NEW SYLLABUS

CS EXECUTIVE

JURISPRUDENCE, INTERPRETATION AND GENERAL LAW

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SOURCES OF LAW

The nature and meaning of law has been described by various jurists. However, there is no unanimity of opinion regarding the true nature and meaning of law. The reason for lack of unanimity on the subject is that the subject has been viewed and dealt with by different jurists so as to formulate a general theory of legal order at different times and from different points of view, that is to say, from the point of view of nature, source, function and purpose of law, to meet the needs of some given period of legal development. The various definitions of law propounded by legal theorists serve to emphasize the different facets of law and build up a complete and rounded picture of the concept of law.

Various definitions of law can be classified in to following **5 classes**:

1. **Natural School**
   - **Ulpine** defined Law as "the art or science of what is equitable and good."
   - **Cicero** said that Law is "the highest reason implanted in nature."
   - **Justinian's Digest** defines Law as "the standard of what is just and unjust."
     In above definitions "justice" is the main and guiding element of law. Ancient Hindu view was that 'law' is the command of God and not of any political sovereign. Everybody including the ruler, is bound to obey it. Thus, 'law' is a part of "Dharma". The idea of "justice" is always present in Hindu concept of law.
   - **Salmond,** defines law as "the body of principles recognised and applied by the State in the administration of justice."
     In other words, the law consists of rules recognised and acted upon by the courts of Justice. It may be noted that there are 2 main factors of the definition.
     1st→ To understand law, one should know its purpose:
     2nd→ In order to ascertain the true nature of law, one should go to the courts and not to the legislature.
   - **Vinogradoff** described Law as "A set of rules imposed and enforced by society with regard to the attribution and exercise of power over persons and things."

2. **Positivistic Definition of Law**
   - According to **John Austin**, "Law is the aggregate of rules set by man as politically superior, or sovereign, to men as political subject." **OR** law is the "command of the sovereign". It obliges a certain course of conduct or imposes a duty and is backed by a sanction. Thus, the command, duty and sanction are the 3 elements of law.
   - **Kelsen** gave a 'pure theory of law'. According to him, law is a **'normative science'**. The legal norms are 'Ought' norms as distinct from 'Is' norms of physical and natural sciences. Law does not attempt to describe what actually

occurs but only prescribes certain rules. The science of law to Kelson is the knowledge of hierarchy of normative relations. All norms derive their power from the **ultimate norm called Grund norm.**

3. **Historical Definition of Law**

Savigny's theory of law can be summarised as follows:

- ✓ That law is a matter of unconscious and organic growth. Therefore, law is found and not made.
- ✓ Law is not universal in its nature. Like language, it varies with people and age.
- ✓ Custom not only precedes legislation but it is superior to it. Law should always conform to the popular consciousness.
- ✓ Law has its source in the common consciousness (Volkgeist) of the people.
- ✓ Legislation is the last stage of law making, and, therefore, the lawyer or the jurist is more important than the legislator.

According to **Sir Henry Maine**, "The word 'law' has come down to us in close association with two notions, the notion of order and the notion of force".

4. **Sociological Definition of Law**

- **Duguit** defines law as **"essentially and exclusively** as social fact."
- **Ihering** defines law as "the form of the guarantee of the conditions of life of society, assured by State's power of constraint". There are 3 essentials of this definition -

  1st → In this definition law is treated as only one means of social control.

  2nd→ Law is to serve social purpose.

  3rd→ It is coercive in character.

5. **Realist Definition of Law**

- Realists define law **in terms of judicial process**.
- **According to Holmes** → "Law is a statement of the circumstances in which public force will be brought to bear upon through courts."
- **According to Cardozo** → "A principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged, is a principle or rule of law."

Main features of Law:

a) Law presupposes a state
b) The state makes or authorises to make rules
c) For the rules to be effective, there are sanctions behind them
d) These rules are made to serve some purpose
e) The purpose may be a social purpose, or any other purpose.

Laws are made effective:

i. By requiring damages to be paid for an injury due to disobedience
ii. By requiring one, in some instances, to complete an obligation he has failed to perform
iii. By preventing Disobedience
iv. By administering some form of punishment

SOURCES OF INDIAN LAW

Austin contends that law originates from the sovereign. Savigny traces the origin in Volkgeist (general consciousness of the people). The sociologists find law in numerous heterogeneous factors. For theologians, law originates from God. Vedas and the Quran which are the primary sources of Hindu and Mohammedan Law respectively are considered to have been revealed by God. Precisely, whatever source of origin may be attributed to law, it has emanated from almost similar sources in most of the societies.

The modern Indian law as administered in courts is derived from various sources and these sources fall under the following two heads:

A. Principle or Primary source

1. Customary or custom law
2. Judicial decisions or Precedents
3. Statutes or Legislations
4. Personal Law

1. Customs or Customary Law

Custom is the most ancient of all the sources of law and has held the most important place in the past, though its importance is now diminishing with the growth of legislation and precedent.

In ancient times, the lives of the people were regulated by customs. When the same thing is done again and again in a particular way, it becomes a custom. The Smritis have strongly recommended that the customs should be followed and recognised.

Classification of Customs

The customs may be divided into two classes:

- ✓ **Customs without sanction** → which are non-obligatory and are observed due to the pressure of public opinion. These are called as "positive morality".
- ✓ **Customs having sanction** → which are enforced by the State. It is with these customs that we are concerned here. These may be divided into two classes:
  (i) Legal, and
  (ii) Conventional.

(i) **Legal Customs:** These customs operate as a binding rule of law. They have been recognised and enforced by the courts and therefore, they have become a part of the law of land.

Legal customs are again of 2 kinds:

a. Local Customs
b. General Customs.

(a) Local Customs: Local custom is the custom which prevails in some definite locality and constitutes a source of law for that place only. But there are certain sects or communities which take their customs with them wherever they go. They are also local customs. Thus, local customs may be divided into 2 classes:
– Geographical Local Customs
– Personal Local Customs
These customs are law only for a particular locality, section or community.

(b) General Customs: A general custom is that which prevails throughout the country and constitutes one of the sources of law of the land. The Common Law in England is equated with the general customs of the realm.

(ii) **Conventional Customs:** These are also known as "usages". These customs are binding due to an agreement between the parties, and not due to any legal authority independently possessed by them. Before a Court treats the conventional custom as incorporated in a contract, following conditions must be satisfied:

- It must be shown that the convention is clearly established and it is fully known to the contracting parties. There is no fixed period for which a convention must have been observed before it is recognised as binding.
- Convention cannot alter the general law of the land.
- It must be reasonable.

Requisites of a Valid Custom

A custom will be valid at law and will have a binding force only if it fulfills the following essential conditions, namely:

i. **Immemorial** (Antiquity): A custom to be valid must be proved to be immemorial; it must be ancient.
ii. **Certainty**: The custom must be certain and definite, and must not be vague and ambiguous.
iii. **Reasonableness**: A custom must be reasonable. It must be useful and convenient to the society. A custom is unreasonable if it is opposed to the principles of justice, equity and good conscience.
iv. **Compulsory Observance**: A custom to be valid must have been continuously observed without any interruption from times immemorial and it must have been regarded by those affected by it as an obligatory or binding rule of conduct.
v. **Conformity with Law and Public Morality:** A custom must not be opposed to morality or public policy nor must it conflict with statute law. If a custom is expressly forbidden by legislation and abrogated by a statute, it is inapplicable.
vi. **Unanimity of Opinion**: The custom must be general or universal. If practice is left to individual choice, it cannot be termed as custom.
vii. **Peaceable Enjoyment**: The custom must have been enjoyed peaceably without any dispute in a law court or otherwise.
viii. **Consistency**: There must be consistency among the customs. Custom must not come into conflict with the other established customs.

2. Judicial Decision or Precedents

In general use, the term "precedent" means some set pattern guiding the future conduct. In the judicial field, it means the guidance or authority of past decisions of the courts for future cases. Only such decisions which lay down some new rule or principle are called judicial precedents.

Judicial precedents are an important source of law. They have enjoyed high authority at all times and in all countries. The rule that a court decision becomes a precedent to be followed in similar cases is known as doctrine of *stare decisis*.

Kinds of Precedents

(i) ***Declaratory and Original Precedents****:* a declaratory precedent is one which is merely the application of an already existing rule of law. An original precedent is one which creates and applies a new rule of law. In the case of a declaratory precedent, the rule is applied because it is already a law. In the case of an original precedent, it is law for the future because it is now applied.

(ii) ***Persuasive Precedents****:* A persuasive precedent is one which the judges are not obliged to follow but which they will take into consideration and to which they will attach great weight as it seems to them to deserve. A persuasive precedent, therefore, is not a legal source of law; but is regarded as a historical source of law. Thus, in India, the decisions of one High Court are only persuasive precedents in the other High Courts.

(iii) ***Absolutely Authoritative Precedents****:* An authoritative precedent is one which judges must follow whether they approve of it or not. Its binding force is absolute and the judge's discretion is altogether excluded as he must follow it. Such a decision has a legal claim to implicit obedience, even if the judge considers it wrong.

Unlike a persuasive precedent which is merely historical, an authoritative precedent is a legal source of law.

Absolutely authoritative precedents in India: Every court in India is absolutely bound by the decisions of courts superior to itself. The subordinate courts are bound to follow the decisions of the High Court to which they are subordinate. A single judge of a High Court is bound by the decision of a bench of two or more judges. All courts are absolutely bound by decisions of the Supreme Court.

(iv) ***Conditionally Authoritative Precedents:*** A conditionally authoritative precedent is one which, though ordinarily binding on the court before which it is cited, is liable to be disregarded in certain circumstances.

The court is entitled to disregard a decision if it is a wrong one, i.e., contrary to law and reason. In India, for instance, the decision of a single Judge of the High Court is absolutely authoritative so far as subordinate judiciary is concerned, but it is only conditionally authoritative when cited before a Division Bench of the same High Court.

Doctrine of *Stare Decisis*

- The doctrine of stare decisis means "adhere to the decision and do not unsettle things which are established".
- It is a useful doctrine intended to bring about certainty and uniformity in the law.
- Under the stare decisis doctrine, a principle of law which has become settled by a series of decisions generally is binding on the courts and should be followed in similar cases.
- In simple words, the principle means that like cases should be decided alike.
- This rule is based on public policy and expediency.
- Although generally the doctrine should be strictly adhered to by the courts, it is not universally applicable.
- The doctrine should not be regarded as a rigid and inevitable doctrine which must be applied at the cost of justice.

Ratio Decidendi

The underlying principle of a judicial decision, which is only authoritative, is termed as ***ratio decidendi***. The proposition of law which is necessary for the decision or could be extracted from the decision constitutes the ratio. The concrete decision is binding between the parties to it. The abstract ratio decidendi alone has the force of law as regards the world at large. In other words, the authority of a decision as a precedent lies in its ***ratio decidendi***.

Ratio decidendi contains the following basic ingredients:

1. Findings or material facts, both direct and inferential
2. Statements of the principles of law applicable to the legal problems disclosed by the facts; and
3. A judgement (or judgements) based on the combined effect or 1 & 2

Obiter Dicta

- The *literal* meaning of this Latin expression is "said by the way".
- The expression is used especially to denote those judicial utterances in the course of delivering a judgement which taken by themselves, were not strictly necessary for the decision of the particular issue raised.
- These statements thus go beyond the requirement of a particular case and have the force of persuasive precedents only.
- The judges are not bound to follow them although they can take advantage of them. They some times help the cause of the reform of law.

Obiter Dicta are of different kinds and of varying degree of weight. Some obiter dicta are deliberate expressions of opinion given after consideration on a point clearly brought and argued before the court. It is quite often too difficult for lawyers and courts to see whether an expression is the ratio of judgement or just a causal opinion by the judge. It is open, no doubt, to other judges to give a decision contrary to such obiter dicta.

3. Statutes or Legislation

- Legislation is that source of law which consists in the **declaration or promulgation of legal rules** by an authority duly empowered by the Constitution in that behalf.
- It is sometimes called **Jus scriptum** (written law) as contrasted with the customary law or **jus non-scriptum** (unwritten law). Salmond prefers to call it as "enacted law". Statute law or statutory law is what is created by legislation, for example, Acts of Parliament or of State Legislature. Legislation is either supreme or subordinate (delegated).
- **Supreme Legislation** is that which proceeds from the sovereign power in the State or which **derives its power directly from the Constitution**. It cannot be replealed, annulled or controlled by any other legislative authority.
- **Subordinate Legislation** is that which **proceeds from any authority other than the sovereign power**. It is dependent for its continued existence and validity on some superior authority.
- The Parliament of India possesses the power of supreme legislation. Legislative powers have been given to the judiciary, as the superior courts are allowed to make rules for the regulation of their own procedure.
- The executive, whose main function is to enforce the law, is given in some cases the power to make rules. Such subordinate legislation is known as executive or delegated legislation. Municipal bodies enjoy by delegation from the legislature, a limited power of making regulations or bye-laws for the area under their jurisdiction. Sometimes, the State allows autonomous bodies like universities to make bye-laws which are recognised and enforced by courts of law.

4. **<u>Personal Law</u>**

In many cases, the courts are required to apply the personal law of the parties where the point at issue is not covered by any statutory law or custom.

Hindu	Sources	Shruti and Smriti
	Matters governed by hindu law in case of Hindus	Hindus are governed by their personal law in all matters relating to inheritance, succession, marriage, adoption, co parcenary, partition of joint family property, pious obligations of sons to pay their father's debts, guardianship, maintenance and religious and charitable endowments.
Muslim Law	Sources	• The holy kuran • Hadis • Ijmas • Kiyas • Digests and commentaries on Mohammedan law
	Matters governed by muslim law in case of Mohammedans	Mohammedans are governed by their personal law in all matters relating to inheritance, wills, succession, legacies, marriage, dowry, divorce, gifts, wakfs, guardianship and pre emption.

B. Secondary source of Law

1. Justice, Equity and Good Conscience

The concept of "justice, equity and good conscience" was introduced by Impey's Regulations of 1781. In personal law disputes, the courts are required to apply the personal law of the defendant if the point at issue is not covered by any statute or custom.

In the absence of any rule of a statutory law or custom or personal law, the Indian courts apply to the decision of a case what is known as "justice, equity and good conscience", which may mean the rules of English Law in so far as they are applicable to Indian society and circumstances.

2. Sources of English Law

a) **Common Law***:* The Common Law, in this context is the name given to those principles of law evolved by the judges in making decisions on cases that are brought before them. These principles have been built up over many years so as to form a complete statement of the law in particular areas.

b) **Law Merchant***:* The Law Merchant is the most important source of the Merchantile Law. Law Merchant means those customs and usages which are binding on traders in their dealings with each other. But before a custom can have a binding force of law, it must be shown that such a custom is ancient, general as well as commands universal compliance. In all other cases, a custom has to be proved by the party claiming it.

c) **Principle of Equity:** Equity is a body of rules, the primary source of which was neither custom nor written law, but the imperative dictates of conscience and which had been set forth and developed in the Courts of Chancery. The procedure of Common Law Courts was very technical and dilatory. Action at Common Law could be commenced by first obtaining a writ or a process.

d) **Statute Law:** "Statute law is that portion of law which is derived from the legislation or enactment of Parliament or the subordinate and delegated legislative bodies." It is now a very important source of Mercantile Law. A written or statute law overrides unwritten law, i.e., both Common Law and Equity.

Mercantile Law or Commercial Law

It is that branch of law which is applicable to or concerned with trade and commerce in connection with various mercantile or business transactions. Mercantile Law is a wide term and embraces all legal principles concerning business transactions. The most important feature of such a business transaction is the existence of a valid agreement, express or implied, between the parties concerned.

The following are the main sources of Mercantile Law in India:

1. English Mercantile Law*:*

The Indian Mercantile Law is mainly an adaptation of English Mercantile Law.

However, certain modifications wherever necessary, have been incorporated in it to provide for local customs and usages of trade and to suit Indian conditions. Its dependence on English Mercantile Law is so much that even now in the absence of provisions relating to any matter in the Indian Law, recourse is to be had to the English Mercantile Law.

2. **Acts enacted by Indian Legislature or Statute Law***:*
   The Acts enacted by the Indian legislature from time to time which are important for the study of Indian Mercantile Law include, (i) The Indian Contract Act, 1872,(ii) The Sale of Goods Act, 1930, (iii) The Indian Partnership Act, 1932, (iv) The Negotiable Instruments Act, 1881, (v) The Arbitration and Conciliation Act, 1996, (vi) The Insurance Act, 1938.

3. **Judicial Decisions***:*
   - Judges interpret and explain the statutes. Whenever the law is silent on a point, the judge has to decide the case according to the principles of justice, equity and good conscience. It would be accepted in most systems of law that cases which are identical in their facts, should also be identical in their decisions. That principle ensures justice for the individual claimant and a measure of certainty for the law itself.
   - The English legal system has developed a system of judicial precedent which requires the extraction of the legal principle from a particular judicial decision and, given the fulfilment of certain conditions, ensures that judges apply the principle in subsequent cases which are indistinguishable. The latter provision being termed "binding precedents". Such decisions are called as precedents and become an important source of law

4. **Customs and Trade Usages***:*
   Most of the Indian Law has been codified. But even then, it has not altogether done away with customs and usages. Many Indian statutes make specific provisions to the effect that the rules of law laid down in a particular Act are subject to any special custom or usages of trade.
   For example, Section 1 of the Indian Contract Act, 1872, lays down that, "Nothing herein contained shall effect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act".

JURISPRUDENCE

The word Jurisprudence is derived from the word 'juris' meaning law and 'prudence' meaning knowledge.
Jurisprudence is the study of the science of law. The study of law in jurisprudence is not about any particular statute or a rule but of law in general, its concepts, its principles and the philosophies underpinning it.

Jurisprudence is the study of the science of law. The study of law in jurisprudence is not about any particular statute or a rule but of law in general. The meaning of jurisprudence has changed over period of time.

According to salmond, the term jurisprudence means the science where the word law includes all species of obligatory rules of human action. He said that jurisprudence in this sense can be further divided into 3 categories

a. Civil
b. International
c. Natural

Prof. Julius stone defined jurisprudence as the lawyer's extraversion.

Legal theory

Legal theory is a field of intellectual enterprise within jurisprudence that involves the development and analysis of the foundations of law. Two most prominent legal theories are the normative legal theory and the positive legal theory. Positive legal theory seeks to explain what the law is and why it is that way, and how laws affect the world, whereas normative legal theories tell us what the law ought to be. There are other theories of law like the sociological theory, economic theory, historical theory, critical legal theory as well.

John Austin's command theory of law

Austin differentiated between 'Law properly so called' and 'laws improperly so called' and said that laws properly so called are general commands but not all of it is given by men for men. A specie of Laws properly so called are given by political superiors to political inferiors.

According to Austin law is the command of sovereign that is backed by sanction. Austin has propagated that law is a command which imposes a duty and the failure to fulfill the duty is met with sanctions (punishment).

Thus Law has three main features:

a. It is a command.
b. It is given by a sovereign authority.
c. It has a sanction behind it.

In order to properly appreciate Austin's theory of law, we need to understand his conception of command and sovereign.

Command

It is an expression of wish or desire of an intelligent person, directing another person to do or to forbear from doing some act, and the violation of this wish will be followed by evil consequences on the person so directed. Command requires the presence of two parties- the commander (political superior) and the commanded (political inferior).

Sovereign

In Austin's theory, sovereign is politically superior. He has defined sovereign as an authority that receives habitual obedience from the people but itself does not obey some other authority habitually. According to Austin, the sovereign is the source of all laws.

Sanction

Is the evil consequence that follows on the violation of a command. To identify a law, the magnitude of the sanction is not relevant but the absence of sanction disentitles an expression of the sovereign from being a law in Austinian sense. Sanction should not also be confused with a reward that might be on offer if a given conduct is followed or refrained from. Reward confers a positive right whereas a sanction is a negative consequence.

Roscoe pound Theory

Roscoe Pound drew a similarity between the task of a lawyer and an engineer and gave his theory of social engineering. The goal of this theory was to build such a structure of society where the satisfaction of maximum of wants was achieved with the minimum of friction and waste. Such a society according to Roscoe Pound would be an 'efficient' society. Realisation of such a social structure would require balancing of competing interests. Roscoe Pound defined interests as claims or wants or desires which men assert de facto, and about which law must do something, if organised societies are to endure. **For any legal order to be successful in structuring an efficient society, there has to be:**

1. A recognition of certain interests- individual, public and social.
2. A definition of the limits within which such interest will be legally recognized and given effect to.
3. Securing of those interests within the limits as defined.

Roscoe pound's classify interest in following 3 categories

1. Individual Interest
2. Public Interest
3. Social Interest

John William Salmond's theory

*Sal*mond was a theorist of normative school because salmond claimed that the purpose of law was deliverance of justice to the people and in this sense he differed from bentham and austin who went into the analysis of law without going into its purpose.

According to Salmond law is the body of principles which are recognized and applied by the state in the administration of justice

His other definition said that law consists of a set of rules recognised and acted on in courts of justice.

Salmond argued that the administration of justice was the primary task of a state and the laws were made to achieve that objective. Administration of justice was thus antecedent to the laws. Laws thus are secondary, accidental, unessential. Law consists of the pre-established and authoritative rules which judges apply in the administration of justice, to the exclusion of their own free will and discretion. *Salmond* further said that the administration of justice is perfectly possible without laws though such a system is not desirable. A court with an unfettered discretion in the absence of laws is capable of delivering justice if guided by equity and good conscience.

Hans Kelson's pure theory of Law

Hans Kelson was an Austrian philosopher and jurist who is known for his 'Pure Theory of Law'. *Kelsen* believed that the contemporary study and therories of law were impure

as they were drew upon from various other fields like religion and morality to explain legal concepts. *Kelson*, like *Austin* was a positivist, in that he focused his attention on what the law was and divested moral, ideal or ethical elements from law. He discarded the, notion of justice as an essential element of law because many laws, though not just, may still continue as law.

Kelsen described law as a "normative science' as distinguished from natural sciences which are based on cause and effect, such as law of gravitation. The laws of natural science are capable of being accurately described, determined and discovered whereas the science of law is knowledge of what law ought to be.

Kelson considered legal science as pyramid of norms with grund norms at the top. The subordinate norms are controlled by norms superior to them in hierarchical order. The Grundnorm is however, independent or any other norm being at the apex. Thus, the system of norms proceeds from downwards to upwards and finally it closes at the grundnorms at the top. Grund norm gives validity to other norms though the grundnorm itself does not derive its validity from any other norm and its validity must be presupposed.

For example, A law is valid because it derives its legal authority from the legislative body, which in its own turn derive its authority from a norm i.e. constitution. As to the question from where does the constitutuion derive its validity theres is no answer and therefeore it is the grund norm.

Jaremy Banthem's theory of Law

Jeremy Bentham was the pioneer of analytical jurisprudence in Britain. According to him 'a law' may be
defined as an assemblage of signs, declarative of volition, conceived or adopted by a sovereign in a state,
concerning the conduct to be observed in a certain case by a certain person or a class of persons, who in the
case in question are or are supposed to be subject to his power. Thus, *Bentham's* concept of law is an
imperative one.

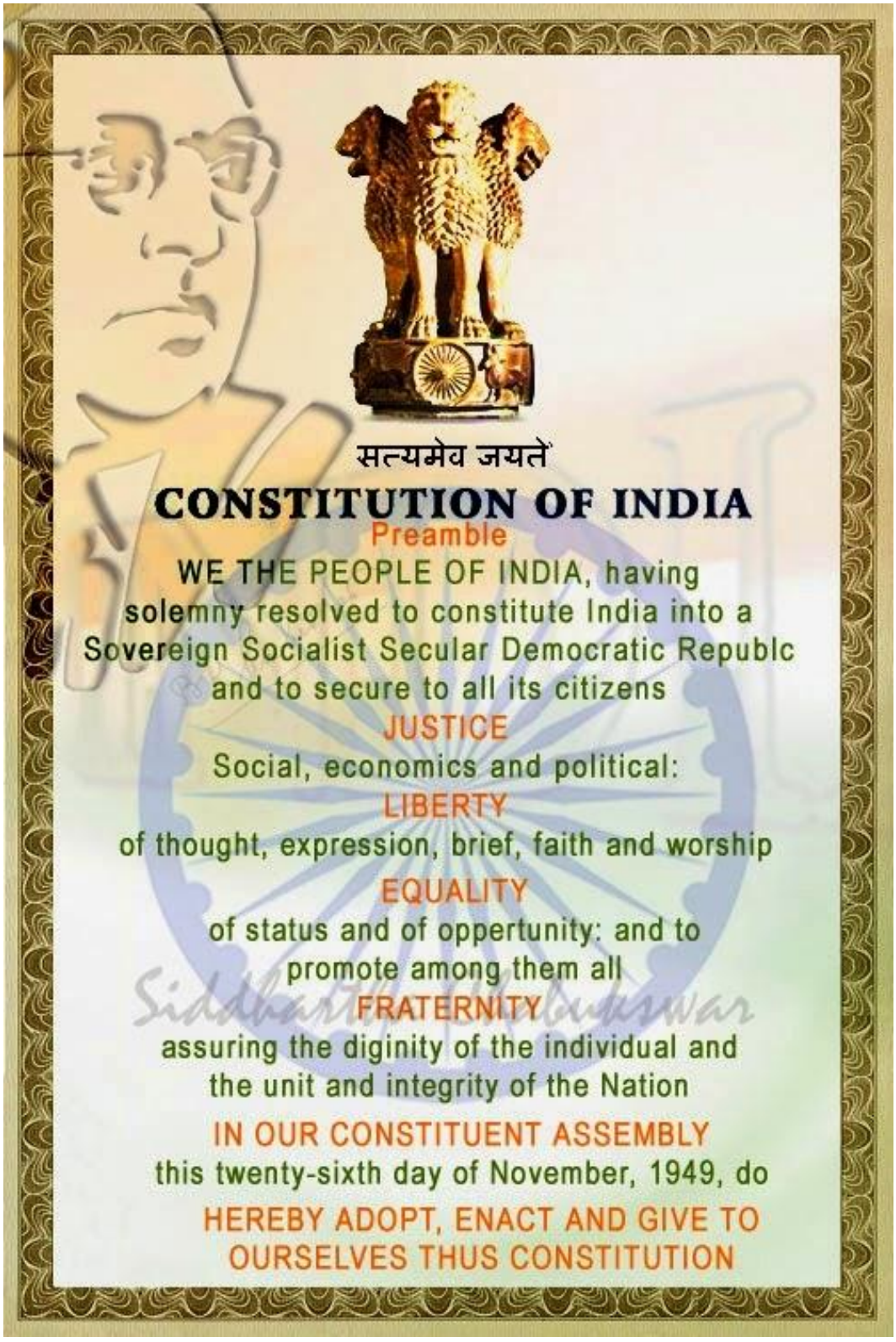
Bentham said that every law may be considered in eight different respects:

1. ***Source:*** *The source of a law is the will of the sovereign, who may conceive laws which he personally issues, or adopt laws previously issued by sovereigns or subordinate authorities, or he may adopt laws to be issued in future by subordinate authorities.*
2. ***Subjects:*** *These may be persons or things. Each of these may be active or passive subjects, i.e., the agent with which an act commences or terminates.*
3. ***Objects:*** *The goals of a given law are its objects.*
4. ***Extent:*** *Direct extent means that a law covers a portion of land on which acts have their termination; indirect extent refers to the relation of an actor to a thing.*
5. ***Aspects:*** *Every law has 'directive' and a 'sanctional' part. The former concerns the aspects of the sovereign will towards an act-situation and the latter concerns the force of a law. The four aspects of the soverign will are command, prohibition, non-*

prohibition and non-command and the whole range of laws are covered under it. These four aspects are related to each other by opposition and concomitancy.

6. ***Force:*** *The motivation to obey a law is generated by the force behind the law.*
7. ***Remedial appendage:*** *These are a set of subsidiary laws addressed to the judges through which the judges cure the evil (compensation), stop the evil or prevent future evil.*
8. ***Expression:*** *A law, in the ultimate, is an expression of a sovereign's will. The connection with will raises the problem of discovering the will from the expression.*

Constitution of India



The Constitution of India came into force on January 26, 1950. It is a comprehensive document containing 395 Articles (divided into 22 Parts) and 12 Schedules. Apart from dealing with the structure of Government, the Constitution makes detailed provisions for the rights of citizens and other persons in a number of entrenched provisions and for the principles to be followed by the State in the governance of the country, labelled as "Directive Principles of State Policy". All public authorities – legislative, administrative and judicial derive their powers directly or indirectly from it and the Constitution derives its authority from the people.

Structure
Constitution of India is basically federal but with certain unitary features.

The essential features of a Federal Polity or System are—
- Dual Government,
- Distribution of powers,
- Supremacy of the Constitution,
- Independence of Judiciary,
- Written Constitution, and
- A rigid procedure for the amendment of the Constitution.

The political system introduced by our Constitution possesses all the aforesaid essentials of a federal polity as follows:
(a) In India, there are Governments at different levels, like Union and States.
(b) Powers to make laws have been suitably distributed among them by way of various lists as per the Seventh Schedule.
(c) Both Union and States have to follow the Constitutional provisions when they make laws.
(d) The Judiciary is independent with regard to judicial matters and judiciary can test the validity of law independently. The Supreme Court decides the disputes between the Union and the States, or the States *inter se.*
(e) The Constitution is supreme and if it is to be amended, it is possible only by following the procedure explained in Article 368 of the Constitution itself.

Fundamental rights
The Constitution seeks to secure to the people "liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and fraternity assuring the dignity of the individual". With this object, the fundamental rights are envisaged in Part III of the Constitution.

The Nehru Committee recommended the inclusion of Fundamental Rights in the Constitution for the country. Although that demand of the people was not met by the British Parliament under the Government of India Act, 1935, yet the enthusiasm of the people to have such rights in the Constitution was not impaired. As a result of that enthusiasm they were successful in getting a recommendation being included in the Statement of May 16, 1946 made by the Cabinet Mission-(which became the basis of the present Constitution) to the effect that the Constitution-making body may adopt the rights in the Constitution. Therefore, as soon as Constituent Assembly began to work in December, 1947, in its objectives resolution Pt. Jawahar Lal Nehru moved for the protection of certain rights to be provided in the Constitution

Part III of the Indian Constitution guarantees six categories of fundamental rights. These are:

a. Right to Equality – Articles 14 to 18;
b. Right to Freedom – Articles 19 to 22;
c. Right against Exploitation – Articles 23 and 24;
d. Right to Freedom of Religion – Articles 25 to 28;
e. Cultural and Educational Rights – Articles 29 and 30;
f. Right to Constitutional Remedies – Articles 32.

Note:

a) Articles 15, 16, 19 and 30 are guaranteed only to ***citizens***.
b) Articles 14, 20, 21, 22, 23, 25, 27 and 28 are available to **any person** on the soil of India—citizen or foreigner.
c) The rights guaranteed by Articles 15, 17, 18, 20, 24 are **absolute limitations** upon the legislative power.

Concept of State

With a few exceptions, all the fundamental rights are available against the State. Under Article 12, unless the context otherwise requires, "the State" includes –

a. The Government and Parliament of India;
b. The Government and the Legislature of each of the States; and
c. All local or other authorities:
   i. within the territory of India; or
   ii. under the control of the Government of India.

Case Laws

1. The expression 'local authorities' refers to authorities like Municipalities, District Boards, Panchayats, Improvement Trusts, Port Trusts and Mining Settlement Boards. The Supreme Court has held that 'other authorities' will include all authorities created by the Constitution or statute on whom powers are conferred by law and it is not necessary that the authority should engage in performing government functions (*Electricity Board, Rajasthan* v.*Mohanlal*).

2. The Calcutta High Court has held that the electricity authorities being State within the meaning of Article 12, their action can be judicially reviewed by this Court under Article 226 of the Constitution of India. (*In re: Angur Bala Parui*). It has also been held that a university is an authority (*University of Madras* v. *Shanta Bai,*).

3. The Gujarat High Court has held that the President is "State" when making an order under Article 359 of the Constitution (*Haroobhai* v. *State of Gujarat*).

4. The words "under the control of the Government of India" bring, into the definition of State, not only every authority within the territory of India, but also those functioning outside, provided such authorities are under the control of the Government of India.

5. In *Bidi Supply Co.* v. *Union of India*, State was interpreted to include its Income-tax department.

6. The Supreme Court in *Sukhdev Singh* v. *Bhagatram* and in *R.D. Shetty* v. *International Airports Authority*, has pointed out that corporations acting as instrumentality or agency of government would become 'State' because obviously they are subjected to the same limitations in the field of constitutional or administrative law as the government itself, though in the eye of law they would be distinct and independent legal entities.

7. In *Satish Nayak* v. *Cochin Stock Exchange Ltd.*, the Kerala High Court held that since a Stock Exchange was independent of Government control and was not discharging any public duty, it cannot be treated as 'other authority' under Article 12.

8. In Zee Telefilms Ltd. v. Union of India, the Supreme Court applying the tests laid down in Pardeep Kumar Biswas case held that the Board of Control for cricket in India (BCCI) was not State for purposes of Article 12 because it was not shown to be financially, functionally or administratively dominated by or under the control of the Government and control exercised by the Government was not pervasive but merely regulatory in nature.

9. Judiciary although an organ of State like the executive and the legislature, is not specifically mentioned in Article 12. However, the position is that where the Court performs judicial functions, e.g. determination of scope of fundamental rights vis-a-vis legislature or executive action, it will not occasion the infringement of fundamental rights and therefore it will not come under 'State' in such situation (*A.R. Antualay* v. *R.S. Nayak*.

   While in exercise of non-judicial functions e.g. in exercise of rule-making powers, where a Court makes rules which contravene the fundamental rights of citizens, the same could be challenged treating the Court as 'State'.

Test for instrumentality or agency of the State

In *Ajay Hasia* v. *Khalid Mujib*, the Supreme Court has enunciated the following test for determining whether an entity is an instrumentality or agency of the State:

- ✓ If the entire share capital of the Corporation is held by the Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of the Government.

- ✓ Where the financial assistance of the State is so much as to meet almost the entire expenditure of the corporation it would afford some indication of the corporation being impregnated with government character.
- ✓ Whether the corporation enjoys a monopoly status which is conferred or protected by the State.
- ✓ Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or an instrumentality.
- ✓ If the functions of the corporation are of public importance and closely related to government functions, it would be a relevant factor in classifying a corporation as an instrumentality or agency of government.
- ✓ If a department of government is transferred to a corporation, it would be a strong factor supporting an inference of the corporation being an instrumentality or agency of government

Justifiability of Fundamental Rights

Article 13 gives teeth to the fundamental rights. It lays down the rules of interpretation in regard to laws inconsistent with or in derogation of the Fundamental Rights.

Exsiting Laws: Article 13(1) relates to the laws already existing in force, i.e. laws which were in force before the commencement of the Constitution (pre constitutional laws). A declaration by the Court of their invalidity, however, will be necessary before they can be disregarded and declares that pre-constitution laws are void to the extent to which they are inconsistent with the fundamental rights.

Future Laws: Article 13(2) relates to future laws, i.e., laws made after the commencement of the Constitution (post constitutional laws). After the Constitution comes into force the State shall not make any law which takes away or abridges the rights conferred by Part III and if such a law is made, it shall be void to the extent to which it curtails any such right. The word 'law' according to the definition given in Article 13 itself includes –". any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India, the force of law."

Doctrine of Severability

It is not the entire law which is affected by the provisions in Part III, but on the other hand, the law becomes invalid only to the extent to which it is inconsistent with the Fundamental Rights. So only that part of the law will be declared invalid which is inconsistent, and the rest of the law will stand. However, on this point a clarification has been made by the Courts that invalid part of the law shall be severed and declared invalid if really it is severable, i.e., if after separating the invalid part the valid part is capable of giving effect to the legislature's intent, then only it will survive, otherwise the Court shall declare the entire law as invalid. This is known as the rule of severability.

The doctrine has been applied invariably to cases where it has been found possible to separate the invalid part from the valid part of an Act. Article 13 only says that any law which is inconsistent with the fundamental rights is void "to the extent of inconsistency" and this has been interpreted to imply that it is not necessary to strike down the whole Act as invalid, if only a part is invalid and that part can survive independently.

In ***A.K. Gopalan* v. *State of Madras***, the Supreme Court ruled that where an Act was partly invalid, if the valid portion was severable from the rest, the valid portion would be maintained, provided that it was sufficient to carry out the purpose of the Act. From above, it is clear that this doctrine applies only to pre constitutional laws as according to Article 13(2), State cannot even make any law which is contrary to the provisions of this Part.

Doctrine of Eclipse

An existing law inconsistent with a fundamental right becomes in-operative from the date of the commencement of the Constitution, yet it is not dead altogether. A law made before the Commencement of the Constitution remains eclipsed or dormant to the extent it comes under the shadow of the fundamental rights, i.e. is inconsistent with it, but the eclipsed or dormant parts become active and effective again if the prohibition brought about by the fundamental rights is removed by the amendment of the Constitution. This is known as the *doctrine of eclipse*.

The doctrine was first evolved in *Bhikaji Narain Dhakras* v. *State of M.P*. In this case, the validity of C.P. and Berar Motor Vehicles Amendment Act, 1947, empowering the Government to regulate, control and to take up the entire motor transport business, was challenged. The Act was perfectly a valid piece of legislation at the time of its enactment. But on the commencement of the Constitution, the existing law became inconsistent under Article 13(1), as it contravened the freedom to carry on trade and business under Article 19(1)(g). To remove the infirmity the Constitution (First Amendment) Act, 1951 was passed which permitted creation by law of State monopoly in respect of motor transport business. In case of a pre-Constitution law or statute, it was held, that the *doctrine of eclipse* would apply.

Waiver

The doctrine of waiver of rights is based on the premise that a person is his best judge and that he has the liberty to waive the enjoyment of such rights as are conferred on him by the State. However, the person must have the knowledge of his rights and that the waiver should be voluntary. The doctrine was discussed in *Basheshar Nath* v. *C.I.T.*, where the majority expressed its view against the waiver of fundamental rights. It was held that it was not open to citizens to waive any of the fundamental rights. Any person aggrieved by the consequence of the exercise of any discriminatory power, could be heard to complain against it.

Single Person Law

A law may be constitutional, even though it relates to a single individual, if that single individual is treated as a class by himself on some peculiar circumstances.

The case is Charanjit Lal Chowdhary v. Union of India, in this case, the petitioner was an ordinary shareholder of the Sholapur Spinning and Weaving Co. Ltd. The company through its directors had been managing and running a textile mill of the same name. Later, on account of mismanagement, a situation had arisen that brought about the closing down of the mill, thus affecting the production of an essential commodity, apart from causing serious unemployment amongst certain section of the community. The

Central Government issued an Ordinance which was later replaced by an Act, known as Sholapur Spinning & Weaving Co. (Emergency Provisions) Act, 1950

The petitioner filed a writ petition on the ground that the said Act infringed the rule of equal protection of laws as embodied in Article 14, because a single company and its shareholders were subjected to disability as compared with other companies and their shareholders. The Supreme Court dismissed the petition and held the legislation as valid. It laid down that the law may be constitutional even though it applies to a single individual if on account of some special circumstances or reasons applicable to him only, that single individual may be treated as a class by himself. However, in subsequent cases the Court explained that the rule of presumption laid down in Charanjit Lal's case is not absolute, but would depend on facts of each case.

For a valid classification there has to be a rational nexus between the classification made by the law and the object sought to be achieved. For example a provision for district-wise distribution of seats in State Medical colleges on the basis of population of a district to the population of the State was held to be void (*P. Rajandran* v. *State of Mysore)*.

Right of Equality

Article 14: Equality before the law and equal protection of the laws
"the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

The expression 'equality before the law' which is barrowed from English Common Law is a declaration of equality of all persons within the territory of India, implying thereby the absence of any special privilege in favour of any individual. Every person, whatever be his rank or position is subject to the jurisdiction of the ordinary courts.

The second expression "the equal protection of the laws" which is based on the last clause of the first section of the Fourteenth Amendment to the American Constitution directs that equal protection shall be secured to all persons within the territorial jurisdiction of the Union in the enjoyment of their rights and privileges without favouritism or discrimination. Article 14 applies to all persons and is not limited to citizens. A corporation, which is a juristic person, is also entitled to the benefit of this Article (*Chiranjit Lal Chowdhurary* v. *Union of India*). The right to equality is also recognised as one of the basic features of the Constitution (Indra *Sawhney* v. *Union of India)*

Legislative classification
A right conferred on persons that they shall not be denied equal protection of the laws does not mean the protection of the same laws for all. To separate persons similarly

situated from those who are not, legislative classification or distinction is made carefully between persons who are and who are not similarly situated. Article 14 does not forbid classification or differentiation which rests upon reasonable grounds of distinction.

The Supreme Court in State of Bihar v. Bihar State 'Plus-2' lectures Associations, held that now it is well settled and cannot be disputed that Article 14 of the Constitution guarantees equality before the law and confers equal protection of laws. It prohibits the state from denying persons or class of person's equal treatment; provided they are equals and are similarly situated. It however, does not forbid classification. In other words, what Article 14 prohibits is discrimination and not classification if otherwise such classification is legal, valid and reasonable.

Test of valid classification

Permissible classification must satisfy 2 conditions, namely;

i. the classification must be founded on an intelligible differentia which must distinguish persons or things that are grouped together from others leaving out or left out; **AND**
ii. Such a differentia must have rational nexus to the object sought to be achieved by the statute or legislation in question

The classification may be founded on different basis, such as, geographical, or according to objects or occupation or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. A law based on a permissible classification fulfils the guarantee of the equal protection of the laws and is valid. On the other hand if it is based on an impermissible classification it violates that guarantee and is void.

Scope of Article 14

The true meaning and scope of Article 14 has been explained in several decisions of the Supreme Court. The rules with respect to permissible classification as evolved in the various decisions have been summarised by the Supreme Court in ***Ram Kishan Dalmiya* v. *Justice Tendulkar as* follows;**

i. Article 14 forbids class legislation, but does not forbid classification.
ii. Permissible classification must satisfy two conditions, namely,
    a) It must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and
    b) The differentia must have a relation to the object sought to be achieved by the statute in question.
iii. The classification may be founded on different basis, namely geographical, or according to objects or occupations or the like.
iv. In permissible classification, mathematical nicety and perfect equality are not required. Similarly, non identity of treatment is enough.
v. Even a single individual may be treated a class by himself on account of some special circumstances or reasons applicable to him and not applicable to others; a law may be constitutional even though it relates to a single individual who is in a class by himself.
vi. Article 14 condemns discrimination not only by substantive law but by a law of procedure.

vii. There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.

Article 14 invalidates discrimination not only in substantive law but also in procedure. Further, it applies to executive acts also.

Possession of higher qualification can be treated as a valid base or classification of two categories of employees, even if no such requirement is prescribed at the time of recruitment. If such a distinction is drawn no complaint can be made that it would violate Article 14 of the Constitution (U.P. State Sugar Corpn. Ltd. v. Sant Raj Singh.

Article 15: Prohibition of discrimination on grounds of religion etc.

State cannot discriminate against any citizen on grounds only of -

i. Religion
ii. Race
iii. Caste
iv. Sex
v. Place of birth
vi. Any of them

Article 15(2) lays down that no citizen shall be subjected to any disability, restriction or condition with regard to—

1. Access to shops, public restaurants, hotels and places of public entertainment; or
2. The use of wells, tanks, bathing ghats, roads and places of public resort, maintained wholly or partially out of State funds or dedicated to the use of the general public.

Article 15(3) and 15(4) create certain exceptions to the right guaranteed by Article 15(1) and 15(2). Under Article 15(3) the State can make special provision for women and children. It is under this provision that courts have upheld the validity of legislation or executive orders discriminating in favour of women (*Union of India* v. *Prabhakaran)*.

Article 15(4) permits the State to make special provision for the advancement of—

i. Socially and educationally backward classes of citizens;
ii. Schedule caste and
iii. schedule tribes

Article 16: Equality of opportunity in matters of public employment.

1. All citizens shall have equal opportunity in matters relating to employment or appointment of office under the State.
2. There shall be no discrimination against a citizen on the grounds of religion race caste, sex descent, place of birth or residence.

Exceptions:

✓ Parliament can make a law that in regard to a class or classes of employment or appointment to an office under the Government of a State on a Union Territory, under any local or other authority within the State or Union Territory, residence

within that State or Union Territory prior to such employment or appointment shall be an essential qualification.

- ✓ A provision can be made for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State is not adequately represented in the services under the State.

- ✓ A law shall not be invalid if it provides that the incumbent of an office in connection with the affair of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

The Supreme Court in *Secy. of* ***State of Karnataka*** **v.** ***Umadevi*** held that adherence to the rule of equality in public employment is a basic feature of the Constitution and since the rule of law is the core of the Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14. Equality of opportunity is the hallmark and the Constitution has provided also for affirmative action to ensure that un equals are not treated as equals. Thus any public employment has to be in terms of the Constitutional Scheme.

Article 17: Abolition of untouchability

Article 17 says that "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

Untouchability does not include an instigation to social boycott (*Davarajiah* v. *Padamanna*). Punishment for violation of Article 17 is to be provided by Parliament under Article 35(a)(ii).

Article 18: Abolition of titles

Article 18 is more a prohibition rather than a fundamental right. British Government used to confer titles upon persons who showed special allegiance to them. Many persons were made Sir, Raj Bahadur, Rai Saheb, Knight, etc. These titles had the effect of creating a class of certain persons which was regarded superior to others and thus had the effect of perpetuating inequality.

To do away with that practice, now Article 18 provides as under:

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

Rights Relating to Freedom

Articles 19-22 guarantee certain fundamental freedoms.

Article 19(1), of the Constitution, guarantees to the citizens of India six freedoms, namely;

a. Right to freedom of speech and expression
b. Freedom of assembly
c. Freedom of association
d. Freedom of movement
e. Freedom of residence
f. *Right to acquire, hold and dispose of property — deleted by 44th Amendment in 1978.]*
g. Freedom to trade and occupations

The Constitution under Articles 19(2) to 19(6) permits the imposition of restrictions on these freedoms subject to the following conditions:

1. The restriction can be imposed by law and not by a purely executive order issued under a statute;
2. The restriction must be reasonable;
3. The restriction must be imposed for achieving one or more of the objects specified in the respective clauses of Article 19.

Reasonableness

It is very important to note that the restrictions should be reasonable. If this word 'reasonable' is not there, the Government can impose any restrictions and they cannot be challenged. This word alone gives the right to an aggrieved person to challenge any restriction of the freedoms granted under this Article.

The following factors are usually considered to assess the reasonableness of a law:

i. The objective of the restriction.
ii. The nature, extent and urgency of the evil sought to be dealt with by the law in question.
iii. How far the restriction is proportion to the evil in question.
iv. Duration of the restriction.
v. The conditions prevailing at the time when the law was framed.

The onus of proving to the satisfaction of the Court that the restriction is reasonable is upon the State.

Procedural and Substantiveness

In determining the reasonableness of a law, the Court will not only see the surrounding circumstances, but all contemporaneous legislation passed as part of a single scheme. It is the reasonableness of the restriction and not of the law that has to be found out, and if the legislature imposes a restriction by one law but creates countervailing advantages by another law passed as part of the same legislative plan, the court can take judicial notice of such Acts forming part of the same legislative plan (*Lord Krishna Sagar Mills* v. *Union of India*).

a) Freedom of speech and expression;

i. The right to speech and expression includes right to make a good or bad speech and even the right of not to speak.

ii. May express oneself even by signs.
iii. The freedom of press and right to publish one's opinion,
iv. Right to circulation and propagation of one's ideas,
v. Freedom of peaceful demonstration,
vi. Dramatic performance and cinematography.

The freedom of speech and expression under Article 19(1)(a) means the right to express one's convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode.

Article 19(2) specifies the limits up-to which the freedom of speech and expression may be restricted. It enables the Legislature to impose by law reasonable restrictions on the freedom of speech and expression under the following heads;

i. Sovereignty and integrity of India
ii. Security of the State
iii. Friendly relation with foreign state
iv. Public order
v. Decency or morality or
vi. Contempt of court
vii. Defamation
viii. Incitement to an offence

b) Assemble peaceably and without arms

The right of citizens to assemble peacefully and without arms. Calling an assembly and putting one's views before it is also intermixed with the right to speech and expression discussed above, and in a democracy it is of no less importance than speech. The fact that the assembly *must be peaceful* and *without arms,* the State is also authorised to impose reasonable restrictions on this right in the interests of:

✓ The sovereignty and integrity of India, or
✓ Public order.

c) Form associations or unions

The freedom of association includes freedom to hold meeting and to takeout processions without arms. Right to form associations for unions is also guaranteed so that people are free to have the members entertaining similar views [Art. 19(1) (c)]. This right necessarily implies a right not to be a member of an association. This right is also, however, subject to reasonable restrictions which the State may impose in the interests of -

a. The sovereignty and integrity of India, or
b. Public order or,
c. Morality.

d) Move freely, throughout the territory of India

Right to move freely throughout the territory of India is another right guaranteed under Article 19(1)(d). This right, however, does not extend to travel abroad, and like other rights stated above, it is also subject to the reasonable restrictions which the State may impose:

- in the interests of the general public, or
- for the protection of the interests of any scheduled tribe.

e) Reside and settle in any part of the territory of India

Article 19(1)(e) guarantees to a citizens the right to reside and settle in any part of the territory of India. This right overlaps the right guaranteed by clause (d). This freedom is said to be intended to remove internal barriers within the territory of India to enable every citizen to travel freely and settle down in any part of a State or Union territory.

Subject to reasonable restrictions:

- ✓ in the interests of the general public, or
- ✓ For the protection of the interests of any scheduled tribe.

f) Practise any profession, or to carry on any occupation, trade or business

Article 19(1) (g) provides that all citizens shall have the right to practise any profession, or to carry on any occupation, trade or business. Article 19(1)(g) of the Constitution guarantees that all citizens have the right to practice any profession or to carry on any occupation or trade or business.

The freedom is not uncontrolled, for, clause (6) of the Article authorises legislation which-

(i) Imposes reasonable restrictions on this freedom in the interests of the general public;
(ii) Prescribes professional or technical qualifications necessary for carrying on any profession, trade or business; and
(iii) Enables the State to carry on any trade or business to the exclusion of private citizens, wholly or partially.

Protection in respect of conviction for offences

Articles 20, 21 and 22 provide a system of protection, relevant to the criminal law. Article 20 guarantees to all persons — whether *citizens* or *non-citizens* - *3* rights namely—

i. protection against ex-post facto laws
ii. protection against double jeopardy
iii. protection against self-incrimination

1) Protection against ex-post facto laws

According to Article 20(1), no person shall be convicted of any offence except for violation of a law in force at *the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that* which might have been inflicted under the law in force at the time of the commission of the offence. Even the penalty for the commission of an offence cannot be increased with retrospective effect.

For Example, suppose for committing dacoity the penalty in 1970 was 10 years imprisonment and a person commits dacoity in that year. By a law passed after his committing the dacoity the penalty, for his act cannot be increased from 10 to 11 years or to life imprisonment.

2) Protection against double jeopardy

According to Article 20(2), no person can be prosecuted and punished for the same offence more than once. It is, however, to be noted that the conjunction "and" is used

between the words prosecuted and punished, and therefore, if a person has been let off after prosecution without being punished, he can be prosecuted again.

3) Protection against self-incrimination

According to Article 20(3), no person accused of any offence shall be compelled to be a witness against himself. In other words, an accused cannot be compelled to state anything which goes against him. But it is to be noted that a person is entitled to this protection, only when all the three conditions are fulfilled -

a. that he must be accused of an offence;
b. that there must be a compulsion to be a witness; and
c. such compulsion should result in his giving evidence against himself

So, if the person was not an accused when he made a statement or the statement was not made as a witness or it was made by him without compulsion and does not result as a statement against himself, then The 'right against self-incrimination' protects persons who have been formally accused as well as those who are examined as suspects in criminal cases. It also extends to cover witnesses who apprehend that their answers could expose them to criminal charges in the ongoing investigation or even in cases other than the one being investigated. [Selvi v. State of Karnataka]. The protection available under this provision does not extend to such person or to such statement.

Protection of life and personal liberty

Article 21 confers on every person the fundamental right to life and personal liberty. It says that,

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

The right to life includes those things which make life meaningful. For example, the right of a couple to adopt a son is a constitutional right guaranteed under Article 21 of the Constitution (Philips Alfred Malvin v. Y.J. Gonsalvis and others,). The right to life enshrined in Article 21 guarantees right to live with human dignity. Right to live in freedom from noise pollution is a fundamental right protected by Article 21 and noise pollution beyond permissible limits is an inroad into that right.

Article 21A Right to education

This was introduced by the constitution (86th amendment) Act, 2002. According to this, the state shall provide free and compulsory education to all children of the age of 6 to 14 years.

Right against illegal arrest and preventive detention

Article 22 lays down the last right to freedom which relates to protection against illegal arrest and preventive detention.

Article 22 does not apply uniformly to all persons and makes a distinction between:

a. Alien enemies,
b. Person arrested or detained under preventive detention law, and

c. Other persons.

Person arrested or detained other than under preventive detention law-

(1) A person who is arrested cannot be detained in custody unless he has been informed, as soon as he may be, of the grounds for such arrest.
(2) The person arrested has right to consult an advocate of his choice.
(3) A person who is arrested and detained must be produced before the nearest magistrate within a period of 24 hours of such arrest, excluding the time of journey. And such a person shall not be detained in custody beyond 24 hours without the authority of magistrate.

Person arrested or detained under preventive detention law

Preventive detention means detention of a person without trial. The object of preventive detention is not to punish a person for having done something but to prevent him from doing it. No offence is proved nor any charge formulated and yet a person is detained because he is likely to commit an act prohibited by law.

Following are the rights available to person detained under preventive detention laws:

a) He cannot be detained more than 3 months unless authorized by –
   i. Advisory board
   ii. Parliament by way of law

b) The authority ordering the detention of a person under the preventive detention law shall:
   i. communicate to him, as soon as may be, the grounds on which the order for his detention has been made, and
   ii. Afford him the earliest opportunity of making the representation against the order.

Right against exploitation (Article 23 & 24)

They provide for rights against exploitation of all citizens and non-citizens. Taking them one by one they guarantee certain rights by imposing certain prohibitions not only against the State but also against private persons.

- Prohibition of traffic in human beings and forced labour
- Prohibition of employment of children

Prohibition of traffic in human beings and forced labour-

Article 23 imposes a complete ban on traffic in human beings, begar and other similar forms of forced labour. The contravention of these provisions is declared punishable by law. Thus the traditional system of beggary particularly in villages, becomes unconstitutional and a person who is asked to do any labour without payment or even a labourer with payment against his desire can complain against the violation of his fundamental right under Article 23.

Prohibition of employment-

Article 24 prohibits the employment of children below the age of 14 in any factory or mine. The Employment of Children Act, 1938; The Factories Act, 1948; The Mines Act, 1952; The Apprentices' Act, 1961; and the Child Labour (Prohibition and Regulation) Act, 1986 are some of the important enactments in the statute book to protect the children from exploitation by unscrupulous employers.

Right to freedom of religion-

India does not accept any religion as state religion. It maintains absolute neutrality and impartiality towards all religion. The provision relating to right of freedom of religion are preserved in articles 25 to 28 of the constitution of India. With Article 25 begins a group of provisions ensuring equality of all religions thereby promoting secularism.

Article 25 gives to every person the:

- Freedom of conscience, and
- The right freely to profess, practice and propagate religion.

Freedom is subject to restrictions imposed by the State on the following grounds:

- Public order, morality and health,
- Other provisions in Part III of the Constitution,
- Any law regulating or restricting any economic, financial; political or other secular activity which may be associated with religious practice, and
- Any law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Article 26 provides following rights to every religious denomination;

1) Right to establish and maintain institutions of religious charitable purposes;
2) To manage its own affairs in matters of religion;
3) To own and acquire movable and immovable property and ;
4) To administer such property in Accordance with law.

ARTICLE 27-

Any person shall not be compelled to pay any taxes, the proceed of which will be used to meet expenses for promotion of any particular religion.

ARTICLE 28-

- An educational institute which is wholly maintained by state fund shall not give any religious institutions.
- Any person shall not be compelled in any educational institutions run by state fund without his consent or his guardians consent to -
  1. To take part in religious institution given
  2. To attend any religious worship conducted.

CULTURAL AND EDUCATIONAL RIGHT [Right of Minorities]
Minority

The word 'minority' has not been defined in the Constitution. The Supreme Court in D.A.V. College, Jullundur v. State of Punjab, seems to have stated the law on the point. It said that minority determined in relation to a particular impugned legislation. The determination of minority should be based on the area of operation of a particular piece of legislation. If it is a State law, the population of the State should be kept in mind and if it is a Central Law the population of the whole of India should be taken into account.

The 2 article guarantee the following rights:

1) Protection of interests of Minorities

Article 29 guarantees 2 rights:

i. Any section of the citizens residing in the territory of Indian or any part thereof having a distinct language, script or culture of its own has the right of conserve the same. Thus, citizens from Tamil Nadu or Bengal has the right to conserve their language or culture if they are living in Delhi, a Hindi speaking area and *vice versa*.

ii. No citizen can be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language, or any of them. This provision is general and applies to each citizen individually and is not confined to a group of citizens. An exception is made to this right to the effect that if a special provision is made for the admission of persons belonging to educationally or/and socially backward classes or scheduled castes or scheduled tribes it shall be valid.

2) Right of Minorities to establish and administer educational institutions

Following rights are declared in Article 30:

i. All minorities, whether based on religion or on language, shall have the right to establish and administer educational institutions of their choice. It may be noted here that this right is not limited only to linguistic minorities but it extends to religious minorities also. Both of them have been given the freedom to establish and administer educational institutions of their own choice.

ii. The State cannot, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. It has been held that the State cannot impose conditions in granting aid to such institutions.

AMENDABILITY OF FUNDAMENTAL RIGHTS

The question about amendability of fundamental right has been raised in various cases and the courts have decided the matter in a different way in diverse cases. Let us see the history and conclusion of amendability of the fundamental right.

1. Initially the Supreme Court had a view that no part of our constitution was unamendable and that parliament in compliance with the requirement of article 368, may amend any provision of the constitution, including fundamental rights. This decision was upheld in shankari prasad v. union of India, 1951 and Sajjan singh v. state of rajasthan, 1964/Rights and article 368.
2. In gokal nath v. state of Punjab, 1967, the petitioner challenged the validity of the Punjab security of land tenures act, 1953 and of the mysore land reforms act. The

Supreme Court reversing its earlier decision in shankari prasad and Sajjan singh cases, contended that parliament had no power to amend fundamental rights.

3. 24th amendment act, 1971 - reacting to this judgement of the Supreme Court, the parliament through the 24th amendment act, 1971 brought certain changes to the amendability of the fundamental rights. The act declared that the parliament has the power to amend any of the fundamental rights under article 368.
4. In keshavanand Bharati v. state of karela, 1973, the petitioner challenged the validity of 24th amendment act, 1971 and karela land reforms act, 1963. The Supreme Court upheld the validity of 24th amendment act and held that the parliament can amend any part of the constitution including fundamental rights.
5. 42nd amendment act, 1976 - in reaction to the above decision this amendment was done during the period of emergency and gave unlimited amending power to parliament by removing the exception of basic structure of constitution. As a result the parliament can amend the constitution even by altering its basic structure.
6. In Minerva mills v. union of India, 1980, the petitioner challenged the unlimited amendability power given to parliament under 42nd amendment act, by destroying the basic structure of the constitution. The Supreme Court was convinced that basic structure of the constitution should be preserved and the unlimited power given under 42 amendment act should not prevail.

Conclusion: PARLIAMENT'S POWER TO AMEND THE CONSTITUTION (INCLUDING FUNDAMENTAL RIGHTS) IS NOT ABSOLUTE AND THE BASIC STRUCTURE OF THE CONSTITUTION SHOULD BE MAINTAINED.

Directive Principle of State Policy

Meaning

Directive principle are the ideals which the union and state governments must keep in mind while formulating policies or pass law. The articles included in part IV of the constitution (article 36 to 51) contain certain directives which are the guidelines for the future government to lead the country.

Importance

The directive principle are not enforceable by the courts yet they are fundamental in the governance of the country. It is the duty of the state to apply these principle in making laws. If any government ignores them they will be answerable before electorate at the time elections. Therefore in-spite of not being enforced by law these principle are important for the long run and future of any government.

Important directive principle of state

1. State to secure a social order for the promotion of welfare of the people
2. Principles and policies to be followed by state
   - ✓ Equal right for men and women
   - ✓ Equal pay for equal work for men and women.
   - ✓ Distribution of ownership of material resources for common good.

- ✓ Prevention of concentration of wealth to the common detriment
- ✓ Ensure health of citizens at workplace.
- ✓ Protection of child and youth against exploitation.

3. Equal justice and free legal aid.
4. Organize village panchayats.
5. Right to work, education and public assistance in certain case.
6. Just and human condition of work
7. Living wages and securing standard of living to workers.
8. Participation of workers in management of industries.
9. Uniform civil code
10. Free and compulsory education for children
11. Promote the educational and economic interests of scheduled castes, scheduled tribes and other weaker sections.
12. Protection of environment, forest and wildlife
13. Protection of monuments and places of national importance.
14. Separation of judiciary from executive
15. Promotion of international peace and security

Relationship between fundamental rights & directive principle

If there is conflict between fundamental rights & directive principles, both have to be complied.

If there is a conflict between fundamental rights and directive principles of state, initially directive principles were totally ignored. Directive principle cannot override fundamental rights was decided in **state of madras v. chanpakram dorairajan**. But later court emphasized on harmonious construction to resolve the conflict. But if still conflict cannot be resolved then as decided in various cases and article inserted in constitution by amendment.

Present sequence of precedence to resolve conflict between fundamental rights and directive principle;

First preference	-	Fundamental rights except article 14 &19
Second preference	-	Directive principle given under article 39(b) & 39(c)
Third preference	-	Fundamental rights given under article 14&19
Last preference	-	Other directive principle [i.e. other than given under article 39(b) & 39(c)]

Fundamental Duties

a. To abide by the constitution and respect its ideals and institutions, the National Flag and the National Anthem.
b. To cherish and follow the nobel ideals which inspired our national struggle for freedom.
c. To uphold and protect the sovereignty, unity and integrity of India.
d. To defend the country and render national service when called upon to do so.

e. To Promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
f. To value and preserve the rich heritage of our composite culture;
g. To protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;
h. To develop the scientific temper, humanism and the spirit of inquiry and reform;
i. To safeguard public property and to abjure violence;
j. To strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement;
k. To provide opportunities for education to one's child or, as the case may be, ward between the age of 6 and 14 years.

Ordinance making power of the president and of the governor

1) Of the president-

In Article 53 the Constitution lays down that the "executive power of the Union shall be vested in the President". The President of India shall, thus, be the head of the 'executive power' of the Union. The various powers that are included within the comprehensive expression 'executive power' in a modern state have been classified under various heads as follows:

i. Administrative power, i.e., the execution of the laws and the administration of the departments of Government.
ii. Military power, i.e., the command of the armed forces and the conduct of war.
iii. Legislative power, i.e., the summoning; prorogation, etc. of the legislature.
iv. Judicial power, i.e., granting of pardons, reprieves etc. to persons convicted of crime.

These powers vest in the President under each of these heads, subject to the limitations made under the Constitution.

Ordinance-making power-

The most important legislative power conferred on the President is to promulgate Ordinances. Article 123 of the Constitution provides that the President shall have the power to legislate by Ordinances at any time when it is not possible to have a parliamentary enactment on the subject, immediately. This is a special feature of the Constitution of India.

This independent power of the executive to legislate by Ordinance has the following peculiarities:

✓ The Ordinance-making power will be available to the President only when both the Houses of Parliament have been prorogued or is otherwise not in session, so that it is not possible to have a law enacted by Parliament. However, Ordinance can be made even if only one House is in Session because law cannot be made by that House in session alone. Both the Houses must be in session when Parliament makes the law. The President's Ordinance making power under the Constitution is not a co-ordinate or parallel power of legislation along with Legislature.

- ✓ This power is to be exercised by the President on the advice of his Council of Ministers.
- ✓ The President must be satisfied about the need for the Ordinance and he cannot be compelled
- ✓ The Ordinance must be laid before Parliament when it re-assembles, and shall automatically cease to have effect at the expiration of 6 weeks from the date of re-assembly or before resolutions have been passed disapproving the Ordinance.
- ✓ The period of 6 weeks will be counted from the latter date if the Houses reassemble on different dates.

2) Of the governor-

The ordinance making power is granted to governor to governor in case of state list u/a 213 the power is on same grounds as of ordinance making power of president.

Legislature power-

While exercising this power Governor must act with the aid and advise of the Council of Ministers. But in following cases the Governor cannot promulgate any Ordinance without instructions from the President:

- ✓ If a Bill containing the same provisions would under this Constitution have required the previous section of the President.
- ✓ He would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President.
- ✓ An Act of the State legislature containing the same provisions would under this Constitution have been invalid under having been reserved for the consideration of the President, it had received the assent of the President.

The Ordinance must be laid before the state legislature (when it re-assembles) and shall automatically cease to have effect at the expiration of six weeks from the date of the re-assembly unless disapproved earlier by that legislature.

Chapter I of Part XI (Articles 245 to 255) of the Indian Constitution read with Seventh Schedule thereto covers the legislative relationship between the Union and the States. Analysis of these provisions reveals that the entire legislative sphere has been divided on the basis of:

a. Territory with respect to which the laws are to be made, and
b. Subject matter on which laws are to be made.

Territorial jurisdiction

Parliament may make laws for the whole of India and the legislature of a state may make laws for the whole or any part of the state.

Note - parliament in some cases can make laws which are effective even outside India.

Subject matter jurisdiction

On the basis of subject matter jurisdiction is divided on the following 3 basis:

- **Union List -** This list contains the subject matter in which parliament has power to legislate. In no case state has power to legislate on the given matters. There are 97

entries in this list. The main subjects of the union list are of national interest and importance like defence, foreign affairs, currency and coinage, war and peace, atomic energy, etc.

- **State list -** this list contains the subject-matter in which state legislature has power to legislate. But at the time of proclamation of emergency the power of the state shifts to the parliament. There were 66 entries in this list initially (currently there are 61 items). The main subjects of the state list are public order, police, state court fees, prisons, local government, public health and sanitation, hospitals and dispensaries, etc.
- **Concurrent List -** this list contains the subject matter in which both parliament and state legislature can legislate. However, when there is a conflict between such laws made by centre and state on same subject-matter then the law made by parliament shall prevail over the law made by the state legislature. There are 47 entries (though there are 52 items currently) in this list. The main subjects listed in this list are criminal law, criminal procedure, marriage and divorce, transfer of property, etc.
- **Residuary list -** With respect to all those matters which are not included in any of the 3 lists, parliament has the exclusive power to make laws. It is called the residuary legislative power of parliament.

Power of Parliament to make Laws on State List

Legislatures have the exclusive powers to make laws with respect to the subjects included in the State List and Parliament has no power to encroach upon them. However, our Constitution makes a few exceptions to this general rule by authorising Parliament to make law even on the subjects enumerated in the State List

1. **In the National Interest** - whenever parliament feels that it is necessary to legislate on the state list in public interest, it can do so

2. **During a proclamation of emergency** - Parliament shall have power to make laws for the whole or any part of the territory of India with respect to all matters in the State List. These laws will cease to have effect on the expiration of six months after the proclamation ceases to operate.

3. **Breakdown of Constitutional Machinery in a State** - In case the Governor of a State reports to the President, or he is otherwise satisfied that the Government of a State cannot be carried on according to the provisions of the Constitution, then he (President) can make a proclamation to that effect.

4. **On the request of two or more States** - The exercise of such power is conditional upon an agreement between two or more States requesting Parliament to legislate for them on a specified subject. The law so made may be adopted by other States also, by passing resolutions in their legislatures. Once, however, such law has been made, the power of those State legislatures which originally requested or which later on adopted such law is curtailed as regards that matter;

5. **Legislation for enforcing international agreements -** Parliament has exclusive power with respect to foreign affairs and entering into treaties and agreements with

foreign countries and implementing of treaties and agreements and conventions with foreign countries and to give effect to the agreement parliament needs to pass a law on the subject-matter which originally belongs to the state, it can do so.

Interpretation of the Legislative Lists

Plenary Powers: The first and foremost rule is that if legislative power is granted with respect to a subject and there are no limitations imposed on the power, then it is to be given the widest scope that its words are capable of, without, rendering another item nugatory.

Thus, a legislature to which a power is granted over a particular subject may make law on any aspect or on all aspects of it; it can make a retrospective law or a prospective law and it can also make law on all matters ancillary to that matter. For example, if power to collect taxes is granted to a legislature, the power not to collect taxes or the power to remit taxes shall be presumed to be included within the power to collect taxes.

Harmonious Construction: Different entries in the different lists are to be interpreted in such a way that a conflict between them is avoided and each of them is given effect. It must be accepted that the Constitution does not want to create conflict and make any entry nugatory.

Pith and Substance Rule: The rule of pith and substance means that where a law in reality and substance falls within an item on which the legislature which enacted that law is competent to legislate, then such law shall not become invalid merely because it incidentally touches a matter outside the competence of legislature.

Colourable Legislation: Doctrine of colourable legislation states, 'whatever legislature can't do directly, it cant do indirectly.' When a legislature seeks to do something in an indirect manner what it cannot do directly, the court struck such law.

Freedom of Trade, Commerce and Intercourse

ARTICLE 301

Article 301 of the constitution lays down the trade, commerce and intercourse throughout the territory of India shall be free. Restrictions in the form of taxes can be imposed. The freedom of trade and commerce guaranteed under article 301 applies throughout the territory of India; it is not only applicable to inter-state but also to inter-state trade, commerce and intercourse. The intension is to make whole territory of India as one for free flow trade and commerce.

ARTICLE 302

However, parliament can impose restriction on freedom of trade, commerce and intercourse in public interest.

ARTICLE 303

While imposing restrictions, the parliament should not discriminate between the state. Discrimination can only be done in case of scarcity of goods.

ARTICLE 304

State legislature can impose taxes on goods which comes into their state from other states if those goods are subject to taxation in their respective states.

ARTICLE 305

The laws which create state monopoly in any trade, etc. are valid irrespective of the fact that they directly impede or restrict the freedom of trade and commerce.

The Judiciary

The Supreme Court-supreme court can issue a writ against any person or government within the territory of India. Supreme Court can issue writ to enforce fundamental rights. Supreme Court issue writ under article 32 which in itself is a fundamental right thus Supreme Court cannot refuses to exercise its writ jurisdiction.

The high court - High court can issue writs against a person residing or against a government located within its territorial jurisdiction or if the cause of action arises within its territorial jurisdiction. High court can issue writ to enforce fundamental rights and for any other purpose. Whereas article 226 is discretionary thus high court can refuse to exercise its writ jurisdiction.

Types of Writs

A brief description of the various types of writs is given below:

i. Habeas corpus
ii. Mandamus
iii. Prohibition
iv. Certiorari
v. Quo-warranto

HABEAS CORPUS

The words 'Habeas Corpus' literally mean "to have the body". If a person is detained whether in prison or private custody without any justification for detention then he himself or through his representative may seek relief under this writ. The Supreme Court or high court will then issue this writ to produce the person who has been detained before a court and to release him if such detention is found illegal. This writ is issued in order to protect individual liberties against state and other individuals.

MANDAMUS

Mandamus means 'we command'. It is issued when a public official or a person holding a public office has failed to perform his/her public or statutory duty. Mandamus can be issued against any public authority. But it cannot be issued against the president or the governor of a state for the exercise of their duties and power.

PROHIBITION

A writ of prohibition is issued to an inferior court preventing it from assuming jurisdiction which is not legally vested in it. When a tribunal or lower court acts without or in excess of jurisdiction writ of prohibition can be demanded. It is generally issued before the trial of the case or during pendency of proceeding, but never after the order is made. While mandamus commands activity, prohibition commands inactivity, it is available only against judicial or quasi-judicial authorities and is not available against a public officer.

CERTIORARI

The writ of certiorari can be filed to high court or Supreme Court if a subordinate court

i. acts without or in excess of jurisdiction or
ii. acts in contravention of the rules of natural justice or
iii. Commits an error apparent on the face of the record.

Although the object of both the writs of prohibition and of certiorari is the same, prohibition is available at an earlier stage whereas certiorari is available at a later stage when the order is made.

QUO-WARRANTO

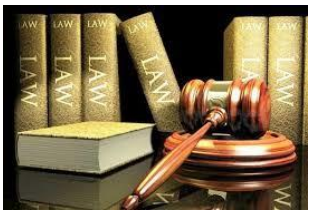
The term 'quo-warranto' means 'what is your authority'. If a public office is held by any one not qualified to hold it, it can be challenged by any person. Under this writ, the person is ordered by the court to explain under what valid grounds he is holding such a position. If it is found on investigation that he is not entitled to the office, the court may restrain him from acting in the office and order to vacate the office.

INTERPRETATION OF STATUTES

Introduction

- **Interpretation** is **the process of establishing the true meaning** of the words of the law.
- A **statute** is thus a written "will" of the legislature expressed according to the form necessary to constitute it as a law of the State, and rendered authentic.
- It is a well settled principle of law that as the statute is an edict of the Legislature, the conventional way of interpreting or construing a statute is to **seek the intention of legislature**.
- The intention of legislature assimilates **two aspects**
  - one aspect carries the concept of 'meaning', and
  - another aspect conveys the concept of 'purpose' and 'object' or the 'reason' or 'spirit' pervading through the statute.

  The process of construction, therefore, combines both the literal and purposive approaches.



- The Constitution of India does not use the term 'statute' but it employs the term "law" to describe an exercise of legislative power

Statutes are commonly divided into following classes:

1. *codifying,* when they codify the unwritten law on a subject;
2. *declaratory,* when they do not profess to make any alteration in the existing law, but merely declare or explain what it is;
3. *remedial,* when they alter the common law, or the judge made (non-statutory) law;
4. *amending*, when they alter the statute law;
5. *consolidating*, when they consolidate several previous statutes relating to the same subject matter, with or without alternations of substance;
6. *enabling*, when they remove a restriction or disability;
7. *disabling or restraining*, when they restrain the alienation of property;
8. *penal*, when they impose a penalty or forfeiture.

Need and object of Interpretation

The following has been observed in *Seaford Court Estates Ltd.* v. *Asher,* on the **need** for statutory interpretation

- "It is not within human powers to forsee the manifold sets of facts which may arise; and that; even if it were, it is not possible to provide for them in terms free from all ambiguity.
- The Judge must set to work on the constructive task of finding the intention of Parliament, and he must do this, not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature.

- To put into other words, a Judge should ask himself the question - If the makers of the Act had themselves come across this luck in the texture of it, how would they have straight ended it out?
- A judge must not alter the material of which it is woven, but he can and should iron out the creases.

The **object** of interpretation has been explained in *Halsbury's Laws of England* in the following words:

- The function of the court is to ascertain what the parties meant by the words which they have used; to declare the meaning of what is written in the instrument, and not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent of the intention.
- It is not possible to guess at the intention of the parties and substitute the presumed for the expressed intention. The ordinary rules of construction must be applied, although by doing so the real intention of the parties may, in some instances be defeated.
- The object of interpretation, thus, in all cases is to see what is the intention expressed by the words used. The words of the statute are to be interpreted so as to ascertain the mind of the legislature from the natural and grammatical meaning of the words which it has used.

Principles of Interpretation

It is only when the **intention** of the legislature as expressed in the statute is **not clear**, that the Court in interpreting it will have any need for the rules of interpretation of statutes.

A. Primary Rules

1. The Primary Rule: Literal Construction

- According to this rule, the words, phrases and sentences of a statute are ordinarily to be understood in their **natural, ordinary or popular** and grammatical meaning **unless** such a construction leads to an absurdity or the content or object of the statute suggests a different meaning.
- If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed according to the ordinary and natural meaning of the words.
- It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express.
- Some of the other **basic principles** of literal construction are:
  - Every word in the law should be given meaning as no word is unnecessarily used.
  - One should not presume any omissions and if a word is not there in the Statute, it shall not be given any meaning.
  - The Court has no power to legislate.
- While discussing rules of literal construction the Supreme Court in State of *H.P v. Pawan Kumar* held that One of the basic principles of interpretation of statutes is

to construe them according to plain, literal and grammatical meaning of the words.

2. **The Mischief Rule or Heydon's Rule**
   - In *Heydon's Case*, it was resolved "that for the **sure and true interpretation** of all statutes in **four things** are to be considered:
     i. What was the Common Law before the making of the Act;
     ii. What was the mischief and defect for which the Common Law did not provide;
     iii. What remedy the Parliament had resolved and appointed to cure the disease of the Commonwealth; and
     iv. The true reason of the remedy.
   - The rule directs that the Courts must adopt that construction which "shall **suppress the mischief and advance the remedy**". But this does not mean that a construction should be adopted which ignores the plain natural meaning of the words or disregard the context and the collection in which they occur.
   - The Supreme Court in *Sodra Devi's* case, has expressed the view that the rule in Heydon's case is **applicable only when** the **words** in question are **ambiguous** and are reasonably capable of **more than one meaning**.
   - The correct principle is that after the words have been construed in their context and it is found that the language is capable of bearing only one construction, the rule in Heydon's case ceases to be controlling and gives way to the plain meaning rule.

3. **Rule of Reasonable Construction i.e. Ut Res Magis Valeat Quam Pareat**
   - This is the golden rule of interpretation.
   - While, interpreting the provision, it becomes necessary to have regard to the **subject matter** of the statute and the **object** which it is intended to achieve.
   - According to this rule, the words of a statute must be construed *ut res magis valeat quam pareat*, so as to give a sensible meaning to them and the **intention of law maker** should be given utmost importance,
   - It is the **duty of a Court** in constructing a statute to give effect to **the intention of the legislature**.
   - If the Court considers that the **litera legis is not clear**, it, must **interpret** according to the **purpose, policy or spirit** of the statute (ratio-legis). It is, thus, evident that no invariable rule can be established for literal interpretation.
   - In *RBI* v. *Peerless General Finance and Investment Co. Ltd.* The Supreme Court stated that if a statute is looked at in the context of its enactment, with the glasses of the statute makers provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act.

4. **Rule of Harmonious Construction**
   - A statute must be read as a whole effect should be given to every provision.

- Such a construction has the merit of **avoiding any inconsistency or repugnancy** either within a section or between a section and other parts of the statute.
- It is the duty of the Courts to **avoid "a head on clash**" between two sections of the same Act and, "whenever it is possible to do so, to construct provisions which appear to conflict so that they harmonise"
- Where in an enactment, there are two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect may be given to both. This is what is known as the "rule of harmonius construction".

5. Rule of Ejusdem Generis

- *Ejusdem Generis,* literally means "of the **same kind or species**".
- In other words, the *ejusdem generis* rule is that, where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified, unless there is a clear manifestation of a contrary purpose.
- To apply the rule the following conditions must exist:
    i. The statute contains an enumeration by specific words,
    ii. The members of the enumeration constitute a class,
    iii. The class is not exhausted by the enumeration,
    iv. A general term follows the enumeration,
    v. There is a distinct genus which comprises more than one species, and
    vi. There is no clearly manifested intent that the general term be given a broader meaning that the doctrine requires.
- The rule of *ejusdem generis* must be **applied with great caution** because, it **implies a departure from the natural meaning of words**, in order to give them a meaning or supposed intention of the legislature.
- The rule must be controlled by the fundamental rule that statutes must be construed so as to carry out the object sought to be accomplished. The rule requires that specific words are all of one genus, in which case, the general words may be presumed to be restricted to that genus.
- **For example** – If a law refers to yatchs, ships, cruise, boat and other vehicles, "vehicles" would not include trucks, since the list was of water-based transportation.

B. Other Rules of Interpretation

1. Expressio Unis Est Exclusio Alterius

- The rule means that **express mention of one thing implies the exclusion of another**.
- At the same time, general words in a statute must receive a general construction, unless there is in the statute some ground for limiting and restraining their meaning by reasonable construction; and it is not to be assumed that anything not specifically included is for that reason alone excluded from the protection of the statute.
- In other words, when something is mentioned expressly in a statute it should be presumed that the things not mentioned are excluded.

2. Contemporanea Expositio Est Optima Et Fortissima in Lege

- The maxim means that a contemporaneous exposition is the best and strongest in law. Where the words used in a statute have undergone alteration in meaning in course of time, the words will be construed to bear the **same meaning as they had when the statute was passed** *on* the principle expressed in the maxim.
- In simple words, old statutes should be interpreted as they would have been at the date when they were passed and prior usage and interpretation by those who have an interest or duty in enforcing the Act, and the legal profession of the time, are presumptive evidence of their meaning when the meaning is doubtful.

3. Noscitur a Sociis

- The *'Noscitur a Sociis'* i.e. "It is **known by its associates**". In other words, meaning of a word should be known from its accompanying or associating words.
- It is not a sound principle in interpretation of statutes, to lay emphasis on one word disjuncted from its preceding and succeeding words. A word in a statutory provision is to be read in collocation with its companion words.
- The rule states that where two or more words which have analogous meaning are coupled together, they are understood in their cognate sense. It is only where the intention of the legislature in associating wider words with words of narrower significance, is doubtful that the present rule of construction can be usefully applied. The *same words bear the same meaning in the same* statute.
- **For example** – The word 'plant' if used in 'plant and trees' should be interpreted as shrub, herbs, bushes etc. Whereas if used in 'plant and machinery' it would mean some kind of equipment.
- But this rule will not apply:
  i. when the context excluded that principle.
  ii. if sufficient reason can be assigned, it is proper to construe a word in one part of an Act in a different sense from that which it bears in another part of the Act.
  iii. where it would cause injustice or absurdity.
  iv. where different circumstances are being dealt with.
  v. where the words are used in a different context.

4. Strict and Liberal Construction

- What is meant by '**strict construction**' is that "Acts, are not to be regarded as including anything which is not within their letter as well as their spirit, which is not clearly and intelligibly described in the very words of the statute, as well as manifestly intended",
  In other words, statute has to construed in its strict sense.
  Generally, **criminal laws** are given strict interpretation.
- '**Liberal construction**' is meant that "everything is to be done in advancement of the remedy that can be done consistently with any construction of the statute".
  Generally, **Labour and Welfare laws** are given liberal interpretation as the primary focus of the acts are to provide benefit.
- "Although the literal rule is the one most frequently referred to in express terms, the Courts treat all three (viz., the literal rule, the golden rule and the mischief rule) as valid and refer to them as occasion demands, but do not assign any reasons for choosing one rather than another.

Presumptions

Where the meaning of the statute is clear, there is no need for presumptions. But if the intention of the legislature is not clear, there are number of presumptions.
These are:

a) that the **words in a statute are used precisely** and not loosely.
b) that **vested rights**, i.e., rights which a person possessed at the time the statute was passed, are **not taken away without express words**, or necessary implication or without compensation.
c) that "**mens rea**", i.e., guilty mind is **required** for a **criminal act**. There is a very strong presumption that a statute creating a criminal offence does not intend to attach liability without a guilty intent.
d) that the **state is not affected by a statute unless it is expressly mentioned** as being so affected.
e) that a statute is **not intended to be inconsistent with the principles of International Law.** Although the judges cannot declare a statute void as being repugnant to International Law, yet if two possible alternatives present themselves, the judges will choose that which is not at variance with it.
f) that the **legislature knows** the **state of the law**.
g) that the **legislature does not make any alteration** in the existing law unless by express enactment.
h) that the **legislature knows the practice of the executive and the judiciary**.
i) **legislature confers powers** necessary to carry out duties imposed by it.
j) that **the legislature does not make mistake**. The Court will not even alter an obvious one, unless it be to correct faulty language where the intention is clear.
k) **the law compels no man to do that which is futile or fruitless**.
l) **legal fictions** may be said to be statements or suppositions which are known, to be untrue, but which are not allowed to be denied in order that some difficulty may be overcome, and substantial justice secured. It is a well settled rule of interpretation that in construing the scope of a legal fiction, it would be proper and even necessary to assume all those facts on which alone the fiction can operate.
m) where powers and duties are inter-connected and it is not possible to separate one from the other in such a way that powers may be delegated while duties are retained and *vice versa*, the **delegation of powers takes with it the duties**.
n) **the doctrine of natural justice is really a doctrine** for the interpretation of statutes, under which the Court will presume that the legislature while granting a drastic power must intend that it should be fairly exercised.

Internal and External Rules of Interpretation

A. Internal Aids in Interpretation

1. *Title*

- The **long title** of an Act is a part of the Act and is admissible as an aid to its construction. It sets out the general terms, the purpose of the Act and it often precedes the preamble.
- The **Short Title cannot be used** for interpretation as short title implies only an abbreviation for purposes of reference.

- The true nature of the law is determined not by the name given to it but by its substance. However, the long title is a legitimate aid to the construction.

2. ***Preamble***
   - Where the enacting part is **clear and unambiguous**, the **preamble cannot be used** but where the enacting part is **ambiguous**, the preamble can be referred to for interpretation.
   - Supreme Court in *Kamalpura Kochunni* v. *State of Madras*, pointed out that the preamble may be legitimately consulted in case any ambiguity arises in the construction of an Act and it may be useful to fix the meaning of words used so as to keep the effect of the statute within its real scope.

3. ***Heading and Title of a Chapter***
   - It has been settled that the headings or titles prefixed to sections or group of sections can be referred to in construing an Act of the legislature.
   - The Supreme Court observed that "the headings prefixed to sections or entries (of a Tariff Schedule) cannot control the plain words of the provision; they cannot also be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. **Only in the case of ambiguity** or doubt the **heading or the sub-heading may be referred** to as an aid for construing the provision but even in such a case aid could not be used for cutting down the wide application of the clear words used in the provision

4. ***Marginal Notes***
   - The Supreme Court in *Western India Theatres Ltd.* v. *Municipal Corporation of Poona*, has also held, that a marginal note cannot be invoked for construction where the meaning is clear.
   - Marginal notes appended to the Articles of the Constitution have been held to constitute part of the Constitution as passed by the Constituent Assembly and therefore, they have been made use of in consulting the Articles.
   - When reference to marginal note is relevant? The Supreme Court has held that the marginal note although may not be relevant for rendition of decisions in all types of cases but where the main provision is sought to be interpreted differently, reference to marginal note would be permissible in law

5. ***Interpretation Clauses***
   - The definition given under the Act is a **"key to interpretation".**
   - Definition may be of following types: -
     i. **Exhaustive Definition** – It is a restrictive definition which means there is nothing that can be included in the meaning beyond what has been stated. The words 'means' and 'means and includes' indicates such definition.
     ii. **Inclusive Definition** – Here, the definition of the word has the scope and ambit to go beyond what has been stated. The words 'includes', 'to apply to and include' and 'so deemed to include' indicates such definition.
     iii. **Exclusive Definition**- When definition excludes certain things from its ambit, it is exclusive definition.
   - A definition is not to be read in isolation. It must be read in the context of the phrase which it defines, realising that the function of a definition is to give

precision and certainty to a word or a phrase which would otherwise be vague and uncertain but not to contradict or supplement it altogether.

- When a word is defined to bear a number of inclusive meanings, the sense in which the word is used in a particular provision must be ascertained from the context of the scheme of the Act, the language, the provision and the object intended to be served thereby.

6. *Proviso*

- As stated by Hidayatullah, J."As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule".
- A distinction is said to exist between the provisions worded as 'proviso', 'exception' or 'saving clause'.
- 'Exception' is intended to restrain the enacting clause to particular cases; 'proviso' is used to remove special cases from the general enactment and provide for them specially; and 'saving clause' is used to preserve from destruction certain rights, remedies or privileges already existing.

7. *Illustrations or Explanation*

- "**Illustrations** are **examples** that are attached to sections are part of the statute and they are useful so far as they help to furnish same indication of the presumable intention of the legislature.
- But illustrations cannot have the effect of modifying the language of the section and they cannot either curtail or expand the ambit of the section which alone forms the enactment.
- An **explanation** is at times appended to a section to **explain the meaning of words** contained in the section. It becomes a part and parcel of the enactment.
- An explanation, normally, should be so read as to harmonise with and clear up any ambiguity in the main section and should not be so construed as to widen the ambit of the section.

8. *Schedules*

- The schedules form a part of the statute and must be read together with it for all purposes of construction
- There are **two principles** which ought to be applied to the combination of an Act and its schedule.
  - If the Act says that the schedule is to be used for a certain purpose and the heading of the part of the schedule in question shows that it is *prima facie* at any rate devoted to that purpose, then the Act and the schedule must be read as if the schedule were operating for that purpose only.
  - If Schedule and Act are inconsistent to each other, first an attempt should be made to harmonize both but if conflict is not resolved the Act shall prevail.
- *The* **statement of objects and reasons** as well as the '**notes on clauses of the Bill** relating to any particular legislation may be **relied upon for construing** any of its provisions where the clauses have been adopted by the Parliament without any change in enacting the Bill, but where there have been extensive changes during the passage of the Bill in Parliament, the objects and reasons of the changed provisions may or may not be the same as of the clauses of the original

Bill and it will be unsafe to attach undue importance to the statement of objects and reasons or notes on clauses.

B. External Aids in Interpretation

Apart from the intrinsic aids, such as preamble and purview of the Act, the Court can consider resources outside the Act, called the extrinsic aids, in interpreting and finding out the purposes of the Act.

1. Parliamentary History

- It has already been noticed that the Court is entitled to take into account "such external or historical facts as may be necessary to understand the subject-matter of the statute", or to have regard to "the surrounding circumstances" which existed at the time of passing of the statute.
- Like any other external aid, the inferences from historical facts and surrounding circumstances must give way to the clear language employed in the enactment itself

2. Reference to Reports of Committees

- The report of a Select Committee or other Committee on whose report an enactment is based, can be looked into "so as to see the background against which the legislation was enacted, the fact cannot be ignored that Parliament may, and often does, decide to do something different to cure the mischief. So oneshould not be unduly influenced by the Report
- When Parliament has enacted a statute as recommended by the Report of a Committee and there is ambiguity or uncertainty in any provision of the statute, the Court may have regard to the report of the Committee for ascertaining the intention behind the provision.
- But where the words used are plain and clear, no intention other than what the words convey can be imported in order to avoid anomalies.

3. Reference to other Statutes

- It has already been stated that a statute must be read as a whole as words are to be understood in their context. Extension of this rule of context, permits reference to other statutes in *pari materia, i.e*. statutes dealing with the same subject matter or forming part of the same system.
- Words in a later enactment cannot ordinarily be construed with reference to the meaning given to those or similar words in an earlier statute. But the later law is entitled to weight when it comes to the problem of construction.
- Generally speaking, a subsequent Act of a legislature affords no useful guide to the meaning of another Act which comes into existence before the later one was ever framed.
- Both must be laws on the same subject and the part of the earlier Act which is sought to be construed must be ambiguous and capable of different meanings.
- Although a repealed statute has to be considered, as if it had never existed, this does not prevent the Court from looking at the repealed Act in *pari materia* on a question of construction.

4. Dictionaries

- When a word is not defined in the Act itself, it is permissible to refer to dictionaries to find out the general sense in which that word is understood in common parlance. However, in selecting one out of the various meanings of the word, regard must always be had to the context as it is a fundamental rule that *"the meaning of words and expressions used in an Act must take their colour from the context in which they appear".* Therefore, when the context makes the meaning of a word quite clear, it becomes unnecessary to search for and select a particular meaning out of the diverse meanings a word is capable of".
- Judicial decisions expounding the meaning of words in construing statutes in pari materia will have more weight than the meaning furnished by dictionaries.

5. Use of Foreign Decisions

- Use of foreign decisions of countries following the same system of jurisprudence as ours and rendered on statutes in *pari materia* has been permitted by practice in Indian Courts.
- The assistance of such decisions is subject to the qualification that prime importance is always to be given to the language of the relevant Indian Statute, the circumstances and the setting in which it is enacted and the Indian conditions where it is to be applied.

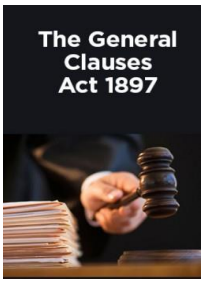
GENERAL CLAUSES ACT, 1897

Introduction

- The general definitions provided under the General Clauses Act is applicable to all Central Acts and Regulations where there is no definition in the Act that conflicts with provisions of Central Acts or regulations
- The General Clauses Act 1897 **belongs to** the class of Acts which may be called as **Interpretation Acts**.
- Interpretation Act provides a standard set of definitions or extended definitions of words and expressions commonly used in legislation. It also provides a set of rules which regulate certain aspects of operation of other enactments.

Object of General Clauses Act

1. Shorten the language of Central legislations.
2. Provide uniformity by defining common legal terminology.
3. Provide for various definitions which help to interpret various statutes.
4. Avoid unnecessary repetitions of same words in various Acts.
5. Provide for general definitions of words which are not specifically defined under an Act.
6. Helps to resolve any conflict between 2 or more Central legislations.



Key Definitions

Section 3 of the General Clause Act provides that in this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context –

1. "**Act**", used with reference to an offence or a civil wrong, shall include a series of acts, and words which refer to acts done extend also to illegal omissions;
2. "**Affidavit**" shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing
3. "**Central Act**" shall means an Act of Parliament and shall include
   - An Act of the Dominion legislature or of the Indian Legislature passed before the commencement of the Constitution, and
   - An Act made before such commencement by the Governor General in Council or the Governor General, acting in a legislative capacity;
4. "**Central Government**" shall, -

a) In relation to anything done **before the commencement of the Constitution**, mean the Governor General or the Governor General in Council, as the case may be; and shall include,-

i. In relation to functions entrusted under sub-section (1) of Section 124 of the Government of India Act, 1935, to the Government of a Province, the Provincial Government acting within the scope of the authority given to it under that sub-section; and

ii. in relation to the administration of a Chief Commissioner's Province, the Chief Commissioner acting within the scope of the authority given to him under sub-section (3) of section 94 of the said Act; and

b) In relation to anything done or to be done **after the commencement of the Constitution**, mean the President; and shall include,-

i. in relation to Functions entrusted under clause (1) of article 258 of the Constitution, to the Government of a State, the State Government acting within the scope of the authority given to it under that clause;

ii. In relation to the administration of a Part C State before the Commencement of the Constitution (Seventh Amendment) Act, 1956, the Chief Commissioner or the Lieutenant-governor or the Government of a neighboring State or other authority acting within the scope of the authority acting within the authority given to him or it under Article 239 or Article 243 of the Constitution, as the case may be; (and)

iii. In relation to the administration of a Union territory, the administrator thereof acting within the scope of the authority given to him under article 239 of the Constitution;

5. "**Commencement**" used with reference to an Act or regulation, shall mean the day on which the Act or regulation comes into force
6. "**Constitution**" shall mean the Constitution of India
7. "**District Judge**" shall mean the Judge of a principal civil court of original jurisdiction, but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction;
8. "**document**" shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter;
9. "**Financial year**" shall mean the year commencing on the first day of April
10. A thing shall be deemed to be done in "**good faith**" where it is in fact done honestly, whether it is done negligently or not
11. "**Government**" or "**the Government**" shall include both the Central Government and any State Government;
12. "**Government securities**" shall mean securities of the Central Government or of any State Government, but in any Act or regulation made before the commencement of the Constitution shall not include securities of the government of any Part B State
13. "**Immovable property**" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth
14. "**local authority**" shall mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the government with the control or management of a municipal or local fund;
15. "**Magistrate**" shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force
16. "**Month**" shall mean a month reckoned according to the British calendar;
17. "**Movable property**" shall mean property of every description, except immovable property;
18. "**Oath**" shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing;

19. "**Offence**" shall mean any act or omission made punishable by any law for the time being in force;
20. "**Person**" shall include any company or association or body of individuals, whether incorporated or not;
21. "**Registered**", used with reference to a document, shall mean registered in 6[India] under the law for the time being in force for the registration of documents
22. "**Regulation**" shall mean a Regulation made by the President under article 240 of the Constitution and shall include a Regulation made by the President under article 243 thereof and a regulation made by the Central Government under the Government of India Act, 1870, or the Government of India Act, 1915, or the Government of India Act, 1935;
23. "**Rule**" shall mean a rule made in exercise of a power conferred by any enactment, and shall include a Regulation made as a rule under any enactment;
24. "**Schedule**" shall mean a schedule to the Act or Regulation in which the word occurs;
25. "**Section**" shall mean a section of the Act or Regulation in which the word occurs
26. "**State Act**" shall mean an Act passed by the Legislature of a State established or continued by the Constitution
27. "**State Government**"-
    a) As respects anything done before the commencement of the Constitution, shall mean, in a Part A State, the Provincial Government of the corresponding Province, in a Part B State, the authority or person authorized at the relevant date to exercise executive government in the corresponding Acceding State, and in a Part C State, the Central Government;
    b) As respects anything done after the commencement of the Constitution and before the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a Part A State, the Governor in a Part B State, the Rajpramukh, and in a Part C State, the Central Government;
    c) As respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a State, the Governor, and in a Union Territory, the Central Government; and shall, in relation to functions entrusted under Article 258A of the Constitution to the Government of India, include the Central Government acting within the scope of the authority given to it under that article;
28. "**Sub-section**" shall mean a sub-section of the section in which the word occurs
29. "**Union Territory**" shall mean any Union Territory specified in Schedule I to the Constitution and shall include any other territory comprised within the territory of India but not specified in that Schedule
30. "**Will**" shall include a codicil and every writing making a voluntary posthumous disposition of property;
31. Expression referring to "**writing**" shall be construed as including references to printing, lithography, photography and other modes of representing or reproducing words in a visible form; and
32. "**Year**" shall mean a year reckoned according to the British calendar

General Rule of Construction

- Rule of Construction is a rule used for interpreting legal instruments, especially contracts and statutes.

- A rule of construction is a principle that either governs the effect of the ascertained intention of a document or agreement containing an ambiguous term or establishes what a court should do if the intention is neither express nor implied.
- A regular pattern of decisions concerning the application of a particular provision of a statute is a rule of construction that governs how the text is to be applied in similar cases.
- ***Contra proferentem*** and ***Ejusdem Generic*** are two examples of rules of construction.
  - According to *Contra Proferentem Rule*, if a clause in a contract appears to be ambiguous, it should be interpreted against the interests of the person who insisted that the clause be included.
  - Likewise *Ejusdem Generis Rule* states that where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed
- In the rule of construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.

Kinds of Rule of Construction and Interpretation

1. **The Literal Rule of Interpretation:**
   - The primary and important rule of interpretation is called the Literal Rule.
   - This rule stated that The only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act.
   - If the words of the statute are in themselves precise and unambiguous, then nothing else necessary than to explain those words in their natural and ordinary sense. The words themselves alone do, in such case; best declare the intention of the lawgiver.
2. **Purposive Rule of Interpretation**
   - An 'enactment shall remedy a particular mischief and it is therefore presumed that Parliament intends that the court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment corresponds to its legal meaning, should find a construction which applies the remedy provided by it in such a way as to suppress that mischief.
   - In *Heydon's Case*, it was resolved "that for the **sure and true interpretation** of all statutes in **four things** are to be considered:
     i. What was the Common Law before the making of the Act;
     ii. What was the mischief and defect for which the Common Law did not provide;
     iii. What remedy the Parliament had resolved and appointed to cure the disease of the Commonwealth; and
     iv. The true reason of the remedy

3. **Harmonious Construction**
   - A statute must be read as a whole effect should be given to every provision.

- Such a construction has the merit of **avoiding any inconsistency or repugnancy** either within a section or between a section and other parts of the statute.
- It is the duty of the Courts to **avoid "a head on clash**" between two sections of the same Act and, "whenever it is possible to do so, to construct provisions which appear to conflict so that they harmonise"
- Where in an enactment, there are two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect may be given to both. This is what is known as the "rule of harmonius construction".

4. **Rule of Beneficial Construction*:***

- Beneficent construction involves giving the **widest meaning possible** to the statutes.
- When there are two or more possible ways of interpreting a section or a word, the meaning which gives relief and protects the benefits which are purported to be given by the legislation, should be chosen.
- A beneficial statute has to be construed in its correct perspective so as to know the legislative intent.
- Also, beneficial construction does not permit rising of any presumption that protection of widest amplitude must be deemed to have been conferred on those for whose benefit the legislation may have been enacted.
- Beneficial Construction of statutes have enormously played an important role in the development and beneficial interpretation of socio – economic legislations.

5. Strict Construction of Penal Statutes

- The general rule for the construction of a penal statute is that it would be strictly interpreted, that is, if two possible and reasonable constructions can be put upon a penal provision, the Court must lean towards that construction which exempts the subject from penalty rather than the one which imposes a penalty.
- A penal statute has to be construed narrowly in favor of the person proceeded against.
- This rule implies a preference for the liberty of the subject, in case of ambiguity in the language of the provision.
- In constructing a penal Act, if a reasonable interpretation in a particular case can avoid the penalty the Court adopts that construction.

Retrospective Amendments

Where a particular **date of enforcement** of the Act is **specified** – The Act will become effective on **given specified date**.
Where **no particular date** of enforcement of the Act is specified –

If Act is made **before** commencement of the Indian Constitution	The Act will become effective on the date it receives the **assent of the Governor General**
If Act is made **after** commencement of the Indian Constitution	The Act will become effective on the date it receives the **assent of the President**

The regulation shall come into force instantly on the ending of the day prior to its commencement unless expressly provided.

Effect of Repealment

Where any Central legislation or any regulation enacted after the commencement of this Act repeals any Act made or yet to be made, unless another purpose exists, the repeal shall not:

- Renew anything not enforced or prevailed during the period at which repeal is effected or;
- Affect the prior management of any legislation that is repealed or anything performed or undergone or;
- Affect any claim, privilege, responsibility or debt obtained, ensued or sustained under any legislation so repealed or;
- Affect any punishment, forfeiture or penalty sustained with regard to any offence committed as opposed to any legislation or
- Affect any inquiry, litigation or remedy with regard to such claim, privilege, debt or responsibility or any inquiry, litigation or remedy may be initiated, continued or insisted.

In any Central legislation or regulation framed subsequent to the enforcement of the legislation, it shall be essential to revive any legislation either entirely or partly repealed expressly to provide the purpose.
In simple words, if one Act is repealed by second, which is subsequently repealed by third Act, the first Act will not automatically revive on repealing of second Act unless third Act does not expressly provided that

Powers and Functionaries

The Power and Functionaries are provided under section 14 to section 19 of the General Clause Act, 1897.

Powers conferred to be exercisable from time to time [Section 14]

(1) Where, by any Central Act or Regulation made after the commencement of this Act, any power is conferred, then unless a different intention appears that power may be exercised from time to time as occasion requires.
(2) This section applies also to all Central Acts and Regulations made on or after the fourteenth day of January, 1887

Power to appoint to include power to appoint ex officio [Section 15]

Where, by any Central Act or Regulation, a power to appoint any person to fill any office or execute any function is conferred, then, unless it is otherwise expressly provided, any such appointment, if it is made after the commencement of this Act, may be made either by name or by virtue of office.

Power to appoint to include power to suspend or dismiss [Section 16]

Where, by any Central Act or Regulation, a power to make any appointment is conferred, then, unless a different intention appears, the authority having for the time

being power to make the appointment shall also have power to suspend or dismiss any person appointed whether by itself or any other authority in exercise of that power.

Substitution of functionaries [Section 17]

(1) In any Central Act or Regulation, made after the commencement of this Act, it shall be sufficient, for the purpose of indicating the application of a law to every person or number of persons for the time being executing the function of an office, to mention the official title of the officer at present executing the functions, or that of the officer by whom the functions are commonly executed.
(2) This section applies also to all Central Acts made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

Successors [Section 18]

(1) In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of indicating the relation of a law to the successors of any functionaries or of corporations having perpetual succession, to express its relation to the functionaries or corporations.
(2) This section applies also to all Central Acts made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

Officials chiefs and sub-ordinates [Section 19]

(1) In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of expressing that a law relative to the chief or superior of an office shall apply to the deputies or subordinates lawfully performing the duties of that office in the place of their superior, to prescribe the duty of the superior.
(2) This section applies also to all Central Acts made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

Section 21 of the General Clause Act deals with power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules or bye-laws.
It says where, by any Central Act or Regulation, a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued.

Administrative law

Introduction

The study of Administrative law involves **analysis** of the **institutions and legal rules** through which governmental decision making is authorized, affected, limited and reviewed.

Administrative law is that branch of law that **deals with powers, functions and responsibilities** of various organs of the state.

Administrative law is the **by-product** of ever increasing functions of the Governments.

There **is no single universal definition** of 'administrative law' because it means different things to different theorists. Some of the definitions by theorists are given below:

1. **Kenneth Culp Davis**
   - Kenneth defines administrative law as the law concerning the **powers and procedures of administrative agencies**, including especially the law governing the judicial review of administrative action.
   - An **administrative agency**, according to him, is a government authority, **other than a court and a legislative body**, which **affects the rights of private parties** either through adjudication or rule-making.
   - He further adds that apart from judicial review, the manner in which public officials handle business unrelated to adjudication or rule-making is not a part of administrative law.
   - The formulation of administrative agency in this definition is restrictive as it seeks to exclude agencies having administrative authority pure and simple and not having adjudicative or legislative functions.
   - This definition also **does not cover purely discretionary functions** which may be called (administrative) of administrative agencies not falling within the category of legislative or quasi-judicial.

2. **Albert Venn Dicey**
   - According to him, administrative law relates to that portion of a nation's legal system which **determines the legal status and liabilities of all state officials**, which defines the rights and liabilities of private individuals in their dealings with public officials, and which specifies the procedure by which those rights and liabilities are enforced.
   - Dicey's formulation focuses on one aspect of administrative law, i.e., **judicial control over public officials**.
   - This definition is narrow as it leaves out of consideration many aspects of administrative law, e.g., Public Corporations would not be covered under this definition because, strictly speaking, they are not state officials.

Need for Administrative Law

The modern state typically has **three organs**- legislative, executive and judiciary.

- **Legislature** is unable to come up with the required quality and quantity of legislations because of limitations of time, the technical nature of legislation and the rigidity of their enactments.
- The traditional administration of justice through **judiciary** is technical, expensive and dilatory.
- The states have empowered their **executive** (administrative) branch to fill in the gaps of legislature and judiciary. This has led to an all pervasive presence of administration in the life of a modern citizen. In such a context, a study of administrative law assumes great significance.
- The **ambit of administration** is wide and embraces following elements within its ambit:-
- It makes policies,
- It executes, administers and adjudicates the law
- It exercises legislative powers and issues rules, bye- laws and orders of a general nature.
- Since the whole purpose of bestowing the administration with larger powers is to ensure a better life for the people, it is **necessary to keep a check on the administration**, consistent with the efficiency, in such a way that it does not violate the rights of the individual
- It is the demand of prudence that when large powers are conferred on administrative organs, **effective control-mechanism** be also evolved so as to ensure that the officers do not use their powers in an undue manner or for an unwarranted purpose.
- It is the **task of administrative law** to **ensure** that the **governmental functions are exercised according to law and legal principles** and rules of reason and justice.
- The **goal** of administrative law is to ensure that the individual is not at receiving end of state's administrative power and in cases where the individual is aggrieved by any action of the administration, he or she can get it redressed.

A careful and systematic study and development of administrative law becomes a desideratum as administrative law is an instrument of control on the exercise of administrative powers.

Sources of Administrative Law

There are **four principal sources** of administrative law in India.

1. **Constitution of India**

- It is the **primary source** of administrative law.
- Article 73 of the Constitution provides that the executive power of the Union shall extend to matters with respect to which the Parliament has power to make laws. Similar powers are provided to States under Article 62.
- Indian Constitution has not recognized the doctrine of separation of powers in its absolute rigidity.
- The Constitution also envisages tribunals, public sector and government liability which are important aspects of administrative law.

2. **Acts/ Statutes**
   - Acts passed by the central and state governments for the maintenance of peace and order, tax collection, economic and social growth empower the administrative organs to carry on various tasks necessary for it.
   - These Acts list the responsibilities of the administration, limit their power in certain respects and provide for grievance redressal mechanism for the people affected by the administrative action.

3. **Ordinances, Administrative directions, notifications and Circulars**
   - Ordinances are issued when there are unforeseen developments and the legislature is not in session and therefore cannot make laws.
   - The ordinances allow the administration to take necessary steps to deal with such developments.
   - Administrative directions, notifications and circulars are issued by the executive in the exercise of power granted under various Acts.

4. **Judicial decisions**
   - **Judiciary** is the **final arbiter** in case of any dispute between various wings of government or between the citizen and the administration. In India, we have the supremacy of Constitution and the Supreme Court is vested with the authority to interpret it.
   - The courts through their various decisions on the exercise of power by the administration, the liability of the government in case of breach of contract or tortuous acts of Governments servants lay down administrative law which guide their future conduct.

Administrative Discretion

- It means the **freedom of an administrative authority** to choose from amongst various alternatives but with reference to rules of reason and justice and not according to personal whims. The exercise of discretion should **not be arbitrary, vague and fanciful**, but legal and regular.

- The government cannot function without the exercise of some discretion by its officials. It is necessary because it is humanly impossible to lay down a rule for every conceivable eventuality that may arise in day to-day affairs of the government. It is, however, equally true that **discretion is prone to abuse**. Therefore there needs to be a system in place to ensure that administrative discretion is exercised in the right manner.
- Freedom to choose from various alternatives allows the administration to fashion its best response to various situations. If a certain rule is found to be unsuitable in practice, the administration can change, amend or abrogate it without much delay. Even if the administration is dealing with a problem on a case to case basis it can change its approach according to the exigency of situation and the demands of justice.

Judicial Control over Administrative Actions

In India the modes of judicial control of administrative action can be conveniently grouped into **three heads**

A. CONSTITUTIONAL

- The Constitution of India is supreme and all the organs of state derive their existence from it.
- Consequently, an Act passed by the legislature is required to be in conformity with the requirements of the Constitution and it is for the judiciary to decide whether or not that Act is in conformity with the Constitutional requirements. If it is found in violation of the Constitutional provisions the Court has to declare it unconstitutional and therefore, void.

Judicial Review

- Judicial review is the **authority of Courts to declare void the acts of the legislature and executive**, if they are found in violation of provisions of the Constitution.
- Judicial Review is the **power of the highest Court of a jurisdiction to invalidate on Constitutional grounds**, the **acts of other Government agency** within that jurisdiction.
- The doctrine of judicial review has been originated and developed by the American Supreme Court
- The judicial review is **not an appeal** from a decision **but a review** of the manner in which the decision has been made. The judicial review is **concerned not with the decision but with the decision making process**.
- The power of judicial review controls not only the legislative but also the executive or administrative act.
- The Court interferes when the uncontrolled and unguided discretion is vested in the executive or administrative authorities or the repository of the power abuses its discretion.

In *Mansukhlal Vithaldas Chauhan v State of Gujarat, AIR 1997 SC 3400*, the Supreme Court held that while exercising the power of judicial review it does sit as a court of appeal but merely reviews the manner in which the decision was made, particularly as the court lacks the expertise to correct the administrative decision and if a review of the administrative decision is permitted, it will be substituting its own decision which itself may Constitutional Statutory Ordinary or Equitable be fallible. The court is to confine itself to the question of legality. Its concern should be:

1. whether a decision making authority exceeding its power?
2. committed an error of law?
3. committed a breach of rules of natural justice?
4. reached a decision which no reasonable tribunal would have reached, or
5. abused its power?

Judicial review is **exercised at two stages**:

1. Judicial review at the stage of delegation of discretion

The court exercise control over delegation of discretionary powers to the administration **by adjudicating upon the constitutionality of the law** under which such powers are delegated with reference to the fundamental rights enunciated in **Part III of the Indian Constitution**. Therefore, if the **law confers vague and wide discretionary power** on any administrative authority, it may be **declared ultra vires** Article 14, Article 19 and other provisions of the Constitution

In certain situations, the statute though does not give discretionary power to the administrative authority to take action, may still give discretionary power to frame rules and regulations affecting the rights of citizens. The court can control the bestowing of such discretion on the ground of excessive delegation. The fundamental rights thus provide a basis to the judiciary in India to control administrative discretion to a large extent.

Administrative Discretion and Article 14

- Article14 of the Constitution of India provides for **equality before law**. It prevents arbitrary discretion being vested in the executive.
- Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. Right to equality affords protection not only against discretionary laws passed by legislature but also prevents arbitrary discretion being vested in the executive.
- In a number of cases, the **statute has been challenged** on the ground that it conferred on an administrative authority wide discretionary powers of selecting persons or objects discriminately and therefore, it violated Article 14. The Court in

determining the question of validity of such statute examines whether the statute has laid down any principle or policy for the guidance of the exercise of discretion by the government in the matter of selection or classification. The Court will not tolerate the delegation of uncontrolled power in the hands of Executive to such an extent as to enable it to discriminate.

- In *State of West Bengal v. Anwar Ali, AIR 1952 SC 75* it was held that in so far as the Act empowered the Government to have cases or class of offences tried by special courts, it violated Article 14 of the Constitution. The court further held the Act invalid as it laid down "no yardstick or measure for the grouping either of persons or of cases or of offences" so as to distinguish them from others outside the purview of the Act. Moreover, the necessity of "speedier trial" was held to be too vague, uncertain and indefinite criterion to form the basis of a valid and reasonable classification

Administrative Discretion and Article 19

- Article 19 **guarantees certain freedoms** to the citizens of India, but they are **not absolute**. Reasonable restrictions can be imposed on these freedoms under the authority of law.

- In *Dr. Ram Manohar v. State of Delhi*, AIR 1950 SC 211, where the D.M. was empowered under East Punjab Safety Act, 1949, to make an order of externment from an area in case he was satisfied that such an order was necessary to prevent a person from acting in any way prejudicial to public peace and order, the Supreme Court upheld the law conferring such discretion on the executive on the grounds, inter alia, that the law in the instant case was of temporary nature and it gave a right to the externee to receive the grounds of his externment from the executive.
- In a large number of cases, the question as to how much discretion can be conferred on the executive to control and regulate trade and business has been raised. The **general principle** laid down is that the **power conferred on the executive should not be arbitrary**, and that it should not be left entirely to the discretion of any authority to do anything it likes without any check or control by any higher authority.
- Where the Act provides some general principles to guide the exercise of discretion and thus saves it from being arbitrary and unbridled, the court will uphold it, but where the executive has been granted unfettered power to interfere with the freedom of property or trade and business, the court will strike down such provision of law.

2. Judicial review at the stage of exercise of discretion

- No law can clothe administrative action with a complete finality even if the law says so, for the courts always examine the ambit and even the mode of its exercise to check its conformity with fundamental rights.

- The courts in India have developed various formulations to control the exercise of administrative discretion, which can be grouped under two broad heads, as under:
  a) Authority has not exercised its discretion properly- '**abuse of discretion'**.
     i. **Mala fides**:
        - If the discretionary power is exercised by the authority with bad faith or dishonest intention, the action is quashed by the court.
        - Malafide exercise of discretionary power is always **bad and taken as abuse** of discretion.
        - Malafide (bad faith) may be taken to mean dishonest intention or corrupt motive. In relation to the exercise of statutory powers it may be said to comprise dishonesty (or fraud) and malice.
        - A power is exercised fraudulently if its repository intends to achieve an object other than that for which he believes the power to have been conferred.
        - The intention may be to promote another public interest or private interest.
        - In *Tata Cellular v. Union of India, AIR 1996 SC 11* the Supreme Court has held that the right to refuse the lowest or any other tender is always available to the Government but the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power.

     ii. **Irrelevant considerations**:
        - If a statute confers power for one purpose, its use for a different purpose is not regarded as a valid exercise of power and is likely to be quashed by the courts.
        - If the administrative authority takes into account factors, circumstances or events wholly irrelevant or extraneous to the purpose mentioned in the statute, then the administrative action is vitiated.

     iii. **Leaving out relevant considerations**:
     The administrative authority exercising the discretionary power is required to take into account all the relevant facts. If it leaves out relevant consideration, its action will be invalid.

     iv. **Arbitrary orders**:
     The order made should be based on facts and cogent reasoning and not on the whims and fancies of the adjudicatory authority.

     v. **Improper purpose**:
     The discretionary power is required to be used for the purpose for which it has been given. If it is given for one purpose and used for another purpose it will amount to abuse of power.

     vi. **Colourable exercise of power**:

Where the discretionary power is exercised by the authority on which it has been conferred ostensibly for the purpose for which it has been given but in reality for some other purpose, it is taken as colourable exercise of the discretionary power and it is declared invalid.

vii. **Non-compliance with procedural requirements and principles of natural justice:**
If the procedural requirement laid down in the statute is mandatory and it is not complied, the exercise of power will be bad. Whether the procedural requirement is mandatory or directory is decided by the court. Principles of natural justice are also required to be observed.

viii. **Exceeding jurisdiction:**
The authority is required to exercise the power within the limits or the statute. Consequently, if the authority exceeds this limit, its action will be held to be ultra vires and, therefore, void.

b) Authority is deemed not to have exercised its discretion at all- '**non-application of mind**

i. **Acting under dictation**:
- Where the authority exercises its discretionary power under the instructions or dictation from superior authority it is taken as non-exercise of power by the authority and its decision or action is bad.
- In such condition the authority purports to act on its own but in substance the power is not exercised by it but by the other authority. The authority entrusted with the powers does not take action on its own judgment and does not apply its mind.

ii. **Self restriction**:
- If the authority imposes fetters on its discretion by announcing rules of policy to be applied by it rigidly to all cases coming before it for decision, its action or decision will be bad.
- The authority entrusted with the discretionary power is required to exercise it after considering the individual cases and the authority should not imposes fetters on its discretion by adopting fixed rule of policy to be applied rigidly to all cases coming before it.

iii. **Acting mechanically and without due care**:
Non-application of mind to an issue that requires an exercise of discretion on the part of the authority will render the decision bad in law.

B. <u>STATUTORY</u>

The method of statutory review can be divided into **two parts**:

1. **Statutory appeals**: There are some Acts, which provide for an appeal from statutory tribunal to the High Court on point of law. e.g. Section 30 Workmen's Compensation Act, 1923.

2. **Reference to the High Court or statement of case**: There are several statutes, which provide for a reference or statement of case by an administrative tribunal to the High Court. Under Section 256 of the Income-tax Act, 1961 where an application is made to the Tribunal by the assessee and the Tribunal refuses to state the case the assessee may apply to the High Court and if the High Court is not satisfied about the correctness of the decision of the Tribunal, it can require the Tribunal to state the case and refer it to the Court.

C. ORDINARY OR EQUITABLE

The ordinary courts in exercise of the power provide the ordinary remedies under the ordinary law against the administrative authorities. These remedies are also called equitable remedies and include:

1. Injunction

An injunction is a preventive remedy. It is a judicial process by which one who has invaded or is threatening to invade the rights of another is restrained from continuing or commencing such wrongful act.

In India, the law with regard to injunctions has been laid down in the Specific Relief Act, 1963.

An action for declaration lies where a jurisdiction has been wrongly exercised or where the authority itself was not properly constituted. Injunction is issued for restraining a person to act contrary to law or in excess of its statutory powers.

An injunction can be issued to both administrative and quasi-judicial bodies.

Injunction is highly useful remedy to prevent a statutory body from doing an ultra vires act, apart from the cases where it is available against private individuals e.g. to restrain the commission or torts, or breach of contract or breach of statutory duty.

Injunction may be prohibitory or mandatory.

a) **Prohibitory Injunction**:
Prohibitory injunction **forbids the defendant to do a wrongful act**, which would infringe the right of the plaintiff. A prohibitory injunction may be interlocutory or temporary injunction or perpetual injunction.

i. **Interlocutory or temporary injunction**:
- Temporary injunctions are such as to continue until a specified time or until the further order of the court.
- It is granted as an interim measure to preserve status quo until the case is heard and decided.
- Temporary injunction may be granted at any stage of a suit.

- Temporary injunctions are regulated by the Civil Procedure Code and are provisional in nature.
- It does not conclude or determine a right.
- Besides, a temporary injunction is a mere order. The granting of temporary injunction is a matter of discretion of the court.

ii. **Perpetual injunction**:

- A perpetual injunction is granted at the conclusion of the proceedings and is definitive of the rights of the parties, but it need not be expressed to have perpetual effect
- It may be awarded for a fixed period or for a fixed period with leave to apply for an extension or for an indefinite period terminable when conditions imposed on the defendant have been complied with; or its operation may be suspended for a period during which the defendant is given the opportunity to comply with the conditions imposed on him, the plaintiff being given leave to reply at the end of that time.

b) **Mandatory injunction**:

When to prevent the breach of an obligation it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of and also to compel performance of the requisite acts.

The mandatory injunction may be taken as a command to do a particular act to restore things to their former condition or to undo, that which has been done. It prohibits the defendant from continuing with a wrongful act and also imposes duty on him to do a positive act.

2. **<u>Declaratory Action</u>**

- In some cases where wrong has been done to a person by an administrative act, declaratory judgments may be the appropriate remedy.
- Declaration may be taken as a judicial order issued by the court declaring rights of the parties without giving any further relief.
- Thus a declaratory decree declares the rights of the parties. In such a decree there is no sanction, which an ordinary judgment prescribes against the defendant.
- By declaring the rights of the parties it removes the existing doubts about the rights and secures enjoyment of the rights. It is an equitable remedy. It is a discretionary remedy and cannot be claimed as a matter of right.

3. **<u>Action for damages</u>**

If any injury is caused to an individual by wrongful or negligent acts of the Government servant, the aggrieved person can file suit for the recovery of damages from the Government concerned.

Principles of Natural Justice

- Natural justice is a concept of Common Law and represents procedural principles developed by judges. Though it enjoys no express constitutional status, it is one of the most important concepts that ensure that people retain their faith in the system of adjudication.
- Principles of natural justice are not precise rules of unchanging content; their scope varies according to the context. Nevertheless it provides the foundation on which the whole super-structure of judicial control of administrative action is based
- In the course of time many sub-rules were added.

1. **Rule against bias (nemojudex in causa sua)**:
   - According to this rule no person should be made a judge in his own cause.
   - Bias means an operative prejudice whether conscious or unconscious in relation to a party or issue. It is a presumption that a person cannot take an objective decision in a case in which he has an interest.
   - The rule against bias has two main aspects- one, that the judge must not have any direct personal stake in the matter at hand and two, there must not be any real likelihood of bias.
   - Bias can be of the following **three types**:
     a) **Pecuniary bias**: The judicial approach is unanimous on the point that any financial interest of the adjudicatory authority in the matter, howsoever small, would vitiate the adjudication. Thus a pecuniary interest, howsoever insufficient, will disqualify a person from acting as a Judge.
     b) **Personal bias**: There are number of situations which may create a personal bias in the Judge's mind against one party in dispute before him. He may be friend of the party, or related to him through family, professional or business ties. The judge might also be hostile to one of the parties to a case. All these situations create bias either in favour of or against the party and will operate as a disqualification for a person to act as a Judge.

The leading case on the matter of personal bias is *Mineral Development Ltd. V. State of Bihar, AIR 1960 SC 468*. In this case, the petitioner company was owned by Raja Kamakhya Narain Singh, who was a lessee for 99 years of 3026 villages, situated in Bihar, for purposes of exploiting mica from them. The Minister of Revenue acting under Bihar Mica Act cancelled his license. The owner of the company Raja Kamakhya Narain Singh, had opposed the minister in general election of 1952 and the minister had filed a criminal case under section 500, Indian Penal Code, against him. The act of cancellation by the Minister was held to be a quasi- judicial act. Since the personal rivalry between the owner of the petitioner's company and the minister concerned was established, the cancellation order became vitiated in law.

c) **Subject matter bias**: A judge may have a bias in the subject matter, which means that he himself is a party, or has some direct connection with the litigation. To disqualify on the ground of bias there must be intimate and direct connection between adjudicator and the issues in dispute. To vitiate the decision on the ground of bias as for the subject matter there must be real likelihood of bias. Such bias can be classified into **four categories**.

- Partiality or connection to the issue
- Departmental bias
- Prior utterances and pre-judgment of issues
- Acting under dictation

2. **Rule of fair hearing (audi alteram partem):**

- The second principle of natural justice is audi alteram partem (hear the other side) i.e. no one should be condemned unheard. It requires that both sides should be heard before passing the order.
- This rule implies that a person against whom an order to his prejudice is passed should be given information as to the charges against him and should be given opportunity to submit his explanation thereto.
- Following are the **ingredients** of the rule of fair hearing:

a) **Right to notice**:

- Hearing starts with the notice by the authority concerned to the affected person. Unless a person knows the case against him, he cannot defend himself. Therefore, before the proceedings start, the authority concerned is required to give to the affected person the notice of the case against him.
- The proceedings started without giving notice to the affected party, would violate the principles of natural justice.
- The notice is required to be served on the concerned person properly.
- However, the omission to serve notice would not be fatal if the notice has not been served on the concerned person on account of his own fault. The notice must give sufficient time to the person concerned to prepare his case.
- The notice must be adequate and reasonable.
- The notice is required to be clear and unambiguous. If it is ambiguous or vague, it will not be treated as reasonable or proper notice.
- If the notice does not specify the action proposed to be taken, it is taken as vague and therefore, not proper.

b) **Right to present case and evidence**: The party against whom proceedings have been initiated must be given full opportunity to present his or her case and the evidence in support of it. The reply is usually in the written form and the party is also given an opportunity to present the case orally though it is not mandatory.

c) **Right to rebut adverse evidence**: For the hearing to be fair the adjudicating authority is not only required to disclose to the person concerned the evidence or material to be taken against him but also to provide an opportunity to rebut the evidence or material.

1. **Cross-examination**:
   Examination of a witness by the adverse party is called cross-examination. The main aim of cross-examination is the detection of falsehood in the testimony of the witness.
   The rules of natural justice say that evidence may not be read against a party unless the same has been subjected to cross-examination or at least an opportunity has been given for cross examination.
2. **Legal Representation**:

- Ordinarily the representation through a lawyer in the administrative adjudication is not considered as an indispensable part of the fair hearing. However, in certain situations denial of the right to legal representation amounts to violation of natural justice.
- Thus where the case involves a question of law or matter which is complicated and technical or where the person is illiterate or expert evidence is on record or the prosecution is conducted by legally trained persons, the denial of legal representation will amount to violation of natural justice because in such conditions the party may not be able to meet the case effectively and therefore he must be given the opportunity to engage professional assistance to make his right to be heard meaningful.

d) **Disclosure of evidence**: A party must be given full opportunity to explain every material that is sought to be relied upon against him. Unless all the material (e.g. reports, statements, documents, evidence) on which the proceeding is based is disclosed to the party, he cannot defend himself properly.

e) **Speaking orders**:

- When the adjudicatory bodies give reasons in support of their decisions, the decisions are treated as reasoned decision. It is also called speaking order.
- Reasoned decision introduces a check on the administrative powers because the decisions need to be based on cogent reasons. It excludes or at least minimizes arbitrariness. It has been asserted that a part of the principle of natural justice is that a party is entitled to know the reason for the decision apart from the decision itself.
- Reason based judgments and orders allow the party affected by it to go into the merits of the decision and if not satisfied, exercise his right to appeal against the judgment/ order. In the absence of reasons, he might not be able to effectively challenge the order.

- In *Sunil Batra v. Delhi administration AIR 1980 SC 1579*, the Supreme Court while interpreting section 56 of the Prisons Act, 1894, observed that there is an implied duty on the jail superintendent to give reasons for putting bar fetters on a prisoner to avoid invalidity of that provision under Article 21 of the constitution. Thus the Supreme Court laid the foundation of a sound administrative process requiring the adjudicatory authorities to substantiate their order with reasons.

Exceptions to Natural Justice

1. **Statutory Exclusion**:
   - The principle of natural justice may be excluded by the statutory provision.
   - Where the statute is silent as to the observance of the principle of natural justice, such silence is taken to imply the observance thereto.
   - However, the principles of natural justice are not incapable of exclusion. The statute may exclude them.
   - When the statute expressly or by necessary implication excludes the application of the principles of natural justice the courts do not ignore the statutory mandate.
   - But one thing may be noted that in India, Parliament is not supreme and therefore statutory exclusion is not final. T
   - he statute must stand the test of constitutional provision.
   - Even if there is no provision under the statute for observance of the principle of natural justice, courts may read the requirement of natural justice for sustaining the law as constitutional.
2. **Emergency**:
   - In exceptional cases of urgency or emergency where prompt and preventive action is required the principles of natural justice need not be observed.
   - Thus, the pre-decisional hearing may be excluded where the prompt action is required to be taken in the interest of the public safety or public morality and any delay in administrative order because of pre-decisional hearing before the action may cause injury to the public interest and public safety.
   - However, the determination of the situation requiring the exclusion of the rules of natural justice by the administrative authorities is not final and the court may review such determination.
   - In *Maneka Gandhi v. Union of India (AIR 1978 SC 597)* the Supreme Court observed that a passport may be impounded in public interest without compliance with the principles of natural justice but as soon as the order impounding the passport has been made, an opportunity of post decisional hearing, remedial in aim, should be given to the person concerned. In the case, it has also been held that "public interest" is a justiciable issue and the determination of administrative authority on it is not final.
3. **Interim disciplinary action**:

- The rules of natural justice are not attracted in the case of interim disciplinary action.
- For example, the order of suspension of an employee pending an inquiry against him is not final but interim order and the application of the rules of natural justice is not attracted in the case of such order.
- In *Abhay Kumar v. K. Srinivasan AIR 1981 Delhi 381* an order was passed by the college authority debarring the student from entering the premises of the college and attending the class till the pendency of a criminal case against him for stabbing a student. The Court held that the order was interim and not final. It was preventive in nature. It was passed with the object to maintain peace in the campus. The rules of natural justice were not applicable in such case.

4. **Academic evaluation**:
   Where a student is removed from an educational institution on the grounds of unsatisfactory academic performance, the requirement of pre-decisional hearing is excluded. The Supreme Court has made it clear that if the competent academic authority assess the work of a student over the period of time and thereafter declare his work unsatisfactory the rule of natural justice may be excluded but this exclusion does not apply in the case of disciplinary matters.
5. **Impracticability**:
   - Where the authority deals with a large number of person it is not practicable to give all of them opportunity of being heard and therefore in such condition the court does not insist on the observance of the rules of natural justice.
   - In *P. Radhakrishna v. Osmania University, AIR 1974 AP 283*, the entire M.B.A. entrance examination was cancelled on the ground of mass copying. The court held that it was not possible to give all the examinees the opportunity of being heard before the cancellation of the examination.

Effect of Failure of Natural Justice

- Generally speaking, a voidable order means that the order was legally valid at its inception, and it remains valid until it is set aside or quashed by the courts, that is, it has legal effect up to the time it is quashed.
- On the other hand, a void order is no order at all from its inception; it is a nullity and void ab initio.
- In most cases a person affected by such an order cannot be sure whether the order is really valid or not until the court decided the matter. Therefore, the affected person cannot just ignore the order treating it as a nullity. He has to go to a Court for an authoritative determination as to the nature of the order is void.
- The most significant case in the series is *Nawabkhan v. Gujarat*. Section 56 of the Bombay Police Act, 1951 empowers the Police Commissioner to extern any undesirable person on certain grounds set out therein. An order passed by the Commissioner on the petitioner was disobeyed by him and he was prosecuted for this in a criminal court. During the pendency of his case, on a writ petition filed by

the petitioner, the High Court quashed the internment order on the ground of failure of natural justice. The trial court then acquitted the appellant. The government appealed against the acquittal and the High Court convicted him for disobeying the order. The High Court took the position that the order in question was not void ab initio; the appellant had disobeyed the order much earlier than date it was infringed by him; the High Court's own decision invalidating the order in question was not retroactive and did not render it a nullity from its inception but it was invalidate only from the date the court declared it to be so by its judgment. However, the matter came in appeal before the Supreme Court, which approached the matter from a different angle. The order of internment affected a Fundamental Right (Article 19) of the appellant in a manner which was not reasonable. The order was thus illegal and unconstitutional and hence void. The court ruled definitively that an order infringing a constitutionally guaranteed right made without hearing the party affected, where hearing was required, would be void ab initio and ineffectual to bind the parties from the very beginning and a person cannot be convicted for non observance of such an order. The Supreme Court held that where hearing is obligated by statute which affects the fundamental right of a citizen, the duty to give the hearing sound in constitutional requirement and failure to comply with such a duty is fatal.

Liability of State or Government in Contract

According to its provisions a contract with the Government of the Union or state will be valid and binding only if the following conditions are followed:

1. The contract with the Government must be made in the name of the President or the Governor, as the case may be.
2. The contract must be executed on behalf of the President or the Governor of the State as the case may be. The word executed indicates that a contract with the Government will be valid only when it is in writing.
3. A person duly authorized by the President or the Governor of the State, as the case may be, must execute the contract.

Article 299 (2) of the Constitution makes it clear that neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of the Constitution or for the purposes of any enactment relating to the Government of India. Subject to the provisions of Article 299 (1), the other provisions of the general law of contract apply even to the Government contract.

The Supreme Court has made it clear that the provisions of **Article 299 (1) are mandatory** and therefore the contract made in contravention thereof is void and therefore cannot be ratified and cannot be enforced even by invoking the doctrine of estoppel.

According to **section 65** of the Indian Contract Act, 1872, when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it. Therefore if the agreement with the Government is void as the requirement of Article 299(1) have not been complied, the party receiving the advantage under such agreement is bound to restore it or to make compensation for it to the person from whom he has received it.

Effect of a valid contract with Government

As soon as a contract is executed with the Government in accordance with Article 299, the whole law of contract as contained in the Indian Contract Act, 1872 comes into operation. In India the remedy for the breach of a contract with Government is simply a suit for damages.

Earlier the writ of mandamus could not be issued for the enforcement of contractual obligations but the Supreme Court in its pronouncement in *Gujarat State Financial Corporation v. Lotus Hotels, 1983 3 SCC 379*, has taken a new stand and held that the writ of mandamus can be issued against the Government or its instrumentality for the enforcement of contractual obligations. The Court ruled that it cannot be contended that the Government can commit breach of a solemn undertaking on which other side has acted and then contend that the party suffering by the breach of contract may sue for damages and cannot compel specific performance of the contract through mandamus.

Quasi-Contractual Liability

- According to **section 70** of the Indian Contracts Act, 1872, where a person lawfully does anything for another person or delivers anything to him such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered.
- If the requirements of section 70 of the Indian Contract Act are fulfilled, even the Government will be liable to pay compensation for the work actually done or services rendered by the State.
- Section 70 is not based on any subsisting contract between the parties but is based on quasi-contract or restitution.
- Section 70 enables a person who actually supplies goods or renders some services not intending to do gratuitously, to claim compensation from the person who enjoys the benefit of the supply made or services rendered. It is a liability, which arise on equitable grounds even though express agreement or contract may not be proved.

Suit against State in Torts

- A tort is a civil wrong arising out of breach of a civil duty or breach of non-contractual obligation and the only remedy for which is damages.
- The essential requirement for the tort is beach of duty towards people in general.
- Although tort is a civil wrong, yet it would be wrong to think that all civil wrongs are torts.
- A civil wrong which arises out of the breach of contact cannot be put in the category of tort as it is different from a civil wrong arising out of the breach of duty towards public in general.
- When the responsibility of the act of one person falls on another person, it is called vicarious liability. For example, when the servant of a person harms another person through his act, we held the servant as well as his master liable for the act done by the servant.
- Similarly, sometimes the state is held vicariously liable for the torts committed by its servants in the exercise of their duty. The State would of course not be liable if the acts done were necessary for protection life or property. Acts such as judicial or quasi-judicial decisions done in good faith would not invite any liability.
- There are specific statutory provisions which protect the administrative authorities from liability. Such protection, however, would not extend to malicious acts. The burden of proving that an act was malicious would lie on the person who assails the administrative action.
- The principles of law of torts would apply in the determination of what is a tort and all the defenses available to the respondent in a suit for tort would be available to the public servant also.
- In India Article 300 of the Constitution declares that the Government of India or of a State may be sued for the tortious acts of its servants in the same manner as the Dominion of India and the corresponding provinces could have sued or have been sued before the commencement of the Constitution. This rule is, however, subject to any such law made by the Parliament or the State Legislature.

  The first important case involving the tortious liability of the Secretary of State for India-in-Council was raised in *P. and O. Steam Navigation v. Secretary of State for India* (5 Bom HCR App 1). The question referred to the Supreme Court was whether the Secretary of State for India is liable for the damages caused by the negligence of the servants in the service of the Government. The Supreme Court answered the question in the affirmative. The Court pointed out the principle of law that the Secretary of State for India in Council is liable for the damages occasioned by the negligence of Government servants, if the negligence is such as would render an ordinary employer liable. According to the principle laid down in this case the Secretary of State can be liable only for acts of non sovereign nature, liability will not accrue for sovereign acts. The Court admitted the distinction between the sovereign and non sovereign functions of the government and said that here was a great and clear distinction between acts done in exercise of what are termed sovereign

powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them

Then came the important case of *Kasturi Lal v. State of U. P., AIR 1965 SC 1039*, where the Government was not held liable for the tort committed by its servant because the tort was said to have been committed by him in the course of the discharge of statutory duties. The statutory functions imposed on the employee were referable to and ultimately based on the delegation of sovereign powers of the State. The Court held that the 140 EP-JI&GL Government was not liable as the activity involved was a sovereign activity. The Court affirmed the distinction between sovereign and non-sovereign function drawn in the P. and O. Steam Navigation's case.

Damages

- It may happen that a public servant may be negligent in exercise of his duty. It may, however, be difficult to recover compensation from him. From the point of view of the aggrieved person, compensation is more important than punishment. Therefore, like all other employers the State must be made vicariously liable for the wrongful acts of its servants.
- The Courts in India are now becoming conscious about increasing cases of excesses and negligence on the part of the administration resulting in the negation of personal liberty.
- Hence, they are coming forward with the pronouncements holding the Government liable for damages even in those cases where the plea of sovereign function could have negative the governmental liability.

One such pronouncement came in the case of *Rudal Shah v. State of Bihar, AIR 1983 SC 1036*. Here the petitioner was detained illegally in the prison for over fourteen years after his acquittal in a full dressed trail. The court awarded Rs. 30,000 as damages to the petitioner.

Another landmark case namely, *C. Ramkonda Reddy v. State, AIR 1989 AP 235*, has been decided by the Andhra Pradesh, in which State plea of sovereign function was turned down and damages were awarded despite its being a case of exercise of sovereign function.

Liability of the Public Servant

- Liability of the State must be distinguished from the liability of individual officers of the State. So far as the liability of individual officers is concerned, if they have acted outside the scope of their powers or have acted illegally, they are liable to same extent as any other private citizen would be. The ordinary law of contact or torts or criminal law governs that liability.

- An officer acting in discharge of his duty without bias or malafides could not be held personally liable for the loss caused to other person. However, such acts have to be done in pursuance of his official duty and they must not be ultra vires his powers. Where a public servant is required to be protected for acts done in the course of his duty, special statutory provisions are made for protecting them from liability.

Liability of Public Corporation

The term 'Statutory Corporation' (or Public Corporation) refers to such organisations which are incorporated under the special Acts of the Parliament/State Legislative Assemblies.

Its management pattern, its powers and functions, the area of activity, rules and regulations for its employees and its relationship with government departments, etc. are specified in the concerned Act.

It may be noted that more than one corporation can also be established under the same Act.

The **main features** of Statutory Corporations are as follows:

- The principal benefits of the Public Corporation as an organizational device are its freedom from government regulations and controls and its high degree of operating and financial flexibility.
- In this form, there is a balance between the autonomy and flexibility enjoyed by private enterprise and the responsibility to the public as represented by elected members and legislators.
- The public corporation (statutory corporation) is a body having an entity separate and independent from the Government. It is not a department or organ of the Government.
- Consequently, its employees are not regarded as Government servants and therefore they are not entitled to the protection of Article 311 of the Constitution.
- It is to be also noted that a public corporation is included within the meaning of 'State' under Article12 and therefore the Fundamental Rights can be enforced against it.
- Public corporation are included with the meaning of 'other authorities' and therefore it is subject to the writ jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution.
- For the validity of the corporation contract, the requirements of a valid contract laid down in Article 299 are not required to be complied with.
- On principles of vicarious liability, corporation is liable to pay damages for wrong done by their officers or servants.
- They are liable even for tort requiring a mental element as an ingredient, e.g. malicious prosecution.

LAW OF TORTS

Introduction

- The word tort is derived from Latin language from the word ***Tortum***.
- "Tort" means a **civil wrong** which is not exclusively the breach of a contract or the breach of trust
- Thus, simply stated 'tort' means wrong. But **every wrong or wrongful act is not a tort**.
- **Section 2(m)** of the Limitation Act, 1963, states: "Tort means a civil wrong which is not exclusively a breach of contract or breach of trust."
- Two **important elements** can be derived from all the definitions, namely:
  (i) that a tort is a species of civil injury of wrong as opposed to a criminal wrong, and
  (ii) that every civil wrong is not a tort.

General Conditions of Liability for a Tort

In general, a tort consists of some act or omission done by the defendant (tortfeasor) whereby he has without just cause or excuse caused some harm to plaintiff.
To constitute a tort, there must be:

1. **Wrongful act:**
   - The act complained of, should under the circumstances, be **legally wrongful** as regards the party complaining.
   - In other words, it should prejudicially affect any of the above mentioned interests, and protected by law.
   - Thus, every person whose **legal rights** are **violated without legal excuse**, has **a right of action** against the person who violated them, whether loss results from such violation or not.

2. **Legal damages:**
   - There must be a damage which the law recognizes as such.
   - In other words, there should be legal injury or invasion of the legal right. In the absence of an infringement of a legal right, an action does not lie.
   - Also, where there is infringement of a legal right, an action lies even though no damage may have been caused.
   - Two maxims, namely: (i) *Damnum sine injuria*, and (ii) *injuria sine damnum*, explain this proposition.

   i. Damnum Sine Injuria
   - *Damnum* means harm, loss or damage in respect of money, comfort, health, etc.
   - *Injuria* means infringement of a right conferred by law on the plaintiff.
   - The maxim means that in a given case, a man may have suffered damage and yet have no action in tort, because the damage is not to an interest protected by the law of torts.
   - Therefore, causing damage, however substantial to another person is not actionable in law unless there is also a violation of a legal right of the plaintiff.

- Thus, if Mr. A owns a shop and Mr. B opens a shop in the neighbourhood, as a result of which Mr. A loses some customers and his profits fall off, he cannot sue Mr. B for the loss in profits, because Mr. B is exercising his legal right.

ii. Injuria Sine Damnum

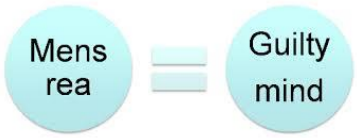
- It means injury without damage, i.e., where there is no damage resulted yet it is an injury or wrong in tort, i.e. where there is infringement of a legal right not resulting in harm but plaintiff can still sue in tort.
- Thus when there is an invasion of an "absolute" private right of an individual, there is an *injuria* and the plaintiff's action will succeed even if there is no *Damnum* or damages..
- *Injuria sine domno* covers such cases and action lies when the right is violated even though no damage has occurred.
- Thus the act of trespassing upon another's land is actionable even though it has not caused the plaintiff even the slightest harm.

Maxim	Meaning	Tort
Damnum Sine Injuria	Damage without Injury	Not a tort
Injuria Sine Damnum	Injury without Damage	Is a tort

3. Legal remedy:

- The third condition of liability for a tort is legal remedy. This means that to constitute a tort, the **wrongful act must come under the law**.
- The **main remedy** for a tort is an **action for unliquidated damages**, although some other remedies, e.g., injunction, may be obtained in addition to damages or specific restitution may be claimed in an action for the detention of a chattel.
- **Self-help** is a remedy of which the injured party can avail himself without going to a law court. It does not apply to all torts and perhaps the best example of these to which it does apply is trespass to land.

Mens Rea



*How far a **guilty mind** of persons is required for liability for tort?*

The General principle lies in the maxim "*actus non facit reum nisi mens sit rea*" i.e. the act itself creates no guilt in the absence of a guilty mind. It does not mean that for the law or Torts, the act must be done with an evil motive, but simply means that mind must concur in the Act, the **act must be done either with wrongful intention or negligence**.

Cases of **absolute or strict liability are exceptions** to this principle.

Kinds of Tortious Liability

A. Strict or Absolute Liability

In some torts, the defendant is liable even though the harm to the plaintiff occurred without intention or negligence on the defendant's part. In other words, the **defendant is held liable without fault.** These cases fall under the following categories:

i. **Liability for Inevitable Accident**

Such liability arises in cases where damage is done by the **escape of dangerous substances** brought or kept by anyone upon his land. Such cases are where a man is made by law an insurer of other against the result of his activities.

ii. **Liability for Inevitable Mistake**
Such cases are where a person interferes with the property or reputation of another.

iii. **Vicarious Liability for Wrongs committed by others**
Responsibility in such cases is imputed by law on grounds of social policy or expediency. These case involve liability of master for the acts of his servant.

Rule in Rylands v. Fletcher

The rule in *Rylands* v. *Flethcer* is that a man acts at his peril and is the insurer of the safety of his neighbour against accidental harm. Such duty is absolute because it is independent of negligence on the part of the defendant or his servants.
It was held in that case that: "If a person brings or accumulates on his land anything which, if it should escape may cause damage to his neighbours, he does so at his own peril. If it does not escape and cause damage he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent damage."

Later in the caser of ***Read* v. *Lyons*** [(1946) 2 All. E.R. 471 (H.L.)], it has been explained that two conditions are necessary in order to apply the rule in *Ryland* v. *Fletcher*, these are:

- ***Escape*** from a place of which the defendant has occupation or over which he has a control to a place which is outside his occupation or control or something likely to do mischief if it escapes; and
- ***Non-natural use of Land:*** The defendant is liable if he makes a non-natural use of land.

If either of these **conditions is absent**, the **rule of strict liability will not apply**

Exceptions to the Rule of Strict Liability

a) Damage due to Natural Use of the Land
- In *Ryland* v. *Fletcher* water collected in the reservoir in such large quantity, was held to be non-natural use of land. Keeping water for ordinary domestic purpose is 'natural use'.
- Things not essentially dangerous which is not unusual for a person to have on his own land, such as water pipe installations in buildings, the working of mines and minerals on land, the lighting of fire in a fire-place of a house, and necessary wiring for supplying electric light, fall under the category of "natural use" of land.

b) Consent of the plaintiff
Where the plaintiff has consented to the accumulation of the dangerous thing on the defendant's land, the liability under the rule in *Ryland* v. *Flethcher* does not arise. Such a consent is implied where the source of danger is for the 'common benefit' of both the plaintiff and the defendant.

c) Act of Third Party
- If the harm has been caused due to the act of a stranger, who is neither defendant's servant nor agent nor the defendant has any control over him, the defendant will not be liable.

- But if the act of the stranger, is or can be foreseen by the defendant and the damage can be prevented, the defendant must, by due care prevent the damage. Failure on his part to avoid such damage will make him liable.

d) Statutory Authority

- Sometimes, public bodies storing water, gas, electricity and the like are by statute, exempted from liability so long as they have taken reasonable care.
- Thus, in *Green* v. *Chelzea Water Works Co.* the defendant company had a statutory duty to maintain continuous supply of water. A main belonging to the company burst without any fault on its part as a consequence of which plaintiff's premises were flooded with water. It was held that the company was not liable as the company was engaged in performing a statutory duty.

e) Act of God

If an escape is caused, through natural causes and without human intervention circumstances which no human foresight can provide against and of which human prudence is not bound to recognize the possibility, there is then said to exist the defence of Act of God.

f) Escape due to plaintiff's own Default

Damage by escape due to the plaintiff's own default was considered to be good defence in *Rylands* v. *Fletcher* itself. Also, if the plaintiff suffers damage by his own intrusion into the defendant's property, he cannot complain for the damage so caused.

Applicability of the rule in Rylands v. Fletcher in cases of enterprises engaged in a hazardous or inherently dangerous industry.

The Supreme Court has discussed the applicability of the rule of *Reylands* v. *Fletcher* in the case of *M.C. Mehta* v. *Union of India and Others*. while determining the principles on which the liability of an enterprise engaged in a hazardous or inherently dangerous industry depended if an accident occurred in such industry.

It held that -

"An enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas, owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or
inherently dangerous activity in which it is engaged, must be conducted with the highest standards of safety; and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm; and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without negligence on its part."

Thus, while imposing absolute liability for manufacture of hazardous substances, the Supreme Court intended that the requirement of non-natural use or the aspect of escape of a dangerous substance, commonly regarded as essential for liability under *Rylands* v. *Fletcher*, need not be proved in India.

B. Vicarious Liability

Normally, the tortfeasor is liable for his tort. But in some cases a person may be held liable for the tort committed by another. This is know as vicarious liability in tort. The common examples of such a liability are:

a) Principal and Agent *[Specific authority]*

- When an agent commits a tort in the ordinary course of his duties as an agent, the principal is liable for the same.
- In *Lloyd* v. *Grace, Smith & Co.* (1912) A.C. 716, the managing clerk of a firm of solicitors, while acting in the ordinary course of business committed fraud, against a lady client by fraudulently inducing her to sign documents transferring her property to him. He had done so without the knowledge of his principal who was liable because the fraud was committed in the course of employment.

b) Partners

- For the tort committed by a partner in the ordinary course of the business of the firm, all the other partners are liable therefore to the same extent as the guilty partner. The liability of the partners is joint and several.
- In *Hamlyn* v. *Houston & Co.*, one of the two partners bribed the plaintiff's clerk and induced him to divulge secrets relating to his employer's business. It was held that both the partners were liable for the tort committed by only one of them.

c) Master and Servant *[Authority by relation]*

- A master is liable for the tort committed by his servant while acting in the course of his employment. The servant, of course, is also liable; their liability is joint and several.
- A master is liable not only for the acts which have been committed by the servant, but also for acts done by him which are not specifically authorized, in the course of his employment.
- The basis of the rule has been variously stated: on the maxim ***Respondeat Superior*** (Let the principal be liable) or on the maxim ***Qui facit per alium facit per se*** (he who does an act through another is deemed to do it himself).
- The master is liable even though the servant acted against the express instructions, for the benefit of his master, so long as the servant acted in the course of employment.

d) Employer and Independent Contractor

- It is to be remembered that an employer is vicariously liable for the torts of his servants committed in the course of their employment, but he is not liable for the torts of those who are his independent contractors.
- An *independent contractor* is one who works for another but who is not controlled by that other in his conduct in the performance of that work.
- A person is a servant where the employer "retains the control of the actual performance" of the work.

e) Where Employer is Liable for the acts of Independent Contractor

The employer is not liable merely because an independent contractor commits a tort in the course of his employment; the employer is liable only if he himself is deemed to have committed a tort. This may happen in one of the following three ways:

- When employer authorizes him to commit a tort.
- In torts of strict liability
- Negligence of independent contractor

f) Where Employer is not Liable for the acts of an Independent Contractor

- An employer is not liable for the tort of an independent contractor if he has taken care in the appointment of the contractor.
- Employers of independent contractors are liable for the "**collateral negligence**" of their contractors in the course of his employment.
- **For example** - Where A employed B to fit casement windows into certain premises. B's servant negligently put a tool on the still of the window on which he was working at the time. The wind blew the casement open and the tool was knocked off the still on to a passer by. The employer was held to be liable, because the harm was caused by the work on a highway and duty lies upon the employer to avoid harm.

g) Liability for the acts of Servants

- An employer is liable whenever his servant commits a tort *in the course of his employment.* An act is deemed to be done in the course of employment if it is either:
  - a wrongful act authorized by the employer, or
  - a wrongful and unauthorized mode of doing some act authorized by the employer.
- In *Century Insurance Co. Ltd.* v. *Northern Ireland Road Transport Board* (1942) A.C. 509, the director of a petrol lorry, while transferring petrol from the lorry to an underground tank at a garage, struck a match in order to light a cigarette and then threw it, still alight on the floor. An explosion and a fire ensued. The House of Lords held his employers liable for the damage caused, for he did the act in the course of carrying out his task of delivering petrol; it was an unauthorized way of doing what he was employed to do.

C. Vicarious Liability of the State

1. The Position in England

At Common Law the Crown could not be sued in tort, either for wrongs actually authorized by it or committed by its servants, in the course of their employment. With the passing of the Crown Proceeding Act, 1947, the Crown is liable for the torts committed by its servants just like a private individual. Thus, in England, the Crown is now vicariously liable for the torts of its servants.

2. The Position in India

We have no statutory provision with respect to the liability of the State in India. When a case of Government liability in tort comes before the courts, the question is whether the particular Government activity, which gave rise to the tort, was the sovereign function or non-sovereign function. It is a sovereign function it could claim immunity from the tortuous liability, otherwise not. Generally, the activities of commercial nature or those which can be carried out by the private individual are termed as non-sovereign functions

Torts or wrongs to personal safety and freedom

An action for damages lies in the following kinds of wrongs which are styled as injuries to the person of an individual:

a) Battery

- Any **direct application of force** to the person of another individual **without his consent** or lawful justification is a wrong of battery.
- To constitute a tort of battery, therefore, two things are necessary:
  - use of force, however, trivial it may be without the plaintiff's consent, and
  - without any lawful justification.
- Even though the force used is very trivial and does not cause any harm, the wrong is committed. Thus, even to touch a person in anger or without any lawful justification is battery.

b) Assault

- Assault is any act of the defendant which directly causes the plaintiff immediately to apprehend a contact with his person.
- Thus, when the defendant by his act creates an apprehension in the mind of the plaintiff that he is going to commit battery against him, the tort of assault is committed.
- The law of assault is substantially the same as that of battery except that apprehension of contact, not the contact itself has to be established.

c) Bodily Harm

A willful act (or statement) of defendant, calculated to cause physical harm to the plaintiff and in fact causing physical harm to him, is a tort.

d) False Imprisonment

- False imprisonment consists in the imposition of a total restraint for some period, however short, upon the liberty of another, without sufficient lawful justification. It means unauthorized restraint on a person's body.
- What happens in false imprisonment is that a person is confined within certain limits so that he cannot move about and so his personal liberty is infringed. It is a serious violation of a person's right and liberty whether being confined within the four walls or by being prevented from leaving place where he is.
- If a man is restrained, by a threat of force from leaving his own house or an open field there is false imprisonment.

e) Malicious Prosecution

- Malicious prosecution consists in instigating judicial proceedings (usually criminal) against another, maliciously and without reasonable and probable cause, which terminate in favour of that other and which results in damage to his reputation, personal freedom or property.
- The following are the essential elements of this tort:
  i. There must have been a *prosecution* of the plaintiff by the defendant.
  ii. There must have been *want of reasonable and probable cause* for that prosecution.
  iii. The defendant must have *acted maliciously* (i.e. with an improper motive and not to further the end of justice).
  iv. The plaintiff must have suffered *damages* as a result of the prosecution.
  v. The prosecution must have terminated *in favour of the plaintiff.*

- To be actionable, the proceedings must have been instigated actually by the defendant. If he merely states the fact as he believes them to a policeman or a magistrate he is not responsible for any proceedings which might ensue as a result of action by such policeman or magistrate on his own initiative.

f) Nervous Shock

This branch of law is comparatively of recent origin. It provides relief when a person may get physical injury not by an impact, e.g., by stick, bullet or sword but merely by the nervous shock through what he has seen or heard. Causing of nervous shock itself is not enough to make it an actionable tort, some injury or illness must take place as a result of the emotional disturbance, fear or sorrow.

g) Defamation

- Defamation is an attack on the reputation of a person. It means that something is said or done by a person which affects the reputation of another.
- Defamation may be classified into two heads: Libel and Slander.
  - ***Libel*** is a representation made in some permanent form, e.g. written words, pictures, caricatures, cinema films, effigy, statue and recorded words. In a cinema films both the photographic part of it and the speech which is synchronized with it amount to tort.
  - ***Slander*** is the publication of a defamatory statement in a transient form; statement of temporary nature such as spoken words, or gestures.
- Generally, the punishment for libel is more severe than for slander.
- Defamation is tort as well as a crime in India.
- In India both libel and slander are treated as a crime.

REMEDIES IN TORTS

1. Judicial Remedies

Three types of judicial remedies are available to the plaintiff in an action for tort namely:

a) Damages,
b) Injunction, and
c) Specific Restitution of Property.

2. Extra Judicial Remedies

In certain cases, it is lawful to redress one's injuries by means of self help without recourse to the court. These remedies are:

a) Self Defence

It is lawful for any person to use reasonable forces to protect himself, or any other person against any unlawful use of force.

b) Prevention of Trespass

An occupier of land or any person with his authority may use reasonable force to prevent trespassers entering or to eject them but the force should be reasonable for the purpose.

c) Re-entry on Land

A person wrongfully disposed of land may retake possession of land if he can do so in a peaceful and reasonable manner.

d) Re-caption of Goods

It is neither a crime nor a tort for a person entitled to possession of a chattel to take it either peacefully or by the use of a reasonable force from one who has wrongly taken it or wrongfully detained it.

e) Abatement of Nuisance

The occupier of land may lawfully abate (i.e. terminate by his own act), any nuisance injuriously affecting it.

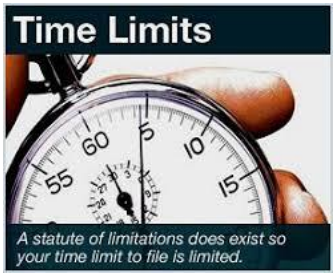
Thus, he may cut overhanging branches as spreading roots from his neighbour's trees, but (i) upon giving notice; (ii) by choosing the least mischievous method; (iii) avoiding unnecessary damage.

f) Distress Damage Feasant

An occupier may lawfully seize any cattle or any chattel which are unlawfully on his land doing damage there and detain them until compensation is paid for the damage. The right is known as that of distress damage feasant-to distrain things which are doing damage.

Limitation Act 1963

Introduction



The law relating to limitation is incorporated in the Limitation Act of 1963, which prescribes different periods of limitation for suits, petitions or applications. The Act applies to all civil proceedings and some special criminal proceedings which can be taken in a Court of law unless its application is excluded by any enactment. The Act extends to whole of India except the State of Jammu and Kashmir.

The Limitation Act derives its roots from 2 maxis:

1. Interest Republicae ut sit fines litum: It is in interest of the state to prescribe limitation period for filing suit.
2. Vigilantibus nor Dormantibus jura Subvenient: Law Protects those who are vigilant and not sleepy

Limitation Bars Remedy, But Does Not Extinguish Rights

The Law of limitation bars the remedy in a Court of law only when the period of limitation has expired, but it does not extinguish the right that it cannot be enforced by judicial process (*Bombay Dying & Mfg. Co. Ltd.* v. *State of Bombay*). Thus if a claim is satisfied outside the Court of law after the expiry of period of limitation, that is not illegal as the right to cause of action always remains.

Bar of Limitation

- Section 3 of the Act provides that any suit, appeal or application if made beyond the prescribed period of limitation, **it is the duty of the Court** not to proceed with such suits irrespective of the fact whether the plea of limitation has been set up in defence or not.
- The Court can **suo moto** take note of question of limitation. The question whether a suit is barred by limitation should be decided on the facts as they stood on the date of presentation of the plaint.

Note: if the period of limitation ends on a day when the court is closed, it will extend up to the day when court re opens.

Extension of Time in Certain Cases

1. **Doctrine of Sufficient causes**
   - ✓ **Section 5** allows the extension of prescribed period in certain cases on sufficient cause being shown for the delay.
   - ✓ Any appeal or any application, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period
   - ✓ The Section is **not applicable to suits**.
   - ✓ The Court has no power to admit a time barred suit even if there is a sufficient cause for the delay. It applies only to appeals or applications as specified therein.

- ✓ The reason for non-applicability of the Section to suits is that, the period of limitation allowed in most of the suits extends from 3 to 12 years whereas in appeals and application it does not exceed 6 months.

What is sufficient cause and what is not may be explained by the following Judicial observations

1. Wrong practice of High Court which misled the appellant or his counsel in not filing the appeal should be regarded as sufficient cause;
2. In certain cases, mistake of counsel may be taken into consideration in condonation of delay. But such mistake must be *bona fide;*
3. Wrong advice given by advocate can give rise to sufficient cause in certain cases;
4. Mistake of law in establishing or exercising the right given by law may be considered as sufficient cause.
5. However, ignorance of law is not excuse, nor the negligence of the party or the legal adviser constitutes a sufficient cause;
2. Imprisonment of the party or serious illness of the party may be considered for condonation of delay;
6. Time taken for obtaining certified copies of the decree of the judgment necessary to accompany the appeal or application was considered for condoning the delay.
7. Non-availability of the file of the case to the State counsel or Panel lawyer is no ground for condonation of inordinate delay
8. Ailment of father during which period the defendant was looking after him has been held to be a sufficient and genuine cause (*Mahendra Yadav* v. *Ratna Devi & others*)

Important: The test of "sufficient course" is purely an individualistic test. It is not an objective test. Therefore, no two cases can be treated alike. The statute of limitation has left the concept of sufficient cause' delightfully undefined thereby leaving to the court a well-intended discretion to decide the individual cases whether circumstances exist establishing sufficient cause. There are no categories of sufficient cause. The categories of sufficient cause are never exhausted. Each case spells out a unique experience to be dealt with by the Court as such. [R B Ramlingam v. R B Bhvansewari]

Note: The quasi-judicial tribunals, labour courts or executive authorities have no power to extend the period under this Section.

Persons under Legal Disability (Sec 6,7,8)

Section 6

- ➢ It applies to person who is entitled to institute suit, file appeal and make application is a **minor, insane or idiot**.
- ➢ This section applies only if disability exists at time when limitation period starts. (Any subsequent disability will not attract this section).
- ➢ If a person is disabled at time when limitation period starts, then the limitation period starts only after the disability ceases.
- ➢ If the person suffers from more than one disability, then the limitation period will start only after all disability ceases.
- ➢ If before one disability ceases, the person contacted with another disability, the period of limitation will start only after such disability ceases.
- ➢ If the person dies before the disability ceases, then fresh period of limitation will be granted to the legal representative.

Example: if Master Lilliput is a minor, the period of limitation will start only after he attains majority. If just before attaining majority he becomes insane then the period of limitation will start only after he attains majority and becomes sane.

Section 7

Where **one of several persons jointly entitled** to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has cased

Section 8

Nothing in section 6 or in section 7 applies to suits to enforce rights of pre-emotion, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby the period of limitation for any suit or application.

Continuous Running of Time

According to **Section 9** of the Act where once time has begun to run, no subsequent disability or inability to institute a suit or make an application can stop it provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover debt shall be suspended while the administration continues.
Thus, when any of the statutes of limitation is begun to run, no subsequent disability or inability will stop this running. The applicability of this Section is limited to suits and applications only and does not apply to appeals unless the case fell within any of the exceptions provided in the Act itself.

Computation of Period Of Limitation

Exclusion of certain days or exclusion of time in legal proceedings-While computing Period of Limitation certain day/days are to be excluded.

In case of suit	The day on which period begins to run
In case of appeal	The day on which period begins to run. The day of pronouncement of judgement. Day of obtaining copy of decree, order sentence or judgement
In case of Application for Revision or Review	The day of pronouncement of Judgement. Day of obtaining copy of decree, order, sentence or judgement.
In case of application to set aside an Award	The day on which period begins to run. Day of obtaining copy of award.
In case of any other Application	The day on which period begins to run

Miscellaneous

Death of Party

If a person dies before the right to sue arises then the limitation period will commence only when the legal representative will come into existence.

Effect of acknowledgement in writing

The section applies if one party against whom certain rights are claimed acknowledge the liability in writing before the expiry of limitation period, then a fresh period or limitation will commence from the date of acknowledgement. However the acknowledgement shall be a valid one.

Essentials of Valid acknowledgement

1. The acknowledgement is made by the party against whom certain rights are claimed.
2. The acknowledgement relates to acceptance of liability.
3. The acknowledgement is made in writing.
4. The acknowledgement is made before expiry of the limitation period.

Effect of Payment on Account of Debt or of Interest on Legacy

As per **Section 19** of the Act where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made.

Acquisition of Ownership By Possession

Section 25 applies to acquisition of easements. It provides that the right to access and use of light or air, way, watercourse, use of water, or any other easement which have been peaceably enjoyed without interruption and for 20 years (30 years if property belongs to Government) shall be absolute and indefeasible. Such period of 20 years shall be a period ending within 2 years next before the institution of the suit.

Classification of Period Of Limitation

Depending upon the duration, period of limitation for different purposes may be classified as follows:

a. **Period of 30 years**: The maximum period of limitation prescribed by the Limitation Act is 30 years and it is provided only for three kinds of suits:
   1. Suits by mortgagors for the redemption or recovery of possession of immovable property mortgaged;
   2. Suits by mortgagee for foreclosure;
   3. Suits by or on behalf of the Central Government or any State Government including the State of Jammu and Kashmir.

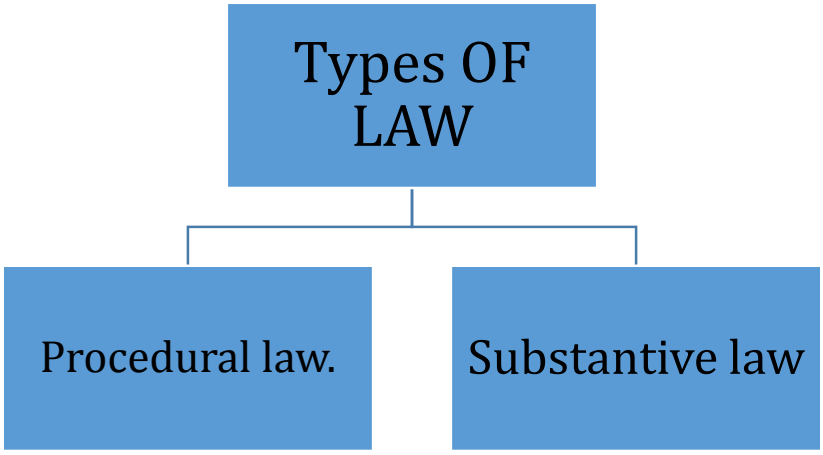
b. **Period of 12 years**: A period of 12 years is prescribed as a limitation period for various kinds of suits relating to immovable property, trusts and endowments.

c. **Period of 3 years**: A period of three years has been prescribed for suits relating to accounts, contracts, declaratory suits, suits relating to decrees and instruments and suits relating to movable property.

d. **Period varying between 1 to 3 years**: The period from 1 to 3 years has been prescribed for suits relating to torts and other miscellaneous matters and suits for which no period of limitation is provided in the schedule to the Act.
e. **Period in days varying between 90 to 10 days**: The minimum period of limitation of 10 days is prescribed for application for leave to appear and defend a suit under summary procedure from the date of service of the summons.
f. For appeals against a sentence of death passed by a court of session or a High Court in the exercise of its original jurisdiction the limitation period is 30 days.
g. For appeal against any sentence other than a sentence of death or any other not being an order of acquittal, the period of 60 days for the appeal to High Court and 30 days for appeal to any other Court is prescribed.

CODE OF CIVIL PROCEDURE 1908

Laws can be divided into 2 groups: (i) substantive law; and (ii) procedural law.



Substantive law determines rights and liabilities of parties and procedural or adjective law prescribes practice, procedure and machinery for the enforcement of those rights and liabilities. Procedural law is thus an adjunct or an accessory to substantive law.

The Civil Procedure Code consolidates and amends the law relating to the procedure of the Courts of Civil jurisdiction. The Code of Civil Procedure is an adjective law it neither creates nor takes away any right. It is intended to regulate the procedure to be followed by Civil Courts.

Scheme of the code

The Civil Procedure Code consists of two parts. 158 Sections form the first part and the rules and orders contained in Schedule I form the second part. The object of the Code generally is to create jurisdiction while the rules indicate the mode in which the jurisdiction should be exercised. Thus the two parts should be read together, and in case of any conflict between the body and the rules, the former must prevail.

INSTITUTION OF SUIT

Suit ordinarily is a civil action started by presenting a plaint in duplicate to the Court containing concise statement of the material facts, on which the party pleading relies for his claim or defence. In every plaint the facts must be proved by an affidavit.

The main essentials of the suit are –

(1) the opposing parties,
(2) the cause of action,
(3) the subject matter of the suit, and

(4) the relief(s) claimed.

The plaint consists of a heading and title, the body of plaint and the relief(s) claimed. Every suit shall be instituted in the Court of the lowest grade competent to try it, as to be determined with regard to the subject matter being either immovable or movable property or to the place of abode or of business or the defendant.

Where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Misjoinder of Parties – Where more than one persons joined in one suit as plaintiffs or defendants in whom or against whom any right to relief does not arise or against whom separate suits are brought, no common question of law or fact would arise, it is a case of 'misjoinder of parties'.

To avoid such misjoinder, two factors are essential

1. The right to relief must arise out of the same act or transaction brought by the plaintiffs or against the defendants, there is a common question of law or fact.
2. The Code does not require that all the questions of law or of fact should be common to all the parties. It is sufficient that if there is one common question.

IMPORTANT STAGES IN PROCEEDINGS OF A SUIT

- Filling of a plaint in the civil court by the plaintiff based on certain cause of action for claiming rights
- The civil court issues summon to the defendant.
- After receiving summon, the defendant has the opportunities to file reply in the court.
- The civil court starts cross-examination and review the evidence.
- The civil court decides the rights of the parties based on the evidence or written statement submitted by the plaintiff and defendant.
- The civil court passes decree and judgement.

Cause of action

Cause of action" means every fact that it would be necessary for the plaintiff to prove in order to support his right to the judgement of the Court. Under Order 2, Rule 2, of the Civil Procedure Code it means all the essential facts constituting the rights and its infringement.

A cause of Action is based on 2 factors

i. A Right
ii. An infringement for which relief is claimed.

Decree (Sec 2(2))

i. the formal expression of an adjudication which, so far as regards the Court expressing it; conclusively;
ii. determines the rights of the parties;
iii. with regard to all or any of the matters in controversy;
iv. in the suit and may be either preliminary (i.e. when further proceedings have to be taken before disposal of the suit) or final

But decree **does not include:**
(a) any adjudication from which an appeal lies as an appeal from an Order, or
(b) any order of dismissal for default

Essentials of a decree are:
1. There must be a formal expression of adjudication;
2. There must be a conclusive determination of the rights of parties;
3. The determination must be with regard to or any of the matters in contravention in the suit;
4. The adjudication should have been given in the suit.

Type of Decree
Preliminary Decree
A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. The preliminary decree is not dependent on the final.

Final Decree
Final decree is dependent and subordinate to the preliminary decree, and gives effect to it. If the preliminary decree is set aside the final decree is automatically superseded.

Note: Every decree is appealable except those which are specifically barred and even second appeal is possible in decree.

Decree-holder
"Decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made.

Order [Sec 2(14)]
The formal expression of any decision of a Civil Court which is not a decree. No appeal lies against orders other than what is expressly provided in the Code or any other law for the time being in force.

Essential of order:
a. An order can be passed by the court at any time during existence of the suit.
b. There is no limit for passing an order by the court.
c. No appeal lies against the orders except law provides otherwise.

Interlocutory order
Interlocutory order is given in an intermediate stage between the commencement and termination of a suit. It is used to provide a temporary or provisional decision on an issue.

Difference between decree and order

Decree	**Order**
It is passed in a suit made on the	It is passed in a suit made on the

presentation of plaint	presentation of plaint, application and petition
It has conclusive determination of right	It may or may not be conclusive
There can be one decree in a suit. Or max 2, if there is a preliminary decree involved	There can be many orders in a suit.
Decrees are always appealable until specifically forbidden by law	Orders are generally not appealable until specifically provided by law
Second appeal is not possible	Second appeal is possible

Judgement [Sec 2(9)]

*T*he statement given by the Judge on the grounds of a decree or order. Thus a judgement must set out the grounds and reasons for the Judge to have arrived at the decision.

Essential elements of Judgement

a) A concise statement of the case
b) The points for determination
c) The decision thereon
d) The reason for the decision

Decree Sec 2(2)	**Order** Sec 2(14)	**Judgement** Sec(9)
Formal expression of an adjudication which conclusively determine the right of parties with regarding to the matter in controversy using suit	Formal expression of any decision of civil court, which is not decree	Statement given by judge on the ground of decree or order.
Decree Preliminary Final		Judgement set out in the ground and the reason for the judge to have arrived at the decision.

Jurisdiction of Courts

Jurisdiction means the authority of the court to decide matters that are brought before it for adjudication.

The jurisdiction of civil court is decided on following basis-

MAIN GROUNDS

(i) ***Jurisdiction over the subject matter:*** The jurisdiction to try certain matters by certain Court is limited by statute; e.g. a small cause court can try suits for money due under a promissory note or a suit for price of work done.

(ii) ***Place of suing or territorial jurisdiction:*** A territorial limit of jurisdiction for each court is fixed by the Government. Thus, it can try matters falling within the territorial limits of its jurisdiction.

(iii) ***Jurisdiction over persons:*** All persons of whatever nationality are subject to the jurisdiction of the Civil Courts of the country except a foreign State, its Ruler or its representative except with the consent of Central Government.

(iv) ***Pecuniary jurisdiction:*** *depending on pecuniary value of the suit* Section 6 deal with *Pecuniary jurisdiction* and lays down that save in so far as is otherwise expressly provide

ADDITIONAL GROUNDS

i. ***Original Jurisdiction*** — A Court tries and decides suits filed before it.
ii. ***Appellate Jurisdiction*** — A Court hears appeals against decisions or decrees passed by sub-ordinate Courts.
iii. ***Original and appellate Jurisdiction*** — The Supreme Court, the High Courts and the District Courts have both original and appellate jurisdiction in various matters.

Appearance of parties and consequence of non-appearance

Appearance and nonappearance is an important issue to settle a dispute. Order 9 of CPC lays down the provision of consequences of appearance and nonappearance of parties in a civil cases.

Effect of Nonappearance of parties

Nonappearance of Defendant

* The court may decide the order Ex parte

However,

A defendant has four remedies available if an *ex-parte* decree is passed against him:

a. He may file an appeal against the *ex-parte* decree
b. He may file an application for review of the judgement.
c. He may apply for setting aside the *ex-parte* decree.
d. A suit can also be filed to set aside an *ex-parte* decree obtained by fraud but no suit shall lie for non-service of summons.

Nonappearance of plaintiff

* If the defendant accept the claim against him → The defendant will require to meet the claim
* If the defendant does not accept the claim against him → The suit will be dismissed

Note:

a) Ex parte means an order or decree passed on the basis of documents, evidences and records available in the absence of one party.
b) If both parties do not appear then suit shall be dismissed

IMPORTANT DOCTRINES

STAY OF SUIT (RES SUB JUDICE)

No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit is pending in the same or any other Court (in India) having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

OBJECT

- To avoid wastage of time as they are already burdened.
- To avoid wastage of resources of the court.
- To avoid conflicting decisions.

CASE LAW : suit was instituted by the plaintiff company alleging infringement by the defendant company by using trade name of medicine and selling the same in wrapper and carton of identical design with same colour combination etc. as that of plaintiff company. A subsequent suit was instituted in different Court by the defendant company against the plaintiff company with same allegation. The Court held that subsequent suit should be stayed as simultaneous trial of the suits in different Courts might result in conflicting decisions as issue involved in two suits was totally identical (*M/s. Wings Pharmaceuticals (P) Ltd. and another* v. *M/s. Swan Pharmaceuticals and others*)

Conditions for stay of suits

a) There must be two suits instituted at different times;
b) The matter in issue in the later suit should be directly and substantially in issue in the earlier suit;
c) Such suit should be between the same parties;
d) Such earlier suit is still pending either in the same Court or in any other competent Court but not before a foreign Court.

Bar on Suits (RES JUDICATA)

Section 11 of the Civil Procedure Code deals with the doctrine of *Res Judicata* that is, bar or restraint on repetition of litigation of the same issues. It is a pragmatic principle accepted and provided in law that there must be a limit or end to litigation on the same issues.

The doctrine underlines the general principle that no one shall be twice vexed for the same cause (*S.B. Temple* v. *V.V.B. Charyulu*).

For the applicability of the principle of *res judicata*, the following requirements are necessary:

- There are 2 suits filed at 2 different time
- Both the matters are substantially the same
- Parties are the same
- Previously instituted suit is conclusively decided.

- The court in which previous suit is a competent court.

The doctrine of res judicata is based on the following public policy

i. There should be an end to litigation
ii. The parties to a suit shall not be harassed for the same matters
iii. The time of court should not be wasted over the matters that ought to have been and should have been decided in the former suit between the parties.

Territorial Jurisdiction of Courts

Every suit shall be instituted in the Court of the lowest grade to try it. Subject to the pecuniary or other limitations prescribed by any law, the following suits (relating to property) shall be instituted in the Court within the local limits of whose jurisdiction the property is situated:

i. for recovery of immovable property
ii. for partition of immovable property
iii. for foreclosure of sale or redemption in the case of a mortgage
iv. for the determination of any other right to or interest in immovable property;
v. for compensation for wrong to immovable property;
vi. for the recovery of movable property

Note:

i. Where immovable property is situated within the jurisdiction of different Courts, the suit may be filed in any court
ii. Where local limits of jurisdiction of Courts are uncertain, a plaintiff may file suit in any court and the courts may proceed to entertain the suit after having recorded a statement to the effect that is satisfied that there is ground for such alleged uncertainty.

iii. *Where wrong done to the person or to movable property***, a plaintiff** may file a case in any court on the following grounds:

- ✓ Where wrong is committed
- ✓ Where defendant resides
- ✓ Where defendant carries on business.
- ✓ Where the defendant personally works for gain.

Body corporate

In the case of a body corporate or company it shall be deemed to carry on business at its sole or principal office in India, or in case of any cause of action arising at any other place, if it has a subordinate office, at such place.

CASE LAW: Where there might be 2 or more competent courts which could entertain a suit consequent upon a part of cause of action having arisen therewith if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute. Such an agreement would be valid (*Angile Insulations* v. *Davy Ashmore India Ltd.*)

Set-off, Counter Claim, *Equitable set-off*

Set-off

Set-off is a reciprocal acquittal of debts between the plaintiff and defendant. It has the effect of extinguishing the plaintiff's claim to the extent of the amount claimed by the

defendant as a counterclaim. In short, both parties extinguish their rights and claims. Where the defendant claims to set off against the plaintiff's demand, in a suit for recovery of money, any ascertained sum of money legally recoverable by him from the plaintiff, the defendant may present a written statement containing the particulars of the debt sought to be set off.

A defendant may claim set off, if following conditions are satisfied:

- ✓ Suit must be for recovery of money
- ✓ Sum of money must be ascertained
- ✓ Such sum must be legally recoverable by the defendant from plaintiff
- ✓ It must not exceed the pecuniary limits of the court in which the suit is brought.

Effect of Set-off

the written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgement in respect both of the original claim and of the set-off, but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

Equitable set-off

Sometimes, the defendant is permitted to claim set-off in respect of an unascertained sum of money where the claim arises out of the same transaction, or transactions which can be considered as one transaction, or where there is knowledge on both sides of an existing debt due to one party and a credit by the other party found on and trusting to such debt as a means of discharging it.

Generally the suits emerge from cross-demands in the same transaction and this doctrine is intended to save the defendant from having to take recourse to a separate cross-suit. In India distinction between legal and equitable set-off is recognised.

Essentials

i. There is no sum specified for claim
ii. The claims must be originated form the same transaction

Difference between Set off and Equitable set off

Set off	Equitable set off
The claim is of ascertained amount of money	The claim can be of ascertained or unascertained sum of money
Claims need not arise out of same transaction	Both the claims should arise out of same transaction
It is a right of party	It is discretion of the court to grant equitable set off or not.

Counter-claim

A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up by way of counterclaim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filling of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of claim for damages or not. Such counter-claim must be within the pecuniary jurisdiction of the Court.

Temporary injunction

The Court may grant temporary injunction to restrain any act for the purpose of staying and preventing the wasting, damaging, alienation or sale or removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit.

The court may grant temporary injunction order on the following grounds;

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors, or

(c) That the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit.

It would be necessary for the plaintiff to satisfy the Court that substantial and irreparable harm or injury would be suffered by him if such temporary injunction (till the disposal of the suit) is not granted and that such loss or damage or harm cannot be compensated by damages.

Interlocutory orders

Power to order interim sale The Court may, on the application of any party to a suit order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any movable property, being the subject-matter of such suit, or attached before judgement in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to be sold at once.

DELIVERY OF SUMMONS BY COURT

Code of Civil Procedure (Amendment) Act, 2002 provides that –

(1) The Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer, who may be an officer of a Court other than that in which the suit is instituted, to be served by him or one of his subordinates or to such courier services as are approved by the Court.

(2) The services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgement due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court or other authorised court or

(3) By any other means to transmission of documents (including fax message or electronic mail service) provided by the High Court. Provided that the service of summons under this sub-rule shall be made at the expenses of the plaintiff.

When an acknowledgement or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee or by any person authorised by the courier service to the

effect that the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept the summons by any other means when tendered or transmitted to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant

Where the Court is satisfied that there is reason to believe that the person summoned is keeping out of the way for the purpose of avoiding service or that for any other reason the summons cannot be served in the ordinary way the Court shall order the service of the summons to be served by affixing a copy thereof in some conspicuous place in the Court house and also upon some conspicuous part of the house in which the person summoned is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit. (O.5, R.20, 'substituted service')

Where defendant resides in another province, a summons may be sent for service in another state to such court and in such manner as may be prescribed by rules in force in that State.

In the case of a defendant who is a public officer, servant of railways or local authority, the Court may, if more convenient, send the summons to the head of the office in which he is employed.

In the case of a suit being instituted against a corporation, the summons may be served (a) on the secretary or on any director, or other principal officer of the corporation or (b) by leaving it or sending it by post addressed to the corporation at the registered office or if there is no registered office, then at the place where the corporation carries on business.

Where persons are to be sued as partners in the name of their firm, the summons shall be served either (a) upon one or more of the partners or (b) at the principal place at which the partnership business is carried on within India or upon any person having the control or management of the partnership business. Where a partnership has been dissolved the summons shall be served upon every person whom it is sought to make liable.

Defence – The defendant has to file a written statement of his defence within a period of thirty days from the date of service of summons. If he fails to file the written statement within the stipulated time period he is allowed to file the same on such other day as may be specified by the Court for reasons to be recorded in writing. The time period for filing the written statement should not exceed 90 days.

Where the defendant bases his defence upon a document or relies upon any document in his possession in support of his defence or claim for set-off or counter claim, he has to enter such document in a list and produce it in Court while presenting his written statement and deliver the document and a copy thereof to be filed within the written statement.

Any document which ought to be produced in the Court but is not so produced, such document shall not be received in evidence at the time of hearing of the suit without the leave of the Court.

However this rule does not apply to documents produced for the cross-examination of the plaintiff witnesses or handover to a witness merely to refresh his memory. Besides, particulars of set-off must be given in the written statement. A plea of set-off is set up when the defendant pleads liability of the plaintiff to pay to him, in defence in a suit by the plaintiff for recovery of money. Any right of counter claim must be stated. In the written statement new facts must be specifically pleaded.

Discovery and interrogatories and production of documents

"Discovery" means finding out material facts and documents from an adversary in order to know and ascertain the nature of the case or in order to support his own case or in order to narrow the points at issue or to avoid proving admitted facts. Discovery may be of 2 kinds —

i. By interrogatories
ii. By documents.

Discovery by interrogations

Any party to a suit, by leave of the Court, may deliver interrogatories in writing for the examination of the opposite parties. But interrogatories will not be allowed for the following purposes:

a. For obtaining discovery of facts which relates exclusively to the evidence of the adversary's case or title.
b. To interrogate any confidential communications between the adversary and his counsel.
c. To obtain disclosures injurious to public interests.
d. Interrogatories that are of a 'fishing' nature i.e. which do not relate to some definite and existing state of circumstances but are resorted to in a speculative manner to discover something which may help a party making the interrogatories.

Discovery by documents

All documents relating to the matters in issue in the possession or power of any adversary can be inspected by means of discovery by documents. Any party may apply to the Court for an order directing any other party to the suit to make discovery on oath the documents which are or which have been in his possession or powers relating to any matter in question. The Court if it thinks fit in its discretion, it may make order for discovery limited to certain classes of documents. Every party to a suit may give notice to the other party at or before the settlement of issues to produce for his inspection any document referred to in the pleadings or affidavits of the other party.

If the other party refuses to comply with this order he shall not be allowed to put any such document in evidence

A party may refuse to produce the document for inspection on the following grounds:

a. where it discloses a party's evidence
b. when it enjoys a legal professional privilege

c. when it is injurious to public interest
d. Denial of possession of document.

If a party denies by an affidavit the possession of any document, the party claiming discovery cannot cross examine upon it, nor adduce evidence to contradict it, because in all questions of discovery the oath of the party making the discovery is conclusive (*Kedarnath* v. *Vishwanath*).

Admission by parties
"Admission" means that one party accepts the case of the other party in whole or in part to be true. Admission may be either in pleadings or by answers to interrogatories, by agreement of the parties or admission by notice.

Issues
Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. Issues may be either of fact or of law. Where the Court is of the opinion that the suit can be disposed of on issues of law only, it shall try those issues first and postpone the framing of the other issues until after that issue has been determined and may deal with the suit in accordance with the decision of that issue.

Issues are to be framed on material proportions of fact or law which are to be gathered from the following—
a. Allegations made in the plaint and written statement,
b. Allegations made by the parties or persons present on their behalf or their pleaders on oath,
c. Allegations in answer to interrogatories,
d. Contents of documents produced by the parties,
e. Statements made by parties or their representatives when examined,
f. From examination of a witness or any documents ordered to be produced.

Hearing of the suit – The plaintiff has the right to begin unless the defendant admits the fact alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief sought by him and in such a case the defendant has a right to begin (O.18, R.1).

Where there are several issues, the burden of proving some of which lies on the other party, the party beginning has an option to produce his evidence on those issues or reserve it by way of an answer to the evidence produced by the other party, and in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence

Care must be taken that no part of the evidence should be produced on those issues for which the plaintiff reserves a right to produce evidence after the defence has closed his evidence, otherwise the plaintiff shall lose his right of reserving evidence

Affidavit

An affidavit is a written statement of the deponent on oath duly affirmed before any Court or Magistrate or any Oath Commissioner appointed by the Court or before the Notary Public. An affidavit can be used in the following cases:

(1) The Court may at any time of its own motion or on application of any party order that any fact may be proved by affidavits.
(2) The Court may at any time order that the affidavit of any witness may be read at the hearing unless either party bona-fide desires to cross-examine him or he can be produced.
(3) Upon application by a party, evidence of a witness may be given on affidavit, but the court may at the instance of either party, order the deponent to attend the court for cross-examination unless he is exempted from personal appearance. Affidavits are confined to such facts as the deponent is able of his own knowledge to prove except on interlocutory applications.

Execution

Execution is the enforcement of decrees or orders of the Court. A decree may be executed either by the Court which passed it or by the Court to which it is sent for execution.

APPEALS

Right of appeal is not a natural or inherent right attached to litigation. Such a right is given by the statute or by rules having the force of statute.

There are 4 kinds of appeals provided under the Civil Procedure Code:

a. Appeals from original Decrees
b. Second Appeals
c. Appeals from Orders
d. Appeals to the Supreme Court

Note:

(1) Appeals from original decrees may be preferred in the Court superior to the Court passing the decree.
(2) An appeal may lie from an original decree passed ex parte. Where the decree has been passed with the consent of parties, no appeal lies.
(3) The appeal from original decree lies on a question of law.
(4) No appeal lies in any suit of the nature cognizable by Courts of small causes when the amount or value of the subject matter of the original suit does not exceed ten thousand rupees.

Second appeal: An appeal lies to the High Court from every decree passed in appeal by any subordinate Court if the High Court is satisfied that the case involves a substantial question of law. Under this Section, an appeal may lie from an appellate decree passed ex parte.

The respondent is allowed to argue that the case does not involve such question. The High Court is empowered to hear the appeal on any other substantial question of law not formulated by it if it is satisfied that the case involves such question.

The High Court is not to vary or reverse any order or decree except the order which if made in favour of the party applying for revision would have finally disposed of the suit or proceedings or against which an appeal lies either to the High Court or any subordinate Court.

A revision shall not operate as a stay suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

Appeal from orders **would lie only from the following orders on grounds of defect or irregularity in law –**

(i) An order under Section 35A of the Code allowing special costs, and order under Section 91 or Section 92 refusing leave to Institute a suit of the nature referred to in Section 91 or Section 92,
(ii) An order under Section 95 for compensation for obtaining attachment or injunction on insufficient ground,
(iii) An order under the Code imposing a fine or directing the detention or arrest of any person except in execution of a decree.
(iv) Appealable orders as set out under.

Appeals to the Supreme Court would lie in the following cases:

a. from any decree or order of Civil Court when the case is certified by the Court deciding it to be fit for appeal to the Supreme Court or when special leave is granted under Section 112 by the Supreme Court itself,
b. from any judgement, decree or final order passed on appeal by a High Court or by any other court of final appellate jurisdiction,
c. From any judgement, decree or final orders passed by a High Court in exercise of original civil jurisdiction.

The general rule is that the parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary. **But the appellate court has a discretion to allow additional evidence in the following circumstances:**

a. When the lower court has refused to admit evidence which ought to have been admitted.
b. The appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgement.
c. For any other substantial cause but in all such cases the appellate court shall record its reasons for admission of additional evidence.

The essential factors to be stated in an appellate judgement are

I. the points for determination,
II. the decision thereon,
III. the reasons for the decision, and
IV. where the decree appealed from is reversed or varied, the relief to which the appellant is entitled

The judgement shall be signed and dated by the judge or judges concurring therein.

REFERENCE, REVIEW AND REVISION

Reference to High Court Subject to such conditions as may be prescribed, at any time before judgement a court in which a suit has been instituted may state a case and refer the same for opinion of the High Court and the High Court may make such order thereon as it thinks fit.

Review

Any person aggrieved by a decree or order may apply for a review of judgement to the court which passed the decree or made the order on any of the grounds –

(i) Discovery by the applicant of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or

(ii) On account of some mistake or error apparent on the face of the record, or

(iii) For any other sufficient reason, and the Court may make such order thereon as it thinks fit.

Revision

The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears –

a. to have exercised a jurisdiction not vested in it by law, or
b. to have failed to exercise a jurisdiction so vested, or
c. to have acted in the exercise of its jurisdiction illegally or with material irregularity

The High Court may make such order as it thinks fit.

Provided that the High Court shall not vary or reverse any order made or any order deciding an issue in the course of a suit or proceeding except where the order, if it had been made in favour of the party applying for revision would have finally disposed of the suit or other proceedings.

The High Court shall not vary or reverse any decree or order against which an appeal lies either to the High Court or any Court subordinate thereto.

A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or proceeding is stayed by the High Court.

SUITS BY OR AGAINST A CORPORATION

Signature or verification of pleading

In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation, by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

Service of summons

Subject to any provision regulating service of process, where the suit is against a corporation, the summons may be served:

i. on the secretary or any director or other principal officer of the corporation, or
ii. By leaving it or sending it by post addressed to the corporation at the registered office or if there is no registered office then at the place where the corporation carries on business.

Power of the Court to require personal attendance
The Court may at any stage of the suit, require the personal appearance of the secretary or any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit.

SUITS BY OR AGAINST MINORS
A minor is a person
(i) who has not completed the age of 18 years and
(ii) For whose person or property a guardian has been appointed by a Court, for whose property is under a Court of Wards, the age of majority is completed at the age of 21 years.

Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. The next friend should be a person who is of sound mind and has attained majority.

However, the interest of such person is not adverse to that of the minor and that he is not in the case of a next friend, a defendant for the suit.

Where the suit is instituted without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.

If the defendant is a minor;
the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor .An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff

A person appointed as guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continues as such throughout all proceeding arising out of the suit including proceedings in any appellate or revisional court and any proceedings in the execution of a decree.

When minor attain majority:
When the minor plaintiff attains majority he may elect to proceed with the suit or application or elect to abandon it. If he elects the former course, he shall apply for an order discharging the next friend and for leave to proceed in his own name and the title of the suit will be corrected. If he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant apply for an order to dismiss the suit on repayment of the costs incurred by the defendant or opposite party etc.

SUMMARY PROCEDURE
A procedure by way of summary suit applies to suits upon bill of exchange, hundies or promissory notes, when the plaintiff desires to proceed under the provisions of Order 37.

The rules for summary procedure are applicable to the following Courts:

1. High Courts, City Civil Courts and Small Courts;
2. Other Courts: In such Courts the High Courts may restrict the operation of order 37 by issuing a notification in the Official Gazette.

The debt or liquidated demand in money payable by the defendant should arise on a written contract or on an enactment or on a guarantee.

Institution of summary suits

Such suit may be instituted by presenting a plaint containing the following essentials:

i. a specific averment to the effect that the suit is filed under this order;
ii. that no relief which does not fall within the ambit of this rule has been claimed;
iii. The inscription immediately below the number of the suit in the title of the suit that the suit is being established under Order 37 of the CPC.

Leave to defend

Order 37 rule 3 prescribe the mode of service of summons etc. and leave to defend. The defendant is not entitled to defend the suit unless he enters an appearance within 10 days from the service of summons. Such leave to defend may be granted unconditional or upon such term as the Court or the Judge may think fit.

However, such leave shall not be granted where:

i. the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence or that the defences are frivolous or veracious, and
ii. The part of the amount claimed by the plaintiff and admitted by the defendant to be due from him is deposited by him in the Court.

On the hearing of such summon for judgement, the plaintiff shall be entitled to judgement provided the defendant has not applied for leave to defend or if such application has been made and is refused or where the defendant is permitted to defend but he fails to give the required security within the prescribed time or to carry out such other precautions as may have been directed by the Court.

After decree, the Court may, under special circumstances set-aside the decree and if necessary stay or set aside execution, and may give leave to the defendant to appear and to defend the suit.

The summary suit must be brought within one year from the date on which the debt becomes due and payable, whereas the period of limitation for suits for ordinary cases under negotiable instrument is three years.

INDIAN PENAL CODE, 1860

Introduction

- Crime is a social phenomenon. It is a wrong committed by an individual in a society.
- It arises first when a state is organized, people set up rules, the breaking of which is an act called crime.
- For determination of crime there is no fixed rule. Crime is what the law says it is.
- The difference between a criminal offence and a civil wrong is that while the former is considered a wrong against the society because of their grave nature, a civil wrong is a wrong done to an individual.

Indian penal code, 1860

The Indian penal code, 1860 is a substantive law of crimes. It defines acts which are offence and lays down punishment for the same. It applies to the whole of India except the state of Jammu & Kashmir.

Jurisdiction of the code,1860

The geographical area or the subjects to which a law applies is defined as the jurisdiction of that law. Indian penal code has **two jurisdictions**, **intra-territorial** jurisdiction and **extra-territorial** jurisdiction which are explained as follows:

1. **Intra-territorial jurisdiction (applies to all human being)-**
   Where a crime under any provision of IPC is committed within the territory of India the IPC applies and the courts can try and punish irrespective of the fact that the person who had committed the crime is an Indian national or foreigner. This is called 'intra-territorial jurisdiction' because the submission to the jurisdiction of the court is by virtue of the crime being committed within the Indian territory.
   The Code applies to any offence committed:
   - Within the territory of India as defined in Article 1 of Constitution of India.
   - Within the territorial waters of India, or
   - On any ship or aircraft either owned by India or registered in India.

   Exemption from intra-territorial jurisdiction of IPC:

   - Article 361(2) of the Constitution protects criminal proceedings against the President or Governor of a state in any court, during the time they hold office.
   - In accordance with well-recognized principles of international law, foreign sovereigns are exempt from criminal proceedings in India.
   - This immunity is also enjoyed by the ambassadors and diplomats of foreign countries who have official status in India. This protection is extended to all secretaries and political and military attaches, who are formally part of the missions.
   - Example:(1) gunjan, a citizen of India murdered Ranjan in India., (2) glory, a foreigner murdered Ranjan in India.

2. **Extra –territorial jurisdiction-**
   Section 3 and section 4 of the IPC provide for extra-territorial jurisdiction. Where a crime is committed outside the territory of India by an Indian national, such a person may be tried and punished by the India courts.
   Example: Chetan, who is a citizen of India, commits a murder in dubai. He can be tried and convicted of murder in any place in India under IPC.

The fundamental elements of crime

The basic function of criminal law is to punish the offender and to deter the incidence of crime in the society. A criminal act must contain the following elements:

1. **Human being-**
   The first requirement for commission of crime is that the act must be committed by a human being. Only a human being is subject of IPC.
   Example: if a lion killed a man, the lion will not be punishable under IPC, as the crime is done by lion, who is not a human being.

2. **Mens rea-**
   - 'mens rea' is a latin word which means a guilty mind.
   - The basic principle of criminal liability is embodied in the legal maxim 'actus non facitreum, nisi mens sit rea' which means 'the act alone does not amount to guilt; the act must be accompanied by a guilty mind'.
   - Mens rea is defined as the mental element necessary to constitute criminal liability.
   - In simple words, a bad intention or guilt is an essential ingredient in every crime.
   - The act is judged not from the mind of the wrong-doer, but the mind of the wrong-doer is judged from the act.

Forms of mens rea-

a) **Intention:**
   - Intention is defined as 'the purpose or design with which an act is done'.
   - Intention indicates the position of mind, condition of someone at particular time of commission of offence and also will of the accused to see effects of his unlawful conduct. Criminal intention does not mean only the specific intention but it includes the generic intention as well.
   - Example: A poisons the food which B was supposed to eat with the intention of killing B. C eats that food instead of B and is killed. A is liable for killing C although A never intended it.

b) **Negligence**
   - Negligence is the second form of *mens rea*. Negligence is not taking care, where there is a duty to take care.
   - Negligence or carelessness indicates a state of mind where there is absence of a desire to cause a particular consequence.
   - The standard of care established by law is that of a reasonable man in identical circumstances. What amounts to reasonable care differs from thing to thing

depending situation of each case. In criminal law, the negligent conduct amounts to *means rea.*

- Example: for every medical negligence, a doctor can be tried under IPC.

c) Recklessness

Recklessness occurs when the person does not desire the consequence, but foresees the possibility and consciously takes the risk. It is a total disregard for the consequences of one's own actions.

Example: drink and drive is prohibited and once a person does that he shall be punshiable for recklessness.

Exception to mens rea

There are many exceptional cases where mens rea is not required in criminal law.
Some of them are as follows:

i. **Liabilities imposed by statutes**
Where a statute imposes liability , the presence or absence of a guilty mind is relevant.

ii. **Petty cases**
Where it is difficult to prove *mens rea* and penalties are petty fines. In such petty cases, speedy disposal of cases is necessary and the proving of *mens rea* is not easy. An accused may be fined even without any proof of *mens rea*.

iii. **Public interest**
In the interest of public safety, strict liability is imposed and whether a person causes public nuisance with a guilty mind or without guilty mind, he is punished.

iv. **Ignorance of law**
If a person violates a law even without the knowledge of the existence of the law, it can still be said that he has committed an act which is prohibited by law. In such cases, the fact that he was not aware of the law and hence did not intend to violate it is no defense and he would be liable as if he was aware of the law. This follows from the maxim 'ignorance of the law is no excuse'.

3. Actus Reus (act or omission):

- A human being and an evil intent are not enough to constitute a crime for one cannot know the intentions of a man.
- Actus Reus means overt act or unlawful commission must be done in carrying out a plan with the guilty intention.
- Actus Reus is defined as a result of voluntary human conduct which law prohibits. It is the doing of some act by the person to be held liable. An 'act' is a willed movement of body.
- Example: a number of people conspire to murder a person and only one of them actually shoots the person, every conspirator would be held liable for it.

Stages of crime

The commission of a crime consists of some significant stages. If a person commits a crime voluntarily, it involves four important stages, viz.

1. Criminal Intention

- Criminal intention is the first stage in the commission of offence. Intention is the conscious exercise of mental faculties of a person to do an act for the purpose of accomplishing or satisfying a purpose.
- Law does not as a rule punish individuals for their evil thoughts or criminal intentions.
- The criminal court does not punish a man for mere guilty intention because it is very difficult for the prosecution to prove the guilty intention of a man.
- Example: if a man drives in a rash and reckless manner resulting in an accident causing death of a person, the reckless driver cannot plead innocence by stating that he never intended to cause the death of the person. It may be true in the strict sense of term. But a reckless driver should know that reckless driving is likely to result in harm and can even cause death of the persons on the road. Further recklessness is a type of mens rea. Therefore, a reckless driver who causes death of a person can be presumed or deemed to have intended to causes the death of the person.

2. **Preparation**

Preparation means to arrange necessary measures for commission of intended criminal act. Preparation itself is not punishable as it is difficult to prove that necessary preparations were made for commission of the offence. In certain exceptional cases mere preparation is also punishable, under IPC.

i. Preparation to wage war against the Government
ii. Preparation for counterfeiting of coins or Government Stamps
iii. Possessing counterfeit coins, false weights or measurements and forged documents
iv. Making preparation to commit dacoity

3. **Attempt**

Attempt, which is the third stage in the commission of a crime, is punishable. Attempt has been called as a preliminary crime. Attempt means the direct movement towards commission of a crime after necessary preparations have been made. Successful attempt becomes an actual commission of crime, otherwise it is just an attempt. The act constituting attempt must be proximate to the intended result.

4. **Commission of Crime or Accomplishment**

The last stage in the commission of crime is its accomplishment. If the accused succeeds in his attempt, the result is the commission of crime and he will be guilty of the offence. If his attempt is unsuccessful, he will be guilty for an attempt only. If the offence is complete, the offender will be tried and punished under the specific provisions of the IPC.

Punishment

The punishments to which offenders are liable under the provisions of IPC are –

1. **Death**
   A death sentence is the harshest of punishments provided in the IPC, which involves the judicial killing or taking the life of the accused as a form of punishment. The Supreme Court has ruled that death sentence ought to be imposed only in the 'rarest of rate cases'.
   The IPC provides for capital punishment for the following offences:
   1. Murder
   2. Dacoity with Murder.
   3. Waging War against the Government of India.
   4. Abetting mutiny actually committed.
   5. Giving or fabricating false evidence upon which an innocent person suffers death
   6. Abetment of a suicide by a minor or insane person;
   7. Attempted murder by a life convict.

   The capital punishment is awarded only in two categories of offences, namely **treason and murder**.
2. **Life imprisonment**
   Imprisonment for life meant rigorous imprisonment, that is, till the last breath of the convict.
3. **Imprisonment**
   Imprisonment which is of two descriptions namely –
   a) Rigorous Imprisonment, that is hard labour;
   b) Simple Imprisonment

4. **Forfeiture of property**
   Forfeiture is the divestiture of specific property without compensation in consequence of some default or act forbidden by law. The Courts may order for forfeiture of property of the accused in certain occasions.
5. **Fine**
   Fine is forfeiture of money by way of penalty. It should be imposed individually and not collectively. When court sentences an accused for a punishment, which includes a fine amount, it can specify that in the event the convict does not pay the fine amount, he would have to suffer imprisonment for a further period as indicated by the court, which is generally referred to as default sentence.

Criminal Conspiracy

Criminal conspiracy is covered under section 120A and 120-B of the IPC.

Definition of criminal conspiracy (Section 120A)

When two or more persons agree to do, or cause to be done—

1. an illegal act, or
2. an act which is not illegal by illegal means,

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation: It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

Essential of criminal conspiracy

1. an agreement between two or more persons;
2. an act which is not illegal in itself but is done by illegal means.

Punishment of criminal conspiracy (Section 120B)

1. Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.
2. Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both the punishment for conspiracy is the same as if the conspirator had abetted the offence. The punishment for criminal conspiracy is more severe if the agreement is one to commit a serious offence and less severe otherwise.

Dishonest misappropriation of property (Section 403)

Whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Punishment for dishonest misappropriation

Imprisonment upto 2 year or fine or both.

Ingredients of dishonest misappropriation of property

1. There should be misappropriation or conversion of property.
2. The misappropriation or conversion should be dishonest.
3. The property should be movable property.

Illustrations

(a) A takes property belonging to Z out of Z's possession, in good faith believing at the time when he takes it, that the property belongs to himself. A is not guilty of theft; but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(b) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But, if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

(c) A and B, being, joint owners of a horse, A takes the horse out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it. But, if A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation: A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Illustration

(a) A finds a rupee on the high road, not knowing to whom the rupee belongs, A picks up the rupee. Here A has not committed the offence defined in this section.

(b) A finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

(c) A finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person, who has drawn the cheque, appears. A knows that this person can direct him to the person in whose favour the cheque was drawn. A appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.

(d) A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to his own use. A has committed an offence under this section.

(e) A finds a purse with money, not knowing to whom it belongs; he afterwards discovers that it belongs to Z, and appropriates it to his own use. A is guilty of an offence under this section.

(f) A finds a valuable ring, not knowing to whom it belongs. A sells it immediately without attempting to discover the owner. A is guilty of an offence under this section.

Dishonest misappropriation of property possessed by deceased person at the time of his death (Section 404)

Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's death, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine, and if the offender at the time of such person's death was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustration

Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this section.

Criminal Breach of Trust

Criminal breach of trust (Section 405)

Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

Criminal breach of trust-essential ingredients

The essential ingredients of the offence of criminal breach of trust are as under;

1. The accused must be entrusted with the property or with dominion over it,
2. The person so entrusted must use that property, or;
3. The accused must dishonestly use or dispose of that property or wilfully suffer any other person to do so in violation,
    - of any direction of law prescribing the mode in which such trust is to be discharged, or;
    - of any legal contract made touching the discharge of such trust.

Illustrations

(a) A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.
(b) A is a warehouse-keeper. Z going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse room. A dishonestly sells the goods. A has committed criminal breach of trust.

Punishment for criminal breach of trust. (Section 406)

.criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Criminal breach of trust by carrier(Section 407)

When breach of trust is done by a carrier, wharfinger or warehouse- keeper shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Criminal breach of trust by clerk or servant (Section 408)

When breach of trust is done by clerk or servant shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Criminal breach of trust by public servant, or by banker, merchant or agent (Section 409)

when breach of trust is done by a public servant or banker, merchant, factor, broker. Attorney or agent

shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cheating

Sections 415 to 420 of Indian Penal Code, 1860 deal with the offence of cheating.
Section 415 provides that:
whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Cheating – Main Ingredients
The main ingredients of cheating are as under:

1. Deception of any person.
2. (A) Fraudulently or dishonestly inducing that person
   (1) to deliver any property to any person; or
   (2) to consent that any person shall retain any property; or
   (B) Intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

Cheating by personation
As per section 416 a person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is**.**
Explanation: The offence is committed whether the individual personated is a real or imaginary person.
Illustrations

1. A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.
2. A cheats by pretending to be B, a person who is deceased. A cheats by personation.

Punishment for cheating
Section 417 provides that whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect
Section 418 provides that whoever cheats shall be with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Punishment for cheating by personation

Section 419 states that whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Cheating and dishonestly inducing delivery of property

section 417 of the IPC. Section 420 comes into operation when there is delivery or destruction of any property or alteration or destruction of any valuable security resulting from the act of the person deceiving. shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors (Section 421)

Whoever dishonestly or fraudulently removes, conceals or delivers to any person, or transfers or causes to be transferred to any person, without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Essential ingredients of section 421

(1) The accused has done any of the following act

- Removed the property
- Concealed the property or
- Delivered the property, or
- Transferred the property, or
- Caused it to be transferred to someone;

(2) The such a transfer was without adequate consideration;

(3) That the accused thereby intended to prevent or knew that he was thereby likely to prevent the
distribution of that property according to law among his creditors or creditors of another person;

(4) That he acted dishonestly and fraudulently.

Punishment under section 421

A person accused under section 421 be punished with imprisonment upto 2 years, or with fine, or both.

Dishonestly or fraudulently preventing debt being available for creditors (Section 422)

Whereby a person has the means of returning his loan but he is not availing such means is fraudulently preventing debt being available for creditors. In simple words, where a person fraudulently prevents the payment of debt amount to the creditor, it will be covered under this section.

Punishment under section 422

A person accused under section 422 be punished with imprisonment upto 2 years, or with fine or with both.

Dishonest or fraudulent execution of deed of transfer containing false statement of consideration (Section 423)

Whoever dishonestly or fraudulently signs, executes or becomes a party to any deed or instrument which purports to transfer or subject to any charge on property, or any interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Punishment under section 423

A person accused under section 423 be punished with imprisonment upto 2 years, or with fine/or with both.

Dishonest or fraudulent removal or concealment of property (Section 424)

Whoever dishonestly or fraudulently conceals or removes any property of himself or any other person, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Punishment under section 424

A person accused under section 424 be punished with imprisonment upto 2 years, or with fine, or with both.

Forgery

Forgery is defined under section 463 of the Indian Penal Code, 1860 and the punishment for it is prescribed under section 465.

Whoever makes any false document or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

Punishment of forgery

Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Defamation

Section 499 provides that whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such

imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation

(1) It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

(2) It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

(3) An imputation in the form of an alternative or expressed ironically, may amount to defamation.

(4) No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a lothsome state, or in a state generally considered as disgraceful.

Illustrations

1. A says— "Z is an honest man; he never stole B's watch"; intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it fall within one of the exceptions.
2. A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.
3. A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

Exceptions

1. **Imputation of truth which public good requires to be made or published**
   It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.
2. **Public conduct of public servants**
   It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.
3. **Conduct of any person touching any public question**
   It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.
4. **Publication of reports of proceedings of courts**
   It is not defamation to publish substantially true report of the proceedings of a Court of justice, or of the result of any such proceedings.
5. **Merits of case decided in Court or conduct of witnesses and others concerned**
   It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case,

or respecting the character of such person, as far as his character appears in that conduct, and no further.

6. **Merits of public performance**
   It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.
7. **Censure passed in good faith by person having lawful authority over another**
   It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates
8. **Accusation preferred in good faith to authorised person**.
   It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation
9. **Imputation made in good faith by person for protection of his or other's interests**
   It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.
10. **Caution intended for good of person to whom conveyed or for public good**
    It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

Punishment for defamation

According to section 500 whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Kinds of Defamation

- The wrong of defamation is of two kinds- libel and slander.
- In **libel**, the defamatory statement is made in some permanent and visible form, such as writing, printing or pictures.
- In it is made in spoken words or in some other transitory form, whether visible or **slander** audible, such as gestures or inarticulate but significant sounds.
- The ambit of 'publish' is very wide. The publication of defamatory matter means that it is communicated to some person other than the person about whom it is addressed.

Printing or engraving matter known to be defamatory [Section 501]

- It provides that whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished

with simple imprisonment for a term which may extend to two years, or with fine, or with both.

- A person printing or engraving defamatory matter abets the offence of defamation and is guilty under section 501.
- Printing or engraving of defamatory material is not sufficient and the court is required to be satisfied that the accused knew or had good reasons to believe that such a matter was defamatory before holding a person guilty under section 501.
- In *Sankaran* v. *Ramkrishna Pillai*, AIR 1960 Ker 141, the defamatory matter was printed in Malayalam and the accused did not know the language, his *mens rea* was absent and he was not guilty.

Sale of printed or engraved substance containing defamatory matter

Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

To bring an offence under **section 502**, it must be:

(i) That the published material was defamatory as per section 499 of the IPC.
(ii) That the published material was either printed or engraved.
(iii) That the accused knew that such matter contained defamatory imputation
(iv) That the accused sold or offered for sale the defamatory matter

General Exceptions

The Indian Penal Code, 1860 also provides for general exceptions for a person accused of committing any offence under the Code to plead in his defense. General defences or exceptions are contained in sections 76 to 106 of the IPC.

The exceptions strictly speaking came within the following six categories.

- Judicial acts
- Mistake of fact
- Accident
- Trifling Act
- Consent
- Absence of Criminal Intention.

1. **Mistake of Fact- *bound by law*:-**
   According to section 76, if any one commits any act which he is bound to do or mistakenly believes in good faith that he is bound by law to do it, he is not guilty. The mistake or ignorance must be of fact, but not of law. If the mistaken facts were true, the act would not be an offence. Mistake of fact, is a general defence based on the Common Law maxim -*ignorantiafacitexcusat; igoranita juris non excusat*- (Ignorance of fact excuses; Ignorance of law does not excuse). In mistake of fact the accused does not possess *mens rea* or guilty mind.
2. **Act of Judge when acting judicially (section 77):-**
   If any judge in his authority in good faith believing authorized by law commits any act, no offence is attracted.
3. **Act done pursuant to the judgment or order of Court (section 78):-**
   When any act is committed on judgment or order of the Court of Justice which is in force, it is no offence even if the judgment or order of the Court is without any jurisdiction, though the person who executes the judgment and order must believe

that the Court has the jurisdiction. Section 77 protects judges from any criminal liability for their judicial acts. Section 78 extends this protection to ministerial and other staff, who may be required to execute orders of the court. If such immunity was not extended, then executing or implementing court orders would become impossible.

4. **Mistake of Fact-justified by law:-**
   According to section 79 of the IPC, if any one commits any act which is justified by law or by reason of mistake of fact and not by reason of mistake of law believes himself to be justified by Law.
5. **Accident in doing a lawful act:-**
   According to section 80, if any one commits any offence by accident or misfortune without malafide or without knowledge in performance of his legal duty in legal manner with proper care and caution is no offence. The protection under this section will apply only if the act is a result of an accident or a misfortune. It rather means an unintentional, an unexpected act. Thus, injuries caused due to accidents in games and sports are all covered by this section.
6. **Act likely to cause harm, but done without criminal intent, and to prevent other harm (section 81):-**
   Any act done by anyone without any criminal intent for saving or preventing harm to third person or property in good faith is no offence. According to the 'explanation' to this section, it is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.
7. **Act of a child under seven years of age (section 82):-**
   If any child who is below seven years of age commits any offence, he is not guilty because it is the presumption of law that that a child below 7 years of age is incapable to having a criminal intention (*mens rea*) necessary to commit a crime.
8. **Act of a child above seven and under twelve of immature understanding (section 83):-**
   If any minor child is in between seven and twelve years of age and not attained the maturity of what is wrong and contrary to law at the time of commission of offence in not liable to be convicted and punished.
9. **Act of a person of unsound mind (section 84):-**
   Nothing done by any person of unsound mind is an offence if at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.
10. **Act of a person incapable of judgment by reason of intoxication caused against his will (section 85):-**
    Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law: provided that the thing which intoxicated him was administered to him without his knowledge or against his will.
11. **Offence requiring a particular intent or knowledge committed by one who is intoxicated (section 86):-**
    In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will. If the accused himself takes and

consumes intoxicated thing or material with knowledge or intention and under intoxication he commits any offence he is liable for punishment.

12. **Act not intended and not known to be likely to cause death or grievous hurt, done by consent (section 87):-**
When anyone commits any act without any intention to cause death or grievous hurt and which is not within the knowledge of that person to likely to cause death or grievious hurt to any person who is more than eighteen years of age and has consented to take the risk of that harm, the person doing the act has committed no offence. This section is based on the principle of *'volenti-non-fit injuria'* which means he who consents suffers no injury. The policy behind this section is that everyone is the best judge of his own interest and no one consents to that which he considers injurious to his own interest.
13. **Act not intended to cause death, done by consent in good faith for person's benefit (section 88):-**
Nothing, which is not intented to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.
Section 88 extends the operation of consent to all acts except that of causing death intentionally provided that the act is done in good faith for the benefit of the consenting party.
14. **On consent of guardian if any act is done in good faith to it (section 89):-**
This section gives power to the guardian of a child under 12 years of age or a person of unsound mind to consent to do an act done by a third person for the benefit of the child or a person of unsound mind. Anything done by the third person will not be an offence provided that it is done in good faith and for the benefit of the child or a person of unsound mind. This section gives protection to the guardians as well as other person acting with the consent of a guardian of a person under 12 years of age or a person of unsound mind.
15. **Consent (section 90):-**
The consent is not valid if it is obtained from a person who is under fear of injury, or under a misconception of fact and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception. The consent is also not valid if it's given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent. The consent is given by a person who is under twelve years of age is also not valid unless the contrary appears from the context.
16. **Exclusion of acts which are offences independently of harm caused (section 91):-**
The exceptions in sections 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.
17. **Act done in good faith for benefit of a person without consent (section 92):-**
Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in

lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit. This defense is subject to certain exceptions.

18. **Communication made in good faith (section 93):-**
    No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person. For example: A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.
19. **Act to which a person is compelled by threats (section 94):-**
    Except murder, and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence. For this defense to be valid the person acting under threat should not have himself put under such a situation.
20. **Act causing slight harm (section 95):-**
    Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.

THE CODE OF CRIMINAL PROCEDURE, 1973

The Code of Criminal Procedure, 1898 (Cr. P.C.) was repealed by the Code of 1973 enacted by Parliament on 25th January, 1974 and made effective from 1.4.1974 so as to consolidate and amend the law relating to Criminal Procedure.

It's object is to provide a machinery for determining the guilt of and imposing punishment on offenders under the substantive criminal law, for example, the Indian Penal Code (I.P.C.)

Definitions

Offence

Section 2(n) of the Cr.P.C. defines the word "offence" to mean any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under Section 20 of the Cattle-trespass Act, 1871

Mens rea

Mens rea means a guilty mind. The fundamental principle of penal liability is embodied in the maxim actus non facit ream nisi mens sit rea. The act itself does not constitute guilt unless done with a guilty intent. Thus, unless an act is done with a guilty intention, it will not be criminally punishable. The general rule to be stated is "there must be a mind at fault before there can be a be a crime".

The motive is not an intention. Intention involves foresight or knowledge of the probable or likely consequences of an injury

Bailable Offence and Non-bailable Offence

A "bailable offence" means an offence which is shown as bailable in the 1st Schedule or which is made bailable by any other law for the time being in force. "Non-bailable" offence means any other offence.

Cognizable Offence and Non-cognizable Offence

"Cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the 1st Schedule or under any other law for the time being in force, arrest without warrant.

"Non-cognizable offence" means an offence for which, and "non-cognizable" case means a case in which, a police officer has no authority to arrest without warrant. Thus, a non-cognizable offence needs special authority to arrest by the police officer.

Complaint

"Complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence, but it does not include a police report. [Section 2(d)]

A complaint in a criminal case is what a plaint is in a civil case. The requisites of a complaint are:

I. an oral or a written allegation;
II. some person known or unknown has committed an offence;
III. it must be made to a magistrate; and
IV. it must be made with the object that he should take action.

Police report is expressly excluded from the definition of complaint but the explanation to Section 2(d) makes it clear that such report shall be deemed to be a complaint where after investigation it discloses commission of a non-cognizable offence

Bail

It means the release of the accused from the custody of the officers of law and entrusting him to the private custody of persons who are sureties to produce the accused to answer the charge at the stipulated time or date.

Inquiry

It means every inquiry other than a trial, conducted under this Code by a Magistrate or Court. [Section 2(g)]. It carries the following three features:

(i) the inquiry is different from a trial in criminal matters;
(ii) inquiry is wider than trial;
(iii) *it stops when trial begins.*

Investigation

It includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf. [Section 2(h)]

The three terms – 'investigation', 'inquiry' and 'trial' denote three different stages of a criminal case. The first stage is reached when a police officer either on his own or under orders of a Magistrate investigates into a case (Section 202).

If he finds that no offence has been committed, he submits his report to the Magistrate who drops the proceedings. But if he is of different opinion, he sends that case to a Magistrate and then begins the second stage – a trial or an inquiry

Judicial Proceeding

It includes any proceeding in the course of which evidence is or may be legally taken on oath. The term judicial proceeding includes inquiry and trial but not investigation. [Section 2(i)]

Pleader

With reference to any proceedings in any Court, it means a person authorised by or under any law for the time being in force, to practise in such Court and includes any other person appointed with the permission of the Court to act in such proceeding. [Section 2(q)]

It is an inclusive definition and a non-legal person appointed with the permission of the Court will also be included.

Public Prosecutor

A "public prosecutor" means any person appointed under Section 24, and includes any person acting under the directions of a Public Prosecutor. [Section 2(u)]

Summons and Warrant Cases

"Summons case" means a case relating to an offence and not being a warrant case. [Section 2(w)] A "Warrant case" means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding 2 years.
Those cases which are punishable with imprisonment for two years or less are summons cases, the rest are all warrant cases. Thus, the division is based on punishment which can be awarded.

Classes of Criminal courts

Following are the different classes of criminal courts:

I. High Courts;
II. Courts of Session;
III. Judicial Magistrates of the first class, and, in any metropolitan area; Metropolitan Magistrates;
IV. Judicial Magistrates of the second class; and
V. Executive Magistrates;
VI. Besides this, the Courts may also be constituted under any other law

Power of courts

Chapter III of Cr.P.C. deals with power of Courts. One of such power is to try offences. Offences are divided into two categories:

a) those under the Indian Penal Code; and
b) those under any other law.

According to Section 26, any offence under the Indian Penal Code, 1860 may be tried by the High Court or the Court of Session or any other Court by which such offence is shown in the First Schedule to be triable, whereas any offence under any other law shall be tried by the Court mentioned in that law

Power of the Court to pass sentences

Sentences which High Courts and Sessions Judges may pass

(a) According to Section 28, a High Court may pass any sentence authorised by law.
(b) A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law, but any sentence of death passed by any such judge shall be subject to confirmation by the High Court

(c) An Assistant Sessions Judge may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years.

Sentences which Magistrates may pass

The powers of individual categories of Magistrates to pass the sentence are as under:

I. The Court of a Chief Judicial Magistrate may pass any sentence authorised by law **except** a sentence of death or of imprisonment for life or of imprisonment for a term exceeding 7 years.
II. A Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding 3 years or of a fine not exceeding Rs. 10,000 or of both.
III. A Magistrate of the 2nd class may pass a sentence of imprisonment for a term not exceeding 1 year, or of fine not exceeding Rs. 5000 or of both.
IV. A Chief Metropolitan Magistrate shall have the powers of the Court of a Chief Judicial Magistrate and that of a Metropolitan Magistrate, and the powers of the Court of a Magistrate of the First class.

Sentence of imprisonment in default of fine

Where a fine is imposed on an accused and it is not paid, the law provides that he can be imprisoned for a term in addition to a substantive imprisonment awarded to him, if any. Section 30 defines the limits of Magistrate's powers to award imprisonment in default of payment of fine.

It provides that the Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law provided the that the term:

I. is not in excess of the powers of the Magistrate under Section 29; and
II. where imprisonment has been awarded as part of the substantive sentence, it should not exceed 1/4th of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

Sentences in cases of conviction of several offences at one trial

Section 31 relates to the quantum of punishment which the Court is authorised to impose where the accused is convicted of two or more offences at one trial.

Arrest of Persons

Arrest without warrant (Section 41)

(a) who has been concerned in any cognizable offence or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or
(b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of housebreaking; or
(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or
(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or
(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or
(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or
(h) who being a released convict, commits a breach of any rule, relating to notification of residence or
(i) change of or absence from residence; or
(j) for whose arrest any requistion, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other causes for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

Arrest on refusal to give name and residence (Section 42)
If any person who is accused of committing a non-cognizable offence does not give his name, residence or gives a name and residence which the police officer feels to be false, he may be taken into custody. However, such person cannot be detained beyond 24 hours if his true name and address cannot be ascertained or fails to
execute a bond or furnish sufficient sureties. In that event he shall be forwarded to the nearest Magistrate having jurisdiction.

Arrest by a private person (Section 43)
A private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence or who is a proclaimed offender

Arrest how made (Section 46)
The Section authorises a police officer or other person making an arrest to actually touch or confine the body of the person to be arrested and such police officer or other person may use all necessary means to effect the arrest if there is forcible resistance.

The Section does not give a right to cause the death of a person who is not accused of an offence punishable with death sentence or life imprisonment

The word “arrest” consists of taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge and preventing the commission of a criminal offence.

Section 48 authorises a police officer to pursue the offender in to any place in India for the purpose of effecting his arrest without warrant.

Arrest out of India

Ordinarily, a police officer is not at liberty to go outside India and to arrest an offender without a warrant, but if he can arrest an offender without warrant who escapes into any place in India, he can be pursued and arrested by him without warrant.

Period of Custody

Persons arrested are to be taken before the Magistrate or officer-in-charge of a police station without unnecessary delay and subject to the provisions relating to bail, Article 22(2) of the Constitution of India also provides for producing the arrested person before the Magistrate within 24 hours.

When a person is arrested under a warrant, Section 76 becomes applicable, and when he is arrested without a warrant, he can be kept into custody for a period not exceeding 24 hours, and before the expiry of that period he is to be produced before the nearest Magistrate, who can under Section 167 order his detention for a term not exceeding 15 days, or he can be taken to a Magistrate, under whose jurisdiction he is to be tried, and such Magistrate can remand him to custody for a term which may exceed 15 days but not more than 60 days.

Officers in-charge of the concerned police stations shall report to the Magistrate the cases of all persons arrested without warrant, within the limits of their respective police stations whether such persons have been admitted to bail or otherwise. (Section 58)

A person arrested by a police officer shall be discharged only on his own bond or on bail or under the special order of a Magistrate, (Section 59).

If a person in lawful custody escapes or is rescued, the person, from whose custody he escaped or was rescued, is empowered to pursue and arrest him in any place in India and although the person making such arrest is not acting under a warrant and is not a police officer having authority to arrest, nevertheless, the provisions of section 47 are applicable which stipulates provisions relating to search of a place entered by the person sought to be arrested.

Summons and Warrants

The general processes to compel appearance are:

(a) Summons (Section 61)
(b) Warrants (Section 70)

Summon

A summon is issued either for appearance or for producing a document or thing which may be issued to an accused person or witness. Every summons issued by the Court shall be in writing, in duplicate, signed by the Presiding Officer of such Court or by such officer as is authorised by the High Court and shall bear the seal of the Court (Section 61).

The summons should be clear and specific in its terms as to the title of the Court, the place at which, the day and time of the day when, the attendance of the person summoned is required.

Service of summons

(a) The summons shall be served by a police officer or by an officer of the Court or other public servant (Section 62).
(b) When personal service of summons cannot be affected under Section 62, the extended service under Section 64 can be secured by leaving one of the duplicates with some adult male member of his family residing with him who may also be asked to sign the receipt for that. A servant is not a member of the family within the meaning of Section 64.

(c) In case the service cannot be effected by the exercise of due diligence, the serving officer can perform substituted service by affixing one of the duplicates of the summons to some conspicuous part of the house or homestead in which person summoned ordinarily resides, and thereupon the Court, after making such enquiries as it thinks fit may either declare that the summons has been duly served or order fresh service, as it considers proper (Section 65).

The service of summons on corporate bodies, and societies (Section 63)
The service of summons on a corporation may be effected by serving it on the secretary, local manager or other principal officer of the corporation, or by letter sent by registered post, addressed to the Chief Officer of the corporation in India, in which case the service shall be deemed to have been effected when the letter would
arrive in ordinary course of post.

In the case of a Government Servant (Section 66)
In the case of a Government Servant, the duplicate copy of the summons shall be sent to the head of the office by the Court and such head shall thereupon cause the summons to be served in the manner provided by Section 62 and shall return it to the Court under his signature with the endorsement required by Section 62. Such signature shall be evidence of due service.

Warrant of Arrest(Section 70)
Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court, and shall bear the seal of the Court. Such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed. The form of warrant of arrest is Form No. 2 of the Second Schedule.

The requisites of a warrant are as follows:
1. It must be in writing.
2. It must bear the name and designation of the person who is to execute it;
3. It must give full name and description of the person to be arrested;
4. It must state the offence charged;
5. It must be signed by the presiding officer; and
6. It must be sealed.

Procedure after arrest (Section 76)

The police officer or other person executing the warrant of arrest shall bring the person arrested before the Court without unnecessary delay provided that such delay shall not

in any case exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

Where a warrant remains unexecuted, the Code provides for two remedies:

(1) issuing a proclamation (Section 82); and
(2) attachment and sale of property (Section 83)

Issuing a proclamation
If a Court has reason to believe that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, the Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than 30 days from the date of publishing such proclamation. (Section 82)

While issuing proclamation, the Magistrate must record to his satisfaction that the accused has absconded or is concealing himself. The object of attaching property is not to punish him but to compel his appearance.

Production of Documents
Sometimes it is necessary that a person should produce a document or other thing which may be in his possession or power for the purposes of any investigation or inquiry under this Code. This can be compelled to be produced by issuing summons (Sections 91 and 92) or a warrant (Sections 93 to 98).

According to Section 93, a search warrant can be issued only in the following cases:
a. where the Court has reason to believe that a person summoned to produce any document or other thing will not produce it;
b. where such document or thing is not known to the Court to be in the possession of any person; or
c. where a general inspection or search is necesary. However, a search warrant may be general or restricted in its scope as to any place or part thereof.

But such warrant shall not be issued for searching a document, parcel or other thing in the custody of the postal or telegraph authority, by a magistrate other than a District Magistrate or Chief Judicial Magistrate

Security for keeping the peace and for good behaviour
The provisions of Chapter VIII are aimed at persons who are a danger to the public by reason of the commission of certain offences by them. The object of this chapter is prevention of crimes and disturbances of public tranquillity and breach of the peace.

Security for keeping the peace on conviction
When a Court of Session or Court of a Magistrate of first class convicts a person of any of the offences or of abetting any such offence and is of opinion that it is necessary to take security from such person for keeping the peace, the Court may, at the time of passing sentence on such person, order him to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding three years, as itthinks fit.

The offences specified under are as follows:

a) any offence punishable under Chapter VIII of the India Penal Code 1860.
b) any offence which consists of or includes, assault or using criminal force or committing mischief;
c) any offence of criminal intimidation;
d) any other offence which caused, or was intended or known to be likely to cause a breach of the peace.

However, if the conviction is set-aside on appeal or otherwise, the bond so executed shall become void. (Section 106)

Security for keeping the peace in other cases

When an Executive Magistrate receives information that any person is likely to:

i. commit a breach of peace; or
ii. disturb the public tranquillity; or
iii. do any wrongful act that may probably occasion a breach of the peace; or disturb the public tranquillity;

he may require such person to show cause why he should not be ordered to execute a bond for keeping the peace for a period not exceeding one year as the Magistrate deem fit. (Section 107)

A–Unlawful assemblies

Dispersal of assembly by use of civil force

Any Executive Magistrate or office in-charge of a police station or, in the absence of such officer in-charge, any other officer not below the rank of sub-inspector may command any unlawful assembly or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse and it shall be thereupon the duty of the members of such assembly to disperse accordingly.

If any such assembly does not disperse or conducts itself in a manner as to show a determination not to disperse, any Executive Magistrate or police officer referred to above may proceed to disperse such assembly by force and may require the assistance of any male person not being an officer or member of the armed forces and acting as such, for the purpose of dispersing such assembly and if necessary arresting and confining the persons who form part of it, in order to disperse such assembly. (Section 129)

No prosecution shall be instituted against such persons in any criminal Court except with the sanction of Central Government if the person is an officer or member of the armed forces or with the sanction of State Government in any other case.(Section 130)

B–Public nuisances

Conditional order for removal of nuisance Section 133 lays down the following public nuisances which can be proceeded against:

(a) the unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

(b) carrying on any trade or occupation, or keeping of any goods or merchandise, injurious to the health of the community; or
(c) the construction of any building or the disposal of any substance, as is likely to cause conflagration or explosion; etc.
(d) the building, tent or structure near a public place.
(e) the dangerous animal requiring destroying, confining or disposal.

For initiating prevention under this Section the Magistrate should keep in mind that he is acting purely in the public interest. For the applicability of clause A, the public must have the right of way which is being obstructed.

Power to issue order in urgent cases of nuisance or apprehended danger
As per Section 144 of the Code where in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this Section and immediate prevention or speedy remedy is desirable, in such cases the Magistrate may by a written order stating the material facts of the case and served in the manner provided by Section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent or tends to prevent, obstruction, annoyance of injury to any person lawfully employed, or danger to human life, health or safety or a disturbance of the public tranquillity, or a riot, or an affray.

An order under this Section may be passed ex-parte in cases of emergency or in cases where the circumstances do not admit of the serving of notice in due time upon the person against whom the order is directed. An order under this Section can remain in force for two months, and may be extended further for a period not exceeding 6 months by the State Government if it considers necessary.

Preventive Detention
Section 149 authorises a police officer to prevent the commission of any cognizable offence. If the police officer receives the information of a design to commit such an offence, he can communicate such information to his superior police officer and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence. The police officer may arrest the person without orders from Magistrate and without a warrant if the commission of such offence cannot be otherwise prevented.

The arrested person can be detained in custody only for 24 hours unless his further detention is required under any other provsions of this Code or of any other law.

Inspection of weights and measures (Section 153)
Any officer incharge of the police station may without a warrant enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false, and if he finds in such place any false weights, measures or instruments

he may seize the same and shall give information of such seizure to a Magistrate having jurisdiction.

INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

Information in cognizable cases (Section 154)

(a) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant.
(b) Every such information shall be signed by the person giving it and the substance thereof shall be entered ina book kept by such officer in such form as may be prescribed by the State Government in this behalf.
(c) The above information given to a police officer and reduced to writing is known as First Information Report (FIR).The investigation of the case proceeds on this information only. Thus, the principal object of this Section is to set the criminal law in motion and to obtain information about the alleged criminal activities so as to punish the guilty.
(d) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information may send the substance of such information in writing and by post to the Superintendent of Police concerned who if satisfied that such information discloses the commission of a cognizable offence shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him
(e) A copy of the information as recorded under sub-section (1) shall be given to the informant free of cost.

Information as to non-cognizable cases and investigation of such cases (Section 155)

(a) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf and refer the informant to the Magistrate.
(b) The police officer is not authorised to investigate a non-cognizable case without the order of Magistrate having power to try such cases, and on receiving the order, the police officer may exercise the same powers in respect of investigation as he may exercise in a cognizable case.
(c) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable. [Section 155(4)]

Police officer's powers to investigate cognizable case

In case of a cognizable offence the police officer may conduct investigations without the order of a Magistrate. Investigation includes all proceedings under the Code for the collection of evidence by the police officer or by any person who is authorised by the Magistrate in this behalf.

Any Magistrate empowered under Section 190 may order such investigation as above mentioned. Sections 160 and 161 authorise a police officer making an investigation to

require the attendance of and may examine orally any person who appears to be acquainted with the facts and circumstances of the case. *(Section 156)*

Search by police officer

This Section authorises general search if the police officer has reason to believe that anything necessary for the purpose of an investigations may be found. The officer acting under this sub-section must record in writing his reasons for making of a search. But, the illegality of search will not affect the validity of the articles or in any way vitiate the recovery of the articles and the subsequent trial. (Section 165)

Whenever any person is arrested or detained in custody and it appears that the investigation cannot be completed within the period of twenty four hours as laid down in Section 57 The Magistrate may authorise the detention of the accused in custody for a term not exceeding of fifteen days. (Section 167)

On completion of investigation, the competent police officer under the Code shall forward a police report with the prescribed details to a Magistrate empowered to take cognizance of the offence and send along with the report all documents or relevant extracts (Section173)

Cognizance of an offence by Magistrate Section 190

Any Magistrate of first class and of the second class specially empowered may take cognizance of an offence upon:

a. receiving a complaint of facts constituting such offence;
b. a police report of such facts;
c. information received from any person other than a police officer;
d. His own knowledge that such offence has been committed.

Complaints to Magistrates

(a) A Magistrate taking cognizance of an offence on complaint examines the complainant and the witnesses if any upon oath and then the substance of such examination is reduced to writing and signed by the complainant and witnesses and also by the Magistrate.
(b) The Magistrate enquiring into a case may take evidence of witnesses on oath but where the offence is triable by the Court of Session, he shall call upon the complainant to produce all his witnesses and examines them on oath.
(c) He may dismiss the complaint if after considering the statement on oath and the result of the investigation or enquiry, there is no sufficient ground for proceeding and may record his reasons for doing so.
(d) On the other hand if the Magistrate is of opinion that there is sufficient ground for taking cognizance of an offence he may either issue summons for attendance of the accused
(e) If the case appears to be a summons-case or he may in a warrant case issue a warrant or summons for the accused to be produced at a certain time before such Magistrate.
(f) It is important that no summon or warrant shall be issued against the accused unless a list of prosecution witnesses has been filed.

(g) Every charge under this Code shall state the offence with which the accused is charged specifying the law and the name of the offence, particulars of time and place of the alleged offence.
(h) For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately.
(i) If more than one offence is committed by the same person in one series of acts so connected together as to form the same transaction, he may be charged with and tried at one trial for every such offence.
(j) Persons accused of the same offence, committed in the course of the same transaction, or abetment of such offence may be charged jointly and tried together.
(k) The judgement in every trial in any Criminal Court of original jurisdiction shall be pronounced by the presiding officer by delivering or reading out the whole of the judgement or the operative part of the judgement in open Court. (Section 353)
(l) Every judgement should be written in the language of the Court and should contain the point or points for determination, the decision thereon and the reasons for the decision.
(m) It should specify the offence and the Section of Indian Penal Code or other law under which the accused is convicted and the punishment to which he is sentenced.
(n) no court when it has signed its judgement or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error (Section 362)

Appeal

No appeal shall lie from any judgement or order of Criminal Court except as provided for by this Code (Section 372). In the case of an acquittal, the State. Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

Every appeal in the case of appealable orders shall be made in the form of a petition in writing presented by the appellant or his pleader and shall be accompanied by a copy of the judgement or order appealed against.

An Appellate Court may if it thinks additional evidence to be necessary shall record its reasons and may either take such evidence itself or direct it to be taken by a Magistrate. (Section 391)

A Court may refer a case to High Court if it is of the opinion that is involves a question as to validity of any Act, Ordinance or Regulation and the Court is of opinion that such Act, Ordinance, or Regulation is in-operative or invalid but has not been declared so by the High Court or the Supreme Court. The Court has to state setting out its opinion and the reasons therefor, and refer the same for the decision of the High Court

Bail

U/s 438, provisions have been made for a person who has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction and that Court may if it thinks fit direct that in the event of such arrest, the person shall be released on bail on such conditions which the Court may include in such directions.

Limitation or Taking Cognizance

Code prescribes limitation period for taking cognizance of certain offences. (Sections 467 to 473)Except as otherwise specifically provided in the Code, no Court shall take cognizance of an offence after the expiry of the period of limitation mentioned below:

i. 6 months, if the offence is punishable with fine only.
ii. 1 year, if the offence is punishable with imprisonment for a term not exceeding one year; and
iii. 3 years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

Commencement of the period of limitation

The period in relation to an offender commences

(a) on the date of the offence;
(b) if the commission of the offence was not known to the person aggrieved or to the police officer, the first day on which either such offence comes to the knowledge of such person or to any police officer, whichever is earlier;
(c) Where the identity of the offender is not known, the first day on which such identity becomes known either to the person aggrieved or the police officer whichever is earlier.

Section 470 provides provisions for exclusion of time in certain cases.

These are as under:

(a) The period during which another prosecution was diligently prosecuted (the prosecution should relate to the same facts and is prosecuted in good faith);
(b) the period of the continuance of the stay order or injunction (from the date of grant to the date of withdrawal) granted against the institution of prosecution;
(c) where notice of prosecution has been given, the period of notice;
(d) where previous sanction or consent for the institution of any prosecution is necessary, the period required for obtaining such consent or sanction including the date of application for obtaining the sanction and the date of the receipt of the order;
(e) the period during which the offender is absent from India or from territory outside India under Central Govt. Administration; and
(f) Period when the offender is absconding or concealing himself.
(g) If limitation expires on a day when the Court is closed, cognizance can be taken on the day the Court re-opens.

Continuing offence – In the case of a continuing offence, a fresh period of limitation begins to run at every moment during which the offence continues.

Extension of period of limitation – The Court may take cognizance of an offence after the expiry of the period of limitation if it is satisfied that -

(a) the delay is properly explained or
(b) it is necessary to do so in the interests of justice.

Summary trial

Summary trial means the "speedy disposal" of cases. Section 260(1) of the Criminal Procedure Code sets out the provisions for summary trials. It says:

(a) any Chief Judicial Magistrate;

(b) any Metropolitan Magistrate;
(c) any Magistrate of the First class who is specially empowered in this behalf by the High Court, may, if he thinks fit, try in a summary way all or any of the following offences:

I. offences not punishable with death, imprisonment for life or imprisonment for a term exceeding two years;
II. theft under Section 379, Section 380 or Section 381 of the Indian Penal Code, where the value of the property stolen does not exceed Rs. 2000;
III. receiving or retaining stolen property, under Section 411 of the Indian Penal Code, where the value of such property, does not exceed Rs. 2000;
IV. assisting in the concealment or disposal of stolen property, under Section 414 of the Indian Penal Code, where the value of such property does not exceed Rs. 2000;
V. offences under Sections 454 and 456 of the Indian Penal Code;insult with intent to provoke a breach of the peace, under Section 504 of the Indian Penal Code;
VI. abetment of any of the foregoing offences;
VII. an attempt to commit any of the foregoing offences, when such attempt is an offence;
VIII. any offence constituted by an act in respect of which a complaint may be made under Section 20 of the Cattle Trespass Act, 1871.

Record in summary trials

The Magistrate shall enter in the prescribed form the following particulars in every case tried summarily:
(1) The serial number of the case;
(2) The date of the commission of the offence;
(3) The date of the report or complaint;
(4) The name of the complainant (if any);
(5) The name, parentage and residence of the accused;
(6) The offence complained of and the offence proved, and the value of the property in respect of which the offence has been committed if the case comes under clause (ii) (iii) or (iv) of Section 260(1).
(7) the plea of the accused and his examination if any;
(8) the findings;
(9) the sentence or other final order;
(10) the date on which proceedings terminated.

The register containing the particulars mentioned above forms the record in a summary trial.

Judgement in summary trials

In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgement containing a brief statement of the reason for the finding. The concerned Magistrate must sign such record and judgement.
The question whether a case may be tried summarily by a Magistrate as provided in this Section and if the offence is summarily triable, it is a matter of discretion of the Magistrate, which is to be judicially exercised with due care as well as considering the circumstances of the case.

Maximum imprisonment under summery trial the person found guilty in a summary trial can be sentenced to imprisonment maximum for a period of 3 months.

Judgement in summary trials

In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgement containing a brief statement of the reason for the finding. The concerned Magistrate must sign such record and judgement.

INDIAN EVIDENCE ACT, 1872

Introduction

The "Law of Evidence" may be defined as a **system of rules** for ascertaining controverted questions of fact in judicial inquiries.
This system of ascertaining the facts, which are the essential elements of a right or liability and is the primary and perhaps the most difficult function of the Court, is regulated by a **set of rules and principles** known as "**Law of Evidence**".
The Indian Evidence Act, 1872 is an Act to **consolidate, define and amend** the Law of Evidence.
The Act extends to the whole of India **except the State of Jammu and Kashmir**
It **applies** to **all judicial proceedings** in or before any Court, including Court-martial other than

- the Court-martial convened under the Army Act,
- the Naval Discipline Act or
- the Indian Navy Discipline Act, 1934 or
- the Air Force Act

but **not to affidavits** presented to any Court or officer, or to proceedings before an arbitrator

Judicial Proceedings

- The Act **does not define** the term "judicial proceedings"
- It is defined under **Section 2(i)** of the **Criminal Procedure Code** as "a proceeding in the course of which evidence is or may be legally taken on oath".
- The **proceedings under the Income Tax** are **not "judicial proceedings"** under this Act.
- The Act is also **not applicable to the proceedings before an arbitrator**.
- An **affidavit** is a **declaration sworn** or affirmed before a person competent to administer an oath. Thus, an affidavit per se **does not become evidence** in the suits but it **can become evidence only by consent** of the party or if specifically, authorised by any provision of the law.

Evidence

- The term evidence is defined under **Section 3** of the Evidence Act as follows:
  "Evidence" means and **includes**:
  1) all **statements** which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;
  2) all **documents** (including electronic records) produced for the inspection of the Court; such documents are called documentary evidence.

- The word evidence in the Act signifies **only the instruments** by means of which **relevant facts are brought** before the Court, viz., witnesses and documents, and by means of which the court is convinced of these facts.
- Evidence may be either **oral or personal**.
- In general, the rules of evidence are same in civil and criminal proceedings but there is a strong and marked **difference** as to the **effect of evidence in civil and criminal proceedings**. In the former a mere preponderance of probability due regard being had to the burden of proof, is sufficient basis of a decision, but in the latter, specially when the offence charged amounts to felony or treason, a much higher degree of assurance is required. The persuasion of guilt must amount to a moral certainty such as to be beyond all reasonable doubt.

Facts

According to **Section 3**, *"fact"* means and **includes**:

a) **anything**, state of things, or relation of things capable of being perceived by the senses;
b) **any mental condition** of which any person is conscious.

Thus facts are classified into **physical and psychological facts**.

Illustrations

a) That a man heard or saw something, is a fact.
b) That a man has a certain reputation, is a fact.

(a)is example of physical facts whereas (b)is example of psychological bids

Section 5

This Section provides that evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

The Explanation appended to Section 5, however, makes it clear that this section shall not enable any person to give evidence of a fact to which he is disentitled to prove by any provision of the law.

Evidence may be given of **facts in issue** and **relevant facts**.

1) Relevant Fact

- Relevant facts are those inter-connected facts which prove the existence or non-existence of facts in issue. It is not an essential ingredient of a right or liability.
- Where in a case direct evidence is not available to prove a fact in issue then it may be proved by any circumstantial evidence and in such a case every piece of circumstantial evidence would be an instance of a "relevant fact".
- Relevant facts can be:
  - **i. Logical relevancy and legal relevancy**
    A fact is said to be logically relevant to another when it bears such casual relation with the other as to render probably the existence or non-existence of the latter. All facts logically relevant are not, however, legally relevant.
  - **ii. Legal relevancy and admissibility**

Relevancy and admissibility are not co-extensive or interchangeable terms. A fact may be legally relevant, yet its reception in evidence may be prohibited on the grounds of public policy, or on some other ground. Similarly every admissible fact is not necessarily relevant.

2) Facts in issue

"facts in issue" means and includes-any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceedings, necessarily follows. The facts which establish the litigated right or liability is called fact in issue. It is called 'factum probandum'.

Illustration

A is accused of the murder of B.

At his trial the following facts may be in issue:

- that A caused B's death;
- that A intended to cause B's death;
- that A had received grave and sudden provocation from B;
- that A at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature.

Thus, 'facts in issue' are those facts, which are alleged by one party and denied by other party in the pleading in a civil case or alleged by the prosecution and denied by the accused in a criminal case.

Facts in issue and issues of fact

Under Civil Procedure Code, the Court has to frame issues on all disputed facts which are necessary in the case. These are called issues of fact but the subject matter of an issue of fact is always a fact in issue.

Thus when described in the context of Civil Procedure Code, it is an 'issue of fact' and when described in the language of Evidence Act it is a 'fact in issue'. Thus as discussed above, distinction between facts in issue and relevant facts is of **fundamental importance**.

Classification of relevant facts

Relevant facts may be classified in the following form:

i. facts connected with the facts to be proved;
ii. statement about the facts to be proved e.g. admission, confession;
iii. statements by persons who cannot be called as witnesses;
iv. statements made under special circumstances;
v. how much of a statement is to be proved;
vi. judgements of Courts of justice, when relevant;
vii. opinions of third persons, when relevant;
viii. character of parties in Civil cases and of the accused in criminal cases.

Two **fundamental rules** on which the law of evidence is based are:

a) no facts other than those having rational probative value should be admitted in evidence and,
b) all facts having rational probative value are admissible in evidence unless excluded by a positive rule of paramount importance.

- The Court 'may presume' a fact as may be provided by the Act, unless and until it is disproved or may call for proof of it.
- **Presumption** has been defined as an **inference, affirmative or affirmative of the existence** of some fact, drawn by a judicial tribunal, by a process of probable reasoning form some matter of fact, either judicially noticed, admitted or established by legal evidence to the satisfaction of the tribunal. It is an inference of the existence of some fact, which is drawn, without evidence, from some other fact already proved or assumed to exist (wills).
- Presumption **is either of a fact or law**.
- These presumptions which are inference are always rebuttable.
- Presumption of law is either conclusive or rebuttable.
- The Act also provides that when one fact is declared by this Act to be conclusive proof of another, the court shall on the proof of the one fact, regard the other as proved and shall not allow evidence to be given for the purpose of disproving it.

Relevancy of facts connected with the fact to be proved

The facts coming under this category are as follows:

1) ***Res gestae or facts which though not in issue, are so connected with a fact in issue as to form part of the same transaction.***

   Section 6 embodies the **rule of admission of evidence** relating to what is commonly known as **res gestae**. Acts or declarations accompanying the transaction or the facts in issue are treated as part of the res gestae and admitted as evidence. The obvious ground for admission of such evidence is the spontaneity and immediacy of the act or declaration in question.

   Illustration
   Arman is accused of the murder of Bharat by beating him. Whatever was said or done by Arman or Bharat or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact. The entire conversations, act between Arman, Bharat and by-standers shall be treated as *Res Gestae.*

2) ***Facts constituting the occasion, or effect of, or opportunity or state of things for the occurrence of the fact to be proved whether it be a fact or another relevant fact.*** **(Section 7)**

   Illustration
   The question is, whether A robbed B.
   The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

3) ***Motive, preparation and previous or subsequent conduct.***

   - According to **Section 8**, any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

- What is relevant under Section 8 is the particular act upon the statement and the statement and the act must be so blended together as to form a part of a thing observed by the witnesses and sought to be proved.
- ***Motive*** means which moves a person to act in a particular way. It is different from intention. Motive is a psychological fact and the accused's motive, will have to be proved by circumstantial evidence.
- The Section makes the conduct of certain persons relevant. Conduct means behaviour. The conduct of the parties is relevant. The conduct to be relevant must be closely connected with the suit, proceeding, a fact in issue or a relevant fact,. It must influence the decision. If these conditions are satisfied it is immaterial whether the conduct was previous to or subsequent to the happening of the fact in issue.

Illustrations
A is tried for the murder of B. The fact that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

4) Facts necessary to explain or introduce relevant facts.
According to **Section 9**, such facts are -

i. which are necessary to explain or introduce a fact in issue or relevant fact, or
ii. which support or rebut an inference suggested by a fact in issue or relevant fact, or
iii. which establish the identity of a person or thing whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or
iv. which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Facts which establish the identity of an accused person are relevant under Section 9.

Illustrations
The question is, whether a given document is the will of A. The state of A's property and of his family at the date of the alleged will may be relevant facts.

Statements about facts to be proved

The general rule known as the hearsay rule is that what is stated about the fact in question is irrelevant. To this general rule there are **three exceptions** which are:

1. Admissions and Confessions
Sections 17 to 31 lay down the first exception to the general rule known as admissions and confessions.

Admissions

- An admission is defined in Section 17 as a **statement**, oral or documentary or *contained in electronic form* which **suggests any inference** as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances mentioned under Sections 18 to 20.
- Admission may be **verbal or contained in documents** as maps, bills, receipts, letters, books etc.

- An admission may be made by a party, by the agent or predecessor-in-interest of a party, by a person having joint propriety of pecuniary interest in the subject matter or by a "reference".
- An admission is the **best evidence** against the party making the same unless it is untrue and made under the circumstances which does not make it binding on him.
- An admission by the Government is merely relevant and non-conclusive, unless the party to whom they are made has acted upon and thus altered his detriment.
- An admission must be **clear, precise**, not vague or ambiguous.
- Admission means conceding something against the person making the admission. That is why it is stated as a general rule (the exceptions are in Section 21), that admissions must be self-harming; and because a person is unlikely to make a statement which is self-harming unless it is true evidence of such admissions as received in Court.
- Admissions by conduct are not covered by these sections.
- *Oral admissions as to the contents of electronic records are not relevant unless the genuineness of the record produced is in question. (Section 22A)*

Confessions

- **Sections 24 to 30** deal with confessions. However, the Act does **not define** a confession but includes in it admissions of which it is a species. Thus confessions are **special form of admissions**.
- Whereas **every confession must be an admission but every admission may not amount to a confession**.
- A confession is relevant as an admission unless it is made:
  i. to a person in authority in consequence of some inducement, threat or promise held out by him in reference to the charge against the accused;
  ii. to a Police Officer; or
  iii. to any one at a time when the accused is in the custody of a Police Officer and no Magistrate is present.
- Thus, a statement made by an accused person if it is an admission, is admissible in evidence. The confession is evidence only against its maker and against another person who is being jointly tried with him for an offence.
- **Section 30** is an **exception to the general rule** that confession is only an evidence against the confessor and not against the others.
  The confession made in front of magistrate in a native state recorded is admissible against its maker is also admissible against co-accused under Section 30.
- The Privy Council in *Pakala Narayanaswami* v. *Emperor,* observed that:
  No statement that contains self-exculpatory matter can amount to confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. All confessions are admissions but not *vice versa.*
  A confession must, either admit, in terms the offence, or substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, is not of itself a confession. For example, an admission that the accused was the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession of the knife or revolver. A confession cannot be construed as meaning a statement by the accused suggesting the inference that he committed the crime.

- According to Section 24, **confession caused by inducement**, threat or promise is **irrelevant**. To attract the prohibition contained in Section 24 of the Evidence Act the following **six facts** must be established:
  (i) that the statement in question is a confession;
  (ii) that such confession has been made by an accused person;
  (iii) that it has been made to a person in authority;
  (iv) that the confession has been obtained by reason of any inducement, threat or promise proceeded from a person in authority;
  (v) such inducement, threat or promise, must have reference to the charge against the accused person;
  (vi) the inducement, threat or promise must in the opinion of the Court be sufficient to give the accused person grounds, which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.
- To exclude the confession, it is **not always necessary to prove** that it was the result of inducement, threat or promise. It is sufficient if a legitimate doubt is created in the mind of the Court or it appears to the Court that the confession was not voluntary. It is however for the accused to create this doubt and not for the prosecution to prove that it was voluntarily made. A confession if voluntary and truthfully made is an efficacious proof of guilt.

Difference between Admission and Confession

Admission	**Confession**
It means voluntary acknowledgement of existence of truth of particular fact	It means a statement made by accused admitting his guilt
Admission is a genesis	Confession is specie hence all confessions are admissions but all admissions are not confessions.
It is defined under Indian Evidence Act, 1872	It is not defined
It can be oral or written	It should be in writing and signed by the parties.
It may or may not be voluntary	It is always mandatory

2. Statements by persons who cannot be called as witnesses

Certain statements made by persons who are dead, or cannot be found or produced without unreasonable delay or expense, makes the second exception to the general rule. However, the following conditions must be fulfilled for the relevancy of the statements:

a) That the statement must relate to a fact in issue or relevant fact,
b) That the statement must fall under any of following categories:
   i. the statement is made by a person as to the cause of this death or as to any of the circumstances resulting in his death;
   ii. statement made in the course of business;

iii. Statement which is against the interest of the maker;
iv. a statement giving the opinion as to the public right or custom or matters of general interest;
v. a statement made before the commencement of the controversy as to the relationship of persons, alive or dead, if the maker of the statement has special means of knowledge on the subject;
vi. a statement made before the commencement of the controversy as to the relationship of persons deceased, made in any will or deed relating to family affairs to which any such deceased person belong;
vii. a statement in any will, deed or other document relating to any transaction by which a right or custom was created, claimed, modified, etc.;
viii. a statement made by a number of persons expressing their feelings or impression;
ix. evidence given in a judicial proceeding or before a person authorised by law to take it, provided that the proceeding was between the same parties or their representatives in interest and the adverse party in the first proceeding had the right and opportunity to cross examine and the questions in issue were substantially the same as in the first proceeding.

Illustrations

The question is, whether A was murdered by B; or A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B; or The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the course of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration are relevant facts.

3. Statements made under special circumstances

The following statements become relevant on account of their having been made under special circumstances:

i. Entries made in books of account, including those maintained in an electronic form regularly kept in the course of business. Such entries, though relevant, cannot, alone, be sufficient to charge a person with liability; **(Section 34)**
ii. Entries made in public or official records or an *electronic record* made by a public servant in the discharge of his official duties, or by any other person in performance of a duty specially enjoined by the law; **(Section 35)**
iii. Statements made in published maps or charts generally offered for the public sale, or in maps or plans made under the authority of the Central Government or any State government; **(Section 36)**
iv. Statement as to fact of public nature contained in certain Acts or notification; **(Section 37)**
v. Statement as to any foreign law contained in books purporting to be printed or published by the Government of the foreign country, or in reports of decisions of that country. **(Section 38)**
vi. When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or is contained in part of electronic record or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, *electronic record,* book or

of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made. **(Section 39)**

Opinion of third persons when relevant

The **general rule** is that **opinion of a witness** on a question whether of fact or law, is **irrelevant**. However, there are **some exceptions** to this general rule. These are:

a) Opinions of experts. (Section 45)

- ***Illustration* -** The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.
  The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant. Similarly the opinions of experts on typewritten documents as to whether a given doucment is typed on a particular typewriter is relevant.
- As a general rule the opinion of a witness on a question whether of fact, or of law, is irrelevant. Witness has to state the facts which he has seen, heard or perceived, and noted the conclusion, form of observations. The functions of drawing inferences from facts is a judicial function and must be performed by the Court.
- Opinions of experts are relevant upon a point of (a) foreign law (b) science (c) art (d) identity of hand writing (e) finger impression special knowledge of the subject matter of enquiry become relevant.

b) Facts which support or are inconsistent with the opinions of experts are also made relevant. (Section 46)

c) Others: In addition to the opinions of experts, opinion of any other person is also relevant in the following cases:

- Opinion as to the handwriting of a person if the person giving the opinion is acquainted with the handwriting of the person in question; (**Section 47**)
- Opinion as to the digital signature of any person, the opinion of the Certifying Authority which has issued the Digital Signature Certificate; (**Section 47A**)
- Opinion as to the existence of any general right or custom if the person giving the opinion is likely to be aware of the existence of such right or custom; (**Section 48**)
- Opinion as to usages etc. words and terms used in particular districts, if the person has special means of knowledge on the subject; (**Section 49**)
- Opinion expressed by conduct as the existence of any relationship by persons having special means of knowledge on the subject. (**Section 50**)

Facts of which evidence cannot be given (Privileged Communications)

There are some facts of which evidence cannot be given though they are relevant, such as facts coming under Sections 122, 123, 126 and 127, where evidence is prohibited under those Sections. They are also referred to as 'privileged communications'
A witness though compellable to give evidence is privileged in respect of particular matters within the limits of which he is not bound to answer questions while giving evidence. These are based on public policy and are as follows:

i. Evidence of a Judge or Magistrate in regard to certain matters; (Section 121)
ii. Communications during marriage; (Section 122)
iii. Affairs of State; (Section 123)
iv. Official communications; (Section 124)
v. Source of information of a Magistrate or Police officer or Revenue officer as to commission of an offence or crime; (Section 125)
vi. In the case of professional communication between a client and his barrister, attorney or other professional or legal advisor (Sections 126 and 129). But this privilege is not absolute and the client is entitled to waive it.

Under **Section 122** of the Act, communication between the husband and the wife during marriage is privileged and its disclosure cannot be enforced. This provision is based on the principle of domestic peace and confidence between the spouses. The Section contains two parts; the first part deals with the privilege of the witness while the second part of the Section deals with the privilege of the husband or wife of the witness.

Evidence as to affairs of State

Section 123 applies only to evidence derived from unpublished official record relating to affairs of State. According to Section 123, no one shall be permitted to give any evidence derived from unpublished official
records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Professional communications

- **Section 126 to 129** deal with the professional communications between a legal adviser and a client, which are protected from disclosure.
- A client cannot be compelled and a legal adviser cannot be allowed without the express consent of his client to disclose oral or documentary communications passing between them in professional confidence.
- The rule is founded on the impossibility of conducting legal business without professional assistance and securing full and unreserved communication between the two.
- Under Sections 126 and 127 neither a legal adviser i.e. a barrister, attorney, pleader or vakil (Section 126) nor his interpreter, clerk or servant (Section 128) can be permitted to disclose any communication made to him in the course and for the purpose of professional employment of such legal adviser or to state the contents or condition of any document with which any such person has become acquainted in the course and for the purpose of such employment.

- In general it is not open to a party to test the credit or impeach the "truthfulness of a witness offered by him. But the Court can in its discretion allow a party to cross examine his witness" if the witness unexpectedly turns hostile. (Section 154)

Oral, Documentary and Circumstantial Evidence

The Act divides the subject of proof into **two parts**:

(i) **proof of facts** other than the contents of documents;

(ii) **proof of documents** including proof of execution of documents and proof of existence, condition and contents of documents.

However, all facts except contents of documents or *electronic records* may be proved by oral evidence (Section 59) which must in all cases be "direct" (Section 60). The direct evidence means the evidence of the person who perceived the fact to which he deposes. Thus, the two broad rules regarding oral evidence are:

i. all facts except the contents of documents may be proved by oral evidence;

ii. oral evidence must in all cases be "direct".

Oral evidence means statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry. But, if a witness is unable to speak he may give his evidence in any manner in which he can make it intelligible as by writing or by signs. (Section 119)

Direct evidence

- In **Section 60** of the Evidence Act, expression "oral evidence" has an altogether different meaning. It is used in the sense of "original evidence" as distinguished from "hearsay" evidence and it is not used in contradiction to "circumstantial" or "presumptive evidence".
- According to Section 60 oral evidence must in all cases whatever, be direct; that is to say:
  - if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;
  - if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;
  - if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;
  - if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.
- Thus, if the fact to be proved is one that could be seen, the person who saw the fact must appear in the Court to depose it, and if the fact to be proved is one that could be heard, the person who heard it must appear in the Court to depose before it and so on.
- In defining the direct evidence in Section 60, the Act impliedly enacts what is called the rule against hearsay. Since the evidence as to a fact which could be seen, by a person who did not see it, is not direct but hearsay and so is the evidence as to a statement, by a person who did hear it.

Documentary evidence

A *"document"* means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used for the purpose of recording that matter. Documents produced for the inspection of the Court is called Documentary Evidence.

Section 60 provides that the contents of a document must be proved either by primary or by secondary evidence.

Primary evidence

"*Primary evidence*" means the document itself produced for the inspection of the Court (Section 62). The rule that the best evidence must be given of which the nature of the case permits has often been regarded as expressing the great fundamental principles upon which the law of evidence depends. The general rule requiring primary evidence of producing documents is commonly said to be based on the best evidence principle and to be supported by the so called presumption that if inferior evidence is produced where better might be given, the latter would tell against the withholder.

Secondary evidence

Secondary evidence is generally in the form of compared copies, certified copies or copies made by such mechanical processes as in themselves ensure accuracy. Section 63 defines the kind of secondary evidence permitted by the Act. According to Section 63, "secondary evidence" means and includes.

1. certified copies given under the provisions hereafter contained;
2. copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;
3. copies made from or compared with the original;
4. counterparts of documents as against the parties who did not execute them;
5. oral accounts of the contents of a document given by some person who has himself seen it.

Section 65 stipulates the cases in which secondary evidence relating to documents may be given. As already stated, documents must be proved by primary evidence but in certain cases for example, where the document is lost or destroyed or the original is of such a nature as not to be easily, movable, or consists of numerous documents, or is a public document or under some law by a certified copy, the existence, condition or contents of the document may be proved by secondary evidence.

Special Provisions as to Evidence Relating to Electronic Record

Section 65A provides that the contents of electronic records may be proved in accordance with the provisions of Section 65B.

Under **Section 65B(1**) any **information contained in an electronic record** which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be **deemed** to be also a **document**, if the conditions mentioned in this Section are satisfied in relation to the information and computer in question and shall be **admissible in any proceedings**, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

Circumstantial evidence

- In English law the expression direct evidence is used to signify evidence relating to the 'fact in issue' (*factum probandum*) whereas the terms circumstantial evidence, presumptive evidence and indirect evidence are used to signify evidence which relates only to "relevant fact" (*facta probandum*).

- However, under Section 60 of the Evidence Act, the expression "direct evidence" has altogether a different meaning and it is not intended to exclude circumstantial evidence of things which could be seen, heard or felt. Thus, evidence whether direct or circumstantial under English law is "direct" evidence under Section 60.
- Before acting on circumstances put forward are satisfactorily proved and whether the proved circumstances are sufficient to bring the guilt to the accused the Court should not view in isolation the circumstantial evidence but it must take an overall view of the matter.

Presumptions

The Act recognises some rules as to presumptions. Rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and coincidence of facts and circumstances. A presumption is not in itself an evidence but only makes a prima facie case for the party in whose favour it exists. A presumption is a rule of law that courts or juries shall or may draw a particular inference from a particular fact or from particular evidence unless and until the truth of such inference is disproved.
There are three categories of presumptions:

i. presumptions of law, which is a rule of law that a particular inference shall be drawn by a court from particular circumstances.
ii. presumptions of fact, it is a rule of law that a fact otherwise doubtful may be inferred from a fact which is proved.
iii. mixed presumptions, they consider mainly certain inferences between the presumptions of law and presumptions of fact.

The terms presumption of law and presumption of fact are not defined by the Act. Section 4 only refers to the terms "conclusive proof", "shall presume" and "may presume". The term "conclusive proof" specifies those presumptions which in English Law are called irrebuttable presumptions of law; the term "shall presume" indicates rebuttable presumptions of law; the term "may presume" indicates presumptions of fact. When we
see a man knocked down by a speeding car and a few yards away, there is a car going, there is a presumption of fact that the car has knocked down the man.

Estoppel

The general rule of estoppel is when one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative to deny the truth of that thing (Section 115). However, there is no estoppel against the Statute. Where the Statute prescribes a particular way of doing something, it has to be done in that manner only. Other relevant Sections are Sections 116 and 117.

Principle of Estoppel

Estoppel is based on the maxim *'allegans contratia non est audiendus'* i.e. a person alleging contrary facts should not be heard. The principles of estoppel covers one kind

of facts. It says that man cannot approbate and reprobate, or that a man cannot blow hot and cold, or that a man shall not say one thing at one time and later on say a different thing.

The doctrine of estoppel is based on the principle that it would be most inequitable and unjust that if one person, by a representation made, or by conduct amounting to a representation, has induced another to act as he would not otherwise have done, the person who made the representation should not be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it (*Sorat Chunder* v. *Gopal Chunder*).

Estoppel is a rule of evidence and does not give rise to a cause of action. Estoppel by record results from the judgement of a competent Court (Section 40, 41). It was laid down by the Privy Council in *Mohori Bibee* v. *Dharmodas Ghosh,* (1930) 30 Cal. 530 PC, that the rule of estoppel does not apply where the statement is made to a person who knows the real facts represented and is not accordingly misled by it. The principle is that in such a case the conduct of the person seeking to invoke rule of estoppel is in no sense the effect of the representation made to him. The main determining element is not the effect of his representation or conduct as having induced another to act on the faith of such representation or conduct.

Different kinds of Estoppel:

1. Estoppel by Attestation
2. Estoppel by Contract
3. Constructive Estoppel
4. Estoppel by Election
5. Estoppel by Negligence
6. Estoppel by Silence
7. Equitable Estoppel.

SPECIAL COURTS, TRIBUNALS UNDER COMPANIES ACT & OTHER LEGISLATIONS

INTRODUCTION

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 word quasi means 'not exactly'. So tribunals are not court but they are bodies formed under specific act to resolve disputes.

To overcome the situation that arose due to the pendency of cases in various Courts, domestic tribunals and other Tribunals have been established under different Statutes, hereinafter referred to as the Tribunals. A 'tribunal' in the legal perspective is different from a domestic tribunal. The 'domestic tribunal' refers to the administrative agencies designed to regulate the professional conduct and to enforce disciple among the members by exercising investigatory and adjudicatory powers. Whereas, Tribunals are

the quasi-judicial bodies established to adjudicate disputes related to specified matters which exercise the jurisdiction according to the Statute establishing them.

Matters related to Companies Act are referred to NCLT.

Parties aggrieved by decision of NCLT can file appeal to NCLAT.

Parties aggrieved by decision of NCLAT can file an appeal to Supreme Court.

BACKGROUND OF ESTABLISHMENT OF NCLT AND NCLAT

Tribunals play a vital part of our Judiciary system, and it is necessary to ensure that a Tribunal is setup to deal with those cases under special laws as may be applicable therein, thus providing specialized adjudications.

Though the Tribunals cannot decide following cases:

- Those disputes which are basically criminal in nature.
- A case which involves substantial question of law.

The Companies (Amendment) Act, 2002 introduced the NCLT as a dedicated tribunal to handle certain matters under the Companies Act, 1956 and allied. Though it got knotted in a stretched litigation of 14 years. National Company Law Tribunal (NCLT) & the Appellate Tribunal have been constituted by the Central Govt. under section 408 & 410 of the Companies Act, 2013 (the Act) to exercise and discharge the powers and functions conferred on NCLT. The Appellate Tribunal is required to hear appeals against the orders of the NCLT.

POWERS OF NCLT UNDER COMPANIES ACT,2013

Powers of NCLT	***Section under Companies Act, 2013***
Chapter –I "Preliminary"	
To allow certain companies or body corporate to have a different financial year	2(41)
Chapter –II "Incorporation of Company and matters incidental thereto"	
In case a company has got incorporated by furnishing any false or incorrect information or by suppression of any material fact or information, NCLT can pass such orders as it thinks fit.	7(7)

Any assets remaining on wind-up of Section 8 company may be transferred to another company having similar objects with the approval of Tribunal or transferred to the Rehabilitation and Insolvency Fund u/s 269.	8(9)
Conversion of a public company into a private company requires the approval of NCLT.	Proviso of 14(1)
Chapter -IV "Share Capital and Debentures"	
Not less than ten percent of the issued shares of a class, who did not consent to a variation, may apply to the Tribunal for cancelling the variation.	48(2)
NCLT can approve issue of further redeemable preference shares when a company is unable to redeem its existing unredeemed preference shares or to pay dividend thereon.	55(3)
NCLT can order forthwith redemption of such preference shares the holder of which have not consented to the issue of further redeemable preference shares.	Proviso of 55 (3)
To make an order imposing prohibition on delivery of certificates for the securities issued by a company.	56(4)
The transferee of shares in a private company may appeal to the NCLT within one month from the receipt of notice of refusal or within sixty days from the date on which the instrument of transfer or intimation of transmission was delivered to the company.	58(3)
The transferee in a public company within sixty days of refusal to register transfer or transmission, or within ninety days of delivery of instrument of transfer or of intimation of transmission may apply to the NCLT for relief.	58(4)
To dismiss appeal against refusal to register transfer and transmission of shares OR to direct rectification of register and payment of damages by company.	58(5)
To order rectification of register of members on transfer or transmission of shares.	59(2)
To direct a Company or depository to set right a contravention of SCRA or SEBI Act or any other law, resulting by transfer of securities and to rectify concerned registers and records held by the Company or depository.	59 (4)
To approve Consolidation and division of share capital resulting in change in voting percentage of shareholders.	Proviso under 61(1)(b)
Where the terms of conversion of debentures into shares of a company ordered by the Government are not acceptable to the company, the company may appeal to the Tribunal for making such order as it may deem fit.	Proviso under 62(4)

Confirmation by NCLT for reduction of capital in a company limited by shares or guarantee and having share capital.	66(1)
Where the assets of a company are insufficient to discharge the debentures, the debenture trustee may apply to the NCLT.	71(9)
NCLT to order redemption of debentures forthwith by payment of principal and	71(10)
interest due thereon.	
Chapter V "Acceptance of Deposits by Companies"	
To direct the company to make repayment of the matured deposits or for any loss or damage incurred by him as a result of non-payment.	73(4)
On an application by the company, NCLT may allow further time to the company to repay the amount of deposit or part thereof and the interest payable.	74(2)
Chapter –VII "Management and Administration"	
On the application of a member, the Tribunal may call or direct the calling of an annual general meeting if default is made in holding the Annual General Meeting.	97(1)
In case it is impracticable to call a meeting, the Tribunal may either *suomoto*, or on application of a director or member of the company who is entitled to vote at the meeting, order to call meeting i.e extra ordinary general meetings and give such directions as may be necessary.	98(1)
The Tribunal may direct that inspection of minute book of general meeting be given to a member.	119(4)
Chapter –VIII " Declaration and Payment of Dividend"	
To sanction utilization of IEPF for reimbursement of legal expenses incurred on class action suits by members, debentures or depositors.	125 (3)(d)
Chapter –IX "Accounts of Companies"	
The Tribunal may allow a company to recast its financial statements.	130(1)
With the approval of NCLT, company may prepare revised financial statement for any of the three preceding financial years.	131(1)
Chapter-X "Audit and Auditors"	
To restrict copies of representation of the auditor to be removed to be sent out.	140 (4)
The Tribunal may, on the application of the company or any aggrieved person, order that copy of representation by the Auditor need not be sent to members nor read at the meeting.	2nd proviso of 140(4)(iii)(b)
Where NCLT is satisfied that the Auditor has acted in a fraudulent manner, it mat order that the Auditor may be changed	140(5)

Chapter- XI "Appointment and Qualifications of Directors"	
Regarding removal of director, NCLT may order that representation from the director need not be sent to the members and nor read at the meeting.	169(4)(b) proviso
Chapter –XIV " Inspection, Inquiry and Investigation"	
To order investigation of the affairs of the company.	210(2)
The Tribunal may ask the Central Government to investigate into the affairs of the company in other cases on application where the business of the company is being conducted with intent to defraud creditors, persons concerned in the formation of the company or management of its affairs have been guilty of fraud, misfeasance or other misconduct and members have not been given all the information with respect to the affairs of the Company.	213
To order investigation of ownership of Company.	216 (2)
NCLT may pass suitable orders for the protection of the employees in respect of investigation under section 210,212,213 or 219.	218(1)
To order freezing of assets of company on inquiry and investigation in case of complaint made by its members, for a period of three years.	221(1)
To impose restrictions in connection with securities.	222(1)
To entertain petition for winding up of a Company or Body Corporate in pursuance of Inspector's report.	224(2)
To hear petition for winding up of a Company presented by Central Govt.	224(2)
NCLT may, on application of Central Government, pass order for disgorgement of assets and other matters.	224(5)
To pass orders after inspector's intimation of pendency in investigation proceedings.	226 1st Proviso
Chapter –XV "Compromises, Arrangements and Amalgamations"	
With reference to compromise or arrangements between the company and its creditors and members, Tribunal may order a meeting of creditors or class of creditors or members of the company.	230(1)
To sanction compromise or arrangement agreed to at the meeting of creditors/ members ordered by the Tribunal.	230 (6)
To dispense with calling of meeting of members/ creditors for approving compromise or arrangement.	230(9)
To pass orders on an application on grievance in respect of takeover offer of companies other than listed companies.	230 (12)
To enforce compromise and arrangement as sanctioned under Section 230.	231(1)

If the Tribunal is satisfied that the compromise or arrangement sanctioned under Section 230 cannot be implemented satisfactorily with or without modifications, and the company is unable to pay its debts as per the scheme, it may make an order for winding up the company.	231(2)
To sanction the scheme of merger and amalgamation.	232(1)
To call meeting of creditors or members for facilitating merger and amalgamation of	232 (2)
companies.	
If the Central Government is of the opinion that the scheme filed under section 233 is not in public interest, it may file an application before the Tribunal within Sixty days of receipt of the scheme under sub section (2).	233(5)
To entertain the application made by the dissenting shareholders of the scheme approved by the majority.	235(2)
Any aggrieved person in respect of compensation made by the prescribed authority may make appeal to the Tribunal within 30 days.	237(4)
Appeal to the tribunal against the refusal of the Registrar to register the circular.	238(2)
Chapter- XVI "Prevention of Oppression and Mismanagement"	
Complaints of oppression and mismanagement will be heard by the Tribunal.	241(1)
Where the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company, Tribunal may pass necessary orders.	242(1)(a)
To make an order where winding up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the Company should be wound up.	242(1)(b)
Tribunal may pass orders for regulation of conduct of affairs of the company in future.	242(2)(a)
To make an order for purchase of shares or interests of any members of the company by other members thereof or by the company.	242(2)(b)
To make an order for reduction of share capital consequent to purchase of shares of the company in the manner envisaged under Section 242(2)(b)	242(2)(c)
The Tribunal can restrict on the transfer or allotment of the shares of the company.	242(2)(d)
To terminate, set aside or modify any agreement, however arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the NCLT, be just and equitable in the circumstances of the case.	242(2)(e)

To terminate, set aside or modify any agreement between the company and any person other than the managing director, any other director or manager referred to in Clause (e) of sub-section (2) of Section 242. Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned.	242(2)(f)
To set aside any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within 3 months before the date of the application made pursuant to section 241, which would, if made or done by or	242(2)(g)
against an individual, be deemed in his insolvency to be a fraudulent preference.	
Removal of the managing director, manager or any of the directors of the company.	242(2)(h)
Recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilization of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims.	242(2)(i)
Manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made.	242(2)(j)
Appointment of such number of persons as directors, who may be required by the NCLT to report to be NCLT on such matters as the NCLT may direct.	242(2)(k)
Imposition of costs as may be deemed fit by the NCLT	242(2)(l)
Any other matter for which, in the opinion of the NCLT, it is just and equitable that provision should be made	242(2)(m)
In case of termination or modification of certain agreements by the Company with managing directors or other directors, leave be granted by the NCLT.	243(1)
To pass specified order in receipt of application by members or depositors or any class of them in case if they are of the opinion that the management or conduct of the affairs of the company is being conducted in a manner prejudicial to the interests of the company or its members or depositors.	245(1)
To punish for the contempt of the Tribunal in cases where a fraudulent application is made u/s 241(Oppression and Mismanagement) and 245(Class Action Suits). This power shall apply for Sections 337 to 341.	246
Chapter –XVIII "Removal of Name of Companies from the Register of Companies"	

To wind up a company the name of which has been struck off by registrar from Register of Companies.	248 (8)
Tribunal may order restoration of the name of a company to the Register of companies in case of an appeal made to the tribunal within three years of the order of the Registrar.	252(1)
To entertain the application made by the secured creditors of a company representing 50 per cent or more of its outstanding amount of debt and the company has failed to pay the debt within a period of 30 days of the service of the notice of demand.	253(1)
NCLT may appoint an interim administrator within seven days of receipt of application under Section 256.	254(1),(3)
NCLT may appoint interim administrator to be the company administrator in case of an application made by the creditors that the company can be revived.	258
NCLT can delineate or direct the functions and duties of the Company administrator.	260
To sanction the scheme of revival and rehabilitation of sick industrial companies as prepared in Section 261, Companies Act, 2013.	262
To implent the scheme of revival and rehabilitation of sick industrial companies.	264
Where the scheme is not approved by the creditors, NCLT may issue orders for the winding up of the sick company.	265
To assess damages against the delinquent Directors in the course of the scrutiny or implementation of any scheme or proposal and pass suitable orders.	266
To punish in case of making a false or incorrect evidence to the NCLT or the NCLAT.	267
Chapter-XX "Winding Up"	
To pass order of winding up of the company.	270 (1)
To wind up companies under various circumstances.	271 (1)
To decide about the inability of the company to pay its debts.	271(2)(c)
To grant leave to prospective creditor for filing petition of winding up.	272 (6)
On receipt of petition for winding up, NCLT may either dismiss the petition with or without costs; make any interim order as it thinks fit; appoint a provisional liquidator of the company till the making of a winding up order, make an order for the winding up of the company with or without costs; or any other order as the NCLT thinks fit.	273 (1)
NCLT may ask the company to file its objections, if any, along with a statement of its affairs within 30 days of the order in the manner prescribed.	274

NCLT shall appoint Official Liquidator from the panel maintained by the Central Government, as the Company Liquidator.	275(1)
To limit and restrict the powers of the Official Liquidator or Provisional Liquidator as the case may be.	275(3)
It can remove the Provisional Liquidator or the Company Liquidator as the Liquidator of the company on specified grounds.	276(1)
Where loss or damage is caused due to fraud or misfeasance or where liquidator fails to exercise due care or diligence in the performance of its powers, NCLT can pass orders to recover loss or damage from the liquidator.	276(3)
To give intimation of order for winding up to Company Liquidator, Provisional Liquidator and Registrar of Companies.	277(1)
On application of company liquidator, NCLT to constitute winding up committee.	277(4)
To put stay on suits or other legal proceedings on winding up order.	279(1)
To give directions on report of Company Liquidator	282(1)
During liquidation, the custody of companies' property passes to the NCLT.	283(1)
The list of contributories and application of assets in all cases where rectification is required will be settled by the Tribunal.	285(1)
To constitute an advisory committee to advise the Company Liquidator and to report to the NCLT.	287(1)
To stay the proceedings of winding up on application of promoter, shareholders or creditors or any other interested person.	289(1)
To issue directions and to exercise control on the powers of the Company liquidator.	290
To issue directions and to exercise overall control on the powers of the liquidator.	290 (1)
To sanction the appointment of professionals (CA, CS, CWA or Legal Practitioners) for assistance to Company Liquidator in the performance of his functions and duties.	291(1)
To Confirm, reverse or modify the act or decision complained of for the company liquidator.	292 (4)
For better accountability in company's winding up, NCLT to order the audit of accounts of Company Liquidator.	294(1)
To exercise control on inspection of books by creditor or contributory.	293 (2)
To cause accounts of the company liquidator to be audited.	294 (3)
To pass an order requiring any contributory for the time being on the list of contributories to pay any money due to the company, from him or from the estate of the person whom he represents, exclusive of any money	295(1)

payable by him or the estate by virtue of any call.	
To make calls on the contributories on the list for payment of money to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves.	296
To adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto.	297
To make an order for the payment out of the assets, of the costs, charges and expenses incurred in the winding up	298
To summon persons suspected of having property of company in case the person is capable of giving information concerning the promotion, formation, trade, dealings, property, books or papers, of affairs of the company.	299
To order examination of promoters, directors in case the Company Liquidator is of the opinion that a fraud has been committed by any person in the promotion, formation, business or conduct of affairs of the company since its formation.	300
In case a person is having property, accounts or papers of the company in his possession and is trying to leave India or abscond NCLT to order detention and	301
arrest of such person.	
NCLT, after considering the report of the company liquidator, shall pass order dissolving the company.	302
To hear winding up petition where company is being wound up voluntarily.	306 (3) (b)
Where in a voluntary winding-up the company liquidator reports that a fraud has been committed, NCLT may pass such order and give such directions as are necessary.	317
When the affairs of the company have been completely wound up, NCLT can pass order for dissolution of the company in a voluntary winding up.	318(5)
To vary, confirm or set aside arrangement between the company and its creditors.	321 (2)
To determine questions in winding up or exercise powers as to staying of proceedings etc.	322 (1)
NCLT determines the questions arising out of winding up of the company where an application has been made for determining any question arising in the course of winding up of the Company, or exercise the staying of proceedings or any other matter with respect to the enforcing of the calls.	322(3)
To give an option to company to declare the transaction relating to transfer of property, delivery of goods etc as fraudulent preference and to restore the position as if the company had not given such preference.	328 (1),(2)

To determine liabilities and rights of certain fraudulently preferred persons who acted as surety or guarantor or creditor to the company.	331 (3)
To grant leave to disclaim the onerous property in case of a company likely to be wound up.	333
To pass orders against avoidance of transfers including actionable claims or alteration in the status of members of company etc, after commencement of winding up.	334 (2)
To grant permission to enforce any attachment, distress or execution after the commencement of winding up.	335(1)
To direct liability for fraudulent conduct of business to any person on application of Company Liquidator.	339(1)
To assess damages against delinquent directors, manager, liquidator or officer of the Company for misapplication, retainer, misfeasance or breach of trust.	340
Liability of partners or directors of the company under Section 339, Companies Act, 2013 relating to fraudulent conduct of business or under section 340, Companies Act, 2013 relating to misfeasance or breach of trust can be extended by the NCLT.	341
The delinquent officers and members of the Company who are found to be guilty of any offence in relation to the company are liable to be prosecuted by the NCLT.	342
To sanction powers to be exercised by liquidator for payment to creditors in full etc.	343 (1)
To direct the manner for disposal of books and papers of company after the complete winding up of the company or of the company likely to be dissolved.	347 (1)(a)
To permit company liquidator to open account in a bank other than scheduled bank for the deposit of the monies received.	Proviso of 350 (1)
To disallow the payment of remuneration in part or in full to the liquidator in case money is required to be deposited in Company Liquidation Account and Undistributed assets Account is not deposited by the liquidator.	352 (8) (c)
To pass order to make the default good by filing the returns etc to the company liquidator on request of any creditor or contributory or the Registrar.	353
To ascertain the wishes of creditors or contributors by calling their meetings in all matters relating to winding up of the company.	354
To declare dissolution of company void on an application made by the Company Liquidator of the Company or by any other person at any time within 2 years from the date of dissolution.	356
Chapter- XXI " Companies Authorised to Register under this Act"	
To grant leave to initiate suits or any legal proceedings against the company or any contributory after passing of winding up order.	373

Powers regarding winding up of unregistered company in case of inability of the Company to pay its debts or it is consider equitable and just to wind up the company or the company is carrying business only for the purpose of winding up.	375 (3)
To exercise powers or to do nay act for winding up of Unregistered Companies.	377
Chapter- XXVII "National Company Law Tribunal and Appellate Tribunal "	
NCLT can rectify any mistake in any order passed by it, within 2 years from the date of order.	420
General Power to amend any defect or error in any proceeding before NCLT and to make all necessary amendments for the purpose of determining the real question or issue raised by or depending on such proceeding.	
The NCLT shall have the powers of a Civil Court under the Code of Civil Procedure, 1908. In this regard, the NCLT can pass order in the following circumstances: a) Summoning and enforcing the attendance of any person and examining him on oath; b) requiring the discovery and production of documents; c) receiving evidence on affidavits; d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act 1872, requisitioning any public record or document or copy of such record or document from any office; e) issuing commissions for the examination of witnesses or documents f) dismissing a representation for default or deciding it ex-parte; g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and h) any other matter which may be prescribed by the Central Government. Matters prescribed by the Central Government for the purpose, are as under:- 1. Granting stay or order status quo 2. Ordering injunction or cease and desist; 3. Appointing commissioner(s) for the purpose under the Companies Act, 2013 4. Exercising limited power to review its decision to the extent of correcting clerical or arithmetical mistakes or any accidental slip or omission as provided in rule 140 of NCLT Rules, 2013; 5. Passing such order or orders as it may deem fit and proper in the interest of justice.	424(2)
Power of Bench of NCLT to call for further information or evidence.	
Where the applicant appears but respondent does not appear at the hearing, NCLT has the Power to hear and decide a petition or application ex parte.	

NCLT to dispose of application or petition expeditiously within 3 months from the date of presentation before it. Extension period of 90 days may be granted for disposal.	422
NCLT has the power to regulate its own procedure for the purpose of discharging its functions under the Companies Act, 2013.	424(1)
Power to pass order after giving the parties to any proceeding before it a reasonable opportunity of being heard, thereby observing the principles of natural justice. The NCLT shall send a copy of every order passed to the parties concerned.	424
Power of NCLT to pass orders and directions to prevent abuse of its process or to secure the ends of justice.	
Power of NCLT to make orders necessary for meeting the ends of justice or to prevent abuse of process of NCLT is absolute and inherent and nothing in the NCLT Rules, 2013 shall limit such power of the NCLT.	
NCLT has the powers to issue commission for examination of witnesses or documents.	424(2)(e)
Power to punish for contempt The NCLT shall have the same jurisdiction, powers and authority in respect of contempt of themselves as a High Court has and may exercise, for the purpose, the powers under the provisions of the Contempt of Courts Act, 1971. **Powers of High Court under Contempt of Courts Act, 1971** The High Court has and exercises the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of courts subordinate to it as it has and exercises in respect of contempt of itself. Provided that no High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code (45 of 1860) These powers of the NCLT shall have the effect subject to the modification prescribed in Section 425 of the Companies Act, 2013, namely as under:- The reference to a High Court shall be construed as including a reference to the NCLT and the NCALT; and The reference to Advocate-General in section 15 of the Contempt of Courts Act, 1971 shall be construed as a reference to such Law Officers as the Central Government may, specify in this behalf.	425
NCLT has the power to delegate powers to any officer or employee or any person to inquire in to the matter connected with any proceeding and report to it.	426

To impose such conditions or restrictions as it thinks fit subject to the payment of fee, while according approval, sanction, consent, confirmation etc. giving directions or granting exemptions.	426
NCLT can seek assistance of Chief Metropolitan Magistrate, Chief Judicial Magistrate, or District Collector to take possession of property, books of accounts or other documents on behalf of the NCLT.	429
Chapter- XXVIII "Special Courts"	
NCLT can compound certain offences in certain cases before the investigation has been initiated or pending.	441
Offences punishable with fine only, either before or after the institution of any prosecution, can be compounded by 22NCLT.	441
Chapter- XXIX "Miscellaneous"	
Power to accord approval, sanction, consent, confirmation or recognition to, or in relation to, any matter.	459

Constitution of Appellate Tribunal

The Central Government shall, by notification, constitute, with effect from such date as may be specified therein, an Appellate Tribunal to be known as the National Company Law Appellate Tribunal consisting of a chairperson and such number of Judicial and Technical Members, not exceeding eleven, as the Central Government may deem fit, to be appointed by it by notification, for hearing appeals against the orders of the Tribunal or National Financial Authority.

Benches of Tribunal

Central Government can specify by notification constitution of any number of benches of Tribunal.
The Principal Bench of the Tribunal shall be at New Delhi which shall be presided over by President of Tribunal.

Exercise of powers by Tribunal

1. The powers of the Tribunal shall be exercisable by Benches consisting of two Members out of whom one shall be a Judicial Member and the other shall be a Technical Member.

2. The bench may consist of a single Judicial member and exercise the powers of Tribunal in class of cases prescribed by the president.

3. If at any stage of the hearing of any such case or matter, it appears to the Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the President, or, as the case may be, referred to him for transfer, to such Bench as the President may deem fit.

Orders of Tribunal

1. The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit.
2. The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties:
3. Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.
4. The Tribunal shall send a copy of every order passed under this section to all the parties concerned.

Disposal of Cases by Tribunal or Appellate Tribunal

Every application made to Tribunal and appeal made to Appellate Tribunal shall be disposed of as soon as possible and not later than 3 months.

The Authority can apply for extension of not exceeding 90 days to President or Chairperson on giving recorded reasons.

Appeal to Supreme Court

Any person aggrieved by any order of the Appellate Tribunal may file an appeal to the Supreme Court within 60 days from the date of receipt of the order of the Appellate Tribunal to him on any question of law arising out of such order:

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding 60 days.

Procedure before Tribunal and Appellate Tribunal

1. The Tribunal and appellate tribunal shall **not be bound** by the procedure laid down in the **Code of Civil Procedure, 1908**, but the proceedings shall **be guided by** the **principles of natural justice**.

2. The Tribunal shall have the same powers as are vested in a civil court under the Code of Civil Procedure,1908 while a suit, namely;
   a) summoning and enforcing the attendance of any person and examining him on oath;
   b) requiring the discovery and production of documents;
   c) receiving evidence on affidavits;
   d) subject to the provisions of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office
   e) issuing commissions for the examination of witnesses or documents;
   f) dismissing a representation for default or deciding it ex parte;
   g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and
   h) any other matter which may be prescribed.

3. Any order made by the Tribunal or the Appellate Tribunal may be enforced

by that Tribunal in the same manner as if it were a decree made by a court.

4. All proceedings before the Tribunal and Appellate Tribunal shall be **deemed to be judicial proceedings**.

Right to Legal Representation

A party to any proceeding or appeal before the Tribunal or the Appellate Tribunal, as the case may be, may either appear **in person** or **authorise** one or more **company secretaries or chartered accountants or cost accountants or legal practitioners** or any other person to present his case before the Tribunal or appellate tribunal.

Institution of Proceedings, Petition, Appeals Before NCLT

Part III of the NCLT Rules, 2016 dealing with the Institution of proceedings, petition, appeals etc. before NCLT.

Procedure of Appeal -

1. Every appeal or petition or application or objection or counter presented to the Tribunal shall be **in English** and in case it is in some **other Indian language**, it shall be accompanied by a **copy translated in English** and shall be **fairly and legibly** type written, lithographed or printed in double spacing on one side of **standard petition paper** with an **inner margin** of about **4 centimetre** width on top and with a right margin of 2.5. cm, and left margin of 5 cm, duly paginated, indexed and stitched together in paper book form;
2. The cause **title** shall state "**Before the NCLT**" and shall **specify the Bench** to which it is presented and also set out the proceedings or order of the authority against which it is preferred.
3. Appeal or petition or application or counter or objections shall be **divided into paragraphs** and shall be **numbered consecutively** and each paragraph shall contain as nearly as may be, a separate fact or allegation or point
4. Where Saka or other dates are used, corresponding **dates of Gregorian Calendar** shall also be given.
5. **Full name, parentage, age, description of each party** and address and in case a party sues or being sued in a representative character, shall also be set out at the beginning of the appeal or petition or application and need not be repeated in the subsequent proceedings in the same appeal or petition or application.
6. The **names of parties** shall be **numbered consecutively** and a separate line should be allotted to the name and description of each party.
7. These numbers shall not be changed and in the event of the death of a party during the pendency of the appeal or petition or matter, his legal heirs or representative, as the case may be, if more than one shall be shown by sub-numbers.
8. Where fresh parties are brought in, they may be numbered consecutively in the particular category, in which they are brought in.
9. Every proceeding shall state immediately after the cause title the provision of law under which it is preferred.

Rights of A Party to Appear Before the Tribunal

1. Every party may appear before a Tribunal **in person** or through an **authorised representative**, duly authorised in writing in this behalf.

2. The authorised representative shall make an appearance through the **filing of Vakalatnama or Memorandum of Appearance** in **Form No. NCLT. 12** representing the respective parties to the proceedings.
3. The CG, the RD or the ROC or Official Liquidator may authorise an officer or an Advocate to represent in the proceedings before the Tribunal.
4. Such authorised officer shall be an officer not below the rank of Junior Time Scale or company prosecutor.
5. During any proceedings before the Tribunal, it may for the purpose of its knowledge, call upon the ROC to submit information on the affairs of the company on the basis of information available in the MCA21 portal. Reasons for such directions shall be recorded in writing.

Special Courts

As per **Section 435** of the Companies Act, the Central Government may, for the purpose of **providing speedy trial** of offences under this Act, by notification, establish or designate as many Special Courts as may be necessary.
A special court shall **consist of** –

1. A **single judge** holding office as **session judge or additional session judge**, in case of offences punishable under this act with **imprisonment of 2 years or more** and
2. A **metropolitan magistrate** or **judicial magistrate of the 1st class**, in the case of other offences, who shall be appointed by the CG with the concurrence of the chief justice of the high court within whose jurisdiction the judge to be appointed is working.

Offences Triable Under Special Court (Sec 436)

1. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, —
   a) **All offences under this act** shall be triable only by the Special court, which is established in the area where the registered office of the company is situated in relation to which offence is committed or where there are more than one Special Courts for that area, then the one specified by High Court.
   b) Where a person accused or suspected of the commission of an offence is **forwarded to the Magistrate** under the Code of Criminal Procedure, 1973. Such magistrate may **authorize the detention** of the person as follows:
      - **1 maximum detention** of **15 days** if such magistrate is a **Judicial Magistrate** and
      - **2 maximum detention** of **7 days** if such magistrate is an **Executive Magistrate.**

      Provided that where such Magistrate considers that the detention of such person upon or before the expiry of the period of detention is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;
   c) the Special Court may exercise, in relation to the person forwarded to it, the same power which a Magistrate having jurisdiction to try a case may exercise under Cr. PC 1973 in relation to an accused person who has been forwarded to him under that section; and
   d) a Special Court may, upon perusal of the police report of the facts constituting an offence under this Act or upon a complaint in that behalf, take cognizance of that offence without the accused being committed to it for trial.

2. When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 be charged at the same trial.

3. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the **Special Court** may, if it thinks fit, **try in a summary** way any offence under this Act which is **punishable with imprisonment for a term not exceeding 3 years**:

   Provided that in the case of any **conviction in a summary trial**, **no sentence of imprisonment for a term exceeding 1 year shall be passed**:

   Provided further that when **at the commencement of, or in the course** of, a summary trial, it **appears to the Special Court** that the nature of the case is such that the sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Special Court shall, after hearing the parties, record an order to that effect and thereafter recall any witnesses who may have been examined and proceed to hear or rehear the case in accordance with the procedure for the regular trial.

ARBITRATION AND CONCILIATION ACT, 1996

Alternate Dispute Resolution

Alternate Dispute Resolution or ADR is a fine substitute for the more common judicial process. ADR includes methods like negotiation, **arbitration, conciliation** and mediation. All these modes have some common features, which make ADR a very viable and preferable mode in dealing with disputes. Most commonly, these have shorter time duration a compared to the court route. The cost is considerably less than the court and legal fees. Privacy, neutrality of the proceedings and of the decision and possibilities of customizing the procedures are some more attractive features.

Arbitration

Arbitration is one of the methods of settling civil disputes between two or more persons by reference of the dispute to an independent and impartial third person, called arbitrator, instead of litigating the matter in the usual way through Courts. It saves time and expenses. It also avoids unnecessary technicalities and at the same time ensures ''substantial justice within limits of the law''.

As per Section 2(a) of the Arbitration and Conciliation Act, 1996, ''Arbitration'' means any arbitration, whether or not administered by an arbitrator appointed specially for the settlement of a particular dispute or by some permanent arbitral institution.

ARBITRATION AGREEMENT

Definition of Arbitration Agreement

Section 7 of the Act defines the Arbitration Agreement in the following words:
''Arbitration Agreement means an agreement by the parties to submit to arbitration all or certain disputes, which have arisen or which may arise between them, in respect of a defined legal relationship, whether contractual or not''.

Essentials of Arbitration Agreement

An arbitration agreement, to be valid and binding, must have the following essential elements:

1. It must be in writing and includes an exchange of letters, telex telegrams or other means of communication, which provides a record of such arbitration agreement.
2. It must have all the essential elements of a valid contract.
3. An arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if dispute arise between them in respect of subject-matter of the contract, such disputes shall be referred to arbitration then such an agreement would spell out an arbitration agreement.[Rukmanibai v. Collector]

4. It must be to refer a dispute, present or future, between the parties to arbitration.
5. It may be in the form of separate agreement.

It may noted that if certain provisions of a contract, containing an arbitration clause,comes to an end owing to frustration or is avoided on the ground of fraud, misrepresentation, undue influence or coercion, the arbitration clause continues to be binding. [Naihati v. Khyaliram].

POWER OF JUDICIAL AUTHORITY TO REFER PARTIES TO ARBITRATION [SECTION 8]
A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement, shall refer the parties to arbitration, if a party so applies.

In order that the judicial authority may refer the parties to arbitration, the following conditions must be fulfilled:

1. There should be a valid and a subsisting arbitration agreement capable of being enforced.
2. The subject matter in question in the legal proceedings must be within the scope of arbitration agreement.
3. The application must be made by a party to the arbitration agreement or by some person claiming under him.
4. The applicant must make the application at the earliest stage of the proceedings, i.e., before submitting his first statement on the substance of the dispute.
5. The application must be accompanied by the original arbitration agreement or a duly certified copy thereof.

The Supreme Court in Hindustan Petroleum Corporation Ltd. V. M/s Pink City Midway Petroleum, has held that jurisdiction of Civil Court is barred after an application under Section 8 of the Act is made for arbitration.

MATTERS WHICH MAY AND CAN NOT BE REFERRED TO ARBITRATION [SECTION 9 OF CIVIL PROCEDURE CODE, 1908]
All matters in dispute in between parties relating to private rights or obligations, which Civil Courts may take cognizance of, may be referred to arbitration. However, a matter shall not be referred to arbitration if it is forbidden by a Statute or is opposed to public policy.

Matters which may be referred to Arbitration

1. Determination of damages in case of breach of contract.
2. Question of validity of marriage.
3. Matters of right to office.
4. Time barred claims.

Matters which cannot be referred to Arbitration

1. Matters relating to divorce.
2. Testamentary matters like the validity of will.
3. Insolvency matters.
4. Matters relating to public charities and charitable trusts.
5. Matters relating to guardianship of a minor.

6. Lunacy proceedings.
7. Matters of criminal nature.

ARBITRAL TRIBUNAL

Introduction

The person who is appointed to determine the differences and disputes is called the Arbitrator or Arbitral Tribunal (which may consist of sole arbitrator or panel of arbitrators) , the proceedings before whom are called arbitration proceedings , and his decision is called as award.

Number of Arbitrators [Sec. 10]

The parties are free to determine the number of arbitrators provided that such number shall not be an even number. If the parties fail to make the determination, the arbitral tribunal shall consist of a sole arbitrator.

Appointment of Arbitrators [Sec. 11]

A person of any nationality may be appointed as an arbitrator, unless otherwise agreed by the parties.

When the parties have agreed that the number of arbitrators to be appointed shall be three, but do not agree on a procedure for their appointment, then each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator, who shall act as the Presiding Arbitrator.

Section 11 further provides that where a party fails to appoint an arbitrator within 30 days from the date of the receipt of a request to do so from the other party or where the two appointed arbitrators fail to agree on the third arbitrator within 30 days from the date of their appointment, then a party may request the Chief Justice of High Court of the State concerned or any person or institution designated by the Chief Justice, to take necessary measures. The decision on the matter entrusted to the Chief Justice or an person or institution designated by the Chief Justice shall be final.

It may be noted that in an international commercial arbitration, the power to appoint an arbitrator is vested with the Chief Justice of India or a person or institution designated by the Chief Justice of India. An international commercial arbitration is an arbitration relating to disputes considered commercial in nature, where atleast one of the parties belongs to a foreign country.

Challenge of appointment of Arbitrator

The appointment of arbitrator may be challenged on any of the following grounds:

1. Circumstances exist that give rise to justifiable doubts as to his independence or impartiality; or
2. He does not possess the qualification agreed to by the parties.

It may be noted that a party may challenge an arbitrator appointed by him only on those grounds which came to his knowledge after the appointment has been made.

Procedure [Sec .13]: The parties are free to agreee on a procedure for challenging an

arbitrator. If there is no agreement on this point or the parties have failed to agree, then the procedure to be followed is that the party wising to present the challenge has to inform the Arbitral Tribunal of the matter. This would be done within 15 days after becoming aware of the constitution of the Arbitral Tribunal or after becoming aware of any circumstances of the challenge, whichever is later. The Tribunal shall decide on the challenge unless the arbitrator withdraws from office or the other party to the arbitration agrees to the challenge.

If the challenge is not successful, the Tribunal shall continue with the proceedings and shall make an award. But at that stage, the party who challenged arbitrator may challenge the award and also make an application for setting aside the award in accordance with Section 34 of the Act.

Failure or Impossibility to act [Sec. 14]

Section 14 deals with when a mandate given to an arbitrator shall be terminated. ''***Mandate***'' means an authorization to act given to an arbitrator.

The mandate of an arbitrator shall terminate if-

a. He becomes de jure (by right) or de facto (in fact) unable to perform his functions or for other reasons fails to act without undue delay; and
b. He withdraws from his office or the parties agree to the termination of his mandate.

The mandate of an arbitrator shall also be terminated in the following cases:

a. Where he withdraws from office for any reason; or
b. By virtue of an agreement between the parties.

Case law: In **Construction India Ltd. v. Secretary, Works Department, Government of Orissa,** it was held that demotion of a government employee from his government position does not lead to termination of that person as an arbitrator. Section 14 provides the circumstances of termination of arbitrator and demotion from a government position is not covered under Section 14.

Substitution of Arbitrator [Sec. 15]

Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the government of th arbitrator being replaced.

Unless otherwise agreed by the parties:

a. Where an arbitrator is replaced, any hearings previously held may be repeated at the discretion of the Arbitral Tribunal;
b. An order or ruling of the Arbitral Tribunal made prior to the replacement of an arbitrator shall not be invalid solely because there has been a change in the composition of the Arbitral Tribunal.

Jurisdiction of Arbitral Tribunal [Sec. 16]

The arbitral tribunal may rule on its jurisdiction, including ruling on any objections with respect to the existence or validity of an arbitration agreement. For this purpose:

a. An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

b. A decision by the arbitral tribunal that the certain provisions of a contract are null and void shall not automatically invalidate the arbitration clause.

It may be noted that a plea that arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. However, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of an arbitrator.

Procedure for Arbitral/Arbitration Proceedings

Sections 23 to 27 of the Arbitration and Conciliation Act, 1996 lays down the procedure to be followed in the arbitral/arbitration proceedings. The procedure involves the following steps:

i. **Statements of claim and defence:** The claimant has to submit his claim, consisting of facts supporting the claim, points at issue and the relief of remedy sought – within the period agreed by the parties, or determined by the arbitral tribunal. Likewise, the respondent has to state the defence in respect of the claims of the claimant.
ii. **Hearing and written proceedings:** It is open to parties to agree for holding oral hearings for presentation of evidence and for oral arguments, or, alternatively, for conducting proceedings on the basis of documents such as affidavits. In such absence of any such agreement, a decision in this regard may be taken by the arbitral tribunal.
iii. **Default of a party:** It is open to the parties to agree to what constitutes a default in the proceedings. In the absence of any such agreement, certain situations as stipulated under the Act are regarded as defaults, leading to certain consequences.
iv. **Expert appointment by arbitral tribunal:** The arbitral tribunal may appoint one or more experts to report to it, on specific issues to be determined by the arbitral tribunal.
v. **Court assistance in taking evidence:** The arbitral tribunal as well as any party, with the approval of the arbitral tribunal, can apply to the court for assistance in taking evidence.
vi. **Decision:** The decision of the Tribunal is generally by a majority of all its members.

Settlement [Sec.30]

This section declares that, in spite of an arbitration agreement, the arbitral tribunal may encourage the settlement of disputes by using mediation, conciliation or other proceedings, with the agreement of the parties.

If the parties reach to a settlement, the arbitral award will be given by the arbitral tribunal. The arbitral award, on agreed terms, will have the same status and effect as any other arbitral award on the merits of the dispute.

AWARD

Meaning of Award

Award means an arbitral award. It is a final judgement of the arbitral tribunal on all matters referred to it. It is in fact a final adjudication by a tribunal of the parties own choice. It is binding in the same manner as the decision of a Court.

It may be noted that an arbitral award includes an interim award.

Essentials of a valid award:

i. It must be in writing. It may be in such language as agreed upon.

ii. It must follow the agreement and not purport to decide matters not within the agreement.
iii. It must be final and give a decision on all matters referred.
iv. It must be certain i.e., it should be clear and possible to perform.
v. It must be dated and signed by the arbitrators and in the presence of parties.
vi. It must be legal and must be in conformity with the powers contained in the reference .

Form and contents of Arbitral Award

Section 31 provides that the following are the important provisions pertaining to form and contents of arbitral award:

i. Arbitral award must be in writing.
ii. It must state the reasons unless otherwise agreed by the parties or the award is on agreed terms u/s 30.
iii. It must be dated and signed by the arbitrators.
iv. It must state the place of arbitration.
v. A signed copy of arbitral award must be delivered to each of the parties to the reference.

Correction and Interpretation of Award [Sec. 33(1)]

Within 30days from the receipt of arbitral award:

a. a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award.;
b. if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

It may be noted that the arbitral tribunal may correct any error of the type referred to in clause a) above, on its own initiative, within 30 days from the date of arbitral award.

Additional Award [Sec. 33(4)]

Unless otherwise agreed by the parties, a party with notice to the other party may request, within 30days from the receipt of arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award. If the arbitral tribunal considers the request made to be justified, it shall make the additional arbitral award within 60days from the receipt of such request.

Setting aside of an Arbitral Award [Sec.34]

Section 34 provides that an arbitral award may be challenged before the Competent Court and can be set aside on the following grounds:

i. A party to arbitration suffered from want of competency.
ii. The arbitration agreement is illegal and void.
iii. The concerned party (i.e., party applying for setting aside the award) was not given proper notice of appointment of an arbitrator.
iv. The arbitral tribunal was not properly constituted or the procedure adopted not in accordance with the agreement.
v. The arbitral tribunal acted without jurisdiction.

vi. Award dealing with a dispute not contemplated by or not falling within the terms of submission to arbitration.
vii. The subject matter of dispute is not capable of settlement by arbitration under the law.
viii. Award is in conflict with the public policy.

An application for setting aside an arbitral tribunal may be made within 3 months from the date on which the party making the application had received the award. However, if the Court is satisfied that the applicant was prevented by sufficient cause from making application within the prescribed period of 3 months, it may entertain the application within a further period of 30 days, but not thereafter.

APPEALS [SECTION 37]

An appeal against the order of Arbitral Tribunal granting or refusing to grant any interim measures shall lie to a Competent Court.
Further, appeal shall also lie to the Competent Courts only against the following orders of the Court:

- Order granting or refusing to grant any interim measures ;
- Order setting aside or refusing to set aside an arbitral award.

International Commercial Arbitration

International commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in for in India and where at least one of the parties is-

i. an individual who is a national of, or habitually resident in, any country other than India; or
ii. a body corporate which is incorporated in any country other than India; or\
iii. an association or a body of individuals whose central management and control is exercised in any country other than India; or
iv. the Government of a foreign country.[Section 2(1)(f)].

Arbitration agreement not to be discharged by death of party thereto

Section 40 (1) provides that an arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or, as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

Section 40 (2) states that the mandate of an arbitrator shall not be terminated by the death of any party by whom he was appointed.

Time limit for Arbitral Award:

Sec 29A	Sec 29B
The award shall be made within 12 months from the date of arbitral tribunal enters upon reference.	The parties to an arbitration agreement may, at any stage, either before or at the time of appointment of the arbitral tribunal, agree in writing to have dispute resolved within 6 months by fast track

	process

Fast track procedure

Section 29B(1) provides that notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub-section (3).

Section 29B (2) states that the parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.

Section 29B (3) says that the arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1):

a) The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;
b) The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;
c) An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;
d) The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.

Conciliation

Meaning of Conciliation

Conciliation means the setting of disputes without litigation. Conciliation is an informal process in which the conciliator (the third party) tries to bring disputants to an agreement. He does this by lowering tensions, improving communication, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement. The Arbitration and Conciliation Act, 1996 gives a formal recognition to conciliation in India.

Appointment of Conciliator

Section 64 of the Arbitration and Conciliation Act, 1996 provides that the conciliator is appointed in the following manner:

- ✓ If there is one conciliator in conciliation proceedings, there should be an agreement on his name.
- ✓ If there are two conciliators, each party should appoint one conciliator each.
- ✓ If there are three conciliators in conciliation proceedings, each party should appoint one conciliator each and the third conciliator will be an agreed person, who shall act as Presiding Conciliator.

Role of Conciliator

The conciliator's role is to provide assistance in an independent and impartial manner to the parties to reach an amicable settlement of their disputes and to conduct the conciliation proceedings in such a manner as he considers appropriate. He is guided by the principles of objectivity, fairness and justice. The conciliator may conduct the conciliation proceedings in an appropriate manner taking into consideration all circumstances and wishes of the parties.

The conciliator's role is not confined merely in providing assistance, but also extends top to making proposals for settlements of disputes. The conciliator may make proposals for settlement of disputes at any stage of the proceedings.

Difference between Arbitration and conciliation

Arbitration	Conciliation
Arbitration is a process in which the conflicting parties agree to refer their dispute to a neutral third party known as 'Arbitrator'.	The conciliator or mediator tries to remove the difference between the parties.
Arbitration differs from conciliation in the sense that in arbitration the arbitrator gives his judgment on a dispute while in conciliation, the conciliator disputing parties to reach at a decision.	He/she persuades the parties to think over the matter with a problem-solving approach, i.e., with a give and take approach.
The arbitrator does not enjoy any judicial powers. The arbitrator listens to the view points of the conflicting parties and then gives his decision which is binding on all the parties.	He/she only persuades the disputants to reach a solution and never imposes his/her own viewpoint. The conciliator may change his approach from case to case as he/she finds fit depending on other factors.

Termination of conciliation proceedings

Section 76 provides that the conciliation proceedings shall be terminated-

a) by the signing of the settlement agreement by the parties, on the date of the agreement; or
b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or
c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or
d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings am terminated, on the date of the declaration.

Costs:
Upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties. "costs" means reasonable costs relating to-

- ✓ the fee and expenses of the conciliator and witnesses requested by the conciliator, with the consent of the parties;
- ✓ any expert advice requested by the conciliator with the consent of the parties;
- ✓ any assistance provided
- ✓ any other expenses incurred in connection with the conciliation proceedings and the settlement agreement.

The costs shall be borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party shall be borne by that party.

Enforcement of foreign arbitration award
Chapters I and II of Part II of the Arbitration and Conciliation Act, 1996 deal with the enforcement of certain foreign awards made under the New York Convention and the Geneva Convention, respectively.

Sections 44 and 53 of the Act define the foreign awards as to mean an arbitral award on differences between persons arising out of legal relationship, whether contractual or not, considered commercial under the law in force in India made on or after the 11th day of October 1960 in the case of New York Convention awards and after the 28th day of July 1924 in the case of Geneva Convention awards.

Awards made under New York convention or Geneva Convention Any foreign award, whether made under New York Convention or Geneva Convention, which would be enforceable under the respective provisions of the Act applicable to the award, have been treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India.

Power of judicial authority to refer parties to arbitration
Section 45 provides that notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908, a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

When foreign award binding
Section 46 states that any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to

enforcing a foreign award shall be construed as including references to relying on an award.

Evidence

Section 47 (1) provides that the party applying for the enforcement of a foreign award shall, at the time of the application, produces before the court-

a. the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
b. the original agreement for arbitration or a duly certified thereof; and
c. such evidence as may be necessary to prove that the award is a foreign award.

Further Section 47 (2) states that if the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation- In this section and in the sections following in this Chapter, "Court" means the High Court.

Conditions for enforcement of foreign awards

Section 48 of the Act enumerates the conditions for enforcement of foreign awards and provides that the party, against whom the award is invoked, may use one or more of the following grounds for the purpose of opposing enforcement of a foreign award, namely:

a. the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
b. the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
c. the award deals with a difference not contemplated by or not failing within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matter submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or
d. the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
e. the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which. or under the law of which, that award was made; or
f. the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or
g. the enforcement of the award would be contrary to the public policy of India.

Explanation -It is clarified that an award is in conflict with the public policy of India, only if-

a. the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
b. it is in contravention with the fundamental policy of Indian law; or
c. it is in conflict with the most basic notions of morality or justice.

Enforcement of foreign awards

As per section 49 where the Court is satisfied that the foreign award is enforceable, the award is executable as a decree of the Court.

INDIAN STAMP ACT, 1899

INTRODUCTION:

(a) **Union List, Entry 91** gives power to the Union Legislature to levy stamp duty with regard to certain instruments (mostly of a commercial character).

They are bill of exchange, cheques, promissory notes, bill of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipt. The power to reduce or remit duties on these instruments is vested in the Union Government as per Section 9 of the Act.

(b) **State List**, **Entry 63** confers on the States power to prescribe the rates of stamp duties on other instruments

(c) **Concurrent List, Entry 44**. Some States, for their convenience, have passed separate legislation to cover the matters coming under State's domain. As a result, the rates of stamp duties in different States on other instruments category differ from State to State for the same instrument

Instrument:

Section 2(14) defines an —instrument to include every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded.

Following instances may be noted:

(i) An unsigned draft document is not an —instrument (because it does not create or purport to create any right, etc.)

(ii) An entry in register containing terms of Hiring of machinery is an instrument, where it is authenticated by the thumb impression of the hirer. (Reason is, that it purports to create, a liability etc.)

(iii) A letter which acknowledges receipt of a certain sum as having been borrowed at a particular rate of interest and for a particular period and that it will be repaid with interest on the due date is an instrument.

(iv) Photocopy of an agreement is not an instrument as defined under Section 2(14) of the Act.

Instrument Chargeable with duty (Section 3):

This is charging section and provides that subject to the provisions of the act and the exemptions contained in schedule, I, the following instruments shall be chargeable with duty:

1. Instrument mentioned in **schedule I**, which are executed in India.

2. **BOE & Promissory Note drawn or made out of India** and accepted or paid, or presented, for acceptance or payment or endorsed, transferred or otherwise negotiated in India.
3. **Every Instrument executed out of India and relates to any property** situated in Indian and is received in India.

Exception

1. **Instrument by or in favour of Government**: Any instrument executed by or on behalf of or in favour of the Government
2. **Sale of Ship:** No stamp duty shall require in respect of any instrument for the sale, transfer of, other disposition, either absolutely or by way of mortgage etc. of the any registered ship.
3. **Instrument for the purpose of SEZ:** Any instrument executed by, or, on behalf of, or in favour of, the Developer or Unit or in connection with the carrying out of purposes of the special Economic Zone**.**

Case law: The Court has observed in Swadeshi cotton mills case that the first thing to be noticed is that thing which is made liable to duty is an instrument. If a contract of purchase and sale or a conveyance by way of purchase and sale, can be, or is carried out without an instrument the case is not within the section and no tax is imposed : And if any one carries through a purchase and sale without an instrument, then the Legislature has not reached that transaction and stamp duty shall not be chargeable

Substance and description

Courts have invariably upheld the principle of substance of the transaction, over the form, in the matter of deciding the nature of the instrument. It is the substance of the transaction as contained in the instrument and not the form of the instrument that determines the stamp duty, though the duty is leviable on the instrument and not on the transaction. In determining whether a document comes within the description of a document upon which a stamp is required by the Act, one has to look at the entire document to find out whether it falls within the description.

Section 4: When single transaction effected by several instruments:

Only principle instrument shall be chargeable with duty, prescribed in schedule & subsidiary instrument by one rupee duty.

Example: Mr. A wants to sll his property but to affect such sale he needs consent of his mother. Then sale deed being the primary instrument is chargeable with stamp as per schedule and the consent being a subsidiary instrument is chargeable to Rs. 1.

Mr. A wants to sell his share in partnership firm ABC & Co. to an outsider but to affect such sale he needs consent of his co-partners Mr. B & Mr. C. The sale deed being the primary instrument is chargeable with stamp as per schedule and consent being a subsidiary instrument is chargeable to Rs. 1.

Section 5: Instrument relating several distinct matter i.e. multifarious instruments:

When several distinct matters or transaction are embodied in a single instrument it shall be chargeable with the aggregate amount of the duties with which separate instruments in respect of each distinct matter would have been charged.

Examples:

1. A document containing both an agreement for the dissolution of a partnership and a bond, is chargeable with the aggregate of the duties with which two such separate instruments would be distinct matters
2. A grant of annuity by several persons requires only one stamp (because there is only one transaction).
3. A lease to joint tenants requires only one stamp.
4. A power of attorney executed by several persons authorising the agent to do similar acts for them in relation to different subject matter is chargeable under Section 5, where they have no common interest.
5. Where a person having a representative capacity (as a trustee) and a personal capacity delegates his powers in both the capacities, section 5 applies. In law, a person acting as a trustee is a different entity from the same person acting in his personal capacity.

Section 6: Instrument falling within several descriptions

When an instrument falls within provisions of 2 or more Article in schedule I and the instrument doesn't contain "distinct matters", it is to charge with the highest of the duties chargeable are different.

Example: An instrument which can be treated both as a dissolution of partnership and as an instrument of partition has to be charged to the duty prescribed for partition deed, which is the higher of the 2.

Methods of Stamping (Section 10-16):

Section 10: Payment of Duty

All duties with which any instrument is chargeable shall be paid, and such payment shall be indicated on such instrument, by means of stamp i.e. adhesive stamp or impressed stamp as per provisions of the act or rules.

Section 11: Use of Adhesive Stamps:

The following instrument may be stamped with adhesive stamps:

1. Instruments chargeable with a duty not exceeding 10 naya paisa, except parts of Bills of Exchange payable otherwise than on demand and drawn in sets.
2. BOE & PN drawn or made out of India.
3. Entry as an advocate, vakil on the roll of a High Court.
4. Notarial acts;
5. Transfers by endorsement of shares in a company or body corporate;

Section 12: Cancellation of adhesive stamps :

In order to prevent the re-use of adhesive stamps, section 12(1A) provides that any person affixing any adhesive stamp to any instrument chargeable with duty, which has been executed, by any person shall, when affixing such stamp, cancel the same.

Manner of Cancellation

1. A stamp can be cancelled effectually merely by drawing a solitary or single line across the stamps. However, in Hafiz allah Baksh v. Dost Mohammed, it was held that if it is possible to use the stamp even after drawing a line, it will not be considered as an effectual cancellation.
2. In Melaram v. Brij Lal, it was held that a very effective method of cancellation of stamps is drawing of diagonal lines across the stamp with the ends of the lines extending on to the paper of the document.
3. If an illiterate person marks a cross on the stamp it would amount to effectual cancellation.
4. By writing name or initials across the stamp.

Section 12(1B):	If there is plain paper bearing adhesive stamp duty, it must be cancelled first so it can't be re-used. .
Section 12(2):	Consequences of non-cancellation: Instrument bearing an adhesive stamp, which has not been cancelled, is deemed to be unstamped

Section 13: Impressed Stamps

Impressed stamps means and includes labels affixed and impressed and stamps embossed or engraved.

Every instrument executed on stamp paper shall be in such manner that the stamp may appear on the face of the instrument and can't be used for or applied to any other instrument.

If an instrument is stamped in contravention of the aforesaid manner, it shall be deemed as unstamped.

The expression face of the instrument means the embossed portion of stamp, "Daulat Ram Harji vs. VithoRadhoji"

Rule 7 of Stamp Rules, 1925 Provides:

When one stamp paper is insufficient in space, plain paper may be added but the substantial part of the instrument must appear on the stamp paper.

Section 14 only one Instrument on One Stamp:

"No second instrument chargeable with duty shall be written upon a piece of stamped paper upon which an instrument chargeable with duty has already been written".

However, endorsement of the same instrument should not be treated as second instruments. If an instrument is written in contravention of section 13/14. It shall be deemed to be unstamped and inadmissible in evidence.

Time of Stamping of Instruments (Section 17):

When document is executed in India: Before or at the time of execution of the instruments.

Please note that the "at the time of execution" means not simultaneously with signing and therefore can be a reasonable time after signing. (Kurivla vs. Varkeg.)

Document executed out of India (Section 18-19):

Section 18: Any instrument executed out of India except (BOE & PN) must be stamped **within 3 months** of its receipt in India. If an adhesive stamp is permissible, the party receiving the instrument must affix and cancel it himself. But when it can't be stamped by a private person, with reference to the description of stamp prescribed, such person shall present the same to the collector within 3 months of its receipt.

Bills or notes drown out of India (Section 19):

By first holder in India before he deals with the instrument, i.e. presents the same for acceptance or payment or endorses transfer or otherwise negotiates the same in India.

Provision relating to valuation of instruments:

Section 20	Where consideration is stated in a foreign currency, rate of exchange on the date of instrument will be considered to convert the amount into Indian currency. Exchange rate as notified by CG shall be used for the conversion. Eg: If a machine purchased for $40,000 and the rate of exchange notified by CG is $1=Rs. 70. Then value on which stamp duty payable will be 40,000*70 = 28,00,000.
Section 21	Value of stock or security will be calculated on the basis of average price on the value on the date of instrument. In case of share transfer stamp duty is paid on the market value as on the date of instrument.
Section 22	Any rate of exchange or market value stated in the instrument is presumed to be correct, until the contrary is proved. (Section 22)
Section 23	Where interest is expressly made payable by the terms of an instrument, such instrument is not chargeable with duty higher than that with which it would have been chargeable had no mention of interest. Eg: a promissory note for Rs. 10,000 is drawn with the recital of interest @18% p.a., payable by the promisor; stamp duty is leviable on the basis that the instrument is for Rs. 10,000 only.
Section 24	Where any property is transferred to any person in consideration (wholly or in part) of any debt due to him, such debt shall be treated as consideration for calculating the stamp duty. Eg: If a has given a loan of Rs. 5,00,000 to B. Instead of Repayment of loan to A, B transfer his property to A, then the stamp duty will be paid on the debt amount i.e. Rs. 500000. On the same grounds, it the property is transferred subject to payment or transfer of any money or stock, such money or stock will be considered for valuation purpose. Eg: If A has transferred shares worth Rs. 50,000 to B. Instead of paying money to A, B transfers his property to A, then the stamp duty will be paid on the value of shares i.e. Rs. 50,000 If sale of property is subject to a mortgage, any unpaid mortgage together with interest due, if any, will be treated as consideration. Eg: A sells a property to B for Rs. 500 which is subject to a mortgage to C for Rs. 1000/- and unpaid interest Rs. 200/-, stamp duty is payable on Rs. 1700/- Where property transferred is subject to mortgage, duty already paid in respect of mortgage will be deducted. Eg: A mortgages a house of the value of Rs. 10,000/- to B for Rs. 5000/-. B afterwards buy the house from A. Stamp duty is payable on

<table>
<tr><td></td><td>Rs. 10,000 minus amount of stamp duty already paid for the mortgage.</td></tr>
<tr><td></td><td></td></tr>
<tr><td>Section 25</td><td>When the payments are made in instalments and not in lump sum amount. The valuation will be done as follows:
<table>
<tr><th>Particulars</th><th>Valuation</th></tr>
<tr><td>When period of annuity is definite</td><td>Total amount of annuity to be paid during such period shall be considered for valuation</td></tr>
<tr><td>When period of annuity is not definite
i. And is not subject to life or death of a person
ii. Is subject to life or death of a person</td><td>* Total amount payable within 20 yrs of the date of 1st payment.
* Annuity payable for 12 years from the date of 1st payment.</td></tr>
</table></td></tr>
<tr><td>If the value of the subject matter is indeterminate</td><td>When on the date of execution of instrument, value of the subject matter cannot be determined then the stamp duty can be paid on the estimated basis of valuation. But the benefit derived form the instrument cannot exceed the value of the stamp duty paid.</td></tr>
<tr><td>Valuation in case of lease of Mine</td><td>If lease is paid on the basis of Royalty or share of produce, it is not possible to determine the exact amount of lease annually. In such cases the valuation will be done as follows:
<table>
<tr><td>Lease has been granted on behalf of Govt.</td><td>The amount estimated by collector of district is considered for valuation</td></tr>
<tr><td>Lease has been granted by any other person</td><td>The amount of Rs. 20,000 per year will be considered for valuation</td></tr>
</table></td></tr>
</table>

Consideration to be set Out (Section 27):

Consideration and all other facts and circumstances affecting the chargeability of any instrument with duty or the amount of the duty with which it is' chargeable, shall be fully and truly set forth there in.

The sections compel the parties to give true & full disclosure.

Penalty (Section 64): Fine up to Rs. 5,000/-

Person Liable to pay Duty: Section 29 deals with the persons responsible for payment of duty. Under this section, in the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne:

(a) in the case of any instrument described in any of the following articles of Schedule-I→by the person drawing, making or executing such instrument;
(b) in the case of a policy of insurance other than fire insurance→ by the person effecting the insurance;
(c) in the case of a policy of fire-insurance → by the person issuing the policy;

(d) in the case of a conveyance including a re-conveyance of mortgaged property → by the grantee;
(e) in the case of a lease or agreement to lease → by the lessee or intended lessee;
(f) in the case of a counterpart of a lease → by the lessor;
(g) in the case of an instrument of exchange → by the parties in equal shares;
(h) in the case of a certificate of sale → by the purchaser of the property to which such certificate relates; and
(i) in the case of an instrument of partition → by the parties thereto in proportion to their respective shares in the whole property partitioned, or, when the partition is made in execution of an order passed by a Revenue Authority or Civil Court or arbitrator, in such proportion as such authority, Court or arbitrator directs.

Impounding of Instrument (Section 33)

1. If an instrument which is not duly stamped is produced as evidence before any public authority except an officer of police, shall impound (seize and confiscate) the same.
2. The word produced means produced in response to a summon or produced voluntarily for some judicial purpose, such as for supporting an evidence. It does not refer to a document which accidentally or incidentally falls into a judge's hand.
3. The section also provides that the instrument must be impounded, before it can be admitted in evidence. Once it is admitted in evidence, the instrument cannot be impounded at a later stage.
4. The original instrument after impounding has to be sent to the collector along with report by the impounding authority.

UNSTAMPED RECEIPTS

Section 34 provides that where the instrument is an unstamped receipt produced in the course of an audit of any public account, the officer before whom the receipt is produced has discretion either to impound or to require the receipt to be stamped.

INSTRUMENTS NOT DULY STAMPED INADMISSIBLE IN EVIDENCE

Section 35 stipulates that no instrument chargeable with duty shall be–

i. Admitted in evidence *for any purpose* whatsoever by any person authorised by law (such as judges or commissioners) or by the consent of the parties (such as arbitrators) to record evidence; or
ii. Shall be acted upon; or
iii. Registered; or
iv. Authenticated by any such person as aforesaid or by any public officer unless such instrument is duly stamped.

An insufficiently stamped instrument is not an invalid document and it can be admitted in evidence on payment of penalty. [See *K. Narasimha Rao* v. *Sai Vishnu*]

ADMISSION OF INSTRUMENTS (WHERE NOT TO BE QUESTIONED)

Section 36 provides that where an instrument has been admitted in evidence, such an admission shall not be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

If notwithstanding any objection, the trial Court admits the document, the matter ends there and the Court cannot subsequently order the deficiency to be made and levy penalty (*Bhupathi Nath* v. *Basanta Kumar*).

REFUND OF DUTY OR PENALTY IN CERTAIN CASES BY REVENUE AUTHORITY

Section 45 deals with power of the Revenue Authority to refund the penalty **in excess of duty payable on instrument** in certain cases.

Section 39 of the Act empowers the Collector to refund **a part** and in some cases, the whole of the penalty. Section 45 further empowers the Chief Controlling Revenue Authority to order refunds.

The object of granting such further power to the Chief Controlling Revenue Authority is evidently to set right mistakes or other omissions by the Collector to order refund in deserving cases. The Section provides that where any penalty is paid under Section 35 or Section 40, the Chief Controlling Revenue Authority may, upon application in writing made within one year from the date of payment, order, refund such penalty wholly or in part.

It is necessary to appreciate the differences between the powers of the Collector under Section 39 and the powers of the Controlling Revenue Authority under Section 45 at this stage.

They are:

(i) Section 39 provides for refund of penalty, whereas Section 45 confers powers to refund even duties where they have been paid in excess.

(ii) The Collector's power to refund penalty is restricted only to 2 cases mentioned in Section 39(3) but the powers under Section 45 are not subject to any such limitation.

(iii) Section 39 does not lay down any time limit for the Collector to exercise his powers to refund, but in the case of Section 45 there is a time limit.

(iv) The power under Section 45 is to be exercised only when an application is made by a party, whereas under Section 39 it is routine function of the Collector.

Recoveries of Duties and Penalties

Under Section 48, all duties penalties and other sums required to be paid under this Chapter may be recovered by the Collector by distress and sale of the movable property of the person or by any other process used for the recovery of the arrears of land revenue. This section provides for the mode of realisation of duty or penalty or other sums not voluntarily paid.

Unused Forms

Section 51 of the Act enables the Chief Controlling Revenue Authority or the Collector if authorised by the Chief Controlling Revenue Authority, for such purpose to allow refunds in cases where refunds of stamps on printed forms used by bankers, incorporated companies/bodies corporate if required.

Allowance may be made without limit of time, for stamped papers used for printed forms of instruments any bankers or by any incorporated company or other body corporate, if for any sufficient reasons such forms have ceased to be required by the said banker, company or body corporate: provided that the Chief Controlling Revenue Authority or the Collector, as the case may be, is satisfied that the duty in respect of such stamped papers has been duly paid.

CRIMINAL OFFENCES (penalties)
As per Section 62(1),
Any person

a) drawing, making, issuing, endorsing or transferring, or signing otherwise than as a witness, presenting for acceptance or payment, or accepting, paying or receiving payment of or in any manner negotiating, any bill of exchange (payable otherwise than on demand) or promissory note without the same being duly stamped; or
b) executing or signing otherwise than as a witness any other instrument chargeable with duty without the same being duly stamped; or
c) voting or attempting to vote under any proxy not duly stamped shall,

For every such offence, be punishable with fine which may extend to Rs. 5000.

(2) **Section 63** Any person required by Section 12 to cancel an adhesive stamp, and failing to cancel such stamp in the manner prescribed by that section, shall be punishable with fine which may extend to Rs. 100. The criminal intention is necessary for an offence under this Section.

(3) **Section 64**, any person who, with intent to defraud the Government-

a) executes any instrument in which all the facts and circumstances required by Section 27 to be set forth in such instrument are not fully and truly set forth; or
b) being employed or concerned in or about the preparation of any instrument, neglects or omits fully and truly to set forth therein all such facts and circumstances; or
c) does any other Act calculated to deprive the Government of any duty or penalty under this Act;

shall be punishable with fine which may extend to Rs. 5000.

Here also, an intention to evade payment of proper stamp duty or intention to defraud the Government of its stamp revenue is necessary.

E-Stamping
E-Stamping is a computer based application and a secured way of paying Non-Judicial stamp duty to the Government. The benefits of e-Stamping are e-Stamp Certificate can be generated within minutes; e-Stamp Certificate generated is tamper proof; Easy accessibility and faster processing; Security; Cost savings and User friendly.

REGISTRATION ACT, 1908

INTRODUCTION

Registration Act, 1908 provides for registration of certain documents. Following are the purposes or objectives of registration of documents:

1. To give notice to the world that such a document has been registered and to serve as a source of information.
2. To prevent fraud and forgery with the purpose of providing good evidence of the genuineness of the written document and
3. To secure the interest of person dealing with any immovable property where such dealings requires registration.

DOCUMENTS FOR WHICH REGISTRATION IS COMPULSORY AND OPTIONAL [SECTION 17 & 18]

Documents for which Registration is Compulsory [Sec. 17]

Section 17 provides that the following documents require compulsory registration:

1. Instruments of gift of immovable property.
2. Other non-testamentary instruments **which create, declare, assign, limit or extinguish**, any right, title or interest of the value of Rs.100/- and above in immovable property. A document which is plainly intended to be operative immediately and to be final and irrevocable is non-testamentary instrument.
3. Non-testamentary instruments **which acknowledge the receipt or payment of any consideration** on account of creation, declaration, assignment, limitation or extinction, of any right, title or interest of the value of Rs.100/- and above in immovable property.
   This clause requires an acknowledgement in the form of a receipt to be registered, but not an acknowledgement of the fact that a transaction has taken place.
4. Nontestamentary instruments **transferring or assigning any decree of a court** or an y award of an arbitrator when such decree or award declares, assigns, limits or extinguishes, of any right, title or interest of the value of Rs.100/- and above in immovable property.
5. Lease Deeds of following leases of immovable property:
   a) Lease from year to year basis;
   b) Lease for the term exceeding 1 year; and
   c) Lease which reserves a yearly rent.

6. A document, other than a will, through which one person authorizes another person to adopt his son.

It may be noted that a document covered under the aforesaid provisions, but also covered under Section 17(2) is **optionally registerable**.

Documents not required for registration section 17(2)

(i) any composition deed, i.e., every deed the essence of which is composition; or
(ii) any instrument relating to shares in Joint Stock Company; or

(iii) any debentures issued by any such Company; or
(iv) any endorsement upon or transfer of any debenture; or
(v) any document other than the documents specified under clause (e) above creating merely a right to obtain another document which will, when executed create, declare, assign, limit or extinguish any such right, title or interest; or
(vi) any decree or order of a court;

Documents for which Registration is Optional[Section 18]

Section 18 provides that in respect of the following documents, registration is optional:

1. instruments (other than instruments of gift and wills) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent, of value **less than one hundred rupees**, to or in immovable property;
2. instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment; limitation or extinction of any such right, title or interest;
3. leases of immovable property for any term not exceeding one year and leases exempted under Section 17
4. instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of a value less than one hundred rupees, to or in immovable property.
5. Instruments (other than wills) which purport or operate to create, declare, assign, limit or extinguish any right, title or interest to or in movable property;
6. Wills; and
7. Other documents not required by Section 17 to be registered. (Section 18)

TIME LIMIT FOR PRESENTATION OF DOCUMENT FOR REGISTRATION
Documents executed in India [Section 23, 24 & 25]

Section 23 of Registration Act, 1908 provides that the document must be presented before the Registrar for registration **within four months** of its execution.
In cases of **urgent necessity** etc., the period is **8 months** but higher fees has to be paid.

Section 24 provides that where there are several persons executing a document at different times, such document may be presented for registration may be presented for registration and re-registration within 4 months from the date of each execution.

Section 25 further provides that the **Registrar** has got the **power to condone the delay** in presenting the document for registration up to a period of four months; provided that the applicant satisfies the Registrar that he has been prevented by sufficient cause or reasons beyond his control in presenting the documents for registration within the prescribed period of four months.

Documents executed outside India[Section 26]

As per section 26 of the Registration Act, where the Registrar is satisfied that the document was executed outside India and it has been presented for registration **within four months after its arrival in India**, he may accept such documents for registration on payment of proper registration fees.

A document executed outside India and which requires compulsory registration, is not valid unless it is registered in India.**[Nain Sukhdas *v.* Gowardhandas]**

If document is not sufficiently stamped its presentation is still good presentation though penalty under Stamp Act can be levied. **(Mahaliram *v.* Upendra Nath)**

Time limit for presentation of Will [Section 27]
A will may be presented **at any time** for the purpose of registration.

Place for Registration of Document
Documents pertaining to Immovable Property[Section 28]
Section 28 of the Registration Act provides that the document relating to immovable property shall be presented for registration in the **office of Sub-Registrar** within whose sub-district the whole or some portion of the **relevant property is situated**.

Documents pertaining to Other Property[Section 29]
Section 29 of the Registration Act provides that documents pertaining to any property, other than immovable property, may be presented for registration in **the office of Sub-Registrar** in whose sub-district the **document was executed** or in the office of any other Sub-Registrar under State Govt. at which all persons executing and claiming under the document desired the same to be registered.

Registration in certain cities
Section 30 – In any city comprising a Presidency town or in Delhi, a document relating to property situated anywhere in India may be registered.
Section 31 – Registration is permitted in cases of necessity under extra-ordinary circumstances, at residence of the executant.

WHO CAN PRESENT THE DOCUMENT FOR REGISTRATION [SECTION 32]
Every document to be registered under the Registration Act, whether such registration is compulsory or optional, shall be presented before the Registrar by any of the following persons:
1. Some persons executing or claiming under the document;
2. The representative or assign of such person;
3. The agent of the aforesaid persons, duly authorised by **special power of Attorney**

It is immaterial whether the registration is compulsory or optional; but if it is presented for registration by a person other than a party not mentioned in Section 32, such presentation is wholly inoperative and the registration of such a document is void.
[Kishore Chandra Singh *v.* Ganesh Prasad Singh]

RE-REGISTRATION OF CERTAIN DOCUMENTS [SECTION 23A]
Sometimes, a document requiring registration may be accepted for registration by

Registrar from a person not duly empowered to present the same and may be registered. In such a case, any person claiming under such document may present such document, in accordance with the provisions of the Registration Act, for registration in the office of the Registrar of the district in which the document was originally registered. He can, however, do so within four months from his first becoming aware that registration of such document is invalid.

When such a document is presented for re-registration, the Registrar shall register the same as if it has not been previously registered. The document, if duly re-registered in accordance with the provisions of Section 23A, shall be deemed it have been duly registered for all purposes from the date of its original registration.

EFFECT OF REGISTRATION/NON REGISTRATION OF DOCUMENTS

Effect of Registration of Documents [Section 47 & 48]

A registered document operates from the time from which it was intended to operate and not from the date of registration**.[Section 47]**

As between two registered documents, the date of execution determines the priority. Of the two registered documents, executed by same persons in respect of the same property to two different persons at two different times, the one which is executed first gets priority over the other, although the former deed is registered subsequently to the later one. **[K.J. Nathan *v.* S. V. Maruti Rai].**

A non-testamentary registered document, relating to property, takes effect against any oral agreement relating to such property. However, when the oral agreement is accompanied by delivery of possession, then the oral agreement will prevail over the registered document. **[Section 48]**

Effect of Non-Registration of Documents[Section 49]

A document which is compulsorily registrable but is not registered, fails to take effect and is void as regards immovable property. It cannot effect any immovable property comprised therein. Further it cannot confer ant power to adopt.

An unregistered document cannot be received as evidence of any transaction effecting such property or conferring such power. However such a document may be received as evidence of:

1. A contract in a suit for specific performance; or
2. Part performance of a contract as per section 53A of Transfer of Property Act.

REFUSAL BY REGISTRAR TO REGISTER DOCUMENTS[SECTION 71-75]

Reasons for refusal to register the document to be recorded[Section 71]

Every Sub-Registrar refusing to register the document, except on the ground that the property to which the document relates is not situated within its sub-district, shall make an order of refusal and shall record the reasons for such order.

It may be noted that the under- valuation of stamp duty is not a valid ground for refusing the registration of a document. In such a case, the sub-registrar can guide the person to affix proper stamps before he can register the docments presented. If the sub-registrar is doubtful as to the proper value of stamps affixed, he can refer the case to the Collector of Stamps to be adjudicated.

Appeal to Registrar from the orders of Sub-Registrar refusing registration on ground other than denial of execution of document[Section 72]

An appeal shall lie, against order of Sub-Registrar refusing to register a document, to the Registrar to whom such Sub-Registrar is subordinate. However, the appeal shall not lie where the refusal is made on the ground of denial of execution of a document. The appeal can be presented to the Registrar within 30 days from the date of order of Sub-Registrar .

If the Registrar directs the documents to be registered and the document is duly presented for registration within 30 days after the making of such order, the Sub-Registrar shall register the same.

Such registration shall take effect as if the document has been registered when it was first duly presented for registration.

Appeal to Registrar when Sub-Registrar refused to register the Documents on the ground of Denial of Execution[Section 73, 74 & 75]

Where the Sub-Registrar refused to register the Documents on the ground of denial of execution, then any person claiming under such document may, within 30days after the making of the order of refusal, apply to the Registrar to whom such Sub-Registrar is subordinate in order to establish his right to have the document registered.

Where such an appeal is made to the Registrar, then he shall enquire to find out whether the document has been really executed or not. If the Registrar finds that the document is duly presented for registration within 30days after the making of such order, the Sub-Registrar shall register the same.

Such registration shall take effect as if the document has been registered when it was first duly presented for registration.

LAW RELATING TO REGISTRATION OF GIFT DEED

If the donor dies before registration of the gift deed, the gift deed may be presented for registration after his death and if registered, it will have the same effect as registration in his lifetime.

In **Kalyana Sundaram v. Karuppa**, it was held that the registration of gift deed of any immovable property shall operate from the date of execution of gift deed.When the instrument of gift has been handed once by the donor, the former has done everything in his power to complete the donation and to make it effective. If it has been presented before the Registrar for registration within prescribed time period,the Registrar must register it. Neither death nor express revocation by the donor is ground for refusing registration provided other conditions are complied with.

Delay in registration of a gift does not postpone its operation. Section 123 of the Tranfer of Property Act, 1882 merely requires the donor should have signed the deed of gift. Hence a gift deed can be registered even if the donor does not agree to its registration. **[Venkata Rama Reddy v. Pillai Rama Reddy]**

LAW RELATING TO REGISTRATION OF WILL

- Registration of a Will is **Optional**.
- The Will may be presented for registration by
  - Testator/Donor or
  - His executor or
  - Donee or
  - Legatee

- The will can be presented for registration either **before or after** death of donor.
- If the will is presented by donor, it may be registered in same manner as any other document
- If will presented by any other person entitled to do so, it shall be registered if registering officer is satisfied that –
  i. The document was actually executed by donor and
  ii. Donor is dead
  iii. Person presenting will is authorised to do so.

RIGHT TO INFORMATION ACT, 2005

Introduction

The Right to Information Act, 2005 is an Act to provide for **setting out the practical regime** of right to information for citizens to secure access to information under the control of public authorities, in order to **promote transparency and accountability** in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.

Right to know

- Before reading the RTI Act, 2005, mention should be made that in *R.P. Limited v Indian Express Newspapers,* the Supreme Court read into **Article 21** the right to know. The Supreme Court held that **right to know** is a necessary ingredient of participatory democracy.
- Article 21 confers on all persons a right to know which **include a right to receive information.**
- Thus, a citizen has a right to receive information and that right is derived from the concept of freedom of speech and expression comprised in Article 19(1) (a).
- The State is not only under an obligation to respect the Fundamental Rights of the citizens, but it is equally under an obligation to ensure conditions under which these rights can meaningfully and effectively be enjoyed by one and all.

Features of RTI Act

- It extends to whole of India **except Jammu and Kashmir**.
- It shall apply to **Public authorities**.
- **All citizens** have right to information, subject to provisions of the Act.
- The Public Information Officers / Assistant Public Information Officers will be responsible to deal with the requests for information and also to assist persons seeking information.
- Certain categories of information have been exempted from disclosure under Section 8 and 9 of the Act.

Important Definitions

1. **Section 2(h) - "Public authority"** means any authority or body or institution of self-government established or constituted
   - By or under the Constitution;

- By any other law made by Parliament;
- By and other law made by State Legislature;
- By notification issued or order made by the appropriate Govt.

2. **Section 2(I) - "Record"** includes—
   a) any document, manuscript and file;
   b) any microfilm, microfiche and facsimile copy of a document;
   c) any reproduction of image or images embodied in such microfilm (whether enlarged or not); and
   d) any other material produced by a computer or any other device;

3. **Section 2(f) - "Information"** means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data, material held in any electronic form.

4. **Section 2(j) - "Right to information"** means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to—
   i. taking notes, extracts, or certified copies of documents or records;
   ii. inspection of work, documents, records;
   iii. taking certified samples of material;
   iv. obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;

5. **Section 2(n) - "Third party"** means a person other than the citizen making a request for information and includes a public authority.

Obligations of Public Authority

Section 4(1)(a)

Every public authority under the Act has been entrusted with a duty to maintain records and publish manuals, rules, regulations, instructions, etc. in its possession as prescribed under the Act.

Section 4(1)(b)

Every public authority has to publish **within 120 days** of the enactment of this Act:

- the **particulars of its organization**, functions and duties;
- the **powers and duties** of its officers and employees;
- the **procedure** followed in its decision making process, including channels of supervision and accountability;
- the **norms** set by it for the discharge of its functions;
- the **rules, regulations, instructions**, manuals and records used by its employees for discharging its functions;
- a **statement of the categories of the documents** held by it or under its control;
- the **particulars of any arrangement** that exists for consultation with, or representation by the members of the public, in relation to the formulation of policy or implementation thereof;

- a **statement of the boards, councils, committees** and other bodies consisting of two or more persons constituted by it. Additionally, information as to whether the meetings of these are open to the public, or the minutes of such meetings are accessible to the public;
- a **directory** of its officers and employees;
- the **monthly remuneration** received by each of its officers and employees, including the system of compensation as provided in its regulations;
- the **budget allocated** to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;
- the **manner of execution of subsidy programmes**, including the amounts allocated and the details and beneficiaries of such programmes;
- **particulars of recipients** of concessions, permits or authorizations granted by it;
- **details of the information** available to, or held by it, reduced in an electronic form;
- the **particulars of facilities available** to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;
- the **names, designations** and other particulars of the **Public Information Officers**.
- Such other information as may be prescribed; and thereafter update the publications every year.

Designation of Public Information Officers (PIO)

Section 5

Every public authority has to—

- **Designate** in **all administrative units** or offices Central or State Public Information Officers **to provide information to persons who have made a request for the information.**
- **Designate** at each **sub-divisional level or sub-district level** Central Assistant or State Assistant Public Information Officers **to receive the applications for information or appeals for forwarding the same to the Central or State Public Information Officers**.
- No reason to be given by the person making request for information except those that may be necessary for contacting him.

Request for obtaining information

Application is to be submitted in **writing or electronically**, with prescribed fee, to Public Information Officer (PIO).

Particular	**Days within which information is to be provided from date of receipt of application**
Request made to PIO	30 days
Request made to Assistant PIO	35 days
Interest of third party involved	40 days (Includes maximum period + time given to party to make representation)
Life or liberty is involved	48 hours

Note:

- Time taken for calculation and intimation of fees excluded from the time frame.

- No action on application for 30 days is a deemed refusal.
- No fee for delayed response.

Duties of PIO

1. **Assist in writing application** –
   PIO shall deal with requests from persons seeking information and where the request cannot be made in writing, to render reasonable assistance to the person to reduce the same in writing.
2. **Transfer the request** –
   If the information requested for is held by or its subject matter is closely connected with the function of another public authority, the PIO shall transfer, within 5 days, the request to that other public authority and inform the applicant immediately.
3. **Seek Assistance** –
   PIO may seek the assistance of any other officer for the proper discharge of his/her duties.
4. **Provide Information** –
   - PIO, on receipt of a request, shall as expeditiously as possible, and in any case within 30 days of the receipt of the request, provide the information on payment of such fee as may be prescribed. or reject the request for any of the reasons specified in Section 8 or Section 9.
   - Where the information requested for concerns the life or liberty of a person, the same shall be provided within 48 hours of the receipt of the request. If the PIO fails to give decision on the request within the period specified, he shall be deemed to have refused the request.
5. **Rejection of Application** –
   Where a request has been rejected, the PIO shall communicate to the requester –
   (i) the reasons for such rejection,
   (ii) the period within which an appeal against such rejection may be preferred, and
   (iii) the particulars of the Appellate Authority.
6. **Form of Information** –
   PIO shall provide information in the form in which it is sought unless it would disproportionately divert the resources of the Public Authority or would be detrimental to the safety or preservation of the record in question.
7. **Duties in case of Partial Access** –
   If allowing partial access, the PIO shall give a notice to the applicant, informing:

➢ that only part of the record requested, after severance of the record containing information which is exempt from disclosure, is being provided;
➢ the reasons for the decision, including any findings on any material question of fact, referring to the material on which those findings were based;
➢ the name and designation of the person giving the decision;
➢ the details of the fees calculated by him or her and the amount of fee which the applicant is required to deposit; and
➢ his or her rights with respect to review of the decision regarding non-disclosure of part of the information, the amount of fee charged or the form of access provided.

8. **Duty in case of third party** –

If information sought has been supplied by third party or is treated as confidential by that third party, the PIO shall give a written notice to the third party within 5 days from the receipt of the request. Third party must be given a chance to make a representation before the PIO within 10 days from the date of receipt of such notice.

Exemption from Disclosure

Section 8

Certain categories of information have been exempted from disclosure under the Act. These are:

a) Where disclosure **prejudicially affects the sovereignty and integrity of India**, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;
b) Information which has been **expressly forbidden** by any court or tribunal or the disclosure of which may constitute contempt of court;
c) Where disclosure would **cause a breach of privilege** of Parliament or the State Legislature;
d) Information including commercial confidence, trade secrets or intellectual property, where disclosure would **harm competitive position** of a third party, or available to a person in his fiduciary relationship, unless larger public interest so warrants;
e) Information received in confidence from a **foreign government**;
f) Information the disclosure of which **endangers life or physical safety** of any person or identifies confidential source of information or assistance;
g) Information that would **impede the process of investigation** or apprehension or prosecution of offenders;
h) **Cabinet papers** including records of deliberations of the Council of Ministers, Secretaries and other officers:
Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:
Provided further that those matters which come under the exemptions specified in this section shall **not be disclosed**;
i) **Personal information** which would **cause invasion of the privacy** unless larger public interest justifies it.

Rejection of Request

Section 9

The Public Information Officer has been **empowered to reject a request** for information where an **infringement of a copyright** subsisting in a person would be involved.

Partial Disclosure Allowed

- Under **Section 10** of the Act, only that part of the record which does not contain any information which is exempt from disclosure and which can reasonably be severed from any part that contains exempt information, may be provided.

- As per Section 10 of the Act if the request for access to information is rejected on the ground that it is in relation to the information which is exempt from disclosure, in that event access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can be reasonably severed from any part that contains exempt information.

Exclusions

Section 24

The Act excludes: -

a) **Central Intelligence and Security agencies** specified in the **Second Schedule** like IB, R&AW, Directorate of Revenue Intelligence, Central Economic Intelligence Bureau, Directorate of Enforcement, Narcotics Control Bureau etc.
b) **Agencies specified** by the State Governments **through a Notification** will also be excluded.

The **exclusion**, however, is **not absolute** and these organizations have an obligation to provide information pertaining to allegations of corruption and human rights violations.

Information Commissions

1. Central Information Commission (CIC):

Section 12

- The CIC is to be **constituted by the Central Government** through a Gazette Notification.
- The CIC **consists of** the **Chief Information Commissioner** and **Central Information Commissioners** not exceeding 10.
  - These shall be appointed by the President of India on the recommendations of a committee consisting of PM who is the Chairman of the Committee; the leader of Opposition in the Lok Sabha; and a Union Cabinet Minister to be nominated by the Prime Minister.
  - They shall be **persons of eminence in public life** with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.
  - CIC/IC shall not be a Member of Parliament or Member of the Legislature of any State or Union Territory.
  - He shall not hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.
- The general superintendence, direction and management of the affairs of the Commission vests in the Chief Information Commissioner who shall be assisted by the Information Commissioners. Commission shall have its **Headquarters in Delhi**.

Section 13

- CIC shall be appointed for a term of **5 years** from date on which he enters upon his office or till he attains the **age of 65 years**, whichever is **earlier**.
- CIC is **not eligible for reappointment**.

- Salary will be the same as that of the Chief Election Commissioner. This will not be varied to the disadvantage of the CIC during service.

2. **State Information Commission (SIC):**
   Section 15 & 16
   - The State Information Commission will be **constituted by the State Government** through a Gazette notification.
   - The State Information Commission **consists o**f one State Chief Information Commissioner (SCIC) and not more than 10 State Information Commissioners (SIC).
     - These shall be appointed by the Governor on the recommendations of a committee consisting of the Chief Minister who is the Chairman of the committee. Other members include the Leader of the Opposition in the Legislative Assembly and one Cabinet Minister nominated by the Chief Minister.
     - The qualifications for appointment as SCIC/SIC shall be the same as that for Central Commissioners.
     - The salary of the State Chief Information Commissioner will be the same as that of an Election Commissioner.
     - The salary of the State Information Commissioner will be the same as that of the Chief Secretary of the State Government.
   - The Commission will exercise its powers without being subjected to any other authority.
   - The headquarters of the State Information Commission shall be at such place as the State Government may specify. Other offices may be established in other parts of the State with the approval of the State Government

Power of Information Commissions

Section 18

The Central Information Commission/State Information Commission has a **duty to receive complaints** from any person—

- who has not been able to submit an information request because a PIO has not been appointed;
- who has been refused information that was requested;
- who has received no response to his/her information request within the specified time limits;
- who thinks the fees charged are unreasonable;
- who thinks information given is incomplete or false or misleading; and
- any other matter relating to obtaining information under this law.

If the Commission feels satisfied, an enquiry may be initiated and while initiating an enquiry the Commission has same powers as vested in a Civil Court.

The Central Information Commission or the State Information Commission during the inquiry of any complaint under this Act may examine any record which is under the control of the public authority, and no such record may be withheld from it on any grounds.

Appellate Authorities

Section 19

Any person who does not receive a decision within the specified time or is aggrieved by a decision of the PIO may file an appeal under the Act.

1. **First Appeal**
   First appeal to the officer senior in rank to the PIO in the concerned Public Authority **within 30 days** from the expiry of the prescribed time limit or from the receipt of the decision (delay may be condoned by the Appellate Authority if sufficient cause is shown).
2. **Second Appeal**
   Second appeal to the Central Information Commission or the State Information Commission as the case may be, **within 90 days** of the date on which the decision was given or should have been made by the First Appellate Authority (delay may be condoned by the Commission if sufficient cause is shown).
3. **Third Party appeal against PIO's decision**
   It must be filed **within 30 days before first Appellate Authority**; and, **within 90 days of the decision on the first appeal**, before the appropriate Information Commission which is the second appellate authority.

Burden of proving that **denial of information** was justified **lies with the PIO**.

First Appeal shall be **disposed of within 30 days** from the date of its receipt or within such extended period **not exceeding a total of 45 days** from the date of filing thereof, for reasons to be recorded in writing. Time period could be extended by 15 days if necessary.

Penalties

- **Section 20** of the Act imposes stringent penalty on a Public Information Officer (PIO) for **failing to provide information**.
- Every PIO will be liable for fine **of Rs. 250 per day**, up to a **maximum of Rs. 25,000/** for -
  i. not accepting an application;
  ii. delaying information release without reasonable cause;
  iii. malafidely denying information;
  iv. knowingly giving incomplete, incorrect, misleading information;
  v. destroying information that has been requested; and
  vi. obstructing furnishing of information in any manner.
- The **Information Commission** (IC) at the Centre and at the State levels will have the **power to impose** this penalty. They can also recommend disciplinary action for violation of the law against the PIO for persistently failing to provide information without any reasonable cause within the specified period.

Jurisdiction of Courts

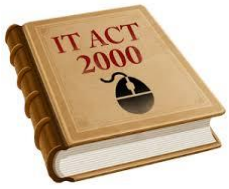
As per **Section 23**, **lower Courts** are **barred** from entertaining suits or applications against any order made under this Act.

Role of Central/State Governments

Section 26 contemplates the Role of Central/State Governments. It authorizes the Central/State Governments to:

a) **Develop and organize educational programmes** for the public especially disadvantaged communities on RTI
b) **Encourage public authorities** to participate in the development and organisation of such programmes.
c) **Promote timely and effective dissemination** of accurate information by the public authorities.
d) **Train officers** and develop training materials
e) **Compile and disseminate a User Guide** for the public in the respective official language.
f) **Publish** names, designation, postal addresses and contact details of PIOs and other information.

INFORMATION TECHNOLOGY ACT, 2000



Introduction

Information Technology Act, 2000 is the primary law in India dealing with electronic commerce and Cyber Crime.

It is based on the United Nations Model Law on Electronic Commerce (UNCITRAL Model) recommended by the General Assembly of United Nations by a resolution dated 30th January 1997.

The Information Technology Act, 2000, was enacted to make, in the main, three kinds of provisions, as under:

a) It provides **legal recognition for transactions carried out by** means of electronic data interchange and other means of electronic communication, usually referred to, as "**electronic Commerce**".
b) It facilitates the **electronic filing of documents** with the Government agencies, (and also with the publication of rules etc, in the electronic form).
c) It **amends** the, Indian Penal Code, the Indian Evidence Act, 1872, the Bankers' Book Evidence Act, 1891, and the Reserve Bank of India Act, 1934, so as to bring in electronic documentation within the purview of the respective enactments.

Documents or Transactions to which Act shall not apply

1. A **negotiable instrument** (other than a cheque) as defined in section 13 of the Negotiable Instruments Act, 1881.
2. A **power-of-attorney** as defined in section 1A of the Powers-of-Attorney Act, 1882.
3. A **trust** as defined in section 3 of the Indian Trust Act, 1882.
4. A **will** as defined in clause (h) of section 2 of the Indian Succession Act, 1925, including any other testamentary disposition by whatever name called.
5. Any **contract for the sale or conveyance of immovable property** or any interest in such property

Important Definitions

1. ***"Addressee"*** means a person who is intended by the originator to receive the electronic record, but does not include any intermediary. [Section 2(1)(b)]

2. ***"Affixing electronic signature"*** with its grammatical variations and cognate expressions means adoption of any methodology or procedure by a person for the purpose of authenticating an electronic record by means of digital signature. [Section 2(1)(d)]

3. ***"Asymmetric crypto system"*** means a system of a secure key pair consisting of a private key for creating a digital signature and a public key to verify the digital signature [Section 2(1)(f)]

4. ***"Digital signature"*** means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of Section 3. [Section 2(1)(p)]

5. ***"Electronic signature"*** means authentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes digital signature. [Section 2(1)(ta)]

6. ***"Electronic Signature Certificate"*** means an Electronic Signature Certificate issued under section 35 and includes Digital Signature Certificate. [Section 2(1)(tb)]

7. ***"Intermediary"*** with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, webhosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes; [Section 2(1)(w)]

8. ***"Key pair"*** in an asymmetric crypto system, means a private key and its mathematically related public key, which are so related that the public key can verify a digital signature created by the private key. [Section 2(1)(x)]

9. ***"Originator"*** means a person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person, but does not include an intermediary. [Section 2(1)(za)]

10. ***PrivateKey"*** means the key of a key pair, used to create a digital signature. [Section 2(1)(zc)]

11. ***"Public key"*** means the key of a key pair, used to verify a digital signature and listed in the Digital Signature Certificate. [Section 2(1)(zd)]

12. ***"Secure system"*** means computer hardware, software, and procedure that–
    a) are reasonably secure from unauthorised access and misuse;
    b) provide a reasonable level of reliability and correct operation;
    c) are reasonably suited to performing the intended functions; and
    d) adhere to generally accepted security procedures;

Digital Signature and Electronic Signature

Sections 3(1), 3(2)

Digital Signature

Digital signature (i.e. authentication of an electronic record by a subscriber, by electronic means) is recognised as a **valid method of authentication**. The authentication is to be effected by the use of "**asymmetric crypto system and hash function**", which envelop

and transform electronic record into another electronic record.

Section 3(3)
Verification of the electronic record is done by the use of a public key of the subscriber. The private key and the public key are unique to the subscriber and constitute a functioning "key pair".

Section 3A
It deals with **electronic signature**.
Section 3A(1) provides that notwithstanding anything contained in section 3(1), but subject to the provisions of sub-section (2), a subscriber may **authenticate any electronic record by such electronic signature** or electronic authentication technique which—
(a) is considered **reliable**; and
(b) may be specified in the **Second Schedule**.

For the purposes of above any electronic signature or electronic authentication technique shall be **considered reliable if**—
a) the signature creation data or the authentication data are, **within the context in which they are used**, linked to the signatory or, as the case may be, the authenticator and to no other person;
b) the signature creation data or the authentication data were, at the time of signing, **under the control** of the signatory or, as the case may be, the authenticator and of no other person;
c) **any alteration** to the **electronic signature** made after affixing such signature is **detectable**;
d) **any alteration** to the **information** made after its authentication by electronic signature is **detectable**; and
e) it fulfils **such other conditions** which may be prescribed.

Electronic Governance (Legal Recognition of Electronic Records)

Section 4
The Act grants legal recognition to electronic records by laying down that where (by any law) "information" or any other matter is to be in writing or typewritten form or printed form, then, such requirement is satisfied, if such information or matter is:
i. rendered or made available in an **electronic form**; and
ii. **accessible**, so as to be usable for a subsequent reference.

Section 5
It deals with **legal recognition of electronic signatures**. It states that where any law provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature of any person, then, notwithstanding anything contained in such law, such **requirement** shall be **deemed to have been satisfied,** if such **information** or matter is **authenticated by means of electronic signature** affixed in such manner as may be prescribed by the Central Government.

Section 6

This provision grants recognition to electronic records and electronic record signatures, in cases where any law provides for

a) the filing of any form, application or any other document with a Governmental office or agency or
b) the grant of any licence, permit etc. or
c) the receipt or payment of money in a particular manner.

Section 6A

The appropriate Government may, for the purposes of this Chapter and for efficient delivery of services to the public through electronic means authorise, by order, any service provider to **set up, maintain and upgrade the computerised facilities** and perform such other services as it may specify, by notification in the Official Gazette.

Retention of Information

Section 7

The Act also seeks to permit the retention of information in electronic form, where any law provides that certain documents, records or information shall be retained for any specific period.

Audit of documents maintained in electronic form

Section 7A

Where in any law for the time being in force, there is a provision for audit of documents, records or information, that provision shall also be applicable for audit of documents, records or information processed and maintained in the electronic form.

Validity of contracts formed through electronic means

As per **section 10A** of the Act, where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic records, such contract shall **not be deemed to be unenforceable** solely on the ground that such electronic form or means was used for that purpose

Attribution and Dispatch of Electronic records

Section 11- Attribution

An electronic record is attributed to the "originator".

The "originator" is the person at whose instance it was sent in the following cases -

a) if it was sent by the originator himself; or
b) if it was sent by a person authorised to act on behalf of the originator in respect of that electronic record; or
c) if it was sent by an information system programmed by or on behalf of the originator to operate automatically.

Section 12(1) - Acknowledgement of receipt of electronic records

Where there is no agreement that the acknowledgment be given in a particular form etc. then the acknowledgement may be given by:

a) any communication by the addressee (automated or otherwise) or
b) any conduct of the addressee which is sufficient to indicate to the originator that the electronic record has been received.

Time and Place of Dispatch

Section 13(1)

Subject to agreement between the parties, the **dispatch** of an electronic record occurs, when it **enters a "computer resource**" outside the control of the originator.

Section 13(2)(a)

Subject to agreement, if the addressee has **designated a computer resource** for receipt, then receipt occurs **when the electronic record enters the designated resource**.

However, if the record is **sent to a computer resource** of the addressee which is **not the designated** resource, then receipt occurs at the **time when the electronic record is retrieved by the addressee.**

Sections 13(1), 13(2)

If the addressee has **not designated a computer resource** (with or without specified timings), then receipt is deemed to occur, **when the electronic record enters the computer resource of the addressee.**

Above provisions apply, even where the place of location of the computer is different from the deemed place of receipt.

Secure Electronic Record

Section 14

When the procedure has been applied to an electronic record at a specific point of time, then such record is deemed to be a secure electronic record, from such point of time to the time of verification.

Section 15

An electronic signature shall be deemed to be a **secure electronic signature** if—

i. the signature creation data, at the time of affixing signature, was under the exclusive control of signatory and no other person; and
ii. the signature creation data was stored and affixed in such exclusive manner as may be prescribed.

Section16

The Central Government is required, by the Act, to prescribe the security procedure for electronic records, having regard to the commercial circumstances prevailing at the time when the procedure is used.

Certifying Authority

A Certifying Authority is expected to reliably identify persons applying for "signature key certificates", reliably verify their legal capacity and confirm the attribution of a public signature key to an identified physical person by means of a signature key certificate. To regulate the Certifying Authorities, there is a Controller of Certifying Authorities.

Electronic Signature Certificates

Sections 35-39 of the Act deal with Electronic Signature Certificates.
As per **Section 35** of the Act, **Certifying authority** to **issue electronic signature Certificate.**
Followings are the **procedure** of obtaining electronic signature Certificate:

1. Any person may **make an application** in prescribed form to the Certifying Authority for the issue of electronic signature Certificate in such form as may be prescribed by the Central Government.
2. Every such application shall be accompanied by **prescribed fees**
3. Every such application shall be accompanied by a **certification practice statement** or where there is no such statement, a statement containing such particulars, as may be specified by regulations.
4. On receipt of an application, the Certifying Authority may, after consideration of the certification practice statement or the other statement and after making such enquiries as it may deem fit, **grant the electronic signature Certificate** or for reasons to be recorded in writing, reject the application.

It may be noted that no application shall be rejected unless the applicant has been given a reasonable opportunity of showing cause against the proposed rejection.

Penalties and Adjudications

Section 43 provides that if any person **without permission of the owner** or any other person who is in charge of a computer, computer system or computer network, –

a) **accesses or secures access** to such computer, computer system or computer network or computer resource;
b) **downloads, copies or extracts** any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium;
c) **introduces** or causes to be introduced any computer **contaminant or computer virus** into any computer, computer system or computer network;
d) **damages** or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network;
e) **disrupts or causes disruption** of any computer, computer system or computer network;
f) **denies or causes the denial of access** to any person authorised to access any computer, computer system or computer network by any means;

g) **destroys, deletes or alters** any information residing in a **computer resource** or diminishes its value or utility or affects it injuriously by any means;
h) **steal, conceal, destroys or alters** or causes any person to steal, conceal, destroy or alter any **computer source code** used for a computer resource with an intention to cause damage;

he shall be **liable to pay damages by way of compensation** to the person so affected.

Compensation for failure to protect data

Section 43A
Where a **body corporate**, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is **negligent** in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the person so affected.

Appellate Tribunal

Chapter X of the Act provides for the establishment of Appellate Tribunal.
The Central Government shall specify, by notification the matters and places in relation to which the Appellate Tribunal may exercise jurisdiction.

Section 57
Any **person aggrieved** by an **order of the Controller of Certifying Authorities** or of the adjudicator can **appeal to the Appellate Tribunal**, **within 45 days**.
Any **person aggrieved** by "**any decision or order" of the Appellate Tribunal** may appeal to the **High Court**, **within 60 days**.
Jurisdiction of Civil Courts is barred, in respect of any matter which an adjudicating officer or the Appellate Tribunal has power to determine.

Offences

Tampering with computer source documents (Section 65)
Whoever **knowingly or intentionally** conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy, or alter any computer source code used for a computer, computer programme, computer system or computer network, when the computer source code is required to be kept or maintained by law for the time being in force, shall be **punishable** with **imprisonment up to three years**, or with **fine** which may extend **up to two lakh rupees**, or with **both**.

Computer related offences (Section 66)
If any person**, dishonestly or fraudulently**, does any act referred to in section 43, he shall be **punishable** with **imprisonment** for a term which may **extend to three years** or with **fine** which may extend to **five lakh rupees** or with **both**.

Section 69
Where the Central Government or a State Government or any of its officers, as the case may be, is satisfied that it is necessary or expedient so to do,

in the interest of the sovereignty or integrity of India, or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence, it may, for reasons to be recorded in writing, **by order**, **direct any agency** of the appropriate Government **to intercept, monitor or decrypt** or cause to be intercepted or monitored or decrypted any information generated, transmitted, received or stored in any computer resource.

Extraterritorial operation (Section 75)

Extra-territorial operation of the Act is provided for, by enacting that the provisions of the Act apply to any offence or **contravention committed outside India** by any person, **irrespective of his nationality**, if the act or conduct in question **involves a computer, computer system or computer network located in India.**