira, the following question was raised: When the inquiry officer, during the course of the disciplinary proceedings, comes to the conclusion that the charges of misconduct against an official are not proved, then can the disciplinary authority differ from that view and give a contrary finding without affording and opportunity to the delinquent officer. The Court has ruled that natural justice demands that the authority which proposes to hold the delinquent officer guilty must give him a hearing. If the inquiry officer holds the charges to be proved then the report has to be given to the delinquent officer who can make a representation, before the disciplinary authority takes further action prejudicial to the delinquent officer.

Right to Cross Examination

Hira Nath Mishra v*. Principal, Rajendra Medical College (1973)*

Facts: Appellants were students of Medical College. On a particular night, they entered the girls hostel and misbehaved with the inmates. Four of the intruders were recognized by the girls. An enquiry was conducted with due notice to the four boys. They were provided with a

copy of charges. Statements of the girls and the boys were recorded. The boys were found guilty and expelled. They moved court alleging violation of natural justice in as much that they had not been allowed to cross examine the witnesses.

Court observed: The safety of the girls would have been threatened had the boys identified them. They would have been subject to harassment from them. The requirements of natural justice must depend on circumstances of the case, the nature of inquiry and the subject matter. In this case cross examination was not found practicable.

ALSO REFER - https://gyan.lbsnaa.gov.in/mod/scorm/player.php

2.5 ALTERNATE DISPUTE REDRESSAL MECHANISMS- LOK ADALATS, CONCILIATION, ARBITRATION ETC

Alternate Dispute Redressal Mechanisms

Considering the delay in resolving the dispute, Abraham Lincoln has once said:

"Discourage litigation. Persuade your neighbours to compromise whenever you can point out to them how the nominal winner is often a real loser, in fees, expenses and waste of time".

Alternative Dispute Resolution Act of Bhutan 2013

PREAMBLE

Whereas, the Constitution of the Kingdom of Bhutan stipulates that the Parliament may, by law, establish impartial and independent Administrative Tribunals as well as Alternative Dispute Resolution Centres;

Whereas, there is a need to encourage alternative resolution of disputes through arbitration and negotiated settlement through establishment of institutions and procedures; and

Whereas, it is important to enforce and recognize the arbitral awards and outcomes of negotiated settlements.

Parliament of the Kingdom of Bhutan do hereby enact the Alternative Dispute Resolution Act of Bhutan 2013 on the 15th Day of the 1st Month of Water Female Snake Year of the Bhutanese Calendar corresponding to the 25th Day of February, 2013

163. "Negotiated settlement" means a process, whether referred to by the expression 'conciliation', 'mediation' or an expression of similar import, whereby parties request negotiator to assist the parties to settle dispute arising out of or relating to a contractual or other legal relationship, amicably.

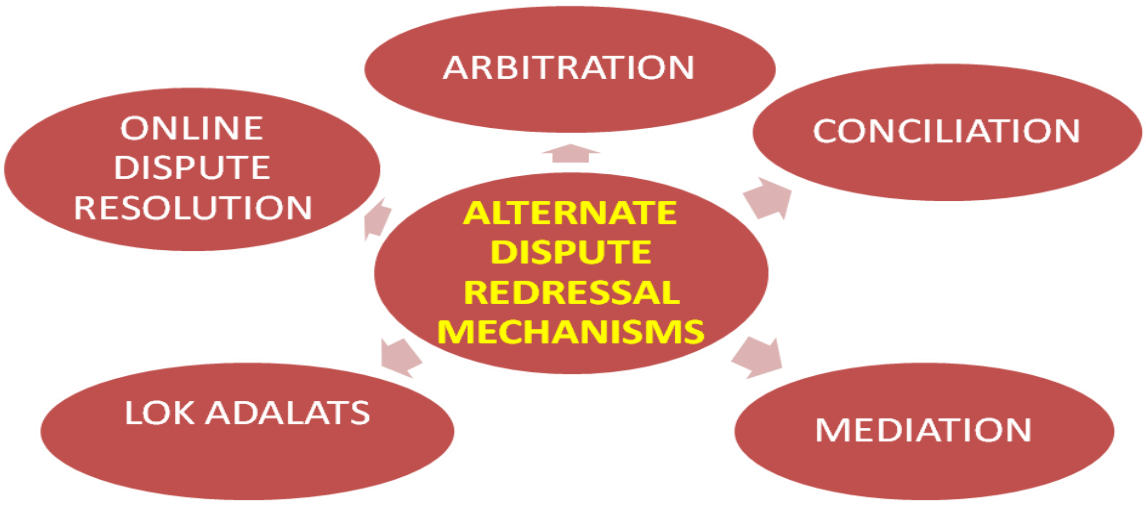
Justice delivery institutions in India are currently confronted with serious crises, mainly on account of delay in the resolution of the disputes. This situation has eroded public trust and public confidence in the justice delivery institutions. It obstructs economic growth,

development and social justice to the citizens in a country. The crisis therefore, calls for an urgent solution.

An available solution is to persuade the parties to dispute to adopt ADR mechanism. Alternative Dispute Resolution (ADR) is a term for describing process of resolving disputes in place of litigation and includes arbitration, mediation, conciliation and Judicial settlement through Lok Adalats. It refers to a variety of streamlined resolution techniques, designed to resolve issues in controversy more efficiently when the normal negotiation process fails. It is an alternative to the formal legal system and as such, it is an alternative to litigation.

Human conflicts are inevitable. Disputes are equally inevitable. It is difficult to imagine a human society without conflict of interests. Disputes must be resolved at minimum possible cost both in terms of money and time, so that more time and more resources are spared for constructive pursuits.[7]

'Alternative Dispute Resolution' or ADR is an attempt to devise a machinery which should be capable of providing an alternative to the conventional methods of resolving disputes. An alternative means the privilege of choosing one of two things or courses offered at one's choice. It does not mean the choice of an alternative court but something which is an alternative to court procedures or something which can operate as court annexed procedure.[8]



[7] Singh, Dr. Avtar, Law of Arbitration and Conciliation (including ADR Systems), Eastern Book Company, Lucknow, 7th Edition(2006), p. 391

[8] *Ibid*

Settlement of disputes through ADR process is a win–win situation where no party loses. Its best part is that, since both parties come face to face and they work out the modalities and reach to an amicable solution, there is no likelihood of losing the case, i.e. it's a win–win situation and no party loses; thereafter, no appeal lies and thus, ADR reduces the burden of appellant courts as well.

ADR was at one point of time considered to be a voluntary act on the apart of the parties which has obtained statutory recognition in terms of *Civil Procedure Code (Amendment) Act, 1999; Arbitration and Conciliation Act, 1996; Legal Services Authorities Act, 1997 and Legal Services Authorities (Amendment) Act, 2002*.

Following are the advantages of ADR[9]:

i) It can be used at any time, even when a case is pending before a Court of Law.

ii) It can be used to reduce the number of contentious issues between the parties; and it can be terminated at any stage by any of the disputing parties.

iii) It can provide a better solution to dispute more expeditiously and at less cost than regular litigation.

iv) It helps in keeping the dispute a private matter and promotes creative and realistic business solutions, since parties are in control of ADR proceedings.

v) The ADR is flexible and not governed by the rigors of rules or procedures.

vi) The freedom of parties to litigation is not affected by ADR proceedings. Even a failed ADR proceeding is never a waste either in terms of money or times spent on it, since it helps parties to appreciate each other's case better.

vii) The ADR can be used with or without a lawyer. A lawyer however, plays a very useful role in identification of contentious issues, position of strong and weak points in a case, rendering advice during negotiations and overall presentation of his client's case.

[9] Sathe, S.P.; "Judicial Activism in India- Transgressing Borders and Enforcing Limits, Oxford India Paperbacks(2003), Motiwal O.P "Alternative Dispute Resolution", p. 233

viii) ADR helps in reduction of work load of courts and thereby helps them to focus attention on other cases.

ix) The ADR procedure permits to choose neutrals who are specialists in the subject-matter of the dispute.

x) The parties are free to discuss their difference of opinion without any fear of disclosure of facts before a Court of Law.

xi) The last, but not the least, point is the fact that parties are having the feeling that there is no losing or winning among the parties; but at the same time they are having the feeling that their grievance is redressed and the relationship between the parties is restored.

xii) The ADR system is apt to make a better future. It paves the way to further progress.

Statutory recognition

Following are the statutory provisions dealing with the alternate disputes resolutions mechanisms: -

1. *Civil Procedure Code (Amendment) Act, 1999;*
2. *Arbitration and Conciliation Act, 1996;*
3. *Legal Services Authorities Act, 1987* makes the provisions for National Legal Services Authority (NLSA), State Legal Services Authorities (SLSA), District Legal Services Authorities DLSA, Taluk LS Committee
4. *Legal Services Authorities (Amendment) Act, 2002 (Permanent Lok Adalats)*.

Civil Procedure Code

In order to encourage this recourse, Section 89 has been incorporated in the *Civil Procedure Code*, 1908 which provides that where it appears to the court that there exists an element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods

mentioned in the section and if, the parties do not agree, the court shall refer them to one or the other of the said modes.

According to Section 89 of the Code of Civil Procedure,*there exist elements of a settlement which may be acceptable to the parties. Refer the same for -*

(a) arbitration;

(b) conciliation;

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

(d) mediation.

In *Afcons infrastructure Limited v. Cherian Varkey Construction Company Private Limited*, 2010 (8) SCC 24, Supreme Court has held that, although actual reference of all cases to an ADR process is not mandatory but, considering recourse to ADR process under section 89 CPC is mandatory. If a case is unsuited for reference to any of the ADR processes, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under Section 89 of the Code.

Legal Service Authorities Act, 1987

The Parliament amended the Legal Services Authorities Act, 1987 with the intention to constitute 'Permanent Lok Adalat' for deciding the disputes concerning 'Public Utility Services' which means transport services; postal or telephone services; supply of power, light or water; system of public conservancy or sanitation; services in hospital or dispensary; Insurance services.[10]

In 1987 Legal Service Authorities Act was enacted to give a statutory base to legal aid programmes throughout the country on a uniform pattern. This Act was finally enforced in 1995 after certain amendments were introduced therein by the Amendment Act of 1994. National Legal Service Authority (NALSA) was constituted on 5th December, 1995. It is a

[10]*Ibid.* pp. 50-51

statutory body constituted under the National Legal Services Authorities Act, 1986 as amended by the Act of 1994. It is responsible for providing free legal assistance to poor and weaker sections of the society on the basis of equal opportunity. NALSA is engaged in providing legal services, legal aid and speedy justice through Lok Adalats. The Authority has its office at New Delhi and is headed by the Chief Justice of India, who is the *ex-officio* Patron-in-Chief.

Similarly, the State Legal Service Authorities have been constituted in every State Capital. Supreme Court Legal Services Committee, High Court Legal Services Committees where it is headed by Chief Justice of the State High Court who is the Patron-in-Chief and a serving or retired Judge of the High Court is its *ex-officio* Chairman, District Legal Services Authorities where it is headed by the District Judge of the District and acts as the *ex-officio* Chairman, Taluk Legal Services Committees have also been constituted in every State. Every Taluk Legal Services Committee is headed by a senior Civil Judge operating within the jurisdiction of the Committee who is its ex-officio Chairman.[11]

Persons entitled for free Legal Aid

Section 12 of the Legal Services Authorities Act, 1987 provides the criteria for giving legal services which states that 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 Section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995;

(e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or

[11] *Ibid.*

(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.

Lok Adalat

Alternative Dispute Redressal or Alternative Dispute Resolution has been an integral part of our historical past. Like 'zero', the concept of Lok Adalat (Peoples' Court) is an innovative Indian contribution to the world of Jurisprudence. The institution of Lok Adalat in India, as the very name suggests means, Peoples' Court. 'Lok' stands for 'people' and the vernacular meaning of the term 'Adalat' is the Court. India has long tradition and history of such methods being practiced in the society at grass root level. These are called panchayat, and in legal terminology these are called arbitration. These are widely used in India for resolution of disputes both commercially and non-commercially.

Equal Justice for all is a cardinal principle on which the entire system of administration of justice is based. It is deep rooted in the body and spirit of common law as well as civil law jurisprudence. This ideal has always been there in hearts of every man since the dawn of civilisation. It is embedded in Indian ethos of justice- '*dharma*'. The ideal of justice was even inserted in "*Magna Carta*" where it was stated that:

"To no man will we deny, to no man will we sell, or delay, justice or right."[12]

[12]Rao, P.C & Sheffield, William "Alternative Dispute Resolution- What it is and how it works?", Universal Law Publishing Co. Pvt. Ltd. New Delhi- India, 1997 Edition, Reprint 2011, Ramaswamy K. "Settlement of

Arbitration

According to Russell, "the essence of arbitration is that some disputes are referred by the parties for settlement to a tribunal of their own choice instead of to a court." Arbitration is a procedure for the resolution of disputes on a private basis through the appointment of an arbitrator, an independent, neutral third person who hears and considers the merits of the dispute and renders a final and binding decision called an award.[13] The parties to the arbitration have some control over the design of the arbitration process. In the Indian context, the scope of the rules for the arbitration process are set out broadly by the provisions of the Arbitration and Conciliation Act, 1996 and in the areas uncovered by the Statute the parties are free to design an arbitration process appropriate and relevant to their disputes. There is more flexibility in the arbitration process than in the traditional courts system as the parties can facilitate the creation of an arbitration process relevant to their disputes. Once the process is decided upon and within the parameters of the Statute, the Arbitrator assumes full control of the process. Among the advantages of the arbitration process are considerable saving in time and money compared to a trial; the limited possibility for challenging the award which again contribute the lower costs and finality of outcome; and greater participation by the parties than is the case in the courts/tribunal system. Arbitration may be *ad-hoc*, contractual, institutional or statutory.[14]

What can be referred to Arbitration

All disputes of a civil nature or quasi-civil nature which can be decided by a civil court can be referred to arbitration:

a) Relating to property

b) Right to an office

c) Compensation for non-fulfillment of a clause in a contract

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Disputes Through Lok Adalat Is One Of The Effective Alternative Dispute Resolution (ADR) On Statutory Basis", p. 93

[13] Prof. Agarwal, Nomita; "Alternative Dispute Resolution : Concept & Concerns", NYAYA DEEP, Vol. VII, Issue: 01, Jan. 2006, p.73

[14] Raghuram, Goda, J.; "Alternative Dispute Resolution", NYAYA DEEP, Vol. VIII, Issue: 02, April- 2007, pp. 19-20

d) Disputes in a partnership

What cannot be referred to Arbitration

There are disputes excluded from the Arbitration Act. The law has given jurisdiction to determine certain matters to specified tribunal only; these cannot be referred to arbitration: -

a) Matters involving questions about validity of a will.
b) Relating to appointment of a guardian.
c) Pertaining to criminal proceedings
d) Relating to Charitable Trusts
e) Winding up of a company
f) Matters of divorce or restitution of conjugal rights
g) Disputes arising from an illegal contract
h) Insolvency matters, such as adjudication of a person as an insolvent.
i) Matters falling within the purview of the Competition Act.

Conciliation

Conciliation is a private, informal process in which a neutral third person helps disputing parties reach an agreement. This is a process by which resolution of disputes is achieved by compromise or voluntary agreement. Here the parties, together with the assistance of the neutral third person or persons, systematically isolate the issues involved in the dispute, develop options, consider alternatives and reach a consensual settlement that will accommodate their needs.[15] In contrast to arbitration, the conciliator does not render a binding award. The parties are free to accept or reject the recommendations of the conciliator. The conciliator is, in the Indian context, often a Government official whose report contains recommendations. The conciliation process is sometimes considered synonymous to mediation. Where a third party is informally involved without a provision under any law, which is mediation. In other words, a non-statutory conciliation is what mediation is.

[15] Prof. Agarwal, Nomita "Alternative Dispute Resolution : Concept & Concerns", NYAYA DEEP, Vol. VII, Issue: 01, Jan. 2006, p. 73

Essentially however in effect and structure, conciliation and mediation are substantially identical strategies where assistance is provided to parties to a dispute by a stranger to the dispute. Both the conciliator and mediator are required to bring to the process of dispute resolution fairness, objectivity, neutrality, independence and considerable expertise, to facilitate a resolution of the conflict.[16]

What Can be Referred to Conciliation?

The following matters can be referred to conciliation–

a) Civil nature

b) Breach of contract

c) Disputes of movable or immovable property

d) Matrimonial matters

What Cannot be Referred to Conciliation?

The following matters cannot be referred to conciliation –

1. Criminal nature

2. Illegal transactions

3. Matrimonial matters (with exceptions)

a) ceased to be a Hindu

b) unsound mind

c) incurable form of leprosy

d) venereal disease in a communicable form

e) renounced the world (religious order)

f) not been heard for the last 7 Years

[16] Raghuram, Goda, J.; "Alternative Dispute Resolution", NYAYA DEEP, Vol. VIII, Issue: 02, April-2007, pp. 21-22

Part III of the Arbitration and Conciliation Act, 1996 deals with conciliation. Conciliation means "the settling of disputes without litigation." The main difference between arbitration and conciliation is that in arbitration proceedings the awards is the decision of the Arbitral Tribunal while in the case of conciliation the decision is that of the parties arrived at with the assistance of the conciliation.[17]

Mediation

It is an informal process in which a neutral third party without the power to decide or usually to impose a solution helps the parties resolve a dispute or plan a transaction. Mediation is voluntary and non-binding, although the parties may enter into a binding agreement as a result of mediation. It is not an adjudicative process.[18] The process of mediation aims to facilitate their negotiations. The mediator has no independent decision-making power, jurisdiction or legitimacy beyond what is voluntarily offered by the parties themselves. Mediation is a process of structured negotiation conducted by a facilitator with skill, training and experience necessary to assist the litigating parties in reaching a resolution of their dispute. It is a process that is confidential, non-coercive and geared to aid them in arriving at a mutually acceptable resolution to their dispute of any nature. One of the advantages of the mediation process is its flexibility. It is not as if one party wins and the other party looses. But the parties arrive at an equitable solution that is why mediation is said to be a win-win situation. Mediation employs several strategies, sub-strategies and techniques to encourage the parties to reach an agreement.[19]

Mediation like many ADR strategies has distinct advantages over the traditional courts/ tribunals format of dispute resolution. The advantages of ADR including mediation are the informality of the process, the speed in dispute resolution, relatively low cost, the ability of the process to focus on the disputing parties' interests and concern rather than exclusively on

[17] Singh, Dr. Avtar; Law of Arbitration and Conciliation (including ADR Systems), Eastern Book Company, Lucknow, 7th Edition(2006), p. 471

[18] Sinha, S.B. J.; "Mediation: Constituents, Process and Merit", NYAYA DEEP, Vol. VII, Issue: 04, Oct. 2006, p. 35

[19] Raghuram, Goda, J. "Alternative Dispute Resolution", NYAYA DEEP, Vol. VIII, Issue: 02, April-2007, pp. 20-21

their legal rights; encouragement to the parties to fashion their own solutions; much greater involvement of the parties in the process; the essential confidentiality of the process and the high success rate.[20]

The appropriate case for mediation are those where-

1. Parties want to control the outcome.
2. Communication problem exist between parties or their lawyers.
3. Personal or emotional barriers prevent settlement.
4. Resolution is more important than vindicating legal or moral principles.
5. Creative possibilities for settlement exist.
6. Parties have an ongoing or significant past relationship.
7. Parties disagree about the facts or interpretation.
8. Parties have incentive to settle because of time, cost of litigation, drain on productivity, etc.

A formidable obstacle to resolution appears to be the reluctance of the lawyers, not the parties.[21]

Concept of Online Dispute Resolution

Online Dispute Resolution (ODR) was born from the synergy between Alternative Dispute Resolution (ADR) and Information & Communication Technology (ICT) as a method for resolving dispute that were arising online, and for which traditional means of dispute resolution were inefficient or unavailable. Online Dispute Resolution is an automated platform or rather a trendy tool for the development of e-commerce and to solve disputes easily. Due to increasing use of the Internet worldwide, the number of disputes arising from Internet commerce is on the rise. Numerous websites have been established to help resolve these Internet disputes, as well as to facilitate the resolution of disputes that occur offline. It is becoming an increasingly effective mechanism for resolving disputes as technology advances.

[20] *Ibid*, p. 21

[21] Sinha, S.B. J. "Mediation: Constituents, Process and Merit", NYAYA DEEP, Vol. VII, Issue: 04, Oct. 2006, p. 35

ADR is the best and most effective solution to reduce the Himalayan pendency of cases in various courts of our country. It is our duty as envisaged by the new CPC to encourage the ADR, in civil matters in the interest of justice. Its process is similar to the Panchayat system, we have in our villages. It avoids protracted litigation and is based on the ground realities verified in person by the adjudicators and the award is fair and honest settlement of doubtful claims based on legal and moral grounds

Extract of the Speech by Hon'ble the Chief Justice of India - Shri Justice N V Ramana at the Curtain Raiser and Stakeholders' Conclave of International Arbitration and Mediation Centre

"The great Indian epic, the Mahabharata, provides an example of an early attempt at mediation as a conflict resolution tool, where Lord Krishna attempted to mediate the dispute between the Pandavas and Kauravas. It may be worthwhile to recall that the failure of mediation led to disastrous consequences.

You may not be law graduates, but with your experience of dealing with complex commercial transactions and practical knowledge, you already know about the legal system. Many of you may already prefer alternate dispute resolution mechanisms, before approaching Courts.

The reasons for conflicts are many. Misunderstandings, ego issues, trust and greed can lead to conflicts. Ultimately, small differences of opinion can lead to a big conflict. And even big conflicts can be resolved with some effort in understanding one other.

If conflicts arise in your personal life, they can be resolved by avoiding the people you do not like, or you can choose to personally sacrifice some property or money to get mental peace by satisfying the other person's ego. Sometimes, you may choose the path of silence or even develop a philosophical attitude to such issues. Every day, in our lives, we face conflicts - be it between family members or in our business or professional life.

Can anyone even imagine a world without conflicts? A prudent person tries to find ways to resolve the same amicably. Conflicts have a human face and it helps to be humane in our approach to resolve the same. One must have the foresight to look beyond the conflict.

But in a business, you cannot lose money, honor or your reputation. You cannot sacrifice the interests of business or industry. In such a situation also, you can think of an easy way of settling disputes without wasting much time or money, or losing your peace of mind. You can find a better way for further growth and improvement.

Now to come back to the reality, in business you might have a difference of opinions and disagreements. One would usually start by initiating a dialogue to clarify issues. If it doesn't happen, you will start to look for people who can help you resolve such issues by negotiating. If this also doesn't work, then the only option people consider is to go to Courts. My advice, after participating in the legal profession for over 40 years in different capacities, is that you must keep the option of going to Courts as a last resort. Use this last resort only after exploring the option of ADR- arbitration, mediation and conciliation. Arbitration and mediation are efforts at restoring a relationship. I think that the most important factor behind the resolution of any dispute is having the right attitude. By right attitude, I mean we should leave aside our ego, emotions, impatience and embrace practicality. But, once these conflicts enter a Court, much gets lost in the practice and procedure.

I do not need to elaborate the benefits of mediation and arbitration to this gathering of domain experts and businesspeople. Dispute resolution mechanisms like arbitration and mediation are nowadays the preferred modes of dispute resolution.

The reasons for opting for mediation or arbitration over traditional litigation are manifold:

- Fewer delays Less expensive
- More involvement of the parties in the process Greater Party Choice
- More control
- More comfortable and amicable environment for the parties

Similarly, mediation has immense potential for dispute resolution in India, for both domestic and international disputes. In addition to the above advantages, mediation also has following benefits:

- Allows for settlements and compromises between parties, ensuring there is no winner or loser in the process
- Parties have far more control over the outcome
- Possibility of a continued relationship between parties after the dispute resolution process
- Greater options for choice of mediator with varied expertise, as there is no requirement for a legally trained mediator.

The exact steps in arbitration would depend on the complexity and type of issue being considered. International Arbitration Centers are present in most commercial hubs- Paris, Singapore, Hong Kong, London, New York, and Stockholm. Despite the presence of some arbitration centers in India, Indian parties that enter into an international arbitration agreement often opt for an arbitration center outside India incurring huge expenses."

2.6 CONTEMPT OF COURT

(An outline substantially based on decisions of the Supreme Court and High Courts)

1. Source of the law of Contempt of Courts

   i). Common Law of England.

   ii). Rulings of the superior courts - Supreme Court or High Courts.

   iii). Statutes:

      a) I.P.C. - 175, 178, 179, 180 and 228.

      b) Cr. P.C. - 345.

      c) Contempt of Courts Act, 1971.

   iv). Constitution of India.

      a) Supreme Court - Article 129.

      b) High Court - Article 215.

2. Court within the meaning of Contempt of Courts Act, 1971

   i) Civil, Criminal and Revenue Courts, are courts within the meaning of the Contempt of Courts Act.

   ii) Supreme Court of India and High Courts are very much within the purview of the Act. That apart, they are Courts of record as declared by the Constitution of India. (Court of Record explained in paragraph 14)

   iii) When a question arises as to whether an adjudicatory authority is a Court as distinguished from a quasi-judicial tribunal, it has to be decided in the light of whether it possesses all the attributes of a Court, due regard being had to the provisions of the Act creating it.

iv) The attributes of the Court may be summarised in the following words: -

a) It is constituted by the State for administration of Justice.

b) Its pronouncement must be definitive and binding on the parties.

c) It must arrive at its decision on the evidence which the parties have a right to adduce.

d) It must possess authority to summon parties and their witnesses, to compel production of documents and to take evidence.

e) It has a legal duty to act judicially.

f) It must have power to have his judgement or the order enforced against the parties.

v) Collector functioning under the Essential Commodities Act., 1955 is NOT a Court within the meaning of the Contempt of Courts Act., 1976 (Vide *State of MP* v. *L.C. Bahirani*, 1982 MPLJ 835(MP) - Division Bench).

vi) A Presiding Officer is an important component of Court, not the whole of it.

3. Contempt of Courts - Object

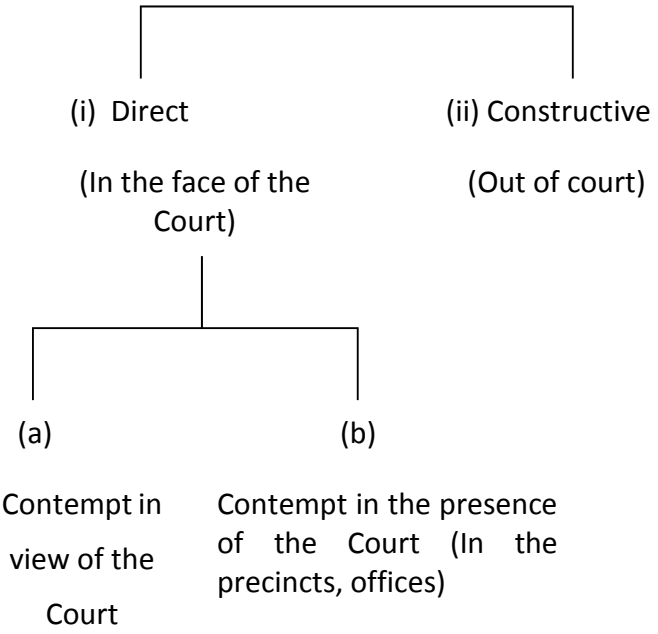
i) To uphold the majesty and dignity of the Court

ii) To maintain the continuity of the crystal-clear flow of the stream of justice by sustaining the confidence of the public at large in the administration of Justice

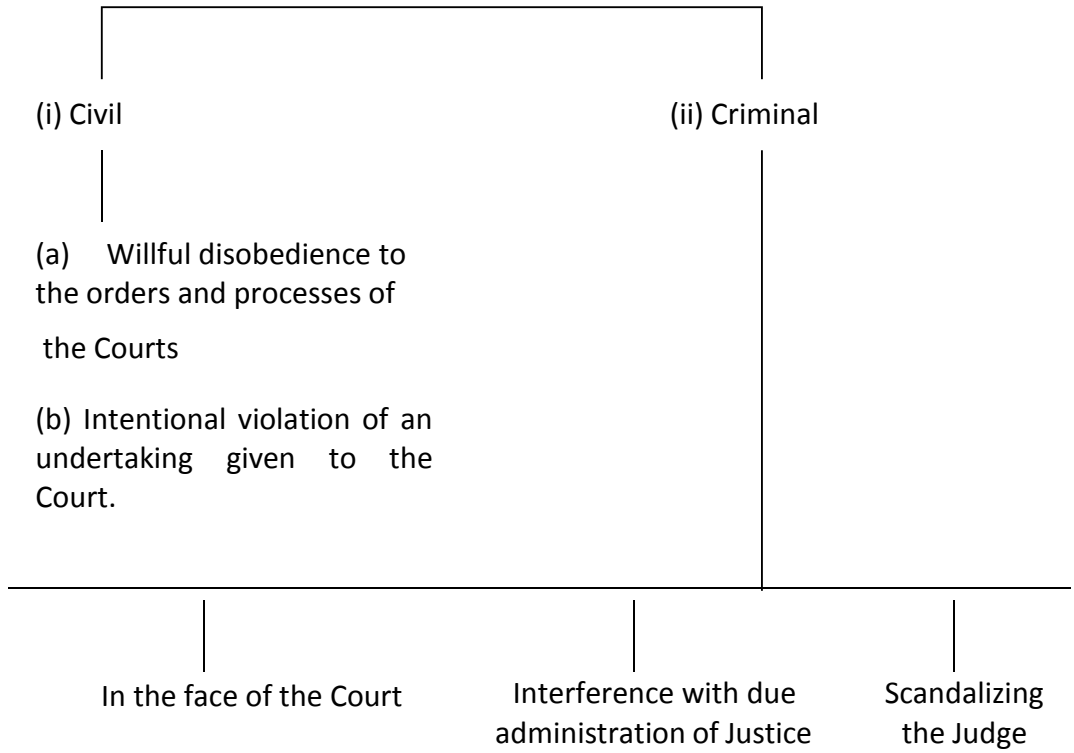
Note: It is neither to protect an individual Judge or Magistrate nor to vindicate his/her prestige. For this, the proper remedy lies in an action for libel or defamation. Contempt is a wrong done to the public. It is an offence against the free society.

4. Classification of Contempt

I. First Classification



II. Second Classification



5. Civil Contempt (Definition) vide Section 2(b) of Contempt of Courts Act, 1971 (Act No. 70 of 1971)

"Civil Contempt" means willful disobedience to any judgement, decree, direction, order, writ or other process or a court or willful breach of an undertaking given to a court.

6. Criminal Contempt (Definition) vide Section 3(c) of Contempt of Courts Act, 1971 (Act No. 70 of 1971)

It means "publication" -

i) by words, spoken or written

ii) by signs

iii) by visible representation

iv) or otherwise of any matter or doing of any other act which :-

(a) scandalises or tends to scandalise or lowers or tends to lower the authority or any court.

(b) prejudices or interferes or tends to interfere with the course of any judicial proceeding.

(c) interferes or tends to interfere with or obstructs or tends to obstruct, the administration of Justice in any other manner.

7. Examples of Contempt of Courts from decided cases: -

i) Secretary of a Political Party's Committee wrote a recommendatory letter to the District Magistrate about the facts of the case

ii) Use of threats by letters or otherwise to a party while his case is sub-judice or abusing in letters to persons likely to be witnesses

iii) Orders of stay, injunctions, bail received from superior courts must receive close and prompt attention.

Unnecessary delay in dealing with them may well furnish grounds for an inference that it was due to a natural disinclination and may constitute contempt.

iv) The Chief Minister delivers a speech on a subject which is sub judice in a writ petition before the High Court with full knowledge - it amounts to interference with administration of Justice

v) Circular directing Magistrates to ignore the decisions of the High Court tantamount to Contempt of Court

vi) "Judges are guided and dominated by class hatred, class interests and class prejudices and where the evidence is balanced between a well-dressed pot-bellied rich man and a poor ill-dressed and ill-treated person, the Judge instinctively favours the former" - Chief Minister at a Press Conference - Contempt (AIR 1970 SC 2015).

vii) In the garb of transfer application, a person cannot be allowed to make allegations of a serious nature, scandalizing the Court and imputing improper motives to the Judge trying the case - Contempt (AIR 1972 SC 989).

viii) A lawyer, hurled shoes at the Judge in order to overawe and to bully him (AIR 1981 SC 1382).

ix) Comments on pending proceedings with a tendency to prejudice fair trial.

x) A person walking into the chamber of a Magistrate and insisting on cancelling the order he passed against him, else a serious consequence would follow.

xi) Assault on Magistrate.

xii) Insult to a Magistrate.

xiii) Private Communication with a Judge or Magistrate about a *sub judice* matter.

xiv) Threatening a counsel in a case.

xv) Bullying witnesses.

xvi) Destroying documents in the custody of the Court.

8. Commitment of Contempt of Court by a Judge or a Magistrate

A Judge or a Magistrate may commit Contempt of his own Court (Vide Sec. 16 C.C. Act.)

i) Calling a Police Guard to turn out a lawyer without justification.

ii) A Judge commenting in the Press and on Doordarshan about a case when appeal is pending. He endeavoured to justify his decision publicly when the matter was subjudice in the form of an appeal.

iii) An Executive Magistrate delivered judgement in a case u/s 145 Cr.PC after 8 months and 13 adjournments. (*State* v. *P.C. Mali* (1973) 39 C.LJ 458).

9. Defences to a charge of Contempt

i) Innocent publication or distribution of matter (Section 3).

ii) Fair and accurate report of judicial proceeding (Section 4).

ii) Fair criticism of judicial act (Section 5) - Comments on the merits of any case finally decided.

iv) Complaint against the presiding officers of Subordinate Courts to the High Court done in good faith (Section 6)

iii) Publication of information relating to proceedings in chambers or in camera (Section 7)

vi) An order passed by a Court without jurisdiction is void *ab intio*. Violation of such order is not contempt

10. Section 345 Cr.PC (You in the capacity of Court - Criminal or Revenue - may invoke the aid of Section 345 Cr. P.C. in appropriate situations when the circumstances so demand in the larger interest of Justice)

Section 345 Cr. P.C. - an outline

a) It gives special power to a Court to deal with certain cases of contempt.

b) The provisions of Section 345 Cr.PC are mandatory and must be strictly complied with.

c) Basic principles of Natural Justice must be observed.

d) The Court is not bound to record evidence in a proceeding u/s 345 Cr.PC.

e) It is incumbent to follow the provisions of Section 251 Cr.PC and to explain to the accused the particulars of the offence.

f) So far as possible, the exact words used by the offender should be recorded.

g) The Court need not be unduly sensitive or unnecessarily be touchy as to its own dignity or authority.

h) The finding of the Court needs to be recorded.

i)The sentence which is limited to: -

Fine upto Rs. 200/- ,in default simple imprisonment up to one month.

No sentence of substantive imprisonment.

11. Conditions for application of Section 345 Cr.PC.

i. Offence committed must be one of the following:- 175 IPC, 178 IPC, 179 IPC, 180 IPC and 228 IPC.

ii. The offence must be committed during a judicial proceeding.

iii. Such Court must be a Civil or Criminal or Revenue Court including Registrar or Sub-Registrar when so directed by the State Government.

iv. Such offence must have been committed in the view of or in the presence of the Court.

v. Action must be taken before the Court rises on that day by taking cognizance of the offence.

vi. The offender must be given reasonable opportunity of showing cause.

vii. The Court must record.

(a) facts constituting the offence.

(b) the statement, if any, made by the offender.

viii. When the offence is under 228 IPC, the record should further show: -

a) the nature and stage of the judicial proceeding in which the court interrupted or insulted.

b) the nature of the interruption or insult.

12. Section 345 Cr.PC - five classes of contempt:-

i) Intentional omission to produce a document by a person legally bound to do so (Section 175 IPC).

ii) Refusal to take oath when duly required to take (Section 178 IPC).

iii) Refusal to answer questions by one legally bound to state the truth (Section 179 IPC)

iv) Refusal to sign a statement made to a Public Servant when legally required to do so (Section 180 IPC).

v) Intentional insult to a Public Servant or interruption to a Public Servant at any stage of a judicial proceeding (Section 228 IPC)

13. Offences under Section 228 IPC - three choices

i) To make a complaint to J.M., Ist Class, u/s 340 Cr.PC, read with Sec. 195 Cr.PC.

ii) To try the offender summarily u/s 345 Cr.PC.

iii) To send him to the J.M. u/s 346 Cr.PC for heavier punishment.

i) and (iii) - after taking cognizance.

14 Court of Record

A Court of record is one where the acts and judicial proceedings are enrolled for perpetual memory and testimony; and which has the authority to fine and imprison for contempt of itself as well as of subordinate courts (*Delhi Judicial Service Association* v. *State of Gujarat* (1991) 4 SCC 406).

15. Reference to the High Court u/s 15 (2) of the Contempt of Courts Act - a broad procedure.

(a) Subordinate Courts may make reference to the High Court for taking proceedings under the Contempt of Courts Act.

(b) Before making reference, Subordinate Court may hold a preliminary enquiry issuing show cause notice to the party and giving him a hearing.

(c) Subordinate Court means any Civil Court, Criminal Court or Revenue Court subordinate to the High Court.

(d) Address the communication to the Registrar (Judicial) of the High Court.

(e) Submit it through the District Judge/District Magistrate, as the case may be.

(f) Mention the nature of the Contempt under the head "Civil Contempt" or "Criminal Contempt" as the case may be.

(g) Give out the name, description, place of residence of the person charged.

(h) State the material facts constituting contempt including the date/dates, brief statement of the case in connection with which the contempt is alleged to have been committed.

(i) Transmit the documents, if relied upon, to the High Court.

(j) Request for laying before the High Court and taking cognizance.

(k) Your language should be clear, your statement of facts should be precise and exact, and your decision to make a reference ought to be backed by reasons.

(l) Don't allow your emotion to have any role, either in vitiating the reference or in drafting it.

(m) Objectivity, detachment and larger interests of the Administration of Justice shall be your guiding principles.

16. Contempt - Scandalising Court

Accused hurled shoes at Magistrate - Conviction u/s 228 Cr. P.C. does not bar proceeding and conviction for Contempt.

Misconduct complained falls under the contempt of Courts Act as well as Indian Penal Code.

Reference : 1992 Cr. L.J. 2130 (HP)

17. Contempt Proceedings - Nature -

(a)They are in the nature of a quasi-criminal proceedings.

18. Contempt - Standard of Proof.

Ingredients should be proved beyond reasonable doubt.

19. Notings in office file, even if derogatory to Court's Order - do not constitute Civil or Criminal Contempt.

The notings in the departmental files by the hierarchy of officials are meant for independent discharge of official duties and not for exposure outside. In a democracy, it is necessary that its steel frame in the form of Civil Service is permitted to express itself freely, uninfluenced by extraneous considerations.

20. Media and Court - right to make fair criticism of subordinate judiciary.

So long as it does not undermine the integrity and dignity of the judiciary and the comments are not detrimental to the cause of the Judiciary as a whole, there is no contempt.

21. Contempt of Courts - at a Glance

Table I

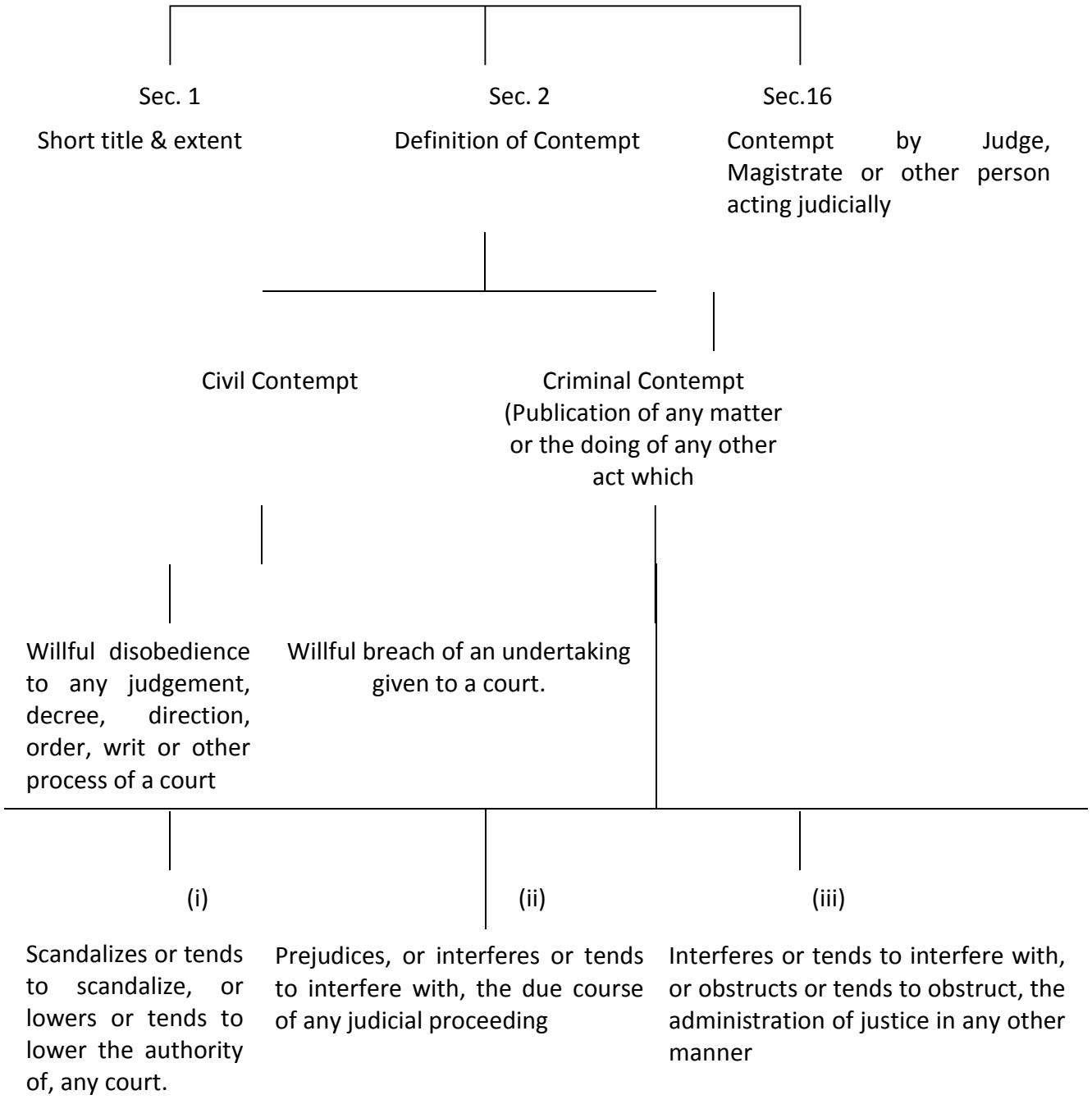


Table -II

Not Contempt

Sec. 3	Innocent publication and distribution of matter not contempt
Sec. 4	Fair and accurate report of judicial proceeding not contempt
Sec. 5	Fair criticism of judicial act not contempt
Sec. 6	Complaint against presiding officers of subordinate courts when not contempt
Sec. 7	Publication of information relating to proceedings in chambers or in camera not contempt except in certain cases.
Sec. 8	Other defenses not affected
Sec. 13	Contempts not punishable in certain cases

Table - III

Power and Procedure

Sec. 9	Act not to imply enlargement of scope of contempt
Sec. 10	Power of High Court to punish contempt of subordinate courts
Sec. 11	Power of High Court to try offences committed or offenders found outsid jurisdiction
Sec. 12	Punishment for contempt of court
Sec.14	Procedure where contempt is in the face of the Supreme Court or a High Court
Sec. 15	Cognizance of criminal contempt in other cases
Sec. 17	Procedure after cognizance
Sec. 18	Hearing of cases of criminal contempt to be by Benches

Table - IV

Appeal/Limitation/Applicability/Rule -making Power etc.

Sec. 19	Appeal
Sec. 20	Limitation for actions for contempt one year
Sec. 21	Act not to apply to Nyaya Panchayats or other village courts.
Sec. 22	Act to be in addition to, and not in derogation of, other laws relating to contempt
Sec. 23	Power of Supreme Court and High Courts to make rules
Sec. 24	Repeal

Table – V

Power of the Courts to Punish for Contempt

1. Power Of Subordinate Courts (Civil, Criminal & Revenue Courts)

a) May punish under section 345(1) Cr.PC for offences u/s 175, 178, 179, 180 & 228 IPC; Fine not exceeding Rs. 200/- and in default; SI for a term extending to 1 month or
b) Thereafter discharge the offender or remit the punishment u/s 348 Cr. PC on submission to the order or on apology being tendered.

2. Power of the High Court

a) to punish for contempt of itself (Article 215 of the Constitution)
b) to punish for contempt of subordinate courts except for these contempt where such contempt is an offence under IPC (vide Sec. 10 Contempt of Courts Act)
c) SI upto 6 months or fine upto 2000/- or both (Sec. 12, Contempt of Courts Act.)

3. Power of the Supreme Court

a) To punish for contempt of itself (Article 129, Constitution of India)
b) It being a Court of record, it has inherent power to punish for Contempt of a Subordinate Court
c) To deal with any contempt case in the exercise of its appellate jurisdiction under the constitution or under section 19 of the Contempt of Courts Act.)
d) SI up to 6 months or fine of Rs. 2000/- or both (Section 12 of the Contempt of Courts Act.)

Table - VI

Procedure for Contempt of Court

Procedure Before Subordinate Courts
Summary Procedure by Subordinate Court 345 Cr. P.C.

Procedure Before Supreme Court or High Courts	
Where contempt is in the face of the Supreme Court or High Court (Procedure as in Sec. 14 of the Contempt of Courts Act.)	Criminal contempt other than referred to in Sec. 14 (cognizance u/s 15 of the Contempt of Courts Act and procedure after cognizance u/s 17 of the Contempt of Court Act hearing by Benches (Sec 18)

(i) u/s 345 (1) Cr.PC, a Subordinate Court is empowered to deal with five kinds of contempt, Ss. 175, 178, 179, 180 and 228 IPC and sentence the offender itself.

ii) or if the court thinks that the case calls for more severe sentence or that a regular trial is desirable, it may forward the accused to a Magistrate having jurisdiction to try the same (Sec. 346 Cr.PC.)

iii) or even after sentence under section 345 Cr.PC or action u/s 346 Cr.PC, the court may thereafter discharge the offender or remit the punishment if there is submission to the order or tender of apology (Section 348 Cr.PC)

Limitation: Limitation for actions for contempt - one year (Section 20 Contempt of Courts Act.)

3. LEGAL REMEDIES

3.1 CIVIL LEGAL REMEDIES – SPECIFIC RELIEF ACT AND LIMITATION

Law is a growth from small beginnings. The development of a legal system consists in the progressive substitution of pre-established principles for individual judgment, and to a large extent, these principles grow up spontaneously with the tribunals themselves. That great aggregate of rules which constitutes a developed legal system is not a condition precedent of the administration of justice, but a product of it. Gradually, from various sources – precedent, custom, statute, – there is collected a body of fixed principles which the Courts apply to the exclusion of their private judgement.

Civil law is a portion of the law of the land which is enforced by the law Courts. As a matter of fact, it is law in the strictest sense of the term. The characteristics of civil law includes:-

i) Civil law means positive law of the land or law as it exists.

ii) Like any other law, civil law is uniform and this uniformity is established by judicial precedents.

*iii)*Law is noted for its constancy, because without this, law would be nothing but the law of the jungle.

iv) Law is in the nature of the enjoinments by the people who inhabit a particular State, with the capacity to assert themselves and command obedience through the judicial processes.

v) Law is backed by the force and might of the State for the purposes of enforcement. In other words, civil law has an imperative character and has legal sanction behind it.

vi) Law is essentially of territorial nature and it only applies within that territory of the State. It is the law of the territory, as opposed to the law of the locality, or as opposed to the law of the Nations or the law of the Nature. It is not universal but general.

vii) Law creates legal rights, - fundamental or primary, as also secondary rights.

viii) As law is enforced by the sanction of the State, an infringement of the law is always

attendant with attachments, fines or imprisonment, or some other form of punishments which the society inflicts on the wrongdoer in order to show its displeasure against the person who commits an anti-social act.

In considering the nature of civil law, one must consider both law in the abstract sense and law in the concrete sense. Law in its abstract sense means and is known as *jus* or *droit*, in its concrete sense, it is known as *lex* or *loi.* In other words, law in its concrete sense implies a particular law, e.g., the law of the Income-tax, Industrial law, Company law, etc., while in its abstract or general sense, if means laws generally.

In England, the Common Law provides remedy of damages to an aggrieved party. The famous legal maxim is '*ubi jus ibi remedium'* which means 'there is no wrong without a remedy'. The word '*remedium*' signifies the right of action. Whenever the common law gives a right or prohibits an injury, it also gives a remedy. According to Lord Holt, "If men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense".

The object of the Specific Relief Act is confined to that class of remedies which a suitor seeks to obtain and a Court of justice seeks to give him the very relief to which he is entitled.

'Relief' means 'deliverance from some hardship, burden or grievance; legal redress or remedy for wrongs or injury'. In England the term 'relief' means the remedy which is granted by Court of justice to suitors when legal right are infringed by the commission of civil injuries, the person injured is entitled to redress, for 'there is no wrong without a remedy'.

The term 'Specific' means 'not general or vague; appropriate to or concerned of with a particular kind'. The meaning of the word 'specific' is the reverse of 'general'. Specific means 'explicit and defined'. Specific relief means a particular relief or relief specific to which a person is entitled in the first instance as distinguished from compensatory relief.

Modes or methods or kind of giving specific relief (classification of specific relief) (kind of equitable relief)

There are various reliefs available under the Specific Relief Act, 1963:-

1. Restoration of possession

The court will order the disputed property to be delivered to the rightful claimant. (sections 5-8)

2. Specific performance of contracts

The court can order the defendant to do the very act which he has contracted to do. (sections 9-25).

3. Injunction(sections 36-42)

An injunction is granted to the plaintiff to prevent the breach of an obligation existing in his favor. The remedies under injunction are: -

(i) the preventive remedy of injunction;

(ii) the retrospective remedy of mandatory injunction.

The remedy of injunction consists of an order directing a defendant not to do an act which he has threatened or not to continue doing an act which he has already done.

4. Declaratory Relief (section 34 and 35)

The court many may grant a declaration as to rights of the parties. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right. The court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief

5. Rectification of instruments (Sec. 26)

An instrument which for any reason (e.g. fraud or ignorance of the draftsman) does not express the intention of the parties and the true intention cannot be proved is the ground upon which rectification or reformation of written instruments is based.

6. Rescission of contract (Sections 27-30)

Rescission of contract is the remedy open to a party when the contract is avoidable at his instance.

7. Cancellation of instruments (Sections 31-33)

The court may, in its discretion, order to deliver up and cancel the void or voidable contract which may cause serious injury to the party.

Specific relief is not for enforcing penal law

Section 4 of the Specific Relief Act, 1963 provides that specific relief can be granted only for the purpose of enforcing individual civil rights and not for mere purpose of enforcing a penal law.

Recovery of possession of immovable property on the strength of the title

Section 5 of the Specific Relief Act, 1963 provides that "Person entitled to the possession of specific immovable property may recover it in the manner provided by the Code of Civil Procedure,1908''.

According to Section 5 there should be: -

a) person, and

b) he should be entitled to possession, and

c) this possession should be of immovable property, and

d) the recovery should be in the manner provided by the Civil Procedure Code.

Meaning of possessory Action

Possessor action is one in which the plaintiff seeks restoration of possession on the strength of his prior possession. He need not in such a suit assert or prove his title. In fact, he need not have a title superior to that of the person from whom he seeks to recover possession. His earlier possession is itself sufficient for the court to restore possession to him.

Chattel

Section 8 deals with movable property i.e; *chattel*. *Chattel* is a French word signifying 'goods' '*Chattel*' is more comprehensive than 'goods' and includes animate as well as inanimate

property. Every movable thing which can be weighed, measured or counted is included under the general term *chattel*.

Applicability or conditions or requisites of Section 8

In order that the provisions of Section 8 come into operation the following requisites must exist:

i) The defendant has possession or control of the particular article claimed;

ii) Such article is movable property i.e. capable of being seized and delivered to the successful party;

iii) The defendant is not the owner of the article;

iv) The plaintiff must be one who should be entitled to immediate possession;

v) The thing claimed is held by the defendant: -

(a) As plaintiff's agent or trustee;

(b) When the compensation is not adequate relief;

(c) To ascertain the actual damage is extremely difficult;

(d) When the possession of the thing is wrongfully transferred.

Specific Performance of Contract

According to Sections 10 and 11, specific performance of contract may be enforced in the following cases or circumstances: -

i) When there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or

ii) When the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or

iii) When it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done; or

iv) When the act agreed to be done is in the performance of a trust.

Exceptions to the general rule of specific performance of part of contract

The words in Section 12(1), “except as otherwise hereinafter provided in this section” provided exceptions to the general rule “the court shall not direct the specific performance of a part of a contract”. These exceptions are embodied in sub-sections (2), (3) and (4) of Section 12 as given below: -

i) When part unperformed is small and compensation can be estimated.
ii) Part unperformed is large but compensation can be estimated
iii) Where a contract consists of independent parts i.e. divisible parts.

When contracts cannot be specifically enforced? Types of contracts which cannot be specifically enforced).

i) When compensation in money is adequate- According to Section 14(1) (a) of the Specific Relief Act, a contract for the non-performance of which compensation in money is an adequate relief cannot be specifically enforced.
ii) Contracts involving personal service
iii) Contract in its nature determinable
iv) Contracts involving continuous supervision of the Court
v) Contract for arbitration

Section 15-19 deals with the persons for or against whom contracts may be specifically enforced.

Section 16 deals with the persons in whose favor specific performance may not be enforced (personal bars to relief) which includes: -

i) A person not entitled to recover compensation
ii) A person incapable of performing the contracts
iii) A person who violates the essential term of the contract
iv) A person not ready and willing to perform the contract

The Limitation Act, 1963

Limitation means:-

The cut-off date for different legal Action

Bar of Limitation - s.3 as per the Limitation Act

Extension of time in certain cases – condonation of delay

SCHEDULE 1 – Limitation Act

(a) 3 years - accounts, contracts, declarations, decrees, suits relating to movable property, recovery of law suit under a contract etc.

(b) 12 years - to possession of immovable property and 30 years for mortgaged property

(c) 1 year for suit relating to torts (3 years for compensation) in certain cases

(d) 30 to 90 days in case of appeals under Civil Procedure Code and Criminal Procedure Code

4. COURT PROCEDURE IN CIVIL CASES

4.1 THE CODE OF CIVIL PROCEDURE, 1908

An Introduction

1. C.P.C. -

(a) It is a piece of legislation.

(b) It lays down and consolidates the law relating to the procedure of the Civil Courts.

(c) It deals with the process of litigation of a civil nature.

2. C.P.C. - its scheme

(a) It has two parts.

(b) The first part consists of 158 sections. It may be called body of the Code.

(c) The second part consists of Rules. The Rules are arranged under 51 "Orders" and contained in the Schedule I.

(d) Besides the Sections and the Rules, there are eight appendices giving out the specimen forms.

3. Body and Rules - Distinction

(a) The Body contains fundamental principles and Rules deal with details.

(b) Sections comprising the body are expressed in more general terms while the Rules are more particular provisions.

(c) The body generally creates jurisdiction while the Rules indicate how the jurisdiction should be exercised.

(d) The body is unalterable except by legislative amendment. The Rules may be changed by the High Courts and as such, they are more flexible.

4. Suit -

It is a civil proceeding instituted by the presentation of a plaint.

5. Plaint -

It is the basic document of the plaintiff which gives rise to a suit.

6. Plaint - what it should contain

(a) Please see Order 7 Rule 1 CPC for details.

(b) In short, all facts which would entitle the plaintiff to get a decree and the reliefs claimed by him should be stated in the plaint.

7. Plaintiff -

The party who commences a law suit is known as the Plaintiff.

8. Defendant -

The party against whom a suit is filed is called the defendant.

9. Written Statement

The basic document which the defendant files in Court in answer to the plaint is known as "written statement". It contains statements of defence.

10. Pleadings

The plaint and the written statement constitute the pleadings of the parties.

11. Pleadings - what they should contain

Material facts on which the party pleading relies and not evidence by which those facts may

be proved.

12. Basic Rules of Pleadings

(i) Every pleading should state facts and not law.

(ii) It must state material facts and material facts only.

(iii) It must state facts and not evidence by which they are to be proved.

(iv) It must state facts in concise form.

13. Pleading of Law

A party cannot plead law but he may by his pleading raise any point of law.

14. Pleadings - their object

The whole object of pleadings is to bring the parties to issues.

15. Pleadings - their implications

(a) Parties cannot be allowed to deviate from their pleadings.

(b) Proof may be given in support of the facts pleaded.

(c) Evidence cannot be given to prove a plea not properly raised in the pleadings.

(d) The decision in a case cannot be based on grounds outside the pleadings of the parties.

(e) If an allegation of fact made by the plaintiff is not specifically denied by the defendant, it should be deemed to have been admitted.

(f) Pleadings may be amended with the leave of the Court.

(g) Inconsistent pleadings are not prohibited but are liable to be viewed with suspicion.

16. Elements of a Judicial Procedure

(i) Summons

(ii) Pleadings

(iii) Proof

(iv) Judgement

(v) Execution.

Note : Proof is the effect of Evidence

17. Essentials of a Suit

(i) opposing parties

(ii) a subject in dispute

(iii) a cause of action

(iv) a demand for relief

18. Cause of Action

(a) "Cause of Action" means the bundle of essential facts which is necessary for the plaintiff to allege and prove in order to succeed.

(b) "Cause of Action" includes not only the material facts which constitute the right claimed by the plaintiff but also the facts which show infringement, actual or threatened, by the defendant, of such right providing the immediate occasion for the action.

19. Stages of a suit from the beginning till the end

(i) Presentation of the plaint.

(ii) Preliminary scrutiny by the Court.

(iii) Registration/Return/Rejection.

If found in order, the plaint may be registered. Otherwise the plaint may be returned under order 7 Rule 10 if the Court does not have jurisdiction to try it or the plaint may be rejected for any of the reasons specified in Order 7 Rule 11 CPC or for any other recognised reason. The plaint may also be returned for the time being for the purpose of amendment.

(iv) Summons to the defendant.

(v) Appearance of the defendant.

(vi) Filing of the written statement by the defendant.

(vii) Attendance of the parties in the Court.

(viii) Examination of the parties by the Court for determination of the matters in dispute.

(ix) Interrogatories, inspection, production of documents admission, etc. (all pre-trial proceedings).

(x) Settlement of issues.

(xi) Summoning and attendance of witnesses.

(xii) Adjournments, if any.

(xiii) Hearing of the suit including examination of witnesses, reception of documentary/material evidence, and hearing of arguments.

(xiv) Delivery of the Judgement.

(xv) Drawl of the decree.

(xvi) Appeal, if any.

(xvii) Execution.

20. Return of the plaint and rejection of the plaint - points of distinction

(a) Return of the plaint is done u/s 7 Rule 10, whereas the rejection of the plaint is made u/s 7 Rule 11.

(b) Want of jurisdiction is the only ground for return of the plaint. Non-disclosure of cause of action, non-payment of deficit court fee, failure to rectify under-valuation of the suit and bar imposed by Law are the major grounds for rejection of the plaint.

(c) A plaint may be returned at any stage. Rejection, though may be resorted to at any stage, is generally made during the initial stage.

(d) In case of return of the plaint, the same plaint may be presented to the proper Court. If the plaint is rejected, it cannot be re-filed. In such event, a fresh plaint is required to be filed.

(e) When a plaint is returned, the Court fees it bears may be used. The Court fees affixed to the rejected plaint cannot be used again.

(f) Rejection of a plaint is deemed to be a decree. Return of plaint is, however, an order.

(g) When a plaint is returned after the appearance of the defendant, the Court has the power to fix a date for appearance of the parties in the Court where the plaint is proposed to be filed, in order to obviate the necessity of summoning the defendant again. In case of rejection of the plaint, the Court has neither any competence nor any occasion to do so.

(h) An order for return of plaint is appealable save and except where the procedure specified in Order 7 Rule 10A has been followed. There is no second appeal. Rejection of a plaint being a decree is always appealable and what is more, second appeal also lies.

21. Decree - its chief element

(i) Formal expression of adjudication.

(ii) Adjudication of the rights of the parties with regard to all or any of the matters in controversy.

(iii) Conclusive determination of rights.

(iv) Must be in a suit.

22. Order - its elements

(a) it is a formal expression of a decision.

(b) it is given by a Civil Court.

(c) it is other than a decree.

23. Decree and Order - distinction

Decree and Order both are formal expressions of decisions given by a Civil Court. The essence of distinction between them lies in the nature of the decision.

The points of difference are given below in a tabular form:-

	Decree	Order
(a)	Every decree is appealable except a decree on consent vide Section 96.	Orders are generally not appealable except those specified in Section 104(1)

(b)	Second appeal lies on certain grounds vide Section 100.	There is no second appeal
(c)	Decree adjudicates and conclusively determines the rights of the parties.	May or may not finally determine the rights of the parties.
(d)	Decree may be preliminary or final.	Order cannot be preliminary.
(e)	Must be in a suit.	Need not necessarily be in a suit.
(f)	One decree is passed in a suit.	Several orders may be passed suit.

24. Decree - What it should contain (vide Order 20 Rule 6 CPC)
    (a) Number of the suit.
    (b) Description of the parties.
    (c) Particulars of the claims.
    (d) Reliefs granted or other determination of the suit.
    (e) Costs - by whom and to whom payable.
25. Judgement - what it should contain (vide Order 20 Rule 4)
    (a) Concise statements of the cases of the contending parties.
    (b) Points for determination.
    (c) Decisions thereon.
    (d) Reasons for such decisions.
    (e) Reliefs granted, if any.
26. Judgement and Decree - their co-relation
    (a) Decree follows the judgement.
    (b) Decree should accord with the judgement.

(c) Decree reflects the operative part of the Judgement.

(d) The date of the decree is the date on which the judgement was pronounced.

(e) Certified copy of the decree has to be filed for execution.

27. Preliminary decree and final decree - the points of difference

	Preliminary Decree	Final Decree
(a)	Conclusively determines the rights of the parties with regard to some matters in controversy but does not completely dispose of the suit.	Conclusively determines rights of the parties with regard to the remaining matters in controversy and completely disposes of the suit.
(b)	Further proceedings have to be taken for complete disposal of the suit.	No further proceeding is required to be taken.
(c)	It is a stage of working out the rights of the parties in the suit.	It finalises the process of litigation in the form of suit.
(d)	Final decree is based on preliminary decree.	If the preliminary decree is set aside in appeal, the final decree is superseded.

28. Examples of Preliminary Decree

A Decree for partition is passed in the preliminary form and thereafter, it is made final.

(a) Preliminary decree determines the shares of the parties in the suit property.

(b) Final decree makes division of the suit property and declares the allotment in favour of each co-sharer.

29. Interlocutory Order - What it is?

(a) “Interlocutory” means “provisional”, interim, ‘temporary’, not final.

(b) Interlocutory order is one that is made during the pendency of the suit which does not finally dispose of any dispute or claim in the suit itself.

(c) Examples -

(i) order appointing a receiver

(ii) order granting a temporary injunction against eviction forcibly

(iii) order issuing a commission for examination of witnesses

(iv) order directing sale of perishable goods

(v) orders relating to interrogatories, inspection, etc

30. Non-joinder and Mis-joinder of parties

(a) "Non-joinder of parties" - it means omission to join some person as a party to a suit, either as plaintiff or as defendant.

(b) "Mis-joinder of parties" - it means improper joining together of parties to a suit as plaintiffs or defendants.

(c) Objections as to non-joinder or mis-joinder of parties should be taken at the earliest opportunity (Order 2 Rule 13).

(d) A mis-joinder or non-joinder of parties is not fatal to the suit. The Court may deal with the rights of the parties actually before it (vide Order 1 Rule 9).

(e) The suit is, however, liable to be dismissed for non-joinder of a necessary party (vide the proviso to Rule 9 of Order 1).

(f) In case of mis-joinder of parties, the name of the plaintiff or the defendant improperly joined may be struck out under Order 1 Rule 10(2).

(g) In case of non-joinder of parties, a person may be added as a party provided that he ought to have been joined but actually not joined and without whose presence, the questions in suit cannot be completely decided Vide Order 1 Rule 10(2).

31. Necessary and Proper Parties

(a) Necessary parties are those parties whose presence is essential and in whose absence, no effective decree or order can be passed. They are parties which ought to have been joined within the meaning of Order 1 Rule 10(2).

(b) Proper parties are those parties whose presence is a matter of convenience to enable the Court to adjudicate more effectively and completely.

(c) Examples -

(i) In a suit for partition, all the co-owners are necessary parties.

(ii) In a suit against the Railway, Union of India is a necessary party.

(iii) The sub-tenant is a proper party and not a necessary party in a suit for eviction of the tenant on the ground of sub-letting.

5.0 LAW OF CRIMES

5.1 INDIAN PENAL CODE, 1860 – AT A GLANCE

Indian Penal Code - An Introduction

1. Title - Its meaning

(a) It consists of three words, namely:

- Indian

- Penal

- Code

(b) Out of these three, the key word is “code”.

Code - What it means ?

It is systematic, complete, written collection of a body of laws, arranged methodically in a coherent manner. A Code is the end product of codification. Codification is a process which consists of compilation arrangement, systemization and promulgation of a body of laws by the authority competent to do so.

Examples: Indian Penal Code, Criminal Procedure Code, Civil Procedure Code

(c) Codification - its advantages

i. Simplicity

ii. Symmetry

iii. Intelligibility

iv. Logical coherence

v. Certainty

(d) Penal - What it means ?

It is an adjective. It qualifies the noun "code". It means "relating to punishment".

Indian Penal Code is a penal statute, because it not only defines offences but also prescribes punishments for commission of such offences.

(e) "Indian"

The term "Indian" signifies that it is the penal code for India. The preamble indicates that the I.P.C. was enacted to provide a General Penal Code for India.

(f) India in the context of the IPC

IPC extends to the whole of India except the State of Jammu & Kashmir.

Article 1(3) of the Constitution of India, read with the First Schedule, will tell you the extent of the territory of India.

2. Historical Background

The year 1833 was very crucial in the history of development of law in British India. The Charter Act of 1833 was passed by the British Parliament with a view to facilitating codification of Indian Laws.

The Charter Act of 1833

(i) established an All India Legislature namely Governor General in Council, for the whole of British India.

(ii) created the office of Law Member in that Council.

(iii) provided for the appointment of a Law Commission.

Mr. T.B.Macaulay was appointed to fill the office of the Law Member. In Pursuance of the Charter Act of 1833, the first Law Commission was set up in 1834. Mr. Macaulay, later on Lord Macaulay, became its President. The first task assigned to the Law Commission was to prepare a draft penal code for India. A draft Code was drawn up and submitted to the Governor-General in Council on the 14th October 1837. The draft was then circulated to the Judges and the Legal Advisers of the crown for eliciting their comments and views. It was thereafter

revised thoroughly. The Bill so revised remained pigeon-holed for many years. It was ultimately passed and placed on the statute book on the 6th October, 1860.

3. Date of commencement of the Indian Penal Code

The IPC was brought into force on the first day of January 1862. Hence, its date of commencement is 1.1.1862. It has, therefore, been in force for more than 152 years.

4. I.P.C. its nature

(i) It is a codifying statute.

(ii) It contains the general law of crimes in India.

(iii) It is a substantive law. The Code of Criminal Procedure is an adjective law.

(iv) It is exhaustive in respect of the matters covered by it. It is a complete Code.

(v) It lays down the general principles of criminal liability.

(vi) It also provides for general exceptions to criminal liability.

(vii) It defines specific offences and prescribes punishments therefor.

5. Scheme of the Code

(a) The Code is broadly divided into twenty-three Chapters.

(b) To be more precise, the Code at present contains 26 Chapters, because three Chapters, namely, VA, IXA and XXA have been added subsequently.

(c) Each Chapter is again sub-divided into several Sections.

(d) Each Section has been given a numeral figure for distinguishing it from the others.

(e) The last Section of the IPC bears the number 511.

(f) That, however, does not imply that the IPC has 511 Sections.

(g) Many Sections have been added and several Sections have been omitted.

6. Arrangement

(a) There are two broad divisions of the Code, they are:

(i) General Principles and

(ii) Specific offences.

(b) Specific offences may be roughly categorised under two heads, namely (i) offences against the State and the public and (ii) Offences against the person and the property.

(c) The general principles are embodied in Chapters I, II, III, IV, V, VA and XXIII as detailed below:

Chapter I	-	Title and extent of operation of the Code.
Chapter II	-	Definition of certain terms.
Chapter III	-	Punishments. (General)
Chapter IV	-	General Exceptions
Chapter V	-	Abetment of offences
Chapter VA	-	Criminal conspiracy
Chapter XXIII	-	Criminal Attempts

(d) Specific offences

Chapter VI to	-	Offences against the State and the public
Chapter XV	-	Offences Relating to Religion
Chapter XVI	-	Offences affecting human body.
Chapter XVII	-	Offences against the properties (corporeal and Incorporeal)
Chapter XIX	-	Chap. XXII

7. Jurisdiction

(a) IPC has two kinds of jurisdiction, namely,

(i) Intra-territorial (Sec.2).

(ii) Extra-territorial (Sec.3 and 4).

(b) If any offence under the IPC is committed by a person within the territory of India, whether Indian or foreigner, he is liable to be prosecuted and punished by the Court in India having jurisdiction.

(c) If an Indian commits an act of commission or omission outside India, which is an offence under the IPC, he may still be prosecuted and punished under the IPC by a competent Indian Court, even though the act may not constitute an offence under the law of that land.

(d) If any offence under the IPC is committed on any ship or aircraft, registered in India, the person committing it shall be liable to be dealt with under the IPC by a competent Indian Court, even though the ship or aircraft, at the time of commission of such offence has remained outside India.

Note :

i. In this context, reference may be made to Sec.188 of the Criminal Procedure Code.

ii. A person cannot however, be prosecuted and punished twice for the same offence, one under the IPC and the other under the Foreign Law.

8. Elements of crime

(a) Broadly speaking, it has two elements.

i. Physical

ii. Mental

(b) The physical element is known as "*Actus Reus*". The mental element is called "*Mens Rea*".

(c) The literal meaning of "*Actus Reus*" is as given below :

Actus - deed

Reus - forbidden

(d) The literal meaning of *Mens Rea* is "guilty mind"

(e) According to Prof. Kenny, "*Actus Reus*" means "such result of human conduct as the law seeks to prevent.

(f) Strictly speaking, *Actus Reus* is constituted by the event and not by the activity which caused the event.

(g) *Actus Reus* may consist of both consequences and circumstances.

(h) In case of murder, the *actus reus* is the death of a human being, which is the event, caused by another human being (i) Death may be caused by various means, such as shooting, stabbing, poisoning etc. *Actus Reus* will really refer to the event, that is, the causing of the death of a human being by a human being, (ii) That does not mean that whenever death of a human being is caused by another human being, it shall constitute 'Murder'.

(i) The act alone is not sufficient. The act and the intent must combine together to constitute crime.

(j) The "intent" here is the mental component of crime, which is called "*Mens Rea*".

(k) *Mens Rea* is, therefore, an essential ingredient of crime, which refers to the condition of Mind. In other words, there must be a blame-worthy condition of mind, otherwise there shall not be a crime (subject to certain exceptions).

(l) There were so many umbrellas hanging outside your class-room. It was raining heavily. You had also brought your own umbrella. While leaving the class, you took away an umbrella believing genuinely that it was yours. Ultimately, it was found that it belonged to another probationer, although it looked like the one you had.

Did you commit theft? No,

Why? There was no "*Mens Rea*". You did not have the dishonest intention" to take umbrella belonging to some one else.

(m) We may, therefore, formulate:

Crime = *Actus Reus* + *Mens Rea*

This equation holds good in respect of all conventional and traditional crimes. We shall discuss the exceptions later on.

9. Concept of Crime - An analysis

From what has already been stated, it will appear that crime is

(a) either an act or an omission

(b) the act should be something forbidden by law.

(c) the omission must relate to something not performed, although Law commanded its performance;

(d) "omission" must be an illegal omission, that is, there must be a legal duty to do but it is not done. Example: The Officer-in-Charge of Mussoorie Police Station, sees an accused in the police lock-up being beaten up by a Head Constable. The O.C. does not do anything. It is not only an omission but it is also an illegal omission because it is his legal duty to prevent such act. The O.C. commits a crime.

(e) The act alone is not sufficient. The mind must be at fault. In other words, *Mens Rea* must be there.

(f) Law dubs an act or omission as crime, when the society perceives the same to be injurious. The question of injury, either actual or threatened is, therefore, associated with the concept of crime.

In this context, it is relevant to mention that according to the Russian Criminal Procedure, "A socially dangerous act shall be deemed to be a crime". Hence, social danger is a test of criminality.

(g) Crime is something, which must have resulted from human behaviour. If an 'ox' gores you and thereby breaks your bone, in circumstances where its master is not in any way responsible for negligence or rashness etc., then crime cannot be said to have been committed, although you suffered a fracture.

(h) Crime is a violation of that branch of public law, which may be described as "criminal law".

(i) The sanction prescribed for commission of crime is 'punishment'. Examples: If your servant steals your wrist watch, he may be jailed and also fined. Here, imprisonment and fine are the punishments.

If a husband poisons his wife to death with intention to kill her, he commits murder. He may be sentenced to death or imprisonment for life. These are the alternative punishments prescribed for murder.

10. Stages of a Crime

If a person commits a crime voluntarily or after preparation the doing of it involves four different stages. In every crime, there is first the intention to commit it, secondly, preparation to commit it, thirdly, attempt to commit it and fourthly the accomplishment. The stages can be explained as under-

1. Intention- Intention is the first stage in the commission of an offence and known as mental stage. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. But 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.

2. Preparation- Preparation is the second stage in the commission of a crime. It means to arrange the necessary measures for the commission of the intended criminal act. Intention alone or the intention followed by a preparation is not enough to constitute the crime. Preparation has not been made punishable because in most of the cases the prosecution has failed to prove that the preparations in the question were made for the commission of the particular crime.

If A purchases a pistol and keeps the same in his pocket duly loaded in order to kill his bitter enemy B, but does nothing more. A has not committed any offence as still he is at the stage of

preparation and it will be impossible for the prosecution to prove that A was carrying the loaded pistol only for the purpose of killing B.

Preparation When Punishable- Generally, preparation to commit any offence is not punishable but in some exceptional cases preparation is punishable, following are some examples of such exceptional circumstances-

a) Preparation to wage war against the Government - Section 122, IPC 1860;

b) Preparation to commit depredation on territories of a power at peace with Government of India- Section 126, IPC 1860;

c) Preparation to commit dacoity- Section 399, IPC 1860;

d) Preparation for counterfeiting of coins or Government stamps- Sections 233-235, S. 255 and S. 257;

e) Possessing counterfeit coins, false weight or measurement and forged documents. Mere possession of these is a crime and no possessor can plead that he is still at the stage of preparation- Sections 242, 243, 259, 266 and 474.

3. Attempt- Attempt is the direct movement towards the commission of a crime after the preparation is made. According to English law, a person may be guilty of an attempt to commit an offence if he does an act which is more than merely preparatory to the commission of the offence; and a person will be guilty of attempting to commit an offence even though the facts are such that the commission of the offence is impossible. There are three essentials of an attempt: -

a) Guilty intention to commit an offence;
b) Some act done towards the commission of the offence;
c) The act must fall short of the completed offence.

Attempt Under The Indian Penal Code, 1860- The Indian Penal Code has dealt with attempt in the following four different ways-

a. Completed offences and attempts have been dealt with in the same section and same punishment is prescribed for both. Such provisions are contained in Sections 121, 124, 124-A,

125, 130, 131, 152, 153-A, 161, 162, 163, 165, 196, 198, 200, 213, 240, 241, 251, 385, 387, 389, 391, 394, 395, 397, 459 and 460.

b. Secondly, attempts to commit offences and commission of specific offences have been dealt with separately and separate punishments have been provided for attempt to commit such offences from those of the offences committed. Examples are- murder is punished under section 302 and attempt to murder to murder under section 307; culpable homicide is punished under section 304 and attempt to commit culpable homicide under section 308; Robbery is punished under section 392 and attempt to commit robbery under section 393.

c. Thirdly, attempt to commit suicide is punished under section 309;

d. Fourthly, all other cases [where no specific provisions regarding attempt are made] are covered under section 511 which provides that the accused shall be punished with one-half of the longest term of imprisonment provided for the offence or with prescribed fine or with both.

4. Accomplishment or Completion- The last stage in the commission of an offence is its accomplishment or completion. If the accused succeeds in his attempt to commit the crime, he will be guilty of the complete offence and if his attempt is unsuccessful he will be guilty of an attempt only. For example, A fires at B with the intention to kill him, if B dies, A will be guilty for committing the offence of murder and if B is only injured, it will be a case of attempt to murder.

11. Motive

(a) Intention is, however, not to be confused with Motive.

(b) Motive is what prompts a person to form an intention.

(c) A crime is generally not committed for the sake of crime itself. There is always an ulterior objective. In the context of a crime, if you ask why it was committed the answer is what may be called as “Motive”.

(d) ‘X’ was murdered. Why ?

Ans. For gain For revenge

Here, gain or revenge, as the case may be, is the motive behind the murder.

(e) Evidence of motive is relevant but not essential for the establishment of a crime.

(f) Motive is relevant, because it throws or tends to throw light over "Intention" which is covered by the expression "*Mens Rea*". An evil intention is a form of *Mens Rea*.

(g) Absence of Intention may be a defence at a criminal trial but absence of motive is not. Sometimes, Motive is known only to the criminal. That apart, a motiveless crime is also a crime.

(h) Motive does not affect criminal liability, although it may be taken into account in determining the nature and quantum of punishment to be inflicted upon the guilty person.

(i) Motive, however, pure or laudable it may be, will not exonerate the criminal.

Examples:

A mother kills her minor son, who is suffering from an incurable disease and having extreme unbearable pain, out of compassion. She is as much guilty of murder as any other person.

A low paid employee, while under severe financial strain, has not money. His wife is critically ill and will die if a particular injection is not administered to her immediately. He steals that medicine from a pharmacy in order to save the life of his wife. His motive, however, pure it may be, will not excuse him from the criminal charge of theft.

5.2 THEORIES OF PUNISHMENT & PUNISHMENTS UNDER IPC

THEORIES OF PUNISHMENT AND PUNISHMENTS UNDER IPC

Criminal Law reflects those fundamental social values expressing the way people live and interact with each other in the society. It uses the 'stick' of punishment as a means of reinforcing those values and securing compliance therewith. In this way, criminal law seeks to protect not only the individual, but also the very structure and fabric of society from undesirable, nefarious and notorious activities and behavior of such individuals and organizations who try to disrupt and disturb public peace, tranquility and harmony in the society. The object of criminal legislation is to prevent perpetration of acts classified as a crime, because they are regarded as being socially damaging. The transgression of such harmful acts in modern times is prevented by a threat or sanction of punishment administered by the State. In other words, punishment is the sanction imposed on an accused for the infringement of the established rules and norms of the society.

The object of punishment has been summarized by Manu, the Great Hindu law-giver, in the following words:

Punishment governs all mankind; punishment alone preserves them; punishment wakes while their guards are asleep; the wise considers the punishment (danda) as the perfection of justice.

The protection of society and security of person's life, liberty and property is an essential function of the state. This could be achieved through instrumentality of criminal law by imposing appropriate sentence and stamping out criminal proclivity. The aim of protecting society is sought to be achieved by application of the principle of deterrence, prevention, retribution and reformation. Of these, deterrence is virtually regarded as the main function of punishment, the others being merely secondary.

(i) Deterrent theory:

According to this theory, the object of punishment is not only to prevent the wrong-doer from doing a wrong a second time, but also to make him an example to others who have criminal tendencies. Salmond considers deterrent aspects of criminal justice to be the most important for control of crime. Thus, the commission of every offence must be made a bad bargain.

The deterrent theory was the basis of punishment in England in the medieval period. The culprits were subjected to the severe punishment of death by stoning and whipping. In India, the penalty of a death sentence or mutilation of the limbs was imposed even for petty offences of forgery and stealing, etc., during the Mughal period. Even today in most of the Muslim countries, such as Pakistan, Iran, Iraq and Saudi Arabia, the deterrent theory is the basis of penal jurisprudence.

(ii) Preventive theory:

Another object of punishment is prevention or disablement. Offenders are disabled from repeating the crime by awarding punishments, such as death, exile or forfeiture of an office. By putting the criminal in jail, he is prevented from committing another crime. According to Paton on Jurisprudence 'The preventive theory concentrates on the prisoner and seeks to prevent him from offending again in the future. The death penalty and exile serve the same purpose of disabling the offender.'

(iii) Retributive theory:

In primitive society, punishment was mainly retributive. The person wronged was allowed to have revenge against the wrong doer. The principle of 'eye for an eye', 'a tooth for a tooth', 'a nail for a nail', 'limb for limb', was the basis of criminal administration. According the Justice Holmes: 'It is commonly known that the early forms of legal procedure were grounded in vengeance.'

The advocates of this theory plead that the criminal deserves to suffer. Retributive punishment gratifies the instinct for revenge or retaliation, which exists not merely in the individual wronged, but also in society at large. However, in modern times the idea of private

revenge has been forsaken and the State has come forward to effect revenge in place of the private individual.

(iv) Reformative theory:

According to the reformative theory, the object of punishment is the reformation of criminals. It is maintained that punishment tends to reform criminals and that it accomplishes this by instilling in them a fear of repetition of the punishment and a conviction that crime does not pay, or by breaking habits that the criminals have formed, especially if the penalty is a long period of imprisonment which gives the prisoner no opportunity for improvement.

The object of punishment should be to reform the offender. The criminal must be educated and taught some art or craft or industry during his term of imprisonment, so that he may be able to lead a good life and become a responsible and respectable citizen after release from jail.

(v) Multiple Approach Theory:

A perfect system of criminal justice could never be based on any single theory of justice. It would have to be a combination of all. Every theory has its own merits and every effort should be made to extract the good points of each and integrate it so that best of all could be achieved. Punishment should be propotionate to the nature and gravity of the crime. A first offender should be leniently treated. Special treatment should be given to a juvenile delinquent. A criminal should be able to secure his release by showing improvement in his conduct.

The Supreme Court in *Narotam Singh v. State of Punjab*,[22] has said that reformative approach to punishment should be the object of criminal law, in order to promote rehabilitation without offending community conscience and to secure social justice.

However, Justice Krishna Iyer in *M.H. Hoskot v. State of Maharashtra,*[23] cautioned that the Court should not confuse the correctional approach with prison treatment and nominal

[22] (1979) 4 SCC 505.

[23] (1978) 3 SCC 544.

punishment verging on decriminalization for serious social and economic offences. Soft-sentence justice is gross injustice when many innocents are the potential victims.

Punishment under the Indian Penal Code

The Indian Penal Code in sections 53 to 75 has provided for a graded system of punishment to suit the different categories of offences for which the offenders are accountable under it. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. Section 53 prescribes five types of punishments to be meted out to a person convicted of a crime under the Code, depending on the nature and gravity of the offence, viz. (i) Death; (ii) Imprisonment for life; (iii) Imprisonment, rigorous with hard labour or simple; (iv) Forfeiture of property; and (v) Fine.

Death Penalty under the Indian Penal Code:

The sentence of death is the most extreme punishment provided under the Code in eight cases. Regarding 'death' as a punishment, the authors of the Code have categorically stated that it ought to be very sparingly inflicted in exceptional cases where either murder or the highest offence against the State has been committed. Death sentence under the Code to which offenders may be sentenced are:

(1) Waging or attempting to wage war or abetting waging of war against the Government of India (Section 121)

(2) Abetting mutiny actually committed (Section 132)

(3) Giving or fabricating false evidence upon which an innocent person suffers dealth (Section 194)

(4) Murder which may be punished with death or life imprisonment (Section 302)

(5) Abetment of suicide of a minor or insane or intoxicated person (Section 305)

(6) Attempt to murder by a person under sentence of imprisonment for life, if hurt is caused (Section 307)

(7) Kidnapping for ransom, etc (Section 364A)

(8) Dacoity accompanied with murder (Section 369)

In addition to the above stated cases, IPC, provides for death sentence in the following conditions:

(9) Criminal conspiracy to commit any offence punishable with death if committed in consequence thereof for which no punishment is prescribed (Section 120B)

(10) Joint liability extending the principle of constructive liability on all the persons who conjointly commit an offence punishable with death, if committed in furtherance of common intention or common object of all (Section 34 and 149)

(11) Abetment of offences punishable with death (Section 109)

Delay in execution of Death Sentence does not by itself entitle commutation to life imprisonment:

In Sher Singh v. State of Punjab,[24] the apex Court held that delay in execution of death sentence, exceeding two years, by itself does not violate Article 21 of the Constitution to entitle a person under sentence of death to demand quashing of sentence and converting it into sentence of imprisonment. Finally, the constitutional bench of the Apex Court held that the prolonged delay in execution of death sentence does not automatically entitle the accused to a lesser sentence of life imprisonment.

Power of pardon:

The Constitution of India has empowered the President of India and the Governors of the States under Articles 72 and 161 respectively with the power to grant pardon (absolute or conditional), reprieve (temporary suspension of punishment fixed by law), respite (postponement to a future date of execution of a death sentence), remission (to reduce the amount of punishment without changing the character of the punishment), or to suspend,

[24] AIR 1983 SC 465.

remit or commute the sentence of any person convicted of offences (i) against the Union laws (ii) sentence by Court Martial, and (iii) in all cases of death sentence.

The prerogative of mercy is in essence an executive function to be exercised by the head of the State after taking into consideration a number of factors which may not be germane for consideration by a court of law.

Imprisonment

The Code does not in general prescribe for imposition of minimum penalty for offences punishable under the Penal Code except in a few cases, such as murder, waging war against the Government, dowry death, sexual offences, such as rape etc. A wide discretion has been accorded to the courts, within the maximum limits of punishment prescribed for different offences, to award sentence in each case on its individual merit. The severity of punishment is not uniform in all cases. It varies according to the nature of the offence, the intention, age, mental condition of the accused and the circumstances in which the offence is committed.

Imprisonment for life: This means a sentence of imprisonment running throughout the remaining period of a convict's natural life. As regards, the nature of punishment, the Supreme Court of India in the case of *KM Nanavati* v. *State of Maharashtra,*[25] held that imprisonment in such a case meant rigorous imprisonment for life and not simple imprisonment.

Section 57 does not state that imprisonment for life shall be reckoned as imprisonment for 20 years. It is only the government that can remit, suspend or commute the sentence. A sentence for life would endure for the lifetime of the accused, as it is not possible to fix a particular period of a prisoners' death, so any remission given under the rules cannot be regarded as a substitute for a sentence for life.

Solitary confinement: is an isolation of the prisoner from other co-prisoners and complete segregation from society. It is an extreme measure and is to be rarely invoked in exceptional

[25] AIR 1962 SC 605.

cases, of unparalleled brutality and atrocity. The Supreme Court in *Kishore Singh Ravinder Dev* v. *State of Rajasthan,*[26] held that solitary confinement or putting fetters could be imposed only in exceptional cases for security reasons.

The Supreme Court has held in Sunil Batra that any harsh isolation of a prisoner from the society of fellow prisoners by cellular detention under the Prison's Act, 1894 (Section 29 and 30) is penal and it must be inflicted only in accordance with fair procedure and in the absence of which the confinement would be violative of Article 21 of the Constitution.

Fine

In imposing a fine it is necessary to have as much regard for the pecuniary circumstances of the accused as for the character and magnitude of the offence, and where a substantial term of imprisonment is inflicted, an excessive fine should not accompany except in exceptional cases. Offence and penalty must be propotionate to the nature of crime. However, a heavy fine that the accused is unable to pay should not be imposed. The paying capacity of the accused should be taken into account while awarding fine. The court should not ignore the youth of the offender since, without doubt, the fine imposed on a child will have to be paid by the parent. Imprisonment in default of payment of a fine can only be simple imprisonment.

Following are the sentencing factors

While considering the punishment the court should consider the following

a) Offense Characteristics – loss value, Age, Victim

b) Harm caused by the offence – great bodily harm, emotional harm, force, threat

c) Role of offender – leader, minimal, other role

d) Criminal history- no record/ prior similar offences

e) Aggravating factors – dangerous weapons / S. 110 Cr P C

[26] AIR 1962 SC 605.

Landmark Judgments dealing with punishment

Gauri Shanker Sharma v. *State of UP,*[27] in this case death of a man took place in custody on account of third degree methods. The Supreme Court set aside the acquittal granted by the High Court and restored the sentence of 7-year RI. The Court was of the view that in such cases, deterrent punishment should be awarded.

Inder Singh v. *State*,[28] the SC directed – young accused of the case are not given any degrading work and they are given the benefit of liberal parole every year if their behaviour shows responsibility and trustworthiness.

Bachan Singh v. *State of Punjab,*[29]

The minimum sentence awardable under Sec 302 being life imprisonment, it was held that the sentence cannot be reduced.

Jagmohan Singh v. State of UP,[30] *c*hallenged Death sentence as unconstitutional (violation of fundamental rights). SC held that death penalty is valid.

Kehar Singh v*. State,*[31] Kehar Singh was considered by the Supreme Court as one belonging to the "rarest of the rare" category. It was not simply a murder of a human being. It was the crime of assassination of the duly elected Prime Minister of the country. There was no personal motivation. The grievance was as an action taken by the Government in the exercise of constitutional powers and duties. The security guards who were duty bound to protect the person of the Prime Minister themselves assumed the role of assassins. It was a betrayal of the worst sort. It was a murder most foul and senseless. Those who executed the plot and those who conspired with them would, therefore, all fall in the "rarest of rare" category.

[27] AIR 1990 SC 709
[28] AIR 1978 SC 1091
[29] AIR 1980 SC 898
[30] *1973 CrLJ 370*
[31] AIR 1988 SC 1883

Vasanta Sampat Dupare v. *State of MH*,[32] the rape of a minor girl child is nothing but a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a girl child & the soul of society and such a crime is aggravated by the manner in which it has been committed. – RAREST OF RARE CASE

Molai v. *State of M.P.,*[33] the victim, a 16-year-old girl was alone in her house and was preparing for her examination. The two accused were working in the house. They took advantage of the fact of her being alone. They raped her, strangulated her by using her undergarments and caused injuries on her person with a sharp weapon. They threw her body into a septic tank at the back side of the house, which shows a disregard of respect for human dead body. No mitigating circumstances were pointed out for reducing sentence. The Court said that it was "rarest of rare" cases, in which capital punishment was rightly awarded to both the accused.

[32] (2015) 1 SCC 253

[33] AIR 2000 SC 177

5.3 GENERAL EXCEPTIONS UNDER IPC

Meaning of General Exceptions

Certain acts, or acts in particular circumstances have been removed from the ambit of being treated as offences under the IPC by virtue of Chapter IV of the IPC. The provisions of the IPC must be read in such a manner so as to be subject to the exceptions contained in Chapter IV.

Burden of Proving Exception

The onus of proving that an act lies within an exception is on the accused. Under S. 105 of the Indian Evidence Act, 1872, the burden of proving the existence of circumstances bringing the case within exceptions lies on the accused, and the court shall presume the absence of such circumstances.

In *Nanavati*, the Court said that it shall regard the non-existence of such circumstances as proved, until they are disproved. (*K. M.Nanavati* v. *State of Maharashtra*, AIR 1962 SC 605)

Standard of Proof for Proving Exception

The Supreme Court has held that the standard of proof required for an accused to discharge his burden of proving that his acts come within a general exception is that of preponderance of probabilities. (*Vijayee Singhand others* v. *State of Uttar Pradesh*, (1990) 3 SCC 190). The test is not whether the accused has proved beyond all reasonable doubt that he comes within an exception, but whether in setting up the defence, he has established a reasonable doubt in the case of the prosecution and thereby earned his right of acquittal. (*Kanali Barui* v. *Subhas Das*, 1983 Cri. L. J. 1474)

Although an exception must normally be proved in trial by the accused, the Supreme Court in *Vadilal Panchal* v. *Dattatraya Dulaji Ghadigaonker and Another*, AIR 1960 SC 1113, has recognized that where an act falls within one of the exceptions provided in the IPC, and this is apparent on the complaint itself, the Magistrate is within her powers to decline to issue process.

The Supreme Court held:

"*The short question before us is - was the High Court right in its view that when a Magistrate directs an enquiry under S.202 of the Code of Criminal Procedure for ascertaining the truth or falsehood of a complaint and receives a report from the enquiring officer supporting a plea of self-defence made by the person complained against, it is not open to him to hold that the plea is correct on the basis of the report and the statements of witnesses recorded by the enquiring officer?* Must he, as a matter of law, issue process in such a case and leave the person complained against to establish his plea of self-defence at the trial? *It may be pointed out here that the High Court itself recognised that it would not be correct to lay down a proposition in absolute terms that whenever a defence under any of the exceptions in the Indian Penal Code is pleaded by the person complained against, the Magistrate would not be justified in dismissing the complaint and must issue process. Said the High Court: "As we have already observed, if there is a complaint, which itself discloses a complete defence under any of the exceptions, it might be a case where a Magistrate would be justified in dismissing such a complaint finding that there was no sufficient ground to proceed with the case.*"

Exceptions Provided under Chapter IV: General Categories

Mistake of Fact

S.76 of the IPC excuses a person who has done what by law is an offence under a mistake of facts (and not under a mistake of law), that lead her to believe in good faith that she was bound by law to do such an act.

Illustration: A, soldier, fires on a mob by the order of his superior officer, in conformity with the command of the law. A has committed no offence.

Illustration: A, an officer of a court, being ordered by that court to arrest Y, and after due enquiry, believing Z to be Y, arrests Z. A has committed no offence.

In the case of Chaman Lal (1940) 21 Lah 521; Mangal Singh, 1981 Cr. LJ 84 (Cal) : Held that for a manifestly illegal superior order, that is an order which is illegal on the face of it, e.g., to kill an innocent bystander or to torture an accused in custody or to fire on a group of people who have assembled for a lawful purpose, the superior order affords no protection to a subordinate.

Act of Judge when Acting Judicially - Section-77: Under this section a Judge is exempted not only in those cases in which he proceeds judicially in the exercise of a power which the law gives him, but also in cases where he, in good faith, exceeds his jurisdiction and has no lawful powers. It protects judges from criminal process just as the Judicial Officers Protection Act, 1850, saves them from civil suits.

Act done Pursuant to the Judgment or Order of Court - Section-78: This section is merely a corollary to Section 77. It affords protection to officers acting under the authority of a judgment, or order of a Court of Justice. It differs from Section 77 on the question of jurisdiction. Here, the officer is protected in carrying out an order of a Court which may have no jurisdiction at all, if he believed that the Court had jurisdiction; whereas under section 77 the Judge must be acting within his jurisdiction to be protected by it.

S.79 of the IPC

S.79 of the IPC excuses a person who has done what by law is an offence under a mistake of fact (and not under a mistake of law) that lead her to believe in good faith that she was justified in law to do such an act.

Illustration: A sees Z commit what appears to A to be a murder. A, in the exercise, to the best of his judgment exerted in good faith, of the power which the law gives to all person of apprehending murderers in the act, seizes Z,in order to bring Z before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self-defence.

S.76 and 79 of the IPC are based on the principle that ignorance of a fact may be excused, but ignorance of the law cannot be excused. The distinction between Ss.76 and 79of the IPC is that in the former, a person is assumed to be *bound*, and in the latter to be *justified*, by law.

Accident

S.80 of the IPC exempts the commission of any innocent or lawful act, done in an innocent or lawful manner, which has led to an unforeseen result that may have ensued from an accident or misfortune. For the accused to avail of this exception, it must be shown that due care and caution were exercised at the time of commission of the act. *Bhupendrasinh A. Chudasama* v.

State of Gujarat, AIR 1997 SC 3790.

Absence of Criminal Intent

These exceptions, including for unsoundness of mind and intoxication, are based on the premise that the accused, while committing the acts in question had no criminal/*malafide* intent. For instance, under S.82 of the IPC, acts done by a child under the age of seven are not offences.

The principle in Sec. 81 is that where in a grave and sudden emergency, one of the two evils is inevitable, it would be logical as well as legal to direct the events so as to suffer the slighter of them. Sec. 81 of the code in essence adopts the above principle but it adopts those principles only which are conditional. The benefit of this section can be availed if act is done in good faith for the purpose of avoiding other evils. Lack of mens rea shall be established.

Section 83 relates to an act done by a child above seven years of age and under twelve. It does not contemplate conclusive presumption of innocence of the child. Benefit is given to a child who has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct.

Unsound Mind

S.84 of the IPC lays down the test of responsibility in cases of alleged unsoundness of mind. There is no definition of unsoundness of mind' under the IPC. However, courts have treated this term as being equivalent to insanity.

Insanity itself, however, has no precise definition and is a term used to describe varying degrees of mental disorder. Therefore, every person suffering from some sort of a mental ailment is not ipso facto exempted from criminal responsibility and thereby within the ambit of the protection provided by S.84 of the IPC. (*Bapu and Gajraj Singh* v. *State of Rajasthan*, (2007) 8 SCC 66)

A person is exonerated from liability of doing an act on the ground of unsoundness of mind, if she, at the time of doing the act, is either incapable of knowing the nature of the act, or that she is doing what is either wrong or contrary to law.

In *Nanney Khan* v. *State (Delhi Administration)*, (1986) 2 Crimes 328 (Del), since no questions were put to witnesses regarding the alleged insanity of the accused at the time of the commission of the crime, and since the accused didn't set up any defence of insanity, the Court held that a plea of insanity before the appellate court taken for the first time cannot prevail, and the accused is not entitled to the benefit of S.84 of the IPC.

In *Jagdish* v. *State of M.P.*, JT 2009 (12) SC 300, the Supreme Court rejected a plea of insanity under S. 84 of the IPC that was taken by the accused/convict for the first time before the Supreme Court.

Intoxication

Under S.85 of the IPC, a person will be exonerated from liability for doing an act while in a state of intoxication, if at the time of the act, the person (due to intoxication) was incapable of knowing the nature of his act, or that he was doing what was either wrong or contrary to law.

Consent

S.87 of the IPC provides that nothing is an offence if the person to whom harm is caused is above eighteen years of age and has given consent to suffer such harm. The provision however, provides that the act for which consent is offered should not be intended to cause death or grievous hurt.

Illustration: A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence.

Trifling Acts

S.95 of the IPC provides that if the harm caused by an act is so slight that a person of ordinary sense and temper would not complain of such harm, the act would not be an offence. This defence is often known as the 'defence of triviality'.

The High Court in revision came to the conclusion that the injuries were trivial and the case was one in which the injury intended to be caused was so slight that a person of ordinary sense and temper would not complain of the harm caused thereby and accordingly set aside

the conviction and acquitted the accused.

While upholding the decision of the High Court, the Supreme Court held:

"*The next question is whether, having regard to the circumstances, the harm caused to the appellant ... ..was so slight that no person of ordinary sense and temper would complain of such harm. S.95 is intended to prevent penalisation of negligible wrongs or of offences of trivial character. Whether an act, which amounts to an offence, is trivial would undoubtedly depend upon the nature of the injury, the position of the parties, the knowledge or intention with which the offending act is done, and other related circumstances. There can be no absolute standard or degree of harm which may be regarded as so slight that a person of ordinary sense and temper would not complain of the harm. It cannot be judged solely by the measure of physical or other injury the act causes ... An assault by one child or another, or even by a grown-up person on another, which causes injury may still be regarded as so slight, having regard to the way and station of life of the parties, relation between them, situation in which the parties are placed, and other circumstances in which harm is caused, that the victim ordinarily may not complain of the harm". (Neelam Mahajan Singh* v. *Commissioner of Police & Others, 1994 (2) Crimes 75)*

Private Defence

Ss.96 to 106 of the IPC deal with the right of private defence and are a recognition of the right of a person to protect his or her life and property against the unlawful aggression of others.

S.96 of the IPC states that nothing is an offence which is done in the exercise of the right of private defence. S.97 of the IPC defines the right of private defence of the body and property. Every person has a right to defend his own body and the body of any other person against any offence affecting the human body, subject to the restrictions contained in S. 99 of the IPC.

Among the restrictions stated in S.99 of the IPC, the provision stipulated the extent to which the right of private defence may be exercised, namely that it in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. Further, S. 100 details instances in which the right of private defence of the body extends to causing death.

For the plea of right to defence to succeed in totality, it must be proved by the accused that there existed a right to private defence in favour of the accused, and that this right extended to causing death. Hence, if the Court were to reject this plea, there are two possible ways in which this may be done. On one hand, it may be held that there existed a right to private defence of the body. However, more harm than necessary was caused or, alternatively, this right did not extend to causing death. The other situation is where,on appreciation of facts, the right of private defence is held not to exist at all. (*Bhanwar Singh* v. *State of MP,* (2008) 16 SCC 657)

IPC Section100. When the right of private defence of the body extends to causing death:

The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:--

Firstly-Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly-Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly-An assault with the intention of committing rape;

Fourthly-An assault with the intention of gratifying unnatural lust;

Fifthly-An assault with the intention of kidnapping or abducting;

Sixthly-An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

To invoke the provisions of sec 100, I.P.C., four conditions must exist:

• That the person exercising the right of private defense must be free from fault in bringing about the encounter.

• There must be present an impending peril to life or of great bodily harm

• There must be no safe or reasonable mode of escape by retreat;

• There must have been a necessity for taking the life.

Moreover before taking the life of a person four cardinal conditions must be present:

(a) the accused must be free from fault in bringing the encounter;

(b) presence of impending peril to life or of great bodily harm, either real or apparent as to create an honest belief of existing necessity;

(c) no safe or reasonable mode of escape by retreat; and

(d) a necessity for taking assailant's life.

IPC Section 103. When the right of private defence of property extends to causing death:

The right of private defence of property extends, under the restrictions mentioned in Section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely;

First-Robbery;

Secondly-House-breaking by night;

Thirdly-Mischief by fire committed on any building, tent or vessel, which building, tent of vessel is used as a human dwelling, or as a place for the custody of property; Fourthly-Theft, mischief, or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

IPC Section 103 provides the right of private defence to the property whereas IPC Section 100 is meant for exercising the right of private defence to the body of a person. It justifies homicide in case of robbery, house breaking by night, arson and the theft, mischief or house trespass which cause apprehension of grievous harm. If a person does not have possession over the property, he cannot claim any right of private defence regarding such property. Right to dispossess or throw out a trespasser is not available to the true owner if the trespasser has been successful in accomplishing his possession to his knowledge. This right can be only exercised against certain criminal acts which are mentioned under this section.

6. PROCEDURE IN CRIMINAL CASES

6.1 ARREST, BAIL, SEARCH

THE CIVIL AND CRIMINAL PROCEDURE CODE OF BHUTAN, 2001
Arrest - CHAPTER 25, 26, 27, 28, 34
Search - CHAPTER 29, 30, 31, 32, 33
Bail - CHAPTER 41

Arrest

Arrest means deprivation of the personal liberty of a person by a person having legal authority to do so. S.60A of the Cr.P.C. (added by way of amendment in 2009) now provides that no arrest shall be made except in accordance with the provisions of the Code or any other law, for the time being in force, that provides for arrest.

The police exercise its powers of arrest in two cases, either with the use of a warrant, or without such warrant. S.87 of the Cr.P.C. also empowers a Magistrate to issue warrants, regardless of whether the case is a summons case or a warrants case. S.204 of the Cr.P.C. provides that after taking cognizance of a warrant case, a Magistrate may issue warrants of arrest.

It is important to remember that the words 'arrest' and 'custody' are not synonymous. (*Niranjan Singh* v. *Prabhakar Raja Ram Kharote*,)[34] A person can be in custody not merely when the police arrest him/her, but also when the police produces him/her before a Magistrate and gets a remand to judicial or other custody.
A person can be stated to be in the custody of the Court (judicial custody) when s/he surrenders before Court and submits to its directions. Arrest is therefore a form of custody.

[34] (1980) 2 SCC 559

Illustration: A is accused of a cognizable offence and surrenders before the Court. A is now in judicial custody.
A is accused of a cognizable offence and is arrested by the police. A is now in police custody.

S.41: Power to Arrest Without a Warrant

S.41 deals with cases where the police is empowered to arrest without a warrant. The police have no powers to arrest a person without a warrant in a non-cognizable case, except in certain specified circumstances.

A person can also be arrested by a police officer under S.42 of the Cr.P.C. if she has committed a non-cognizable offence in the presence of such police officer, and has failed to give the police officer her name and residence.

S. 43 provide that in certain limited circumstances, a private person may arrest a person or cause such person to be arrested. S. 44 provides for powers of a Magistrate to effect arrest.

S.46: Arrest how made

S.46 provides that in making an arrest, a police officer must actually touch or confine the body of a person arrested, unless the person to be arrested submits to custody by words or by action.

S.46 empowers a police officer to use all means necessary to effect arrest, barring causing the death of a person who is not accused of an offence punishable with death or imprisonment for life.

Bail

Once an accused is arrested, she has a right to be considered for release on bail. Bail connotes the process of procuring the release of an accused charged with certain offences by ensuring her future attendance in the court for trial, and to compel her to remain within the jurisdiction

of the court.

During the course of trial, an accused has a right to be presumed to be innocent until proven guilty. Pre-trial detention is the anti- thesis to this proposition. While balancing the rights of the accused and the right of society to protect itself from crime, however, it becomes necessary at times to continue pre-trial detention of the accused person. This pre-trial detention is open to challenge by the accused, who can seek bail under various provisions of the Code. Bail seeks to restore liberty to the arrested person without compromising the objective of his arrest. Release on bail, apart from release where conditions under S.167(2) of the Cr.P.C. are satisfied, is a matter of discretion of a court and varies in each fact situation.

Chapter XXXIII contains provisions as to bails and bail bonds. Apart from Chapter XXXIII, bail can also be granted under various provisions of the Code, including Ss.81(1), 167 (2), and 389 of the Cr.P.C.

Illustration: T is arrested on a charge of theft. On the 59th day of her custody, the police express their inability to file a charge sheet against her within 60 days. T is now entitled to be released on bail under S.167 of the Cr.P.C.

S.436 of the Cr.P.C.

Under S.436 of the Cr.P.C., when any person, other than a person accused of a non bailable offence, is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before the court and is prepared to give bail, such person shall be released on bail. It has been held in *Rasik Lal* v. *Kishore Khan Chand Wadhwani*,[35] that the right to claim bail under S.436 of the Cr.P.C. in a bailable offence is an absolute and indefeasible right. The Supreme Court further held that in a bailable offence, there can be no question of discretion in granting bail since the words of S.436 of the Cr.P.C. are imperative in

[35] AIR 2009 SC 1349

nature.

Illustration: P is arrested for a charge under S. 471 of the IPC. The offence is cognizable but bailable. P ought to be granted bail under S.436 of the Cr.P.C. at the time of her arrest, subject to P being willing to comply with the bail conditions.

S.436(A) of the Cr.P.C.: Maximum Period for which an Under-trial can be Detained

This provision was inserted by way of an amendment in 2005 (with effect from March 26, 2006). This provision provides that when a person has, during the period of investigation, inquiry, or trial of an offence under any law, undergone detention for a period extending up to one half of the maximum period of imprisonment specified for that offence under that law, she shall be released on her personal bond. This provision will not apply to cases where a person is undergoing detention for an offence for which the punishment of death has been specified as one of the punishments of that law.

Ss.437 and 439 of the Cr.P.C.: Bail in Non-Bailable Offences

S.437 of the Cr.P.C.gives a court (other than a High Court or a Court of Sessions) or a police officer the power to release the accused on bail in a non-bailable case, unless there appears reasonable grounds that the accused has been guilty of an offence punishable with death or with imprisonment for life.

S.439 of the Cr.P.C. grants special powers to the High Court or Court of Sessions to direct the release of a person on bail. The power to grant bail under S.437 of the Cr.P.C.is granted to Courts other than the High Court or the Court of Session, and the powers under S.437 of the Cr.P.C. cannot be treated at par with the powers of the Sessions Court and High Court under S.439 of the Cr.P.C.

In *State of Rajasthan* v. *Balchand*,[36] the Supreme Court held that the basic rule is bail not jail,

[36] AIR 1977 SC 2447

except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating utter troubles in the shape of repeating offences or intimidating witnesses. Grant of bail is the rule and its refusal is the exception. - *Moti Ram* v. *State of Madhya Pradesh*.[37]

In *Jayendra Saraswati Swamigal* v. *State of Tamil Nadu*,[38] the considerations, which normally the Court weighs while granting bail in non-bailable offences, were set out as the following:

- The nature and seriousness of offence;
- The character of the evidence;
- Circumstances which are peculiar to the accused;
- A reasonable possibility of the presence of the accused not being secured at the trial;
- Reasonable apprehension of evidences being tampered with; and
- The larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case.

These considerations are not exhaustive, and bail ought to be considered on the basis of the facts of each case and the circumstances in which bail is being sought by the accused.
Illustration: A is arrested in a cognizable offence after having evaded summons and non-bailable warrants in the case and having absconded for many years. The fact that A had absconded will be looked into by the Court while considering A's fresh application for bail.

Decisions of the Supreme Court in relation to grant/refusal of bail include *Ram Govind Upadhyay* v. *Sudarshan Singh*,[39] *Puran*v. *Ram Bilas*,[40] *Kalyan Chandra Sarkar* v. *Rajesh Ranjan & Pappu Yadav*.[41]

[37] (1978) 4 SCC 47
[38] AIR 2005 SC 716
[39] (2002) 3 SCC 598
[40] (2001) 6 SCC 338
[41] (2004) 7 SCC 528

Bail granted under S.437 of the Cr.P.C. can also be cancelled under S.437(5) of the Cr.P.C. Any Court may direct that a person granted bail under S.437(1) or (2) of the Cr.P.C. be arrested and committed to custody. Bail granted under S.439 of the Cr.P.C. can be cancelled by the Court granting bail under S. 439(2) of the Cr.P.C.

The Supreme Court has held that once bail has been granted, it can only be cancelled based on cogent and overwhelming circumstances. Proceedings for the cancellation of bail are not in the nature of an appeal from the grant of bail, and therefore, a court must look for circumstances that warrant cancellation of bail such as interference or attempt to interfere with the due course of justice, or abuse of concession of bail granted to the accused in any manner. (*Dolat Ram* v. *State of Haryana*.[42]

An accused has the right to file successive bail applications; however, after the bail application has been dismissed, a second application must be filed only upon a change of circumstances that warrants a fresh application. *Kalyan Chandra Sarkar* v. *Rajesh Ranjan* & *Pappu Yadav*[43]. It may be noted that efflux of time alone is not a circumstance that always warrants grant of bail.

S.438 of the Cr.P.C.: Anticipatory Bail

The provision for anticipatory bail was introduced for the first time in the Code. Such a provision was not available in the 1898 Code.

An order under S.438 of the Cr.P.C. comes into effect only upon the arrest of a person. Such an order is usually taken/granted where a person has reason to believe that she is about to be arrested in connection with a case. Upon consideration of such an application, a High Court or a Court of Session can direct the Investigating Authority to release the applicant on bail in the event of the applicant's arrest. It is reiterated that an orderunder S.438 of the Cr.P.C. takes effect only upon arrest.

[42] (1995) 1 SCC 349
[43] (2005) 1SCC 801

The power under S.438 Cr.P.C. is extraordinary in character and is to be exercised only in exceptional cases where it appears that a person may be falsely implicated, or where there are reasonable grounds to hold that a person accused of an offence is not likely to otherwise misuse his liberty. The *sine qua non* for an application seeking relief under S.438 of the Cr.P.C.is a reason to believe that a person may be arrested on an accusation of having committed a non-bailable offence (*Gurbaksh Singh Sibia* v. *State of Punjab*.)[44]

SEARCH

SEARCH - Why ?

- Investigating Officer considers the production of any particular document or thing, necessary or desirable for the purpose of investigation

Section 47 - Search of place entered by person sought to be arrested

Search of person

- After arrest – s. 51 in safe custody all articles
- By police officer
- In case of woman – by female - strict regard to decency

Search without Warrant

- S. 165 - Search by police officer
- documents or things cannot otherwise be obtained without undue delay
- Write the grounds of his belief along with material searching for
- by the Officer himself

Section 166 - When officer in charge of police station may require another to issue search-warrant

Section 153 - Inspection of weights and measures -without warrant

Warrants to be obtained for Searches

[44] 1978 Cri.L.J. 20

Section 93 - obtain warrants from a competent Magistrate in important and sensitive cases (as well as where time and circumstances permit).

Search to be witnessed by Independent Witnesses - Section 100(4)

- two / more
- independent and respectable inhabitants of the locality

Procedure for House Searches S 100

- incriminating documents/articles must be seized in the presence of witnesses
- Section 52 - Power to seize offensive weapons - may be taken from the person arrested - any offensive weapons
- Deliver - weapons so taken to the Court or officer

Section 102 - Power of police officer to seize certain property Stolen property - alleged or suspected - report the seizure to the Magistrate

Section 94 - Search of place suspected to contain - stolen property, forged documents, counterfeit coin, note, stamps, false seals, obscene material - DM / SDM/ M - may by warrant authorise – Enter, Search and take possession.

6.2 GENERAL PROVISIONS OF THE CODE OF CRIMINAL PROCEDURE, 1973

(Act-II of 1974)

Introductory Concepts and Basic Principles

1. Cr.PC - What it is?

   (a) It is a Central Act, which means, it is an Act passed by the Indian Parliament.

   (b) It is a Code.

2. Code- its meaning

   (a) A Code is the end product of codification

   (b) Codification is a process which consists of compilation, arrangement, systemisation and promulgation of a body of laws by an authority competent to do so.

   (c) Examples of Code - Indian Penal Code, Civil Procedure Code and Criminal Procedure Code.

   (d) Advantages of codification - simplicity, symmetry, intelligibility and certainty.

3. Cr. P.C. - its nature

   (a) Basically, it is a procedural or adjective law.

   (b) It consolidates and amends the law relating to Criminal Procedure.

4. Cr.PC - its main scope

   (a) It provides for a machinery for the prevention of and punishment for offences under the Indian Penal Code and other substantive criminal law of the Land.

   (b) It lays down the procedures for investigation, inquiry and trial.

Note : Substantive Criminal Law - it is that part of the Criminal Law which creates offences and prescribes punishments for the same, such as Indian Penal Code, Dowry Prohibition Act, Arms Act, Civil Rights Protection Act. etc.

5. Cr. P.C. - its basic objectives :

(a) to further the ends of Criminal Justice.

(b) to ensure the observance of the basic principles of Natural Justice.

(c) to complement and actualise the substantive Criminal Law.

(d) to afford to the accused reasonable opportunity, fair deal and just trial.

(e) to expedite investigation, inquiry and trial.

(f) to provide for safeguard against misuse and abuse of the process of criminal law.

6. An outline of the historical background

(a) The year 1882 was crucial in the history of development of Criminal Procedure in India.

(b) Before 1882, law relating to Criminal Procedure was not uniform.

(c) The Criminal Procedure Code, 1882, was enacted to introduce for the whole of British India, as it was at that time, a uniform criminal procedure.

(d) The Cr.PC of 1882 was replaced by a new Code of Criminal Procedure in the year 1898.

(e) The Cr.PC of 1898 was amended from time to time. It was subjected to drastic changes in 1923 and again in 1955.

(f) The Cr.PC of 1898 was repealed by the existing Code of Criminal Procedure, 1973(Act II of 1974).

(g) The new Cr.PC, 1973 was substantially founded upon the recommendations of the Law Commission of India, as embodied in its 14^{th} and 48 reports.

(h) The Cr.PC 1973 itself has suffered amendments several times. Mention may be made of the following Amending Acts:-

i) Act 45 of 1978

ii) Act 63 of 1980

iii) Act 43 of 1983

iv) Act 46 of 1984

v) Act 43 of 1986

vi) Act 32 of 1988

vii) Act 10 of 1990

viii) Act 43 of 1991

ix) Act 41 of 2010

x) Act 13 of 2013

7. Commencement:

It came into force on the 1st April, 1974.

8. Extent of its operation:

(a) It extends to the whole of India except the State of Jammu and Kashmir

(b) Exceptions have also been made in favour of the State of Nagaland and Tribal areas of Assam. The whole of Cr.PC does not apply there. Only certain chapters, Chapters VIII, X and XI are applicable. The concerned State Government may, however, make applicable the other provisions of the Cr.PC.

(c) The State of Jammu and Kashmir is governed by a different, though substantially identical, code of Criminal Procedure.

9. Offence - how defined

(a) Cr.PC being the procedural part of the Criminal Law, it touches the people at many points. The Criminal law is centered at the concept of crime. The term “crime” has not been defined in any Act but a definition of the expression “offence” has been given in Sec. 2(n) Cr.PC.

(b) It may be noted that “offence” is the genus of which crime is a species. In other words, all crimes are offences but all offences are not crimes.

(c) Simply speaking, offence means any act or omission made punishable by any law for the time being in force. It may be resolved into components as detailed below:-

(i) An act is a deed, that is, doing of something positive such as assaulting, killing, stealing. It should be something prohibited under the law.

(ii) Omission means a negative act, non-doing of something which the Law commands the person to do. When a Jailor omits to give food to the prisoner under his charge, he commits an illegal omission. If the officer-in-charge of a police station stands by and looks on when an accused is beaten up by a Head Constable in the thana Lock-up, he indulges in illegal omission, because he has a legal duty to prevent such a happening.

(iii) The act or omission must be something punishable under the Law. Punishment contemplated in one that should be inflicted by a competent Court of Law and it should be something authorised by the Law.

(iv) That law must have been in force when the alleged offence was committed. It should have been validly made by a competent Legislature.

(v) Law generally does not punish an act or omission unless it is accompanied by a guilty mind. There are, however, exceptions to this rule. Offences where guilty mind or *mens rea* is not an essential ingredient are known as strict liability offences. Illustrative case: *Cundy* v. *Le Coq.*

The accused had a licence, for sale of liquor in his premises. He sold liquor to a drunken person, which was against the Licensing Act, 1872. His defence was that he did not know that the customer was drunk. The Court accepted that fact but held that absence of his knowledge was immaterial. The offence was decided to be one of strict liability. The accused was found guilty.

By way of illustration, it may be cited that in India, kidnapping from lawful guardianship, an offence u/s 363 IPC and sale of an adulterated article of food, an offence under the Prevention of Food Adulteration Act, do not require any mens rea (an evil intention or a knowledge of the wrongfulness of the act.).

10. Classification of offences

Under the Cr.PC, offences have been classified on the basis of four different criteria. They are :-

(i) Cognizable and Non-cognizable.

(ii) Bailable and non-bailable.

(iii)Offence triable as summons case and offence triable as warrant case.

(iv) Offence exclusively triable by a Court of Sessions and offence not exclusively triable by a Court of Sessions, that ordinarily means an offence which may be tried by a Judicial Magistrate of competent jurisdiction.

11. Cognizable and Non-cognizable offences

(a) This division has been made with reference to police power.

(b) Cognizable offence means an offence for which a Police Officer may arrest without any warrant vide Sec. 2(c)

(c) Non-cognizable offence means an offence for which a police officer has no authority to arrest without warrant vide Sec. 2(e).

(d) Another formulation that flows out of Sessions 155 and 156 Cr.PC is that cognizable offence is where the police may investigate on their own without any order of any judicial authority but they cannot do so when the offence is non-cognizable. In such a case, order of the competent Magistrate is necessary in order to enable the police to investigate.

(e) Examples - Murder, Kidnapping, Dacoity, etc. are cognizable offences while simple hurt, defamation, bigamy, etc. are non-cognizable offences.

(f) Column No. 4 of the First Schedule to the Cr.PC will show whether a particular offence is cognizable or non-cognizable.

(g) The first schedule has two parts, namely (I) relating to the IPC and (II) concerning non-IPC offences

Note : IPC stands for Indian Penal Code, which contains the general law of crimes, so far as India is concerned.

12. Bailable and Non-bailable offence

(a) Bailable offence is an offence where the accused, after arrest, is entitled to be released on bail as a matter or right.

(b) In non-bailable offence, bail is not a matter of right for the accused but it is a matter of discretion for the authority competent to grant bail, that is, the Court of the Police Officer.

(c) It should not be supposed that bail cannot be granted in a non-bailable offence.

(d) Each application for bail made by an accused in a non-bailable offence has to be decided by the competent Court or the Police Authority, on its own merits, due regards being had to the relevant facts and circumstances of the case and bearing in mind the limitation imposed by law, if any, upon their powers.

(e) When an accused is granted bail, he is released from legal custody, upon his furnishing a bond, with or without surety, for his/her attendance at the time and place mentioned therein. The place is generally a specified Court.

(f) Ordinarily, the question of bail arises when a person has been arrested or detained or some kind of restraint has been imposed upon him.

(g) To find out, whether a particular IPC offence is bailable or non-bailable, you should refer to Part-I of the 1st Schedule to the Cr.PC and check up the entry under the column No. 5. As for example, rioting, an offence punishable u/s 147 IPC is bailable, whereas theft, an offence punishable u/s 379 IPC is non-bailable.

(h) For any non-IPC offence, examine that particular Act which has created the offence. If that Act declares the offence to be bailable or non-bailable, then accept that position. If that Act is silent on that point, then decide the matter in terms of punishment prescribed for that offence and in the light of the principle enunciated in Part-II of the 1st schedule. If the offence is punishable with imprisonment for three years or more, it is non-bailable. Where the punishment is less than three years or with fine only, it is bailable.

13. Investigation

(a) This term has been defined in Sec. 2(h) of the Cr.PC. The definition is, however, not exhaustive.

(b) Literally investigation means, following up step by step by observation, examination and inquisition.

(c) Investigation implies ascertainment of facts, shifting of materials and search for relevant data.

Reference : AIR 1968 Orissa 20.

(d) Under the Cr.PC, Investigation may be conducted either by a Police Officer or by any person, other than a Magistrate.

(e) The object of investigation is collection of evidence.

(f) Police Investigation generally consists of the following steps :

(i) Proceeding to the spot.

(ii) Ascertainment of the facts and circumstance of the case.

(iii) Discovery and arrest of the suspected offender.

(iv) Collection of evidence by the processes indicated below or any other lawful means:

- Examination of various persons including the accused.
- Reduction of the statements of such persons to writing (discretionary and optional).
- Seizure of things considered necessary.
- Search of places

(v) Formation of opinion as to whether on the material collected, there is a case to place the accused for trial and if so, taking necessary steps for the same by filling of a charge-sheet u/s 173(2) Cr.PC.

Reference: (i) AIR 1955 SC 196

(ii) AIR 1959 SC 707

(g) Police investigation commence when a Police Officer takes steps for the same after having come to know of the commission of a cognizable offence.

Reference : (1972) 74 Punjab LR(D) 228

14. Inquiry

(a) Inquiry, according to Sec. 2(g) Cr.PC, means every inquiry, other than a trial, conducted under the Code, by a Magistrate or a Court.

(b) It follows that Inquiry, as contemplated in the Cr.PC can be held either by a Magistrate or by a Court.

(c) What is done by a Police Officer under the Cr.PC can never be described as Inquiry.

(d) Inquiry is distinct and different from trial. In practice, trial begins when the Inquiry ends.

(e) The object of inquiry is determination of truth or falsehood of certain allegations with a view of taking further action according to law.

Reference : (i) AIR 1920 Patna 563

(ii) AIR 1940 Calcutta 97

(f) Inquiry may be of different kinds, such as:-

(i) Judicial Inquiry

(ii) Non-Judicial/Administrative Inquiry

(iii) Preliminary Inquiry

(iv) Local Inquiry

(v) Inquiry into an offence

(vi) Inquiry relating to a matter other than an offence.

(g) Inquiry may involve examination of witnesses and inspection of the locale.

15. Investigation and Inquiry – differences

		Investigation	Inquiry
(i)	By whom	By a Police Officer or a person other than a Magistrate who is authorised by a Magistrate.	By a Court or by a Magistrate
(ii)	Object	Collection of evidence	Ascertainment of truth
(iii)	Nature	*Always non-judicial*	May be judicial or non-judicial
(iv)	Matter	It is always about or into an offence.	It may relate to an offence or any matter other than an offence.
(v)	Initiation	It commences when there are grounds for investigation, based on information or otherwise.	It may start on vague rumours with shadowy beginning vide AIR 1968 Madras 117
(vi)	Sequence	In cognizable offence, police investigation is a normal preliminary to the accused being put up for trial.	In a warrant case instituted other than on Police report, the proceeding up to the framing of the charge is inquiry. Here, Trial follows inquiry he points of difference between them are:-

16. Trial

(a) Cr.PC has not defined “trial”.

(b) Judiciary, through its process of interpretation, has endeavoured to supply that omission. It is: -

"A trial is a judicial proceeding which ends in conviction or acquittal" vide AIR 1940 Calcutta 97, AIR 1929 Patna 644.

(c) A trial is a proceeding different from inquiry vide 1987 Cr.LJ 55.

(d) When inquiry stops, trial may begin vide 1957 Cr.LJ 937.

(e) Trial means whole of the proceedings including sentence vide 24 Cr.LJ 886.

(f) The right to reasonably speedy trial is a fundamental right conferred by Article 21 of the Constitution of India vide AIR 1979 SC 1177.

(g) The Cr.PC in Sections 167, 209 and 309 has emphasised the importance of expeditious disposal of cases including investigations and trials vide AIR 1979 SC 1518.

17. Court - What it is?

(a) It has not been defined in the Cr.PC, although the classes of Criminal Courts have been enumerated in Sec. 6 Cr.PC.

(b) In order to constitute a court in the strict sense of the term, an essential condition is that the Court should have, apart from having some of the trappings of a judicial tribunal, power to give a decision or a definitive judgement which has finality and authoritativeness which are the essential tests of a judicial pronouncement.

Reference : 1955(2) S.C.R.955.

(c) For the sake of brevity, the Criminal Procedure Code uses "Court" and "Magistrate" generally, if not always, as convertible terms.

Reference : AIR 1953 Madras 953.

(d) A Magistrate is not a court unless he is acting in a judicial capacity vide ILR 36 Calcutta 433.

18. Meaning of Judicial

The work “Judicial” has two meanings.

It may refer to the discharge of duties exercised by a Judge or by Justices in Court or to administrative duties which need to be performed in Court but in respect of which it is necessary to bear a Judicial mind - that is a mind to determine what is fair and just in respect of matters under consideration.

(1892) 1 QB 431

Quoted in AIR 1980 Kerala 18 Full Bench

19. Types of Trial

The word “trial” is not defined anywhere in the Criminal Procedure Code. However, it is commonly understood as the stage which begin after framing of the charges and end with the conviction or acquittal.

CrPC broadly classifies trial in three categories which are as follows:

I] Session trial- Chapter XVIII of Cr.P.C. starting with Sec.225 and ending with section 237 deals with provisions governing the trial before a Court of Session.

Sec.225 Cr.P.C. enjoins that in every trialbefore a Court of Session the prosecution shall be conducted by a Public Prosecutor.

II]Summon Trial- A summons case means a case relating to an offence not being a warrant case, implying a cases relating to offences punishable with imprisonment not exceeding two years. In respect of summons cases, there is no need to frame a charge. The court gives substance of the accusation, which is called “notice”, to the accused when the person appears in pursuance to the summons.

III] Summary Trial- The object of summary trial is to disposal of cases speedily.

Procedure prescribed for trial of summons cases should be followed (S.262). There is no appeal in such a trial if a sentence of fine only not exceeding two hundred rupees has been awarded. There can be an application for revision to the High Court.

6.3 PREVENTION OF CORRUPTION ACT, CVC ACT AND LOK AYUKTA ACT

"Corruption debases democracy, undermines rule of law, distorts market, stifles economic growth and denies many, their rightful share of economic resources of life- saving aid"

- Kofi Annan

In the pre-independence period, the Indian penal Code (IPC) was the main tool to combat corruption in public life. The Code had a chapter on 'Offences by Public Servants'. Sections 161 to 165 provided the legal framework to prosecute corrupt public servants. At that time, the need for a special law to deal with corruption was not felt.

Corruption may be alternatively defined as unlawful practices. Thus, Section 161[45] of the *Indian Penal Code*, defines corruption as follows:

"Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain gratification whatever, other than legal remuneration as a motive or a reward for doing or forbearing to do any official act or for showing or forbearing to show, in exercise of his official functions, favour or disfavor to any person with the Central or State Government or Parliament or Legislature of any State or with any public servants as such……."

Corruption as viewed in Criminal Law

Corruption has always been considered a serious type of anti-social act in criminal law. In India, the first codified criminal law i.e. the Indian Penal Code, 1860, contained a full chapter which dealt with corruption. However, it confined its operation to those defined as public servants under Section 21 of the code. Mainly misconduct and abuse of power by public servants were covered under this chapter. Being governed by the traditional rules of criminal liability, the provisions in the I.P.C. could not successfully combat corruption by public servants. To supplement and strengthen law against corruption, the Prevention of Corruption Act, 1947, entered the statute book. The Act being social legislation aimed at eradicating

[45] Rep. by the *Prevention of Corruption Act*, 1988.

corruption, changed the traditional rules of criminal liability by presuming *mens rea* on the part of public servant if *actus reus* was proved.

Prevention of Corruption Act, 1947

The *Prevention of Corruption Act*, 1947 did not redefine nor expand the definition of offences related to corruption in the already existing IPC. Similarly, it has adopted the same definition of 'Public Servant' as in the IPC.

The Criminal Law (Amendment) Act, 1952 brought some changes in laws relating to corruption. The punishment specified under Section 165 of IPC was enhanced to three years instead of existing two years. Also, a new Section 165A was inserted in the IPC, which made abetting of offences, defined in Sections 161 and 165 of IPC. It was also stipulated that all corruption related offences should be tried only by Special Judges.

The *Prevention of Corruption Act,* 1947, was amended in 1964 based on the recommendations of the Santhanam Committee. There are provisions in Chapter IX of the Indian Penal Code to deal with public servants and those who abet them by way of criminal misconduct. There are also provisions in the Criminal Law Amendment Ordinance, 1944 to enable attachment of ill-gotten wealth obtained through corrupt means, including from transferees of such wealth. The Bill seeks to incorporate all these provisions with modifications so as to make the provisions more effective in combating corruption among public servants.

Prevention of Corruption Act, 1988

The *Prevention of Corruption Act,* 1988 consolidates the provisions of the Prevention of Corruption Act, 1947, the Criminal Law Amendment Act, 1952 and sections 161 to 165 of IPC. Besides, it has certain provisions intended to effectively combat corruption among public servants. The salient features of the Act are as follows:

- The term 'Public Servant' is defined in the Act. The definition is broader than what existed in the IPC.
- A new concept – 'Public Duty' is introduced in the Act.

- Offences relating to corruption in the IPC have been brought in Chapter 3 of the *Prevention of Corruption Act*, and they have been deleted from the *Indian Penal Code*.
- All cases under the Act are to be tried only by Special Judges.
- Proceedings of the court have to be held on a day-to-day basis.
- Penalties prescribed for various offences are enhanced.
- Criminal Procedure Code (for the purpose of this Act only) to provide for expeditious trial (Section 22 of the Act provides for amended Sections 243,309,317 and 397 of Cr.P.C).
- It has been stipulated that no court shall stay the proceedings under the Act on the grounds of any error or irregularity in the sanction granted, unless in the opinion of the court it has led to failure of justice.
- Other existing provisions regarding presumptions, immunity to bribe giver, investigation by an officer of the rank of Dy. S.P., access to bank records etc have been retained.

In the statements of objects and reasons it is expressly mentioned that the object of the Act is to amend the existing anti-corruption laws with a view to making them more effective by extending the scope and ambit of the definition of "public servant" and to bring within its sweep each and every person who held an office by virtue of which he was required to perform any public duty.

Section 2 of the *PC Act*, 1988 defines "Public Servant" broadly. It covers 12 categories of persons. Irrespective of the fact whether they have been appointed by Government or not, they are under purview of the definition of public servant. These categories are as follow.

- Any person in the service or pay of the Government or remunerated by the Government by fees or commission for the performance of any public duty;
- Any person in the service or pay of a Local Authority;
- Any person in the service or pay of a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956;
- Any Judge, including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions;

- Any person authorized by a Court of Justice to perform any duty, in connection with the administration of justice, including a liquidator, receiver or commissioner appointed by such court;
- Any arbitrator or other person to whom any cause or matter has been referred for decision or report by a court of justice or by a competent public authority.
- Any person who holds an office by virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election.
- Any person who holds an office by virtue of which he is authorised or required to perform any public duty.
- Any person who is the President, Secretary or other office bearer of a registered co-operative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the Central Government or a State Government or from any corporation established by or under a Central, Provincial or State Act, or any authority or body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956.
- Any person who is a chairman, member or employee of any Service Commission or Board, by whatever name called, or a member of any selection committee appointed by such Commission or Board for the conduct of any examination or making any selection on behalf of such Commission or Board.
- Any person who is a Vice-Chancellor or member of any governing body, professor, reader, lecturer or any other teacher or employee, by whatever designation called, of any University and any person whose services have been availed of by a University or any other public authority in connection with holding or conducting examinations.
- Any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance form the Central Government or any State Government, or local or other public authority.

Penal Provision

If a public servant takes gratification other than his legal remuneration in respect of an official act or to influence public servants is liable under the Act. The Act also penalizes a public servant for taking gratification to influence the public by illegal means and for exercising his personal influence with a public servant. If a public servant accepts a valuable thing without paying for it or paying inadequately from a person with whom he is involved in a business transaction in his official capacity, he shall be penalized under the Act.

It is necessary to obtain prior sanction from the central or state government in order to prosecute a public servant.

Investigation of Cognizable offence

Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of the Criminal Procedure Code, 1973.

According to Section 17 of the *Prevention of Corruption Act*, 1988 investigation into cases under this Act should be done by police officers not below the rank of Deputy Superintendent of Police and it also enumerates the police officers who are entitled to investigate.

Speeding up of Trials

In order to ensure speedy trial of corruption cases, the *Prevention of Corruption Act*, 1988 made the following provisions:

- All cases under the Act are to be tried only by Special Judges.
- The proceedings of the court should be held on a day-to-day basis.
- No court shall stay the proceedings under the Act on the grounds of any error or irregularity in the sanction granted, unless in the opinion of the court it has led to failure of justice.

Power to appoint Special Judges

The Central and the State Governments are empowered to appoint Special Judges by placing a notification in the Official Gazette, to try the following offences:

- Any offence punishable under this Act.
- Any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a).
- A person shall not be qualified for appointment as a Special Judge under this Act unless he is or has been a Sessions Judge or an Additional Session Judge or an Assistant Sessions Judge under the code of Criminal Procedure Code, 1973 (2 of 1974).

Powers of Special Judge

A Special Judge is a creature of the Criminal Law (Amendment) Act, 1952. He enjoys a special status under the Act and is clothed with such powers as have been given to him by the provisions of the Act. The provisions of Sections 326 and 475 of the Cr.P.C. shall apply to the proceedings before a Special Judge and for purpose of the said provisions, a Special Judge shall be deemed to be a Magistrate. A Special Judge may pass a sentence authorized by law for the punishment of the offence for which a person is convicted. A Special Judge, while trying any offence punishable under the Act, shall exercise all powers and functions exercised by a District Judge under the Criminal Law Amendment Ordinance, 1944.

Other Laws and Provisions to tackle Corruption

GOI has created a number of offices promulgating anti-corruption measures, such as the Administrative Vigilance Division in the Department of Personnel and Training, CBI, Vigilance Units in the Ministries and departments of the Government of India, disciplinary authorities, and the CVC. The CVC, CBI and ACB work to eradicate the offenses laid out in the PCA.

Apart from the Prevention of Corruption Act, 1988, the Law makers have enacted the following Laws and Provisions to eradicate the corruption in India.

Indian Penal Code, 1860:

The Benami Transactions (Prohibition) Act, 1988

The Prevention of Money Laundering Act, 2002

The Right to Information Act, 2005

The Prevention of Corruption Act, 1988 is being amended to give protection to bonafide action taken by civil servants. Presumption of guilt whenever there occurred a loss to the Government was stifling the decision making process, which led to the present set of amendments.

Central Vigilance Commission (CVC) Act, 2003

The CVC was established in 1964 by an administrative order of the Government pursuant to the recommendation of the Santhanam Committee on the prevention of corruption. The CVC was established for the purpose of inquiring into and investigating offenses under the Prevention of Corruption Act, 1988 by certain categories of public servants of the Central Government, corporations established by or under any Central Act, government companies, societies and local authorities owned or controlled by the Central Government.

Vineet Narain v. UoI,[46] (Jain Hawala case), Validity of Investigation - Whether charge sheet filed by Investigating Officer was filed after proper investigation? Held, Government agencies have failed to fully investigate into the matter. This is being done with view to protect persons involved, who are very influential and powerful. The Court further observed that

STATUTORY STATUS SHOULD BE CONFERRED UPON CVC.

The CVC is comprised of a Central Vigilance Commissioner and not more than two Vigilance Commissioners. Their appointment is intended to be apolitical and bi-partisan. Accordingly, the Commissioners are appointed by the President of India upon the recommendation of a committee comprised of the Prime Minister, the Minister of Home Affairs and the leader of the opposition in the Lok Sabha (Lower House).

Chief Vigilance Officer

At the organizational level, the vigilance function is discharged by the Chief Vigilance Officer ("CVO") in that organization. The primary responsibility for maintenance of ethical purity,

[46] AIR1996 SC 3386.

integrity and efficiency in the organization vests, as the case may be, with the Secretary of the concerned ministry, or the head of the department, or the chief executive of the public sector enterprise. Such person however is, in the discharge of vigilance functions, assisted by the Chief Vigilance Officer (CVO). The CVO acts as a special assistant or advisor to the chief executive, and reports directly to him in all matters relating to vigilance. He heads the vigilance division of the organization concerned and provides a link between his organization and the Central Vigilance Commission and the Central Bureau of Investigation.

The Chief Vigilance Officers in all government departments and organizations are appointed after prior consultation with the Central Vigilance Commission, and no person whose appointment in that capacity is objected to by the Commission may be so appointed.

The vigilance functions to be performed by the CVO are of wide sweep and include collecting intelligence about the corrupt practices committed, or likely to be committed by the employees of his organization; investigating or causing an investigation to be made into verifiable allegations reported to him; processing investigation reports for further consideration by the disciplinary authority concerned; referring vigilance related matters to the Central Vigilance Commission for advice wherever necessary, taking steps to prevent commission of improper practices and misconduct. Thus, the CVO's functions can broadly be divided into three parts: (i) preventive vigilance; (ii) punitive vigilance; and (iii) surveillance and detection.

Functions and Powers of the Central Vigilance Commission under the Central Vigilance Commission Act, 2003[47]

1. Exercise superintendence over the functioning of the Delhi Special Police Establishment (CBI) insofar as it relates to the investigation of offences under the Prevention of Corruption Act, 1988; or an offence under the Cr.PC for certain categories of public servants – section 8(1)(a);

[47] http://cvc.gov.in/CVC_power.htm

2. Give directions to the DSPE in Special Police Establishment (CBI) for superintendence in so far as it relates to the investigation of offences under the Prevention of Corruption Act, 1988 – section 8(1)(b);

3. To inquire or cause an inquiry or investigation to be made on a reference by the Central Government – section 8(1)(c);

4. To inquire or cause an inquiry or investigation to be made into any complaint received against any official belonging to such category of officials specified in sub-section 2 of Section 8 of the CVC Act, 2003 – section 8(1)(d);

5. Review the progress of investigations conducted by the DSPE into offences alleged to have been committed under the Prevention of Corruption Act, 1988 or an offence under the Cr.P.C. – section 8(1)(e);

6. Review the progress of the applications pending with the competent authorities for sanction of prosecution under the Prevention of Corruption Act, 1988 – section8(1)(f);

7. Tender advice to the Central Government and its organizations on such matters as may be referred to it by them – section 8(1)(g);

8. Exercise superintendence over the vigilance administrations of the various Central Government Ministries, Departments and organizations of the Central Government – section 8(1)(h);

9. Shall have all the powers of a Civil court while conducting any inquiry – section 11;

10. Respond to Central Government on mandatory consultation with the Commission before making any rules or regulations governing the vigilance or disciplinary matters relating to the persons appointed to the public services and posts in connection with the affairs of the Union or to members of the All India Services – section 19;

11. The Central Vigilance Commissioner (CVC) is also the Chairperson of the two Committees, on whose recommendations, the Central Government appoints the Director of the Delhi Special Police Establishment and the Director of Enforcement –section 25 and section 26;

12. The Committee concerned with the appointment of the Director CBI is also empowered to recommend, after consultation with the Director (CBI), appointment of officers to the posts of the level of SP and above in DSPE –section 26;

13. The Committee concerned with the appointment of the Director of Enforcement is also empowered to recommend, after consultation with the Director of Enforcement appointment of officers to the posts of the level of Deputy Director and above in the Directorate of Enforcement – section 25;

Chief Vigilance Officers

The Chief Vigilance Officers are extended hands of the CVC. The Chief Vigilance Officers are considerably higher level officers who are appointed in each and every Department/Organisation to assist the Head of the Department/Organisation in all vigilance matters.

Selection and Appointment

The Chief Vigilance Officers constitute an important link between the organizations concerned and the Central Vigilance Commission (as also the CBI). The following procedures have been laid down/evolved in the matter of appointment of CVOs:

a) Prior approval of the Commission for appointment of an officer as CVO;

b) As far as possible, the Chief Vigilance Officers should be from outside the Organization in which he is to be appointed. The initial tenure of full-time CVO in PSUs is for three years extendable by two years in the same organisation with the approval of the Commission or upto a further period of three years on transfer to another PSU on completion of initial tenure of three years in the previous PSU.

c) In cases where the scale of operation of a particular organization does not justify creation of a full-time post, an officer within the organization sufficiently senior in rank to be able to report directly to the Chief Executive or vigilance matters may be considered for such appointments;

d) The officer to be given additional charge of the post of CVO should not be one whose normal duties involve dealing with matters sensitive from vigilance point of view (like recruitment, purchase, etc.);

e) Once an officer has worked as CVO in an organization, he should not go back as CVO to the same organization again;

f) An officer who is appointed from outside as CVO in Central Public Undertaking shall not be permanently absorbed in the same organization on expiry or in continuation of his tenure as CVO in that organization; and

g) The "Vigilance" and "Security" function in an organization should be separated as both the activities are equally demanding and the discharge of "security" functions by a Chief Vigilance Officer only leads to dilution of supervision on vigilance matters. However, an exception has been made in respect of the hotel industry.

Role and functions of Chief Vigilance Officers

Even though detection and punishment of corruption and other malpractices are certainly important, what is more important is taking preventive measures instead of hunting for the guilty in the post corruption stage. Therefore, the role and functions of CVOs has been broadly divided in to two parts, which are (I) Preventive and (II) Punitive.

On the preventive side

The CVOs undertake various measures, which include:

a) To examine in detail the existing Rules and procedures of the Organisation with a view to eliminate or minimise the scope for corruption or malpractices;

b) To identify the sensitive/corruption prone spots in the Organisation and keep an eye on personnel posted in such areas;

c) To plan and enforce surprise inspections and regular inspections to detect the system failures and existence of corruption or malpractices;

d) To maintain proper surveillance on officers of doubtful integrity; and

e) To ensure prompt observance of Conduct Rules relating to integrity of the Officers, like

i) The Annual Property Returns;

ii) Gifts accepted by the officials

iii) Benami transactions

iv) Regarding relatives employed in private firms or doing private business etc.

On the punitive side:

a) To ensure speedy processing of vigilance cases at all stages. In regard to cases requiring consultation with the Central Vigilance Commission, a decision as to whether the case had a vigilance angle shall in every case be taken by the CVO who, when in doubt, may refer the matter to his administrative head, *i.e*. Secretary in the case of Ministries/Departments and Chief Executive in the case of public sector organisations;

b) To ensure that charge-sheet, statement of imputations, lists of witness and documents etc. are carefully prepared and copies of all the documents relied upon and the statements of witnesses cited on behalf of the disciplinary authority are supplied wherever possible to the accused officer along with the charge-sheet;

c) To ensure that all documents required to be forwarded to the Inquiring Officer are carefully sorted out and sent promptly;

d) To ensure that there is no delay in the appointment of the Inquiring Officer, and that no dilatory tactics are adopted by the accused officer or the Presenting Officer;

e) To ensure that the processing of the Inquiry Officer's Reports for final orders of the Disciplinary Authority is done properly and quickly;

f) To scrutinise final orders passed by the Disciplinary Authorities subordinate to the Ministry/Department, with a view to see whether a case for review is made out or not;

g) To see that proper assistance is given to the C.B.I. in the investigation of cases entrusted to them or started by them on their own source of information;

h) To take proper and adequate action with regard to writ petitions filed by accused officers;

i) To ensure that the Central Vigilance Commission is consulted at all stages where it is to be consulted and that as far as possible, the time limits prescribed in the Vigilance Manual for various stages are adhered to;

j) To ensure prompt submission of returns to the Commission;

k) To review from time to time the existing arrangements for vigilance work in the Ministry/Department for vigilance work subordinate officers to see if they are adequate to ensure expeditious and effective disposal of vigilance work;

l) To ensure that the competent disciplinary authorities do not adopt a dilatory attitude in processing vigilance cases, thus knowingly or otherwise helping the subject public servants, particularly in cases of officers due to retire;

m) To ensure that cases against the public servants on the verge of retirement do not lapse due to time-limit for reasons such as misplacement of files etc. and that the orders passed in the cases of retiring officers are implemented in time;

n) To ensure that the period from the date of serving a charge-sheet in a disciplinary case to the submission of the report of the Inquiry Officer, should, ordinarily, not exceed six months.

Lok Ayukta

The *Lokpal and Lokayuktas Act*, 2013 provide for the establishment of a body of Lokpal for the Union and Lokayukta for States to inquire into allegations of corruption against certain public functionaries and for matters connected therewith or incidental thereto.

Salient Features of the Act

(a) Establishment of the institution of Lokpal at the Centre and Lokayuktas at the level of the States, thus providing a uniform vigilance and anti-corruption road-map for the nation, both at the Centre and the States.

(b)The Lokpal to consist of a Chairperson and a maximum of eight Members, of which fifty percent shall be judicial Members. Fifty per cent of members of Lokpal shall be from amongst SC, ST, OBCs, Minorities and Women.

(c) The selection of Chairperson and Members of Lokpal shall be through a Selection Committee consisting of –

- Prime Minister;
- Speaker of Lok Sabha;
- Leader of Opposition in the Lok Sabha;
- Chief Justice of India or a sitting Supreme Court Judge nominated by CJI;
- An eminent jurist to be nominated by the President of India

(d) A Search Committee will assist the Selection Committee in the process of selection. Fifty per cent of members of the Search Committee shall also be from amongst SC, ST, OBCs, Minorities and Women.

(e) Prime Minister was brought under the purview of the Lokpal with subject matter exclusions and specific process for handling complaints against the Prime Minister. (Section 14)

(f) Lokpal's jurisdiction will cover all categories of public servants including Group 'A', 'B', 'C' & 'D' officers and employees of Government. On complaints referred to CVC by Lokpal, CVC will send its report of Preliminary enquiry in respect of Group 'A' and 'B' officers back to Lokpal for further decision. With respect to Group 'C' and 'D' employees, CVC will proceed further in exercise of its own powers under the CVC Act subject to reporting and review by Lokpal.

(g) A high powered Committee chaired by the Prime Minister will recommend selection of the Director, CBI.

(h) Attachment and confiscation of property of public servants acquired by corrupt means, even while prosecution is pending.

(i) Clear time lines for: -

- Preliminary enquiry – three months extendable by three months.
- Investigation – six months which may be extended by six months at a time.
- Trial – one year extendable by one year and, to achieve this, special courts to be set up.

(j) Enhancement of maximum punishment under the Prevention of Corruption Act from seven years to 10 years. The minimum punishment under sections 7, 8, 9 and 12 of the Prevention of Corruption Act will now be three years and the minimum punishment under section 15 (punishment for attempt) will now be two years.

Process followed to investigate and prosecute corrupt public servants

The three main authorities involved in inquiring, investigating and prosecuting corruption cases are the Central Vigilance Commission (CVC), the Central Bureau of Investigation (CBI) and the state Anti-Corruption Bureau (ACB). Cases related to money laundering by public

servants are investigated and prosecuted by the Directorate of Enforcement and the Financial Intelligence Unit, which are under the Ministry of Finance.

The CBI and state ACBs investigate cases related to corruption under the Prevention of Corruption Act, 1988 and the Indian Penal Code, 1860. The CBI's jurisdiction is the central government and Union Territories while the state ACBs investigates cases within the states. States can refer cases to the CBI.

The CVC is a statutory body that supervises corruption cases in government departments. The CBI is under its supervision. The CVC can refer cases either to the Central Vigilance Officer (CVO) in each department or to the CBI. The CVC or the CVO recommends the action to be taken against a public servant but the decision to take any disciplinary action against a civil servant rests on the department authority.

Prosecution can be initiated by an investigating agency only after it has the prior sanction of the central or state government. Government appointed prosecutors undertake the prosecution proceeding in the courts.

All cases under the Prevention of Corruption Act, 1988 are tried by Special Judges who are appointed by the central or state government.

T.S.R. Subramanian v. UoI,[48] : oral directions / instructions by the administrative superiors, political executive. Repeated shuffling / transfer of the officers are deleterious to good governance. Minimum assured service tenure ensures efficient service delivery and also increase efficiency.

The Prevention of Corruption Act, 1988 (PCA, 1988) is an Act of the Parliament of India enacted to combat corruption in government agencies and public sector businesses in India. The PCA 1988 has gone through many amendments in order to better implement it. This article will highlight the features of the Prevention of Corruption Act and also shed light on the amendments implemented. The information from the article will be useful in the polity segment of the UPSC Exams.

[48] AIR 2014 SC 263

Highlights of Prevention of Corruption Act, 1988

The Prevention of Corruption Act was enacted in order to fight corruption and other malpractices in government and public sector business in India.

Under PCA, 1988 the Central Government has the power to appoint judges to investigate and try those cases where the following offences have been committed

1. Offences punishable under the act

2. A conspiracy to commit or an attempt to commit the offences specified under the act `

The following are the offences specified under the Prevention of Corruption Act as well as their subsequent punishments:

Punishments and Offences under PCA, 1988	
Offences	Punishments
Taking gratification other than legal remuneration	Those found guilty shill face imprisonment of 6 months extendable upto 5 years. A fine shall also be levied
Taking gratification with the purpose of influencing a public servant, through illegal and corrupt means	Imprisonment for not less than three years which is expandable upto seven years. A fine shall also be levied.
Taking gratification with the purpose of wielding personal influence with public servant	Imprisonment not less than 6 months extendable upto 5 years. A fine shall also be levied
Act of criminal misconduct by the public servant	Imprisonment not less than 1year expandable upto 7 years. A fine shall also be levied

Investigation shall be done by a police officer not below the rank of:

● In the case of Delhi, of an Inspector of Police.

● In metropolitan areas, of an Assistant Commissioner of Police.

● Elsewhere, a Deputy Superintendent of Police or an officer of equivalent rank shall investigate any offence punishable under this Act without the order of a Metropolitan Magistrate or a magistrate of first class, or make any arrest therefore without a warrant.

Amendments to the Prevention of Corruption Act, 1988

Two amendment acts have been passed for the Prevention of Corruption Act, 1988. One in 2013 and the other in 2018. The highlights of both the amendment acts are given below:

Highlights of the 2013 amendment act:

● Bribery was made a punishable offence. A person who was compelled to bribe, should he/she report this incident to the law enforcement within seven days shall not be charged under the Prevention of Corruption Act.

● Two types of offences were covered under the amended criminal misconduct. The offences are illicit enrichment as in amassing wealth disproportionate to one's income sources and fraudulent misappropriation of property.

● The amendments were made taking prior approval of the relevant government authority to conduct any investigation regarding any offences allegedly conducted by public cases. However, if the offender has been arrested on the spot for taking bribes, then this approval is not needed.

● The Trial Limit for cases under PCA was fixed within two years if it is handled by a special judge. The total period for the trial should last only four years.

Highlights of the 2018 amendment act are as follows:

● Bribery is a specific and a direct offence

● Anyone taking bribes will face imprisonment for 3 to 7 years along with being levied a fine

● Those giving bribes can also be punished with imprisonment for upto 7 years and levied a fine

The 2018 amendment creates a provision to protect those who have been forced to pay a bribe in the event the matter is reported to law enforcement agencies within 7 days.

● It redefines criminal misconduct and will now only cover misappropriation of property and possession of disproportionate assets.

● It proposes a 'shield' for government servants, including those retired, from prosecution by making it mandatory for investigating agencies such as the Central Bureau of Investigation to take prior approval from a competent authority before conducting an enquiry against them.

● However, it states that such permissions shall not be necessary for cases involving the arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person.

● In any corruption case against a public servant, the factor of "undue advantage" will have to be established.

● The trial in cases pertaining to the exchange of bribes and corruption should be completed within two years. Further, even after reasoned delays, the trial cannot exceed four years.

● It covers bribe-giving commercial organisations to be liable for punishment or prosecution. However, charitable institutions have been left out of its ambit.

● It provides powers and procedures for the attachment and forfeiture of a corruption-accused public servant's property.

7. LAW OF CONTRACTS

7.1 THE INDIAN CONTRACT ACT, 1872

Law of Contract – An Outline

1. What is Law Relating to Contract?

Prior to the enactment of Indian Contract Act, 1872 the personal law of the parties was applied in all matters relating to contracts viz in case of Hindus the Hindu law and in case of Mohamedans, the Mohamedan law was applied. Wherever the parties belonged to different religions, it was the law of the defendant which was made applicable.

The Indian Contract Act, however, was enacted in the year 1872 and it came into operation on 1st day of September, 1872.

The Indian Contract Act does not affect provisions of any other Statute, Act or Regulation nor any usage or custom of trade unless such usages or customs are inconsistent with the provisions of the Act.

2. What is Contract?

A contract under the American law has been defined as a promise or a set of promises for the breach of which law gives a 'remedy' or the performance of which the law in some way is recognised as a 'duty'.

Section 2 (h) of the Indian Contract Act defines "Contract" as follows:-

"AN AGREEMENT ENFORCEABLE BY LAW IS A CONTRACT"

3. What is an Agreement?

For understanding the Contract, we must know what is an "Agreement". Section 2 (e) defines "Agreement" as under: -

"Every promise and every set of promises, forming the consideration for each other is an agreement."

A promise on the other hand has been defined as an “Accepted Proposal” under section 2 (b).

The process of Contract therefore, can be simplified as under: -

(i) There should be an offer or proposal from one person signifying his willingness to do or to abstain from doing something.

(ii) The proposal must be communicated

(iii) After communication, it must be accepted by the person to whom the proposal was made.

(iv) As soon as a proposal is accepted it becomes a promise and this promise is nothing but an “Agreement”.

(v) Any agreement which is enforceable by law is a “Contract”.

4. Essentials of Valid Proposal

(i) “An offer must be intended to create and be capable of creating legal relationship” is a settled principle under the English law. Although there is no such express provision under the Indian Contract Act but the contracts are not and must not be the sport of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatsoever as stated by “Lord Stowell” in *Darlymple* v. *Darlymple* (1811) 161 ER 665.

(ii) Mere invitation does not constitute a binding promise. An invitation to traders to make tenders, display of goods for sale in a shop, holding of an auction are all an invitation to make a ‘proposal’ and not a proposal by themselves.

Examples:

a) An invitation to dinner

b) An agreement to take a walk together

c) An invitation of a company to the public to subscribe for its shares.

(iii) An offer must be made for the purpose of being agreed to.

(iv) An offer may be made to a particular person or to the people in general but no contract can come into existence until it has been accepted by an ascertained person.

5. Essentials of a Valid Acceptance (Section 7)

In order to convert a proposal into a promise the acceptance must be: -

(i) Absolute and unqualified;

(ii) It should be made in the prescribed manner only and if the manner has not been prescribed it may be made in some usual and reasonable manner.

"The Contract is only complete when the acceptance is received by the proposer and the Contract is made at the place, where the acceptance is received"

6. Revocation of proposal/acceptance

(i) A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer but not afterwards.

(ii) Acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor but not afterwards.

Thus, a proposal can be revoked before it is accepted by the acceptor and acceptance can be revoked before it becomes known to the proposer.

7. Consideration

What Does It Mean?

The conception of "Consideration" in English Law is some "Detriment" to the promisee (in that he may suffer something or give something of value) or some 'benefit' to the promisor (in that he receives something of value).

The consideration is necessary for formation of every Contract.

A promise made without any consideration is not a contract.

Section 2 (d) defines consideration as under:-

"When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise:

Certain Rules Relating to Consideration

(i) The consideration must move at the desire or request of the promisor. An act done at the desire of the third party is not a consideration.

(ii) The consideration may, however, move from even a third party but under the modern English law, it must move from the promisee.

(iii) Past consideration is no consideration under the English law but it is not so in case of Indian law.

(iv) The adequacy of consideration is not relevant except for the purpose of determining whether the consent of the promisor was freely given or not.

Exception to the Rule "No Consideration No Contract"

(i) An agreement reduced in writing and registered under the law, if such agreement is made on account of natural love and affection between the parties standing in near relation to each other.

(ii) A promise to compensate for past services rendered.

(iii) Promise made in writing to pay a time-barred debt.

(iv) Gift transactions lawfully made.

8. What Agreements are Contracts?

All agreements are contracts if they are made: -

(i) By the free consent of the parties (section 13-22);

(ii) Competent to contracts (section 11-12);

(iii) For a lawful consideration with lawful object (section 23);

(iv) Not expressly declared to be void (section 20, 26, 27, 28, 29, 30 and 56); and

(v) In writing if required by law (e.g. Article 299 (1) of the Constitution of India, Section 17 of the Indian Registration Act, the Companies Act etc.

9. Consent -what it is?

When two or more persons agree upon the same thing in the same sense, they are said to "Consent".

A Consent is free when it is not caused by-

(i) Coercion, as defined in Section 15, or

(ii) Undue influence, as defined in Section 16, or

(iii) Fraud, as defined in Section 17, or

(iv) Misrepresentation, as defined in Section 18, or

(v) Mistake as to fact or Law (Section 20, 21, and 22).

10. Persons not Competent to Contract

(i) Infants (who have not attained the prescribed age of majority).

But there is no bar to a minor being admitted to the benefits of a partnership.

Similarly, a Contract of insurance by a *de-facto* guardian of a minor for the minor's benefit would be valid and enforceable by minor.

A surety bond jointly executed by a minor and an adult will be void vis-à-vis the minor, but it can be enforced against the surety.

But minor's property is liable for necessaries supplied to him, as this is covered by section 68.

(ii) An insane person, while he is insane.

(iii) Subject to disqualification under any other law.

11. Unlawful Objects or Considerations (Section 23)

The consideration or object of an agreement is lawful, unless-

- It is forbidden by law; or
- Is of such a nature that, if permitted it would defeat the provisions of any law; or
- Is fraudulent
- Involves or implies injury to person or property of another, or
- The Court regards it as immoral or opposed to public policy

12. Kinds of Agreements

(a) Valid

A valid agreement is one which is enforceable by law. When an agreement fulfills all the requirements of enforceability and is given effect to by law, it is a valid agreement. It is called a contract.

(b) Void

When an agreement violates some essential conditions of enforceability, it is a void agreement. A void agreement is one which is not enforceable at law. A void agreement has no legal existence.

Example:-

A promises to pay Rs. 10,000/- to B if he kills C.

Here the object is illegal and hence such an agreement cannot be enforced and is void.

The various kinds of void agreements under the Indian Contract Act are:-

- Agreements made by incompetent persons: S 11.
- Agreements made under mutual mistake as to a matter of fact or law (see 20 and 22).
- Agreements of which consideration or object is unlawful: S. 23.
- Agreements of which consideration or object is unlawful in part; S.24.
- Agreements without consideration: S.25.
- Agreements in restraint of marriage: S.26.

- Agreements in restraint of trade: S.27.
- Agreements in restraint of legal proceedings: S.28
- Agreements the meaning of which is uncertain or not capable of being made certain: S.29.
- Agreements by way of wager: S.30.
- Agreements contingent on an event happening, and the event becoming impossible: SS. 32, 36.
- Where the agreement is to do an act impossible in itself: S.56.
- Where the agreement is to do an act which subsequently becomes impossible or unlawful: S.56.

(c) Voidable

A voidable agreement is one which is enforceable in law at the option of one or more of the parties thereto, but not at the option of the other. Thus, an agreement induced by coercion, undue influence, fraud, or misrepresentation is voidable.

Example:

If A's consent to an agreement is obtained by fraud, A has the option to treat the agreement valid and binding or not. B who obtained the consent by fraud does not have that option. Such an agreement is voidable.

(13) Contingent Contract

i) Contingent contract is a contract to do or not to do something if some event collateral happens or does not happen. (Section 13).

ii) The contract may be subject to a condition precedent or a condition subsequent or a condition concurrent.

(14) Quasi Contract

i) The term 'quasi' is a prefix implying appearance without reality. It means 'as if', 'sort of', 'resembles like'.

ii) The quasi contract, therefore, means a kind of obligation, which is not really contractual in that it does not rest on any agreement but which the law treats as if it is a contract.

iii) It is, therefore, contractual in law, but not in fact, that is to say there is no contract in fact but there is one in the contemplation of law. Such contracts are called quasi contracts.

Example

Thus if A pays a sum of money to B believing him to be his creditors when as a matter of fact, B was not, B is bound to return the money to A on the assumption that the above sum was given to him by way of loan.

Section 68 to 72 of the Act deal with quasi contracts and these are of five kinds viz:-

(i) Claim for necessaries supplied to person incapable of entering into a contract (Section 68).

A supplies to B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.

(ii) Reimbursement of person paying money due by another in payment of which he is interested (Section 69).

(iii) Obligation of person enjoying benefit of non-gratuitous Act (Section 70)

A, a tradesman leaves goods at B's house by mistake B treats the goods as his own. He is bound to pay A for them.

(iv) Rights and Liabilities of finder of goods (Section 71).

(v) Liability of person to whom money is paid or thing delivered by mistake or under coercion (Section 72).

15. Performance of Contract

i) The parties to a Contract must either perform or offer to perform their respective promises unless such performance is dispensed with or excused under the provisions of this Act or of any other law.

ii) Promises also bind the representatives of the promisors in case of death unless different intention appears in the Contract.

16. Essentials of Valid Performance

(i) It should be unconditional (sec. 38);

(ii) It should be performance by promisor or by his representatives (sec. 40);

(i) It should be performed at proper time specified in the agreement or within a reasonable time (secs. 46-47).

(ii) It should be performed at the place specified in the agreement.

(iii) The promises must have reasonable opportunity to ascertain:

(a) the thing offered; and

(b) whether the performance is of the whole or of a part [s.38(1)]

The performance of the Contract amounts to discharge and the non-performance of contract amounts to breach of Contract.

The other means of discharge of Contract are as follows: -

(a) When performance becomes impossible or unlawful (s.56)

(b) By death of the contracting party if the contract is personal in its character (s.37).

(c) By recession (s.62)

(d) By novation (s.62)

(e) By remission (s.63)

(f) By accord and satisfaction (s.63)

(g) By operation of other laws such as Presidency Towns Insolvency Act, Provincial Insolvency Act, Agricultural Debtors Relief Act, Rent Restriction Act, C.P. and Berar Reduction of Interest Act, etc.

17. Breach of Contract and its Consequences

When a party commits a breach of Contract the law entitles other party three remedies. He may seek to obtain:-

(i) Damages for the loss sustained, or

(ii) A decree for specific performance, or

(iii) An injunction

The law as to damages is regulated by the Contract Act whereas the law as to specific performance and injunction is regulated by Specific Relief Act.

(i) Damages

Section 77 of the Contract Act provides that the party who suffers by such breach of Contract is entitled to receive compensation for any loss or damage caused by breach. But such compensation is for:-

(a) Any loss or damage caused to him which naturally arose in the usual course from such breach;

(b) Which the party knew to be likely to result from the breach of it; or

(c) Such compensation cannot be given for remote or indirect loss.

(ii) Specific Performance

It can be grated only when the damages are an adequate remedy, or when the court can supervise the execution of the Contract.

Specific performance cannot be enforced for contract of personal service.

Example

A agrees to buy and B agrees to sell a picture by a dead painter. A may compel B specifically to perform the contract.

(iii) Injunction

It is used as a means of enforcing a contract, generally by way of enforcing the "promise to forbear"

Example

A, a singer, contracts with B, a manager of a theatre, to sing at his theatre for a year and to abstain from singing at other theatre during the period. She absents herself. B cannot compel A, to sing at his theatre, but he may sue her for an injunction restraining her from singing at other theatre.

ALSO REFER - https://gyan.lbsnaa.gov.in/mod/scorm/player.php

8. OTHER LEGISLATIONS (NEED FOR SOCIAL LEGISLATIONS)

8.1 THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013

Introduction

In India, the Supreme Court on issue of sexual harassment of women at the work place, seek the help from the various International instruments including CEDAW to which Indian government is a party, and finally gave exhaustive guidelines to protect the women. In the year 1993, India had ratified the United Nation Convention on Elimination of all Forms of Discrimination against Women. One of the requirements of the said UN Convention is that "*State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights.* " The International law shows the path on the human rights enactments to the states.

In *Vishakha* v*. State of Rajasthan,* the Supreme Court relied on the Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the General Assembly of the United Nations, in 1979, which India has both signed and ratified, acknowledges sexual harassment at the workplace as a human rights violation and outlined the Guidelines making it mandatory for employers to provide for sympathetic and non-retributive mechanisms to enforce the right to gender equality of working women. However societal attitudes towards sexual harassment has impeded any effective implementation of the law.

Apparel Export Promotion Council v A.K. Chopra case is pivotal in the development of the law of sexual harassment at the workplace. The following was highlighted in the case: Sexual Harassment is a form of sexual discrimination projected through unwelcome sexual advances, or sexual favours or acts with sexual overtones. Sexual Harassment interferes with the work performance of a female employee and creates an intimidating and hostile environment for her to work in.

The Supreme Court, in *Medha Kotwal Lele v. Union of India*, (2013) 1 SCC 297 gave the following directions

1. The States and Union Territories which have not yet carried out adequate and appropriate amendments in their respective Civil Services Conduct Rules (by whatever name these Rules are called) shall do so within two months from today by providing that the report of the Complaints Committee shall be deemed to be an inquiry report in a disciplinary action under such Civil Services Conduct Rules. In other words, the disciplinary authority shall treat the report/findings, etc. of the Complaints Committee as the findings in a disciplinary inquiry against the delinquent employee and shall act on such report accordingly. The findings and the report of the Complaints Committee shall not be treated as a mere preliminary investigation or inquiry leading to a disciplinary action but shall be treated as a finding/report in an inquiry into the misconduct of the delinquent.

2. The States and Union Territories which have not carried out amendments in the Industrial Employment (Standing Orders) Rules shall now carry out amendments on the same lines, as noted above in para 44.1 within two months.

3. The States and Union Territories shall form adequate number of Complaints Committees so as to ensure that they function at taluka level, district level and State level. Those States and/or Union Territories which have formed only one committee for the entire State shall now form adequate number of Complaints Committees within two months. Each of such Complaints Committees shall be headed by a woman and as far as possible in such committees an independent member shall be associated.

4. The State functionaries and private and public sector undertakings /organisations/bodies/institutions, etc. shall put in place sufficient mechanism to ensure full implementation of *Vishaka* [*Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241 : 1997 SCC (Cri) 932] guidelines and further provide that if the alleged harasser is found guilty, the complainant victim is not forced to work with/under such harasser and where appropriate and possible the alleged harasser should be transferred. Further provision should be made that harassment and intimidation of witnesses and the complainants shall be met with severe disciplinary action.

5. The Bar Council of India shall ensure that all Bar Associations in the country and persons registered with the State Bar Councils follow *Vishaka* [*Vishaka*v. *State of Rajasthan*, (1997) 6 SCC 241 : 1997 SCC (Cri) 932] guidelines. Similarly, the Medical Council of India, Council of Architecture, Institute of Chartered Accountants, Institute of Company Secretaries and other statutory institutes shall ensure that the organisations, bodies, associations, institutions and persons registered/affiliated with them follow the guidelines laid down by *Vishaka* [*Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241 : 1997 SCC (Cri) 932] . To achieve this, necessary instructions/circulars shall be issued by all the statutory bodies such as the Bar Council of India, Medical Council of India, Council of Architecture, Institute of Company Secretaries within two months from today. On receipt of any complaint of sexual harassment at any of the places referred to above the same shall be dealt with by the statutory bodies in accordance with *Vishaka* [*Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241 : 1997 SCC (Cri) 932] guidelines and the guidelines in the present order.

6. We are of the view that if there is any non-compliance or non-adherence to *Vishaka* [*Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241 : 1997 SCC (Cri) 932] guidelines, orders of this Court following *Vishaka* [*Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241 : 1997 SCC (Cri) 932] and the above directions, it will be open to the aggrieved persons to approach the respective High Courts. The High Court of such State would be in a better position to effectively consider the grievances raised in that regard.

Meaning of Sexual Harassment

The CEDAW Convention aims at elimination of acts discrimination against women and ensures access to equal opportunities in all spheres of life. Vishaka Guidelines adapted several instances for sexually determined behavior which are as follows:

a) Physical contact as well as advances of a sexual nature
b) Demand or request for sexual favors
c) Sexually coloured remarks

d) Showing pornography and;

e) Any other unwelcome verbal or non-verbal conduct which is of a sexual nature

In the landmark case of *Dr. Malabika Bhattacharjee v Internal Complaints Committee*, Vivekananda College, the court declared that same-gender complaints are valid under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, commonly referred to as the PoSH Act. The court held that the definition of 'Respondent' does not restrict the application of the Act to any particular gender. The complaint of Sexual Harassment as described under Sec 9 of the POSH Act, 2013 also doesn't confine the scope of making a complaint against a person of the same gender. Furthermore, the definition of sexual Harassment under Sec.2(m) of the Act is dynamic and is ever-evolving with changing societal trends.

Sexual harassment is described as unsolicited nonreciprocal male behaviour that asserts a women's sex role over her function as a worker. The problem of sexual harassment relates not so much to the actual biological differences between men and women, but to the gender or social roles which are attributed to men and women in social and economic life, and perceptions about male and female sexuality in society. However, it's not that only women are victims of this malpractice but males also face it, though the percentage is low.

Sexual harassment as defined in section 2(n) of the Sexual Harassment of Women at Workplace Act, 2013 as to include any one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely: -

- physical contact and advances; or
- a demand or request for sexual favours; or
- making sexually coloured remarks; or
- showing pornography; or
- any other unwelcome physical, verbal or non-verbal conduct of sexual nature

Salient features of the Sexual Harassment Act, 2013

Scope of the Sexual Harassment Act

The Sexual Harassment Act is very wide and is applicable to the organized sector as well as the unorganized sector. In view of the wide definition of workplace, the statute, inter alia, applies to government bodies, private and public sector organisations, non-governmental organisations, organisations carrying on commercial, vocational, educational, entertainment, industrial, financial activities, hospitals and nursing homes, educational institutes, sports institutions and stadiums used for training individuals. As per the Sexual Harassment Act, a workplace also covers within its scope places visited by employees during the course of employment or for reasons arising out of employment, including transportation provided by the employer for the purpose of commuting to and from the place of employment.

Section 2(f) of the Act defines 'employee' which includes regular, temporary, ad hoc employees, individuals engaged on daily wage basis, either directly or through an agent, contract labour, co-workers, probationers, trainees, and apprentices, with or without the knowledge of the principal employer, whether for remuneration or not, working on a voluntary basis or otherwise, whether the terms of employment are express or implied including probationer and trainee.

Complaint of Sexual Harassment

A complaint is to be made in writing by an aggrieved woman within three months of the date of the incident. The time limit may be extended for a further period of three months if, on account of certain circumstances, the woman was prevented from filing the complaint. If the aggrieved woman is unable to make a complaint on account of her physical or mental incapacity or death, her legal heirs may do so.

Internal and Local Complaints Committee

The Act contemplates the constitution of Internal Complaints Committee which comprises all branches or administrative units where the number of employee is more than ten. The government is required to set up a Local Complaints Committee at district and block levels. A District Officer (District Collector or Deputy Collector) shall be responsible for facilitating and monitoring the activities under the Act. The Sexual Harassment Act also sets out the

constitution of the committees, process to be followed for making a complaint and inquiring into the complaint in a time bound manner.

Transfer and Leave as Interim Reliefs

The Sexual Harassment Act empowers the Internal Complaints Committee and the Local Complaints Committee to recommend to the employer, at the request of the aggrieved woman, following interim measures: -

i) transfer of the aggrieved woman or the respondent to any other workplace; or
ii) granting leave to the aggrieved woman up to a period of three months in addition to her regular statutory/ contractual leave entitlement; or
iii) any other relief.

Provision for Conciliation

The Sexual Harassment Act makes the provision for conciliation in order to settle the matter before initiating the inquiry at the request of the aggrieved woman but monetary settlement should not be made as a basis of such conciliation.

Action against Frivolous and Malicious Complaints

The Sexual Harassment Act also ensures that the provisions of the Act should not be misused and penalized the complainant woman if she files a frivolous and malicious complaint. But the inability to substantiate a complaint will not magnetize action against complainant.

Prohibition on Publications of Identity

The Act prohibits the disclosure of the identity and addresses of the victim, respondent and witnesses. Section 16 gives the overriding effect on the *Right to Information Act*, 2005 and any information relating to the conciliation and inquiry proceedings or recommendations cannot be communicated to public through any means and in case of any contraventions with this provision the person entrusted with such information will face penal consequences.

Employer's Obligations

There are certain duties of the employer fixed by the Act. These are to: -

i) provide a safe working environment.

ii) display conspicuously at the workplace, the penal consequences of indulging in acts that may constitute sexual harassment.

iii) inform about the composition of the Internal Complaints Committee.

iv) organise workshops and awareness programmes for sensitizing employees on the issues and implications of workplace sexual harassment and organizing orientation programmes for members of the Internal Complaints Committee.

v) assist the committee in securing the attendance of witnesses and respondents.

vi) assist the woman to file a complaint under IPC or any other law

vii) treat sexual harassment as a misconduct under the service rules and initiate action for misconduct.

viii) monitor the timely submission of reports by the internal committee.

If an employer fails to constitute an Internal Complaints Committee or does not comply with any provisions contained therein, the Sexual Harassment Act prescribes a monetary penalty. A repetition of the same offence could result in the punishment being doubled and / or de-registration of the entity or revocation of any statutory business licenses.

ALSO REFER - https://gyan.lbsnaa.gov.in/mod/scorm/player.php

8.2 SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES ACT, 1989 AS AMENDED BY THE 2018 ACT

Introduction

The centuries-old caste system in India has disadvantaged thousands and thousands of backward class people from fundamental human rights. It gave loose license for the upper class to consolidate their societal dominance via all means viable. Consequently, the legislature in its awareness enacted The Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989 to prevent the commission of offences towards SC/ ST and provide strict penal measures for the offender. The 'Dalits' (*legally recognized as* 'Scheduled Castes') and the 'Tribals' (*legally recognized* as 'Scheduled Tribes') are the most marginalized sections of Indian society. Since time immemorial many atrocities have been committed against them. To provide protection to the particular segment of the population The SC/ST (Prevention of Atrocities) Act, 1989 came into force to deal with such discrimination and atrocities.

Many attempts have been made in past to deal with the problem of discrimination. The preamble of India and the Constitution contains provisions for providing them the protection. The legislation was passed cam to known as the Untouchability (Offences) Act, 1955 but the lacunae and loopholes of this act impelled the government to project a major overhaul of this legal instrument. From 1976 onwards the Act was refurbished as the Protection of Civil Rights Act. Despite the various measures, adopted by the government to remove this gap between lower and upper caste and to protect the Dalits from humiliation, disrespect, offences, indignities and harassment they still remained a vulnerable category.

Therefore the objective of the Act is very clear which emphasizes the intention of the Indian

state to provide justice to the Dalit class and also abolish the ill practice of untouchability.

The Act is generally divided into three different categories, which cover a list of problems or issues related to atrocities against SC/ST people and their position in society.

The first category contains provisions related to criminal law. This category in general establishes criminal liability for several specifically defined crimes and also extends the scope of certain categories of penalizations given in the Indian Penal Code (IPC). The second category contains provisions for relief and compensation for victims of atrocities. The third category contains provisions that set up special authorities for the exertion
and monitoring of the Act.

The salient features of the Act

• Creation of new types of offences not in the Indian Penal Code (IPC) or in the Protection of Civil Rights Act 1955 (PCRA).
• Commission of offences only by specified persons i.e. barbarity can be committed only by non-SCs and non-STs on members of the SC or ST communities. Crimes among SCs and STs or between STs and SCs do not come under the purview of this Act.
• The Act lists 37 offences relating to various patterns or behaviours inflicting criminal offences and breaking the self-respect and esteem of the scheduled castes and tribes community. This includes denial of economic, democratic and social rights, discrimination, exploitation and abuse of the legal process.

The Act also defines various types of atrocities against SCs/STs and prescribes strict punishment for such atrocities. It contains Enhanced quality of punishment for some offences as well as enhanced minimum punishment for public servants. Among several other features, it deals with the Creation of Special Courts and the appointment of Special Public Prosecutors.

The legislation also provides a safeguard to tribals against atrocities. According to the Act and Rules, there are to be monthly reports (from the District Magistrates), quarterly review meetings at the district level by the District Monitoring and Vigilance Committee (DVMC), and half-yearly reviews by a 25-member State Monitoring and Vigilance Committee (SVMC) the chaired by the Chief Minister. The pursuance of every Special Public Prosecutor (SPP) will also have to be reviewed by the Director of Public Prosecutions (DPP) every quarter. Annual reports have to be sent to the central government by 31 March every year.

Process Of Seeking Remedy

1. Complain of offence by the victim to the nearest police station orally or in written form signed by the victim herself/himself or can be sent through registered post to the relevant police station.
2. The spot investigation should be carried out by any competent official, not below the rank of Deputy Superintendent of Police. Thereafter a list of victims and the loss to person and damage to property is ascertained.
3. The investigating officer after preparing the report sends the same to the Superintendent of Police which is subsequently forwarded to the Director-General or the Commissioner of Police. Thereafter, the Inspector in Charge of the Police Station having jurisdiction is asked to file the charge-sheet in Special Court within 60 days.
4. In case there is a delay in filing of charge-sheet beyond 60 days lime limit in the special court, then a reason for such delay should also be cited in its support.

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act of 2018

The 2018 amendment to the Act, sought to amend the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. The amendment Act, 2018 excludes the provision of anticipatory bail for a person who has been accused of atrocities against SC and STs. Under the Act, the investigating officer does not require the approval of any authority to arrest the person accused of such crimes. Further, the Act also does not

mandate a preliminary enquiry before registration of a First Information Report (FIR) against the person accused under the Act.

However, a two-judge bench of the Supreme Court had held in *Subhash Kashinath Mahajan v. State of Maharashtra & Ors,* 2018 (4) SCC 454 that there will be no automatic arrest on a complaint filed under the SC/ST Amendment Act 2018. A two-judge bench of Supreme Court held that the exclusion of anticipatory bail provisions of the Code of Criminal Procedure (by Section 18 of the Act) did not constitute an absolute bar for the grant of bail, where it was discernable to the court that the allegations about atrocities or violation of the provisions of the Act were false. It was also held, more crucially, that public servants could be arrested only after approval by the appointing authority (of such public servant) and in other cases, after approval by the Senior Superintendent of Police. It was also directed that cases under the Act could be registered only after a preliminary enquiry into the complaint.

However, a three-judge bench of the Supreme Court in *Prathvi Raj Chauhan v. Union Of India & Others* WP(C) 1015/2018 restored the automatic arrest in cases of atrocities against SC and STs. A 3-judge bench has upheld the constitutional validity of the SC/ST (Prevention of Atrocities) Amendment Act, 2018, and said that a court can grant anticipatory bail only in cases where a prima facie case is not made out.

8.3 INFORMATION TECHNOLOGY ACT

The reasons and jurisprudence behind the Act has been clearly indicated by the intention of legislature which is given in the beginning of the Information Technology Act *per se*.

Need of the IT Act

a) To provide legal recognition of e-records & e-signature

b) To provide legal rights and obligations through e-transactions

c) To prevent misuse arising out of e-transactions

d) To create civil & criminal liability

e) To facilitate e-governance

f) To resolve domain name disputes and Trademarks

g) To facilitate e-commerce

The basic aim of the Information Technology Act, 2000, is to provide legal recognition to the transactions which are carried out by means of electronic data interchange and by other means of electronic communication. This is usually termed as e-commerce which deals with the alternatives to paper based methods of communication and the storage of information in a physical form. The Act has also been brought in to provide for and facilitate the electronic filing of documents with that of the government agencies. The filing of the documents electronically has been the latest trend in the modern times and this is how the system has changed over a period of time.

The salient features of the Information Technology Act, 2000 may briefly be stated as follows:—

i) The Act provides legal recognition to e-commerce, which facilitates commercial e-transactions.

ii) It recognises records kept in electronic form like any other documentary record. In this way,it brings electronic transactions at par with paper transactions in documentary form.

iii) The Act also provides legal recognition to e-signatures which need to be duly authenticated by the certifying authorities.

iv) Cyber Law Appellate tribunal has been set up to hear appeal against adjudicating authorities.

v) The provisions of the I.T. Act have no application to negotiable instruments, power of attorney, trust, will and any contract for sale or conveyance of immovable property.

vi) The Act applies to any cyber offence or contravention committed outside India by a person irrespective of his/her nationality.

vii) As provided under Section 90 of the Act, the State Government may, by notification in 'Official Gazette' make rules to carry out the provisions of the Act.

viii) Consequent to the passing of this Act, the SEBI had announced that trading of securities on the internet will be valid in India.

Section 1 deals with Extra territorial Jurisdiction

Section 4 deals with E-records

Section 6 deals with E-signatures

Section 8 deals with E-gazette

Types of Offences

Cyber-crime as a term was not defined in the Act. It only delved with few instances of computer related crime. These acts as defined in Chapter XI of the Act which includes:

a) Illegal access, introduction of virus, denial of services, causing damage and manipulating computer accounts (Section 43). Act of causing denial of service, introduction of virus etc as defined in section 43 only amounts to payment of damages which could be up to one crore.

b) Tampering, destroying and concealing computer code (Section 65)

c) Acts of hacking leading to wrongful loss or damage (Section 66). Punishment in section 65 and 66 is three years or fine up to two lakh rupees or both.

d) Acts related to publishing, transmission or causing Publication of obscene/ lascivious in nature (section 67). For the first-time offenders can be punished up to 5 years with fine up to

one lakhs of rupees. Subsequent offence can lead to ten years of punishment and fine up to two lakhs of rupees.

Phishing and Spam

While this has not been mentioned specifically but this can be interpreted in the provisions mentioned here in section 66 A. Through this section sending of menacing, annoying messages and also misleading information about the origin of the message has become punishable with imprisonment up to three years and fine.

Sending of Offensive Messages (S.66A)

The introduction of S.66A to the IT Act, 2000 unarguably expands the scope of the Act to deal with instances of cyber stalking, threat mails, spam and phishing mails, with an attempt to strengthen the law and circumscribe aspects of unlawful cyber conduct that were left untouched under the old legislation, but a few flagrant issues do emerge on closer inspection of the provision.

But, in Shreya Singhal v. Union of India, (2015) 5 SCC 1 Section 66A of the Information Technology Act, 2000 was struck down in its entirety being violative of Article 19(1)(a).

Stolen Computer Resource or Communication Device

Section 66B has been introduced to tackle with acts of dishonestly receiving and retaining any stolen computer resource. This has also been made punishable with three years or fine of one lakh rupees or both.

Misuse of e-Signature (Section 66C)

Dishonest use of somebody else's e-signature has been made punishable with imprisonment which may extend to three years and shall also be liable to fine with may extend to rupees one lakh.

Theft of Computer Resource (S.66B)

S.66B deal with situations where there has been theft of a '*computer resource*' or '*communication device*'. Under this section, an individual who receives a stolen computer, cellphone or any other electronic device maybe imprisoned for up to three years.

Identity Theft and Impersonation (S. 66C and S. 66D)

An examination of identity theft protection laws for internet users indicates that the harm sought to be prevented is not radically different from the territorial crime of the same nature. The basic nature of the crime involves the use of identifying information of someone to represent oneself as the individual for fraudulent purposes, essentially, the wrongful appropriation of one's identity by another.

Voyeurism (S. 66E)

The offence of voyeurism would locate itself under the heading 'content-related offences' and based on the subject of the crime, may be slotted into the category of crimes against individuals, specifically, against their person.

Cyber Terrorism (S.66F)

This is the convergence of terrorism and cyberspace. Terrorism, by itself is not a new phenomenon, but with the development of modern technologies, the creation of laws specifically dealing with the same or related acts, conducted through the medium of cyberspace, was imminent.

Sexually Explicit Content and Child Pornography (S.67A and S.67B)

Section 67 B attempts to address the issue of child pornography. Through this section it has made the publication or transmission of material in any electronic form which depicts children engaged in sexually explicit act or conduct, anyone who creates, facilitates or records these acts and images punishable with imprisonment of five years and fine which may extend up to ten lakhs in first offence and seven years and fine of ten lakhs on subsequent offence.

Intermediary's Liability

It is mandatory for the Intermediaries to retain any information in the format that Central government prescribes. (Sections 67C) and are punishable for any violation with a punishment of imprisonment of 3 years and fine. In case of any act which affects national sovereignty, intermediaries are liable to seven years (Section 69(4).

Cognizance of Cases

All cases, which entail punishment of three years or more, have been made cognizable. Offences with three years punishment have been made bailable (Section 77B).

Investigation of Offences

Inspectors are the investigating officers for offences defined in this Act (section 78).

The following chapter has been taken from the book titled "The Basics of Cyber Crime Investigation" written by Dr.Atul Fulzele, IPS and Mr.Vikrant Bonsra (Co-author)

CHAPTER - 10
Comparative analysis of the IT Act, IPC and other Laws

Sr. No.	Name of complaint	Applicable section(s) and punishment under ITAA 2008	Applicable section(s) under other laws and punishment
1	Mobile phone stolen		Section 379 IPC up to 3 years imprisonment or fine or both
2	Receiving stolen computer/data (data or computer or mobile phone owned by you is found in the hands of someone else.	Section 66 B of ITAA 2008- up to 03 years imprisonment or rules one lakh fine or both	Section 411 IPC- upto 03 years imprisonment or fine or both
3	Data owned by you or your company in any form is stolen	Section 66 B of ITAA 2008-upto to 03 years imprisonment or fine upto rupees five lakh or both	Section 379 IPC upto to 03 years imprisonment or fine or both
4	A password is stolen and used by someone else for fraudulent purpose	Section 66C of ITAA 2008- upto to 03 years imprisonment and fine upto rupees one lakh Section 66 Dof ITAA 2008- upto to 03 years imprisonment and fine upto rupees one lakh	Section 419 IPC - up to 03 years imprisonment or fine Section 420 IPC- upto 7 years imprisonment and fine

5	An e-mail is read by someone else by fraudulently making use of password	Section 66 of ITAA 2008- upto 03 years imprisonment or fine upto rupees five lakh or both Section 66C of ITAA 2008 – upto 03 years imprisonment and fine upto rupees one lakh	
6	A biometric impression is misused	Section 66C of ITAA 2008 – upto 03 years imprisonment and fine upto rupees one lakh	
7	An electronic signature or digital signature is misused	Section 66C of ITAA 2008 – upto 03 years imprisonment and fine upto rupees one lakh	
8	A phishing e-mail is sent out in your name, asking for login credentials	Section 66 D of ITAA 2008- upto 03 years imprisonment and fine upto rupees one lakh	Section 419 IPC –upto 03 years imprisonment or fine
9	Capturing, publishing or transmitting the image of private area without any person's consent or knowledge	Section 66E of ITAA 2008 upto 03 years imprisonment and fine not exceeding Rs two lakh or both	Section 292 IPC - upto 02 years imprisonment and fine rupees 2000; and upto 5 years and rupees 5000 for second and subsequent
10	Tempering with	Section 65 of ITAA	

	computer source documents	2008 upto 03 years imprisonment or fine upto rupees two lakh or both Section 66 of ITAA 2008 upto 03 years imprisonment or fine upto rupees five lakh or both	
11	Data modification	Section 66 of ITAA 2008 upto 03 years imprisonment or fine upto rupees five lakh or both	
12	Sending offensive messages through communication services etc.	Section 66A* of ITAA 2008 upto 03 years imprisonment or fine	Section 500 IPC – upto 02 years or fine or both Section 504 IPC – upto 02 years or fine or both Section 506 IPC – upto 02 years or fine or both if threat be to cause death or grievous hurt etc. upto 07 years or fine or both Section 507 IPC – upto 02 years along with punishment under section 506 IPC Section 508 IPC – upto 01 years or fine or both

			Section 509 IPC – upto 01 years or fine or both of IPC as applicable
13	Publishing or transmitting obscene material in electronic form	Section 67 of ITAA 2008 first conviction- upto 03 years and 5 lakh; second and subsequent conviction- upto 05 years and upto 10 lakh	Section 292 IPC upto to 2 years imprisonment and fine rupees 2000; and upto 05 years and rupees 5000 for second and subsequent conviction
14	Publishing or transmitting of material containing sexually explicit act etc. in electronic form	Section 67A of ITAA 2008 first conviction- upto 05 years and 10 lakh; second or subsequent conviction- upto 07 years and upto 10 lakh	Section 292 IPC upto to 2 years imprisonment and fine rupees 2000; and upto 05 years and rupees 5000 for second and subsequent conviction
15	Punishment for Publishing or transmitting of material depicting children in sexually explicit act etc. in electronic form	Section 67B of ITAA 2008 first conviction- upto 05 years and 10 lakh; second or subsequent conviction- upto 07 years and upto 10 lakh	Section 292 IPC upto to 2 years imprisonment and fine rupees 2000; and upto 05 years and rupees 5000 for second and subsequent conviction
16	Misusing WiFi connection if done against the state	Section 66 of ITAA 2008 - upto 03 years imprisonment or	

		fine upto rupees five lakh or both Section 66F- life imprisonment of ITAA 2088	
17	Planting a computer virus, if done against the state	Section 66 of ITAA 2008 upto 03 years imprisonment and fine upto rupees five lakh or both	
18	Conducting denial of service attack against a government computer	Section 66 of ITAA 2008 upto 03 years imprisonment and fine upto rupees five lakh or both	
19	Stealing data from a government computer that has significance from nation security perspective	Section 66 of ITAA 2008 upto 03 years imprisonment or fine upto rupees five lakh or both Section 66F- Life imprisonment of ITAA 2008	
20	Not allowing the authority to decrypt all communication that passes through computer or computer to be relevant authorities	Section 69 of ITAA 2008 –imprisonment upto 07 years and fine	
21	Failure to block websites, when ordered	Section 69 A of ITAA 2008- imprisonment upto 07 years and fine	
22	Sending offensive messages by e-mail	Section 66 A* of ITAA 2008- imprisonment upto 03 years and fine	Section 504 IPC – upto 02 years or fine or both

23	Word, gesture or act intended to insult the modesty of a women		Section 509 IPC – upto 01 years or fine or both- IPC as applicable
24	Sending defamatory message by e-mail	Section 66 A* of ITAA 2008- imprisonment upto 03 years and fine	Section 500 IPC – upto 02 years or fine or both
25	Bogus website, cyber frauds	Section 66 D of ITAA 2008- upto 03 years imprisonment and fine upto rupees one lakh	Section 419 IPC – upto 03 years imprisonment or fine Section 420 IPC – upto 07 years imprisonment and fine
26	E-mail spoofing	Section 66C of ITAA 2008- upto 03 years imprisonment and fine upto rupees one lakh	Section 465 IPC – upto 02 years imprisonment or fine or both Section 468 IPC – upto 07 years imprisonment and fine
27	Making a false document	Section 66D of ITAA 2008- upto 03 years imprisonment and fine upto rupees one lakh	Section 465 IPC – upto 02 years imprisonment or fine or both
28	Forgery for purpose of cheating	Section 66D of ITAA 2008- upto 03 years imprisonment and fine upto rupees one lakh	Section 468 IPC – upto 07 years imprisonment and fine
29	Forgery for purpose of harming	Section 66D of ITAA	Section 469 IPC

	reputation	2008- upto 03 years imprisonment and fine upto rupees one lakh	– upto 03 years imprisonment and fine
30	E-mail abuse	Section 66A* of ITAA 2008- upto 03 years imprisonment and fine	Section 500 IPC – upto 02 years imprisonment or fine or both
31	Punishment for criminals intimidation communication	Section 66A* of ITAA 2008- upto 03 years imprisonment and fine	Section 506 IPC – upto 02 years imprisonment or fine or both- if threat be to cause death or grievous hurt etc. upto 07 years imprisonment or fine or both
32	Criminal intimidation by an anonymous communication	Section 66A* of ITAA 2008- upto 03 years imprisonment and fine	Section 507 IPC – upto 02 years along with punishment under section 506 IPC
33	Copyright infringement		Section 63, 63B Copyright Act 1957
34	Theft of computer hardware		Section 379 IPC – upto 03 years imprisonment or fine or both
35	Online sales of drugs		NDPS Act
36	Online sales of arms		Arms Act

* A division bench of Supreme Court decided on 24th march , 2015 in Shreya Singhal vs. Union of India to struck down section 66A of Information Technology Act, 2000 as unconstitutional. Now comments on social networking sites will not be offensive unless they come under the provisions of The Indian Penal Code, 1860 .

8.4 PRIVACY LAW

Constitutional Basis For Privacy Protection In India

The Right to Privacy is not expressly mentioned as a Fundamental Right under the Constitution; however, the Courts have been reading this right into Article 21 of the Constitution which guarantees the Right to Life and Personal Liberty. The Supreme Court of India has adjudicated on the multiple dimensions of privacy but has refrained from defining it in a straight-jacketed way and has allowed it to evolve on a case to case basis.

It was in *Kharak Singh's case* (Supreme Court, 1964) that the Supreme Court first laid down the parameters of the right to privacy in India. The case related to the constitutionality of certain police regulations which allowed for domiciliary visits and surveillance of persons with criminal records. The Court by majority held that "The right of privacy is not a guaranteed right under our Constitution, and therefore the attempt to ascertain the movements of an individual is merely a manner in which privacy is invaded and is not an infringement of a fundamental right guaranteed in Part III." The minority view, however, was that although "the Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty". This minority view was later upheld in *Govind's case* (Supreme Court, 1975) which too dealt with the issue of surveillance by the police. The judgment recognized Right to Privacy as a Fundamental Right though qualified by a caveat that it could be curtailed in cases of "compelling public interest". However, this "compelling public interest" was also circumscribed by the Court. In *PUCL Vs Union of India* (Supreme Court, 1997) the State action of intercepting telephone calls was challenged. Although the Court did not strike down the provision of interception in the Telegraph Act of 1885 it held that telephone-tapping was a very serious invasion of an individual's privacy and therefore curtailed the number of authorities approving surveillance and also mandated the constitution of oversight committees. Further, while deciding on the issue of telephone-tapping in the case of PUCL v. Union of India, the Supreme Court observed that telephone-tapping would be a serious invasion of an individual's privacy. Thus, telephone-tapping would

infract Article 21 of the Constitution, unless it is permitted under the procedure established by law.

On the 24th of August, a nine-judge bench of the Supreme Court delivered its verdict in Justice K.S. Puttaswamy vs Union of India, (2017) 10 SCC 1 unanimously affirming that the right to privacy is a fundamental right under the Indian Constitution. The verdict brought to an end a constitutional battle that had begun almost exactly two years ago, on August 11, 2015, when the Attorney-General for India had stood up during the challenge to the Aadhaar Scheme, and declared that the Constitution did not guarantee any fundamental right to privacy. The three judges hearing the case referred the constitutional question to a larger bench of five judges which, in turn, referred it further to a nine-judge bench. The case was argued over six days in the month of July, during which the Union of India, with many supporting state governments, the UIDAI and TRAI, repeated the Attorney-General's 2015 claim – a claim which, as we shall see, was decisively rejected by the Court.

Six out of nine judges – Chelameswar, Bobde, Nariman, Sapre, Chandrachud and Kaul JJ – delivered separate opinions (Chandrachud J wrote for himself and on behalf of Khehar CJI, Aggarwal and Nazeer JJ). Spanning 547 pages, Puttaswamy is undoubtedly a historic and landmark verdict of our times, and one of the most important civil rights judgments delivered by the Supreme Court in its history. Apart from affirming the existence of the fundamental right to privacy under the Indian Constitution – for which each of the nine judges must be unreservedly applauded – Puttaswamy will have a profound impact upon our legal and constitutional landscape for years to come. It will impact the interplay between privacy and transparency and between privacy and free speech; it will impact State surveillance, data collection, and data protection, LGBT rights, the legality of food bans, the legal framework for regulating artificial intelligence, as well as many other issues that we cannot now foresee or anticipate.

Privacy in law of Tort

The Right to Privacy is further encompassed in the field of Torts which include the principles of nuisance, trespass, harassment, defamation, malicious falsehood and breach of confidence.

The tort of Defamation involves the right of every person to have his reputation preserved inviolate. It protects an individual's estimation in the view of the society. However, defenses in this regard are 'truth' and 'privilege', which protect the competing right of freedom of speech.

Privacy in law of Contract

Under Indian laws, the governing legislation for contractual terms and agreements is the Indian Contract Act. There exist certain other means by which parties may agree to regulate the collating and use of personal information gathered, viz. by means of a "privacy clause" or through a "confidentiality clause". Accordingly, parties to a contract may agree to the use or disclosure of an individual's personal information, with the due permission and consent of the individual, in an agreed manner and/or for agreed purposes. But, any unauthorized disclosure of information, against the express terms of the agreement would amount to a breach of contract inviting an action for damages as a consequence of any default in observance of the terms of the contract.

Privacy obligations under Specific Relations

There are instances of specific inter-personal relationships wherein one party might be obligated to maintain a certain measure of confidentiality. A doctor-patient, husband-wife, customer-insurance company or an attorney-client relationship; are instances where there exists a strong ethical obligation on the part of one party to protect the privacy of information relating to an individual which may expose him to social humiliation and/or ridicule. The above principle also receives legal recognition in Ss. 123-126 of the Indian Evidence Act, 1871.

Other relevant provisions-

1. Information Technology Act, 2000: The (Indian) Information Technology Act, 2000 deals with the issues relating to payment of compensation (Civil) and punishment (Criminal) in case of wrongful disclosure and misuse of personal data and violation of contractual terms in

respect of personal data. The said Act creates personal liability for illegal or unauthorized use of computers, computer systems and data stored therein. However, the said section is silent on the liability of internet service providers or network service providers, as well as entities handling data. The liability of the entities is further diluted in Section 79 by providing the criteria of "knowledge" and "best efforts" before determining the quantum of penalties. This means that the network service provider or an outsourcing service provider would not be liable for the breach of any third-party data made available by him if he proves that the offence or contravention was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence or contravention.

The law makes no differentiation based on the intention of the unauthorized breach, and no criminal penalties are associated with the breach. Section 65 offers protection against intentional or knowing destruction, alteration, or concealment of computer source code while Section 66 makes alteration or deletion or destruction of any information residing in a computer an offence. Both sections 65 and 66 are punishable with criminal penalties including imprisonment up to 3 years

2. Indian Penal Code: The Indian Criminal law does not specifically address breaches of data privacy. Under the Indian Penal Code, liability for such breaches must be inferred from related crimes. For instance, Section 403 of the India Penal Code imposes criminal penalty for dishonest misappropriation or conversion of "movable property" for one's own use.

3. Intellectual Property Laws: The Indian Copyright Act prescribes mandatory punishment for piracy of copyrighted matter commensurate with the gravity of the offence. Section 63B of the Indian Copyright Act provides that any person who knowingly makes use on a computer of an infringing copy of computer program shall be punishable for a minimum period of six months and a maximum of three years in prison.

4. Credit Information Companies Regulation Act, 2005 ("CICRA"): As per the CICRA, the credit information pertaining to individuals in India have to be collected as per privacy norms enunciated in the CICRA regulation. Entities collecting the data and maintaining the same have

been made liable for any possible leak or alteration of this data. CICRA has created a strict framework for information pertaining to credit and finances of the individuals and companies in India.

The urgency for such a statute is augmented by the absence of any existing regulation which monitors the handling of customer information databases, or safeguards the Right to Privacy of individuals who have disclosed personal information under specific customer contracts viz. contracts of insurance, credit card companies or the like. The need for a globally compatible Indian privacy law cannot be understated, given that trans-national businesses in the services sector, who find it strategically advantageous to position their establishments in India and across Asia. For instance, India is set to emerge as a global hub for the setting up and operation of call centers, which serve clients across the world. Extensive databases have already been collated by such corporates, and the consequences of their unregulated operations could lead to a no-win situation for customers in India who are not protected by any privacy statute, which sufficiently guards their interests.

Government of India has constituted a Committee of Experts under the Chairmanship of former Supreme Court Justice Shri B N Srikrishna to study various issues relating to data protection in India and make specific suggestions on principles to be considered for data protection in India and suggest a draft Data Protection Bill. The objective is to “ensure growth of the digital economy while keeping personal data of citizens secure and protected.”

Instrumentally, a firm legal framework for data protection is the foundation on which data-driven innovation and entrepreneurship can flourish in India. Fostering such innovation and entrepreneurship is essential if India is to lead its citizens and the world into a digital future committed to empowerment, experiment and equal access.