Centre for Aerospace & Defence Laws (CADL)

Directorate of Distance Education

NALSAR University of Law, Hyderabad

<u>Course Material</u>

P.G. DIPLOMA (ADVANCED MARITIME LAWS)

1.1.1. General Principles of Law

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INTRODUCTION TO THE COURSE

Why this course at NALSAR?

Every job seeker is aware that the job market is no more bountiful due to the economic slowdown worldwide. India is no different in terms of job market and job aspirants have to try harder than ever before. But some newer avenues are opening up notwithstanding the lack of enthusiasm in the economy. A career in Aviation laws is one such area which the latest addition to the job market is and has huge potential in the long run. Marine lawyers are the answer to the legal hassles in the ever increasing as well as complicated marine industry. In India, despite huge potential in the maritime sector there are only few institutions or universities which have started courses in Maritime law. Out of which there are hardly any institution running the course effectively and efficiently.

From its inception, the University is committed to ensure highest quality in imparting legal education. One of the core missions of NALSAR is to produce legal professional who are professionally competent, technically sound and socially relevant lawyers. In this regard the University through the aforementioned course introduced by CADL aims to cater to the growing needs of the maritime industry and impart knowledge and train participants in the legal as well as management aspect.

The programme is the initiative of Centre for Aerospace & Defence Laws (CADL) of NALSAR University towards providing a comprehensive legal education thereby enabling the learner to develop an advanced understanding of a specialized area of maritime law and promote research in the area of maritime laws as there are very few universities in the country that are engaged in conducting teaching and research in the discipline of maritime laws. India is rapidly integrating its economy with more than 90% of the country's trade being conducted through oceans and also the sea provides passageway to 45,000 merchant ships worldwide and over 90 percent of global trade. Hence, there is an urgent need to strengthen and popularize maritime legal education in India. There is a growing need for students specialized in laws of sea. Shipping legal firms handling corporate shipping, insurance and port management are seriously looking for young and talented students trained in the legal regime of international and national maritime sector.

This programme is suitable for those in both the legal and maritime industry who are looking to enhance their career prospects. It provides highly specialised knowledge and research skills relevant for both legal practitioners and those operating more generally within the legal environment of the maritime sector. It would also assist anyone working in profession concerned with international trade and maritime environment depending on the chosen line of speciality within the research framework.

It is mainly designed for lawyers, legal advisers, judges and legal draftsmen. But the programme is also open to law graduates of any country who intend to pursue a legal career in the field of maritime law whether in the public or private sectors, whether in practice, administration or academia.

Nature of perspective target group learners

The course aims to meet the needs of personnel currently involved in the maritime industry, students of marine and marine enthusiasts who wish to upgrade their skills at tertiary level in the field of management and application of maritime law. In addition, the program is designed to have considerable application for personnel in related technologically based service and business industries.

How Course is conducted?

This P.G. Diploma Programme has two semesters. Each Semester will have Onsite intense sessions by the subject experts, followed by online session where participants will work on the case studies and assignments and upload them on the dedicated web platform / submit them by email. The students can contact / communicate by email with the subject experts pertaining to various queries on the concerned subject. Relevant course material will be uploaded on the website and can be accessed through their login id.

Face to Face contact sessions will be conducted for seven days in a semester at Hyderabad by the subject experts. Suggested reference guidance would be provided at the contact sessions. Each subject shall consist of 15 teaching hours which will come to 60 teaching hours per semester for three semesters. Case study analysis will be part of the concerned subjects and will be discussed in onsite sessions. Attendance at the onsite session is not compulsory.

The conduct of the programme involves uploading of updated course material, assignments etc. on the website.

Course Structure

SEMESTER – I			
Subject Code	**Subject**	**Marks**	**Credits**
1.1.1	General Principles of Law	100	5
1.1.2	International Maritime Laws	100	5
1.1.3	Maritime Security and Law of the Sea	100	5
SEMESTER – II			
1.2.4	Maritime Laws in India	100	5
1.2.5	International Trade and Marine Transport Services	100	5
1.2.6	Maritime Laws and Contemporary Issues	100	5

General Principles of Law

It is a well-known legal maxim '*ignorantia juris neminem excusat*' which means that '*ignorance of law is no excuse*'. This is one of the most fundamental principles of law followed since time immemorial. With the growing complexities in the nature of a society, legal awareness is of utmost importance as helps a student of one's rights and obligations as a responsible citizen of a country and a member of the global community. Law has an impact on every small aspect of our lives and professional opportunities. Therefore knowledge of law can open a window of opportunities that you were previously unaware of. It not only has an impact on the human lives but it also forms the foundation on which any civilized society is based.

Though law for centuries together has been taught as a professional course however yet it is very essential that every person should be aware about the general principles of law for several reasons like, understanding of public affairs, awareness on our rights and duties. Further there are numerous myths and wrong notions about law which a non-legal professional should clarify and have a thorough understanding of its fundamental operations.

For this reason a paper on the '***General Principles of Law***' is designed with the intention of providing the course participants with an overall understanding of the fundamental concepts and principles of law and also develop an in-depth base on the functioning of law in government, society and our lives. Therefore knowledge about the practical aspects of law is as important as knowledge about theory and principles of law.

Every action of ours is governed by a code of conduct, be it moral or legal; direct or indirect. Law is a system of rules which regulates human conduct in the society. Law systems are often based on ethical or religious principles and are enforced by the police and criminal justice systems such as the courts. Below is a brief overview of the contents of the module.

Module I - Introduction to Law

Having regard to the importance of the fundamental understanding of law, the first module of this paper focuses basic concepts of law. It gives a brief background to the meaning of law and its varied forms. The module will also look into the law reforms and the transition of law as per the changing needs of a growing society. Without public enforcement agencies the concept of law will just remain an abstract notion. The module further go on describing the classification of global legal systems, Legal System amongst International Institutions and countries inter se and the impact of globalization on legal systems.

Module II - Constitutional Law and Administrative Law

The second module entails a brief discussion on India's Constitution which is the supreme law of the land and the Administrative law. The module is divided into two parts. First part deals with the nature, history and development, salient features and other significant areas of the constitution including fundamental rights, directive principles, fundamental duties, center state relations, etc. The second part of the module deals with the significant aspects of administrative law including the meaning, nature and scope, the relevant principles like doctrine of natural justice, separation of power, rule of law, etc., delegated legislation, administrative discretion and so on.

Module III – Indian Judicial and Legal System

Law is no longer an abstract notion but as discussed above it lays down and regulates the human code of conduct. Hence a discussion on the evolution and practical operation of law in India becomes extremely crucial. With this objective in mind, the second module has been designed to deal with the historical evolution of the Indian Legal System starting from the ancient Indian law. The module thereafter divulges into the administration of justice in India including the detailed discussion on the Indian judiciary, civil and criminal court structure and procedure. Apart from the traditional forms of dispute settlement the module also covers alternate forms of dispute settlement and quasi-judicial framework which has assumed tremendous importance in the modern times to ensure speedy and inexpensive remedy to the parties.

Module IV - Fundamental Aspects of Laws and its Relevance to Maritime Law

Till now we have seen the concept of laws, the sources from law has emerged, the tools that it uses to operate. We also saw an overview of our constitution which lays down the basic law of the land and provides authority and validity to other legislations to operate. Thereafter a detail insight was provided on the functioning of the Indian Legal System and the Indian Judiciary in the second module.

However there is another aspect or rather aspects of law which is very crucial for our course participants to understand in order to have a better and wholesome understanding regarding the operation of International maritime law in India as well as in the international sphere.

This module will discuss in brief and provide an overview of various aspects of law. Law has evolved and developed and is still growing in accordance with the contemporary needs of the society. Different areas of human activities are gradually getting regulated by law. This module thus seeks to provide a basic understanding of those areas along with a special focus on the importance of such laws with respect to maritime.

Module V- Legal Research Methodology and Project Writing Techniques

Research is a desire to search or to find out or to explore an unknown area in order to find an answer. It is a quest for acquiring knowledge. Research is a careful investigation or inquiry especially through search for new facts in any branch of knowledge. Legal Research means research in law which deals with the principles of law and legal institutions. The objective may be to discover new facts or to verify the existing facts, to propound a new legal concept or to analyses existing law and give suggestions for a new law. In order to carry out a research to completion successfully a researcher must be aware of the research methods i.e. the method of doing research. A research method is a systematized investigation to gain new knowledge about the phenomena or problems. It is the technique of conducting research and study of the technique of doing research is research methodology. In a broader sense the research methodology includes the research methods as well as the philosophy and practice of the whole research process. A good research method is crucial for conducting proper research and getting useful results. This module is designed to give an insight into the meaning and significance of research methods for legal research to the students in contemporary times. It aims to provide an understanding of the various types of research methods and the different techniques of legal research and legal writing with a view to equip the students for further research in law.

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MODULE-I

Introduction to Law

DEFINITION, NATURE, SOURCES AND SIGNIFICANCE OF LAW

Law is a system of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the imposition of penalties. Also known as rules or regulations, code of conducts, etc. laws are essentially made and enforced by the government. They are meant to control or change our behavior and unlike moral rules, they can be enforced by the courts. It is a notional pattern of conduct to which actions do or ought to conform.

The large body of Laws are based mainly on general principles of justice, fair play and convenience which have been worked out by governmental bodies to regulate human activities. In broader sense, 'Law' denotes the whole process by which organized society, through government bodies and personnels (Law-makers, Courts, Tribunals, Law Enforcement Agencies and Executive, Penal and corrective Institutions etc.) attempt to apply rules and regulations to establish and maintain peaceful and orderly relations amongst the people in the society. The idea of 'Law' as guide to human conduct is as old as the existence of the civilized society. The relevance of law to human behavior has become so intimate today that every person has his or her own conception about its nature which is influenced, of course, by his/her own perspective. Not surprisingly the search for an agreed definition of 'Law' has been an endless journey.

There have been conflicting and divergent views of jurists regarding the nature, concept, basis and functions of Law. 'Law' has been regarded as a divinely ordained rule or a tradition of the old customs or recorded wisdom of the wise men or philosophically discovered system of principles which expresses the nature of things or as a body of ascertainments and declaration of an eternal and immutable moral code, or as a body of agreements of men/women in politically organized society, or as a reflection of divine reason or as a body of commands of the sovereign, or as a body of rules discovered by human experience, or a body of rules developed through juristic writings and judicial decisions or as a body of rules imposed on men/women in society by the dominant class, or as a body of rules in terms of economic and social goals of the individuals.

The meaning of law has been defined by various jurists, however there is no unanimity of opinion regarding the true definition 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 certian given period of legal development. Therefore, it is not practicable to give a precise and definite meaning to law which may hold good for all times to come. However, it is desirable to refer to some of the definitions given by different jurists so as to develop an undertsnading of the term "law". 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.

In the following pages we will discuss some prominent definitions and conceptions of law. For the purpose of clarity and better understanding of the nature and meaning of law, we may classify the various definitions into five broad classes:

(a) Idealistic,
(b) Positivistic,
(c) Historical,
(d) Sociological, and
(e) Realistic.

(a) *Idealistic Definition of law:* Under this class fall most of the ancient definitions given by Roman and other ancient Jurists. **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 all these definitions, propounded by **Romans**, "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, the prominent modern idealistic thinker, 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 on by the courts of Justice. It may be noted that there are two main factors of the definition. First, that to understand law, one should know its purpose: Second, 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."

(b) *Positivistic Definition of Law:* According to Austin, "Law is the aggregate of rules set by man as politically superior, or sovereign, to men as political subject." In other words, 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 three 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 *Grundnorm*.

(c) *Historical Definition of Law:* **Savigny's** theory of law can be summarised as follows:

(i) That law is a matter of unconscious and organic growth. Therefore, law is found and not made.
(ii) Law is not universal in its nature. Like language, it varies with people and age.

(iii) Custom not only precedes legislation but it is superior to it. Law should always conform to the popular consciousness.

(iv) 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".

(d) *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 three essentials of this definition. First, in this definition law is treated as only one means of social control. Second, law is to serve social purpose. Third, it is coercive in character. **Roscoe Pound** analysed the term "law" in the 20th century background as predominantly an instrument of social engineering in which conflicting pulls of political philosophy, economic interests and ethical values constantly struggled for recognition against background of history, tradition and legal technique. Pound thinks of law as a social institution to satisfy social wants – the claims and demands and expectations involved in the existence of civilised society by giving effect to as must as may be satisfied or such claims given effect by ordering of human conduct through politically organised society.

(e) *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." From the above definitions, it follows that law is nothing but a mechanism of regulating the human conduct in society so that the harmonious co-operation of its members increases and thereby avoid the ruin by coordinating the divergent conflicting interests of individuals and of society which would, in its turn, enhance the potentialities and viability of the society as a whole.

To summarise, following are the main characteristics of law and a definition to become universal one, must incorporate all these elements:

(a) Law pre-supposes a State.

(b) The State makes or authorizes to make, or recognises or sanctions rules which are called law.

(c) For the rules to be effective, there are sanctions behind them.

(d) These rules (called laws) are made to serve some purpose. The purpose may be a social purpose, or it may be simply to serve some personal ends of a despot.

Separate rules and principles are known as "laws". Such laws may be mandatory, prohibitive or permissive. A mandatory law calls for affirmative act, as in the case of law requiring the payment of taxes. A prohibitive law requires negative conduct, as in the case of law prohibiting the carrying of concealed weapon or running a lottery. A permissive law is one which neither requires nor forbids action, but allows certain conduct on the part of an individual if he desires to act.

Laws are made effective:

(a) by requiring damages to be paid for an injury due to disobedience;
(b) by requiring one, in some instances, to complete an obligation he has failed to perform;
(c) by preventing disobedience; or
(d) by administering some form of punishment.

The law, and the system through which it operates, has developed over many centuries into the present combination of statutes, judicial decisions, custom and convention. By examining the sources from which we derive our law and legal system, we gain some insight into the particular characteristics of our law. The State, in order to maintain peace and order in society, formulates certain rules of conduct to be followed by the people. These rules of conduct are called "laws".

SOURCES OF INDIAN LAW

The expression "sources of law" has been used to convey different meanings. There are as many interpretations of the expression "sources of law" as there are schools and theories about the concept of law. The general meaning of the word "source" is origin. There is a difference of opinion among the jurists about the origin of 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) Principal sources of Indian Law.
(B) Secondary sources of Indian Law.

Principal Sources of Indian Law: The principal sources of Indian law are:

(i) Customs or Customary Law.
(ii) Judicial Decisions or Precedents.
(iii) Statutes or Legislation.
(iv) Personal Law e.g., Hindu and Mohammedan Law, *etc.*

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.

A study of the ancient law shows that in primitive society, the lives of the people were regulated by customs which developed spontaneously according to circumstances. It was felt that a particular way of doing things was more convenient than others. When the same thing was done again and again in a particular way, it assumed the form of custom.

Customs have played an important role in moulding the ancient Hindu Law. Most of the law given in Smritis and the Commentaries had its origin in customs. The Smritis have strongly recommended that the customs should be followed and recognised. Customs worked as a re-orienting force in Hindu Law. Custom as a source of law has a very inferior place in the Mohammedan Law. However, customs which were not expressly disapproved by the Prophet were good laws. It was on the basis of such customs that Sunnis interpreted many provisions of the law, especially the law of divorce and inheritance. In India, many sects of Mohammedans are governed by local customary law.

Classification of Customs: The customs may be divided into two classes:

(1) Customs without sanction.
(2) Customs having sanction.

Customs without sanction are those customs which are non-obligatory and are observed due to the pressure of public opinion. These are called as “positive morality”. Customs having sanction are those customs which are enforced by the State. It is with these customs that we are concerned here. These may be divided into two classes: (1) Legal, and (2) Conventional.

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 two kinds: (a) Local Customs (b) General Customs. 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 two classes: Geographical Local Customs, and Personal Local Customs. These customs are law only for a particular locality, sect or community. 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.

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:

1. 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.
2. Convention cannot alter the general law of the land.
3. It must be reasonable.

Like legal customs, conventional customs may also be classified as general or local. Local conventional customs are limited either to a particular place or market or to a particular trade or transaction.

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:

(a) Immemorial (Antiquity): A custom to be valid must be proved to be immemorial; it must be ancient. According to Blackstone "A custom, in order that it may be legal and binding must have been used so long that the memory of man runs not to the contrary, so that, if any one can show the beginning of it, it is no good custom". English Law places a limit to legal memory to reach back to the year of accession of Richard I in 1189 as enough to constitute the antiquity of a custom. In India, the English Law regarding legal memory is not applied. All that is required to be proved is that the alleged custom is ancient.

(b) Certainty: The custom must be certain and definite, and must not be vague and ambiguous.

(c) 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.

(d) 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.

(e) 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.

(f) Unanimity of opinion: The custom must be general or universal. If practice is left to individual choice, it cannot be termed as custom.

(g) Peaceable enjoyment: The custom must have been enjoyed peaceably without any dispute in a law court or otherwise.

(h) Consistency: There must be consistency among the customs. Custom must not come into conflict with the other established customs.

Judicial 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. This is particularly so in the case of England and other countries which have been influenced by English jurisprudence. The principles of law expressed for the first time in court decisions become precedents to be followed as law in deciding problems and cases identical with them in future. The rule that a court decision becomes a precedent to be followed in similar cases is known as doctrine of stare decisis.

The reason why a precedent is recognised is that a judicial decision is presumed to be correct. The practice of following precedents creates confidence in the minds of the litigants. Law becomes certain and known and that in itself is a great advantage. Administration of justice becomes equitable and fair.

General Principles of Doctrine of Precedents: The first rule is that each court lower in the hierarchy is absolutely bound by the decisions of the courts above it. The second rule is that in general higher courts are bound by their own decisions. This is a special feature of the English law.

High Courts

(1) The decisions of High Court are binding on all the subordinate courts and tribunals within its jurisdiction. The decisions of one High Court have only a persuasive value in a court which is within the jurisdiction of another High Court. But if such decision is in conflict with any decision of the High Court within whose jurisdiction that court is situated, it has no value and the decision of that High Court is binding on the court. In case of any conflict between the two decisions of co-equal Benches, generally the later decision is to be followed.

(2) In a High Court, a single judge constitutes the smallest Bench. A Bench of two judges is known as Division Bench. Three or more judges constitute a Full Bench. A decision of such a Bench is binding on a Smaller Bench. One Bench of the same High Court cannot take a view contrary to the decision already given by another co-ordinate Bench of that High Court. Though decision of a Division Bench is wrong, it is binding on a single judge of the same High Court. Thus, a decision by a Bench of the High Court should be followed by other Benches unless they have reason to differ from it, in which case the proper course is to refer the question for decision by a Full Bench.

(3) The High Courts are the Courts of co-ordinate jurisdiction. Therefore, the decision of one High Court is not binding on the other High Courts and have persuasive value only. Pre-constitution (1950) Privy Council decisions are binding on the High Courts unless overruled by the Supreme Court.

(4) The Supreme Court is the highest Court and its decisions are binding on all courts and other judicial tribunals of the country. Article 141 of the Constitution makes it clear that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The words “law declared” includes an obiter dictum provided it is upon a point

raised and argued (Bimladevi v. Chaturvedi, AIR 1953 All. 613). However, it does not mean that every statement in a judgement of the Supreme Court has the binding effect. Only the statement of ratio of the judgement is having the binding force.

Supreme Court

The expression 'all courts' used in Article 141 refers only to courts other than the Supreme Court. Thus, the Supreme Court is not bound by its own decisions. However, in practice, the Supreme Court has observed that the earlier decisions of the Court cannot be departed from unless there are extraordinary or special reasons to do so (AIR 1976 SC 410). If the earlier decision is found erroneous and is thus detrimental to the general welfare of the public, the Supreme Court will not hesitate in departing from it. English decisions have only persuasive value in India. The Supreme Court is not bound by the decisions of Privy Council or Federal Court. Thus, the doctrine of precedent as it operates in India lays down the principle that decisions of higher courts must be followed by the courts subordinate to them. However, higher courts are not bound by their own decisions (as is the case in England).

Kinds of Precedents: Precedents may be classified as: (a) declaratory and original, (b) persuasive, (c) absolutely authoritative, and (d) conditionally authoritative.

(a) Declaratory and original precedents: According to Salmond, 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. In the case of advanced countries, declaratory precedents are more numerous. The number of original precedents is small but their importance is very great. They alone develop the law of the country. They serve as good evidence of law for the future. A declaratory precedent is as good a source of law as an original precedent. The legal authority of both is exactly the same.

(b) 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. The rulings of the English and American Courts are persuasive precedents only. Obiter dicta also have only persuasive value.

(c) 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. In England decisions of the House of Lords are absolutely binding not only upon all inferior courts but even upon itself. Likewise, the decisions of the Court of Appeal are absolutely binding upon itself.

(d) 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. Prof. Goodhart says that ratio decidendi is nothing more than the decision based on the material facts of the case. Where an issue requires to be answered on principles, the principles which are deduced by way of abstraction of the material facts of the case eliminating the immaterial elements is known as ratio decidendi and such principle is not only applicable to that case but to other cases also which are of similar nature.

It is the ratio decidendi or the general principle which has the binding effect as a precedent, and not the obiter dictum. However, the determination or separation of ratio decidendi from obiter dictum is not so easy. It is for the judge to determine the ratio decidendi and to apply it on the case to be decided.

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 the 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 degrees 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.

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 repelled, 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.

The rule-making power of the executive is, however, hedged with limitations. The rules made by it are placed on the table of both Houses of Parliament for a stipulated period and this is taken as having been approved by the legislature. Such rules then become part of the enactment. Where a dispute arises as to the validity of the rules framed by the executive, courts have the power to sit in judgement whether any part of the rules so made is in excess of the power delegated by the parent Act.

In our legal system, Acts of Parliament and the Ordinances and other laws made by the President and Governors in so far as they are authorised to do so under the Constitution are supreme legislation while the legislation made by various authorities like Corporations, Municipalities, etc. under the authority of the supreme legislation are subordinate legislation.

Personal Law

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. In the case of Hindus, for instance, their personal law is to be found in

(a) The Shruti which includes four Vedas.
(b) The 'Smritis' which are recollections handed down by the Rishi's or ancient teachings and precepts of God, the commentaries written by various ancient authors on these Smritis. There are three main Smritis; the Codes of Manu, Yajnavalkya and Narada.

Hindus are governed by their personal law as modified by statute law and custom 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.

The personal law of Mohammedans is to be found in

(a) The holy Koran.
(b) The actions, percepts and sayings of the Prophet Mohammed which though not written during his life time were preserved by tradition and handed down by authorised persons. These are known as Hadis.
(c) Ijmas, i.e., a concurrence of opinion of the companions of the Prophet and his disciples.
(d) Kiyas or reasoning by analogy. These are analogical deductions derived from a comparison of the Koran, Hadis and Ijmas when none of these apply to a particular case.
(e) Digests and Commentaries on Mohammedan law, the most important and famous of them being the Hedaya which was composed in the 12th century and the Fatawa Alamgiri which was compiled by commands of the Mughal Emperor Aurangzeb Alamgiri.

Mohammedans are governed by their personal law as modified by statute law and custom in all matters relating to inheritance, wills, succession, legacies, marriage, dowery, divorce, gifts, wakfs, guardianship and pre-emption.

Secondary Source of Indian Law

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.

The Ancient Hindu Law had its own versions of the doctrine of justice, equity and good conscience. In its modern version, justice, equity and good conscience as a source of law, owes its origin to the beginning of the British administration of justice in India. The Charters of the several High Courts established by the British Government directed that when the law was silent on a matter, they should decide the cases in accordance with justice, equity and good conscience. Justice, equity and good conscience have been generally interpreted to mean rules of English law on an analogous matter as modified to suit the Indian conditions and circumstances. The Supreme Court has stated that it is now well established that in the absence of any rule of Hindu Law, the courts have authority to decide cases on the principles of justice, equity and good conscience unless in doing so the decision would be repugnant to, or inconsistent with, any doctrine or theory of Hindu Law: (1951) 1 SCR

Significance and Relevance to Modern Civilized Society: Law is not static. As circumstances and conditions in a society change, laws are also changed to fit the requirements of the society. At any given point of time the prevailing law of a society must be in conformity with the general statements, customs and aspirations of its people.

Modern science and technology have unfolded vast prospects and have aroused new and big ambitions in men. Materialism and individualism are prevailing at all spheres of life. These developments and changes have tended to transform the law patently and latently. Therefore, law has undergone a vast transformation – conceptual and structural. The idea of abstract justice has been replaced by social justice

The object of law is order which in turn provides hope of security for the future. Law is expected to provide socio-economic justice and remove the existing imbalances in the socio-economic structure and to play special role in the task of achieving the various socio-economic goals enshrined in our Constitution. It has to serve as a vehicle of social change and as a harbinger of social justice.

CLASSIFICATION OF LAWS

Civil v. Criminal Law

Civil law deals with the disputes between individuals, organizations, or between the two, in which compensation is awarded to the victim. The object of civil law is the redress of wrongs by compelling compensation or restitution: the wrongdoer is not punished; he only suffers so much harm as is necessary to make good the wrong he has done. The person who has suffered gets a definite benefit from the law, or at least he avoids a loss.

Criminal law is the body of law that deals with crime and the legal punishment of criminal offenses. In Criminal Law the main object of the law is to punish the wrongdoer; to give him and others a strong inducement not to commit same or similar crimes, to reform him if possible and perhaps to satisfy the public sense that wrongdoing ought to meet with retribution.

In civil law the cases are filed by the private party, where as in criminal law the cases are filed by the government because any offence though committed against a particular person is considered as a violation of the criminal law and hence an offence against the state.

The standard of proof in both the set of laws is also different. Where on one hand, in civil law the principle applied to determine the standard of evidence is 'Preponderance of evidence' i.e. the claimant must produce evidence beyond the balance of probabilities. On the other hand in criminal law the guilt of the accused needs to be proved beyond a reasonable doubt. Similarly the natures of punishment in both the cases are also different. In a civil matter, punishment is usually in the form of compensation i.e. monetary relief for the injuries or damages, or an injunction in nuisance. In a criminal matter, a guilty defendant is subject to custodial imprisonment or non-custodial punishment fines or community service. In exceptional cases, the death penalty may also be awarded.

There are separate court structures for civil and criminal matters which have been explained in details in the subsequent chapters.

Territorial v. Personal Laws

The people of India belong to different religions and faiths. They are governed by different sets of personal laws in respect of matters relating to family affairs, i.e., marriage, divorce, succession, etc. Personal law applies to those who profess a particular religion. Personal laws based on religion, there are also various customary rules that apply to areas of marriage, divorce and family matters.

India has two systems of law, one territorial and one personal. For example, the Special Marriage Act applies to all people in the territory of India. The fact that some persons or categories of persons are excluded from the provisions of the Act does not change its nature to personal. On the other hand, the Hindu Succession Act applies to Hindus, and is therefore personal. The fact that it is also applicable in the territory of India does not make it territorial.

Procedural v. Substantive Laws

Procedural Laws deals with the rules and regulations that govern the procedures of civil, criminal and administrative courts. The basic purpose of these laws is to ensure that the principles of due process and fundamental justice are followed in all the cases which is brought before a court. In particular these laws lay down the procedures which are to be followed once a case reaches the court docket. From the manner in which parties are informed to the steps that should be followed in examination of evidences to the presentation of oral arguments till the time the final decision if delivered and executed, these laws cover and govern each and every intricate details of court procedures. Procedural laws would thus include within its ambit various laws on civil and criminal procedures.

Substantive Laws refers to the written or statutory law which governs the relationship between people, or between people and the state. It defines the rights, duties, obligations and powers of people. It lays down a rule of conduct for the people. Substantive law is the statutory, or written law, that defines rights and duties, such as crimes and punishments (in the criminal law), civil rights and responsibilities in civil law. It is codified in legislated statutes or can be enacted through the initiative process. Thus substantive law would cover the law of contracts, aviation law, space laws, international laws, corporate laws, family laws, consumer protection laws, etc.

When there is an ongoing trial, substantive law is the branch of the legal industry which will define the crimes and punishments to which the accused will be subjected. It’s also the branch of law which defines the rights and responsibilities of a civilian.

THEORIES OF LAW

Whether there shall be any philosophical or ideological basis for law? This is the most debated question among legal scholars. To address this question legal scholars offer various opinions. They can be broadly tagged under three schools:

- Natural Law Theory
- Legal Positivism
- Functional Approach Theory
    - Historical Theory
    - Sociological Theory

Natural Law Theory

According to the Natural Law Theory law consists of rules that are in accordance with reason. They proclaim that there is a necessary connection between law and morality. Under this banner of Natural law theory we find three distinct versions.

The first version by Thomas Aquinas who sought to lay down that positive law which is in conflict with natural law is invalid. The chief reason for the same would that there are certain objective moral principles, which depend upon the essential nature of the universe and which can be discovered by human reason'. It therefore propounds that unjust law is no law i.e. '*les injusta non est lex*'.

The second version is led Lon Fuller who propounded that in order to identify and call a legal system as genuine there must be an inner morality. This inner morality must constitute following eight principles:

- The rules must be general
- The rules must be promulgated
- Retroactive rulemaking and application must be minimized
- The rules must be understandable
- The rules must not be contradictory
- The rules must not be impossible to obey
- The rules must be relatively constant through time and
- There should be congruence between rules as announced and as applied.

The third version is led by Ronald Dworkin who claims that law is not merely a system of rules, but there are also principles, policies and other sort of standards that govern the legal system. He called it as 'Original problem'. This theory is based upon the case- *Riggs v. Palmer* wherein the principle '*no person should benefit from her own wrong*' was laid down.

Legal Positivism

According to this theory the concepts of law and morality are devoid of any relationship or connection. Thus it gives no superiority to Natural law theory over positive law. The positivist school of law was propounded and strongly advocated for by John Austin, H.L.A Hart, and Joseph Raz are the champions of this school.

Austin says Law is the command of political sovereign enforceable by sanction. As per Austin logic, the idea of sanction is built into the notion of law. Accordingly, people who act contrary to rules ought to be liable for punishment. He suggests that law is a concept based upon the notion of power and it need not be looked at from the perspective of moral concepts.

Hart doesn't completely discount the possibility of interface between law and morality, his theory is characterized as 'Inclusive legal positivism'. Hart defines law as a union of primary and secondary rules. Primary rules are those that impose obligations and secondary rules are those that define those rules that create obligations (enactment, amendment and enforcement).

Exclusive Legal positivism says law is an independent authority. There is an obligation to obey the law. If norms and morals are given undue importance on the basis of inchoate idea of fairness law losses its authoritativeness. Hence, the legal validity of the norm shall be located in its source not content.

Modern Age Positivism and Morality Debate by Hart, Devlin:

The debate concerned with the role of conventional morality that reflects the moral view of the majority in the society and critical morality i.e., what in fact is right irrespective of the opinion held by the majority of the society.

Functional Approach to Law

It's a reaction to analytical school. It says law is the result of the evolution of society or a result of historical developments. It is argued that the law is not so much made by man, as it by social and economic circumstances, or pre-existing facts. The functional school may be divided into the

- Historical and
- Sociological School

Historical: Savigny, Henry main are the proponents. Savigny says law is the reflection of the spirit of the people. It has it source in the volksgeist or common consciousness of people. Legislator is only the mouthpiece of common consciousness.

Sociological School: Roscoe pound says law is a tool to harmonize social interest that may be in conflict. These interests could be individual, public, social. In order to priorities conflicting interest, pound theorized, one must consider various assumption or Jural postulates on the basis of which every society is ordered. To the question how to evaluate the conflicting interest in due order of priority, pounds' answer is that every society has certain basic assumptions upon which its ordering rests. He called them as Jural postulates. Jural Postulates of the legal system embodying its fundamental purpose. Interests are based on views held by a community at a particular time. Ex: One such postulate is that in a civilized society, men must be able to assume that others will not commit intentional aggressions upon them. According to him the end of law should be to satisfy a maximum of wants with a minimum of friction and restriction. His theory is called Theory of Social Engineering: It means a balance between the competing interests in the society. He is the one who coined the term lawyer is a social engineer.

In Indian context any law passes by any legislature or any action of State must be meet the values of Constitution of India, otherwise such law is not a law and it can be struck down in the name that it violates Basic structure of Indian constitution.

OPERATIVE TOOLS OF LAW

Rights and Duties:

Bentham who is the forerunner of Analytical School of thought states that the relationship between State and its subjects and inter-se is governed law and law is nothing but distribution of rights and obligation amongst them. In fact all modern legal systems are constructed on the edifice of this principle only.

General meaning of term Right and duty

Right means advantages, benefits a person can enjoy. Obligations on the contrary are duties or charges imposed on a person, who is under the obligation to full-fill them.

Relationship between Right and duty

Rights and obligations though distinct and opposite, they are no manner different as one cannot exist without other. They are simultaneously same in origin. There cannot be a right without there being corresponding obligation one another. However, it is expressed as right at one place and duty at another place basing on the context. To illustrate, a person in settled peaceful possession of property has every right to continued to be in possession of the property without the interference of another and there is an obligation on the whole world to respect the same. If we read the same from penal law perspective, it can be said that no one shall commit trespass into possession of property in the hands of another. Thus penal law converts obligation on part of individual into offences. Penal law creates an offence either by way of positive command or by a prohibition. Thus civil law is in fact only another aspect of penal law and to establish right means prohibition on another and vice-versa.

With the above back ground now let us see what is the legal meaning given to the term right?

Legal Meaning of term Right

According to Salmond: "A legal right is an interest recognized and protected by a rule of legal Justice – an interest the violation of which would be a legal wrong done to whom whose interest it is and respect for which is a legal duty". For Holland, "A right means a capacity residing in one man of controlling with the assent and assistance of the state the acts of the other". According to Ihering such of those interests that have gained legal protection can be regarded as legal rights.

Classification of Rights

The message previous chapter conveys is very clear. One can seek the aid of court only if there is an invasion or threat to invasion of right guaranteed by law. Therefore a robust understanding of some of the most basic and relevant rights is very much necessary. IN this chapter we are going to study various kinds of legal rights an individual can claim. The laws that deal with rights and obligations are called substantive laws.

For convenience sake and insightful understanding they are studied under following head

- ❖ Fundamental rights

- Public rights
- Personal rights
- Customary rights
- Contractual rights

Fundamental Rights: Every person by virtue of being a human is entitled to certain inalienable and exclusive rights. They are inalienable and exclusive rights as their absence would negate the very existence of human being and their presence guarantees the most basic freedoms that would ensure peaceful and purposeful life. There is hardly any modern democratic constitution without these rights. They are referred with different names in different constitutions. Indian Constitution calls them as "Fundamental Rights". These rights have explained in Chapter 1.3 which deals with the constitutional framework of India.

Public Rights:

- **Right to Free Legal Aid**: Independent India inherited a legal system which is basically adversarial in nature and its mode of functioning is also alien to our culture. As a result Welfare Legislations made for the benefit of poor and needy didn't yield desired result as promised in the Constitution. To address this challenge Indian parliament by way of 42nd Amendment to the constitution introduced Article 39A to constitution. Article 39A titled as Equal justice and free legal aid says the state shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Thus, spirit and letter of A.39A sought for paradigm shift in structuring legal system in a way that ensures access of justice to everyone both qualitatively and quantitatively. In pursuance of A.39 A of constitution, the Parliament of India in the year 1987 enacted Legal service authority Act-1987(hereinafter referred as Act) is enacted. This Act provides free legal aid service to women, child, physically disabled, SC's ST's, and other person whose annual income is less than one lakh. Under the Act 'legal service' includes the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter. It is important to note that such legal assistance can be pertaining to either pending litigation or pre-litigation. This application can be made before any legal service authority i.e., Taluk legal service committee or District legal service committee. On receipt of such application legal service committees shall refer to such matter to Lok-Adalat which has jurisdiction to try the case and resolve the matter.

- **Right to Information**: To Promote Transparency and Accountability in the Working of every Public Authority, the Right to Information Act,2005 is enacted so as to provide for setting up the practical regime of right to information for citizens' to secure access to information under the control of public authorities. Any citizen can apply in writing or through electronic means in English or Hindi or in the official language of the area, to the Public Information Officer, specifying the particulars of the information sought for. He needn't give reason for seeking information but one has to pay nominal fee as may be prescribed. The information must be furnished within thirty days from the date of application and it must be in forty eight hours in case of information concerning the life or liberty of a person. If there is failure to provide information within the specified period is a deemed refusal. If information sought is covered by exemption from disclosure u/S.8 or if it infringes copyright of any person other than the State as per S.9, information need not be given. There is an appellate authority which and Central and State information commission to ensure the functioning of the Act. The law imposes penalties on officer who fail furnish information.

➔ **Right to Work**: The Parliament of India by way of Mahatma Gandhi National Rural Guarantee Act, 2005 (MNREGA) made citizens to demand government an employment as a matter of right. As per this law any adult member of a rural household who applies for employment in rural areas has to be given work on local public works within 15 days. If employment is not given, an unemployment allowance has to be paid. The employment guarantee subject to a limit of 100 days per household per year. Thus there is a Guaranteed Employment. The Wages are to be paid on a weekly basis and not beyond a fortnight. Wages are to be paid on the basis of Centre- notified, state- specific MGNREGA wage list. In any case, the wage cannot be at a rate less than Rs. 100 per day. If work is not provided within 15 days of applying, the state is expected to pay an unemployment allowance which is one-fourth of the wage rate. Work is to be provided within a 5km radius of the applicant's village, else compensation of 10 per cent extra wage is to be provided to meet expenses of travel. Men and women are entitled to equal payment of wages. One- third of the beneficiaries are supposed to be women. Worksite facilities like crèches are to be provided at all worksites. All wage payments have had to be transferred to bank or post office accounts of beneficiaries.

➔ **Rights under the Penal Laws**: Indian penal code sets out certain basic positive obligations on the part of every person and in way they guarantee corresponding rights on all persons to enjoy life and liberty and acquire and protect property and reputation from being violated by any person. The following are the some of the most important positive obligations Indian Penal Code imposes on individuals. They are: 1

- Not to kill any human being: Every person is under an obligation not to be cause intentional death of any other human being and it prohibited and punishable under Sec. 299 & 300 r/w 302 IPC. Sec.304 IPC prohibits and punishes for causing death of a human being with knowledge. Sec - 304 A IPC imposes punishment for death caused by rash or negligent act.
- Not to cause any injury to any person: Every person has a right not to get hurt by other. As such law imposes obligation on every individual not to cause voluntarily hurt to

others. Sec.319 to 326 IPC sets out certain rules with respect injuries inflicted against law and imposes punishments on violators.

- Not to deal with property of any person in manner against the Law. 4. Not to injure the reputation of other: Not to deal with property of any person in manner against the Law: Law permits only legal acquisition or possession of property. It imposes liabilities on those who acquire or possess property against law. Some of those obligations are not to commit theft, extradition, cheating, and forgery.
- Not to injure the reputation: Next to life and liberty, reputation is the one man craves for. Thus, any injury to reputation is treated an offence. Sections:499 & 500 IPC sets out positive obligations on every person not to injury the reputation of others and imposes liabilities in the event of violation.

Personal Rights: It is mentioned elsewhere that to regulate desires of human being and ensure social cohesion and viability of society concept of family is invented. The concept of family involves issues like marriage, procreation and protection of children, maintenance of dependents, succeeding to property etc. Therefore each society depending upon its socio, economic, political, cultural and geographical conditions imposed certain restrictions and granted certain rights to the members of its communities. The law dealing with these restrictions and rights are called personal laws. In India we have different personal laws. Though constitution envisions Uniform Civil Code it remains to be distant dream. In this part we will discuss some of rights relating to these issues. They are:

➔ **Right to marriage:** Every person has right to marry subject to fulfillment of certain conditions laid down under Hindu Marriage Act 1955. Possession of Capacity to Marry and performance of necessary formalities of marriage are necessary conditions of a legally recognizable marriage.
This Capacity constitutes several aspects: a) not having living spouse at the time of marriage, b) Age of marriage, c) Spouse shall not be in Prohibited degree of relationship or Sapinda relation unless custom permits, d) Sound State of mind. Even if in sound state of mind and Capable of giving valid consent but suffering from mental disorder to such an extent as to be unfit for marriage and the procreation of children or subject to recurrent attacks of insanity or epilepsy, person is disqualified to undergo marriage.
Age of marriage: According to Prohibition of Child Marriage Act, 2006, No girl below 18 years and boy below 21 years of age shall marry. It is applicable to all religions. It is void under Special Marriage Act but not under any other personal laws. If a minor Hindu marries, it shall be neither void nor voidable but valid.
If marriage occurred in violation of Bigamy, Prohibited degree of relationship or Sapinda relation, such marriage is null and void

➔ **Right to take divorce**: Any married person either under Hindu law or Muslim law is entitled for Divorce. S.13 of Hindu Marriage Act, 1956 sets grounds for seeking divorce.

They are: a) Adultery b) renunciation of the world Desertion c) Cruelty d) Insanity e) Leprosy f) Venereal diseases g) Conversion h) Presumption of death: unheard for seven years i) has not complied with a decree of Restitution of Conjugal rights for one year or more after the passing of decree j) has not resumed cohabitation for one year or upwards after the passing of a decree for judicial separation.

A wife has the following additional grounds for divorce: 1) that the husband is guilty of Rape, Sodomy and Bestiality. 2) That she has repudiated before attaining 18 years of age her marriage solemnized before she attained 15 years age. 3) That a maintenance order has been passed against the husband and there is no cohabitation thereafter for one year or upwards.

- ➔ **Right to adopt child**: Adoption is permanent transfer of a boy or girl from his natural family to the other. Adopted child has certain rights and privileges in the adopter's family. On the other hand, Adopted child loses all rights and privileges of a natural born child in the natural family. Adoption once made is final and irrevocable.

Customary Rights: The term Custom signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law in any local area, tribe, community, group or family. Further to claim right out of such custom it must be certain and not unreasonable or opposed to public policy and in the case of a rule applicable only to a family it has not been discontinued by the family.

Rights can also be acquired by way of custom. This is recognized under various provisions of law including constitution under Article 13. The great extent of Muslim law is also customary law only. Customary rights are not the creature of a written instrument and they are not even listed out separately by legislation in India.

Contractual Rights: Man in pursuit of his happiness desires to undertake variety of ventures either with his fellow beings or artificial persons recognized by law. Thus by entering into agreements with others he acquires rights and duties. Those rights and duties acquired by contract are known as contractual rights or obligations. Law permits every person to enter into any kind of agreement in any form with respect to any matter not only with respect to property also. However, this broad general rule is subjected to long list of do’s and don’ts. These rules are set-out in Indian contract Act, 1872

REMEDIES UNDER LAW

Any person who’s right is violated or who has an apprehension that his right may be violated can approach the court to protect his right or to prevent its violation or for remedy provided under law for its violation.

Indian Constitution: Constitution provides following kinds of remedial measures for protection or enforcement of violated of fundamental rights. They are:

- ❖ Writ of Habeas Corpus,
- ❖ Writ of Quo Warranto,
- ❖ Writ of Mandamus,
- ❖ Writ of Certiorari,
- ❖ Writ of Prohibition.

Other Remedies under Civil Law

Damages: Every breach of contract upsets many settled expectations of the injured party. Some of such expectations may be hey long drawn and endless, but a line must be drawn somewhere for ascertainment of liability. An attempt to draw a line was made in 1854 by Alderson B in *Hadley vs. Baxendale* in 1854. This decision laid down two rules regarding nature of damages:

General damages: they are those which arise naturally in the usual course of things from the breach itself. The defendant is held liable for all the foreseeable consequences of his breach. The basis of this rule is that everyone, as a reasonable man, is expected to know the loss which would accrue to the other party from a breach, in the ordinary course.

Special damages: They are awarded for loss which arises on account of the unusual circumstances affecting the plaintiff. They are recoverable only of the unusual circumstances are known to the defendant so that the possibility of special loss is in contemplation of both the parties. Thus it talks about knowledge of special circumstances leading t the possibility of some extra-ordinary loss.

So, the parties basing on kind of facts and circumstances of each case can claim damages.

Maintenance: If any person who is under an obligation, neglected or refused to maintain their dependent wives, children and parents, the wife and children and parents are entitled to claim maintenance against the husband, father and sons respectively. The remedy for maintenance is available under civil law and criminal law by way of S.125 Cr.P.C and Protection of women from Domestic Violence Act, 2005.

Mesne profits: If a person in wrongful possession of property received any benefits or profits out of such property is under an obligation to return the same to lawful owner with interest and in the event failure to repay a suit for Mesne profits can be filed. However, it shall not include profits due to improvements made by the person in wrongful possession

Partition: A Coparcener of Joint Hindu family can seek allotment of share at any time by filing a suit for partition. . Earlier, only males acquired an interest in the coparcenary properties as coparceners. By virtue of a recent amendment to the Hindu Succession Act, the daughter of a coparcener has been given equal share as that of a son. As such, with effect from 09.09.2005, the daughter of a coparcener shall, by birth, become a coparcener in her own right and in the same manner as the son and will have the same rights and liabilities in the coparcenary property like a son and as such she can also file suit for partition.

- Grant of succession certificate.

Remedies under Criminal Law:

Indian Penal code and other penal laws provide followings kinds of remedial measures for violation of duties prescribed under them. It is also known as punishment.

- Death
- Imprisonment for life
- Imprisonment, which is of two descriptions, namely:—
    - Rigorous, that is, with hard labour;
    - Simple;
- Forfeiture of property;
- Fine.
- Court can also award compensation.

Remedies Available with an aggrieved Consumer: Consumer courts are empowered to grant one or more of the following reliefs for the deficit services or goods by sellers:-

- Repair of defective goods.
- Replacement of defective goods.
- Refund of price paid for the defective goods or service.
- Removal of deficiency in service.
- Refund of extra money charge.
- Withdrawal of goods hazardous to life and safety.
- Compensation for the loss or injury suffered by the consumer due to negligence of the opposite party.
- Adequate cost of filing and pursuing the complaint.
- Grant of punitive damages.

LAW REFORMS

Change is the law of nature. This fundamental rule is followed in every aspect of human life. Law or legal reform is this process of examining the existing laws and amending and reforming the same as per the developing and contemporary needs of the global communityLaw reforms are often conducted by various governmental agencies established for this purpose. For instance in India the Law Commission of India is the apex executive body established primarily responsible for working on law reforms. Its membership primarily comprises legal experts, who are entrusted a mandate by the Government.

Law Commission of India: The Commission is empowered to have five part-time Members and/or Consultants depending upon the need and on the Approval of the Government. The Terms of Reference of the Twentieth Law Commission are as follows:-

- Review/Repeal of obsolete laws: The commission is required to identify laws which have become obsolete and useless and are no longer required to be implemented in the current societal setup. This function also includes identifying those legislations that have become inconsistent with the existing climate of economic liberalization and need change. The function of identification also includes identification of those laws which require complete or partial modifications. Thereafter the commission considers the suggestions put forth by various expert groups, ministries, other governmental departments and the non-governmental organizations on the proposed changes to be introduced and propose amendments to be made.
- Review of Judicial Administration: The objective of the said function is to ensure that the judiciary is responsive to the reasonable demands of the changing times. It does seeks to secure elimination of delays, speedy clearance of arrears and reduction in costs so as to secure quick and economical disposal of cases without affecting the cardinal principle that decision should be just and fair, simplification of procedure to reduce and eliminate technicalities and devices for delay so that it operates not as an end in itself but as a means of achieving justice and improvement of standards of all concerned with the administration of justice.
- Examine the existing laws in the light of Directive Principles of State Policy and to suggest ways of improvement and reform and also to suggest such legislations as might be necessary to implement the Directive Principles and to attain the objectives set out in the Preamble to the Constitution.
- Examine the existing laws with a view for promoting equality and suggesting amendments thereto.
- Revise the Central Acts of general importance so as to simplify them and to remove anomalies, ambiguities and inequities.
- Consider the requests for providing research to any foreign countries to know the global best practices as may be referred to it by the Government through Ministry of Law and Justice (Department of Legal Affairs).

CLASSIFICATION OF GLOBAL LEGAL SYSTEM

Although each country has its own legal system, yet all of them are connected to each other on the basis of common traits and features. These features are common because their sources are very few and can be counted on fingers, and there lies the basis of classification of legal systems. There exist different Legal Systems around the world based on broad classifications on the basis of common traits and features. On the basis of such classification, the Legal Systems of the world can be divided into four broad categories: (a) Common Law System, (b) Civil Legal System, (c) Religious Legal System, and (d) Customary legal System.

1. Common Law System:

According to Black's Law Dictionary common law denotes, "The body of law derived from judicial decisions, rather than from statutes or constitutions. It is distinct from a civil-law legal system; the general Anglo-American system of legal concepts, together with the techniques of applying them, that form the basis of the law in jurisdictions where the system applies".

In its historical origin the term common law (*jus commune*) was identical in meaning with the term general law. The *jus commune* was the general law of the land-the *lex terrae*-as opposed to *jus speciale*. By a process of historical development, however, the common law has now become, not the entire general law, but only the residue of that law after deducting equity and statute law. The common law of England was one of the three main historical sources of English law. The other two were legislation and equity. The expression common law was adopted by English lawyer from the canonists who used it to denote the general law of the church as opposed to those divergent usages which prevailed in different local jurisdictions and superseded or modified within their territorial limits the common law of Christendom. The common law evolved from custom and was the body of law created by and administered by the King's courts.

By the beginning of the 14th century, the Court of Chancery arose and began to administer justice by the side of common law courts. Equity was finally absorbed into the general law when the Judicature Act, 1873 united the common law and equity jurisdictions. Though equity and common law have become coordinate parts of a single system of general law, the original jurisdiction between them still persists and the term common law is even now used in contrast with equity.

The Judicature Act, 1873, provided for a High Court of Justice with a Court of Appeal over it. The High Court of Justice was again divided into five divisions: the Chancery, the Queen's Bench, Common Pleas, Exchequer and the Probate and the Divorce and Admiralty.

In its historical origin, common law was taken to mean the whole of the law of England including equity. Statute law was referred to separately because of its authority. In modern times, statute law was developed to a very great extent and even certain portions of the common law are undergoing a slow transformation into statute law by the process known as codification. The term Common law is still used to mean the whole of the law of England when it is contrasted with the foreign systems of law like Roman law or French law.

Common Law System has influenced the development of many legal systems of the world, such as India, England, U.S.A., Canada, and Australia. Actually, the origin of Common Law is believed to have been in England and so wherever the British Empire spread its sovereignty, the Common Law System was imposed. We will discuss and understand the four common features of this legal system briefly in the following paragraphs.

(a) *Authority of the judgments delivered by Higher Courts and Tribunals:* In 'Common Law System', you would observe that the judgments rendered by the High Courts and Supreme Court (or the Superior Courts) enjoy authority and powerful position. Those judgments have to be obeyed by the lower Courts and Tribunals in a similar case as the decisions of higher courts enjoy authoritative power in law. If the lower courts would not abide by the decisions of the higher courts, the judgments of the lower court can be challenged and it may become a nullity. Do not think that this feature is present in other legal systems. Other legal systems do not place such reliance on the authority of the judgments of the higher Courts. So the judgments of High Courts or Courts of higher/appellate jurisdiction may not be authoritative or binding on lower Courts in a legal system which is not a member of Common Law family. The authority of judgments of the higher Courts is given the technical name 'judicial precedent'. Thus, we can say that the judgments of higher courts are judicial precedents and they must be followed by the lower Courts in similar cases. For example in India, the judgments of Bombay High Court are 'judicial precedents' for all the lower Courts coming under the jurisdiction of that High Court and they are bound by it. India is thus a member of Common Law family of legal systems.

(b) *Composition of Judicial Institutions:* Second common feature of the Common Law family is that the judges of the Courts are highly skilled persons who have specially studied the discipline of law and possess practical experience in legal administration either as advocates or judges. A judge, in other words, cannot be a lay person or even a scientist. He must be a person of legal background, either as an advocate or a judge or at least with a degree in law. This feature of Common Law makes the judicial institutions a separate set of professional persons. This might be one of the reasons why the judgments rendered by them are technical and based upon the finer details of the bare provisions of law. This leads to a better quality of judgment due to which these judgments carry authority when they are rendered by experienced judges or advocates. As an example, you can say that in India the judges at the trial Court or District Court are selected on the basis of an entrance examination where the minimum eligibility is a degree in law and the judges of High Courts and Supreme Court are selected from among those with at least 10 years of practice as advocates or judges. Persons outside the legal background cannot become judges of the State or Central government. So, the social background of judges in Common Law system is not diverse, but very limited.

(c) *Adversarial System of Court Proceedings and the role of Judge*: Another feature of Common Law system is that the Court Proceedings are focused on the adversarial nature, where the disputing parties have engaged advocates who act like adversaries in the court of law and each advocate fights tooth and nail against the other in order to win the case. The judge in the court acts like a neutral observer listens patiently to the advocates of each party. You might have seen in the films that the judges say 'Order, order', when there is commotion in the court or the advocates start leveling comments. That is not exactly the power of the judge in the 'Common Law System', but the judge does not play an active role in going beyond the evidence presented by both the adversary advocates. They depend upon the skills of the advocates who present their best possible case before the neutral judge. It does not matter to the judge whether the truth of the matter has been revealed by the advocates in the case or not. He/she has to be satisfied on the evidence presented by the advocates only. He/she does not take any interest in establishing the truth underlying the claims of the disputing parties.

(d) *Acts, Statutes passed by Competent Authorities*: A very important feature of Common Law system is that though the legislations passed by competent authorities such as the Parliament and Legislatures are given an authoritative place which is binding on the judges, whenever the judges find any gaps in the Acts or Statutes passed by the Parliament, they can make suitable interpretations to fill the gap in these Acts. In other words, the judges and advocates of the Common Law system would think that the Acts are very abstract and the rules contained in those Acts are very general in nature. These general and abstract rules are incapable in themselves to be applied in all facts and circumstances. Facts of every case would be so peculiar that it would be very difficult to apply the general and abstract form of rule which may need suitable additions and interpretations. That addition and interpretation is as important as the bare provision of general and abstract law. For example, the punishment prescribed by the Act passed by Indian Parliament for the commission of murder ranges from life imprisonment to death penalty. However, it has not been prescribed in what situations punishment would be life imprisonment or death. The judges have filled this gap and made their own addition into the law by holding that the 'rarest of rare cases' would be suitable for the death penalty whereas the others would only get life imprisonment.

2. Civil Legal System

Civil law is a legal system inspired by Roman law, the primary feature of which is that laws are written into a collection, codified, and not determined, as in common law by judges[1].Conceptually, it is the group of legal ideas and systems ultimately derived from the Code of Justin, but heavily overlaid by Germanic, ecclesiastical, feudal, and local practices, as well as doctrinal strains such as natural law, codification, and legislative positivism. It holds legislation as the primary source of law, and the court system is usually inquisitorial, unbound by precedent, and composed of specially-trained judicial officers.

The principle of civil law is to provide all citizens with an accessible and written collection of the laws which apply to them and which judges must follow. It is the most prevalent and oldest surviving legal system in the world. Colonial expansion spread the civil law system and European civil law has been adopted in much of Latin America as well as in parts of Asia and Africa.

[1]Ernest Metzger, http://www.iuscivile.com/

Further Classifications of Civil Law: Civil law systems may be subdivided into further categories:

- Countries where Roman law in some form is still living law and there has been no attempt to create a civil code: Andorra and San Marino
- Countries with mixed systems in which Roman law is an academic source of authority but common law is also influential: Scotland and the Roman-Dutch law countries such as South Africa ,Zambia, Zimbabwe, Sri Lanka and Guyana
- Countries with codes intended to be comprehensive, such as France.

A prominent example of civil law would be the Napoleonic Code, named after French emperor Napoleon Bonaparte. The Code comprises three components: the law of persons, property law, and commercial law. Rather than a catalog of judicial decisions, the Code consists of abstractly written principles as rules of law.[2]

Civil law is sometimes referred to as neo-Roman law, Romano-Germanic law or Continental law. The expression *civil law* is a translation of Latin *jus civile*, or "citizens' law", which was the Late Imperial term for its legal system, as opposed to the laws governing conquered peoples (*jus gentium*).

History of Roman Law: Roman law was in place in the Byzantine Empire until its final fall in the 15th century. However, subject as it was to multiple incursions and occupations in the latter Middle Ages, its laws became widely available in Western Europe. It was first received into the Holy Roman Empire partly because it was considered imperial law, and it spread in Europe mainly because its students were the only trained lawyers. It became the basis of Scots law, though partly rivaled by feudal Common law. In England, it was taught academically at Oxford and Cambridge, but underlay only probate and matrimonial law, inherited by canon law when secularized, and maritime law, adapted from the law merchant through the Bordeaux trade.

Consequently, neither of the two waves of Romanism completely dominated in Europe. Roman law was a secondary source that was applied only when local customs and laws were found lacking on a certain subject. However, after a time, even local law came to be interpreted and evaluated primarily on the basis of Roman law, thereby in turn influencing the main source of law. Eventually, the works of Civilian glossators and commentators led to the development of a common body of law and writing about law, a common legal language, and a common method of teaching and scholarship, all termed the *jus commune*, or law common to Europe, which consolidated canon law and Roman law, and to some extent, feudal law.

Differentiation From Other Major Legal Systems : Civil law is primarily contrasted with common law, which is the legal system developed among Anglophone people, especially in England. The original difference is that, historically, common law was law developed by custom beginning before there were any written laws and continuing to be applied by courts after there

[2] Neubauer, David W.,and Brendan C. Slowe, JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES, Belmont: Thomson Wadsworth, 2007, pg.28

were written laws, too, whereas civil law developed out of the Roman law of Justinian's Corpus Juris Civilis.

In later times, civil law became codified as customary law that were local compilations of legal principles recognized as normative. Sparked by the age of enlightenment, attempts to codify private law began during the second half of the 18th century, but civil codes with a lasting influence were promulgated only after the French Revolution, in jurisdictions such as France.

Codification, however, is by no means a defining characteristic of a civil law system. For example, the statutes that govern the civil law systems of Sweden and other Nordic countries are not grouped into larger, expansive codes like those found in France and Germany.[3] Furthermore, many common law jurisdictions have codified parts of their laws, for example, the federal statutes in the United States Code, and much Australian criminal law. There are also so-called "mixed systems" that combine aspects of both common and civil law systems, such as the laws of Scotland, Louisiana, Namibia, the Philippines, Quebec, Sri Lanka, Mauritius, South Africa, and Zimbabwe.[4]

Thus, the difference between civil law and common law lies not just in the mere fact of codification, but in the methodological approach to codes and statutes. In civil law countries, legislation is seen as the primary source of law. By default, courts thus base their judgments on the provisions of codes and statutes, from which solutions in particular cases are to be derived. Courts thus have to reason extensively on the basis of general rules and principles of the code, often drawing analogies from statutory provisions to fill lacunae and to achieve coherence. By contrast, in the common law system, case law is a major source of law, while statutes are often seen as supplemental to judicial opinions and thus interpreted narrowly.

The term "civil law" as applied to a legal tradition actually originates in English-speaking countries, where it was used to lump all non-English legal traditions together and contrast them to the English common law. However, since continental European traditions are by no means uniform, scholars of comparative law and economists promoting the legal origins theory usually subdivide civil law into four distinct groups:

- **Romanistic**- in France, Belgium, Luxembourg, the Canadian Province of Quebec, the U.S. state of Louisiana, Italy, Spain and former colonies of those countries;
- **Germanic**- in Germany, Austria, Switzerland, Greece, Brazil, Portugal, Turkey, Japan, South Korea and the Republic of China(Taiwan);
- **Scandinavian**: in Denmark, Finland, Iceland Norway and Sweden.
- **Chinese** is a mixture of civil law and socialist law.

[3] Ibid.
[4] http://www.la-legal.com/modules/article/view.article.php?c8/29

Some systems of civil law do not fit neatly into this typology, however. The Polish civil law developed as a mixture of French and German civil law in the 19th century. After the reunification of Poland in 1918 five legal systems (French code civil from the Duchy of Warsaw, German BGB from Western Poland, Austrian ABGB from Southern Poland, Russian law from Eastern Poland and Hungarian law from Spisz and Orawa) were merged into one.

Law in the state of Louisiana is based in part on civil law. Louisiana is the only U.S. state partially based on French and Spanish codes and ultimately Roman law, as opposed to English common law.[5] In Louisiana, private law is based on the Louisiana Civil Code. The current state of Louisiana law has converged considerably with US law.

2. Religious Legal System

Islamic Law: Sharia refers to the "way" Muslims should live or the "path" they must follow. Sharia is derived from the sacred text of Islam and Traditions gathered from the life of the Islamic Prophet Muhammad. There are different interpretations in some areas of Sharia, depending on the school of thought (Madh'hab), and the particular scholars Ulema involved. Traditionally, Islamic jurisprudence (Fiqh) interprets and refines Sharia by extending it's principles to address new questions. Islamic judges (Qadi) apply the law, however modern application varies from country to country. Islamic law is now the most widely used religious law, and one of the three most common legal systems of the world alongside common law and civil law. During the Islamic Golden Age, classical Islamic law may have influenced the development of common law, and also influenced the development of several civil law institutions.

The first treatise on international law was the Introduction to the Law of Nations written at the end of the 8th century by Muhammad al-Shaybani, an Islamic jurist of the Hanafi school[6], eight centuries before Hugo Grotius wrote the first European treatise on the subject. Al-Shaybani wrote a second more advanced treatise on the subject, and other jurists soon followed with a number of other multi-volume treatises written on international law during the Islamic Golden Age. They dealt with both public international law as well as private international law.

These early Islamic legal treatises covered the application of Islamic ethics, Islamic economic jurisprudence and Islamic military jurisprudence to international law, and were concerned with a number of modern international law topics, including the law of treaties; the treatment of diplomats, hostages, refugees and prisoners of war; the right of asylum; conduct on the battlefield; protection of women, children and non-combatant civilians; contracts across the lines

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[5] Ibid.
[6] Kelsay, J.,"AL-SHAYBANI AND THE ISLAMIC LAW OF WAR", Journal of Military Ethics.

of battle; the use of poisonous weapons; and devastation of enemy territory.[7] The Umayyad and Abbasid Caliphs were also in continuous diplomatic negotiations with the Byzantine Empire on matters such as peace treaties, the exchange of prisoners of war, and payment of ransoms and tributes.

After Sultan al-Kamil defeated the Franks during the Crusades, Oliverus Scholasticus praised the Islamic laws of war, commenting on how al-Kamil supplied the defeated Frankish army with food. The Islamic legal principles of international law were largely based on Qur'an and the Sunnah of Muhammad, who gave various injunctions to his forces and adopted practices toward the conduct of war. The most important of these were summarized by Muhammad's successor and close companion, Abu Bakr, in the form of ten rules for the Muslim army.

Islamic private international law arose as a result of the vast Muslim conquests and maritime explorations, giving rise to various conflicts of laws. A will, for example, was "not enforced even if its provisions accorded with Islamic law if it violated the law of the testator." Islamic jurists also developed elaborate rules for private international law regarding issues such as contracts and property, family relations and child custody, legal procedure and jurisdiction, religious conversion, and the return of aliens to an enemy country from the Islamic world. Democratic religious pluralism also existed in classical Islamic law, as the religious laws and courts of other religions, including Christianity, Judaism and Hinduism.

Islamic law also introduced "two fundamental principles to the West, on which were to later stand the future structure of law: equity and good faith", which was a precursor to the concept of *pacta sunt servanda* in civil law and international law. Islamic law also "introduced it to international relations, making possible the systematic development of conventional law, which became a partial substitute for custom."[8]

Islamic law also made "major contributions" to international admiralty law, departing from the previous Roman and Byzantine maritime laws in several ways. These included Muslim sailors being "paid a fixed wage "in advance" with an understanding that they would owe money in the event of desertion or malfeasance, in keeping with Islamic conventions" in which contracts should specify "a known fee for a known duration", in contrast to Roman and Byzantine sailors who were "stakeholders in a maritime venture, in as much as captain and crew, with few exceptions, were paid proportional divisions of a sea venture's profit, with shares allotted by rank, only after a voyage's successful conclusion." Muslim jurists also distinguished between "coastal navigation, or cabotage," and voyages on the "high seas", and they also made shippers "liable for freight in most cases except the seizure of both a ship and its cargo." Islamic law also

[7] Aboul-Enein, H. Yousuf and Zuhur, Sherifa, ISLAMIC RULINGS ON WARFARE, p. 22, Strategic Studies Institute, US Army War College, Diane Publishing Co.,

[8] Boisard, Marcel A. (July 1980), "ON THE PROBABLE INFLUENCE OF ISLAM ON WESTERN PUBLIC AND INTERNATIONAL LAW", International Journal of Middle East Studies

"departed from Justinian's Digest and the Nomos Rhodion Nautikos in condemning slave jettison", and the Islamic Qirad was also a precursor to the European commenda limited partnership. The "Islamic influence on the development of an international law of the sea" can thus be discerned alongside that of the Roman influence.[9]

Hindu Law: Hinduism is a way of life, a Dharma. The word Dharma is derived from the Sanskrit word “dhri” which means “to hold together.” Those who profess the Hindu Dharma and seek to follow it are guided by spiritual, social, legal and moral rules, actions, knowledge and duties which are responsible for holding the human race together. Dharma does not mean religion: it is the law that governs all actions. The Hindu religion not only consists of rules encompassing the rights and duties of kings and warriors, but also provides norms of Desa Dharma that govern inter-State relations. Hinduism is based on numerous texts.[10]
The laws of armed conflicts were founded in ancient India on the principle of humanity. The ancient Hindu texts clearly recognized the distinction between military targets, which could be attacked, and non-military persons and objects, which could not be attacked. Warfare was thus largely confined to combatants, and only the armed forces were legitimate targets.[11]

Modern Hindu law refers to one of the personal law systems of India along with similar systems for Muslims, Parsis, and Christians. This Hindu personal law or modern Hindu law is an extension of the Anglo-Hindu Law developed during the British colonial period in India, which is in turn related to the less well-defined tradition of Classical Hindu Law. The time frame of this period of Hindu law begins with the formal independence of India from Great Britain on August 14, 1947, and extends up until the present. While modern Hindu law is heralded for its inherent respect for religious doctrines, many still complain that discrimination (especially with the historical tradition of the caste system) still pervades the legal system. Though efforts to modernize and increase the legal rights of the marginalized have been made (most notably with the passage of the Hindu Code Bills and the establishment of notable legal precedents), the modern legal situation is, like all legal systems across the world, far from perfect.

It is sufficiently clear that in terms of the ideals of humanitarianism of ancient India the laws of war were more progressive. The modern laws of war were developed mainly by The Hague Peace Conferences of 1899 and 1907, and in the four Geneva Conventions of 1949 and the two 1977 Additional Protocols thereto. India is party to the four Geneva Conventions of 1949 and has incorporated them into its municipal law. Although it did not sign the two Additional Protocols, the non-formal nature of its adoption of them has not hindered the effective implementation of

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[9] Tai, Emily Sohmer (2007), "Book Review: Hassan S. Khalilieh, Admiralty and Maritime Laws in the Mediterranean Sea (ca. 800-1050): The "Kitāb Akriyat al-Sufun" vis-à-vis the "Nomos Rhodion Nautikos"",Medieval Encounters

[10] Manoj Kumar Sinha, HINDUISM AND INTERNATIONAL HUMANITARIAN LAW, http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-858-p285/$File/irrc_858_sinha.pdf

[11] The humanitarian principles are largely articulated in The Hague Conventions of 1899 and 1907 and the four Geneva Conventions of 1949 and their two Additional Protocols. For the texts see Handbook of the International Red Cross and Red Crescent Movement, ICRC, Geneva, 1994.

international humanitarian law in India. Hinduism believes that war is undesirable and must be avoided because it involves the killing of fellow human beings.[12]

4. Customary Law

Today, hardly any political entity in the world operates under a legal system which could be said to be typically and wholly customary. Custom can take on many guises, depending on whether it is rooted in wisdom born of concrete daily experience or more intellectually based on great spiritual or philosophical traditions. Be that as it may, customary law still plays a sometimes significant role, namely in matters of personal status, in a relatively high number of political entities with mixed legal systems. This obviously applies to a number of African countries but is also the case, albeit under very different circumstances, as regards the law of China or India, for example. Customary international laws are those aspects of international law that are derived from custom.

Coupled with general principles of law and treaties, custom is considered by the International Court of Justice, the United Nations, and its member states to be among the primary sources of international law. For example, the law of War and Peace originated as a form of customary law before they were codified in the Hague Conventions of 1899 and 1907, the Geneva Conventions, and other treaties.

The vast majority of the world's governments accept in principle the existence of customary international law, although there are many differing opinions as to what rules are contained in it. The Statute of the International Court of Justice acknowledges the existence of customary international law in Article 38(1)(b). This Article is incorporated in the United Nations Charter by Article 92.[13]

Customary international law consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way.[14] It follows that customary international law can be discerned by a "widespread repetition by States of similar international acts over time. Acts must occur out of sense of obligation; Acts must be taken by a significant number of States and not be rejected by a significant number of States." A marker of customary international law is consensus among states exhibited both by widespread conduct and a discernible sense of obligation.

A peremptory norm is a fundamental principle of international law which is accepted by the international community of states as a norm from which no derogation is ever permitted. Examples include various international crimes; a state which carries out or

[12] V. S. Mani, "International humanitarian law: An Indo-Asian perspective", International Review of the Red Cross, No. 841, 2001, pp. 59-76.
[13] "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply international custom, as evidence of a general practice accepted as law."
[14] http://www.burneylawfirm.com/international_law_primer.htm

permits slavery, genocide, war of aggression, or crimes against humanity is always violating customary international law. Other examples accepted or claimed as customary international law include the principle of non-refoulement, immunity of visiting foreign heads of state, and the right to humanitarian intervention.

LEGAL SYSTEM AMONGST INTERNATIONAL INSTITUTIONS AND COUNTRIES INTER SE

Open a newspaper, listen to the radio or watch television or surf the internet, and we will be confronted with events of international nature. Allegations of human rights abuses, killing of civilians during an armed conflict, impact of climate change, and disputes between nations are but a few examples of such events. It is in the context of these events and this interdependence of the countries in the era of globalization that you might think of a different kind of legal system. The legal system which caters to these issues and challenges is known as International Legal System. In this legal system, the legal principles are formulated with a view to promote interactions amongst nations, international institutions and organizations. You can say that without an International Legal System in place, there cannot be a possibility of international peace and security and if international peace and security is not maintained, then there would be no development all over the world. It is for this reason that International Legal System which is a new phenomenon, has taken birth in the twentieth century, especially after the First World War. For the sake of your convenience, this legal system can be understood by four specific examples: Role of Treaties, United Nations, European Union, and SAARC.

a) *Role of Treaties:* Treaties are a form of agreement between or amongst countries and international organizations which are regulated by International Law. There are around two hundred countries and several hundreds of international organizations, such as the United Nations, World Trade Organization, World Intellectual Property Organization. You might wonder how these countries and international organizations would interact with each other? Do you not think that mutual agreement is one possible way out to achieve that objective? This kind of agreement is called by various names such as Treaty, Convention, Pact, Covenant, Protocol, Charter, and even simply an Agreement. You might know the names of several such Treaties. The famous examples may be: Versailles Treaty, Kyoto Protocol, Pact of Paris, Charter of the United Nations, and International Covenant on Civil and Political Rights. These Treaties bind the Nations to carry out their responsibilities according to their provisions. If they would not observe those responsibilities, it would amount to breach of a treaty and some kind of compensation would have to be paid by the violating country. There is a fundamental principle in this legal system which says: "Treaties must be observed in good faith". This principle has become a guiding factor in the continued observance of treaties in International Legal System.
b) *United Nations:* The United Nations is central to the whole international legal system because it has several principal organs, specialized agencies, committees and

commissions. It was established in 1945 on the basis of the Charter of the United Nations. You might have known about General Assembly, Security Council, Economic and Social Council, World Health Organization, UN Educational, Scientific, and Cultural Organization. One of the Commissions of the United Nations, International Law Commission (ILC), has been instrumental in drafting many Treaties which are subsequently adopted by the countries and international organizations themselves. Mention must also be made about the role of the Security Council. The Security Council is one of the principal organs of the United Nations and in fact, the most powerful one. It is the executive wing of the United Nations and has been vested with all powers to maintain international peace and security.

c) *European Union (E.U.):* European Union is a remarkable regional International Organization which has economically and politically united the majority of European countries. This regional union was established on the basis of Maastricht Treaty of 1993 and Lisbon Treaty of 2009. The EU has developed a common market for the member countries of EU, which is very significant. They have established an exclusive area called 'Schengen area', in which a passport is not required to enter anywhere in the whole area which includes as many as 22 EU countries and 4 non-EU countries. This Union is also distinguishable from other organizations in the sense that the Lisbon Treaty authorizes the EU to conclude treaties which would enjoy primacy over the national legislations. Key principles of EU law include fundamental rights as guaranteed by the Charter of Fundamental Rights and as resulting from constitutional traditions common to the EU's States. The Treaties are primary legislation of the EU, supported with secondary legislation (regulations, directives, and decisions).

d) *South Asian Association for Regional Co-operation (SAARC):* South Asian Association for Regional Co-operation was established on 8 December 1985 by the South Asian countries of India, Bangladesh, Bhutan, Pakistan, Nepal, Sri Lanka, and Maldives. Afghanistan also became a member of this organization in 2007. Many Agreements and Conventions have been concluded under the auspices of SAARC, such as Agreement on South Asian Free Trade Area (SAFTA), Agreement on Avoidance of Double Taxation, Convention on Combating and Prevention of Trafficking in Women and Children for Prostitution, Regional Convention on Suppression of Terrorism. It has launched visa exemption scheme also whereby for some defined categories of entitled persons, there would be no requirement of a visa to enter any country of 'SAARC'. These are some of the remarkable achievements of this regional organization which works on the basis of treaties recognized by the International Legal System.

IMPACT OF GLOBALIZATION ON LEGAL SYSTEMS

Globalization as a Recent Trend: Globalization of law is a recent trend in the development of law and legal systems throughout the world. It is important to note the difference between the internationalization of law, which has been around for quite some time, and the globalization of law. The prevalence of non-state actors, as well as inter-governmental legal institutions has decreased the sovereignty of nation-states more significantly than the use of international law. International law is based on the sovereignty of nation-states, whereas the trend of globalization of law is to some degree eroding that sovereignty by reducing the power of the nation-states to control the development of the law. Almost all legal analysts acknowledge that there has been some globalization of the law. They differ with respect to their characterization of that development, and the normative conclusions that they draw from it. The central debate, therefore, focuses on the extent to which the interplay of private and public forces is harmonizing legal thinking and legal behavior.[15]

Globalization is reshaping the fixed and firm boundary between domestic and international spheres and changing our conceptions of the proper domain of domestic and international politics and law. In reformulating the entrenched disciplinary assumptions underlying these conceptual definitions of the national and the international, we necessarily move the concept of sovereignty to the foreground when analyzing the relationship between globalization and law. There is no doubt that the process of globalization is transforming traditional conceptions and constructions of sovereignty; the conventional image of a sovereignty associated with exclusive territorial jurisdiction is no longer theoretically or empirically serviceable in the face of the internationalization of economic and social activity. International law, like international relations, relies on a political theory of sovereignty to buttress its conceptual framework. In a sense, the concept of sovereignty stands in much the same relation to the disciplines of international law and international relations as does the concept of markets to the discipline of economics. Given the rapid globalization of the economy, the growth of regional institutions like the European Union (EU), and the emergence of international regulatory regimes, the conventional notion of a sovereign State has limited efficacy. The concept of the sovereign State as an entity that has exclusive jurisdiction over its territory (with the concomitant limitation on external encroachment on its power), as well as the notion of an internal sovereignty reflected in the internal unity of the State and its "monistic" legal order, needs rethinking. The notion of a single unified system of internal sovereignty has become increasingly problematic in a global political economy surrounded by islands of sovereignty, rather than by a single, central decision-making authority.[16]

An example can be taken from the Polish scenario in which, first of all it is important to understand that Polish legal system is based on the civil law system developed in Europe over many years. Poland has codified law and that is why the main sources of that law are Constitution, codes, statues and international treaties. The Polish legal system is divided into public and private law categories. Public law, mainly which is constitutional, criminal and

[15] LAW AND GLOBALIZATION, http://www.uiowa.edu/ifdebook/issues/globalization/readingtable/law.shtml
[16] Kanishka Jayasuriya, GLOBALIZATION, LAW AND THE TRANSFORMATION OF SOVREIGNTY: THE EMERGENCE OF GLOBAL REGULATORY GOVERNANCE, Global Legal Studies Journal, 6 Ind. J. Global Leg. Stud. 425 (1999), http://www.javvo.com/colerche/documents/globregul.pdf

administrative laws, is a type of law where exists relation between some government department or agency and people and their organizations. Private law regulates relations between private individuals and organizations. Because of the globalization process, Poland needed to transform its legal system to be more coherent with international relations. That's why currently it is not hard to run business activity in Poland for foreign entities. Also the Polish International Private Law had to be transformed. The International Private Law includes principles of conflict of law which state will be used to a certain situation. Nationality, place of residence seat, situation of the object will affect on the choice of using concrete legal system.[17]

Concept of Convergence: Among the phenomena generally included under the label of "globalization," there are undeniably strong pressures toward harmonization and homogenization of legal systems. In comparative law, there is a concept of "convergence", which means, to refer to the degree to which modern legal systems are becoming more and more alike. Significant pressures toward convergence are created by, on the one hand, the forces of international trade, which tend to demand harmonized commercial law because significant differences in local law stand as impediments to international trade, and, on the other hand, by the international human rights and democratization movements, which are arguably based on the values of western liberal democracy and which seek to have all domestic and international legal systems adopt certain characteristics of western liberal democratic law. While the various religious-based traditions of law (Jewish, Islamic, or Hindu, for example) pose obvious barriers to convergence, the thesis of ever-increasing convergence seems plausible with respect to the two main western traditions of law, the common and the civil law.[18] Legal systems are flexible and rationality prevails, so however much they are bound to the internal logical unfolding of their own legal tradition or family, through transpositions and fertilisation, transmigration of ideas, institutions and structures occurs and causes legal systems as a whole, and areas of law in particular, to change. Legal systems are driven by their internal dynamics and by the external dynamics of transmigration.[19] This movement and change can be dubbed 'convergence' or 'divergence within harmony'. The results are mixed legal systems and areas of law that are themselves mixed systems.[20]

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[17] Jaroslaw Warylewski, REMARKS ON GLOBALIZATION AND THE POLISH LEGAL SYSTEM, http://www.ialsnet.org/meetings/business/WarylewskiJaroslaw-Poland.pdf

[18] John C. Reitz, SYMPOSIUM: INTERROGATING GLOBALIZATION: THE IMPACT ON HUMAN RIGHTS: DOUBTS ABOUT CONVERGENCE: POLITICAL ECONOMY AS AN IMPEDIMENT TO GLOBALIZATION, https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=12+Transnat'l+L.+%26+Contemp.+Probs.+139&srctype=smi&srcid=3B15&key=bfd80f7a945e6da1e26483c5e8737178

[19] Lord Irvine observes: 'Through these processes of cross-fertilisation we begin to see the emergence of common principles of European public law which, in turn, help to ensure that all European citizens benefit from certain bench-mark standards as they interact with national and transnational public bodies. . . . Our constitutional landscape is changing, and administrative law in Britain and Europe are growing closer together.

[20] Esin Örücü, PUBLIC LAW IN MIXED LEGAL SYSTEMS AND PUBLIC LAW AS A 'MIXED SYSTEM', http://www.ejcl.org/52/art52-2.html

MODULE-II

Constitutional Law And Administrative Law

INTRODUCTION TO THE CONSTITUTION OF INDIA

A constitution is essentially a formal representation of the basic ideas and organization of a government in one document. The constitution of any country is the most important piece of legislation. This is particularly important because the polity of any country is the spinal cord of law of that country. It is a legal document having a special legal sanctity, which sets out the framework and the principal functions of the organs of the government of a state, and declares the principles governing the operation of those organs. It determines law and rules, and describes the form of the government, the relationship between the citizens and the various structures of the government.

The Constitution of India is considered as the supreme law of the land. It frames fundamental political principles, procedures, practices, rights, powers, and duties of the government. It imparts constitutional supremacy and not parliamentary supremacy, as it is not created by the Parliament but, by a constituent assembly, and adopted by its people, with a declaration in its preamble. Parliament cannot override it.

DRAFTING OF THE INDIAN CONSTITUTION

Journey from Government of India Act 1935 to the Constituent Assembly Debates

During 1930s Indian freedom struggle had reached its epitome. The spirit of fighting and driving away the British had penetrated each and every strata of the society and its members and as far as the British were concerned they knew that it was getting day by day to suppress the freedom fighters. British also were well aware that they needed the support of Indians in facing and fighting in one of the most destructive war ever fought in the world history i.e. the World War II.

Amongst the plethora of demands put forth by the freedom fighters greater participation in the government was often considered as the most significant. During this time the political relations between the British and the Indians was governed by the Government of India Act 1919 which had established the concept of 'Provisional Dyarchy'. According to this there were certain areas of government which were placed in the hands of independent ministers. But the final decision-making power would still remain in the hands of the British.

Gradually even this arrangement was strongly opposed by the Indians and consequently in order to cater to the increasingly violent demands on more autonomy in these areas the aforesaid was revised and in its place the Government of India Act 1935 was enacted. The provisions of the Government of India Act 1935, though never implemented fully, had a great impact on the Constitution of India. Many key features of the constitution are directly taken from this Act. It is really a lengthy and detailed document having 321 sections and 10 schedules. The majority of the today's constitution has drawn from this.

Salient Features of the Government of India Act:

- *Provincial Autonomy:* The system of Dyarchy was abolished and with it the system of revenue and executive council also had to bid adieu. The council of ministers primarily administered all the provincial subjects barring few crucial exceptions like Law and Order for which the Head Government was responsible. These ministers were chosen from the elected members of the provincial legislature and were collectively responsible to it.
- *All India Federation States:* The enactment also proposed setting up of an All India Federation which would be primarily comprised of the British India and the Princely States. These units were further sub-categorized into eleven governor's provinces, six chief commissioner's provinces and all those princely states that had consented to become a part of the same. Such an accession was supposed to be completely voluntary and was to be executed through an Instrument of Accession in favour of the Crown.
- *Introduction of Dyarchy at the Central Level:* The federal subjects were further categorized into Reserved subjects and Transferred Subjects. Where the former included crucial subjects like Defence, Ecclesiastical Affairs, External Relations and Tribal Affairs, the remaining areas of governance formed a part of the latter. The Reserved Subjects were supposed to be administered by the Governor General along with the aid of three executive counselors. Transferred subjects were required to be administered by the Governor General with the aid of Council of Ministers.
- *Bicameral Legislature:* It also established a federal bicameral legislature consisting of a Upper House i.e. Council of States and a Lower House i.e. the Federal Assembly. The strength of the Upper house was fixed at 260 out of which 104 members were nominated by the rulers to present the Indian states. 6 members were to be nominated by the governor-general whereas the remaining members were required to be elected. The lower house comprised of 375 members out of which 250 represented British India and 125 represented the Indian States. The members of the British India were indirectly elected enjoying a tenure of five years unless the house was dissolved earlier by the Governor General. Six provinces were given the Bicameral System of Legislature.
- *Establishment of a Federal Court:* Primarily function of this court was to adjudicate inter-state disputes and matters concerning the interpretation of the Constitution. However the Privy Council remained the final court of appeal.
- Division of Law Making Powers in to three lists
- Establishment of an Advisory Body in place of the Indian Council
- Separation of Burma from India w.e.f. April 1937

Constituent Assembly: The Constituent Assembly of India consisted of indirectly elected representatives and was established for the prime purpose of framing the constitution of India. The assembly remained in session for close to three years and its functioned in the capacity of the first parliament of India after India's independence in 1947. Though the assembly consisted of people from the major walks of life however nevertheless majority of the members in the assembly belonged to the biggest political party i.e. Congress with little representation to other minority groups like Muslims or Sikhs. The Assembly had close to eleven sessions, before the final draft of our constitution was prepared. Dr. Sachchidananda Sinha was the first President (temporary chairman) of the Constituent Assembly. Dr. Rajendra Prasad then became the President of the Constituent Assembly and later became the first President of India. The hope behind the Assembly was expressed by Jawaharlal Nehru:

> "*The first task of this Assembly is to free India through a new constitution, to feed the starving people, and to cloth the naked masses, and to give every Indian the fullest opportunity to develop himself according to his capacity*."

SALIENT FEATURES OF THE INDIAN CONSTITUTION

The constitution of a country essentially seeks to establish its fundamental or basic organs of the government and administration and describe their structure, composition and powers and principle functions and define the inter-relationships of these organs with one another and regulate their relations with the people more particularly the political relation. Thus the constitution lays down the essential framework of a government.

The following are the Key Features of the Indian Constitution:

Distribution of Powers: India is a quasi-federal state and having certain features of federalism means that the India would necessarily possess the feature of distribution of powers between the Centre and a State. The basis of such distribution of powers is that in the matters of national interest in which an uniform polity is desirable in the interests of the units, authority is entrusted to the Union and the matters of local concern is given to the state.

Supremacy of the Constitution: The Constitution is the supreme law of the land. All the other legislations, authorities, every power be it legislature, executive or judiciary derives its authority and validity from the constitution.

Written Constitution: Federal Constitution should be written. The foundation of a federal state is complicated contracts and it will practically be impossible to maintain the supremacy of the constitution unless the terms of the constitution have been reduced into writing. Indian Constitution is one of the lengthiest and the largest constitution of the world. While US constitution originally consisted of seven articles, Canadian constitution consisted of one hundred and forty seven articles; Indian Constitution initially consisted of 395 Articles with twenty-two parts and nine schedules. The composition of the extraordinary document will be discussed at length in the following sections.

Parliamentary Form of Government: The constitution of India established a parliamentary form of government both at the Centre as well as at the state level. In this respects the drafters have adopted the British model in toto as India was accustomed to that form of the government. The essence of a Parliamentary form of government is its responsibility to the legislature. The President is the constitutional head but the real executive power vests with the Prime Ministers and his Council of Ministers who are collectively responsible to the Lok Sabha. The members are elected for a period of five years.

A Unique Blend of Rigidity and Flexibility

Rigidity: A natural corollary of a written constitution is its rigidity. The constitution is supreme law of the land and therefore it should definitely not be amendable as per the whims and fancies of the government. A rigid constitution is one which requires a special method of amendment of any of its provisions. In a flexible constitution provisions could be amended through ordinary legislative process. A written constitution is usually said to be flexible. It is only a few provisions that require the consent of half of the state legislature. The remaining provisions of the constitution can be amended by a special majority of the Parliament.

Authority of the Court: In a federal state the legal supremacy of the constitution is essential for the existence of the federal system. The very nature of the federal state is division of powers between the Central and the State government under the framework of the constitution. The judiciary has the final authority to interpret and guard the provisions of the constitution.

PREAMBLE

> WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:
> JUSTICE, social, economic and political;
> LIBERTY of thought, expression, belief, faith and worship;
> EQUALITY of status and of opportunity;
> and to promote among them all
> FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;
> IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

The preamble to the Constitution of India is a brief introductory statement that sets out the guiding purpose and principles of the document. The Preamble to a Constitution embodies the fundamental values and the philosophy, on which the Constitution is based, and the aims and objectives, which the founding fathers of the Constitution enjoined the polity to strive to achieve.

The Preamble of the Constitution of India is a unique piece of document. It embodies the most important values and objectives of our constitution. It is the soul and spirit of the constitution.

The Preamble to our Constitution serves, two purposes:

- It indicates the source from which the constitution derives its authority
- It also states the objects which the constitution seeks to establish and promote

Crucial principles imbibed in the Preamble:

Sovereignty: The word sovereign means supreme or independent. India is internally and externally sovereign - externally free from the control of any foreign power and internally, it has a free government which is directly elected by the people and makes laws that govern the people. The word Sovereign emphasizes on the belief that the people of India have a supreme right to take a decision over both internal and external affairs. It also makes it clear that no external power can dictate the government of India.

Socialist: It implies social and economic equality. Social equality in this context means the absence of discrimination on the grounds only of caste, color, creed, sex, religion, or language. The word Socialistic indicates that the government mainly aims at reducing the inequalities among the people belonging to various sections of the society, by indeed distributing the wealth equally among them.

Secular: It implies equality of all religions and religious tolerance. India therefore does not have an official state religion. Secularism reiterates the belief of the government that all the religions in the country are equal and there is no official religion in India.

Democratic: India is a democracy. The people of India elect their governments at all levels (Union, State and local) by a system of universal adult suffrage.

Republic: A democratic republic is an entity in which the head of state is elected, directly or indirectly, for a fixed tenure. The President of India is elected by an electoral college for a term of five years. The post of the President of India is not hereditary. Every citizen of India is eligible to become the President of the country. It reflects that the head of a state being an elected one rather than a hereditary one.

Justice establishes the idea that the Government should work for the welfare of the State and also that the people cannot be discriminated on the basis of caste, religion and gender.

The word Liberty emphasizes on the idea that no unreasonable restrictions should be laid on the citizens of the country by the Government.

The word Equality simply establishes the belief that all the citizens are equal before law.

Finally, the word Fraternity aims at spreading the feeling of brotherhood among all the citizens of the country.

FUNDAMENTAL RIGHTS

Every person by virtue of being a human is entitled to certain inalienable and exclusive rights. They are inalienable and exclusive rights as their absence would negate the very existence of human being and their presence guarantees the most basic freedoms that would ensure peaceful and purposeful life.

The following are the fundamental rights guaranteed under our constitution:

- Right to Equality,
- Freedom of speech and expression,
- Right to life and liberty,
- Right of freedom from exploitation,
- Right to practice religion,
- Cultural and educational rights
- Right to approach court

Right to Equality: Among all the basic freedoms, the right to equality stands at forefront as success of Democratic life is based upon it. In fact, in all modern constitutions it is the first fundamental right. The term equality has many connotations. They are: Protective discrimination, Rule of law, Concept of Arbitrariness, Principles of natural justice etc. All these tools ensure operation of equality in reality.

Protective discrimination: A.14 of Constitution says all are equal before law and there shall be no discrimination on any grounds whatsoever. However, equality doesn't mean equality that is measured with scale. The rights guaranteed by Articles 15 to 18 emanate from Article.14. A.15 deals with discrimination on grounds of religion, race, caste, sex or place of birth. It also permits State to undertake certain beneficial measures to Scheduled Castes, Scheduled Tribes, Socially and educationally backward classes, women and children. A.16 deals with equality of opportunity in matters of public employment and makes provision for reservation in favour of backward classes and Scheduled Castes. A.17 prohibits untouchability.

The following is the test adopted by Supreme Court to determine any measure taken by legislature or executive in the name of Protective discrimination. It is also known as Test of reasonable classification. The classification or discrimination on any ground is permissible if following two conditions are satisfied:

- The classification must be founded upon an intelligible differentia which distinguishes person or things that are grouped together from other left out of that group.
- The differentia must have a rational relation to the object sought to be achieved by the Act in question.

The classification may be founded on different bases namely geography, occupations, persons, places etc., what is necessary is that there must be nexus between the basis of the classification and the object of the Act under consideration.

Concept of Arbitrariness: Equality encompasses fairness in state action. Therefore every action of state affecting legal or any rights of persons must be not arbitrary. In fact equality and arbitrariness are sworn enemies. Fairness in action is the theme of democracy wedded with rule of law and arbitrariness is the realm of monarchy.

The Principles of Natural Justice: In India, the principles of natural justice are firmly grounded in Article 14 & 21 of the Constitution. With the introduction of the concept of substantive and procedural due process in Article 21, fairness, which is included in the principles of natural justice, can be read into Article 21. The violation of the principles of natural justice results in arbitrariness; therefore, violation of natural justice is a violation of the equality clause of Article 14. (Discussed in detail later)

The Principles of Natural Justice is also one of the tools to ascertain absence of Arbitrariness. The Principles of Natural Justice says: No man shall be condemned unheard, Judge shall not have any bias (Whether monetary, personal or subject matter), Justice should not only be done but appears to be done, every decision of state should be based on reasons (Speaking order).

Rule of Law: This concept is popularized by British jurist A. V. Dicey. In fact this is the original idea of ancient philosophers like Aristotle who said "law should govern''. Rule of law implies that every citizen is subject to the law. In order to conclude that exist a rule of law in a country or society it must fulfill following three conditions:

- A uniform body of laws to regulate all human conduct in the State. In India we have a uniform body of laws which governs our society and regulates all human conduct within our country.
- A citizen should be able to approach courts to redress any grievance against the State like any other private individual for violation of his rights. There shall not be any prior permission of the state to sue it. This has also been provided in our Constitution by A.300.
- The determination of disputes must be by regular courts manned by independent judges. In India we have independent and integrated Judiciary with its own administrative and regulatory mechanism. The appointment of Judges is also is made in consultation with the Chief Justice of the High Court concerned, the Governor of the State and the Chief Justice of India. This method of appointment guarantees that judges appointed to the High Court would be persons of ability, integrity & independence.

A question has sometimes been asked as to what would happen if the Government–be it State or Central–did not carry out the decisions of the Court. The question has been answered by Article

144 of the Constitution which inter alia says that all civil authorities in the territory of India shall act in aid of the Supreme Court.

Freedom of Speech and Expression: Justice Brandies and Holmes, in Whitney v. California very firmly stated: Liberty is a means to end and vice versa. Framers of our constitution believed that freedom to think as you will and to speak as you think is means indispensable to the discovery and spread of political truth. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. Constitutional framers are quiet conscious of right to

Freedom of speech and expression importance in a Democratic country governed by rule of law and as such crystallized this norm in A.19 of the Constitution in variety of forms. They are:

- freedom of speech and expression
- assemble peacefully and without arms
- to form association or unions
- to move freely throughout the territory of India
- to reside and settle in any part of the territory of India
- to practice any profession, or to carry on any occupation, trade or business.

Right to Life and Personal Liberty: Article.20 to 24 of Constitution imposes certain fundamental limitations on the state in order to deprive any person his right to life or liberty. They are as follows:

- ➔ A man shall be punished only for such act or omission which is declared as an offence as on the date of occurrence offence Article.20 (1).
- ➔ A person can be punished only once for an offence committed Article.20 (2).
- ➔ Person charged can’t be compelled to be a witness against himself Article.20 (3).
- ➔ The deprival of any person’s life or personal liberty shall be according to procedure established by law (A.21).
- ➔ Any Person arrested shall be defended by lawyer of his choice. He must be informed OFis grounds of arrest Article.22 (1).
- ➔ A Person arrested must be produced before the nearest magistrate within a period of twenty-four hours excluding time of journey. This rule is not applicable to preventive OFdetention laws Article.22 (2).

Right to Practice Religion of One’s Choice : Liberty of thought, expression, belief, faith and worship is one of its feature, ideal and goal of our constitution. It means India is a secular state from its inception though 42nd amendment introduced the word Secular in the Preamble of the constitution. A.25, 26, 27 and 28 expressly deal with the rights of religion.

A.25 (1) entitles all persons equally to freedom of conscience and the right to freely profess, practice and propagate religion. However, this is subject to public order, morality, health and other provisions of part-III of the constitution.

A.26 guarantees authorizes citizen to establish religious institution of their subject to public order, morality and health. They also have right to own and acquire movable and immovable property and to administer such property in accordance with law.

A.27 prohibits any compulsion in the matter of the payment of any tax, the proceeds of which are specifically appropriated for the promotion of any particular religion. A.28 (1) bars any religious instructions being provided in any educational institution wholly maintained out of state funds.

It is clear from A.25 that constitution wishes to address the evils of religion by imposing restrictions on right to religion on the basis of public health, morality and fundamental rights. Further, it also suggests that our secularism is not supportive in nature to any religion. However, it interferes with the religion if offends public order, morality, health. Thus, in India, the freedom of religion is guaranteed solely out of concern for the individual as an aspect of the general scheme of his liberty. For the simple reason liberty without freedom of religion is incomplete and meaningless.

Cultural and Educational rights: A.29 & 30 deal with this subject. A.29 protects the language, script and culture of minorities and whereas under A.30 minorities have got the right to establish and administer educational institutions of their choice A.30 (1) preserves culture and language of minorities and ensures equal treatment between majority and minority institutions.

DIRECTIVE PRINCIPLES OF STATE POLICY

The Directive Principles of State Policy contained in Part IV, Articles 36-51 of the Indian constitution constitute the most interesting and enchanting part of the constitution. The Directive Principles may be said to contain the philosophy of the constitution. The idea of directives being included in the constitution was borrowed from the constitution of Ireland. As the very term "Directives" indicate, the Directive principles are broad directives given to the state in accordance with which the legislative and executive powers of the state are to be exercised. As Nehru observed, the governments will ignore the directives "Only at their own peril." As India seeks to secure an egalitarian society, the founding fathers were not satisfied with only political justice. They sought to combine political justice with economic and social justice.

FUNDAMENTAL DUTIES

Originally, the constitution of India did not contain any list of fundamental duties. In other words, enjoyment of fundamental rights was not conditional on the performance of fundamental duties. Democratic rights are based on the theory that rights are not created by the state. Individuals are born with right. It is on this theory that the Indians before independence raised the slogan that “freedom is our birth right.” It is in this sense again that Prof. Laski asserts that the “state does not create rights, it only recognizes rights.”

The socialists on the other hand, make enjoyment or rights conditional on the fulfillment of duties. They claim that “he who does not work, neither shall he eat.” The constitution of the world’s first socialist country, that of Soviet Union contains a list of fundamental rights immediately followed by a list of fundamental duties. It is clearly asserted that the enjoyment of fundamental rights is conditional on the satisfactory performance of fundamental duties.

It was on this Soviet model that fundamental duties were added to the Indian Constitution by 42nd amendment of the constitution in 1976. The fundamental duties are contained in Art. 51A.

Art. 51A, Part IVA of the Indian Constitution, specifies the list of fundamental duties of the citizens. It says “it shall be the duty of every citizen of India:

- to abide by the constitution and respect its ideal and institutions;
- to cherish and follow the noble ideals which inspired our national struggle for freedom;
- to uphold and protect the sovereignty, unity and integrity of India;
- to defend the country and render national service when called upon to do so;
- to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional diversities, to renounce practices derogatory to the dignity of women;
- to value and preserve the rich heritage of our composite culture;
- to protect and improve the natural environment including forests, lakes, rivers, and wild-life and to have compassion for living creatures;
- to develop the scientific temper, humanism and the spirit of inquiry and reform;
- to safeguard public property and to abjure violence;
- to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavor and achievement.

Further, one more Fundamental duty has been added to the Indian Constitution by 86th Amendment of the constitution in 2002 i.e. who is a parent or guardian , to provide opportunities for education to his child, or as the case may be, ward between the age of six and fourteen years.

The fundamental duties however are non-justiciable in character. This means that no citizen can be punished by a court for violation of a fundamental duty. In this respect the fundamental duties are like the directive principles of the constitution in part IV. The directive principles lay down some high ideals to be followed by the state. Similarly, the fundamental duties in Art 51 A, lay down some high ideals to be followed by the citizens. In both cases, violation does not invite any punishment. It is significant that the fundamental duties are placed at the end of part IV rather than at the end of part III of the constitution. While part III containing fundamental rights is justiciable, part IV containing the directive principles is not.

However, these fundamental duties are not mere expressions of pious platitudes. Courts will certainly take cognizance of laws seeking to give effect to fundamental duties.

Further, the fundamental duties enumerated in Art. 51A constitute a constant reminder to the citizens that they have duties in building up a free, egalitarian and healthy society. These are expected to act as damper to reckless and anti-social activities on the part of some individuals. Finally, the very fact that these duties figure in the constitution, keeps the door open for the duties to be given higher constitutional at status in future through constitutional amendments.

RELATIONSHIP BETWEEN CENTRE AND STATE

After independence India adopted the federal structure for, perhaps, administrative convenience. There is dual policy, with the Union Government at the centre and the state governments at the periphery—each enjoying powers assigned to them. The autonomy of the states is so adjusted with the centre that the latter can perform its function of ensuring unity of the country. The legislative relations between the centre and the states determined in accordance with the provisions of the Article 246 of the Constitution. The legislative powers are categorized in three lists—Union List with 97 subjects, States List with 66 and Concurrent List with 47 subjects. Residuary legislative powers rest with the Parliament. Moreover when there is state of emergency, Parliament can make laws on the subjects given under Union List. In the case of a conflict between the laws made by the state and the laws passed by the centre the central law will prevail.

The executive power of every state must comply with the laws made by the Parliament. The executive power of the state should be exercised in a manner that it does not impede of prejudice the executive power of the Union. The centre can direct the states if matters of national importance are concerned. During emergency, Union Government can assume vast administrative powers.

The financial relations between the centre and state are the main subject of controversy now-a-days. While deciding these relations the fathers of the Constitution followed the India Act of 1935. Some taxes are levied and collected exclusively by the Central Government while others are levied and collected only by the states. These are taxes levied by the centre which are collected by the states and others which are levied and collected by the centre and given to the states.

INDIAN JUDICIARY

Indian Justice System: A unique feature of the Indian Constitution is that, despite its Federal system and the existence of the Central and State laws with their predefined spheres of application, there exists a single integrated system of Courts which administers both the central and the state laws. Hierarchy of the Courts in India: The Supreme Court of India and the High

Courts are the two constitutional courts that are vested with major powers to protect the Fundamental Rights of the citizens and also to interpret the Constitution and other laws.

The Supreme Court is the highest court in the country. It has original, appellate and advisory jurisdiction. Its exclusive original jurisdiction extends to Central-State and inters State disputes. In addition, Article 32 of the Constitution gives an extensive original jurisdiction to the Supreme Court for the enforcement of Fundamental Rights. It is empowered to issue directions, orders or writs, including writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto and certiorari* to enforce them. The Supreme Court, if satisfied that cases involving substantially the same questions of law of general importance are pending before it and the High Courts, it may withdraw such case and dispose them by itself. It has many benches for litigation and its exclusive original jurisdiction extends to any dispute between the Government of India and one or more States; or between the States themselves. It also has an advisory jurisdiction wherein the President can always seek advice on any matter of law. The Law pronounced by this court is binding on all courts within India and the Court has the power to punish anybody for its contempt.

High Court stands at the head of a State's judicial administration. It has power to issue to any person within its jurisdiction writs, orders or directions. Writs are in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for enforcement of Fundamental Rights and for any other purpose. Each High Court has powers of superintendence over all Courts and Tribunals within its jurisdiction. They work under the direct guidance and supervision of the Supreme Court of India. However no direct administrative control is exercised by the Supreme Court that may in any way affect the functioning of the High Court’s as independent judicial institutions. Every High Court has a Chief Justice and such other Judges which the President may appoint from time to time. Decisions of the Supreme Court are considered law of the land and are binding unless overruled by a larger bench of the same court. High Court decisions are binding to the extent of their respective state jurisdiction. Civil Justice Administration: In civil courts every suit should be instituted before the court of lowest jurisdiction. In the civil side the Munsif's Court is the court of lowest jurisdiction. If the value of the subject matter of the suit is worth rupees one lakh or below, the Munsiff's Court is the competent court to try the suit. If the value exceeds above rupees one lakh the suit should be filed before the Subordinate Judge's Court (Sub Court). If the value exceeds above rupees Ten lakh the suit should be filed before the District Judge's Court. An appeal from the decisions of the Munsiff is filed before the District Court. Appeals from the decisions of the Sub Court are filed before the District Court if the subject matter of the suit is of value up to rupees two lakhs. If the value is above two lakhs, the appeal should be filed before the High Court and next to the Supreme Court.

The purpose of Civil Justice system is to adjudicate rights of the parties in case of their violation and apprehension of violation. The rights can be by way statute, custom, common law, constitution, equity etc., We find the civil rights of the parties in various laws like contract law, transfer of property, easements, partition law, Hindu succession.

These rights are adjudicated with the aid of procedure called Civil procedure code, 1908, Civil rules of Practice and Indian Evidence Act, 1872. Under CPC we find which forum to be approached to redress grievance - how to approach it – steps forum should take to receive grievance – method of calling opposite party – mode of disposing the case and executing the pronounced decree/order – appeal- interim reliefs. Under Evidence act we find when a fact alleged in said to be proved, who has to prove, with what facts it must be proved and mode of recording evidence.

Criminal Justice Administration: Administration of criminal justice is carried out through Magistrate Courts and Sessions courts. The hierarchy of criminal courts is given below. The Court at the lowest level is called Judicial Magistrate of the second class. This Court is competent to try the case if the offence is punishable with imprisonment for a term not exceeding one year, or with fine not exceeding five thousand rupees, or with both. The First Class Magistrate is competent to try offences punishable with imprisonment for a term not exceeding three years or with fine up to ten thousand rupees. The Chief Judicial Magistrate can impose any fine and punishment up to seven years imprisonment. The Assistant Sessions Judge is competent to impose punishments up to ten years imprisonment and any fine. The Sessions Judge can impose any punishment authorized by law; but the sentence of death passed by him should be subject to the confirmation by the High Court. (See for details Sections 28 and 29 of Criminal Procedure Code.)

The purpose of Criminal Justice system is to punish the guilt for actions and omissions prohibited by law and we find prohibited actions and omissions and appropriate sanctions under laws like Indian penal code, NDPS Act,

These commission of these offences are adjudicated with the aid of procedure called Criminal procedure code, 1973, Criminal rules of Practice and Indian Evidence act, 1872. Under Cr.P.C we find which forum to be approached to redress grievance - how to approach it – steps forum should take to receive grievance – method of calling opposite party – mode of disposing the case mode of disposing he case and executing the pronounced order - appeal- interim reifies. Under Evidence act we find when a fact alleged in said to be proved, who has to prove, with what facts it must be proved and mode of recording evidence.

Now the bottom line is we have a right/offence based approach, it means if you have right or causing of injury contravention of law, one can approach court. However, approaching court doesn't mean physical appearance. As in adversarial method of adjudication the role of judge is not active but to act upon version placed on either side. As such, this underlies significance of lawyer with robust personality, skill and values but not a mere message transmitter. These qualities are important as adversarial method of adjudication insists certain rules and principles either to receive or adjudicate aggrieved claim. These rules and principles directly or indirectly mandates trial lawyer to acquire qualities like: a) Conversion of human problem into a legal problem b) knowledge and wisdom in application of procedural laws to the real problems to get the desired result c) skill of ascertaining facts through the client so as to bring them within or outside the fold of right or offence and ability of processing in the court of law so as to prove or disprove it.

EMERGENCY PROVISIONS

Emergency is a very unique concept and one of the most significant features of the Indian Constitution which empowers the Union or the Central Government to assume wide powers to handle emergency situations. When the centre proclaims emergency then in effect the centre can take full legislative and executive control of any state. After the proclamation of emergency a center can restrict certain freedom of the citizens. Such a centralized power in the hands of the union government prevents India from being recognized as a fully federal state.

The Constitution of India recognizes three forms of Emergency:

- National Emergency
- State Emergency
- Financial Emergency

National Emergency: The Constitution of India has provided for imposition of emergency caused by war, external aggression or internal rebellion. This is described as the National Emergency. This type of emergency can be declared by the President of India if he is satisfied that the situation is very grave and the security of India or any part thereof is threatened or is likely to be threatened either

- By war or external aggression
- By armed rebellion within the country.

The President can issue such a proclamation even on the ground of threat of war or aggression. According to the 44th Amendment of the Constitution, the President can declare such an emergency only upon the written approval of the Cabinet along with the two-third majority approval of both the Houses of Parliament. Such an approval must be received within one month from the date of proposal otherwise the proclamation will cease to operate. If a national emergency proclamation is sought to be imposed at a time when the Lok Sabha is under the period of dissolution then the proposal of emergency should be approved by Rajya Sabha later on by the Lok Sabha also within one month of the start of its next session.

Once the emergency is imposed then it shall remain in force for a period of six months from the date of proclamation. Further extension is possible subject to following of the same procedures regarding approval and imposition of emergency.

For the first time, emergency was declared on 26 October 1962 after China attacked our borders in the North East. This National Emergency lasted till 10 January 1968, long after the hostilities ceased.

Imposition of National Emergency has the following effects:

- One of the most notable and first impact of imposition of national emergency is the conversion of the federal aspect of the constitution into unitary form. Legislative and the Executive authority of the states ceases and the centre is empowered to make laws for the entire country or any part thereof including legislating on matters listed in the state list as well.
- Executive authority of the states comes directly under the control of the President.
- During the period of imposition of emergency the Lok Sabha can extend its tenure by a year. However under no circumstances its tenure can be extended for more than six months after the cessation of the emergency.
- All fundamental right except the Right to Life and Personal Liberty stand suspended during the period of emergency.

Emergency due to failure of Constitutional Machinery of State

The quasi-federal structure of the Indian government obligates the Union to ensure that its states are governed as per the provisions of the constitution. Under Article 356, the President may issue a proclamation to impose emergency in a state if he is satisfied on receipt of a report from the Governor of the State, or otherwise, that a situation has arisen under which the Government of the State cannot be carried on smoothly. In such a situation, proclamation of emergency by the President is called ‘proclamation on account of the failure (or breakdown) of constitutional machinery.’ In popular language it is called the President’s Rule. Like National Emergency, such a proclamation must also be placed before both the Houses of Parliament for approval. In this case approval must be given within two months, otherwise the proclamation ceases to operate. If approved by the Parliament, the proclamation remains valid for six months at a time. It can be extended for another six months but not beyond one year. However, emergency in a State can be extended beyond one year if

- a National Emergency is already in operation; or if
- The Election Commission certifies that the election to the State Assembly cannot be held.

It was in 1951 that this type of emergency was imposed for the first time in the Punjab State. In 1957, the Kerala State was put under the President’s Rule.

Imposition of State Emergency has the following effects:

- The President is empowered to undertake and perform all the legislative and the executive functions of the state. Alternatively such powers can also be vested with the Governor of the state or any other executive authority.
- Though not mandatory but if the President deems fit then he may dissolve or suspend the legislative assembly of the state

- ➔ President can authorize the Union Parliament to make laws on behalf of the State Legislature
- ➔ The President can make any other incidental or consequential provision necessary to give effect to the object of proclamation.

Financial Emergency**:** The third form of emergency envisaged under the Indian Constitution is the financial emergency as provided under Article 360 of the Indian Constitution. It provides that if the President is satisfied that the financial stability or credit of India or any of its part is in danger, he may declare a state of Financial Emergency. Like the other two types of emergencies, it has also to be approved by the Parliament. It must be approved by both Houses of Parliament within two months. Financial Emergency can operate as long as the situation demands and may be revoked by a subsequent proclamation.
Imposition of Financial Emergency has the following effects:

- ➔ The Union Government may give direction to any of the States regarding financial matters.
- ➔ The President may ask the States to reduce the salaries and allowances of all or any class of persons in government service.
- ➔ The President may ask the States to reserve all the money bills for the consideration of the Parliament after they have been passed by the State Legislature.
- ➔ The President may also give directions for the reduction of salaries and allowances of the Central Government employees including the Judges of the Supreme Court and the High Courts.

So far, fortunately, financial emergency has never been proclaimed.

AMENDMENT PROVISIONS

Though a rigid constitution is a classified feature of the Indian constitution but its flexibility to the changing needs of the society provides it adaptable to a federal structure as well and hence the Indian Constitution has often be classified as a quasi-federal form of government. That there have been 93 amendments in last 50 years proves this fact.

The amendment provision of the constitution refers to the process of altering the provisions of the Indian Constitution. The said procedure is laid down under Article 368 of the Indian constitution. The amendment provision was included by the drafters in an attempt to ensure the sanctity of the constitution of India and consequently provide a safeguard from the exercise of arbitrary power by the Parliament.

The Constitution provides procedures for three categories of amendments:

- ➔ Amendment by Simple Majority: Constitutional Provisions laid down under Article 4 (i.e. admission and establishment of new states), Article 169 (i.e. power to abolish or create legislative councils in states), Para 7(2) of Schedule V (administration and control of the Schedule Areas and Scheduled Tribes) and Para 21(2) of Schedule VI(power of the Parliament to enact laws amending the Sixth Schedule which contains provisions for the administration of Tribal Areas in the States of Assam, Meghalaya, Tripura and Mizoram) can be altered by way of a Simple Majority such as that required for the passing of any ordinary law.

- Amendment by Special Majority: Amendment by Special Majority along with Ratification by State Legislature: If the amendment seeks to make any change in any of the provisions mentioned in the proviso to article 368, it must be ratified by the Legislatures of not less than one-half of the States. These provisions relate to certain matters concerning the federal structure or of common interest to both the Union and the States viz., the election of the President (articles 54 and 55); the extent of the executive power of the Union and the States (articles 73 and 162); the High Courts for Union territories (article 241); The Union Judiciary and the High Courts in the States (Chapter IV of Part V and Chapter V of Part VI); the distribution of legislative powers between the Union and the States (Chapter I of Part XI and Seventh Schedule); the representation of States in Parliament; and the provision for amendment of the Constitution laid down in article 368. Ratification is done by a resolution passed by the State Legislatures.

An amendment can be initiated by the introduction of a bill in either House of Parliament which should be passed in any of the three means as mentioned above. Once passed the bill is then for assent to the President for assent.

The role of the States in constitutional amendment is limited. State Legislatures cannot initiate any Bill or proposal for amendment of the Constitution. They are associated in the process of the amendment only through the ratification procedure laid down in article 368, in case the amendment seeks to make any change in the any of the provisions mentioned in the proviso to article 368. The only other provision for constitutional changes by State legislatures is to initiate the process for creating or abolishing Legislative Councils in their respective Legislatures, and to give their views on a proposed Parliamentary Bill seeking to affect the area, boundaries or name of any State or States which has been referred to them under the proviso to Article 3. However, this referral does not restrict Parliament's power to make any further amendments of the Bill.

FUNDAMENTAL PRINCIPLES OF CONSTITUTIONAL LAW

Separation of Powers: For the preservation of the political liberty of the individuals and democracy, it becomes necessary in a state to establish special organs for the exercise of powers. The powers of the government are divided between its organs in accordance with the nature of powers to be exercised. Broadly, the powers of a government in a state have been classified as the power to:

- Enact laws i.e., powers of the Legislature.

- Interpret laws i.e. powers of the Judiciary.
- Enforce laws i.e. powers of the Executive.

The theory of separation of powers in its simplest form implies that all the above functions should be entrusted to three different authorities. The three organs of the government should be kept separate and distinct. One organ should be independent of the control of others. Each organ shall exercise its powers within its own sphere. This doctrine entails that each organ shall not encroach upon or interferes with the powers and independence of other organs of government. If any organ encroaches into the terrain of the other organ, it shall be checked by another organ of the government. Thus, no new organ is created over and above the existing organs of government, to check encroachment.

The concept of separation of powers can be traced to Aristotle (384 -322 B.C). Aristotle in his treatise Politics called the three organs of the government as deliberative, executive and judicial. He gave the description about the organization and functions of these organs, without mentioning their separation from each other. In the 14th century, the Italian thinker Marsilius of Padua (1275-1342) drew a clear distinction between legislative and executive functions of the government. In the 16th century, the French philosopher Jean Bodin (1530-1596) stated that judicial functions must be performed by the independent Magistrate, free from the influence of the Monarch.

In the 17thcentury, the British political thinker John Locke (1632-1704) deduced from a study of the English constitutional system that political power was to be divided among several bodies. According to Locke, the executive and federative powers can be combined but the union of executive and legislative organs shall be prohibited to protect the political liberty of people. According to him, an ideal form of government is civil government with limited powers. However, the principle was given its most scientific interpretation by Montesquieu and the theory of separation of powers as propounded by him became the model for governance by all democracies.

Montesquieu had visited England and was thoroughly impressed by the sense of liberty enjoyed by their people. Witnessing the administration of the three main areas of law by three separate departments led him to conclude that the liberty and freedom enjoyed by them were a result of the absence of a single monarch in whom the power to enact, implement and enforce laws rests. He thus advocated for the theory of separation of powers in order to make the government safe for the governed. He argued that whoever has unfettered and unrestricted power would invariably abuse it. He advocated for three distinct departments of government with distinct staff who will be responsible for administration of three different but equally important aspects of governance. Thus the legislative organ of the state shall be authorized to make laws, the executive organ of the state shall be authorized to implement laws and the judicial organ of the state will be authorized to enforce the same if violation occurs. His teachings gave boost to the

French Revolution and led to the adoption of the Declaration of Rights in 1789. The Declaration provided that:

"Every society in which Separation of Powers is not determined has no Constitution. The French Constitution, 1791, made executive, legislative and judiciary independent of one another."

Basic Structure Doctrine: The basic structure doctrine is an Indian judicial principle that the Constitution of India has certain basic features that cannot be altered or destroyed through amendments by the parliament.

The question whether fundamental rights can be amended under article 368 came for consideration in the Supreme Court in *Shankari Prasad case*. In this case validity of the first constitutional amendment was challenged which had inter alia inserted Article 31-A and 31-B to the constitution. The amendment was challenged on the ground that it sought to abridge the rights conferred by part III and hence was void. The Supreme Court however rejected the above argument and held that power to amend including the fundamental rights is contained in Article 368. However this decision was overruled by the Supreme Court in the *Golaknath Case*, wherein the validity of the seventeenth amendment was challenged. In order to resolve the conflict that was thus created, the Supreme Court laid down the Basic Structure Doctrine in the famous *Keshavananda Bharti* case in 1973. In this case validity of the 25th Amendment act was challenged along with the Twenty-fourth and Twenty-ninth Amendments. The court by majority overruled the *Golak Nath* case which denied parliament the power to amend fundamental rights of the citizens. The majority held that article 368 even before the 24th Amendment contained the power as well as the procedure of amendment. The Supreme Court declared that Article 368 did not enable Parliament to alter the basic structure or framework of the Constitution and parliament could not use its amending powers under Article368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the constitution. This decision is not just a landmark in the evolution of constitutional law, but a turning point in constitutional history.

Basic Features of the Constitution according to the *Keshavananda Bharti* case verdict each judge laid out separately, what he thought were the basic or essential features of the Constitution.

Doctrine of Pith and Substance: One of the proven methods of examining the legislative competence of a legislature with regard to an enactment is by the application of the doctrine of pith and substance. This doctrine is applied when the legislative competence of the legislature with regard to a particular enactment is challenged with reference to the entries in various lists. If there is a challenge to the legislative competence, the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. In this process, it is necessary for the courts to go into and examine the true character of the enactment, its object, its scope and effect to find out whether the enactment in question is genuinely referable to a field of the legislation allotted to the respective legislature under the constitutional scheme. This doctrine is an established principle of law in India recognized not only by this Court, but also by various High Courts. Where a challenge is made to the constitutional validity of a particular State Act with reference to a subject mentioned in any entry in List I, the Court has to look to the substance of the State Act and on such analysis and examination, if it is found that in the pith and substance, it falls under an entry in the State List but there is only an incidental encroachment on any of the matters enumerated in the Union List, the State Act would not become invalid merely because there is incidental encroachment on any of the matters in the Union List.

Doctrine of Severability: It provides that only that part of the law will be declared invalid which is inconsistent with the fundamental rights and the rest of the law will stand. However, invalid part of the law will be severed only if 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.

Doctrine of Waiver: It provides that a person has the liberty to waive the enjoyment of such rights as are conferred on him by the state, provide that such person must have the knowledge of his rights and the waiver should be voluntarily, However, citizens cannot waive of any of the fundamental rights

Doctrine of Eclipse: It provides that a law made before the commencement of the constitution remains eclipsed or dormant to be extent in comes under the shadow of fundamental rights i.e., is inconsistency brought about by the fundamental rights is removed by the amendment to the Constitution of India.

INTRODUCTION TO ADMINISTRATIVE LAW

Administrative law is the bye-product of the growing socio-economic functions of the State and the increased powers of the government. Administrative law has become very necessary in the developed society, the relationship of the administrative authorities and the people have become very complex. In order to regulate these complex, relations, some law is necessary, which may bring about regularity certainty and may check at the same time the misuse of powers vested in the administration. With the growth of the society, its complexity increased and thereby presenting new challenges to the administration we can have the appraisal of the same only when we make a comparative study of the duties of the administration in the ancient times with that of the modern times. In the ancient society the functions of the state were very few the prominent among them being protection from foreign invasion, levying of Taxes and maintenance of internal peace & order. It does not mean, however that there was no administrative law before 20th century. In fact administration itself is concomitant of organized Administration. In India itself, administrative law can be traced to the well-organized administration under the Mauryas and Guptas, several centuries before the Christ, following through the administrative, system of Mughals to the administration under the East India Company, the precursor of the modern administrative system. But in the modern society, the functions of the state are manifold, In fact, the modern state is regarded as the custodian of social welfare and consequently, there is not a single field of activity which is free from direct or indirect interference by the state. Along with duties, and powers the state has to shoulder new responsibilities. The growth in the range of responsibilities of the state thus ushered in an administrative age and an era of Administrative law.

The development of Administrative law is an inevitable necessity of the modern times; a study of administrative law acquaints us with those rules according to which the administration is to be carried on. Administrative Law has been characterized as the most outstanding legal development of the 20th-century. Administrative Law is that branch of the law, which is concerned, with the composition of powers, duties, rights and liabilities of the various organs of the Government.

The rapid growth of administrative Law in modern times is the direct result of the growth of administrative powers. The ruling gospel of the 19th century was Laissez faire which manifested itself in the theories of individualism, individual enterprise and self-help. The philosophy envisages minimum government control, maximum free enterprise and contractual freedom. The state was characterized as the law and order state and its role was conceived to be negative as its internal extended primarily to defending the country from external aggression, maintaining law and order within the country dispensing justice to its subjects and collecting a few taxes to finance these activities. It was era of free enterprise. The management of social and economic life was not regarded as government responsibility. But laissez faire doctrine resulted in human misery. It came to be realized that the bargaining position of every person was not equal and uncontrolled contractual freedom led to the exploitation of weaker sections by the stronger e.g.

of the labour by the management in industries. On the one hand, slums, unhealthy and dangerous conditions of work, child labour wide spread poverty and exploitation of masses, but on the other hand, concentration of wealth in a few hands, became the order of the day. It came to be recognized that the state should take active interest in ameliorating the conditions of poor. This approach gave rise to the favoured state intervention in and social control and regulation of individual enterprise. The state started to act in the interests of social justice; it assumed a " positive" role. In course of time, out of dogma of collectivism emerged the concept of " Social Welfare State" which lays emphasis on the role of state as a vehicle of socio-economic regeneration and welfare of the people.

Thus the growth of administrative law is to be attributed to a change of philosophy as to the role and function of state. The shifting of gears from laissez faire state to social welfare state has resulted in change of role of the state. This trend may be illustrated very forcefully by reference to the position in India. Before 1947, India was a police state. The ruling foreign power was primarily interested in strengthening its own domination; the administrative machinery was used mainly with the object in view and the civil service came to be designated as the "steel frame". The state did not concern itself much with the welfare of the people. But all this changed with the advent of independence with the philosophy in the Indian constitution the preamble to the constitution enunciates the great objectives and the socioeconomic goals for the achievement of which the Indian constitution has been conceived and drafted in the mid-20th century an era when the concept of social welfare state was predominant. It is thus pervaded with the modern outlook regarding the objectives and functions of the state. it embodies a distinct philosophy which regards the state as on organ to secure good and welfare of the people this concept of state is further strengthened by the Directive Principles of state policy which set out the economic, social and political goals of Indian constitutional system. These directives confer certain non-justiceable rights on the people, and place the government under an obligation to achieve and maximize social welfare and basic social values of life education, employment, health etc. In consonance with the modern beliefs of man, the Indian constitution sets up machinery to achieve the goal of economic democracy along with political democracy, for the latter would be meaningless without former.

Therefore, the attainment of socio-economic justice being a conscious goal of state policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with state powerholder. The Administrative law is an important weapon for bringing about harmony between power and justice. The basic law of the land i.e. the constitution governs the administrators.

Administrative law essentially deals with location of power and the limitations thereupon. Since both of these aspects are governed by the constitution, we shall survey the provisions of the constitution, which act as sources of limitations upon the power of the state. This brief outline of the Indian constitution will serve the purpose of providing a proper perspective for the study of administrative law.

NEED FOR THE ADMINISTRATIVE LAW: ITS IMPORTANCE AND FUNCTIONS

The emergence of the social welfare has affected the democracies very profoundly. It has led to state activism. There has occurred a phenomenal increase in the area of sate operation; it has taken over a number of functions, which were previously left to private enterprise. The state today pervades every aspect of human life. The functions of a modern state may broadly be placed into five categories, viz, the state as protector, provider, entrepreneur, economic controller and arbiter. Administration is the all-pervading feature of life today. The province of administration is wide and embrace following things within its ambit - It makes policies, It provides leadership to the legislature, It executes and administers the law and It takes manifold decisions. It exercises today not only the traditional functions of administration, but other varied types of functions as well. It exercises legislative power and issues a plethora of rules, bye- laws and orders of a general nature.

The advantage of the administrative process is that it could evolve new techniques, processes and instrumentalities, acquire expertise and specialization, to meet and handle new complex problems of modern society. Administration has become a highly complicated job needing a good deal of technical knowledge, expertise and know-how. Continuous experimentation and adjustment of detail has become an essential requisite of modern administration. If a certain rule is found to be unsuitable in practice, a new rule incorporating the lessons learned from experience has to be supplied. The Administration can change an unsuitable rule without much delay. Even if it is dealing with a problem case by case (as does a court), it could change its approach according to the exigency of the situation and the demands of justice. Such a flexibility of approach is not possible in the case of the legislative or the judicial process. Administration has assumed such an extensive, sprawling and varied character, that it is not now easy to define the term " administration" or to evolve a general norm to identify an administrative body. It does not suffice to say that an administrative body is one, which administers, for the administration does not only put the law into effect, but does much more; it legislates and adjudicates. At times, administration is explained in a negative manner by saying that what does not fall within the purview of the legislature or the judiciary is administration.

In such a context, a study of administrative law becomes of great significance. The increase in administrative functions has created a vast new complex of relations between the administration and the citizen. The modern administration impinges more and more on the individual; it has assumed a tremendous capacity to affect the rights and liberties of the people. There is not a moment of a person's existence when he is not in contact with the administration in one-way or the other. This circumstance has posed certain basic and critical questions for us to consider:

• Does arming the administration with more and more powers keep in view the interests of the individual?

• Are adequate precautions being taken to ensure that the administrative agencies follow in discharging their functions such procedures as are reasonable, consistent with the rule of law, democratic values and natural justice?

• Has adequate control mechanism been developed so as to ensure that the administrative powers are kept within the bounds of law, and that it would not act as a power drunk creature, but would act only after informing its own mind, weighing carefully the various issues involved and balancing the individual's interest against the needs of social control?

It has increasingly become important to control the administration, consistent with the efficiency, in such a way that it does not interfere with impunity with the rights of the individual. Between individual liberty and government, there is an age-old conflict the need for constantly adjusting the relationship between the government and the governed so that a proper balance may be evolved between private interest and public interest. it is the demand of prudence that when sweeping powers are conferred on administrative organs, effective control- mechanism be also evolved so as 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, on proper legal principles and according to rules of reason and justice fairness to the individual concerned is also a value to be achieved along with efficient administration.

A democracy will be no better than a mere façade if the rights of the people are infringed with impunity without proper redressed mechanism. This makes the study of administrative law important in every country. For India, however, it is of special significance because of the proclaimed objectives of the Indian polity to build up a socialistic pattern of society. This has generated administrative process, and hence administrative law, on a large scale. Administration in India is bound to multiply further and at a quick pace. If exercised properly, the vast powers of the administration may lead to the welfare state; but, if abused, they may lead to administrative despotism and a totalitarian state A careful and systematic study and development of administrative law becomes a desideratum as administrative law is an instrument of control of the exercise of administrative powers.

NATURE AND DEFINITION OF ADMINISTRATIVE LAW

Administrative Law is, in fact, the body of those which rules regulate and control the administration. Administrative Law is that branch of law that is concerned with the composition of power, duties, rights and liabilities of the various organs of the Government that are engaged in public administration. Under it, we study all those rules laws and procedures that are helpful in properly regulating and controlling the administrative machinery.

There is a great divergence of opinion regarding the definition/conception of administrative law. The reason being that there has been tremendous increase in administrative process and it is impossible to attempt any precise definition of administrative law, which can cover the entire range of administrative process.

Let us consider some of the definitions as given by the learned jurists.

Austin has defined administrative Law. As the law, which determines the ends and modes to which the sovereign power shall be exercised. In his view, the sovereign power shall be exercised either directly by the monarch or directly by the subordinate political superiors to whom portions of those are delegated or committed in trust.

Holland regards Administrative Law "one of six" divisions of public law. In his famous book "Introduction to American Administrative Law 1958",

Bernard Schawartz has defined Administrative Law as "the law applicable to those administrative agencies which possess of delegated legislation and ad judicatory authority."

Jennings has defined Administrative Law as "the law relating to the administration. It determines the organization, powers and duties of administrative authorities."

Dicey in 19th century defines it as. Firstly, portion of a nation's legal system which determines the legal statues and liabilities of all State officials. Secondly, defines the right and liabilities of private individuals in their dealings with public officials. Thirdly, specifies the procedure by which those rights and liabilities are enforced.

This definition suffers from certain imperfections. It does not cover several aspects of administrative law, e.g. it excludes the study of several administrative authorities such as public corporations which are not included within the expression "State officials," it excludes the study of various powers and functions of administrative authorities and their control. His definition is mainly concerned with one aspect of administrative. Law, namely, judicial control of public officials.

A famous jurist **Hobbes** has written that there was a time when the society was in such a position that man did not feel secured in it. The main reason for this was that there were no such things as administrative powers. Each person had to live in society on the basis of his own might accordingly to Hobbes, " In such condition, there was no place for industry, arts, letters and society. Worst of all was the continual fear of danger, violent death and life of man solitary poor, nasty and brutish and short.

The jurists are also of the view that might or force as a means for the enforcement of any decision by man could continue only for some time. To put it is other words, the situation of "might is right" was only temporary. It may be said to be a phase of development. This can be possible only through the medium of law. Hence, law was made and in order to interpret it and in order to determine the rights and duties on the basis of such interpretation, this work was entrusted to a special organ that we now call judiciary. The organ, which was given the function of enforcing the decision of judicial organ, is called executive. It has comparatively a very little concern with the composition of the executive organ.

K.C. Davis has defined administrative law in the following words: " Administrative Law is the law concerning the powers and procedures of administrative agencies including specially the law governing judicial review of administrative action."

In the view of **Friedman**, Administrative Law includes the following.

- The legislative powers of the administration both at common law and under a vast mass of statutes.
- The administrative powers of the administration.
- Judicial and quasi-judicial powers of the administration, all of them statutory.
- The legal liability of public authorities.
- The powers of the ordinary courts to supervise the administrative authorities.

Thus the concept of administrative law has assumed great importance and remarkable advances in recent times. There are several principles of administrative law, which have been evolved by the courts for the purpose of controlling the exercise of power. So that it does not lead to arbitrariness or despotic use of power by the instrumentalities or agencies of the state. During recent past judicial activism has become very aggressive. It was born out of desire on the part of judiciary to usher in rule of law society by enforcing the norms of good governance and thereby produced a rich wealth of legal norms and added a new dimension to the discipline administrative law.

CAUSES FOR GROWTH OF ADMINISTRATIVE LAW

The following reasons are responsible for the growth and development of Administrative Law.

1. Due to emphasis on public welfare activities, which are increasing day by day.
2. Due to urbanization and industrialization
3. Due to administrative interference in public life and consequential apprehension.
4. Due to the problem of scientific and technological developments and resultant problems.
5. Due to the requirement of speedy and simpler modes of social justice, the administrative law is required to grow.
6. To ensure economic and social justice administrative law is required and ultimately it has become one of the reasons for the growth of administrative law
7. The inadequacy of the traditional type of courts and law making organs to give the quality and speedy performance, which is required for these days, has become a cause for the growth.

RELATIONSHIP BETWEEN ADMINISTRATIVE LAW AND CONSTITUTIONAL LAW

Constitutional and administrative law both govern the affairs of the state. Administrative law, an area of law that gained early sophistication in France, was until well into this century largely unrecognized in the United Kingdom as well as the United States. To the early English writers on administrative law, there was virtually no difference between administrative law and constitutional law. This is evident from the words of Keith: "It is logically impossible to distinguish administrative from constitutional law and all attempts to do so are artificial." Some jurists like Felix Frankfurter even went as far as to call it "illegitimate and exotic".

The root of all confusion in the United Kingdom is its lack of a written constitution. In a state with a written constitution, the source of constitutional law is the Constitution while the sources of administrative law include statutes, statutory instruments, precedents and customs whereas in the United Kingdom, this distinction is not very clear cut – it is in fact, quite blurred.

Due to this lack of clarity, it will be vital to observe the views of jurists and scholars on the difference between administrative law and constitutional law. According to Holland, constitutional law describes the various organs of the government at rest, while administrative law describes them in motion. Holland contends that the structure of the executive and the legislature comes within the purview of constitutional law whereas their functioning is governed by administrative law.

Jennings puts forward another view, which says that administrative law deals with the organization, functions, powers and duties of administrative authorities while constitutional law deals with the general principles relating to the organization and powers of the various organs of the State and their mutual relationships and relationship of these organs with the individual. Simply put, constitutional law lays down the fundamentals of the workings of government organs while administrative law deals with the details.

The fundamental constitutional principle, inspired by John Locke, holds that "the individual can do anything but that which is forbidden by law, and the state may do nothing but that which is authorised by law". Administrative law is the chief method for people to hold state bodies to account. People can apply for judicial review of actions or decisions by local councils, public services or government ministries, to ensure that they comply with the law. The first specialist administrative court was the Conseil d'État set up in 1799, as Napoleon assumed power in France. Whatever be the correct position, there always exists an area of overlap between constitutional law and administrative law. In India, this corresponds to the whole constitutional mechanism for the control of administrative authorities – Articles 32, 136, 226, 227, 300 and 311. It can also include the study of administrative agencies provided for in the Constitution itself. Further, it may include the study of constitutional limitations on delegation of powers to the administrative authorities and also those provisions of the Constitution which restrict administrative action; for example, the Fundamental Rights.

Constitutional Law viewed through Administrative Eyes: Since the English Constitution is unwritten, the impact of constitutional law upon administrative law in England is insignificant and blurred. As Dicey observes, the rules which in other countries form part of a constitutional code are the result of the ordinary law of the land in England. As a result, whatever control the administrative authorities can be subjected to, if any, must be deduced from the ordinary law, as contained in statutes and judicial decisions. But, in countries having written constitutions, there is an additional source of control over administrative action. In these countries there are two sources or modes of exercising judicial control over the administrative agencies – constitutional and non-constitutional. The written constitution imposes limitations upon all organs of the body politic. Therefore, while all authors attempt to distinguish the scope of administrative law from that of constitutional law, they cannot afford to forget not to mention that in a country having written constitution with judicial review, it is not possible to dissociate the two completely.

The acts of the executive or the administration are protected in India in various ways. The legislative acts of the administration, i.e. statutory instruments (or subordinate legislation) are expressly brought within the fold of Article 13 of the Constitution, by defining “law" as including “order, bye-law, rule, regulation, notification" or anything “having the force of law". As in all common law countries, a delegated legislation can be challenged as invalid not only on the ground of being ultra vires the statute which confers power to make it, but also on the additional ground that it contravenes any of the fundamental rights guaranteed by Part III of the Constitution.

A non-legislative and a purely administrative action having no statutory basis will be void if it breaches any of those fundamental rights which set up limitations against any State action. Thus a non-statutory administrative act may be void if it violates Article 14, guaranteeing equal protection ; Article 29 or Article 30—guaranteeing minority rights; Article 19—guaranteeing freedom of speech, association, etc.; and Article 16—guaranteeing equality of opportunity in employment . Thus the court would strike down any administrative instruction or policy, notwithstanding its temporary nature, if it operates as discriminatory, so as to violate any fundamental right of the person or persons discriminated against. Non-statutory administrative action will also be void if its result affects a fundamental right adversely where the Constitution provides that it can be done only by making a law. The most significant examples of such a case would be actions affecting Article 19, 21 or 300-A.

An administrative act, whether statutory or non-statutory, will be void if it contravenes any of the mandatory and justiciable provisions of the Constitution, falling even outside the realm of fundamental rights – like Articles 265, 301, 311 and 314. In cases of statutory administrative actions, there is an additional constitutional ground upon which its validity may be challenged, namely, that the statute, under which the administrative order has been made, is itself unconstitutional. Where the impugned order is quasi-judicial, similarly, it may be challenged on the grounds, inter alia,that the order is unconstitutional; that the law under which the order has been made is itself unconstitutional.

Constitutional law thus advances itself into the judicial review chapter in administrative law in a country like the USA or India. The courts in these countries have to secure that the administration is carried on not only subject to the rule of law but also subject to the provisions of their respective Constitutions. It can be observed that an attack upon the constitutionality of a statute relates to constitutional law and the constitutionality of an administrative action concerns administrative law, but the provisions of the same Constitution apply in both the spheres.

The object of both the common law doctrine of rule of law or supremacy of law and a written constitution is the same, namely, the regulation and prevention of arbitrary exercise of power by the administrative agencies of the Government. The rule of law insists that “the agencies of the Government are no more free than the private individual to act according to their own arbitrary will or whim but must conform to legal rules developed and applied by the courts". The business of the written constitution is to embody these standards in the form of constitutional guarantees and limitations and it is the duty of the courts to protect the individual from a breach of his rights by the departments of the Government or other administrative agencies.

Administrative growth in constitutional matrix: Administrative law is a by-product of intensive form of Government. During the last century, the role of Government has changed in almost every State of the world; from a laissez faire state to a welfare and service state. As a result, it is expected of the modern state not only to protect its citizens from external aggression and internal disturbance, but also to take care of its citizens, right from birth to their death. Therefore, the development of administrative process and the administrative law has become the cornerstone of modern political philosophy.

Today there is a demand by the people that the Government must redress their problems in addition to merely defining their rights. The rights are elaborately defined in the Constitution but the policies to protect these rights are formulated by the Government (the executive) and implemented by the administrative agencies of the State. There thus arises a direct nexus between the constitutional law and administrative law where the former acts as a source from which the rights of the individuals flow and the latter implements its policies accordingly mandated to preserve the sanctity of those rights.

It is widely agreed that the right of equality in the American Constitution will be a sterile right if the black is the first to lose his job and the last to be reemployed. In the same manner the equality clause in the Indian Constitution would be meaningless if the Government does not come forward to actively help the weaker sections of society to bring about equality in fact. This requires the growth of administrative law and administrative process under the welfare philosophy embodied in the constitutional law.

The Genus-Species Relationship: Administrative law has been defined as the law relating to administration. It determines the organisation, powers and duties of administrative authorities. This definition does not make any attempt to distinguish administrative law from constitutional law. Besides, this definition is too wide because the law which determines the powers of administrative authorities may also deal with the substantive aspects of such powers. It may deal with matters such as public health, housing, town and country planning, etc. which are not included within the scope of administrative law. Administrative law, however, tends to deal with these matters as the Constitution has embodied the principle of a welfare State, and the State can execute and implement these rules veraciously in the society only through administrative laws. Prof. Sathe observes that: “Administrative law is a part of constitutional law and all concerns of administrative law are also concerns of constitutional law."

It can therefore be inferred that constitutional law has a wide sphere of jurisdiction, with administrative law occupying a substantive part. In other words, constitutional law can be termed as the genus of which a substantive portion of administrative law is the species.

Constitutional determination of the scope of administrative function: The Indian Constitution is unanimously and rightly termed as the “grand norm" with respect to domestic legislations. The Constitution circumscribes the powers of the legislature and executive and limits their authority in various ways. It distributes the governmental powers between the Centre and the States. It guarantees the fundamental rights to its citizens and protects them from any abridgement by the State by way of legislative or executive action. The courts interpret the Constitution and declare the acts of legislature as well as executive as unconstitutional if they violate the any provision of the Constitution.

It also bridles the legislature in that they cannot make a law which delegates essential legislative powers or which vests unrestrained discretionary powers with the executive so as to make its arbitrary exercise possible. The validity of an executive act is seen with reference to the power given to it by the legislature. The Constitution has, however, in turn laid down the framework defining the extent of laws made by Parliament and the State Legislatures. Constitutional law therefore enjoys the status of the prime moderator monitoring legislative actions and in turn installs a yardstick upon the extent of the rules made by the executive while acting in the capacity of a delegate. It can be inferred indisputably that constitutional law plays a critical role of the key channel from where the guidelines determining the scope of administrative action flow, thereby establishing a unique relationship between the two very distinct but highly related spheres of law.

Constitutional Impact on Administrative Adjudication: In order to provide speedy and inexpensive justice to employees aggrieved by administrative decisions, the Government set up the Central Administrative Tribunal (CAT) in 1985, which now deals with all cases relating to service matters which were previously dealt with by courts up to and including the High Courts. Establishment of the Central Administrative Tribunal under the Administrative Tribunals Act, 1985 is one of the important steps taken in the direction of development of administrative law in India. The Administrative Tribunals Act while stimulating the development of administrative law, drew its legitimacy and substance from the constitutional law and was passed by Parliament in pursuance of Article 323-A of the Constitution. Dr. Rajeev Dhavan comments on the new tribunal system envisaged under Art. 323-A: “The Forty-second Amendment envisaged a tribunal structure and limited review powers by the High Courts. In the long run, this could mean a streamlined system of tribunal justice under the superintendence of the Supreme Court. Properly worked out such a system is not a bad one. It would be both an Indian and a common law adaptation of the French system of droit administratif."

Although the relationship between constitutional law and administrative law is not very emboldened to be seen with naked eyes but the fact remains that concomitant points are neither so blurred that one has to look through the cervices of the texts with a magnifier to locate the relationship. The aforementioned veracities and illustrations provide a cogent evidence to establish an essential relationship between the fundamentals of both the concepts. If doubts still persist, the very fact that each author, without the exception of a single, tends to differentiate between the two branches of law commands the hypothecation of a huge overlap.

The separate existence of administrative law is at no point of time disputed; however, if one draws two circles of the two branches of law, at a certain place they will overlap depicting their stern relationship and this area may be termed as watershed in administrative law. In India, in the watershed one can include the whole control mechanism provided in the Constitution for the control of administrative authorities i.e. Articles 32, 136, 226, 227 300 and 311. It may include the directives to the State under Part IV. It may also include the study of those administrative agencies which are provided for by the Constitution itself under Articles 261, 263, 280, 315, 323-A and 324. It may further include the study of constitutional limitations on delegation of powers to the administrative authorities and also those provisions of the Constitution which place fetters on administrative action i.e. fundamental rights

CLASSIFICATION OF ADMINISTRATIVE ACTION

Administrative action is a comprehensive term and defies exact definition. In modern times the administrative process is a by-product of intensive form of government and cuts across the traditional classification of governmental powers and combines into one all the powers, which were traditionally exercised by three different organs of the State. Therefore, there is general agreement among the writers on administrative law that any attempt of classifying administrative functions or any conceptual basis is not only impossible but also futile. Even then a student of administrative law is compelled to delve into field of classification because the present-day law especially relating to judicial review freely employs conceptual classification of administrative action.

Need for classification: As we discussed above, the executive now performs variegated functions like administrative, quasi-legislative and quasi-judicial functions. So in particular case whether the functions performed by the executive performed by the executive is purely administrative, quasi-legislative or quasi-judicial in character is to be classified, because many consequences flow from it. The possible consequences are as under:

1. If the executive authority exercises a judicial or quasi - judicial function, it must follow Principles of Natural Justice and is amenable to the writ of prohibition or certiorari.
2. If it is an administrative function then writ of "Mandamus" can be filed or writ of
3. Habeas corpus can be filed. And this function can be delegated.
4. If it is a quasi-legislative or legislative function then the requirement of publication
5. Laying on the table and consultation can be done.
6. If it is an administrative function, it can be delegated whereas judicial function cannot be delegated.

It is difficult to classify the functions of the executive, as there is no perfect and scientific formula to distinguish the functions performed by the executive is whether a legislative or an executive or a judicial in given case. Justice Hedge rightly states, "the dividing line between and administrative power and quasi-judicial power is quit thin and is being gradually obliterated ..." But for sake of understanding, broad classification can be done basing on the judgments of Hon'ble Supreme Court and High Courts of various states respectively.

Thus, speaking generally, an administrative action can be classified into four categories:

i) Rule-making action or quasi-legislative action.
ii) Rule-decision action or quasi-judicial action.
iii) Rule-application action or administrative action.
iv) Ministerial action

Rule-making action or quasi-legislative action – Legislature is the law-making organ of any state. In some written constitutions, like the American and Australian Constitutions, the law making power is expressly vested in the legislature. However, in the Indian Constitution though this power is not so expressly vested in the legislature, yet the combined effect of Articles 107 to III and 196 to 201 is that the law making power can be exercised for the Union by Parliament and for the States by the respective State legislatures. It is the intention of the Constitution-makers that those bodies alone must exercise this law-making power in which this power is vested. But in the twentieth Century today these legislative bodies cannot give that quality and quantity of laws, which are required for the efficient functioning of a modern intensive form of government. Therefore, the delegation of law-making power to the administration is a compulsive necessity. When any administrative authority exercises the law-making power delegated to it by the legislature, it is known as the rule-making power delegated to it by the legislature, it is known as the rule-making action of the administration or quasi-legislative action and commonly known as delegated legislation.

Rule-making action of the administration partakes all the characteristics, which a normal legislative action possesses. Such characteristics may be generality, prospectivity and a behaviour that bases action on policy consideration and gives a right or a disability. These characteristics are not without exception. In some cases, administrative rule-making action may be particularised, retroactive and based on evidence.

Rule-decision action or quasi-judicial action – Today the bulk of the decisions which affect a private individual come not from courts but from administrative agencies exercising ad judicatory powers. The reason seems to be that since administrative decision-making is also a by-product of the intensive form of government, the traditional judicial system cannot give to the people that quantity of justice, which is required in a welfare State. Administrative decision-making may be defined, as a power to perform acts administrative in character, but requiring incidentally some characteristics of judicial traditions. On the basis of this definition, the following functions of the administration have been held to be quasi-judicial functions:

1. Disciplinary proceedings against students. 2. Disciplinary proceedings against an employee for misconduct. 3. Confiscation of goods under the sea Customs Act, 1878. 4. Cancellation, suspension, revocation or refusal to renew license or permit by licensing authority. 5. Determination of citizenship. 6. Determination of statutory disputes. 7. Power to continue the detention or seizure of goods beyond a particular period. 8. Refusal to grant ‘no objection certificate’ under the Bombay Cinemas (Regulations) Act, 1953. 9. Forfeiture of pensions and gratuity. 10. Authority granting or refusing permission for retrenchment. 11. Grant of permit by Regional Transport Authority.

Attributes of administrative decision-making action or quasi-judicial action and the distinction between judicial, quasi-judicial and administrative action.

Rule-application action or administrative action – Though the distinction between quasi-judicial and administrative action has become blurred, yet it does not mean that there is no distinction between the two. If two persons are wearing a similar coat, it does not mean that there is no difference between them. The difference between quasi-judicial and administrative action may not be of much practical consequence today but it may still be relevant in determining the measure of natural justice applicable in a given situation. In A.K. Kraipak v. Union of India, the Court was of the view that in order to determine whether the action of the administrative authority is quasi-judicial or administrative, one has to see the nature of power conferred, to whom power is given, the framework within which power is conferred and the consequences.

Therefore, administrative action is the residuary action which is neither legislative nor judicial. It is concerned with the treatment of a particular situation and is devoid of generality. It has no procedural obligations of collecting evidence and weighing argument. It is based on subjective satisfaction where decision is based on policy and expediency. It does not decide a right though it may affect a right. However, it does not mean that the principles of natural justice can be ignored completely when the authority is exercising "administrative powers". Unless the statute provides otherwise, a minimum of the principles of natural justice must always be observed depending on the fact situation of each case.

No exhaustive list of such actions may be drawn; however, a few may be noted for the sake of clarity: 1) Making a reference to a tribunal for adjudication under the Industrial Disputes Act. 2) Functions of a selection committee. Administrative action may be statutory, having the force of law, or non statutory, devoid of such legal force. The bulk of the administrative action is statutory because a statute or the Constitution gives it a legal force but in some cases it may be non-statutory, such as issuing directions to subordinates not having the force of law, but its violation may be visited with disciplinary action. Though by and large administrative action is discretionary and is based on subjective satisfaction, however, the administrative authority must act fairly, impartially and reasonable. Therefore, at this stage it becomes very important for us to know what exactly is the difference between Administrative and quasi-judicial Acts.

Thus broadly speaking, acts, which are required to be done on the subjective satisfaction of the administrative authority, are called 'administrative' acts, while acts, which are required to be done on objective satisfaction of the administrative authority, can be termed as quasi-judicial acts. Administrative decisions, which are founded on pre-determined standards, are called objective decisions whereas decisions which involve a choice as there is no fixed standard to be applied are so called subjective decisions. The former is quasi-judicial decision while the latter is administrative decision. In case of the administrative decision there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh, submissions and arguments or to collate any evidence. The grounds upon which he acts and the means, which he takes to inform himself before acting, are left entirely to his discretion. The Supreme Court observed, "It is well settled that the old distinction between a judicial act and administrative act has withered away and we have been liberated from the pestilent incantation of administrative action.

Ministerial action – A further distillate of administrative action is ministerial action. Ministerial action is that action of the administrative agency, which is taken as matter of duty imposed upon it by the law devoid of any discretion or judgment. Therefore, a ministerial action involves the performance of a definitive duty in respect of which there is no choice. Collection of revenue may be one such ministerial action. 1. Notes and administrative instruction issued in the absence of any 2. If administrative instructions are not referable to any statutory authority they cannot have the effect of taking away rights vested in the person governed by the Act.

DOCTRINE OF SEPARATION OF POWERS

This concept was originated by “Aristotle” and was developed by Lock. But it was given a base and made popular by French jurist, Montesqeu. The theory of separation of powers divides the governmental functions into three categories, namely, 1.Legislative power; 2.judicial power; 3. Administrative power. According to this theory these three powers should be held by different bodies and should not be vested in one body and should not be fused one with the other. Actually, this concept was originated by “Aristotle” and was developed by Lock. However it was given a base and made popular by French jurist, Montesqeu through his great work Esprit Des Lois (The spirit of Laws) in the year1748.

As per Montesque: Executive, judiciary, legislative are the three organs of state. None of these three organs should control or interfere with the exercise of the functions of the other organs i.e., one organ should not exercise the functions of another organ.

It is to be noted that the basis of the doctrine of separation of power is that merger of all the powers in one body will result in negation of individual liberty. In this regard Montesquieu observes that “when the legislative and executive powers are united in the same person or body there can be no liberty because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to enforce them in a tyrannical manner”. Even according to the Black Stone “if the legislative, the executive and the judicial functions were given to one man, there was end of personal liberty. The Lord Acton also observes the same view of point that is “every power tends to corrupt and absolute power tends to corrupt absolutely”.

Draw back of the theory of separation of powers: It is said that the strict application of the doctrine is impossible because three functions of the Government Viz., legislative, executive and judicial are inter dependent and it is not easy to draw a demarcating line between one power and another with accurate precision. According to Friedman and Benjafield “each of the three function of the Government contains elements of other two and that any rigid attempt to define and serious inefficiency in Government”. Thus, it is impossible to stick to this doctrine, as the modern state being a welfare state has to solve many complex socio-economic problems. Justice Frankfurter also states “enforcement of a rigid concept of separation of powers would make modern government impossible.

According to Basu , the theory of separation of powers means an organic separation and a distribution must be drawn between “essential” and “incidental” powers and that one organ of the Government cannot usurp or encroach upon the essential functions belong to another organ , but may exercise some incidental function thereof.

Thus, it is rightly pointed out by the C.K.Takwani in his book that “on the whole, the doctrine of separation of powers in the strict sense is undesirable and impracticable and, therefore, it is not fully accepted in any country. Nevertheless, its value lies in the emphasis on those checks and balances which are necessary to prevent and abuse of enormous powers of the executive. The object of the doctrine is to have a government of law rather than of official will or whim”.

Indian constitution and doctrine of separation of powers: Through not in strict sense, the doctrine of separation of powers has been accepted in the constitution of India. In general under Indian constitution, the executive powers are with the President, the legislative powers with Parliament and the judicial powers with the Judiciary (i.e., the Supreme Court, High Court and subordinate courts).

In *Kartar Sing Vs State of Punjab*, A.I.R 1995 S.C 1726, the Supreme Court held that “It is basic postulate under Indian Constitution that the legal sovereign powers have been distributed between the legislature to make the law, the executive to implement the law and the judiciary to interpret the law with the limits set down by the Constitution.”

RULE OF LAW

The doctrine of rule of law has its origin in England and it is one of the fundamental characteristics of the British constitutional system. It lays down that the law is supreme and hence the government must act according to law and within the limits of the law. It is the legal principle that law should govern a nation, as opposed to being governed by arbitrary decisions of individual government officials. It primarily refers to the influence and authority of law within society, particularly as a constraint upon behavior, including behavior of government officials.

A V Dicey in his book The Law of the Constitution (1885) has given the following three implications of the doctrine of rule of law.

Absence of arbitrary power, that is, no man is punished except for a breach of law

Equality before the law,that is, equal subjection of all citizens (rich or poor, high or low, official or non official) to the ordinary law of the land administered by the ordinary law courts

The primacy of the rights of individual, that is, the constitution is the result of the rights of the individual as defined and enforced by courts of law, rather than constitution being the source of the individual rights

Most legal theorists believe that the rule of law, popularized in 19th century, has purely formal characteristics, and possess the characteristics of generality, equality, and certainty, but there are no requirements with regard to the content of the law and protection of individual rights.

Today Dicey's theory of rule of law cannot be accepted in its totality. The modern concept of the rule of law is fairly wide and therefore sets up an ideal for any government to achieve. Accordingly - "The rule of law implies that the functions of the government in a free society should be so exercised as to create conditions in which the dignity of man as an individual is upheld. This dignity requires not only the recognition of certain civil or political rights but also creation of certain political, social, economical, educational and cultural conditions which are essential to the full development of his personality".

The relevance of the Rule of Law is demonstrated by application of the following principles in practice:

- The separation of powers between the legislature, the executive and the judiciary.
- The law is made by representatives of the people in an open and transparent way.
- The law and its administration is subject to open and free criticism by the people, who may assemble without fear.
- The law is applied equally and fairly, so that no one is above the law.
- The law is capable of being known to everyone, so that everyone can comply.
- No one is subject to any action by any government agency other than in accordance with the law and the model litigant rules, no one is subject to any torture.
- The judicial system is independent, impartial, open and transparent and provides a fair and prompt trial.
- All people are presumed to be innocent until proven otherwise and are entitled to remain silent and are not required to incriminate themselves.
- No one can be prosecuted, civilly or criminally, for any offence not known to the law when committed.
- No one is subject adversely to a retrospective change of the law.

Rule of Law and Indian Constitution: In India the Constitution is supreme. The preamble of our Constitution clearly sets out the principle of rule of law. It is sometimes said that planning and welfare schemes essentially strike at rule of law because they affect the individual freedoms and liberty in many ways. But rule of law plays an effective role by emphasizing upon fair play and greater accountability of the administration. It lays greater emphasis upon the principles of natural justice and the rule of speaking order in administrative process in order to eliminate administrative arbitrariness.

Important Components of Rule-of-Law Reforms:

a) <u>Court Reforms</u> - The efficiency of the courts is an important component in rule-of-law reforms as the existence of a judiciary is a fundamental aspect of the rule of law.

To increase accountability and transparency, information technology systems may be installed to provide greater public access. To increase independence of the courts, the government can provide them with funding that will allow them to make their own financial and administrative decisions. Recent aggressive judicial activism can also be seen as a part of the efforts of the Constitutional Courts in India to establish rule-of-law society, which implies that no matter how high a person, may be the law is always above him. Court is also trying to identify the concept of rule of law with human rights of the people. The Court is developing techniques by which it can force the government not only to submit to the law but also to create conditions where people can develop capacities to exercise their rights properly and meaningfully. However, separation of powers should be maintained.

b) Legal Rules - Another important rule-of-law reform goal is to build the legal rules. As Fuller stated, “laws must exist.”
c) Institutional Encouragement on the Global Level - To encourage additional country-specific development, in the early 1990s the World Bank and the International Monetary Fund (IMF) began conditioning financial assistance on the implementation of the rule of law in recipient countries. These organizations had provided aid to support initiatives in legislative drafting, legal information, public and legal education, and judicial reforms, including alternative dispute resolution. By conditioning funds on the establishment of the rule of law, the World Bank and the IMF also hope to reduce corruption, which undermines economic development by scaring away investors and preventing the free flow of goods and capital. Currently, in its Sustainable Development Goals (SDG), the United Nations (UN) also champions the rule of law as a vehicle to bring about more sustainable environmental practices.

Rule of law is mostly believed to be a modern concept which is a gift of democracy however it is something which is fundamental to the very basic idea of good governance. We need to focus on the weaknesses and loopholes so that we can remove or plug them. Having said this, we cannot resist ourselves from adding that it is not that only the three organs of the State are to be blamed for the dismal state of rule of law in the society. Other actors like the media, civil society and even the ordinary citizen cannot run away from their respective responsibilities. Therefore it is equally important that all the actors of the society ensure for the maintenance of Rule of Law.

PRINCIPLE OF NATURAL JUSTICE

Concept of Natural justice: Natural Justice implies fairness, reasonableness, equity and equality. Natural Justice is a concept of Common Law and it is the Common Law world counterpart of the American concept of ‘procedural due process’. Natural Justice represents higher procedural principles developed by judges which every administrative agency must follow in taking any decision adversely affecting the rights of a private individual.

Natural Justice meant many things to many writers, lawyers and systems of law. It is used interchangeably with Divine Law, Jus Gentium and the Common Law of the Nations. It is a concept of changing content. However, this does not mean that at a given time no fixed principles of Natural Justice can be indentified. The principles of Natural Justice through various decisions of courts can be easily ascertained, though their application in a given situation may depend on multifarious factors. In a Welfare State like India, the role and jurisdiction of administrative agencies is increasing at a rapid pace. The concept of Rule of Law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging these functions in a fair and just manner.

The principles of natural justice are firmly grounded under various Article of the Constitution. With the introduction of the concept of substantive and procedural due process in Article – 21 of the Constitution all that fairness which is included in the principles of natural justice can be read into Article – 21 when a person is deprived of his life and personal liberty In other areas it is Article – 14 which incorporates the principles of natural justice. Article – 14 applies not only to discriminatory class legislation on but also to arbitrary or discriminatory State action. Because violation of natural justice results in arbitrariness therefore violation of natural justice is violation of Equality Clause of Article – 14. Therefore, now the principle of natural justice cannot be wholly disregarded by law because this would violate the fundamental rights guaranteed by Articles – 14 and 21 of the Constitution. There are mainly two Principles of Natural Justice.

These two Principles are: ***'Nemo judex in causa sua'.*** No one should be made a judge in his own cause and the rule against bias. ***'Audi alteram partem'*** means to hear the other party or no one should be condemned unheard.

Rule against Bais

'Bias' means an operative prejudice whether conscious or unconscious in relation to a party or issue. Therefore, the 'Rule Against Bias' strikes against those factors which may improperly influence a judge in arriving at a decision in any particular case. The requirement of this principle is that the judge must be impartial and must decide the case objectively on the basis of the evidence on record. Therefore if a person, for whatever reason, cannot take an objective decision on the basis of evidence on record he shall be said to be biased. A person cannot take an objective decision in a case in which he/she has an interest for, as human psychology tells us, very rarely can people take decisions against their own interests. This rule of disqualification is applied not only to avoid the possibility of a partial decision but also to ensure public confidence in the impartiality of the administrative adjudicatory process because not only must "no man be judge in his/her own cause" but also "justice should not only be done but should manifestly and undoubtedly be seen to be done". Minimal requirement of natural justice is that the authority must be composed of impartial persons acting fairly and without prejudice and bias. A decision which is a result of bias is a nullity and the trial is "Coram non-judice". Inference of bias, therefore, can be drawn only on the basis of factual matrix and not merely on the basis of insinuations, conjectures and surmises. Bias manifests variously and may affect the decision in a variety of ways.

Personal Bias: Personal Bias arises from a certain relationship equation between the deciding authority and the parties which incline him/her unfavourably or other-wise on the side of one of the parties before him/her. Such equation may develop out of varied forms of personal or professional hostility or friendship. How-ever, no exhaustive list is possible.

In a case, the Supreme Court quashed the selection list prepared by the Departmental Promotion Committee which had considered the confidential reports of candidates prepared by an officer, who himself was a candidate for promotion. However, in order to challenge administrative action successfully on the ground of 'personal bias', it is essential to prove that there is a "reasonable suspicion of bias" or a "real likelihood of bias". "Reasonable suspicion" test looks mainly to outward appearance, and “real likelihood” test focuses on the court’s own evaluation of possibilities; but in practice the tests have much. in common with one another and in the vast majority of cases they will lead to the same result. In this area of bias the real question is not whether a person was biased. It is difficult to prove the state of mind of a person. Therefore, what the Courts see is whether there is reasonable ground for believing that the deciding officer was likely to have been biased.

In deciding the question of bias judges have to take into consideration the human possibilities and the ordinary course of human conduct. But there must be real likelihood of bias and not mere suspicion of bias before the proceedings can be quashed on the ground that the person conducting the proceedings is disqualified by bias. The apprehension must be Techniques of Law judged from a healthy, reasonable and average point of view and not on mere apprehension and vague suspicion of whimsical, capricious and unreasonable people.

Pecuniary Bias: The judicial approach is unanimous and decisive on the point that any financial interest, howsoever small it may be, would vitiate administrative action. The disqualification will not be avoided by non-participation of the biased member in the proceedings if he/she was present. The Supreme Court in a case quashed the decision of the Textbook Selection Committee because some of its members were also authors of books which were considered for selection when the decision was reached.

Subject Matter Bias: Those cases fall within this category where the deciding officer is directly, or otherwise, involved in the subject matter of the case. Here again mere involvement would not vitiate the administrative action unless there is a real likelihood of bias. In a case the Supreme Court quashed the decision of the Andhra Pradesh Government, nationalizing road transport on the ground that the Secretary of the Transport Department who gave hearing was interested in the subject-matter.

Departmental Bias: The problem of ‘departmental bias’ is something which is inherent in the administrative process, and if it is not effectively checked, it may negate the very concept of fairness in the administrative proceeding. The problem of ‘departmental bias’ also arises in a different context, when the functions of judge and prosecutor are combined in the same department. It is not uncommon to find that the same department which initiates a matter also decides it, therefore, at times departmental fraternity and loyalty militates against the concept of fair hearing.

In a case, the Supreme Court quashed the notification of the Government which had conferred powers of a Deputy Superintendent of Police on the General Manager, Haryana Roadways in matters of inspection of vehicles on the ground of departmental bias. In this case private bus operators had alleged that the General Manager of Haryana Roadways who is a rival in business in the State, cannot be expected to discharge his duties in a fair and reasonable manner he would be too lenient in inspecting the vehicles belonging to his own department.

The reason for quashing the notification according to the Supreme Court was the conflict between the duty and the interest of the department and the consequential erosion of public confidence in administrative justice.

Preconceived Notion Bias: 'Bias' arising out of preconceived notions is a very delicate problem of administrative law. On the one hand, no judge as human being is expected to sit as a blank sheet of paper, on the other, preconceived notions would vitiate a fair trial. The problem of bias arising from preconceived notions may have to be disposed of as an inherent limitation of the administrative process. It is useless to accuse a public officer of bias merely because he is predisposed in favour of some policy in the public interest. Bias would also not disqualify an officer from taking an action if no other person is competent to act in his place. This limitation is grounded on the doctrine of necessity. However the term 'bias' must be confined to its proper place If 'bias' arising out of preconceived notions means the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. Therefore, unless the strength of the preconceived notions is such that it has the capacity of foreclosing the mind of the judge, administrative action would not be vitiated.

Rule of Fair Hearing

The Rule simply implies that a person must be given an opportunity to defend himself/herself. This principle is a 'sine qua non' of every civilized society. Corollary deduced from this rule is " *qui aliquid statuerit, parte inaudita altera aeuquum licet dixerit, haud aequum facerit*" (he who shall decide anything without the other side having been heard although he may have said what is right will not have done what is right). The same principle was expressed by Lord Hewart when he said, " It is not merely of some importance, but is of Techniques of Law fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seem to be done''.

Administrative difficulty in giving notice and hearing to a person cannot provide any justification for depriving the person of opportunity of being heard. Furthermore, observance of the rules of natural justice has no relevance to the fatness of the stake but is essentially related to the demands of a given situation. Even if the legislature specifically authorizes an administrative action without hearing, except in cases of recognised exceptions, then the law would be violative of the principles of fair hearing as per Articles – 14 and 21 of the Indian Constitution. However, refusal to participate in enquiry without valid reason cannot be pleaded as violation of natural justice at a later stage.

Right to Notice: 'Notice' is the starting point of any hearing. Unless a person knows the formulation of subjects and issues involved in the case, he/she cannot defend himself/herself. It is not enough that the notice in a case be given, but it must be adequate also. The adequacy of notice is a relative term and must be decided with reference to each case. But generally a notice in order to be adequate must contain the following:

The test of adequacy of ‘Notice’ will be whether it gives sufficient information and material so as to enable the person concerned to put up an effective defence. Therefore, the contents of notice, persons who are entitled to ‘Notice’ and the time of giving ‘Notice’ are important matters to ascertain any violation of the principles of natural justice. Sufficient time should also be given to comply with the requirement of notice. Thus, when only 24 hours were given to demolish a structure alleged in a dilapidated condition, Court held that notice is not proper. In the same manner where notice contained only one charge, the person cannot be punished for any other charge for which notice was not given. However, the requirement of notice will not be insisted upon as a mere technical formality, when the concerned party clearly knows the case against him and is not thereby prejudiced in any manner in putting up an effective defence.

Right to Present Case and Evidence: The adjudicatory authority should afford reasonable opportunity to the party to present his/her case. This can be done through writing or orally at the discretion of the authority unless the statute under which the authority is functioning directs otherwise. The requirements of natural justice are met only if opportunity to represent is given in view of the proposed action. The demands of natural justice are not met even if the very person proceeded against has been fur-nished information on which the action is based, if it is furnished in a casual way or for some other purposes. This does not mean that the opportunity need be a “double opportunity”, that is, one opportunity on the factual allegations and another on the proposed penalty. But both may be rolled into one. The Courts are unanimous on the point that oral hearing is not an integral part of fair hearing unless the circumstances are so exceptional that without oral hearing a person cannot put up an effective defence. Therefore, where complex legal and technical questions are involved or where stakes are very high oral hearing shall become a part of fair hearing. Thus, in the absence of a statutory requirement for oral hearing courts will decide the matter taking into consideration the facts and circumstances of every case.

The Right to Rebut Adverse Evidence: The right to rebut adverse evidence presupposes that the person has been informed about the evidence against him. This does not, however, necessitate the supply of adverse material in original in all cases. It is sufficient if the summary of the contents of the adverse material in made available provided it is not misleading. The opportunity to rebut evidence necessarily involves the consideration of two factors: cross-examination and legal representation.

Cross-Examination: ‘Cross-examination’ is the most powerful weapon to elicit and establish truth. However, the Courts do not insist on ‘cross-examination’ in administrative adjudication unless the circumstances are such that in the absence of it the person cannot put up an effective defence. Where the witnesses have orally deposed, the refusal to allow cross-examination would certainly amount to violation of the principles of natural justice. In the area of labour relations and disciplinary proceedings against civil servants also, the right to cross-examination is included in the rule of fair hearing.

Legal Representation: Normally representation through a lawyer in any administrative proceeding is not considered an indispensable part of the rule of natural justice as oral hearing is not included in the meaning of fair hearing. This denial of legal representation is justified on the ground that lawyers tend to complicate matters, prolong the proceedings and destroy the essential informality of the proceedings. It is further justified on the ground that the representation through a lawyer of choice would give edge to the rich over the poor who cannot afford a good lawyer. The fact Techniques of Law remains that unless some kind of a legal aid is provided by the agency itself, the denial of legal representation, to use the words of Professor Allen, would be a 'mistaken kindness' to the poor people. To what extent legal representation would be allowed in administrative proceedings depends on the provisions of the Statute. Factory Laws do not permit legal representation, Industrial Dispute Acts allows it with the per-mission of the Tribunal and some Statutes like Income Tax Act permit legal representation as a matter of right. However, the Courts in India have held that in situations where the person is illiterate, or the matter is complicated and technical, or expert evidence is on record or a question of law is involved, or the person is facing a trained prosecutor, some professional assistance must be given to the party to make his right to defend himself meaningful.

Report of the Inquiry to be shown to the Other Party: In many cases, especially in matters relating to disciplinary proceedings, it happens that to conduct the inquiry, the action is entrusted to someone else and on the basis of the report of the inquiry the action is taken by the competent authority. Under these circumstances a very natural question arises is that whether the copy of the report of the inquiry officer be supplied to the charged employee before final decision is taken by the competent authority?

This question is important both from the constitutional and administrative law point of view. One of the cardinal principles of the administrative law is that any action which has civil consequences for any person cannot be taken without complying with the principles of natural justice. Therefore, administrative law question in disciplinary matter has always been whether failure to supply the copy of the Report of the Inquiry to the delinquent employee before final decision is taken by the competent authority would violate the principles of natural justice?

In the same manner the constitutional question in such a situation will be whether failure to supply the copy of the Report of the Inquiry to the delinquent would violate the provisions of Article – 311(2) of the Constitution of India? Article – 311(2) of the Constitution provides that no government employee can be dismissed or removed or reduced in rank without giving him/her a reasonable opportunity of being heard in respect of charges framed against him/her. Therefore, it has always been a perplexing question whether failure to supply the report of the inquiry officer to the charged government employee before final decision is taken would amount to failure to provide "reasonable opportunity" as required under Article 311(2) Another Constitutional question that can be asked in such a situation would be whether any final action taken by the authority on the basis of the report of the inquiry without first supplying the copy of it to the delinquent would be arbitrary and hence violative of Article – 14 of the Constitution which enshrines the great harmonizing and rationalizing principle?

The findings on the merit recorded by the Inquiry Officer are intended merely to supply appropriate material for the consideration of the government. Neither the findings nor the recommendations are binding on the Disciplinary Authority.

The Inquiry Report along with the evidence recorded by the inquiry officer constitute the material on which the government has ultimately to act. That is the only purpose of the inquiry and the report which the inquiry officer makes as a result thereof.

The application of the principles of natural justice varies from case to case depending upon the factual aspect of the matter. For example, in the matters relating to major punishment, the requirement is very strict and full-fledged opportunity is envisaged under the statutory rules before a person is dismissed removed or reduced in rank, but where it relates to only minor punishment, a mere explanation submitted by the delinquent officer concerned meets the requirement of principles of natural justice. In some matters oral hearing may be necessary but in others, It may not be necessary.

Post Decisional Hearing: 'Pre-Decisional Hearing' is the standard norm of rule of audi alteram partem. But 'Post-Decisional Hearing' affords an opportunity to the aggrieved person to be heard. However, 'post-decisional hearing' should be an exception rather than being the rule itself. It is acceptable in the following situations:

1. where the original decision does not cause any prejudice or detriment to the person affected;
2. where there is urgent need for prompt action; and
3. where it is impracticable to afford pre-decisional hearing.

The idea of 'Post-Decisional Hearing' has been developed to maintain a balance between administrative efficiency and fairness to the individual. This harmonizing tool was developed by the Supreme Court in 'Maneka Gandhi v. Union of India'. In this case on 1st June, 1976 the passport of the petitioner, a journalist, was impounded in public interest by an order of the Government without furnishing any reasons therefore. The petitoner, being aggrieved by such artbitary action of the government filed a petition before the Supreme Court under Article-32 challenging the validity of the impoundment order. One of the contentions of the government Techniques of Law was that the rule of audi alterm partem must be held to be excluded because it may frustrate the very purpose of impounding the passport. Rejecting the contention, the court rightly held that though the impoundment of the passport is an administrative action yet the rule of fair hearing is attracted by necessary implication and it would not be fair to exclude the application of this cardinal rule on the ground of administrative convenience. Though the court had not quashed the order outrightly but has developed the technique of 'Post-Decisional Hearing' in order to balance such situations to provide a fair opportunity of being heard immediately after serving the order impounding the passport; which would satisfy the mandate of natural justice.

Reasoned Decisions or Speaking Orders

The third principle of Natural Justice which has developed in course of time is that the order which is passed affecting the rights of an individual must be a speaking order. This is necessary with a view to exclude the possibility of arbitrariness in the action. A bald order requiring no reason to support it may be passed in an arbitrary and irresponsible manner. It is a step in furtherance of achieving the end where society is governed by Rule of Law.

The other aspect of the matter is that the party, against whom an order is passed, in fair play, must know the reasons of passing such order. It has a right to know the reasons. The orders against which appeals are provided must be speaking orders. Otherwise, the aggrieved party will not be in a position to demonstrate before the appellate authority as to in which manner, the order passed by the initial authorities is bad or suffers from illegality. To a very great extent, in such matters bald orders render the remedy of appeal nugatory. However, it is true that administrative authorities or Tribunals are not supposed to pass detailed orders as passed by the courts of law. They may not be very detailed and lengthy orders but they must at least show that the mind was applied and for the reasons, howsoever briefly they may be stated, the order by which a party aggrieved is passed. There cannot be any prescribed form in which the order may be passed but the minimum requirement as indicated above has to be complied with. The Supreme Court has many times taken the view that non-speaking order amounts to depriving a party of a right of appeal. It has also been held in some of the decisions that the appellate authority, while reversing the order must assign reasons for reversal of the findings.

Exceptions to the Rule of Natural Justice

Application of the Principles of Natural Justice can be excluded either expressly or by necessary implication subject to the provisions of Articles 14 and 21 of the Constitution. Therefore, if the Statute, expressly or by necessary implication, precludes the rules of natural justice it will not suffer invalidation on the ground of arbitrariness.

Exclusion in Emergency: In exceptional cases of emergency where prompt preventive or remedial action, is needed, the requirement of notice and hearing may be obviated. Such as, in situations where a dangerous building is to be demolished, or a company has to be wound up to save depositors. However, the administrative determination of an emergency situation calling for the exclusion of rules of natural justice is not final. The courts may review the determination of such a situation. Natural Justice is pragmatically flexible and is amenable to capsulation under compulsive pressure of circumstances. It is in this context that the Supreme Court observed: “Natural Justice must be confined within their proper limits and must not be allowed to run wild. The concept of Natural Justice is a magnificent thoroughbred on which this Nation gallops forward towards its proclaimed and destined goal of justice social, economic and political.

Exclusion in Cases of Confidentiality: In a case the Supreme Court held that the maintenance of surveillance register by the police is a confidential document. Neither the person whose name is entered in the register nor any other member of the public can have access to it. Furthermore, the court observed that the observance of the principles of natural justice in such situation may defeat the very purpose of surveillance and Techniques of Law there is every possibility of the ends of justice being defeated instead of being served. Same principle was followed in S.P. Gupta v. Union of India where the Supreme Court held that no opportunity of being heard can be given to an Additional Judge of a High Court before his name is dropped from being confirmed. It may be pointed out that in a country like India surveillance may provide a very serious constraint on the liberty of the people, therefore, the maintenance of the surveillance register cannot be so utterly administrative and non-judicial that it is difficult to conceive the application of the rules of natural justice.

Exclusion in case of routine matters: A student of the university was removed from the rolls for unsatisfactory academic performance without giving any pre-decisional hearing. The Supreme Court held that the very nature of academic adjudication appears to negative any right of an opportunity to be heard. Therefore if the competent academic authorities examine and assess the work of a student over a period of time and declare his work unsatisfactory, the rules of natural justice may be excluded. In the same manner when the Commission cancelled the examination of the candidate because, in violation of rules, the candidate wrote his roll number on every page of the answer, the Supreme Court held that the principles of natural justice are not attracted. Court observed that the rule of hearing is strictly construed in academic discipline as if this is ignored it will not only be against public interest but would also erode social sense of fairness. However, this exclusion shall not apply in case of disciplinary matters or where the academic body permits non-academic circumstances.

Exclusion Based on Impracticability: Rules of Natural Justice may be excluded on the grounds of administrative impracticability. For example in a case where the entire M.B.A. entrance examination was cancelled by the university because of mass copying, the court held that notice and hearing to all the candidates is not possible in this situation, which has assumed national proportions. Thus the court sanctified the exclusion of the rules of natural justice on the ground of administrative impracticability.

Exclusion in Cases of Interim Preventive Action: If the action of the administrative authority is a suspension order in the nature of a preventive action and not a final order, the application of the principles of natural justice may be excluded. In a case where the institution passed an order debarring the student from entering the premises of the institution and from attending classes till the pendency of a criminal case against him for stabbing a co-student. The Delhi High Court held that such an order could be compared with an order of suspension pending enquiry which is preventive in nature in order to maintain campus peace and hence the principles of natural justice shall not apply. Therefore, natural justice may be excluded if its effect would be to stultify the action sought to be taken or would defeat and paralyse the administration of the law. The

Supreme Court in *Maneka Gandhi v. Union of India* observed : "Where an obligation to give notice and opportunity to be heard would obstruct the taking of prompt action, especially action of a preventive or remedial nature, right of prior notice and opportunity to be heard may be excluded by implication."

Exclusion in Cases of Legislative Actions: Legislative action, may be plenary or subordinate, is not subjected to the rules of natural justice because these rules lay down a policy without reference to a particular individual. On the same logic principles of natural justice can also be excluded by a provision of the Constitution also. Constitution of India excludes the principles of natural justice in Articles 22, 31(A), (B), (C) and 311(2) as a matter of policy. Nevertheless if the legislative action is arbitrary, unreasonable and unfair, courts may quash such a provision under Articles 14 and 21 of the Constitution. In a case the Supreme Court held that no principles of natural justice have been violated when the government issued notification fixing the prices of certain drugs. The Court reasoned that since notification flowed from a legislative act and not an administrative one so the principles of natural justice do not apply.

Where No Right of the Person is Infringed: Where no right has been conferred on a person by any statute nor any such right arises from common law, the principles of natural justice are not applicable. This can be illustrated by referring a decision of the Supreme Court The Delhi Rent Control Act makes provision for the creation of limited tenancies. Sections 21 and 37 of the Act provide for the termination of limited tenancies. Combined effect of these sections is that after the expiry of the term a limited tenancy can be terminated. The Supreme Court held that after the expiry of the prescribed period of any limited tenancy, a person has no right to stay in possession and hence no right of his is prejudicially affected which may warrant the application of the principles of natural justice.

Exclusion in Case of Statutory Exception or Necessity Techniques of Law: Disqualification on the ground of bias against a person will not be applicable if he is the only person competent or authorized to decide that matter or take that action. If this exception is not allowed there would be no other means for deciding that matter and the whole administration would come to a grinding halt. But the necessity must be genuine and real. Therefore, the doctrine of necessity cannot be invoked where the members of the Text Book Selection Committee were themselves the authors because the constitution of the selection committee could have been changed very easily by the government.

Exclusion in Case of Contractual Arrangement: In a case the Supreme Court held the principles of natural justice are not attracted in case of termination of an arrangement in any contractual field. Termination of an arrangement/agreement is neither a quasi-judicial nor an administrative act so that the duty to act judicially is not attracted.

DELEGATED LEGISLATION

One of the most significant developments of the present century is the growth in the legislative powers of the executives. The development of the legislative powers of the administrative authorities in the form of the delegated legislation occupies very important place in the study of the administrative law. We know that there is no such general power granted to the executive to make law it only supplements the law under the authority of legislature. This type of activity namely, the power to supplement legislation been described as delegated legislation or subordinate legislation. Why delegated legislation becomes inevitable? The reasons as to why the Parliament alone cannot perform the jobs of legislation in this changed context are not far to seek.

Apart from other considerations the inability of the Parliament to supply the necessary quantity and quality legislation to the society may be attributed to the following reasons :

I. Certain emergency situations may arise which necessitate special measures. In such cases speedy and appropriate action is required. The Parliament cannot act quickly because of its political nature and because of the time required by the Parliament to enact the law.
II. The bulk of the business of the Parliament has increased and it has no time for the consideration of complicated and technical matters. The Parliament cannot provide the society with the requisite quality and quantity of legislation because of lack of time. Most of the time of the Parliament is devoted to political matters, matters of policy and particularly foreign affairs.
III. Certain matters covered by delegated legislation are of a technical nature which require handling by experts. In such cases it is inevitable that powers to deal with such matters is given to the appropriate administrative agencies to be exercised according to the requirements of the subject matter. "Parliaments" cannot obviously provide for such matters as the members are at best politicians and not experts in various spheres of life.
IV. Parliament while deciding upon a certain course of action cannot foresee the difficulties, which may be encountered in its execution. Accordingly various statutes contain a 'removal of difficulty clause' empowering the administration to remove such difficulties by exercising the powers of making rules and regulations. These clauses are always so worded that very wide powers are given to the administration.
V. The practice of delegated legislation introduces flexibility in the law. The rules and regulations, if found to be defective, can be modified quickly. Experiments can be made and experience can be profitability utilized.

However the attitude of the jurists towards delegated legislation has not been unanimous. The practice of delegated legislation was considered a factor, which promoted centralization. Delegated Legislation was considered a danger to the liberties of the people and a devise to place despotic powers in few hands. It was said that delegated legislation preserved the outward show of representative institutions while placing arbitrary and irresponsible power in new hands. But the tide of delegated legislation was high and these protests remained futile.

Nature and Scope of delegated legislation: Delegated legislation means legislation by authorities other than the Legislature, the former acting on express delegated authority and power from the later. Delegation is considered to be a sound basis for administrative efficiency and it does not by itself amount to abdication of power if restored to within proper limits. The delegation should not, in any case, be unguided and uncontrolled. Parliament and State Legislatures cannot abdicate the legislative power in its essential aspects which is to be exercised by them. It is only a nonessential legislative function that can be delegated and the moot point always lies in the line of demarcation between the essential and nonessential legislative functions.

The essential legislative functions consist in making a law. It is to the legislature to formulate the legislative policy and delegate the formulation of details in implementing that policy. Discretion as to the formulation of the legislative policy is prerogative and function the legislature and it cannot be delegated to the executive. Discretion to make notifications and alterations in an Act while extending it and to effect amendments or repeals in the existing laws is subject to the condition precedent that essential legislative functions cannot be delegated authority cannot be precisely defined and each case has to be considered in its setting. In order to avoid the dangers, the scope of delegation is strictly circumscribed by the Legislature by providing for adequate safeguards, controls and appeals against the executive orders and decisions.

The power delegated to the Executive to modify any provisions of an Act by an order must be within the framework of the Act giving such power. The power to make such a modification no doubt, implies certain amount of discretion but it is a power to be exercised in aid of the legislative policy of the Act and cannot i) travel beyond it, or ii) run counter to it, or iii) certainly change the essential features, the identity, structure or the policy of the Act.

Under the constitution of India, articles 245 and 246 provide that the legislative powers shall be discharged by the Parliament and State legislature. The delegation of legislative power was conceived to be inevitable and therefore it was not prohibited in the constitution. Further, Articles 13(3)(a) of the Constitution of India lays down that law includes any ordinances, order bylaw, rule regulation, notification, etc. Which if found inviolation of fundamental rights would be void. Besides, there are number of judicial pronouncements by the courts where they have justified delegated legislation.

ADMINISTRATIVE DISCRETION AND ITS JUDICIAL CONTROL

Discretion in layman’s language means choosing from amongst the various available alternatives without reference to any predetermined criterion, no matter how fanciful that choice may be. But the term ‘Discretion’ when qualified by the word ‘administrative’ has somewhat different overtones. ‘Discretion’ in this sense means choosing from amongst the various available alternatives but with reference to the rules of reason and justice and not according to personal whims. Such exercise is not to be arbitrary, vague and fanciful, but legal and regular.

The problem of administrative discretion is complex. It is true that in any intensive form of government, the government cannot function without the exercise of some discretion by the officials. But it is equally true that absolute discretion is a ruthless master. Discretionary power by itself is not pure evil but gives much room for misuse. Therefore, remedy lies in tightening the procedure and not in abolishing the power itself.

There is no set pattern of conferring discretion on an administrative officer. Modern drafting technique uses the words ‘adequate’, ‘advisable’, ‘appropriate’, ‘beneficial’, ‘reputable’, ‘safe’, ‘sufficient’, ‘wholesome’, ‘deem fit’, ‘prejudicial to safety and security’, ‘satisfaction’, belief’, ‘efficient’, ‘public purpose’, etc. or their opposites. It is true that with the exercise of discretion on a case-to-case basis, these vague generalizations are reduced into more specific moulds, yet the margin of oscillation is never eliminated. Therefore, the need for judicial correction of unreasonable exercise of administrative discretion cannot be overemphasized.

Judicial Behavior and Administrative Discretion in India: Though courts in India have developed a few effective parameters for the proper exercise of discretion, the conspectus of judicial behavior still remains halting, variegated and residual, and lacks the activism of the American courts. Judicial control mechanism of administrative discretion is exercised at two stages: I) at the stage of delegation of discretion; II) at the stage of the exercise of discretion.

(1) *Control at 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 it does not give discretionary power to the administrative authority to take action, may give discretionary power to frame rules and regulations affecting the rights of citizens. The court can control the bestowal of such discretion on the ground of excessive delegation.

(2) *Control at the stage of the exercise of discretion* - In India, unlike the USA, there is no Administrative Procedure Act providing for judicial review on the exercise of administrative discretion. Therefore, the power of judicial review arises from the constitutional configuration of courts. Courts in India have always held the view that judge-proof discretion is a negation of the rule of law. Therefore, they have developed various formulations to control the exercise of administrative discretion.

In India the administrative discretion, thus, may be reveiwed by the court on the following grounds.

I. Abuse of Discretion

Now a day, the administrative authorities are conferred wide discretionary powers. There is a great need of their control so that they may mot be misused. The discretionary power is required to be exercised according to law. When the mode of exercising a valid power is improper or unreasonable there is an abuse of power. In the following conditions the abuse of the discretionary power is inferred: -

i. Use for 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.
ii. Malafide or Bad faith: - 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.
iii. Irrelevant consideration: - The decision of the administrative authority is declared void if it is not based on relevant and germane considerations. The considerations will be irrelevant if there is no reasonable connection between the facts and the grounds.
iv. 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.
v. Mixed consideration: - Sometimes the discretionary power is exercised by the authority on both relevant and irrelevant grounds. In such condition the court will examine whether or not the exclusion of the irrelevant or non-existent considerations would have affected the ultimate decision. If the court is satisfied that the exclusion of the irrelevant considerations would have affected the decision, the order passed by the authority in the exercise of the discretionary power will be declared invalid but if the court is satisfied that the exclusion of the irrelevant considerations would not be declared invalid.
vi. Unreasonableness: - The Discretionary power is required to be exercised by the authority reasonably. If it is exercised unreasonably it will be declared invalid by the court. Every authority is required to exercise its powers reasonably. In a case Lord Wrenbury has observed that a person in whom invested a discretion must exercise his discretion upon reasonable grounds. Where a person is conferred discretionary power

it should not be taken to mean that he has been empowered to do what he likes merely because he is minded to do so. He is required to do what he ought and the discretion does not empower him to do what he likes. He is required, by use of his reason, to ascertain and follow the course which reason directs. He is required to act reasonably

vii. 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.

viii. 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.

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

II. <u>Failure to exercise Discretion</u>

In the following condition the authority is taken to have failed to exercise its discretion and its decision or action will be bad.

i. Non-application of mind: - Where an authority is given discretionary powers it is required to exercise it by applying its mind to the facts and circumstances of the case in hand. If he does not do so it will be deemed to have failed to exercise its discretion and its action or decision will be bad.

ii. 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 won 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 judgement and does not apply its mind. For example in *Commissioner of Police v. Gordhandas* the Police Commissioner empowered to grant license for construction of cinema theatres granted the license but later cancelled it on the discretion of the Government. The cancellation order was declared bad as the Police Commissioner did not apply his mind and acted under the dictation of the Government.

iii. Imposing fetters on the exercise of discretionary powers: - 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 if the authority imposes fetters on its discretion by adopting fixed rule of policy to be applied rigidly to all cases coming before it, it will be taken as failure to exercise discretion and its action or decision or order will be bad.

Legitimate expectation as ground of judicial review: Besides the above grounds on which the exercise of discretionary powers can be examined, a third major basis of judicial review of administrative action is legitimate expectation, which is developing sharply in recent times. The concept of legitimate expectation in administrative law has now, undoubtedly, gained sufficient importance. It is stated that the legitimate expectation is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action and this creation takes its place besides such principles as the rules of natural justice, unreasonableness, the fiduciary duty of local authorities and in future, perhaps, the unreasonableness, the proportionality.

Legitimate expectation gives the applicant sufficient locus standi for judicial review. The doctrine of legitimate expectation is to be confined mostly to right of fair hearing before a decision, which results in negativing a promise, or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystallized right as such is involved. The protection of such legitimate does not require the fulfillment of the expectation where an overriding public interest requires otherwise. A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation, which it would be within its powers to fulfill. The protection is limited to that extent and a judicial review can be within those limits. A person, who bases his claim on the doctrine of legitimate expectation, in the first instance, must satisfy that there is foundation and thus he has locus standi to make such a claim.

There are stronger reasons as to why the legitimate expectation should not be substantively protected than the reason as to why it should be protected. If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or arbitrary, discriminatory unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well known grounds attracting Article 14 but a claim based on mere legitimate expectation without any thing more cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider but the court must lift the veil and see whether the decision is violative of these principles warranting interference. It depends very much on the facts and the concept of legitimate expectation which is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action, must be restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the concept of legitimate expectation is " not the key which unlocks the treasury of natural justice and it ought not to unlock the gate which shuts, the court out of review on the merits", particularly when the element of speculation and uncertainly is inherent in that very concept. The courts should restrain themselves and restrict such claims duly to the legal limitations.

ADMINISTRATIVE ADJUDICATION AND ADMINISTRATIVE TRIBUNALS

There are a large number of laws which charge the Executive with adjudicatory functions, and the authorities so charged are, in the strict scene, administrative tribunals. Administrative tribunals are agencies created by specific enactments. Administrative adjudication is term synonymously used with administrative decisionmaking. The decision-making or adjudicatory function is exercised in a variety of ways. However, the most popular mode of adjudication is through tribunals.

The main characteristics of Administrative Tribunals are as follows:

- Administrative Tribunals is the creation of a statute.
- An Administrative Tribunals is vested in the judicial power of the State and thereby performance quasi-judicial functions as distinguished form pure administrative functions.
- Administrative Tribunals is bound to act judicially and follow the principles of natural justice.
- It has some of the trapping of a court and are required to act openly, fairly and impartially.
- An administrative Tribunal is not bound by the strict rules of procedure and evidence prescribed by the civil procedure court.

Structure of the Tribunals: The Administrative Tribunals Act 1985 provides for the establishment of one Central Administrative Tribunal and a State Administrative Tribunal for each State like Haryana Administrative Tribunal etc; and Joint Administrative Tribunal for two or more states. The Central Administrative Tribunal with its principal bench at Delhi and other benches at Allahabad, Bombay, Calcutta and Madras was established on Ist November 1985. The Act vested the Central Administrative Tribunal with jurisdiction, powers and authority of the adjudication of disputes and complaints with respect to recruitment and service matters pertaining to the members of the all India Services and also any other civil service of the Union or holding a civil post under the Union or a post connected with defense or in the defense services being a post filled by a civilian. Six more benches of the Tribunal were set up by June, 1986 at Ahmedabad, Hyderabad, Jodhpur, Patna, Cuttack, and Jabalpur. The fifteenth bench was set up in 1988 at Ernakulam.

The Act provides for setting up of State Administrative Tribunals to decide the services cases of state government employees. There is a provision for setting up of Joint Administrative Tribunal for two or more states. On receipt of specific requests from the Government of Orissa, Himachal Pradesh, Karnataka, Madhaya Pradesh and Tamil Naidu, Administrative Tribunals have been set up, to look into the service matters of concerned state government employees. A joint Tribunal is also to be set up for the state of Arunachal Pradesh to function jointly with Guwahati bench of the Central Administrative Tribunal.

Composition of the Tribunals: Each Tribunal shall consist of Chairman, such number of Vice-Chairman and judicial and administrative members as the appropriate Government (either the Central Government or any particular State Government singly or jointly) may deem fit (vide Sec. 5.(1) Act No. 13 of 1985). A bench shall consist of one judicial member and one administrative member. The bench at New Delhi was designated the Principal Bench of the Central Administrative Tribunal and for the State Administrative Tribunals. The places where their principal and other benches would sit specified by the State Government by Notification (vide Section 5(7) and 5(8) of the Act).

Qualification for Appointment: In order to be appointed as Chairman or Vice-Chairman, one has to be qualified to be (is or has been) a judge of a High Court or has held the post of secretary to the Government of India for at least two years or an equivalent-pay-post either under the Central or State Government (vide Sec. 6(i) and (ii) Act No. 13 of 1985). To be a judicial member, one has to be qualified for appointment as an administrative member, one should have held at least for two years the post of Additional Secretary to the Government of India or an equivalent pay-post under Central or State Government or has held for at least three years a post of Joint Secretary to the Govt. Of India or equivalent post under Central or State Government and must possess adequate administrative experience.

Appointments: The Chairman, Vice-Chairman and every other members of a Central Administrative Tribunal shall be appointed by the President and, in the case of State or joint Administrative Tribunal(s) by the President after consultation with the Governor(s) of the concerned State(s), (vide Section 6(4), (5) and (6), Act No. 13 of 1985). But no appointment can be made of a Chairman, vice-chairman or a judicial member except after consultation with the Chief Justice of India. If there is a vacancy in the office of the Chairman by reason of his resignation, death or otherwise, or when he is unable to discharge his duties / functions owing to absence, illness or by any other cause, the Vice-Chairman shall act and discharge the functions of the Chairman, until the Chairman enters upon his office or resumes his duties.

Terms of Office: The Chairman, Vice-Chairman or other member shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of a) Sixty five, in the case of Chairman or vice-Chairman, b) Sixty-two, in the case of any other member, whichever is earlier.

Resignation or Removal: The Chairman, Vice-Chairman or any other member of the Administrative Tribunal may, by notice in writing under his hand addressed to the President, resign, his office; but will continue to hold office until the expiry of three months from the date of receipt of notice or expiry of his terms of office or the date of joining by his successor, whichever is the earliest. They cannot be removed from office except by an order made by the

President on the ground of proven misbehavior or incapacity after an inquiry has been made by a judge of the Supreme Court; after giving them a reasonable opportunity of being heard in respect of those charges (vide Sec. 9(2). Act No. 13 of 1985).

Jurisdiction, Powers and Authority: Chapter III of the Administrative Tribunal Act deals with the jurisdiction, powers and authority of the tribunals. Section 14(1) of the Act vests the Central Administrative Tribunal to exercise all the jurisdiction, powers and authority exercisable by all the courts except the Supreme Court of India under Article 136 of the Constitution. One of the main features of the Indian Constitution is judicial review. There is a hierarchy of courts for the enforcement of legal and constitutional rights. One can appeal against the decision of one court to another, like from District Court to the High Court and then finally to the Supreme Court, But there is no such hierarchy of Administrative Tribunals and regarding adjudication of service matters, one would have a remedy only before one of the Tribunals. This is in contrast to the French system of administrative courts, where there is a hierarchy of administrative courts and one can appeal from one administrative court to another. But in India, with regard to decisions of the Tribunals, one cannot appeal to an Appellate Tribunal. Though Supreme Court under Article 136, has jurisdiction over the decisions of the Tribunals, as a matter of right, no person can appeal to the Supreme Court. It is discretionary with the Supreme Court to grant or not to grant special leave to appeal.

The Administrative Tribunals have the authority to issue writs. In disposing of the cases, the Tribunal observes the canons, principles and norms of ‘natural justice’. The Act provides that “a Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure 1908, but shall be guided by the principles of natural justice. The Tribunal shall have power to regulate its own procedure including the fixing of the place and times of its enquiry and deciding whether to sit in public of private”. A Tribunal has the same jurisdiction, powers and authority, as those exercised by the High Court, in respect of “Contempt of itself” that is, punish for contempt, and for the purpose, the provisions of the contempt of Courts Act 1971 have been made applicable. This helps the Tribunals in ensuring that they are taken seriously and their orders are not ignored.

Procedure for Application to the Tribunals: Chapter IV of the Administrative Tribunals Act prescribes for application to the Tribunal. A person aggrieved by any order pertaining to any matter within the jurisdiction of the Tribunal may make an application to it for redressal of grievance. Such applications should be in the prescribed form and have to be accompanied by relevant documents and evidence and by such fee as may be prescribed by the Central Government but not exceeding one hundred rupees for filing the application. The Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant has availed of all remedies available to him under the relevant service rules. This includes the making of any administrative appeal or representation. Since consideration of such appeals and representations involve delay, the applicant can make an application before the Tribunal, if a period of six months has expired after the representation was made no order has been made. But an application to the Tribunal has to be made within one year from the date of final order or rejection of the application or appeal or where no final order of rejection has been made, within one year from the date of expiry of six months period.

The Tribunal. May, however admit any application even after one year, if the applicant can satisfy the Tribunal that he/she had sufficient cause for not making the application within the normal stipulated time. Every application is decided by the Tribunal or examination of documents, written representation and at a times depending on the case, on hearing of oral arguments. The applicant may either appear in person or through a legal practitioner who will present the case before the Tribunal. The orders of the Tribunal are binding on both the parties and should be complied within the time prescribed in the order or within six months of the receipt of the order where no time limit has been indicated in the order. The parties can approach the Supreme Court against the orders of the Tribunal by way of appeal under Article 136 of the Constitution. The Administrative Tribunals are not bound by the procedure laid down in the code of Civil Procedure 1908. They are guided by the principles of natural justice. Since these principles are flexible, adjustable according to the situation, they help the Tribunals in molding their procedure keeping in view the circumstances of a situation.

JUDICIAL CONTROL OF ADMINISTRATIVE ACTION

It is a admitted fact that the administrative authorities now a days are conferred on wide administrative powers which are required to be controlled otherwise they will become new despots. The Administrative Law aims to find out the ways and means to control the powers of the administrative authorities. In the context of increased powers for the administration, judicial control has become an important area of administrative law, because Courts have proved more effective and useful than the Legislature or the administration in the matter. “It is an accepted axiom” observed Prof. Jain & Jain that “the real kernel of democracy lies in the Courts enjoying the ultimate authority to restrain all exercise of absolute and arbitrary power. Without some kind of judicial power to control the administrative authorities, there is a danger that they may commit excess and degenerate into arbitrary authorities, and such a development would be inimical to a democratic Constitution and the concept of rule of law. “

Judicial Control (Judicial Remedies). Judiciary has been given wide powers for controlling the administrative action. The Courts have been given power to review the acts of the legislature and executive (administration) and declare them void in case they are found in violation of the provisions of the Constitution.

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

a. Constitutional;
b. Statutory;

c. Ordinary or Equitable.

JUDICIAL REVIEW & ITS EXCLUSION

Judicial review, in short, is the authority of the Courts to declare void the acts of the legislature and executive, if they are found in the violation of the 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, although there is no express provision in the American Constitution for the judicial review. In Marbury v. Madison the Supreme Court made it clear that it had the power of judicial review. In England there is supremacy of Parliament and therefore, the Act passed or the law made by Parliament cannot be declared to be void by the Court. The function of the judiciary is to ensure that the administration or executive function conforms to the law. The Constitution of India expressly provides for judicial review. Like U.S.A., there is supremacy of the Constitution of India. 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 the Act is in conformity with the Constitutional requirements and if it is found in violation of the Constitutional provisions the Court has to declare it unconstitutional and therefore, void because the Court is bound by its oath to uphold the Constitution. The Constitution of India, unlike the American Constitution expressly provides for the judicial review. The limits laid down by the Constitution may be express or implied. Articles 13, 245 and 246, etc. provide the express limits of the Constitution.

The provisions of Article 13 are: Article 13 (1) provides that all laws in force in the territory of India immediately before the commencement of the Constitution of India, in so far as they are inconsistent with the provision of Part III dealing with the fundamental rights shall, to the extent of such inconsistency, be void. Article 13 (2) provides the State Shall not make any law which takes away or abridges the fundamental rights and any law made in contravention of this clause shall, to the extent of the contravention, be void. Article 245 makes it clear that the legislative powers of Parliament and of the State Legislatures are subject to the provisions of the Constitution. Parliament may make laws for the whole or any part of the territory of India and the legislature of State may make laws for the whole or any part of the State. No law made by Parliament shall be deemed to be invalid on the ground that it would have been extra-territorial operation. The State Legislature can make law only for the State concerned and, therefore, the law made by the state Legislature having operation outside the State would be beyond its competence and, therefore ultra vires and void.

The doctrine of ultra vires has been proved very effective in controlling the delegation of legislative function by the legislature and for making it more effective it is required to be applied more rigorously. Sometimes the Court’s attitude is found to be very liberal. Supreme Court has held that the legislature delegating the legislative power must lay down the legislative policy and guideline regarding the exercise of essential legislative function, which consists of the determination of legislative policy and its formulation as a rule of conduct. Delegation without laying down the legislative policy or standard for the guidance of the delegate will amount to abdication of essential legislative function by the Legislature. The delegation of essential legislative function falls in the category of excessive delegation and such delegation is not permissible. The power of judicial review controls not only the legislative but also the executive or administrative act. The Court scrutinizes the executive act for determining the issue as to whether it is within the scope of the authority or power conferred on the authority exercising the power. For this purpose the ultra vires rules provides much assistance in the Court. Where the act of the executive or administration is found ultra virus the Constitution or the relevant Act, it is declared ultra virus and, therefore, void. The Courts attitude appears to be stiffer in respect of the discretionary power of the executive or administrative authorities. The Court is not against the vesting of the discretionary power in the executive, but it expects that there would be proper guidelines or normal for the exercise of the power. 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 discretionary power. 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 Supreme Court has expressed the view that in the exercise of the power of judicial review the Court should observe the self-restraint and confine itself 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 the rules of natural justice.
3. Reached a decision which no reasonable tribunal would have reached, or
4. Abused its power.

It is not for the Court to determine whether a particular policy or a particular decision taken in the furtherance of the policy is fair. The Court is only concerned with the manner in which those decisions have been taken. The extents of the duty to act fairly vary from case to case.

The aforesaid grounds may be classified as under: (i) Illegality (ii) Irrationality (iii) Procedural impropriety. Mala fide exercise of power is taken as abuse of power : Mala fides may be taken to mean dishonest intension or corrupt motive. In relation to the exercise of statutory power 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. The burden to prove mala fide is on the person who wants the order to be quashed on the ground of mala fide.

ADMINISTRATIVE FRAMEWORK OF MARITIME SECTOR IN INDIA

Shipping in India, being a Central subject, is dealt by the Ministry of Shipping. The Indian shipping industry is mainly governed by the following Acts;

1. The Merchant Shipping Act, 1958
2. The Inland Vessels Act, 1917
3. The Coasting Vessels Act, 1838
4. The Multi-modal Transportation of Goods Act, 1993

Some other statutes that have indirect relevance on Indian shipping include:

1. The Indian Ports Act, 1908
2. The Dock Workers (Regulation of Employment) Act, 1948
3. The Major Ports Trust Act, 1963
4. The Seamen's Provident Fund Act, 1966
5. The Inland Waterways Authority of India Act, 1985

There are various subordinate offices, autonomous bodies, societies and associations, and public sector undertakings, which help the Ministry in regulating the shipping industry. Some of them are:

- The National Shipping Board, a statutory body, which advises the Central Government on shipping matters;
- The Directorate General of Shipping, the main administrative authority which issues orders and notifications on various aspects of shipping;
- The Mercantile Marine Department, which comes under the administrative control of Directorate General of Shipping, dealing with the registration and survey of ships;
- The Transchart Wing, responsible for making shipping arrangements for import cargo under the control of Govt./PSUs;
- The Indian Register of Shipping, a classification society.

The Indian shipping industry, apart from the regulations is also governed by the various IMO/ILO instruments (Conventions & Protocols) ratified by the Government of India and also has to comply with the rules and regulations issued by Ministries of Finance, Company Affairs, and Commerce and Industry, Government of India.

It may be mentioned that the Ministry of Shipping, Government of India has been working towards merging two existing port legislations which are Indian Ports Act, 1908, and Major Ports Act, 1963, which rule over Government-controlled major ports, private and non major ports of the country, into a single comprehensive Act. The proposed legislation will club many sections into one which deal with topics that are common in nature for both major and non major ports.

There will be a separate section for board of trustees, operations and management of major ports which is exclusive to them. The proposed port legislation could also have provisions to create a Port Regulatory Authority Act which would help de-link Tariff Authority for Major Ports (TAMP) from the consolidated Act. The powers to fix rates may, then, be left to the management of port authority or Government or any other authority so authorized by the Government.

Also, it has been observed that in all the major ports world over, land has been leveraged for optimizing the throughput and increasing the revenue of ports. It is an established practice globally for ports to allot land for carrying out economic activity including establishing industry to ensure captive cargo to the port, thereby enhancing the sustainability of that port. Port lands have also been used to set up Special Economic Zones (SEZ) aimed at encouraging industrial development in and around the port. Other than the above, ports are generally expected to utilize their land, with port related activities being given the first priority and activities incidental to the port being treated as secondary in nature. Hence, optimum utilization of land is a matter of continuing importance to all ports. Based on this, a Land Policy for Major Ports was issued by the Ministry of Shipping, in 2004. Land policy is one of the most important policy frameworks guiding the overall functioning of the port sector. Recently, the Ministry of Shipping has proposed to issue a revised Land Policy for major ports. Accordingly a committee constituted by the Ministry of Shipping submitted a draft ‘Land Policy for major ports, 2010’. According to the policy, every major port shall have a Land use plan covering the entire land owned and/ or managed by the port. Land can be allotted either on licence or lease basis as per land use plan/zoning. The policy is applicable for all major port trusts, except for land relating to Gandhidham Township of Kandla Port Trust. This policy for land allotment will be applicable to all BOT projects also.

MODULE III

Indian Judicial and Legal System

HISTORICAL EVOLUTION OF THE INDIAN LEGAL SYSTEM

Laws in Ancient India were primarily regulated through established customs and religious norms many of which have found their way into the current Indian legal system. Ancient Indian legal history can be traced back to the Vedic period which contained Dharma which laid down the code of conduct.

Hindu Law- Dharma

'Dharma' in Sanskrit means righteousness, duty and law. Dharma is wider in meaning than what we understand as law today. Dharma consists of both legal duties and religious duties. It not only includes laws and court procedures, but also a wide range of human activities like ritual purification, personal hygiene regimes, and modes of dress. Dharma provided the principal guidance by which one endeavored to lead his life.

There are three sources of Dharma or Hindu law. The first source is the Veda or Vedas. The four primary Vedas are the Rigveda, Yajurveda, Samaveda, and Atharvaveda. They are collections of oral texts of hymns, praises, and ritual instructions. Veda literally means revelation. The second source is called Smriti, which literarily means 'as remembered' and it refers to tradition. They are the humanly authored written texts that contain the collected traditions. The Dharmashastra texts are religion and law textbooks and form an example of the Smriti tradition. Since only a few scholars had access to direct knowledge or learning from the Vedas, Smritis are the written texts to teach others. These texts are considered to be authoritative because they are believed to include duties and practices that must have been sourced from the Vedas and they are accepted and transmitted by humans who know the Vedas. In this way, a connection is made between the Veda and smriti texts that make the latter authoritative. The third source of dharma is called the 'âchâra', which means customary law. Âchras are the norms of a particular community or group. Just like the smriti, chra finds its authority by virtue of its connection with the Vedas. Where both the Vedas and the Smritis are silent on an issue, a learned person who knows the Vedas can consider the norms of the community as dharma and perform it. This way, the Vedic connection is made between the Veda and the âchâra, and the âchâra becomes authoritative.

ADMINISTRATION OF JUSTICE IN INDIA

Charter of 1600: Establishment of the British East India Company: The company was supposed to have a life span of fifteen years and would enjoy exclusive trading rights into and from the countries lying beyond the Cape of Good Hope eastwards to the Straits of Magellan. This would effectively cover areas of India, Asia, Africa and America and no other British could trade in these areas without license from the company. The Charter further authorized the company to enact laws and orders for its internal governance. The charter never envisaged the company as a source of political power but a simple overseas commercial trading enterprise. But it was soon found out that the legislative powers of the company were inadequate to regulate the serious offences committed by their servants on land.

Charter of 1661: It conferred broad powers on the company to administer justice in its settlement. This charter authorized the Governor and Council of each factory to judge all persons whether belonging to the company or living under them in all causes, civil or criminal, according to the laws of England and to execute judgment accordingly.

This granted a much wider and extensive power to the Governor and Council of a factory. Grant of judicial power indicated the existence of the executive government in place. Further justice was required to be administered in accordance with the English Law.

1612: British got the permission from the Moghul Governor to establish a factory in Surat. In order to grant permanency to their establishment a need was felt to obtain the requisite trading facilities directly from the Moghul Emperor instead of depending upon the whims and fancies of the local governor. This permission was given to them by way of a fireman of 1615.

Till 1687, Surat was the hub of company's activities in India but gradually the company started establishing other Presidencies i.e. Madras, Bombay and Calcutta. In the early seventeenth century, the Crown, through a series of Charters, established a judicial system in the Indian towns of Bombay, Madras and Calcutta, basically for the purposes of administering justice within the establishments of the British East India Company. The Governor and the Council of these towns formulated these judicial systems independently. The Courts in Bombay and Madras were called Admiralty Courts, whereas the court in Calcutta was called Collector's Court. These courts had the authority to decide both civil and criminal matters. Interestingly, the courts did not derive their authority from the Crown, but from the East India Company. The Charter issued by King George I on 24 September 1726 marks an important development in Indian legal history. This Charter forms the basis for the establishment of Crown's courts in India. The British East India Company requested King George to issue a Charter by which special power could be granted to the Company. Accepting the Letters Patent of 1726 and the subsequent Charters, had, in effect, applied English law to British India as will be discussed here after.

Charter of 1726: Mayor's Court: By 1699, Calcutta became a Presidency Town and was brought under the direct administration of a Governor. The Moghul Empire during this time was known for administration of judicial powers by the zamindars, collected revenue and maintained the law and order in their respective territories. For judicial purposes Kazi Courts were established in each district, paraganah and villages and handled civil and criminal matters. Though the judicial system was simple, nevertheless its organization was very poor. Hence a new Charter of 1726 was introduced which brought uniformity in the justice system in all the three Presidency Towns and established separate civil and criminal courts. Earlier the courts used to get their authority from the company but now it derived its authority from the British Crown and thus it was also called as the Royal Courts. Final Appeal from these courts will lie before the Privy Council.

Through these courts English Law gradually found place and settled in India. It was also known as the judicial charter as this was the beginning of the development of the Indian Legal system and judiciary.

Charter of 1753: The Presidency town of Madras saw a change of power for a brief period with the French government taking over for three years. In order to re-establish the British control over the Madras Presidency, a new Charter of 1753 was introduced and this opportunity was also utilized to remove the loopholes that were noticed by the Charter of 1726. It reformed the appointment modalities of Mayor and Aldermen with greater discretion to the British Government. The Mayor's Court lost all its autonomy and would hear Indian cases if the native Indian parties consented to its jurisdiction. A new set of courts called as the Courts of Request were also established for the purposes of speedy and inexpensive settlement of disputes.

Charter of 1774: Establishment of Supreme Court in Calcutta: It was to consist of a Chief Justice and three puisne judges who were appointed by the King and would hold the office during his pleasure. Only barristers with a minimum experience of five years were qualified to become a judge in these chambers. The court enjoyed jurisdiction in civil, criminal, admiralty, ecclesiastical matters. In criminal cases the court was required to act as a Court of Oyer, terminer and gaol delivery for the Calcutta Presidency. The territorial jurisdiction of the court was to extend to all the persons from Bihar, Orissa and Bengal. The court was not allowed to hear cases against the Governor-General in Council unless the matter pertained to felony or treason. The appeals from the Supreme Court would lie before the King's Court in England within a period of sixty days. The Supreme Court used to review the law even before it became the law.

DEVELOPMENT OF LEGAL PROFESSION IN INDIA

The legal profession as it exists in India today had its beginnings in the first years of British rule. Prior to the British rule law as a profession was practiced informally by the Hindu Pandits or the Muslim Muftis and even Portuguese to some extent. They essentially prescribed the moral code of conduct influenced by various religious scriptures. However law as a profession was completely revolutionized by the British. However the status of law as a profession was not very high. Only the lowest strata of the students who often didn't perform very well in their educational curriculum were considered capable of joining the profession. But gradually from this low repute the profession developed into the most highly respected and influential one in Indian society. Once the dominance of law and legal awareness over the public life, welfare, policies was realized the perception on legal profession also changed. But this change was not brought about over night or in a day but rather it was a product of gradual revolution.

With the establishment of the first British Court in 1672 began the glorious journey of the legal profession. It also witnessed the appointment of the first Attorney General i.e. Mr. George Wilcox who was well qualified in law. Administration and Management of the estate of a deceased formed the major chunk of the work in this court. The Attorney General formalized the procedure of party representation in the courts by attorneys and also fixed the fees of the said councilor at a little more than Re. one. However there were hardly any attorneys and the number of common pleaders were also minimal. Lawyers during that time were called as ‘Barritors’ i.e. people who stir up litigation.

However the approach of the East India Company was very discouraging towards the legal profession as they feared growth of law suits against the company resulting from the arbitrary and discriminatory means of their governance in the country. Consequently the various charters which started experimenting with various forms of judiciary at various levels barely touched upon the provision of the legal profession leading to haphazard development of the profession. The fact that none of the early attorneys had legal training did not add to the prestige of the profession. Interestingly the first person to work as a qualified advocate of the Court of Judicature was the judge of an Admiralty Court i.e. Dr. John.

As the courts developed, so did the legal profession. The Mayor's Courts, established in the three presidency towns, were crown courts with right of appeal first to the Governor in Council and, if necessary, over him to the Privy Council. The Mayor's Courts improved the quality of justice and gave more prestige to the pleading of cases. However, the need to have legally trained judges and lawyers was still not realized by the Company. The lack of law libraries and a properly trained profession was often evident. As the mayor and aldermen who sat on these courts had no legal training, were elected to short terms, and were very busy men, they had neither the skill nor time to gain knowledge of the law. During this period two principles concerning the profession were established. The right of an attorney to protect the rights of his client in spite of opposition from council members or the governor was upheld for attorneys in each of the Mayor's Courts. The second principle established during the period of Mayor's Courts was the right to dismiss an attorney guilty of misconduct.

Supreme Court Era of British Practice: The weaknesses of the Mayor’s court paved the way for the establishment of the Supreme Court of Judicature at Calcutta through the Royal Charter 1774. The Charter bestowed a very wide jurisdiction on the Supreme Court empowering it to deal with civil as well as criminal matters in Calcutta. It also enjoyed a comparatively restricted jurisdiction over the matters concerned with the inhabitants of the mofussil. Apart from the personal laws of Hindus and Muslims the laws of England were made applicable to the cases that came before these courts.

Dissatisfaction with the weaknesses of the Mayor's Court led to the establishment in 1774 by Royal Charter of a Supreme Court. The Supreme Court enjoyed a wide jurisdiction over civil and criminal matters in the city of Calcutta and a more restricted jurisdiction over cases involving inhabitants of the mofussil. With certain exceptions for Hindu and Muslim law in family matters, the law to be applied was the law of England.

Gradually Supreme Courts were established in Madras in 1801 and Bombay in 1823. Growing complexities of the matter that came up before the courts both in terms of quality and quantity made the involvement of qualified legal profession indispensible and thus entered barristers in the court. As barristers began to come into the courts and work as advocates, the attorneys gave up pleading and worked as solicitors and the two grades of legal practice gradually became distinct and separate as they were in England. Many of the first barristers came as judges, not as lawyers.

With the establishment of the Supreme Court the much needed and well deserved legal recognition, wealth and prestige gradually got associated with the profession. The Charter of 1774 mandatorily required that the Chief Justice along with three puisne judges be English barristers should have a professional standing of at least five years. The Charter further empowered the court to approve, admit, and enroll advocates and attorneys to plead and act on behalf of suitors. It also gave the court authority to remove lawyers from he roll of the court "on a reasonable cause and to prohibit practitioners not properly admitted and enrolled from practicing in the court."

In pursuance of its powers under the Charter the Supreme Court offered employment to three full-time advocates with decent remuneration. Besides these full-time posts there were a number of offices held by attorneys who practiced as solicitors, which brought substantial supplementary income. The Registrar of the court was also allowed to practice. Besides the British, a great number of Indians made use of the courts, preferring the Royal English justice of the presidency towns to the Company's in the mofussil.

Gradually the British diversified into administration of justice in the territories outside the purview of the company. As far as the Presidency towns were concerned dual hierarchy of civil and criminal courts were established but they were ultimately merged into the unified system of the Supreme Court after 1860.

With emergence of various classes of practitioners various forms of procedural rules and regulations started to develop. Rules regarding receiving of retainers, execution of vakalatnama and amount of fees, the number of lawyers who could be engaged for each case, and distribution of fees, punishment of legal practitioners by fine, suspension, and dismissal, disrespect of court, promoting and encouraging litigious suits, fraud, willful delaying of suits, accepting gifts of more than the authorized amount of fees from a client, or dropping a client after receiving a retainer also gradually getting codified with the first one being in Regulation VII.

Sardar Dewani Adalats: Were also empowered to take action only after establishment of a charge. Legal agents were liable to prosecution by their clients for malpractice. Besides providing for discipline of the profession the Regulation offered greater opportunities for lawyers by requiring the appointment of Government pleaders. These Government pleaders were to be paid at the same rate, and had the privilege of working as private pleaders in other suits in which

Government was not a party. Subsequent legislation concerning the profession followed the general pattern laid down in 1793. The rather lengthy and detailed Regulation XXVIII of 1814 extended the provisions for licensing, discipline, and removal of vakils to the Provincial Courts. Rules concerning fees, practice, government pleaders, and malpractice were considerably more detailed than before. The new sections of the 1814 Regulation indicate the kind of problems the courts were having with this rising profession. Section VIII stipulated that pleaders must take precaution to ascertain the real names of parties giving vakalatnama and would be liable for dismissal if a vakalatnama under a fictitious name were accepted. Furthermore, the pleader was warned to study plaints before they were filed and make sure that groundless, irrelevant point were not included, that useless witnesses were not summoned, and that all exhibits were examined previous to being filed. If a vakil continued, after warning, to produce irrelevant exhibits or witnesses he was to be fined Rs20 or made to forfeit his fee. Other provinces passed regulations almost identical to those of Bengal.95 Regulations provided that all pleadings were first to be completely written and then read out.96 Then the court could make inquiries to clarify issues, and call witnesses if necessary.

Professional respectability was hard to come by in spite of continuous legislation to control procedure and practice.

High Court and its Impact on the Legal Profession: Once the British assumed direct control in the territories of the East India Company, separate courts that were established for the British were clubbed together with the Mofussil courts and the royal courts in the Presidency towns into a unified judicial system in each of the three presidencies.

At the apex of the new system were High Courts, chartered by the Crown, established at Calcutta, Bombay and Madras in 1862. The practices followed in these courts were a combination of the Supreme Court and the Sadder Court traditions. This resulted in an unique mixture of the legal learning and judicial experience of the barristers of England and application of this experience and knowledge to the Indian scenario having due regards to our customary norms.

Regarding the composition of judges, a minimum of one-third of the judges including the Chief Justice of the High Court was required to be the barristers of the United Kingdom. Thereafter the next one-third was required to be recruited from the judicial branch of the Indian Civil Service. The remaining judges were recruited through the subordinate judiciary and the Indian lawyers practicing in the High Court.

The powers of the High Court included the power to make rules for enrollment of Advocates, Vakils, and Attorneys at Bar and the qualification that they need to possess. Initially the barristers of England enjoyed a monopoly in the Supreme Courts. With the advent of the High Courts, this monopoly also ended as even ‘Vakils’ were allowed to practice before the High Courts. This was not accomplished without a struggle. The commissioners appointed to arrange the Sadder Court-High Court merger had advocated that the High Court bench be exclusively British and the bar open only to barristers. Practicing side by side with British lawyers, the Indian vakils learned much of law, professional ethics, and standards of practice.

Additional High Courts were established in Allahabad (1886), Patna (1916), and Lahore (1919), creating a demand for many more lawyers and stimulating the rapid growth of the profession.

The High Courts had an upgrading effect upon the district and mofussil courts and bars. Many of the High Court judges encouraged leading members of the High Court bar to practice in the mofussil courts and aided them by giving adjournments. "This served a double purpose. It not only helped the pleader in promoting his own prestige and practice; but more important, the effect of the presence and the methods of conducting cases of experienced High Court lawyers, in the subordinate courts, would be to improve the standards of practice in these court.

There were six grades of legal practice in India after the founding of the High Courts; advocates, attorneys (solicitors), and vakils of the High Courts; and pleaders, mukhtars and revenue agents in the lower courts. The High Court’s set up standards of admission for vakils which were much higher than requirements for the old vakil-pleader of the zilla courts. Vakil became a distinct grade above the pleader.

The Legal Practitioners Act of 1879 brought all six grades of the profession into one system under the jurisdiction of the High Courts. Together with the Letters Patent of the High Courts the Act formed the chief legislative governance of legal practitioners in the subordinate courts of the country until the Advocates Act of 1961. To be a vakil, the prospective lawyer had to study at a college or university, master the use of English, and pass the High Court vakils' examination. Admission requirements were gradually raised so that by 1940 a vakil was required to be a graduate with an LL.B. from a university in India in addition to presenting a certificate saying that he had passed in the examinations, read in the chamber of a qualified lawyer, and was of good character. Though vakils were the lowest rank of the High Court practitioners their position was a most honorable one, and opened the way for pro- motion and wider practice. After ten years of service in the High Court many vakils were raised to the rank of advocate. The Indian Bar Councils Act of 1926 was passed with the two-fold purpose of unifying the various grades of legal practice and pro- viding some measure of self-government to the bars attached to the various courts. The Act required that each High Court constitute a Bar Council made up of the Advocate-General, four men nominated by the High Court of whom two should be judges, and ten elected from among the advocates of the bar. The duties of the Bar Council were to decide all matters concerning legal education, qualification for enrollment, discipline and control of the profession. It was most favorable to advocates as it gave them authority, previously held by the judiciary, to regulate the membership and discipline of their profession. However these rules had to be in accord with the High Court rules.

After independence, there was a growing opinion that there should be one bar for all of India. It repealed the Legal Practitioners Act of 1879 and stipulated that no more pleaders be enrolled. Those already practicing, who were law graduates, could become advocates by paying a fee of Rs250 to the Bar Council. Even law graduates not practicing as pleaders were given opportunity to take an advocates' examination, pay the fee and receive the grade. Pleaders who could not qualify were allowed to remain practicing as previously. Though the Act continues the dual system of advocates and attorneys prevailing in the High Courts of Calcutta and Bombay, elsewhere it recognizes for the future only one class of legal practitioner, advocates." An advocate must have a law degree from an Indian university, or must be a barrister. He must pass a State Bar Council examination and then will be admitted to the bar not by the court but by the bar association made up largely of advocates. Admission, practice, ethics, privileges, regulations, discipline and improvement of the profession as well as law reform are now all in the hands of the profession itself.

INDIAN ADVOCATES ACT 1961

The Indian Bar Councils Act, 1926 was passed to unify the various grades of legal practice and to provide self-government to the Bars attached to various Courts. The Act required that each High Court must constitute a Bar Council made up of the Advocate General, four men nominated by the High Court of whom two should be Judges and ten elected from among the advocates of the Bar. The duties of the Bar Council were to decide all matters concerning legal education, qualification for enrolment, discipline and control of the profession. It was favorable to the advocates as it gave them authority previously held by the judiciary to regulate the membership and discipline of their profession.

Section 7 of the Advocates Act, 1961 lays down the Bar Council’s regulatory and representative mandate. The functions of the Bar Council are to:

- Lay down standards of professional conduct and etiquette for advocates.
- Lay down procedure to be followed by disciplinary committees
- Safeguard the rights, privileges and interests of advocates
- Promote and support law reform
- Deal with and dispose of any matter which may be referred by a State Bar Council
- Promote legal education and lay down standards of legal education.
- Determine universities whose degree in law shall be a qualification for enrollment as an advocate.
- Conduct seminars on legal topics by eminent jurists and publish journals and papers of legal interest.
- Organize and provide legal aid to the poor.
- Recognize foreign qualifications in law obtained outside India for admission as an advocate.

- Manage and invest funds of the Bar Council.
- Provide for the election of its members who shall run the Bar Councils
- Organize and provide legal aid to the scheduled cast.

As per the Advocates Act, the Bar Council of India consists of members elected from each state bar council, and the Attorney General of India and the Solicitor General of India who are ex officio members. The members from the state bar councils are elected for a period of five years.

The council elects its own Chairman and Vice-Chairman for a period of two years from amongst its members. Assisted by the various committees of the Council, the chairman acts as the chief executive and director of the Council.

Eligible persons having a recognized law degree are admitted as advocates on the rolls of the state bar Councils. The Advocates Act, 1961 empowers state bar councils to frame their own rules regarding enrolment of advocates. The Council's enrollment committee may scrutinize a candidate's application. Those admitted as advocates by any state bar council are eligible for a 'Certificate of Enrolment' after qualifying the All India Bar Examination which is a bar qualifying exam conducted by the BCI.

The Bar Council of India has established a Directorate of Legal Education for the purpose of organizing, running, conducting, holding, and administering the following:

- Continuing Legal Education
- Teachers training
- Advanced specialized professional courses
- Education program for Indian students seeking registration after obtaining Law Degree from a Foreign University
- Research on professional Legal Education and Standardization
- Seminar and workshop
- Legal Research
- Any other assignment that may be assigned to it by the Legal Education committee and the Bar Council of India.

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INDIAN JUDICIARY UNDER THE INDIAN CONSTITUTION

Supreme Court: The Supreme Court of India shall consist of the Chief Justice and not more than 25 judges (puisne). The original strength of the court was Chief Justice and 7 other judges. But Parliament is empowered to increase the said number. Though it is located in New Delhi, it can nevertheless hold its sitting anywhere else in India.

Appointment: Eligibility - For appointment as a judge of the Supreme Court, a person must be a citizen of India; must be, at least, five years in succession of a judge of the High Court or an advocate of the High Court for 10 years in succession, or he must be in the opinion of the President a distinguished jurist. The age of retirement is 65 years. A retired judge of the Supreme Court is prohibited from pleading in any court or before any authority. When the office of the Chief Justice is vacant or when he is absent, a judge of the Supreme Court may be appointed temporarily as the acting CJ of India. For the want of quoram in the SC, the CJI, may with previous consent of the President and after consultation with the CJ of the HC concerned, appoint a regular judge of the HC as an adhoc judge.

High Court: The constitution provides for a high court for each state. Parliament may however establish by law a common high court for two or more states and for a Union Territory. It will consist of a chief Justice and as may judges as may be prescribed by the Parliament.

Appointment Eligibility - To be appointed as a judge for the High Court the person should be an Indian citizen with ten years of experience as a judicial officer or ten years of experience as a advocate of the High Court. Their tenure shall be till the age of 62 years. Acting judges can be appointed but only for a period of two years.

APPOINTMENT, TRANSFER AND REMOVAL OF JUDGES

Even though we advocate for independence of judiciary, however the executive still tends to have certain influence in matters of appointment and transfer of the judges. Article 124 provides for appointment of the Supreme Court judges by the President upon due consultation with such of the judges of the Supreme Court and High Court as the President may deem necessary. The proviso to the article further states that in case of appointment of a judge other than the Chief Justice, the Chief Justice shall always be consulted. Similarly the President shall appoint every judge of the High Court upon due consultation with the CJI, the State Governor and the Chief Justice of that High Court.

The requirement of consultation is compulsory. It does not mean that the President has to abide by their decisions but nevertheless the President is under a duty to deliberate on the issue with respective authorities. In S.P. Gupta v. Union of India, the majority held that no primacy need to be given to the opinion of the Supreme Court of India but rather it is the executive which has the primacy in the given matter. However in the matters of appointment of the judges of the High Court; the opinion of the CJI should be given greatest significance.

famous case, *S.P.Gupta Vs Union of India* (1982), this is popularly known as Judges Transfer case. The Supreme Court unanimously agreed with the meaning of the term consultation in Article 212, 22, 124(1)* of the constitution. In the above, Supreme Court Advocates on Record case, the Supreme Court held that the Chief Justice shall have to consult two other senior most Judges of the Supreme Court before sending his opinion. In this judgment, the Supreme Court laid down certain guidelines.

a) Individual initiation of high constitutional functionaries in the matter of appointment of Judges reduced to minimum. It gives privacy to the Chief Justice of India but puts a check on him to consult at least two of his senior most colleagues.

b) Constitutional functionaries must act collectively in Judicial Appointments.

c) Appointment of Chief Justice of India by seniority only.

d) No Judge can be appointment by the Union Government without Consulting the Chief Justice of India.

The Supreme Court, while upholding the Independence of Judiciary in appointment of Judges of the Supreme Court and High Court, on the basis of the term “consultation” under Article 217(1)* and 222 of the constitution in the formation of the opinion of the Chief Justice of India after consultation has to be sent to the President. Two senior most Judges of the Apex Court have to assist the Chief Justice of India to form an opinion. However, the question regarding political interference in the matter of appointment of Supreme Court and High Court Judges, still exists and after, the court has been striving to maintain the Independence. But in 93rd Constitutional Amendment Bill of 2003, it will provide for establishment of National Judicial Commission.

The provisions of the 93rd Amendment are featured as follows:

1) Constitution of the commission to be chaired by the Honourable Chief Justice of India with two senior most Judges of the Supreme Court, Minister In-charge of law and Justice, Union of India , and an eminent citizen to be nominated by the President, as its member.

2) Powers of the Commission regarding appointment of the Supreme Court and High Court Judges, and matters incidental thereto.

3) Powers of the Commission to take action in cases of complaints against Judges and the matters incidental thereto.

4) Association of the Chief Minister of the concerned state in the matter of appointment of High Court Judges.

The Legislature has been conferred with powers for the constitution to enact laws at the same time, the constitution also provides for certain rights to the citizens. The Independence of Judiciary has been provided by the constitution to maintain of Judiciary has been provided by the constitution to maintain balance between the legislative-powers and the rights of the citizens. The legislature must understand that it cannot indirectly interfere with the Independence of the Judiciary and its functioning, which is against the spirit of the constitution.

The Government of India through the 93rd Amendment Bill proposes to constitute a National Judicial Commission in view of the allegations of corruption and misuse of official position, being mode against sitting Judges of different High Courts. The Bill (93rd amendment) provides to deal with the matters relating to Appointment, Transfer of Judges and inquiries into the complaints against the Judges and other incidental matters. The Government of India proposes to establish the National Judicial Commission, so that the Commission comprising eminent persons without any Executive or Political influences. But the Judiciary is expressing a grouse by saying that under the pretext of constituting National Judicial Commission, The Executive is trying to interfere with the Independence of the Judiciary and the so-called nominated persons in the National Judicial Commission, pliable to the Executive and may Act according to the wishes of the Executive. But the Independence of the Judiciary as contemplated in the constitution is without any interference in any manner what so ever. The Independence of Judiciary is a basic structure of the constitution as held by the Supreme Court in *Kesavananda Bharathi Vs State of Kerala.*

Visualizing the present situation, the Judiciary in India, which is the protector and guarantor of Fundamental Rights of the citizens, is to be allowed to function independently without any interference. In this regard, a mute question raises that whether the action of the Executive in respect of constitution of the courts, appointment of Judges, laying down their conditions of service including salary, age of retirement etc., whether this amounts to interfering with the Independence of Judiciary while the Judges are not answerable to any Superior Authority. While exercising their power of delivering Judgments in the course of administration of Justice? However once an office or a post or an Institution is created or constituted, it must be placed under the control of some authority; so that the actions of the persons employed can be supervised or controlled. But, in Indian Constitution, once the courts are constituted and the Judges are appointed, no external influence over exerted or imposed in the course of deliverance of Judgments, either from the legislature or from the executive. But on the other hand, it is for the Judges themselves, who are allured by the influences corruption, malice, bias, favour etc, because the Judges are also human beings. In India, the Judges are influenced only by their vices or weaknesses from among themselves and no external inferences ever entered into the citadels of Independence of Judiciary.

Independence of Judiciary: Justice if considered to be one of the most divine attributes. Proper effectiveness of any rules and regulations can be witnessed by its proper execution by upright, honest and impartial authority. Therefore by independence of judiciary one means that the judges should exercise unfettered discretion in the interpretation of laws and administration of justice and for ensuring the same they should remain uninfluenced in the discharge of their duties. The maintenance of the independence and the impartiality of the judiciary both in letter and spirit is the basic condition of the rule of law. This helps in protecting the people from arbitrary interference and oppression of one single person. Independence of Judiciary is ensured in the following manner:

- Mode of Appointment of Judges - Judges are often selected by method whose selection criteria lay emphasis on the thorough knowledge of law and integrity and honesty.
- Judicial Tenure- Compulsory retirement at a particular age.
- Removal by Procedure established by law
- Salaries of Judges: Fixed Salary under the Constitution

JUDICIAL COURTS AND PROCEDURES

Civil Court Structure: The District Courts of India are presided over by a judge. They administer justice in India at a district level. These courts are under administrative and judicial control of the High Court of the State to which the district concerned belongs.

The highest court in each district is that of the District and Sessions Judge. This is the principal court of civil jurisdiction. This is also a court of Sessions. Sessions-triable cases are tried by the Sessions Court. It has the power to impose any sentence including capital punishment. There are many other courts subordinate to the court of District and Sessions Judge. There is a three tier system of courts. On the civil side, at the lowest level is the court of Civil Judge (Junior Division). On criminal side the lowest court is that of the Judicial Magistrate. Civil Judge (Junior Division) decides civil cases of small pecuniary stake. Judicial Magistrates decide criminal cases which are punishable with imprisonment of up to five years.

The criminal branch of lower judiciary is headed by a sessions court. As per the code of criminal procedure, a sessions court is to be established for every sessions division (which is essentially a district or a group of districts) by the state government. This is followed by Courts of judicial magistrates of first class in non-metropolitan areas (areas with a population of less than one million) and courts of metropolitan magistrates in metropolitan areas. Subordinate to them are courts of judicial magistrates of second class. Sessions judge and assistant sessions judge are appointed to sessions courts, the latter being subordinate to the former. Similarly, in courts of judicial magistrates, additional judicial magistrates are subordinate to the chief judicial magistrate. Every chief judicial magistrate is subordinate to the session judge as per CrPC.

A magistrate of second class may not pass a sentence exceeding imprisonment of one year. Similarly, a magistrate of first class may not pass a sentence of more than 3 years. A session judge can pass an order of execution but the same has to be necessarily confirmed by the concerned High Court. The civil branch of lower judiciary is headed by a district court. As is clear by the name itself a district court is to be established in each district according to the Civil procedure Code. Other courts subordinate to the district courts are the sub-divisional court and Munsiff's court with the latter being subordinate to the former.

Appointment to the post of district judge is made by the governor of the state in consultation with the High Court of competent jurisdiction in relation with the state. Only a person who has been in the state judicial service or has been an advocate or pleader for not less than seven years can be elevated to this post.

Besides the traditional court system, a variety of special courts can be set up in the country. Right to speedy trial has been acknowledged to be a fundamental right by the apex court and as such fast track courts for the same are set up in the country from time to time. Also, there are special courts that deal with legislation on terrorism. While theses courts discharge specialized functions, they also shoulder the burden the judiciary thus helping in reducing the backlog of cases.

Criminal Court Structure: The constitution of India establishes the Supreme Court and defines the jurisdiction and powers of the same. Under the constitution, the Supreme Court is the final appellate authority for all matters including criminal. It acts as a final appellate forum for criminal cases in accordance with the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act 1970.However being the apex court it is not required to hear each and every appeal but those where the issues in the case requires interpretation of pertinent questions of law. SC is also empowered to transfer appeals in the interest of justice.

High Court - The constitution provides for the establishment of the high court in each and every state and generally lays down the broad outline of their jurisdictions. CrPc provides for superintendence of the HC the courts of Judicial Magistrates in order to ensure that an expeditous and proper disposal of cases in such courts. Under the code the HC also enjoys the power of reference, appeal, revision and transfer of cases. It also categorically recognizes the inherent power of the HC to prevent the abuse of process of any court.

Sessions Court - Every state is required to establish a court of session for every sessions division which will be presided over by a judge appointed by the HC. The HC may also appoint Additional Session Judges and Assistant Sessions Judges to exercise jurisdiction in the court of the session. An assistant sessions judge is subordinate to the sessions judge.

Courts of Judicial Magistrates - In every district of the state the government may upon proper consultation with the HC establish courts of judicial magistrate of first class and second class as it may deem necessary. The Presiding Officers of such courts will be appointed by the HC. Any JMFC can act as the Chief Judicial Magistrate of the District upon due appointment from HC. His main function would be to guide, supervise and control other magistrates.

Courts of Metropolitan Magistrates - In every metropolitan areas the court may upon consideration from the HC establish courts of metropolitan magistrates and appoint its presiding officers. Amongst the metropolitan magistrates the HC may also appoint a chief metropolitan magistrate. The court of the CMM shall be subordinate to the Sessions Court.

Courts of Executive Magistrates - The code has also adopted the policy of separating the judiciary from the executive and hence it has created a special category of courts which are distinct from the courts of judicial magistrates. The object of the policy of the separation is to ensure that the independent functioning of the judiciary is free of all suspicion of executive or poltical influence and control. Therefore the Judicial Magistrates and the Metropolitan Magistrates are put under the control of the HC whereas the executive magistrates are put under the control of the state government. The Exectuive magistrates are primarily concerned with the functions which are ‘police’ or ‘administrative’ in nature. State Government can also appoint one of the excutive magistrates as District Magistrate.

Civil Court Procedure:

Adjudicatory Process	
Addressing Grievance	Every suit commences by presentation of plaint. In common law tradition they are numbered as Original suits and whereas in Civil law tradition they are called Original Petitions. Every Plaint must satisfy the rules laid down under OVI and VII of CPC and Chapter I of Civil Rules of Practice. All these rules talk about mode and manner of drafting plaint and contents of plaint.
Summons	Chapter VII of Civil Rules of Practise talks about how to serve summons and the contents of summons and the duties of process server in the event of person over whom process to be served.
Opportunity other side	O VIII Written statement talks about the about mode and manner of drafting written statement and its contents.
Effort to resolve amicably	In view of S.89 CPC, Since 2002 it is the duty of the court whenever there exist elements of a settlement which may be acceptable to the parties to refer them to (a) Arbitration; (b) Conciliation; (c) Judicial settlement by formulate the terms of settlement.
Fixing up disputed question	On receipt of plaint and written statement court will come to material facts and law over which parties at variance as such OXIV mandates framing of issues by Court. Even Rule.106 of the Civil Rules of Practise talks about the same.
Evidence marking of documents	Generally Plaintiff is directed adduce evidence and the mode of recording of evidence and they name through which he is referred is mentioned in R.95 and R.113 and 115 of the Civil rules of Practise. O.18 R.9 of CPC talks about recording of evidence. (Objection w.r.t to production of secondary & unstamped documents)
Submitting arguments	Right averred in the plaint and evidence disclosed in support of it coupled with law called as Argument.
Decree	The operative portion of judgment
Judgment	The grounds on which decree is passed
Execution	O21 CPC and Chapter 16 of Civil rules of Practise
Filing appeal	Chapter 13 of Civil rules of Practise and S.96 to 112 talks about appeals

INTERLOCUTORY PETITION IN A CIVIL SUIT ADJUDICATORY PROCESS

IA Process	CIVIL
Filing Petition	It is governed by Chapter IV and V of civil rules of practise.
Counter	Opposite party has a right to oppose it and it can be followed by an inquiry
Order	Disposal of petition
Enforcement	S.151 CPC

Writ Petition - Adjudicatory Process:

Writ	WRIT
Filing Petition	Writ Petition Notice for admission or admit for notice and asking for counter.
	It is governed by Writ proceeding rules of each High court and in the absence
	of any such rule CPC applies.
Counter	Filing Counter and matter will be posted for final hearing and as there are no
	disputed factual questions (generally).
Order & Enforcement	Disposal of petition and Contempt of court

Criminal Case - Adjudicatory Process:

Adjudicatory Process Criminal	CRIMINAL
Method of addressing grievance & rules	Most of the Criminal cases commence by filing Charge-sheet by the Police. The Charge-sheet is the summary of investigation. It contains the

relating to it	following: • Offence committed and method of commission and against whom it is committed and date of report of offence. • The approach of investigation so to collect the relevant and admissible evidence and • finally the persons with whom and what evidence Investigating officer (IO) wants to prove the guilt of the accused. S.154 Cr.P.C to S.176 Cr.P.C clothes IO with several powers he can exercise in the course of investigation. Charge-sheet has following enclosures: • FIR, • S.161 Cr.P.C or • S.164 Cr.P.C statements, • Scene of offence Panchanamma, • Inquest/wound certificate/ Post-Mortem, • Confession & recovery Panchnamma,
Cognizance & Summons	On receipt of Charge-sheet the Magistrate if he is of the opinion that allegation made in the Charge-sheet coupled with documents filed make out prima-facie case, cognizance will be taken against the offence. Upon taking cognizance usually summons will be issued to the accused and this summons must be signed by Magistrate. This is served through the concerned police.
Appearance of accused	On appearance of accused it is the duty of the court to furnish copies of Documents and ask him whether he has means to engage an advocate or otherwise court shall engage legal aid counsel. At this stage accused has an opportunity to file discharge petition by stating that allegation made out in the charge-sheet fail to make out any case against him.
Charge	If no discharge petition is filed or it is dismissed. the next step is examination of the accused w.r.t allegation made against him by police by framing charge. The framing of charge must be in accordance with S.211 to 226 of Cr.P.C. During examination if the accused admits guilt court may convict

	him or if he doesn't admit matter will be posted for trial by issuing summons to the witness listed in the charge-sheet.
Prosecution Evidence	Generally in cases initiated by police the first examined would be person who reported the offence to the police. It is followed by eye witness, witness to scene, inquest, PME, confession and recovery and finally Investigation officer. The prosecution witnesses are called as PW1, PW2…. and documents marked on behalf of prosecution are called as ExP1, P2….. . In case of witness examined by accused are called DW1, DW2…. And documents marked are called as ExD1, D2….
S.313 Cr.P.C	On completion of prosecution evidence accused will be examined u/s.313 Cr.P.C w.r.t. incriminating evidence in the prosecution evidence. This examination shall not be on oath. Any document can be filed and whatever said in S.313 Cr.P.C shall not be foundation for conviction.
Defense evidence	Upon completion of S.313 Cr.P.C accused can produce his evidence, however, generally in criminal cases no accused would venture to produce defense witness.
Arguments	If there is no defense evidence or on completion of defense evidence matter will be posted for arguments and party on either side submit oral or written arguments and upon completion of the same matter will be posted for judgment.
Judgment and Sentence.	The judgment of court would be either acquittal or conviction. If matter ends in acquittal, accused will be set at liberty. If the matter ends in conviction, accused will hear on sentence. Upon hearing the accused and prosecution on sentence punishment will be imposed i.e, fine or imprisonment or both.

Difference between various kinds of Adjudicatory Forums:

	Writ	**Suit (Civil Court)**	**Complaint (Criminal Court)**

Kind	Original proceedings	Original proceedings	Original Proceedings
Court	High Court and Supreme court	Jr. Civil judge to District judge	JMFC to Sessions Judge
Object of procedings	To ensure that every state organ and its agency work within the frame work of law, which also means there, is no violation of fundamental or legal rights of citizens and persons. Remember, protection of rights is incidental object.	Determination of right or liability	Determine innocence or Guilt of the accused
Court fee	Nominal, ex: Rs 100 or 200 only.	It is based on value of the right claimed.	No court fee.
Time period	No time limitation. However. Laches, bonafides, acquiescence, waiver are	Limitation Act applies	Limitation Act applies for offences less than
	guiding factors		three years and Appeal, revision.
Territorial Jurisdiction	If part of Cause of action take place within the territory of High court. Even then, principle of forum convenience is the guiding factor	If part of Cause of action take place within the territory of court.	If part of Cause of action take place within the territory of court.

Remedy	Discretionary. Effective alternative remedy, Laches, lack of bonafides, complicated question of fact etc., are guiding factors to refuse relief.	Shall be granted if facts could prove essentials of right except in case of Specific Relief Act.	If the ingredients of the offence are proved accused can be punished.
Locus standi	Does not apply, however, it is a guiding factor	Strictly applies except in certain situations	It's flexible basing on kind and nature of offence
Pleadings	Pleading must state both facts And evidence	Only material facts. Not evidence or law.	Only Material facts
Documents	Only Photo copies must be filed. NO issue of Certified copies of documents	All originals must be filed And they shall be	All originals must be filed And they shall be

QUASI-JUDICIAL FRAMEWORK

Consumer Tribunals: The Consumer Protection Act, 1986 is a benevolent social legislation that lays down the rights of the consumers and provides less expensive and often speedy redressal of their grievances. By spelling out the rights and remedies of the consumers in a market so far dominated by organized manufacturers and traders of goods and providers of various types of services, the Act makes the dictum, caveat emptor ('buyer beware') a thing of the past.

To provide inexpensive, speedy and summary redressal of consumer disputes, quasi-judicial bodies have been set up in each District and State and at the National level, called the District Forums, the State Consumer Disputes Redressal Commissions and the National Consumer Disputes Redressal Commission respectively. Each District Forum is headed by a person who is or has been or is eligible to be appointed as a District Judge and each State Commission is headed by a person who is or has been a Judge of High Court.

The provisions of this Act cover 'goods' as well as 'services'. The goods are those which are manufactured or produced and sold to consumers through wholesalers and retailers. The services are in the nature of transport, telephone, electricity, housing, banking, insurance, medical treatment, etc.

Consumer Forum proceedings are summary in nature. The endeavor is made to grant relief to the aggrieved consumer as quickly as in the quickest possible, keeping in mind the provisions of the Act which lay down time schedule for disposal of cases.

If a consumer is not satisfied by the decision of a District Forum, he can appeal to the State Commission. Against the order of the State Commission a consumer can come to the National Commission.

Consumer: A consumer is any person who buys any goods for a consideration and user of such goods where the use is with the approval of a buyer, any person who hires/avails of any service for a consideration & any beneficiary of such services, where such services are availed of with the approval of the person hiring the service. The consumer need not have made full payment.

Complaint:

a. An unfair trade practice or a restrictive trade practice has been adopted by any trader;
b. The goods bought by him or agreed to be bought by him suffer from one or more defects;
c. The services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect.
d. A trader has charged for the goods mentioned in the complaint a price in excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods.
e. Goods which will be hazardous to life and safety when used, are being offered for sale to the public in contravention of the provisions of any law for the time being in force requiring traders to display information in regard to the contents, manner and effect of use of such goods.

Who can file a complaint?

a. Consumer
b. A Registered Consumer Organization
c. Central or State Government & one or more consumers, where there are numerous consumers having the same interest.

No stamp or court fee is needed

Grounds of Complaint:

a. Any unfair trade practice or restrictive trade practice adopted by the trader.
b. Defective goods.
c. Deficiency in service.

d. Excess price charged by the trader.
e. Unlawful goods sale which is hazardous to life and safety when used.

Procedure to be followed by the Consumer Courts: The following procedure is equally applicable to the District Forum, State Commission with required modifications and National Commission with additional procedures required by the rules. A written complaint, can be filed before the District Consumer Forum for pecuniary value of up to Rupees twenty lakh, State Commission for value upto Rupees one crore and the National Commission for value above Rupees one crore, in respect of defects in goods and or deficiency in service. The service can be of any description and the illustrations given above are only indicative. However, no complaint can be filed for alleged deficiency in any service that is rendered free of charge or under a contract of personal service.

The remedy under the Consumer Protection Act is an alternative in addition to that already available to the aggrieved persons/consumers by way of civil suit. In the complaint/appeal/petition submitted under the Act, a consumer is not required to pay any court fees but only a nominal fee.

Where Laboratory Test is required - A consumer is supposed to file as many copies of the complaint as there are number of judges, with all essential information, supporting papers like correspondence, and specifying the compensation demanded.

On receipt of such complaint -

(a) The District Forum should refer a copy of the complaint to the opposite party directing him to give his version of the case within a period of thirty days which can be extended to forty five days.
(b) The District Forum may require the complainant to deposit specified fees for payment to the appropriate laboratory for carrying out the necessary analysis or test in relation to the goods in question.
(c) The District Forum will obtain a sample of the goods, seal it, authenticate it and refer the sample so sealed to the appropriate laboratory for an analysis or test, whichever may be necessary, with a view to finding out whether such goods suffer from any defect.

    The District Forum will remit the fees to the appropriate laboratory to enable it to carry out required analysis or test. The laboratories supposed to report its findings to the District Forum within a period of fifty-five days. This period is extendible by the District Forum.

(d) Upon receiving laboratory’s report, its copy will be forwarded by the District Forum to the opposite party along with its own remarks.

(e) In the event of any party disputing the correctness of the findings, or the methods of analysis or test adopted by the appropriate laboratory, the District Forum shall require the objecting party to submit his objections in writing.
(f) The District Forum will give an opportunity of hearing to the objecting party.
(g) The District Forum shall issue appropriate order after hearing the parties.

Where No Laboratory Test is required or Complaint Relates to Services -

(a) On receiving the complaint, the District Forum should refer a copy of the complaint to the opposite party directing him to give his version of the case within a period of thirty days which can be extended to forty five days.
(b) The opposite party on receipt of a complaint referred to him may-
    i. admit the complaint
    ii. deny or dispute the allegations contained in the complaint, or
    iii. omits or fails to respond within the time given by the District Forum.
(c) Where the opposite party admits the allegation, the District Forum should decide the matter on the basis of the merits of the case and the documents before it.

    Where the opposite party denies or disputes the allegations made in the complaint, the District Forum will proceed to settle the dispute on the basis of evidence brought to its notice by both the parties.

    Where the opposite party omits or fails to respond within the time given by the Forum, the District Forum will proceed to settle the dispute on the basis of evidence brought to its notice by the complainant.

(d) The District Forum shall issue an appropriate order after hearing the parties and taking into account available evidence.

Time Period for Complaint: As per Section 24 A, a complaint under the Act should be brought within a period of two years from the date on which the cause of action arises.

Penalties: Consumer Courts are empowered to punish the person who feels to comply with their orders with an imprisonment up to three years or fine up to Rs. 10,000/- or with both.

Enforcement of Order: The Consumer Courts (District Court, State Commission and National Commission) are given vast powers to enforce their orders. In case of non-compliance of any interim order, they can attach the property of the person non-complying their order. In case, noncompliance continues for more than six months, the Consumer Courts can sell such attached property.

In case, any amount is due from any person under an order of Consumer Court. The person entitle to that amount can apply to consumer court and court can issue a certificate for the said amount to the Collector of the District (by whatever named called) and the Collector after receiving that certificate from court shall proceed to recover the amount in the same manner as arrear of land revenue. After recovery by Collector, the amount is paid to entitle person.

Appeal: Appeal is a legal instrumentality whereby a person not satisfied with the findings of a court has an option to go to a higher court to present his case and seek justice. In the context of Consumer Forums -

a. An appeal can be made with the State Commission against the order of the District Forum within 30 days of the order which is extendable for further 15 days.
b. An appeal can be made with the National Commission against the order of the State Commission within 30 days of the order or within such time as the National Commission allows.
c. An appeal can be made with the Supreme Court against the order of the National Commission within 30 days of the order or within such time as the Supreme Court allows. Now after 2002 amendment, the appellant has to deposit fifty percent amount which he is required to pay in terms of an order of consumer court or twenty five thousand rupees in State Commission/fifty thousand rupees in National Commission whatever is less.

ADMINISTRATIVE TRIBUNALS

The enactment of Administrative Tribunals Act in 1985 opened a new chapter in the sphere of administering justice to the aggrieved government servants. Administrative Tribunals Act owes its origin to Article 323-A of the Constitution which empowers Central Government to set-up by an Act of Parliament, Administrative Tribunals for adjudication of disputes and complaints with respect to recruitment and conditions of service of persons appointed to the public service and posts in connection with the affairs of the Union and the States. In pursuance of the provisions contained in the Administrative Tribunals Act, 1985, the Administrative Tribunals set-up under it exercise original jurisdiction in respect of service matters of employees covered by it. As a result of the judgment dated 18 March 1997 of the Supreme Court, the appeals against the orders of an Administrative Tribunal shall lie before the Division Bench of the concerned High Court.

The Administrative Tribunals exercise jurisdiction only in relation to the service matters of the litigants covered by the Act. The procedural simplicity of the Act can be appreciated from the fact that the aggrieved person can also appear before it personally. The Government can present its case through its departmental officers or legal practitioners. Thus, the objective of the Tribunal is to provide for speedy and inexpensive justice to the litigants.

The Act provides for establishment of Central Administrative Tribunal (CAT) and the State Administrative Tribunals. The CAT was set-up on 1 November 1985. Today, it has 17 regular benches, 15 of which operate at the principal seats of High Courts and the remaining two at Jaipur and Lucknow. These Benches also hold circuit sittings at other seats of High Courts. In brief, the tribunal consists of a Chairman, Vice-Chairman and Members. The Members are drawn, both from judicial as well as administrative streams so as to give the Tribunal the benefit of expertise both in legal and administrative spheres.

Department of Administrative Reforms and Public Grievances is the nodal agency of the Government for Administrative Reforms as well as redressal of public grievances relating to the States in general and grievances pertaining to Central Government agencies in particular. The Department disseminates information on important activities of the Government relating to administrative reforms best practices and public grievance redressal through publications and documentation. The Department also undertakes activities in the field of international exchange and cooperation to promote public service reforms.

The mission of the Department is to act as a facilitator, in consultation with Central Ministries/Departments, States/UT Administrations, Organizations and Civil Society Representatives, to improve Government functioning through process re-engineering, systemic changes. Organization and Methods, efficient Grievance handling promoting modernization, Citizens Charters, award schemes, e-governance and best practices in government.

TELECOM DISPUTE SETTLEMENT AND APPELLATE TRIBUNAL

The Telecom Disputes Settlement and Appellate Tribunal (TDSAT) was established to adjudicate disputes and dispose of appeals with a view to protect the interests of service providers and consumers of the telecom sector and to promote and ensure orderly growth of the telecom sector.

This quasi-judicial framework was established in order to cater to the dynamic transitional phase of the Indian Telecom Sector in the early 1990s.

The functions of the appellate tribunal are to adjudicate any dispute between a licensor and licensee, between two or more service providers, between a service provider and a group of consumers, and to hear and dispose of appeals against any decision or order of TRAI, the appellate tribunal consists of Chairperson and two Members.

The Appellate Tribunal came into existence on 29th May, 2000 and started hearing cases from January 2001. Hon’ble Mr. Justice Suhas C. Sen, former Judge of Supreme Court of India, was appointed as its first Chairperson and succeeded by Hon'ble Mr. Justice D.P. Wadhwa and Hon'ble Mr.Justice N. Santosh Hegde,Mr. Justice Arun Kumar. The Tribunal is presently headed by Hon’ble Mr. Justice S.B.Sinha, a former Judge of the Supreme Court, Chairperson. The detailed procedure for filing a dispute before the Tribunal is laid down in the Telecom Dispute Settlement and Appellate Tribunal Procedures 2005.

COMPANY LAW BOARD

The Company Law Board is an independent quasi-judicial body in India which has powers to overlook the behavior of companies within the Company Law. The concept of Company Law

Board in its present form was introduced through an amendment to the Companies Act of 1956 in the year 1988. It was constituted in its present form on May 31, 1991.Under Section 10E of the Companies Act, 1956 replacing the erstwhile Company Law Board which was primarily as a delegate of the Central government since 1964. The Company Law Board has framed Company Law Board Regulations 1991 wherein all the procedure for filing the applications/petitions before the Company Law Board has been prescribed. The Central Government has also prescribed the fees for making applications/petitions before the Company Law Board under the Company Law Board (Fees on applications and Petitions) Rules 1991. The Company Law Board will be succeeded over by the National Company Law Tribunal, which will govern all companies under the Companies Act, 2013.

In terms of Section 10F of the Companies Act, any person aggrieved by any decision or order of the Company Law Board may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order.

NATIONAL GREEN TRIBUNAL

The National Green Tribunal has been established on 18.10.2010 under the National Green Tribunal Act 2010 for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto. It is a specialized body equipped with the necessary expertise to handle environmental disputes involving multi-disciplinary issues. The Tribunal shall not be bound by the procedure laid down under the Code of Civil Procedure, 1908, but shall be guided by principles of natural justice.

The Tribunal's dedicated jurisdiction in environmental matters shall provide speedy environmental justice and help reduce the burden of litigation in the higher courts. The Tribunal is mandated to make and endeavor for disposal of applications or appeals finally within 6 months of filing of the same. Initially, the NGT is proposed to be set up at five places of sittings and will follow circuit procedure for making itself more accessible. New Delhi is the Principal Place of Sitting of the Tribunal and Bhopal, Pune, Kolkata and Chennai shall be the other four place of sitting of the Tribunal.

INCOME TAX APPELLATE TRIBUNAL

In pursuance of the recommendations made by the Select Committee, the Legislature introduced Chapter IL-A (Section 5A) in the Indian Income-tax Act in 1941 and 25.1.1941 was notified as the appointed date from which the Tribunal came into being. Subject to minor variations consequent on the expansion of the Tribunal and extension of its jurisdiction the section remained unchanged in its essentials till the repeal of the Income-tax Act, 1922 with effect from 1.4.1962. In the income-tax Act of 1961, the constitution and functions of the Tribunal have been set out in sections 252 to 255. There is no fundamental change either in the constitution or in the functions of the Tribunal due to enactment of the new Income-tax Act. Bench as a rule is to consist two-members--one Judicial and one Accountant Member. Wealth tax Act and the Gift Tax Act introduced in sixties however did not specifically require the Bench of one members each of a class and it may a bench of any two members, Judicial or Accountant. A provision was also made for the constitution of special three-member Benches (consisting of two members of one class and one of the other) and enabling a single member (judicial or accountant) authorised in that behalf, to dispose of small appeals.

DEBT RECOVERY TRIBUNAL

Keeping in line with the international trends on helping financial institutions recover their bad debts quickly and efficiently, the Government of India has constituted thirty three Debts Recovery Tribunals and five Debts Recovery Appellate Tribunals across the country.

The Debts Recovery Tribunal (DRT) enforces provisions of the Recovery of Debts Due to Banks and Financial Institutions (RDDBFI) Act, 1993 and also Securitization and Reconstruction of Financial Assets and Enforcement of Security Interests (SARFAESI) Act, 2002.

There are a number of States that do not have a Debts Recovery Tribunal. The Banks & Financial Institutions and other parties in these States have to go to Debts Recovery Tribunal located in other states having jurisdiction over there area. Thus the territorial jurisdiction of some Debts Recovery Tribunal is very vast. The setting up of a Debts Recovery Tribunal is dependent upon the volume of cases.

Appeals against orders passed by Debts Recovery Tribunal (DRT) lie before Debts Recovery Appellate Tribunal (DRAT).

ALTERNATE MEANS OF DISPUTE RESOLUTION

Arbitration: Justice delivery institutions in most of the developing countries in the world are currently confronted with serious crises, mainly on account of delay in the resolution of the disputes particularly the delay in disposal of the commercial and other civil matters. We must admit that this situation has eroded public trust and public confidence in the justice delivery institutions. It obstructs economic growth, development and social justice to the citizens in a country. The crises therefore, call for an urgent solution. The cause for such backlog of cases is institutional and the delay in disposal of the cases is due to procedural laws. Administrative institutions have failed to monitor the status, substance and pace of litigation in the courts.

Alternative Dispute Resolution (ADR) is a term for describing process of resolving disputes in place of litigation and includes arbitration, mediation, conciliation, expert determination and early neutral evaluation by a third person. In many important respects, arbitration is similar/common with court based litigation than the other forms of ADR. Prior to the enactment of The Arbitration and Conciliation Act, 1996, none of these forms of ADR except arbitration have any statutory basis in India. Mediation and Conciliation require an independent third party as mediator or conciliator to assist the parties to settle their disputes. The expert determination requires independent experts in the subject of disagreement of the parties to decide the case. Such expert is chosen jointly by the parties and his decision is binding.

The objective of ADR as the phrase itself suggest is to resolve disputes of all sorts outside the traditional legal mechanism i.e. courts/judicial system. There is a broad spectrum ranging from the purely consensual mode of resolution of disputes to an executive procedure like arbitration, conciliation or negotiation. Alternatively a combination of some of these techniques like negotiation, conciliation, mediation and arbitration may also be used to resolve certain disputes. ADR thus offers an alternative route for resolution of disputes. The emphasis in the ADR, which is informal and flexible, is on "helping the parties to help themselves".

Arbitration and Conciliation Act 1996 - The Act is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules 1976.

Objective - Framed to cater to the international commitments of India, the Arbitration and Conciliation Act 1996 was enacted to achieve the following objectives:

a. to comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation;
b. to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;
c. to provide that the arbitral tribunal gives reasons for its arbitral award;
d. to ensure that the arbitral tribunal remains within the limits of its jurisdiction;
e. to minimize the supervisory role of courts in the arbitral process;
f. to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;
g. to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;
h. to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and
i. to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two International Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award."

Scheme of the Act: The Act is a composite piece of legislation. It provides for domestic arbitration; international commercial arbitration; enforcement of foreign award and conciliation (the latter being based on the UNCITRAL Conciliation Rules of 1980).

The more significant provisions of the Act are to be found in Part I and Part II thereof. Part I contains the provisions for domestic and international commercial arbitration in India. All arbitration conducted in India would be governed by Part I, irrespective of the nationalities of the parties. Part II provides for enforcement of foreign awards. Part I is more comprehensive and contains extensive provisions based on the Model Law. It provides inter alia for arbitrarily of disputes; non-intervention by courts; composition of the arbitral tribunal; jurisdiction of arbitral tribunal; conduct of the arbitration proceedings; recourse against arbitral awards and enforcement. Part II on the other hand, is largely restricted to enforcement of foreign awards governed by the New York Convention or the Geneva Convention. Part II is thus, (by its very nature) not a complete code. This led to judicial innovation by the Supreme Court in the case of *Bhatia International v. Bulk Trading* (2002) 4 SCC 105. Here the Indian courts jurisdiction was invoked by a party seeking interim measures of protection in relation to arbitration under the ICC Rules to be conducted in Paris. The provision for interim measure (section 9) was to be found in Part I alone (which applies only to domestic arbitration). Hence the Court was faced with a situation that there was no *proprio vigore* legal provision under which it could grant interim measure of protection. Creatively interpreting the Act, the Supreme Court held that the "general provisions" of Part I would apply also to offshore arbitrations, unless the parties expressly or impliedly exclude applicability of the same. Hence by judicial innovation, the Supreme Court extended applicability of the general provisions of Part I to off-shore arbitrations as well.

Subject matter of arbitration: Any commercial matter including an action in tort if it arises out of or relates to a contract can be referred to arbitration. However, public policy would not permit matrimonial matters, criminal proceedings, insolvency matters anti-competition matters or commercial court matters to be referred to arbitration. Employment contracts cannot be referred to arbitration apart from the disputes between the directors and the company as it lacks a master-servant relationship. This rule was laid down in *Comed Chemicals Ltd. v. C.N. Ramchand* 2008 (13) SCALE 17.

Further matters covered by statutory reliefs through statutory tribunals cannot be a subject matter of arbitration.

Role of the court - One of the fundamental features of the Act is that the role of the court has been minimized. Accordingly, Section 8 provides that any matter before a judicial authority containing an arbitration agreement shall be referred to arbitration. Further, no judicial authority shall interfere, except as provided for under the Act.

In relation to arbitration proceedings, parties can approach the Court only for two purposes:

a. for any interim measure of protection or injunction or for any appointment of receiver etc.; or
b. for the appointment of an arbitrator in the event a party fails to appoint an arbitrator or if two appointed arbitrators fail to agree upon the third arbitrator. In such an event, in the

case of domestic arbitration, the Chief Justice of a High Court may appoint an arbitrator, and in the case of international commercial arbitration, the Chief Justice of the Supreme Court of India may carry out the appointment. A court of law can also be approached if there is any controversy as to whether an arbitrator has been unable to perform his functions or has failed to act without undue delay or there is a dispute on the same. In such an event, the court may decide to terminate the mandate of the arbitrator and appoint a substitute arbitrator.

Jurisdiction of the arbitrator - The Act provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. The arbitration agreement shall be deemed to be independent of the contract containing the arbitration clause, and invalidity of the contract shall not render the arbitration agreement void. Hence, the arbitrators shall have jurisdiction even if the contract in which the arbitration agreement is contained is vitiated by fraud and/or any other legal infirmity. Further, any objection as to jurisdiction of the arbitrators should be raised by as party at the first instance, i.e., either prior to or along with the filing of the statement of defence. If the plea of jurisdiction is rejected, the arbitrators can proceed with the arbitration and make the arbitral award. Any party aggrieved by such an award may apply for having it set aside under Section 34 of the Act. Hence, the scheme is that, in the first instance, the objections are to be taken up by the arbitral tribunal and in the event of an adverse order; it is open to the aggrieved party to challenge the award.

Conduct of arbitration proceedings - The arbitrators are masters of their own procedure and subject to parties agreement, may conduct the proceedings "in the manner they consider appropriate." This power includes- "the power to determine the admissibility, relevance, materiality and weight of any evidence" Section 19 (3) and (4). The only restrain on them is that they shall treat the parties with equality and each party shall be given a full opportunity to present his case, which includes sufficient advance notice of any hearing or meeting. 13 Neither the Code of Civil Procedure nor the Indian Evidence Act applies to arbitrations.14 Unless the parties agree otherwise, the tribunal shall decide whether to hold oral hearings for the presentation of evidence or for arguments or whether the proceedings shall be conducted on the basis of documents or other material alone. However the arbitral tribunal shall hold oral hearings if a party so requests (unless the parties have agreed that no oral hearing shall be held).15

Arbitrators have power to proceed exparte where the respondent, without sufficient cause, fails to communicate his statement of defence or appear for an oral hearing or produce evidence. However, in such situation the tribunal shall not treat the failure as an admission of the allegations by the respondent and shall decide the matter on the evidence, if any, before it. If the claimant fails to communicate his statement of the claim, the arbitral tribunal shall be entitled to terminate the proceedings.

Governing Law - In an international commercial arbitration, parties are free to designate the governing law for the substance of the dispute. If the governing law is not specified, the arbitral tribunal shall apply the rules of law it considers appropriate in view of the surrounding circumstances. For domestic arbitration, however, (i.e., between Indian parties), the tribunal is required to decide the dispute in accordance with the substantive laws of India.

Conclusion: India has in place a modern, an efficient Arbitration Act. There have been some decisions which are not in tune with the letter or spirit of the Act. Hopefully, these would be addressed by the judiciary in the near future and continuing popularity of arbitrations would be served by a truly efficient ADR mechanism.

MEDIATION

Mediation is a form of alternative dispute resolution in which a neutral third person helps the parties reaches a voluntary resolution of a dispute. Mediation is an informal, confidential, and flexible process in which the mediator helps the parties to understand the interests of everyone involved, and their practical and legal choices. It can help people resolve civil, family, juvenile and other matters in a less adversarial setting. Court mediation programs have been shown to save the parties time and money, improve satisfaction with the court’s services and reduce future disputes and offenses. Mediation, as used in law, is a form of alternative dispute resolution (ADR), a way of resolving disputes between two or more parties with concrete effects. Typically, a third party, the mediator, assists the parties to negotiate a settlement. Disputants may mediate disputes in a variety of domains, such as commercial, legal, diplomatic, workplace, community and family matters.

The term "mediation" broadly refers to any instance in which a third party helps others reach agreement. More specifically, mediation has a structure, timetable and dynamics that "ordinary" negotiation lacks. The process is private and confidential, possibly enforced by law. Participation is typically voluntary. The mediator acts as a neutral third party and facilitates rather than directs the process.

Mediators use various techniques to open, or improve, dialogue and empathy between disputants, aiming to help the parties reach an agreement. Much depends on the mediator's skill and training. As the practice gained popularity, training programs, certifications and licensing followed, producing trained, professional mediators committed to the discipline.

The mediator helps the parties to: communicate better, explore legal and practical settlement options, and reach an acceptable solution of the problem.

The mediator does not decide the solution to the dispute; the parties do. Mediation can result in a legally enforceable contract agreed to, in writing, by the parties.

OMBUDSMAN

An ombudsman or public advocate is usually appointed by the government or by parliament, but with a significant degree of independence, who is charged with representing the interests of the public by investigating and addressing complaints of maladministration or violation of rights. In some countries an Inspector General, Citizen Advocate or other official may have duties similar to those of a national ombudsman, and may also be appointed by the legislature. Below the national level an ombudsman may be appointed by a state, local or municipal government, and unofficial ombudsmen may be appointed by, or even work for, a corporation such as a utility supplier or a newspaper, for an NGO, or for a professional regulatory body.

Whether appointed by a legislature, the executive, or an organization (or, less frequently, elected by the constituency that he or she serves), the typical duties of an ombudsman are to investigate complaints and attempt to resolve them, usually through recommendations (binding or not) or mediation. Ombudsmen sometimes also aim to identify systemic issues leading to poor service or breaches of people's rights. At the national level, most ombudsmen have a wide mandate to deal with the entire public sector, and sometimes also elements of the private sector (for example, contracted service providers). In some cases, there is a more restricted mandate, for example with particular sectors of society. More recent developments have included the creation of specialized Children's Ombudsman and Information Commissioner agencies.

In some jurisdictions an ombudsman charged with handling concerns about national government is more formally referred to as the "Parliamentary Commissioner" (e.g. the United Kingdom Parliamentary Commissioner for Administration, and the Western Australian state Ombudsman). In many countries where the ombudsman's remit extends beyond dealing with alleged maladministration to promoting and protecting human rights, the ombudsman is recognized as the national human rights institution. The post of ombudsman had by the end of the 20th century been instituted by most governments and by some intergovernmental organizations such as the European Union.

LEGAL SERVICES

Legal Service Authority – Salient Features of Adjudicatory Process: Welfare Legislations made relating to land for the benefit of poor and laws enacted to check the atrocities against weak didn’t yield desired result as promised in the Constitution. Among various reasons, it was prominently felt that Anglo-Saxon legal system which we inherited is the chief cause for this plight. To undo this situation, Indian parliament by way of 42nd Amendment to the constitution introduced Article 39A to constitution. Article 39A titled as Equal justice and free legal aid says the state shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Thus, tone and tenor of A.39A sought for paradigm shift in structuring legal system in a way that ensures access of justice to everyone both qualitatively and quantitatively. Taking cue from it the Parliament of India in the year 1987 enacted Legal service authority Act-1987 is enacted. If one peruses the grand goals, institutional structures and modus operandi provided under this Act gives certainty of meeting the essence of A.39A of constitution. Let us see the novel features of this Act and important schemes brought under this Act so as to show the utility and importance of this Act in the context of Indian legal system.

Features of the Legal service Authority Act: The special features of this Statute can be understood from three angles. First, Institutional structures created and their composition. Second, Kind and nature of services and Persons entitled for the services under this Act. Third, Powers and methods to resolve disputes by institutions created under this Act.

First, Institutional structures created and their composition. There is a National Legal Services Authority at the national level and there is State Legal Services Authority at State level and District Legal service authority at District level. Lastly, Taluk or Mandal Legal service committee at Mandal level. The National level and State level bodies lay down policies and principles for making legal services available under the provisions of the Act and to frame most effective and economical schemes for legal services including funds etc.,. The uniqueness of institutions created under this statute is that there is a conglomeration of all three wings of the state. To illustrate, at the lower where LSA is functioning one can find presence of senior most judge as Chairman and Sub-divisional Revenue officer and police officer as members of the Taluk Legal services Committee. Whereas at District level we find Principal District judge as Chairman of District legal service authority and members being District collector and superintend of police. Further, members of non-governmental organizations and senior advocates are members of this committee. As result of this kind of conglomeration, disputes can be sorted out and remedied in a very conducive atmosphere especially in a quick and inexpensive manner. However, in a reality there is hardly any Sub-divisional Revenue or police officers who are aware of these provisions. Though very few judicial officers are aware of this kind arrangement they hardly took any take initiative in this regard.

Thus the cursory look at kind of services LSA offers and to whom it offers, there shall be no objection any one whatsoever. However, the problem is with quality of services. In order to render legal services as defined under the Act, legal services authority has to necessarily engage lawyers with requisite skills and knowledge, but no able lawyer is coming forward to render quality services. Added to this due to poor knowledge and legal skills of young law graduates which is primarily due incompetent legal education standards, poor and needy are not getting competent free legal service authority despite structured mechanism and able machinery. It is apt mention a word about Leal literacy camps. This Act mandates conducting of legal literacy camps so to educate masses about law and it utilization. However, legal literacy camps are conducted more for the sake of statistics in many parts of the state. The reason can’t solely be attributed authorities as for them legal service is only an additional duty as their main job is some other, which is tough, complex and circumscribed with targets. As a result of all these factors legal aid and legal literacy camps are not been happen in their true spirit.

Under the Act any person who wishes to receive legal service and eligible to receive legal service can give a written application before legal service committee. It is important to note that such legal assistance sought can be pertaining to pending litigation or pre-litigation. This application can be made before any legal service authority i.e., Taluk legal service committee or District legal service committee. On receipt of such application legal service committees shall refer to such matter to Lok-adalat which has jurisdiction to try the case and resolve the matter. The Taluk Legal service committee or District legal service committee can create as many Lok-Adalath Benches for the disposal of applications. In this connection it is pertinent to mention the novelty of this kind of resolution mechanism is that there is no court-fee, flexible and simplified procedure to resolve the dispute, the LoK-Adalat bench has powers of civil court so as to summon any person to attend and give evidence and produce documents. More importantly, the award passed by Lok-adalath is as good as decree passed by civil court and as such it can be enforced like a civil court decree.

The novel features envisaged under this resolution structure are no doubt laudable. However, in reality there are very very few cases where we find resolution of disputes by way of pre-litigation method. In this connection it must also be stated that special and peculiar skills are required for the persons who are holding Lok-Aadlat benches. But manning of this bodies by judges and lawyers who are engaged with some tasks, for which they are not primarily meant, resulting them failure to give undivided and focused attention to the Lok-Adalath benches. Moreover, skills required for resolving disputes in regular court in comparison with Lok-Adalath are completely different though stream of knowledge may be same. As result, of this variation if not contradiction of skills between person holding Lok-Adalath bench and Judge coupled with other administrative inconvenience Lok-Adalath are failing to resolve disputes amicably except acting as machines to record comprises occurred elsewhere.

Lok Adalat System in India: ADR is a suitable alternative mechanism to resolve disputes in place of litigation. The Committee for implementing Legal Aid Schemes (CILAS) constituted by the Ministry of Law and Justice, Govt. of India in 1980 recommended the establishment of Lok Adalat. Consequently, Lok Adalat movement is accepted to be one of the components. It has assumed great importance and attained a statutory recognition under the Legal Services Authorities Act, 1987, which was enforced w.e.f. November 9, 1995. They are not akin to regularly constituted courts but they supplement the existing justice administration system. They provide adequate and effective means of disputes resolution at reasonable costs. Special status has been assigned to the Lok Adalat under the Legal Services Authorities Act which provides statutory base to such Lok Adalat, which are regularly organized primarily by the State Legal Aid and Advice Boards with the help of District Legal Aid and Advice Committees. Some of the Lok Adalats are being sponsored by the various voluntary legal aid agencies. The whole emphasis in the Lok Adalat proceedings is on conciliation rather than adjudication. A Lok Adalat has jurisdiction to determine and arrive at a compromise or settlement between the parties to a dispute in respect of any matter falling within the jurisdiction of any civil, criminal, or revenue courts or of any tribunal constituted under any law for the time being in force for the area for which the Lok Adalat is being organized. In a case where a pending action or proceeding is referred to Lok Adalat by a Joint Application of the parties, the Lok Adalat is to proceed to dispose of that proceeding or matter and arrive at compromise or settle the disputes between the parties. In doing so, the Lok Adalat must be guided by legal principles and principles of justice, equity and fair play. In a case where no compromise or settlement can be arrived at, it is open to the parties to the proceeding, to request for transfer of their proceedings before the courts at a later stage from which it was transferred. Every award of the Lok Adalat is a civil decree and every award made by the Lok Adalat is deemed to be final and binding on all parties to the proceedings or disputes. No appeal lies to any court against such an award. The Lok Adalat is empowered to exercise substantive powers vested in a civil court under the Code of Civil Procedure while trying a suit or proceeding.

MODULE IV

Fundamental Aspects of Laws and its Relevance to Maritime Law

INTRODUCTION

Till now we have seen the concept of laws, the sources from law has emerged, the tools that it uses to operate. We also saw an overview of our constitution which lays down the basic law of the land and provides authority and validity to other legislations to operate. Thereafter a detail insight was provided on the functioning of the Indian Legal System and the Indian Judiciary in the second module.

However there is another aspect or rather aspects of law which is very crucial for our course participants to understand in order to have a better and wholesome understanding regarding the operation of International maritime law in India as well as in the international sphere.

This module will discuss in brief and provide an overview of various aspects of law. Law has evolved and developed and is still growing in accordance with the contemporary needs of the society. Different areas of human activities are gradually getting regulated by law. This module thus seeks to provide a basic understanding of those areas along with a special focus on the importance of such laws with respect to maritime.

LAW OF CONTRACTS

What is a contract?

Entering into contractual agreements mostly oral is a part of our daily lives and we get involved in it even without being aware of the fact that we are entering into a contract with another person. Taking a seat in a bus amounts to entering into a contract. When you put a coin in the slot of a weighing machine, you have entered into a contract. You go to a restaurant and take snacks; you have entered into a contract. In such cases, we do not even realize that we are making a contract. In the case of people engaged in trade, commerce and industry, they carry on business by entering into contracts.

The law relating to contracts is to be found in the Indian Contract Act, 1872. The law of contracts differs from other branches of law in a very important respect. It does not lay down so many precise rights and duties which the law will protect and enforce; it contains rather a number of limiting principles, subject to which the parties may create rights and duties for themselves and the law will uphold those rights and duties.

Agreement

Section 2(h) of the Indian Contract Act, 1872 defines a contract as an agreement enforceable by law. An agreement is an accepted proposal. To constitute a contract there must be an agreement. An agreement is composed of two elements—offer and acceptance. The party making the offer is known as the offeror, the party to whom the offer is made is known as the offeree. Thus, there are essentially to be two parties to an agreement. They both must be thinking of the same thing in the same sense. In other words, there must be consensus-ad-idem.

An obligation which does not have its origin in an agreement does not give rise to a contract. Some of such obligations are torts or civil wrongs or quasi-contracts or judgments of the courts or relationship between husband and wife, etc. These obligations are not contractual in nature, but are enforceable in a court of law. Law of Contracts creates rights in personam as distinguished from rights in rem. Rights in rem are generally in regard to some property as for instance to recover land in an action of ejectment. Such rights are available against the whole world. Rights in personam are against or in respect of a specific person and not against the world at large.

Essentials of a valid contract

Offer and Proposal

The very first step towards entering into a contract is making an offer to do something or abstain from doing something to another person. When such offer is accepted, it creates legal relationship between the person who made the offer and the person to whom the offer was made and later on he accepted the offer. A statement by a person, called the offeror, indicating his willingness to contract which statement is made in the awareness that it shall become binding an acceptance by the other person called the offeree.

Consideration

Under basic principles of contract law, consideration is the answer to the question, "Why are you entering this contract?" or "What are you receiving for being a party to this contract?"

The agreement must be supported by consideration on both sides. Each party to the agreement must give or promise something and receive something or a promise in return. Consideration is the price for which the promise of the other is sought. However, this price need not be in terms of money. In case the promise is not supported by consideration, the promise will be *nudum pactum* (a bare promise) and is not enforceable at law. Moreover, the consideration must be real and lawful.

Capacity

Capacity as an essential element of contract means that the parties making the contract should be legally competent in the sense that each must be of the age of majority, of a sound mind, and not expressly disqualified from contracting. An agreement by incompetent parties shall be a legal nullity.

Consent

Another crucial aspect of having capacity is that the consent for contracting into a contract should be given freely and without any burden. 'Consent' means that the parties must agree about the subject matter of the agreement in the same sense and at the same time. Consent is said to be free if it is not induced by coercion, undue influence, fraud, misrepresentation or mistake. The absence of free consent would affect the legal enforceability of a contract. The consent of the parties to the agreement must be free and genuine. The consent of the parties should not be obtained by misrepresentation, fraud, undue influence, coercion or mistake. If the consent is obtained by any of these flaws, then the contract is not valid.

Void and Voidable Contracts

When dealing with contracts, the terms "void" and "voidable" are often confused. Even though these two contract types seem similar, they are actually completely different.

A contract that is "void" cannot be enforced by either party. The law treats a void contract as if it had never been formed. A contract will be considered void, for example, when it requires one party to perform an act that is impossible or illegal.

A "voidable" contract, on the other hand, is a valid contract and can be enforced. Usually only one party is bound to the contract terms in a voidable contract. The unbound party is allowed to cancel the contract, which makes the contract void.

The main difference between the two is that a void contract cannot be performed under the law, while a voidable contract can still be performed, although the unbound party to the contract can choose to void it before the other party performs.

Another category of contract is void ab initio contracts. These contracts are void from their very inception and thus in effect are invalid, null and void from the time they are concluded and hence cannot be enforced in any court of law. For instance a contract with a minor.

Discharge of contract

Discharge of contract means termination of the contractual relationship between the parties. When the rights and obligations arising out of a contract are extinguished, the contract is said to be discharged. A contract may be discharged either by the acts of the parties or the operation of law. Act of parties may take different forms like performance, agreement, breach, etc. while operation of law includes death, insolvency, etc. A contract may be discharged in any of the following ways:

1. Discharge by Performance:
2. Discharge by Death:
3. Lapse of Time:

4. Breach of Contract:
5. Impossibility of Performance: A contract must be capable of being performed. Section 56 provides "agreement to do an act impossible in itself is void". This rule is based on two principles:
    a. *Lex non cogit ad impossibilia* i.e. Law does not recognize the impossible.
    b. *Impossibilia nulla obligation east* i.e. An impossible act does not create any obligation.

Maritime Contracts

Maritime Law – Contracts - is the study of different contracts used in relation to ships, and the international and national legal framework for these contracts. The contracts relates to different aspects of the operation of a ship; building and repair, purchase, ship management, charter parties and bill of lading, and seafarers employment contracts. By examining different contracts with respect to one area of activity, one discovers connections that one perhaps otherwise would not have seen. Shipping is largely international and several of the contracts are based on international conventions or international standard agreements. Maritime Law – Contracts therefore provides the perfect opportunity for experiencing the international aspects of contract law. Students will also specialize in structure and management of shipping companies.

Over the years, maritime attorneys practicing along the Gulf Coast have been litigating contractual indemnity claims between oil companies and the contractors servicing oil and gas explorations on offshore platforms and vessels in the Gulf. These attorneys have been faced with the nearly impossible task of determining when a master service contract related to such services was considered to be “maritime” or “non-maritime” and therefore subject to the Texas and Louisiana Anti-Indemnity Statutes, which voided any indemnity provisions in those contracts related to oil fields. There had been a six-factor test articulated back in the 1990 case of Davis & Sons, Inc. v. Gulf Oil Corp.¸ 919 F.2d 313 (5th Cir. 1990), which was applied to those contracts and had led to many inconsistent results and created an almost the after-the-fact analysis of whether a contract was going to be considered to be governed by maritime law rather than state law. This six-factor analysis made the task of prospectively advising one’s clients about risk and insurance procurement requirements of a contract prior to any incident very difficult if not impossible.

Key Learning Objectives

- Recognise and analyse the form and nature of documents used in international trade
- Link international sales and carriage of goods by sea with cargo insurance
- Analyse CIF and FOB contracts with emphasis on obligations of sellers and buyers respectively
- Determine and state the rights and obligations of parties under a contract of affreightment
- Explain and differentiate carriage of goods under a ship charter and a bill of lading

- Identify, recognise and interpret components of various types of Bills of Lading according to transport modes, payment terms and sales contracts
- Summarise international rules governing risk allocation Identify issues to prevent and manage maritime fraud.

Most international sales, whether on CIF, FOB or other terms, include an obligation to transport the goods from one country to another. Worldwide, ships are the primary vehicle for performing contracts for the carriage of goods.

To complete an international sale, the buyer or seller or even other persons enter into a contract of carriage with the owner or operator of the carrying ship. One of the parties is also required to arrange insurance for the goods during transit. Hence contracts of carriage
are strongly inter-related with contracts of sale and contracts of cargo insurance: documents demanded from and provided by the ship and also from cargo insurers must satisfy the requirements of the contract of sale.

The whole transaction: sale, insurance and contracts of carriage, will contain provisions in the documents that cover performance and also liability of one or other of the parties if the obligations are not carried out. The expectations and requirements of both carriers and traders are influenced by – and sometimes frustrated by – the contractual obligations and rights of the other parties.

LAW OF TORTS

Tort derived from the Latin word '*tortum*', which means 'to twist'. It includes that conduct which is not straight or lawful. It is equivalent to the English term 'wrong'.

Salmond- It is a civil wrong for which the remedy is a common law action for unliquidated damages and which is not exclusively the breach of a trust or equitable obligation.

We may define tort as a civil wrong which is redressible by an action for unliquidated damages and which is other than a mere branch of contract or breach of trust.

There are many acts which are considered as a wrong. However, a few of them are not codified. Tort law not only identifies these civil wrong but also lays down few general principles that are applicable to these civil wrong.

This chapter seeks to provide a brief insight into these fundamental principles governing the law of torts. These principles have been gradually codified into numerous statutes.

Volenti Non Fit Injuria

There is no injury to one who consents. This principle was laid down in *Hall v. Brooklands Auto Racing Club* wherein the plaintiff was a spectator at a motor car race being held at Brooklands on a track owned by the defendant company. During the race, there was a collision between two cars, one of which was thrown among the spectators, thereby injuring the plaintiff. It was held that the plaintiff impliedly took the risk of such injury, the danger being inherent in the sport which any spectator could foresee, the defendant was not liable.

Ex Turpi Causa Non Oritur Actio

No action arises from a wrongful consideration. *Hardy v. Motor Insurers' Bureau*- This was a case where a security officer was dragged along when he tried to stop a car. Lord Denning MR said: 'no person can claim reparation or indemnity for the consequences of a criminal offence where his own wicked and deliberate intent is an essential ingredient in it… It is based on the broad rule of public policy that no person can claim indemnity or reparation for his own willful and culpable crime. He is under a disability precluding him from imposing a claim.'

Damnum sine injuria

Damage without wrongful act; damage or injury inflicted without any act of injustice; loss or harm for which there is no legal remedy. It is also termed *damnum absque injuria*. There are cases in which the law will suffer a man knowingly and wilfully to inflict harm upon another and will not hold him accountable for it. ***Gloucester Grammar School Case-*** The defendant, a schoolmaster, set up a rival school to that of the plaintiffs. Because of the competition, the plaintiffs had to reduce their fees from 40 pence to 12 pence per scholar per quarter. It was held that the plaintiffs had no remedy for the loss thus suffered by them.

Injuria sine damno

This maxim means injury without damage. Wherever there is an invasion of a legal right, the person in whom the right is vested is entitled to bring an action and may be awarded damages although he has suffered no actual damage. Thus, the act of trespassing upon another's land is actionable even though it has done the plaintiff not the slightest harm.

Negligence

Negligence is a tort which arises from the breach of the duty of care owed by one person to another from the perspective of a reasonable person. Although credited as appearing in the United States in Brown v. Kendall, the later Scottish case of Donoghue v Stevenson [1932], followed in England, brought England into line with the United States and established the 'tort of negligence' as opposed to negligence as a component in specific actions. In Donoghue, Mrs. Donoghue drank from an opaque bottle containing a decomposed snail and claimed that it had made her ill. She could not sue Mr. Stevenson for damages for breach of contract and instead sued for negligence. The majority determined that the definition of negligence can be divided into four component parts that the plaintiff must prove to establish negligence.

Nuisance

"Nuisance” is traditionally used to describe an activity which is harmful or annoying to others such as indecent conduct or a rubbish heap. Nuisances either affect private individuals (private nuisance) or the general public (public nuisance). The claimant can sue for most acts that interfere with their use and enjoyment of their land. In English law, whether activity was an illegal nuisance depended upon the area and whether the activity was "for the benefit of the commonwealth", with richer areas subject to a greater expectation of cleanliness and quiet.

Defamation

Defamation is tarnishing the reputation of someone; it has two varieties, slander and libel. Slander is spoken defamation and libel is printed or broadcast defamation. The two otherwise share the same features: making a factual assertion for which evidence does not exist.

Assault

In common law, assault is the tort of acting intentionally, that is with either general or specific intent, causing the reasonable apprehension of an immediate harmful or offensive contact. Because assault requires intent, it is considered an intentional tort, as opposed to a tort of negligence. Actual ability to carry out the apprehended contact is not necessary.

Battery

At common law, battery is the tort of intentionally and voluntarily bringing about an unconsented harmful or offensive contact with a person or to something closely associated with them (e.g. a hat, a purse). Unlike assault, battery involves an actual contact. The contact can be by one person (the tortfeasor) of another (the victim), or the contact may be by an object brought about by the tortfeasor. For example, the intentional contact by a car is a battery.

False Imprisonment

False imprisonment is a restraint of a person in a bounded area without justification or consent. False imprisonment is a common-law felony and a tort. It applies to private as well as governmental detention. When it comes to public police, the proving of false imprisonment is sufficient to obtain a writ of habeas corpus.

Trespass to Land

Trespass to land is a common law tort that is committed when an individual or the object of an individual intentionally enters the land of another without a lawful excuse. Trespass to land is actionable per se. Thus, the party whose land is entered upon may sue even if no actual harm is done. In some jurisdictions, this rule may also apply to entry upon public land having restricted access. A court may order payment of damages or an injunction to remedy the tort.

Malicious Prosecution

Malicious prosecution is a common law intentional tort, while like the tort of abuse of process, its elements include (1) intentionally (and maliciously) instituting and pursuing (or causing to be instituted or pursued) a legal action (civil or criminal) that is (2) brought without probable cause and (3) dismissed in favor of the victim of the malicious prosecution. In some jurisdictions, the term "malicious prosecution" denotes the wrongful initiation of criminal proceedings, while the term "malicious use of process" denotes the wrongful initiation of civil proceedings.

Fraud

Fraud is a deception deliberately practiced in order to secure unfair or unlawful gain. As a legal construct, fraud is both a civil wrong (i.e., a fraud victim may sue the fraud perpetrator to avoid the fraud and/or recover monetary compensation) and a criminal wrong (i.e., a fraud perpetrator may be prosecuted and imprisoned by governmental authorities). Defrauding people or organizations of money or valuables is the usual purpose of fraud, but it sometimes instead involves obtaining benefits without actually depriving anyone of money or valuables, such as obtaining a driver's license by way of false statements made in an application for the same.

Remedies

Remedies are of two types- (i) judicial and (ii) extra-judicial.

Judicial remedies are of three types:

(i) Damages, (ii) Injunction and (iii) Restitution of property

Damages

a) **Exemplary or Vindictive damages** – are damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice etc.

b) **Ordinary or Real damages** – are compensation for general damage. General damages are those which the law implies in every breach of contract and in every violation of a legal right.

c**) Nominal damages** – They are awarded for the vindication of a right where no real loss or injury can be proved.

Injunction

It is a judicial process operating in personam and requiring a person to whom it is directed to do or refrain from doing a particular thing. Law as to the injunction is contained in the Specific Relief Act 1963 and the CPC 1908. Types of injunction –

(i) Mandatory – When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts, the Court may in its discretion grant an injunction to prevent the breach (s. 55 of the Specific Relief Act, 1877).

(ii) Permanent or perpetual – By perpetual injunction a defendant is perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff (s. 53, the Specific Relief Act, 1877).

(iii) Temporary – Temporary injunction is such as is to continue until a specified time, or until the further order of the Court. It is regulated by the CPC (s. 53, The Specific Relief Act, 1877; CPC Order XXXIX Rule 1.

(iv) Ad-interim - *Restitution of property* – Restitution means restoration of anything to its rightful owner. Extra-judicial remedies are-

a. Self defence – The use of force to protect oneself, one’s family, or one’s property from a real or threatened attack.
b. Expulsion of trespassers – Forcibly evicting the trespasser.
c. Reception of chattels – Chattel means movable or transferable property; personal property.
d. Re-entry of land –
e. Abatement of nuisance – Abatement is the act of eliminating or nullifying; the act of lessening or moderating.
f. Distress damage feasant – the right to seize animals or inanimate chattels that are damaging or encumbering land and to keep them as security until the owner pays compensation.

Maritime Torts

Maritime - Torts Law is a term covering cases where injury, loss or damage is caused to a person or their interests by another party’s action or negligence. The word “tort” derives from a Latinate Middle English word meaning “injury”. In this light, maritime tort applies to cases where injury, loss or damage is caused to a person or their interests in a maritime setting. This gives maritime tort law a very broad range of coverage, particularly as no malice or premeditation is required to designate liability under the tenets of tort law.

Under maritime law, by its very nature, cases will generally be brought against a corporation rather than an individual, as the carriage of persons or goods carries with it an element of responsibility for their safety. Damage to goods can, and usually does, occur as a result of inadequately secure storage on the part of the carrier and leaves them liable to face a claim for damages. In the case of Canal Barge Co. vs Torco Oil Co. heard in July 2000 however, the plaintiff – a shipping company which had chartered its vessel to a company for the transportation of a cargo of oil brought a case when the cargo left a heavy residue. As the defendant's negligent loading of their product was proven in court, the case was upheld and Torco were found liable for material damages.

Crear vs Omega Protein Case

The most interesting cases in maritime tort law are often not the more straightforward ones. In the Crear vs Omega Protein case of 2004, the plaintiffs brought a case against the Omega Protein corporation when former Omega employee Obedean Crear Jr. – suffering from mental problems in the wake of a head injury suffered when an improperly-fixed stern pole fell upon him – killed his grandmother.

LAW OF CRIMES

Criminal Law is that category of law which relates to crime. It regulates social conduct and prescribes threatening, harming, or otherwise endangering the health, safety, and moral welfare of people. It includes the punishment of people who violate these laws. The criminal law is the foundation of the criminal justice system. The law defines the acts that may lead to an arrest, prosecution, and imprisonment. States punish a range of acts in their criminal codes. An important feature of criminal law is that it attracts a punishment or sanction. With civil law damages are imposed with the aim to compensate the injured party for loss suffered whereas with criminal law the aim is to punish the offender and deter others from carrying out the same acts.

Objectives of Criminal Law: Five objectives are widely accepted for enforcement of the criminal law by punishments: retribution, deterrence, incapacitation, rehabilitation and restoration. Jurisdictions differ on the value to be placed on each.

For an act to be considered as an offence under the Indian Penal Law, it should contain not only the elements of a "guilty act" or *actus reus* and "guilty mind" i.e. *mens rea*.

One of the fundamental concepts of criminal law is the presumption of innocence i.e. an accused person is presumed innocent until proved guilty. The burden of proving this guilt is on the prosecution and it must be proved beyond a reasonable doubt.

The Indian Penal Code contains a varied range of acts which are considered as an offence in India. These offences are listed categorically in various groups. They are

Abetment: When several persons take part in the commission of an offence, each one of them may contribute in a manner and degree different from the others to the commission of it.

Criminal Conspiracy: That there should be an agreement between the persons who are alleged to conspire; and that the agreement should be

- for doing of an illegal act, or
- for doing by illegal means an act which may not itself be illegal

Offences against Property: The offences against property may be classified as theft, extortion, robbery and dacoity ; criminal misappropriation, criminal breach of trust, recieveing stolen property, cheating, fraudulent deeds ads dispositions of property, mischief and criminal trespass.

Crimes against Women: Although Women may be victims of any of the general crimes such as murder, robeery or cheating, etc. there are certain set of crimes which are directed specially at women i.e. only a woman can be a victim to those crimes. Thus these set of crimes are categorized as Crimes against Women. IPC recognizes seven types of such crimes:

- Rape
- Kidnapping and Abduction
- Dowry Death
- Torture or Cruelty by Husband or In-Laws
- Molestation
- Sexual Harassment
- Trafficking of Women and Young Girls
- Outraging a Women’s Modesty

Offences Affecting Public Health, Safety, Convenience, Decency and Morals: These provisions are intended to safeguard public health, safety and convenience by making those acts which pollute the environment or threaten the life, health, happiness and safety of the people punishable. Instances of such acts would be food adulteration or spread of infection or rash driving or pornography, etc.

Offences Relating to Religion: These provisions were framed on the principles of our fundamental right on our right to religion which recognizes the fundamental right of every person to practice his or her religion. Thus act of anybody which defiles a place of worship or objects of veneration or otherwise outrages the religious feeling of other persons shall be punishable under the criminal law.

Offences Affecting Human Body: Largest part of the code, the varied nature of these offences indicates the importance attached to the right of life and personal liberty of human beings under the constitution. Hence it covers the offences on murder, culpable homicide, hurt or grievous hurt, kidnapping, abduction, etc. are laid down under this category.

Maritime Crimes

Maritime security is frequently defined as the protection from threats to the freedom or good order at sea. Issues clustered under the notion of **maritime** security include **crimes** such as piracy, armed robbery at sea, trafficking of people and illicit goods, illegal fishing or pollution.

Marine crime is as old as this industry itself. Depending on the times that it prevailed in, the nature of maritime crime has changed a lot over the years but its implications remain just as severe. Marine crime is not only a threat to entire maritime security of goods and people in the industry, but also gives major setbacks to the entire marine industry economically.

At present, there are several maritime crimes that exist. They all differ in their execution but the end result remains the same- loss of life and property. Some of these crimes are:

1. **Maritime Piracy–** Maritime piracy remains one of the biggest crimes of this industry. From causing immense financial loss to causing physical harm to crew members, piracy at sea is probably the most notorious marine crime and a major threat to maritime security.

2. **Unauthorized entry**– For entry of any ship into a nation's marine boundary, the ship must seek permission from government of that nation. Sailing on that nation's waters without a permission is a maritime crime and punishable in all countries.

3. **Smuggling Exotic plants and animals**– Due to quarantine reasons mainly, it is not legal for any ship to bring in exotic plants or animals into a nation without proper permission. Doing so is a punishable offense with punishment ranging from a fine to imprisonment in some cases.

4. **Drug trafficking**– it is one of the most common types of maritime crime. Bringing in illicit drugs through a ship and their further distribution becomes a serious maritime crime.

5**. Illegal Carrying of Weapons and artillery**– due to sensitive nature of these goods, only certain ships are authorized to carry arms and weapons even for transportation purposes. Bringing in weapons on a ship not authorized to do so will make it a punishable offense. Also, a ship which is not equipped to handle such materials may be highly prone to maritime accidents along with endangering lives of others around her.

6. Tax evasion– a white collar maritime crime, this is more common than what is told. Cases of ship owners trying to evade taxes through false documentation or incorrect representation of cargo material have been increasing rapidly, posing a threat to maritime security.

7. Sailing or fishing in unauthorized areas– presence of a ship in an unauthorized spot for any purpose what so ever or fishing in areas not allotted for it is a marine crime and punishable by law. Not just that, crimes such as these can often lead to maritime accidents that can become massive very easily.

8. Discharging in Ocean Waters: Marine pollution is a serious issue and almost all countries have strict policies against ships discharging sewage or oil into their coastal waters.

9. Human Trafficking: Cases **of stowaways** are common in the maritime industry. Travelling to a different country without the permissions from the respective country is a grave marine crime**.**

Ways to improve maritime security

The above mentioned crimes pose a threat to maritime security on a daily basis. Despite of all the efforts, security of waters still suffers a little. The main reason for that is this is a very broad aspect with no concrete boundaries. Lack of a coherent system with insufficient cooperation between countries is also a reason why these crimes still look marine industry in the face. Some ways through which marine crimes can be combated include:

- Better surveillance
- Use of satellite tracking
- Tighter norms and regulations
- More efficient monitoring of ships and ports
- Better quarantine services

Ships being hijacked or drugs being smuggled into the countries are news more common than what is appropriate. As such, it is important that countries realize the loopholes in their security systems and find ways to thwart them.

LAW OF PROPERTY

Transfer of Property has been defined in S. 5 of the Transfer of Property Act meaning 'an act by which a living person conveys property, in present or in future to one or more other living persons and “to transfer property” is to perform such act'.

'Living person' has been defined to include a company or association or body of individuals whether incorporated or not, but nothing herein contained shall effect any law for the time being in force relating to the transfer of property to or by companies, associations or bodies of individuals.

Property

The Legislature has not attempted to define the word 'property', but it is used n this Act in its widest and most generic legal sense. Section 6 says that 'property of any kind may be transferred', etc. thus an actionable claim is property; and so is a right to a reconveyance of land.

It is used in this dual sense of the thing and the right of the thing in S. 54 which contrasts, 'tangible immovable property' with 'a reversion or other intangible thing'. Property includes rights such as trade marks, copyrights, patents and personal rights capable of transfer or transmission such as debt. A share in the company is a movable property freely alienable in absence of any express restrictions under the Articles of Association of the company. The shares are, therefore, transferable like any other movable property and the vendee of the shares cannot be denied the registration of the shares purchased by him on a ground other than stated in the Article.

The words 'in present or in future' in S. 5 qualify the word 'conveys' and not the word 'property'. A transfer of property not in existence operates as a contract to be performed in the future which is specifically enforceable as soon as the property comes into existence. Where the operative portion of the sale-deed recorded that all rights and privileges in the concerning the property either in present or accruing in future as vesting in the vendor were the subject matter of the sale and that the vendor retained no right of any kind, it was held that even the right of the vendor of reconveyance of the property was transferred by the sale-deed.

Interests in Property

As ownership consists of a bundle of rights, the various rights and interests may be vested in different persons. Absolute ownership is an aggregate of component rights such as the right of possession, the right of enjoying the usufruct of the land, and as on. These subordinate rights, the aggregate of which make up absolute ownership, are called in this Act interests in Property. A transfer of property is either a transfer of absolute ownership or a transfer of one or more of these subordinate rights.

Requisites for Valid Transfer: Every person, who is competent to contract, is competent to transfer property, which can be transferred in whole or in part. He should be entitled to the transferable property, or authorised to dispose off transferable property which is not his own. The right may be either absolute or conditional, and the property may be movable or immovable, present or future. Such a transfer can be made orally, unless a transfer in writing is specifically required under any law. In case the property is transferred subject to the condition which absolutely restrains the transferee from parting with or disposing of his interest in the property, the condition is void. The only exception is in the case of a lease where the condition is for the benefit of the lessor or those claiming under him. Generally, only the person having interest in the property is authorised to transfer his interest in the property and can pass on the proper title to any other person. The rights of the transferees will not be adversely affected, provided: they acted in good faith; the property was acquired for consideration; and the transferees had acted without notice of the defect in title of the transferor. It should be noted that these conditions must be satisfied.

There must be a representation by the transferor that he has authority to transfer the immovable property. The representation should be either fraudulent or erroneous. The transferee must act on the representation in good faith. The transfer should be done for a consideration. The transferor should subsequently acquire some interest in the property he had agreed to transfer. The transferee may have the option to acquire the interest which the transferor subsequently acquires.

Various Forms of Transfer of Property:

Mortgage: A mortgage is the transfer of an interest in specific and not absolute immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The essential nature of mortgage is that it is a transfer of an interest in specific immovable property to the mortgagee.

Sale: Sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument. In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property. Delivery of tangible immovable property takes place when the seller places the buyer or such person as he directs, in possession of the property.

Contract for sale: A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property.

Gift: "Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donor, and accepted by or on behalf of the donee. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

Lease: A lease of immovable property is a transfer of a right to enjoy such property made for a certain time or in perpetuity. In a lease, there is a partial transfer that is a transfer of a right of enjoyment for a certain time. The fundamental conception of a lease is that it is the separation of the right of possession from ownership. A lawful agreement of lease of immediately property is therefore, a contract within the meaning of section 10 of the contract Act.

Maritime Property

Action in Rem brings to the Maritime property then elaborately discuss the theme of action in rem. According to the History before 1852 English law was a common law, any dispute resolution matter or plaintiff bring claim to the personam. Continue process change in 19th century, introduced Admiralty court act and new jurisdiction came to force and any dispute resolution could bring to the owner property, In maritime sector such as a vessel. An action in rem fully followed by The supreme court act 1925.Action in rem also bring to the vessel for damaging cargo of vessel, unpaid freight and made pollution by vessel

A maritime Lien is a claim against a vessel or other maritime property, which may be enforced by seizure of the property. A maritime lien therefore stands for a right to property in res or privilege claim upon a vessel or other maritime property in respect of services rendered to it or injury caused by property. A maritime lien exists independently of the possession of the object over which it may be claim and it is unaffected by change of ownership. It is a right, which is enforced against the thing itself or in other words it is a right in rem. A maritime lien attaches to the property or arises as soon as the particular injury is sustained or right of payment accrues, it remains incomplete. Un till The action in rem commenced.

The issue of property become important when several claim may arise against one vessel for instances a claim may arise due to a collision of the vessel with another vessel through negligent navigation and it salved by a third vessel and owner of the salved vessel may become insolvent and thus fail to discharge their liabilities. In such case maritime will arise. The Harbour Docks and piers act 1847(section 74) gives harbour authorities a right to detain vessel for a variety of reason namely quay and these rights are usually treated as for example cargo claim.

However The case “The Lyrma”(No 2)[1978]2 Lloyd’s Rep.30 illustrate that Possible to determine priority between contracts lien and damage lien. In this case contract lien salvage comes first as without salvage the ship may not be preserved. Wages are followed by the salvage and the Masters disbursement bottomry are followed by wages. According to this case liens arising from trot and also various lien arose from different time.The maritime lien cannot be considered without paying any demerge to the ability of the claimant to arrest a vessel. On the other hand claimant to arrest a vessel which right to leads to effect a sale of the vessel becomes important. Action in rem could be brought against the vessel for claims relating to ownership, Co-owner ship or Mortgage,In addition to bring other claims against a vessel. The defendant was the beneficial owner or demise charterer of vessel at the time the writ was issued. Moreover possible to bring action in rem against any other vessel by the term of sister ship provision.

Action in Rem Basically bringing to the maritime property. By history before 1952 English law was a common law for any Dispute resolution matter or plaintiff bring a claim to the Personam.continue process changes in 19th century, introduced Admiralty court act and new jurisdiction on came in to force and any dispute resolution could be brings to the owner’s property such as Vessel. An action in Rem fully processed according to the Supreme court act 1925.Moreover, some circumstances Action in Rem as a jurisdiction also applied to The Vessel,Cargo,Freight.All judgment Made against Maritime property.

Admiralty Action in Rem commenced for most claim of Dispute according to the admiralty jurisdiction under the supreme court act 1981.Action in Personam only effected where the claim is very limited under the Merchant shipping act 1985.According to The Queens branch division High court of justice would be Writ in particular form and issued by the Admiralty and commercial registry. On the other circumstances Action in Rem could be issued to the different property that’s belong to the same owner, as example sister ship arrest of same owner.

The case “THE BERNY”[1977]2 Lloyds rep.533 describing The Plaintiff bring Action in Rem to the sister ship caused by cargo damage belong to the Same owner. Called “Berny” also cargo owner brought action in personam against shipowner.Ultimately action in rem Applied to the sister ship. Suddenly one of the sister ship”Berny” visited the port within the jurisdiction. During the time frame cargo owner renew the writ. Afterword ship owner dismiss the claim of cargo owner but still cargo owner bring the previous court jurisdiction by issuing writs against her sister ship. They also argue that the renewal of Barney writ was the improper under the circumstances.

Following the case judgement writ could be renewed or entered until any sister ship visited restricted areas within the jurisdiction, Plaintiff issue the write to owners any of sister ship arrested and court only allowed procedure for action in Rem to the offending ship.

LAW OF INSURANCE

Insurance may be described as a social device to reduce or eliminate risk of life and property. Under the plan of insurance, a large number of people associate themselves by sharing risk, attached to individual. The risk, which can be insured against include fire, the peril of sea, death, incident, & burglary. Any risk contingent upon these may be insured against at a premium commensurate with the risk involved.

Insurance is actually a contract between 2 parties whereby one party called insurer undertakes in exchange for a fixed sum called premium to pay the other party on happening of a certain event.

Insurance is a contract whereby, in return for the payment of premium by the insured, the insurers pay the financial losses suffered by the insured as a result of the occurrence of unforeseen events. With the help of Insurance, large number of people exposed to similar risks makes contributions to a common fund out of which the losses suffered by the unfortunate few, due to accidental events, are made good.

An insurer is a company selling the insurance; an insured or policyholder is the person or entity buying the insurance. The insurance rate is a factor used to determine the amount to be charged for a certain amount of insurance coverage, called the premium.

Need for insurance

All assets have some economic value attached to them. There is also a possibility that these assets may get damaged/destroyed or become non-operational due to risks like breakdowns, fire, floods, earthquake etc. Different assets are exposed to different types of risks like a car has a risk of theft or meeting an accident, a house is exposed to risk of catching fire, a human is exposed to risk of death/accident. Hence insurance is required for the following reasons:

Marine Insurance

Cregg just started a marine cargo business and contacts his insurance agent to discuss insurance coverages. **Marine insurance** protects against business losses incurred during water transport operations. The insurance agent, Paul, asks Cregg to tell him more about the business. Afterwards, Paul explains the different types of marine property coverages and contract policy standards. Let's see what they discussed.

A contract of marine insurance is an agreement whereby the insurer covers against losses incidental to marine adventure.

There is a marine adventure when any insurable property is exposed to maritime perils i.e. perils consequent to navigation of the sea. The term 'perils of the sea' refers only to accidents or casualities of the sea, and does not include the ordinary action of the winds and waves. Besides, maritime perils include, fire, war perils, pirates, seizures and jettison,etc.

Types of Marine Property Coverages

Paul starts by defining a few terms Cregg needs to understand. Perils are risks. Insurance policies have covered and excluded perils. When Cregg receives his marine policy, it's imperative he review the policy to understand coverages and exclusions. Open cargo is another important term; it means the insurer agrees to pay for covered losses incurred for a specific period of time when the insured provides an average value and pays the premium. Cregg asks Paul to define and explain 'premium'. Premium represents the cost of coverage. Premiums are typically paid monthly, quarterly, or annually for most insurance policies. For marine insurance, the company may require a premium per shipment.

There are four types of Marine Insurance

Hull Insurance - Covers the insurance of the vessel and its equipment i.e. furniture and fittings, machinery, tools, fuel,etc. It is effected generally by the owner of the ship.

protects the vessel during transportation within a specific geographical location. Out-of-region and international locations are typically excluded unless stated.

Cargo Insurance - Includes the cargo or goods contained in the ship and the personal belongings of the crew and passengers.

Cargo reimburses Cregg for the value of incoming and outgoing freight. For example, if Cregg's inventory costs $25,000, he would receive a check for that amount if the ship sank during transportation.

Freight Insurance - Provides protection against the loss of freight. In many cases, the owner of goods is bound to pay freight, under the terms of the contract, only when the goods are safely delivered at the port of destination. If the ship is lost on the way or the cargo is damaged or stolen, the shipping company loses the freight. Freight insurance is taken to guard against such risk.

Freight Revenue pays for profit in the event of a loss. Using the example above, if the cost of inventory is $25,000 and Cregg's profit would have been $10,000, the insurance company would pay $10,000 under this coverage

Liability Insurance - Is one in which the insurer undertakes to indemnify against the loss which the insured may suffer on account of liability to a third party caused by collision of the ship and other similar hazards.

In a contract of marine insurance, the insured must have insurable interest in the subject matter insured at the time of the loss. Insurable interest is not required to be present at the time of taking the policy.

Negligence covers the shipper's legal liability. For example, if the shipment became damaged because Cregg's crew did not properly crate the goods, the insurance company would pay for the damaged goods.

Under marine insurance, the following persons are deemed to have insurable interest :

a) The owner of the ship has an insurable interest in the ship.
b) The owner of the cargo has insurable interest in the cargo.

c) A creditor who has advanced money on the security of the ship or cargo has insurable interest to the extent of his loan.
d) The master and crew of the ship have insurable interest in respect of their wages.
e) If the subject matter of insurance is mortgaged, the mortgagor has insurable interest in the full value thereof, and the mortgagee has insurable interest in respect of any sum due to him.
f) A trustee holding any property in trust has insurable interest in such property.
g) In case of advance freight the person advancing the freight has an insurable interest in so far as such freight is repayable in case of loss.
h) The insured has an insurable interest in the charges of any insurance policy which he may take.

Types of Marine Insurance Policies

1. Voyage Policy - Is a policy in which the subject matter is insured for a particular voyage irrespective of the time involved in it. In this case the risk attaches only when the ship starts on the voyage.

Time Policy - Is a policy in which the subject matter is insured for a definite period of time. The ship may pursue any course it likes, the policy would cover all the risks from perils of the sea for the stated period of time. A time policy cannot be for a period exceeding one year, but it may contain a 'continuation clause'. The 'continuation clause' means that if the voyage is not completed within the specified period, the risk shall be covered until the voyage is completed, or till the arrival of the ship at the port of call.

2. Mixed Policy - Is a combination of voyage and time policies and covers the risk during particular voyage for a specified period of time.

3. Valued Policy - Is a policy in which the value of the subject matter insured is agreed upon between the insurer and the insured and it is specified in the policy itself.

What is Valued Marine Policy

A valued marine policy is a type of marine insurance coverage that places a specific value on the insured property, such as the hull or cargo of a shipping vessel, prior to the event of a loss. In the absence of fraud, a valued marine policy will pay the specified value if a loss occurs. It differs from an unvalued, or open, marine policy, in which the value of the property would need to be proven subsequent to a loss through the production of invoices, estimates and other evidence.

Breaking Down Valued Marine Policy

A valued marine policy's monetary value is pre-determined and stated in the policy document, therefore making clear any questions about the value of the reimbursements in case of a total or partial loss to the ships, cargo and terminals covered under the policy. This serves to avoid disputes as to the value of the insured property, and there is generally no reassessment or revaluation necessary if an insured event or loss were to occur. Such policies are distinguished in a policy by the words valued at or so valued.

A valued marine policy pays a fixed amount, regardless of the extent of the damages. For example, a policy may pay $1,000 per box of lost cargo, regardless of whether the value of the cargo is actually $500 or $2,000 per box. It is important to note that if the insured item depreciates in value, it will not affect the amount which can be claimed in the event of a total loss. The same is also true if the value of the item appreciates, in which case the insured would be unable to receive any additional damages based on the increased value of the item.

Valued Marine Policies and the Marine Insurance Act of 1906

The distinction between valued and unvalued policies was first stated in the United Kingdom's Marine Insurance Act of 1906, which has become the basis for maritime insurance policies and laws in most countries, including the United States. Because the Act states that: for an unvalued policy, the measure of indemnity is the insurable value of the subject matter insured, ship owners with valued policies may fare better if they make a claim during periods of falling market rates. In such scenarios, those with unvalued policies may find that any recovery they will be only a fraction of what the ship was worth at the time when they took out the policy. This makes it extremely important for those insuring ships to obtain policies with the proper wording, especially since the distinction between valued and unvalued marine policies has become the subject of legal disputes in many countries.

4. Open or Un-valued Policy - Is the policy in which the value of the subject matter insured is not specified. Subject to the limit of the sum assured, it leaves the value of the loss to be subsequently ascertained.

5. Floating or Declaration Policy - Is a policy which only mentions the amount for which the insurance is taken out and leaves the name of the ship(s) and other particulars to be defined by subsequent declarations. Such policies are very useful to merchants who regularly despatch goods through ships.

LAW OF COMPANY

The word "company" is derived from the Latin (Com = with or together; panis = bread), and originally referred to an association of persons who took their meals together. A company may be an incorporated company or a "corporation" or an unincorporated company. An incorporated company is a separate person distinct from the individuals constituting it whereas an unincorporated company, such as a partnership, is mere collection or aggregation of individuals.

Therefore, unlike a partnership firm, a company is a corporate body and a legal person having status and personality distinct and separate from that of the members constituting it.

It is called a body corporate because the persons composing it are made into one body by incorporating it according to the law, and clothing it with legal personality, and, so turn it into a corporation (The word “corporation” is derived from the Latin term “corpus” which means “body”). Accordingly, “corporation” is a legal person created by the process other than natural birth. It is, for this reason, sometimes called artificial person. This corporate being is capable of enjoying many of the rights and incurring many of the liabilities of a natural person - a human being.

In the legal sense, a company is an association of both natural and artificial persons incorporated under the existing law of a country. As per the Companies Act, 1956 a “company means a company formed and registered under the Companies Act, 1956 or under the previous laws relating to companies" [Section 3(1)(ii)]. In common law, a company is a “legal person” or “legal entity” separate from, and capable of surviving beyond the lives of, its members. However, an association formed not for profit acquires a corporate life and falls within the meaning of a company by reason of a licence under Section 25(1) of the Act.

Company: Its Characteristics

The main characteristics of a company are as follow:

Corporate Personality: By incorporation under the Act, the company is vested with a corporate personality quite distinct from individuals who are its members. Being a separate legal entity it bears its own name and acts under a corporate name. It has a seal of its own. Its assets are separate and distinct from those of its members. It is also a different ‘person’ from the members who compose it. As such it is capable of owning property, incurring debts, borrowing money, having a bank account, employing people, entering into contracts and suing or being sued in the same manner as an individual. Its members are its owners but they can be its creditors simultaneously as it has a separate legal entity. A shareholder cannot be held liable for the acts of the company even if he holds virtually the entire share capital. The shareholders are not the agents of the company and so they cannot bind it by their acts. The company does not hold its property as an agent or trustee for its members and they cannot sue to enforce its rights, nor can they be sued in respect of its liabilities.

Limited Liability: The company being a separate entity, leading its own business life, the members are not liable for its debts. The liability of the members of a company is limited to the extent of the nominal value of the shares held by them. In no event can a shareholder be asked to pay anything more than the unpaid value of his shares. In the case of a company limited by guarantee, the members are liable only to the extent of the amount guaranteed by them and not beyond, and only when the company goes into liquidation.

Perpetual Succession: Members may come and members may go but the company goes on for ever. Variation in members or their identity does not affect the legal existence and identity of a company. It is a creation of law and can be dissolved only under the law.

Transferability of Shares: The capital of a company is divided into parts, called shares. The shares are said to be movable property and, subject to certain conditions, freely transferable, so that no shareholder is permanently or necessarily wedded to a company. The shares of joint stock companies are freely transferable. In the case of a private company, the Companies Act requires it to put certain restrictions on the transferability of shares. Every member owing fully paid-up shares is at liberty to dispose them off according to his choice but subject to the articles of the company. Any absolute restriction on the right to transfer shares is void.

Separate Property: As a corporate person, the company is entitled to own and hold property in its own name. No member can claim ownership of any item of the company's assets.

Common Seal: On incorporation, a company acquires legal entity with perpetual succession and a common seal. Since the company has no physical existence, it must act through its agents and all such contracts entered into by its agents must be under the seal of the company. The common seal of the company is of very great importance. It acts as the official signature of a company. The name of the company must be engraved on its common seal. A rubber stamp does not serve the purpose. A document not bearing common seal of the company is not authentic and has no legal force behind it.

Capacity to Sue and Be Sued: A company being a body corporate, can sue and be sued in its own name. All legal proceedings against the company are to be instituted in its own name. Similarly, the company may bring an action against anyone in its own name. In case of unincorporated association an action may have to be brought in the name of the members either individually or collectively.

Company as Distinguished from other Associations of Persons

Though there are a number of similarities between a limited company and other forms of associations, there are many dissimilarities. In both the cases individuals are the subjects, and trading is generally the object. In the following paragraphs a limited company is distinguished from a partnership firm, a Hindu Joint Family business, a club and a registered society. Though there are a number of similarities between a limited company and other forms of associations, there are a great number of dissimilarities as well. In both the cases individuals are the subjects, and trading is generally the object. In the following paragraphs, a limited company is distinguished from a partnership firm, a Hindu Joint Family business and a registered society.

Distinction between Company and Partnership

The principal points of distinction between a company and a partnership firm, are as follows:

1. A company is a distinct legal person. A partnership firm is not distinct from the several persons who compose it.
2. In a partnership, the property of the firm is the property of the individuals comprising it. In a company, it belongs to the company and not to the individuals comprising it.
3. Creditors of a partnership firm are creditors of individual partners and a decree against the firm can be executed against the partners jointly and severally. The creditors of a company can proceed only against the company and not against its members.
4. Partners are the agents of the firm, but members of a company are not its agents. A partner can dispose of the property and incur liabilities as long as he acts in the course of the firm's business. A member of a company has no such power.
5. A partner cannot contract with his firm, whereas a member of a company can.
6. A partner cannot transfer his share and make the transferee a member of the firm without the consent of the other partners, whereas a company's share can ordinarily be transferred.
7. Restrictions on a partner's authority contained in the partnership contract do not bind outsiders; whereas such restrictions incorporated in the Articles are effective, because the public are bound to acquaint themselves with them.
8. A partner's liability is always unlimited whereas that of shareholder may be limited either by shares or a guarantee.
9. A company has perpetual succession, i.e. the death or insolvency of a shareholder or all of them does not affect the life of the company, whereas the death or insolvency of a partner dissolves the firm, unless otherwise provided.
10. A company may have any number of members except in the case of a private company which cannot have more than fifty members (excluding past and present employee members). In a public company there must not be less than seven persons and in a private company not less than two. On the other hand, a partnership firm cannot have more than 20 members in any business and 10 in the case of banking business.
11. A company is legally required to have its accounts audited annually by a chartered accountant, whereas the accounts of a firm are audited at the discretion of the partners.
12. A company, being a creation of law, can only be dissolved as laid down by law. A partnership firm, on the other hand, is the result of an agreement and can be dissolved at any time by agreement.

Distinction between Company and Hindu Joint Family Business

1. A company consists of heterogeneous members, whereas a Hindu Undivided Family Business consists of homogenous members since it consists of members of the joint family itself.

2. In a Hindu Joint Family business the Karta (manager) has the sole authority to contract debts for the purpose of the business, other coparceners cannot do so. There is no such system in a company.
3. A person becomes a member of Joint Hindu Family business by virtue of birth. There is no provision to that effect in the company.
4. No registration is compulsory for carrying on business for gain by a Hindu Joint Family even if the number of members exceeds twenty [Shyamlal Roy v. Madhusudan Roy, AIR 1959 Cal. 380 (385)]. Registration of a company is compulsory.

Distinction between a Company and a Club

1. A company is a trading association. A club, on the other hand, is a non- trading association.
2. Registration of a company is compulsory. Registration of a club is not compulsory.

Distinction between a Company and a Corporation (i.e. Company vis-à-vis Body Corporate)

Generally speaking, an association of persons incorporated according to the relevant law and clothed with legal personality separate from the persons constituting it is known as a corporation. The word ‘corporation’ or words ‘body corporate’ is/are both used in the Companies Act, 1956. Definition of the same which is reproduced below is contained in Clause (7) of Section 2 of the Act: “Body corporate” or “corporation” includes a company incorporated outside India but does not include—

(a) a corporation sole;
(b) a co-operative society registered under any law relating to co-operative societies; and
(c) any other body corporate not being a company which the Central Government may, by notification in the Official Gazette, specify in this behalf.”

The expression “corporation” or “body corporate” is wider than the word ‘company’.

A corporation sole is a single individual constituted as a corporation in respect of some office held by him or function performed by him. The Crown or a Bishop under the English law are examples of this type of corporation. It may be noted that though a corporation sole is excluded from the definition for the purposes of the Companies Act, it continues to be a legal person capable of holding property and becoming a member of a company.

A society registered under the Societies Registration Act has been held by the Supreme Court in Board of Trustees v. State of Delhi, A.I.R. 1962 S.C. 458, not to come within the term ‘body corporate’ under the Companies Act, though it is a legal person capable of holding property and becoming a member of a company.

Advantages of Incorporation

As compared to other types of business associations, an incorporated company has the following advantages:

A. Corporate Personality: Unlike a partnership firm, which has no existence apart from its members, a company is a distinct legal or juristic person independent of its members. Under the law, an incorporated company is a distinct entity, even the one-man company as discussed above in Salomon & Co. Ltd., case is different from its shareholders. Section 34(2) of the Companies Act, 1956 provides that from the date of incorporation, the subscribers to the memorandum and other members shall be a body corporate by the name contained in the Memorandum, capable of exercising all the functions of an incorporated company and having perpetual succession and a common seal.

B. Limited Liability: The Companies Act provides that in the event of the company being wound-up, the members shall have liability to contribute to the assets of the company in accordance with the Act [Section 34(2)]. In the case of companies limited by shares, no member is bound to contribute anything more than the nominal value of the shares held by him which remains unpaid. The privilege of limiting the liability is one of the principal advantages of doing business under the corporate form of organisation.

C. Perpetual Succession: As stated in Section 34(2) of the Companies Act, an incorporated company has perpetual succession. Notwithstanding any change in its members, the company will be the same entity with the same privileges and immunities, estate and possessions. The death or insolvency of individual members does not in any way, affect the corporate entity, its existence or continuity. The company shall continue to exist indefinitely till it is wound-up in accordance with the provisions of the Companies Act. "Members may come and members may go but the company can go on forever".

D. Transferable Shares: Section 82 of the Companies Act provides "The shares or other interest of any member in a company shall be movable property, transferable in the manner provided by the articles of the company". This encourages investment of funds in the shares, so that the members may encash them at any time. Thus, it provides liquidity to the investors as shares could be sold in the open market and in stock exchange. It also provides stability to the company.

E. Separate Property: A company as a legal entity is capable of owning its funds and other assets. "The property of the company is not the property of the shareholders, it is property of the company" [Gramophone & Typewriter Co. v. Stanley, (1906) 2 K.B. 856 at p. 869]. "The company is the real person in which all the property is vested, and by which it is controlled, managed and disposed of". In the eyes of law, even a member holding majority of shares or a managing director of a company is held liable for criminal mis-appropriation of the funds or property of the company, if he unauthorisedly takes it away and uses it for his personal purposes.

F. Capacity to Sue: As a juristic legal person, a company can sue in its name and be sued by others. The managing director and other directors are not liable to be sued for dues against a company.

G. Flexibility and Autonomy: The company has an autonomy and independence to form its own policies and implement them, subject to the general principles of law, equity and good conscience and in accordance with the provisions contained in the Companies Act, Memorandum and Articles of Association. The company form of management of business disassociates the "ownership" from the "control" of business, and helps promote professional management and efficiency. The directors and managers can carry on the business activities with freedom, authority and accountability in accordance with the Company Law. Precisely this is the reason why the Government has generally adopted the company form of management for its various undertakings in preference to management through the departmental undertakings.

Disadvantages of Incorporation

There are, however, certain disadvantages and inconveniences in Incorporation. Some of these disadvantages are:

1. Formalities and expenses: Incorporation of a company is coupled with complex, cumbersome and detailed legal formalities and procedures, involving considerable amount of time and money. Such elaborate procedures have been laid down to deter persons who are not serious about doing business, as a company enjoys various facilities from the community. Even after the company is incorporated, its affairs and working must be conducted strictly in accordance with legal provisions. Thus various returns and documents are required to be filed with the Registrar of Companies, some periodically and some on the happening of an event. Certain books and registers are compulsorily required to be maintained by a company. Approval and sanction of the Company Law Board, the Government, the Court, the Registrar of Companies or other appropriate authority, as the case may be, is necessarily required to be obtained for certain corporate activities. Certain corporate activities such as corporate meetings, accounts, audit, borrowings, lending, investment, issue of capital, dividends etc. are necessarily required to be conducted and carried out strictly in accordance with the provisions of the Act and within the prescribed time. Any breach of the legal provisions is followed by severe penal consequences. Other forms of business organisations are comparatively free from these legal complexities and procedural formalities.
2. Corporate disclosures: Notwithstanding the elaborate legal framework designed to ensure maximum disclosure of corporate information, the members of a company are having comparatively restricted accessibility to its internal management and day-to-day administration of corporate working.
3. Separation of control from ownership: Members of a company are not having as effective and intimate control over its working as one can have in other forms of

business organisation, say, a partnership firm. This is particularly so in big companies in which the number of members is too large to exercise any effective control over its day-to-day affairs. No member of a company can act in his individual capacity for and on behalf of the company. The members of a company are neither the owners nor the agents of the company. Thus, the position of ownership of members is more passive in nature. The members may not have an active and complete control over the company's working as the partners may have over the firm's affairs.

4. Greater social responsibility: Having regard to the enormous powers wielded by the companies and the impact they have on the society, the companies are called upon to show greater social responsibility in their working and, for that purpose, are subject to greater control and regulation than that by which other forms of business organisation are governed and regulated.
5. Greater tax burden in certain cases: In certain circumstances, the tax burden on a company is more than that on other forms of business organisation. A company is liable to tax without any minimum taxable limit as is prescribed in the cases of registered partnership firms and others. Also it has to pay income-tax on the whole of its income at a flat rate whereas others are taxed on graduated scale or slab system. These tax implications may have crucial bearing on a decision regarding the selection of any form of business organisation and the time when the existing form of business organisation should be changed to a new one. Thus, tax implications may direct the adoption of the partnership form of business organisation as expedient at the initial stage to be converted into a company later on, when the tax implications may be more favourable because of the size of the organisation and its scale of operations.
6. Detailed winding-up procedure: The Act provides elaborate and detailed procedure for winding-up of companies which is more expensive and time consuming than that which is applicable to other forms of business organisation.

COMPANIES ACT 2013

The Indian Companies Act 2013 replaced the Indian Companies Act, 1956. The Companies Act 2013 makes comprehensive provisions to govern all listed and unlisted companies in the country. The Companies Act 2013 implemented many new sections and repealed the relevant corresponding sections of the Companies Act 1956. This is a landmark legislation with far-reaching consequences on all companies incorporated in India.

Salient features of the Companies Act 2013

1. **Class action suits for Shareholders:** The Companies Act 2013 has introduced new concept of class action suits with a view of making shareholders and other stakeholders, more informed and knowledgeable about their rights.
2. **More power for Shareholders:** The Companies Act 2013 provides for approvals from shareholders on various significant transactions.

3. **Women empowerment in the corporate sector:** The Companies Act 2013 stipulates appointment of at least one woman Director on the Board (for certain class of companies).
4. **Corporate Social Responsibility:** The Companies Act 2013 stipulates certain class of Companies to spend a certain amount of money every year on activities/initiatives reflecting Corporate Social Responsibility.
5. **National Company Law Tribunal:** The Companies Act 2013 introduced National Company Law Tribunal and the National Company Law Appellate Tribunal to replace the Company Law Board and Board for Industrial and Financial Reconstruction. They would relieve the Courts of their burden while simultaneously providing specialized justice.
6. **Fast Track Mergers:** The Companies Act 2013 proposes a fast track and simplified procedure for mergers and amalgamations of certain class of companies such as holding and subsidiary, and small companies after obtaining approval of the Indian government.
7. **Cross Border Mergers:** The Companies Act 2013 *permits* cross border mergers, both ways; a foreign company merging with an India Company and vice versa but with prior permission of *RBI.*
8. **Prohibition on forward dealings and insider trading:** The Companies Act 2013 prohibits directors and key managerial personnel from purchasing call and put options of shares of the company, if such person is reasonably expected to have access to price-sensitive information.
9. **Increase in number of Shareholders:** The Companies Act 2013 increased the number of maximum shareholders in a private company from 50 to 200.
10. **Limit on Maximum Partners:** The maximum number of persons/partners in any association/partnership may be upto such number as may be prescribed but not exceeding *one hundred.* This restriction will not apply to an association or partnership, constituted by professionals like lawyer, chartered accountants, company secretaries, etc. who are governed by their special laws. Under the Companies Act 1956, there was a limit of maximum 20 persons/partners and there was no exemption granted to the professionals.
11. **One Person Company:** The Companies Act 2013 provides new form of private company, i.e., one person company. It may have only one director and one shareholder. The Companies Act 1956 requires minimum two shareholders and two directors in case of a private company.
12. **Entrenchment in Articles of Association:** The Companies Act 2013 provides for entrenchment (apply extra legal safeguards) of articles of association have been introduced.
13. **Electronic Mode:** The Companies Act 2013 proposed E-Governance for various company processes like maintenance and inspection of documents in electronic form, option of keeping of books of accounts in electronic form, financial statements to be placed on company’s website, etc.
14. **Indian Resident as Director:** Every company shall have at least one director who has stayed in India for a total period of not less than 182 days in the previous calendar year.

15. **Independent Directors:** The Companies Act 2013 provides that all listed companies should have at least one-third of the Board as independent directors. Such other class or classes of public companies as may be prescribed by the Central Government shall also be required to appoint independent directors. No independent director shall hold office for more than two consecutive terms of five years.
16. **Serving Notice of Board Meeting:** The Companies Act 2013 requires at least seven days' notice to call a board meeting. The notice may be sent by electronic means to every director at his address registered with the company.
17. **Duties of Director defined:** Under the Companies Act 1956, a director had fiduciary (legal or ethical relationship of trust)duties towards a company. However, the Companies Act 2013 has defined the duties of a director.
18. **Liability on Directors and Officers:** The Companies Act 2013 does not restrict an Indian company from indemnifying (compensate for harm or loss) its directors and officers like the Companies Act 1956.
19. **Rotation of Auditors:** The Companies Act 2013 provides for rotation of auditors and audit firms in case of publicly traded companies.
20. **Prohibits Auditors from performing Non-Audit Services:** The Companies Act 2013 prohibits Auditors from performing non-audit services to the company where they are auditor to ensure independence and accountability of auditor.
21. **Rehabilitation and Liquidation Process:** The entire rehabilitation and liquidation process of the companies in financial crisis has been made time bound under Companies Act 2013.

Marine Companies

Public Private Partnerships (PPPs)

An unstructured regime of PPPs existed in India between 2000 and 2007, before becoming more organized and predictable in 2007. In 2008, a new model concession agreement was developed with a huge bearing on PPPs, serving as a guideline and template document for drafting concession agreements.

One model PPP that has been used in the sector is the Build-Operate-Transfer model (BOT). This model is generally used for private sector participation to facilitate implementation of development schemes and better management practices, with the assets reverting back to the port trust after the concession period. It has enhanced competition by allowing joint ventures between major ports and foreign firms, minor ports and other companies.

Liberalization/Privatization

The extent of privatization in any sector plays a role in determining the degree of competition in the sector. Privatization in the sector was initiated as a means of enhancing the efficiency of transportation and reducing the cost of logistics. In India, private participation in the port sector has been mostly restricted to the development of minor ports, especially green-field ports. The success of a greenfield port project hinges on the extent of the collaboration between a wide range of institutions, including maritime development boards, railways, state governments and other service providers, under a commonly agreed port development plan. Although such collaboration is not really that clear, the entrance of many players and the increase in trade volumes and movement due to liberalization and privatization can be cited as a success.

Due to the public-private partnership, liberalization and privatization in the maritime industry, many private marine companies are coming up. Hence, we require a stronger company law to regulate them.

LAW OF ENVIRONMENT

Environmental law means the laws that regulate the impact of human activities on the environment. Environmental law covers a broad range of activities that affect air, water, land, flora or fauna. It includes laws that relate to protection of animals and plants and includes within its wide ambit laws for planning for the use and development of land mining, exploration and extractive industries, forestry, pollution, fisheries, land and fire management, agriculture and farming, waste management, climate change and emissions, water resource management (lakes, wetlands, rivers and oceans), chemicals and pesticides, weeds and invasive species, marine life conservation of natural and cultural heritage.

The general functions of most environmental laws are to:

- set offences and penalties for causing harm to the environment which is not authorized
- assess, control or stop certain activities (such as land use and development) before they are carried out
- set policies and standards for how activities will be controlled and how environmental decisions and approvals will be made
- enable members of the public to take part in environmental decision-making
- create regulatory structures for environmental management, such as regulatory agencies
- create specialist courts and tribunals

India’s Maritime Environment

Indian Ocean the Indian Ocean, with an area of 68.56 million sq km, is the third largest body of water in the world and covers about 20% of the earth’s surface. The Indian Ocean is separated from the Atlantic Ocean by the meridian of 20° East and from the Pacific by the meridian of 147° East.11 The northern limit of the Indian Ocean is the Persian Gulf, at the approximate latitude of 30° North. Extending southwards down to the parallel of latitude 60° South, it may be seen as a walled ocean bounded on three sides by land. Africa forms the western wall, while Malaysia, Myanmar, and the insular 56 continuations of Indonesia, Papua New Guinea and Australia form the eastern wall. The Asian continent forms a roof over the Indian Ocean northern extent, and distinguishes it from the Pacific and Atlantic, which lie from north to south like great highways without any roof. The Indian Ocean is nearly 10,000 km wide at the southern tips of Africa and Australia, and extends nearly 13,500 km from the Persian Gulf to Antarctica. The great Indian peninsular landmass, jutting out for a thousand miles, characterizes the Indian Ocean and lends it its name.

There are several important straits, gulfs, bays and seas within the Indian Ocean Region (IOR), most of them being in the northern part. Major shipping lanes crisscross its vast expanse, with strategic waterways and choke points linking the Indian Ocean to other important water bodies on the globe. A striking feature, one that is of great geo-strategic importance to the furtherance of maritime power, is the distribution of islands and archipelagos in the IOR.

There are landmark judgments in this area. In the case of Research Foundation for Science v. the Union of India, even though the case dealt with various environment impacts of ship breaking in the port of Alang in Gujarat, the case dealt with an issue of dismantling a foreign ship in India. The fact was that many foreign countries come to India only for the purpose of dismantling their ships. This causes serious health hazards to the people living nearby as the dismantling of ships results in the emission of certain chemicals which are injurious to health. The case gained mass public attention so that Government regulated the entry of ships purely for the purpose of ship breaking. The court also stated that it is up to the State Government as well as the concerned authorities and State maritime board.

Maritime laws and the laws governing trade and commerce through the water plays an inevitable role in the area of development as they are one of the key areas wherein our country generates its revenue for the purpose of economic development. Various other statutes govern this area of the ship and its concerned trade practices. But the fact is that there are no strict regulations regarding the maintenance of vessels mainly the ones which are used for trade and export of certain materials from India to other parts of the World. The issue which took place at Alang port was one among many examples of misuse of our laws and statutes by foreign countries. Such actions must be regulated as it involves a big hazard to the people as well as the environment. Proper management mechanism on ship maintenance and breaking must be included by the State Maritime Boards so that the fitness level of the Ships remains unchanged and there will be adequate procedures for maintaining the ships such that it results in the increase of sea trade and commerce inside the country and among other countries as well.

LAW OF CYBER SPACE AND REGULATION

Cyber Law is a rapidly evolving area of civil and criminal law as applicable to the use of computers, and activities performed and transactions conducted over internet and other networks. This area of law also deals with the exchange of communications and information thereon, including related issues concerning such communications and information as the protection of intellectual property rights, freedom of speech, and public access to information.

Cyber law is the area of law that deals with the Internet's relationship to technological and electronic elements, including computers, software, and hardware and information systems. Cyber law is also known as Cyber Law or Internet Law

The main objective of the Information Technology Act 2000 is to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as E-commerce, which involve the use of alternatives to paper-based methods of communication and storage of information to facilitate electronic filing of documents with the government agencies. The Act has extra-territorial jurisdiction to cover any offence or contravention committed outside the country by any person.

The Act totally has 13 chapters and 90 sections (the last four sections namely sections 91 to 94 in the ITA 2000 dealt with the amendments to the four Acts namely the Indian Penal Code 1860, The Indian Evidence Act 1872, The Bankers' Books Evidence Act 1891 and the Reserve Bank of India Act 1934). The Act begins with preliminary and definitions and from thereon the chapters that follow deal with authentication of electronic records, digital signatures, electronic signatures etc.

Elaborate procedures for certifying authorities (for digital certificates as per IT Act -2000 and since replaced by electronic signatures in the ITAA -2008) have been spelt out. The civil offence of data theft and the process of adjudication and appellate procedures have been described. Then the Act goes on to define and describe some of the well-known cyber-crimes and lays down the punishments therefore. Then the concept of due diligence, role of intermediaries and some miscellaneous provisions have been described.

The Changing Face of Maritime Law and Risk – Cyber, Ecommerce, Automation of Vessels: Shipping Law 2018

The global maritime industry is undergoing a technological revolution that is changing how it has always been seen and understood. Of course, this is an industry which has seen continued and dramatic change since the very first vessels put to sea. Developments in technology, operations, safety management, and the needs and requirements of international global trade, have all had their part to play. However, what the industry is facing today is unprecedented both in terms of advancement and effect.

90% of global world trade continues to be moved by sea. Currently there are in excess of 50,000 merchant ships trading, operated from over 150 nations worldwide, employing in excess of one million seafarers.

What types of cyber-attacks could happen in the maritime industry? There have been many examples of cyber security incidents in the maritime industry:

- Diverting funds to fraudulent accounts using e-mail spoofing;
- Changing a vessel's direction by interfering with its GPS signal;
- Causing a floating oil platform to tilt to one side, thus forcing it to temporarily shut down;
- Infiltrating cyber systems in a port to locate specific containers loaded with illegal drugs to remove them from the port undetected;
- Infiltrating a shipping company's computer systems to identify vessels with valuable cargoes and minimal onboard security, this led to the hijacking of at least one vessel.

What are the consequences of a maritime cyber-attack?

In 2015, Lloyd's of London estimated that cyber-attacks cost companies USD 400 billion every year. In addition to financial loss, the consequences are wide-ranging:

- Physical loss of or damage to ships;
- Physical injury to crew;
- Loss of cargo;
- Pollution;
- Reputational damage;
- Business Interruption.

Some examples of cyber-incidents

But are all these risks genuine – or simply another scare story in an industry historically littered with prophecies of Armageddon that never actually materialize? Unfortunately, the answer is that we are now regularly experiencing real-life examples of these risks in action.

The Port of Antwerp In 2011, the Port of Antwerp was attacked after it introduced a new electronic release system (ERS) for containerized cargo. This was intended to replace the system in use at that time for the authorization of cargo release through delivery orders or release notes. A number of carriers using the port decided to adopt this system which would send computer-generated pin codes via email to cargo receivers or their agents, as well as the port terminal. However, a sophisticated criminal gang managed to break into the system and attacked the port over a two-year period, starting in 2011.

It is estimated that significant amounts of contraband were moved through the terminal for a number of years before the authorities became aware of the system. Indeed, it was only due to the fact that the criminals had operated so effectively without interruption for such a prolonged period of time that they

Maersk NotPetya In 2017, the container line AP Moller Maersk announced that it had been hit by NotPetya, a ransom ware attack that prevented people from accessing their data unless they paid $300 in bitcoin. This caused the company to shut down completely its booking systems, which cost it in the region of $300 million in lost revenue. Maersk should be congratulated by the entire industry, both for its openness in publishing the details of the attack, which has led to a significant increase in shipping corporations taking cyber-risk seriously and introducing risk-prevention measures, but also for the speed with which it was able to deal with the incident due to its advanced and detailed cyber-protection regimes. However, even with this level of sophistication and protection in place, the attack caused Maersk to replace 45,000 PCs, 4,000 servers and 2,500 applications

Oil Rigs

In Mexico, an entire oil rig had to be shut down because its networks had been accidentally infected with viruses that smart devices had caught as a result of employees visiting various online sites, together with the use of unauthorized flash drives. Similarly, off the coast of Africa, the networks of another oil rig were allegedly hacked by a group of individuals who were simply testing their hacking abilities. By tampering with ballast controls, the rig was dangerously destabilized, resulting in its being completely shut down, with all drilling services suspended for over a week while the incident was identified and fixed.

Cyber risk on the agenda

With increasing digitization, we are seeing signs of a holistic approach from a broad spectrum of organizations: Authorities have formed strategies and produced reports (US, EU);

Various organizations in the maritime industry have issued cyber security guidelines and recommendations (BIMCO, IMO, DNV GL); The oil and gas sector have joined forces to combat cyber threats;

The UK's Department for Transportation and the Maritime Coastguard Agency have produced a Code of Practice on Cyber Security for Ports and Port Systems.

LAW OF INTELLECTUAL PROPERTY RIGHTS

Intellectual Property refers to creation of mind i.e. inventions, industrial designs for article, literary & artistic work, symbols etc. used in commerce. It is essentially categorized into two segments i.e. industrial property which includes within its ambit inventions (patents), trademarks, industrial designs, and geographic indications of source and Copyright which entails literary and artistic works such as novels, poems, plays, films and musical works etc.

Need for Intellectual Property Rights

IP provides a proprietary right in intangible products of the human mind, which are also known as "knowledge" goods or "creations''. IP is ownership of property that is distinct from real estate or personal property as these are products of human intellect or mind. Though ownership is similar, the kinds of goods are different: tangible and intangible goods

One of the most significant agreements of the WTO was its Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The agreement for the very first time brought the laws on intellectual property rights into the international trading system. This agreement narrowed down the differences existing in the extent of protection and enforcement of the Intellectual Property rights (IPRs) around the world by bringing them under a common minimum internationally agreed trade standards. The member countries are required to abide by these standards within stipulated time-frame. India, being a signatory of TRIPS has evolved an elaborate administrative and legislative framework for protection of its intellectual property.

The various forms of intellectual property covered under the TRIPS Agreement are:

Copyrights and related rights

These are the rights given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. It is a bundle of rights including, inter alia, rights of reproduction, communication to the public, adaptation and translation of the work. Copyright protection shall extend to expressions and not to ideas, procedures, and methods of operation or mathematical concepts as such.

Trade Marks

Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services.

Geographical Indications

These are the indications which identify a good as originating in the territory of a member country, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

Patents

These are the exclusive rights granted by a country to the inventor to make, use, manufacture and market the invention that satisfies the conditions of novelty, innovativeness and usefulness. Patents shall be available for any such inventions, whether products or processes, in all fields of technology. The members may exclude from patentability:- (i) diagnostic, therapeutic and surgical methods for the treatment of humans or animals; (ii) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. A patent shall confer on its owner the following exclusive rights:-

- Where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of making, using, offering for sale, selling, or importing such those products;
- Where the subject matter of a patent is a process, then, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.

Industrial Designs

It refers to creative activity, which result in the ornamental or formal appearance of a product. But it does not include any mode or principle or construction or anything which is in substance a mere mechanical device.

Protection of Undisclosed Trade Secrets

A trade secret or undisclosed information is any information that has been intentionally treated as secret and is capable of commercial application with an economic interest.

Legislations on IPR in India

The Patents Act 1970

This enactment was a landmark step for the industrial development in India. The main purpose behind the legislation was to grant patents in order to encourage inventions and to further ensure that these inventions are worked on a commercial scale without undue delay.

Thus the legislation granted an exclusive right to the owner of the invention to make, use, manufacture and market his or her invention provided it satisfies certain conditions stipulated in the law. Broadly speaking, these conditions would include the requirements of novelty, inventiveness and usefulness. However this right has been awarded only for a limited period of time and its use and exploitation is subject to the laws of the other countries where the patent is awarded. The Patent right is territorial in nature and the owners have to file separate applications in the countries of their interests along with necessary fees for obtaining patents in their countries. The act also lays down a list of non-patentable inventions.

The time period for the enjoyment of patent was revised in 2002 and now a patentee can enjoy his or her patent for a period of 20 years. The procedure to obtain a patent and the documents that are required to be submitted in this regard are laid down in the act.

Copyright Act 1957

Copyright seeks to protect the expression of original ideas that are expressed in material form. The owner of the copyrighted work can copy the work, issue copies of the work to the public, rent or lend the work to the public, communicate his or her work to the public in the form of written or oral broadcast or electronic transmission or make an adaptation of the work. Copyright ownership can either arise automatically or by means of transfer of ownership through an assignment, assignation or licence. It recognizes the copyright of the owner in written work, computer generated work, the work generated in an employer and employee relationship, work of staff, work generated in collaborative research and copyright ownership of students.

Unlike patents, the duration of copyright protection is dependent upon the nature of work. For instance literary, dramatic, musical and artistic work is protected for a period of 70 years. However computer generated works is protected for 50 years. Detailed list of works along with the duration of protection is provided under the Act.

The act provides detailed procedure with regards to filing an application for copyright work.

Trademarks Act 1999

This legislation has been enacted to amend and consolidate the law relating to trade marks, to provide for registration and better protection of trade marks for goods and services and for the prevention of the use of fraudulent marks. It repealed the earlier Trade & Merchandise Marks Act, 1958.

Under the Act, the Controller-General of Patents, Designs and Trade Marks under Department of Industrial Policy and Promotion, Ministry of Commerce and Industry is the 'Registrar of Trade Marks'. The Controller General of Patents, Designs & Trade Marks directs and supervises the functioning of the Trade Marks Registry (TMR). The 'Trade Marks Registry' administers the Trade Marks Act, 1999 and the Rules thereunder. TMR acts as a resource and information centre and is a facilitator in matters relating to trade marks in the country. The main function of the Registry is to register trade marks which qualify for registration under the Act and Rules.

Any person claiming to be the proprietor of a trade mark used or proposed to be used by him, who is desirous of registering it, shall apply in writing to the Registrar in the prescribed manner for the registration of his trade mark. A single application may be made for registration of a trade mark for different classes of goods and services and fee payable thereof shall be in respect of each such class of goods or services. An application for trademarks can be rejected only for the reasons listed in the act which are categorized into absolute and relative grounds. Provisions are also made under the act for the purposes of receiving applications for opposing the grant of trademark.

Geographical Indication of Goods (Registration and Protection) Act 1999

This act has been enacted to provide for the registration and better protection of geographical indications relating to goods. Under the Act, the Controller-General of Patents, Designs and Trade Marks under Department of Industrial Policy and promotion, Ministry of Commerce and Industry is the 'Registrar of Geographical indications'. The Controller General of Patents, Designs & Trade Marks directs and supervises the functioning of the Geographical Indications Registry (GIR). It lays down the detailed procedure regarding filing an application for the purposes of seeking protection of geographical indications relating to goods along with the procedure for file an opposition to the application.

Semiconductor Integrated Circuit Layout Design Act 2000

This legislation has been enacted to provide for the protection of semiconductor integrated circuits layout-designs and for matters connected therewith or incidental thereto. The Act is implemented by the Department of Information Technology, Ministry of Information Technology. The Act is applicable for Integrated Circuits Layout-Design IPR applications filed at the Registry in India. The Semiconductor Integrated Circuits Layout-Design Registry (SICLDR) is the office where the applications on Layout-Designs of integrated circuits are filed for registration of created IPR. The Registry has jurisdiction all over India.

It lays down the grounds on which the registration for layout designs can be prohibited. When an application for registration of a layout-design has been accepted, the Registrar shall, within fourteen days after the date of acceptance, cause the application as accepted to be advertised in the prescribed manner. Provisions are also made for opposition for the grant of the said registration. The registration of a layout-design shall be only for a period of ten years. Any person who contravenes knowingly and willfully any of the provisions of the Act or falsely represent a layout-design as registered, shall be punishable with imprisonment or with fine or with both.

Intellectual Property Rights and Maritime Industry

Protection under IPR in Shipping and Maritime Industry. Intellectual property rights cover a wide domain in maritime industry mainly as patents, copyright and designs. Maritime industry encompasses the manufacturing of ships & boats and transporting the world's largest volume of cargo sailing through the crest and trough in all the seasons. Patents –The patent is the right granted to the 'owner' of the invention, and it can be anything ranging from product to services. A patent gives its owner the right to prevent others from making, using, importing or selling the invention without approval. In other words, patent protects an invention, and grants to the owner the exclusive rights to use his/her invention for a limited period. An invention must be new or novel showing new characteristic which is not known in the body of existing knowledge (called "prior art") in its technical field. It must be non-obvious or involve an inventive step, that is, it could not be assumed by a person with average knowledge in the technical field. It must be useful or capable of industrial application. The invention must be part of the so-called "patentable subject matter" under the applicable law. As we know Patents protect inventions and can be as diverse as protecting the process for example for cleaning flushing ballast water in oil tankers or the design of a zero emission car ferry harnessing wind or design of a vessel capable of providing a distinct technical advantage over similar vessels or use of a material which provides both advantage and novelty to the design

Industrial Designs: - An industrial design is that aspect of a useful article, which is ornamental or aesthetic. It may consist of three-dimensional features such as the shape or surface of the article or two-dimensional features such as patterns, lines or color. By protecting an industrial design, the owner is ensured an exclusive right against its unauthorized copying or imitation by third parties for a specific period (10 years).

In the GCC, industrial design protection is afforded by registering the product design in each country of interest separately through the national patent office. In the UAE, industrial designs are covered under Chapter 3 of the UAE Federal No. 17 of 2002 ("UAE Patents and Design Law") which covers *"any innovative three-dimensional shape that can be used in industry or craft" or "any innovative creation of lines or colors that generates a product that can be used in industry or craft".*

Copyright – Copyright aims at providing protection to authors (writers, artists, music composers, etc.) on their creations. Such creations are usually designated as "works" ("Works" covered by copyright include, but are not limited to, literary works such as novels, poems and plays; reference works such as encyclopedias and dictionaries; databases; newspaper articles; films and TV programs; musical compositions; choreography; artistic works such as paintings, drawings, photographs and sculptures; architecture; and advertisements, maps and technical drawing). Copyright also protects computer programs. Copyright protection is obtained automatically without any need for registration or other formalities. A work enjoys protection by copyright as soon as it is created. Moreover, copyright is something which protects the design rights and rights associated with both confidential information and reputation. Meanwhile, all the rights (Patents, trademarks & Designs) have to be officially registered in order to be protected. IP rights are territorial in nature.

Those Maritime Industry that really wants to obtain a competitive advantage over its rivals must consider what IP protection could be obtained for any inventions or designs that it creates. The results of invention must not be revealed publicly in advance before the registration else protection will be lost forever.

FTO & Infringement: In addition to protecting new technology and designs through the use of IP rights, companies must be aware of **infringing** somebody else's Patents, Industrial Designs and Copyrights Rights. More carefully there is also a need to consider the Infringement case of a third party's IP rights which can later on lead to legal disputes and injunctions and can also halt a project in its tracks. These are very real risks, which all Maritime companies should consider. However, it is possible to take action to minimize such risks. It is advisable to conduct a 'freedom to operate' search before a project commences in order to check for existing technology. Freedom to operate", abbreviated "FTO", is the ability to proceed with research, development and commercialization of a product, without infringing valid intellectual property rights of others. More clearly, the FTO ensures that a product can be made, used, sold, offered for sale, or exported, with a minimal risk of infringing the unlicensed intellectual property rights (IPR) or tangible property rights (TPR) of others. For Example: - If you have invented a "ship" with propeller and someone else had a patent on propeller your ship would infringe their patent. "Propeller patent" is technology belonging to them and this will restrict your FTO with regard to the ship you are willing to patent. Mainly, FTO is advised to support the clearance of your products, technologies, or processes, to conduct patent infringement risk assessments, uncover licensing needs and to provide direction for your product development programs. The maritime industry will change and will have to embrace new technology. Those with larger designer teams will be in a position to take advantage of new inventions and designs, so long as they remember to protection their IP rights and are aware of the risks of infringing third party's IP rights.

Our ADAM lawyers are experienced in all procedures starting from registration for the Intellectual Property Services till the enforcement of the right and the inhibiting of infringing practices.

If you need assistance with registering a Patent or an Industrial design or Copyrights ADAM Global can assist you on the same matter as we have experience team of experts who can understand your query and make your long term Intellectual Property Strategy so that you concentrate on your business development instead of spending your time on protecting you creation.

LAW OF COMPETITION

Competition is a process of economic rivalry between market players to attract customers. Competition also refers to a situation in a business environment where businesses independently strive for the patronage of customers in order to achieve their business objective. Free and fair competition is one of the pillars of an efficient business environment.

In the recent years the Indian economy has been one of the best performers and is on high growth path. Infusion of greater degree of competition can play a catalytic role in unlocking the fuller growth potential in many critical areas of the economy. In the interest of consumers, and the economy as whole, it is necessary to promote an environment that facilitates fair competition outcomes in the market, restrain anti-competitive behavior and discourage market players from adopting unfair trade practices. Therefore, competition has become a driving force in the global economy.

Laws of competition are those laws which promote and seek to maintain market competition by regulating anti-competitive conduct by companies. Modern competition law has historically evolved on a country level to promote and maintain fair competition in markets principally within the territorial boundaries of nation-states.

Objectives of competition laws are:

- Ensure fair and healthy competition in the market.
- Level playing field.
- Faster and inclusive growth.

Competition law believes in the premise that the unrestrained interaction of the competitive forces in the market will yield the best allocation of economic resources, lower prices; improve quality and maximum material progress for the citizens. Thus, the principal objective of the Competition Law is to make the market economy work better by stopping vested interests from obstructing markets. The purpose, therefore, is to maintain and protect the competitive process.

The benefits of competition for economic growth and consumer welfare are well recognized and therefore, strict enforcement of competition law is a big challenge for any competition authorities.

With these objectives in mind the Competition Act 1999 was enacted replaced the age old MRTP Act. The Act prohibits anti-competitive agreements, abuse of dominant position by enterprises and regulates combinations (acquisition, acquiring of control and Merger and acquisition), which causes or likely to cause an appreciable adverse effect on competition within India. The Act established the Competition Commission of India to prevent activities that have an adverse effect on competition in India

Maritime Competition

Approximately percent of the international trade in goods is currently carried out by sea, despite the development of other means of transport. When it comes to transport, it is maritime transport which undisputedly provides the principal means of carriage of goods. Globalization means that the sea transport will continue to play pivotal role in trade particularly in the European Union. No other continent has such long shoreline in relation to its total surface area to serve its trade. Also, the concentration of ports in the European Union is the highest in the world; moreover, the EU-controlled commercial fleet is by far the largest in the world. Liner and tramp shipping are, without doubt, the most important means of transportation used for international trade.

Two-thirds of world trade (in terms of weight), and one-third (in terms of value) is carried by ocean borne vessels (notably through bulk and liner carriers). This does not necessarily mean that liner and bulk (shipping) sectors are two distinct independent entities. They consist of several sub-sectors and specialized sub-markets. Thus, to call it a unitary industry would be misleading: it is usual to distinguish a number of widely differing services and sub-markets which exist within it. There are basic differences as well as similarities between the two sectors of liner and bulk shipping.

The most important difference is that liner service is a scheduled service where container vessels call certain ports according to a given frequency, while bulk vessels trade around the globe in pursuit of profitable freight in a dynamic but unpredictable pattern. Another difference relates to the design of the vessels: liner vessels have the capacity to transport large and variable numbers of goods in parcels or cargo units, while tramp vessels carry bulk dry or liquid cargo (oil, ore). Moreover, goods moved in liner services are high-value ones, i.e. either manufactured or semi-manufactured goods. Substantially different also are the contractual terms accompanying liner transport vis-à-vis tramp shipping: in the former mode of transportation, the relationship between shippers and carriers is regulated by standard printed forms of contracts (e.g. bills of lading or similar documents) whose terms and conditions are directly prepared by carriers without any negotiation with their contractual counterparts, except as regards tariffs. In tramp shipping, the trader normally charters and pays a negotiated rate for the whole ship, either for a voyage or for a period of time. Another significant difference between the sectors is the degree of cooperation that exists inside them. Cooperation among liner ship-owners has always been structural6; the predominant form of alliance in liner shipping has been the conference, global alliance, full function merger or the consortium. The quest for cooperation among competing shipping lines has for a long time been explained using sophisticated economic theories; that approach lasted for decades and still continues to fascinate some scholars. In contrast, tramp shipping synergy is a phenomenon of the last decade or so, and is expressed mainly by tramp pools or other forms of alliances on which legal and economic research is relatively limited.

For a long time, scholars explained the need for ship-owners to avoid competition among themselves using economic theories: in particular, it was maintained that liner shipping demonstrates peculiarities that cannot cope with a competitive market model since, inter alia, (a) fixed costs are proportionately much higher than variable costs, (b) entering and exiting a given market (i.e. a liner service) is not easy and entails substantial shifting costs, (c) the unit of supply in the liner shipping market (i.e. the vessel) does not correspond to, and is much bigger than, the unit of demand (i.e. the parcel or cargo unit), this making it quite awkward for the carrier to constantly adapt its offer in order to match the fluctuations of demand. The above reasons stood as an obstacle to conceptualizing the application of the perfect competition model in the liner sector: hence, it was a matter of common sense to state that if liner carriers were to compete among themselves for pricing; this would produce “rate wars” and a “destructive competition” whose consequences would undermine the stability of trade.

Concrete benefits resulting from price fixing and capacity regulation are identified; - a fair share of the proved benefits are passed on to consumers; - the indispensability of price fixing and capacity regulation for the provision of reliable services; and - competition is not eliminated on a substantial part of the market.

LAW OF TAXATION

A tax may be defined as a pecuniary burden laid upon individuals or property owners to support the Government, a payment exacted by legislative authority. A tax is not a voluntary payment or donation, but an enforced contribution, exacted pursuant to legislative authority. Tax law in India consists of direct tax law and indirect tax law, and may be paid in money or as its labour equivalent (often but not always unpaid labour). India has a well-developed taxation structure. The tax system in India is mainly a three-tier system, divided between the Central, State and the Local Government organisations.

Direct tax law of India

Corporate Tax laws have been volatile and dynamic in the past decade. Today, it is imperative to strategise business, bearing in mind the fundamentals of Indian tax laws rather than its provisions. The new direct tax law is operational from April 2012. New statutes often promise to be simpler and less burdensome. Yet, taxes are an item of dynamic cost or outgo to the assessee and tax payers strive to garner tax saving opportunities. Hence assessees, resident and non-residents have to plan their activities in a prudent manner, which necessitates professional assistance.

The Central Board of Direct Taxes (CBDT) is a part of the Department of Revenue in the Ministry of Finance, Government of India. The CBDT provides essential inputs for policy and planning of direct taxes in India and is also responsible for administration of the direct tax law through Income Tax Department. The CBDT is a statutory authority functioning under the Central Board of Revenue Act, 1963.

Such assistance may encompass domestic and international income-tax matters, inbound investment structuring, tax efficient mergers and acquisitions compliant with Indian corporate and tax laws, expatriate taxation and transfer pricing.

Indirect tax law of India

Indirect taxes are taxes collected by an intermediary from the person who bears the ultimate economic burden of the tax. Direct taxes are collected directly from the person on whom tax is imposed. In India, both the Union Government at the federal level and the provincial or state governments impose various indirect taxes. Customs Duties, Excise Duties, Service Tax and Value Added Tax are examples of indirect tax that India levies. Indirect taxes occupied the numero uno position for a long time in the fiscal history of India. Being a major source of tax revenue for the governments at all tiers, administration of indirect taxes has been witness to different interpretations of provisions and consequential disputes. India is on the threshold of major reforms in this area as Goods and Services Tax (GST) is set to be introduced merging all indirect taxes.

The Central Board of Excise and Customs under the Department of Revenues in the Ministry of Finance deals with the task of formulation of policy concerning levy and collection of indirect tax. In exercise of the powers conferred, the Central Government makes for the purpose of the assessment and collection of indirect tax.

The indirect tax law is being administered by various Central Excise Commissione rates, working under the Central Board of Excise & Customs. There are six Commission rates located at metropolitan cities of Delhi, Mumbai, Kolkata, Chennai, Ahmedabad and Bangalore, which deal exclusively with work related to Service Tax. Directorate of Service Tax at Mumbai oversees the activities at the field level for technical and policy level coordination.

Maritime Taxation

The shipping industry operates in a highly globalised and competitive business environment. By virtue of being closely linked to the world economy and trade, it is more liberalised (from a tax perspective) than most of the other industries in the world. In many countries having a fairly extensive coastline, the maritime infrastructure development has attracted significant investments, which has impacted the pace, structure and pattern of development in those countries.

Approximately 90 per cent of global trade (in terms of volume) is carried out through sea, making the shipping industry a key participant in world trade. India has an extensive coastline of around 7,500 km. The country’s maritime industry encompasses ports, shipping, inland water transport, as well as aids to navigation and manpower engaged in operations both on board and ashore. Around 95 per cent of India’s external merchandise trade by volume, and 70 per cent by value, is through maritime transport.

In order to provide an impetus to the economic growth of the country, it would be imperative to boost the shipping industry and the port industry through tax and other regulatory reforms coupled-with resolution of the current tax challenges being faced by the shipping industry.

Majority of the countries over the world provide for a tax regime which is low-level taxation linked to vessels tonnage rather than actual revenue. Accordingly, with the intention of making the Indian shipping industry globally competitive, providing Indian shipping companies with a level playing field through the reduction of taxes, the Indian Government introduced the Tonnage Tax Scheme (TTS) in the Finance Act, 2004.

The TTS is optional scheme i.e., if a company does not wish to specifically opt for this scheme, it would continue to be governed by the normal provisions of the Income-tax Act. However, such a beneficial tax regime is only available to Indian companies.

While the world over, the tax regime is relaxed for the shipping industry, the Indian government has provided certain additional stringent conditions which are not in sync with the international tax practices followed by other countries. Further, there are certain types of income which would be chargeable to tax under the normal provisions of the Income-tax Act, even though the company has opted for TTS. Some of the issues faced by the industry have been enumerated hereunder:

- **Determination of Tax Residential Status of Seafarer**

Supplement to the reforms required in the shipping industry, a major concern is towards the procedural difference in determination of tax residential status of seafarers working on Indian ships and those working on foreign ships. This procedural difference has resulted in a large scale drift of skilled seafarers to foreign ships thereby leading to a shortage crisis of qualified personnel to the Indian shipping companies.

- **Income Earned on Investment Linked to Mandatory Reserve**

A company which has opted for TTS is statutorily required to transfer at least 20 per cent of the book profits arising from its shipping business to a reserve account which has to be utilised towards the acquisition of ships.

Since the cash is required to be made available for the acquisition of ships pending utilisation of the same, such cash may be deployed in short-term instruments. The Act does not contain specific provisions to include the income earned/accrued on such instruments as part of the tonnage income, despite it being directly attributable to shipping activity. Further, deploying such income towards mandatory purchase of ships may not be in line with the company’s expansion strategy.

- **Capital Gains**

In the shipping industry, replacing old and obsolete vessels and upgrading vessels with newer technology is essential. Accordingly, the qualifying vessels are required to be sold as a part of the shipping business.

However, any profits or gains arising from the transfer of qualifying capital assets are chargeable to income tax as capital gains under the normal provisions of the Act. The profits arising from the sale of qualifying ships are not considered as tonnage income under the TTS, which, if done, would automatically result in the creation of reserves (as discussed above) for the acquisition of more new ships, thereby further augmenting the shipping business. Whereas, most of the jurisdictions wherein such tax incentives/schemes are prevalent, profits or gains arising from transfer of such assets are included in the tonnage income and exempted from tax.

The key indirect taxes applicable to the shipping industry and the challenges being faced by the industry are summarised below:

Key Issues and Challenges Faced by Shipping Industry

<u>No CENVAT Credit in Respect of International Transportation Services:</u>

- Non eligibility to claim refund of taxes and duties paid on inputs, input services and capital goods result in high costs relating to transportation of goods. This has a serious impact on the Shipping industry and is a stumbling block to the development of the international transportation business.
- Globally, major maritime jurisdictions like UK, Singapore, Netherlands, Greece etc, give full credit of taxes paid on inputs used for export and import cargo.
- Hence, there is a need to allow CENVAT credit in respect input services and inputs used for international transportation services.

<u>Service Tax on Time Charter for a Period up to One Month:</u>

- Time charter services provided by an Indian shipping company to a foreign shipping company for a period up to one month would attract service tax. However, if similar services are provided by foreign shipping companies to foreign customers, service is not taxable since place of provision of services is outside India.
- Time charter services provided by an Indian shipping company to an Indian customer for up to one month would be liable to service tax. However, if similar services are provided by foreign shipping companies to an Indian customer, service tax would not be applicable since place of provision of services is outside India.
- This results in a disparity in levy of service tax on services provided by Indian shipping companies vis-à-vis foreign shipping companies.

No Service Tax Exemption on Services Received by Shipping Companies:

- Service tax is currently imposed not only on various services availed by the Indian shipping companies domestically but also on some of the crucial services availed by them outside India.
- Globally, in major maritime jurisdictions like UK, Singapore, Netherlands, Greece etc, taxes relating to the shipping industry are either zero rated/exempted, whether such services are availed domestically or internationally by non-resident or resident ship owner.
- Government should consider the proposition to grant an upfront service tax exemption on services received by shipping companies.

Lower Service Tax Abatement on Coastal Shipping Services:

- Services of 'transport of coastal goods and goods transported through national waterways and inland water' are liable to service tax with an abatement of 50% (effective rate - 6.18%).
- However, the abatement percentage is higher for rail transport services (70% - service tax rate of 3.708%) and for road transport services (75% - service tax rate of 3.09%).
- The present anomaly results in a cost disadvantage to Indian shipping companies vis-à-vis providers of road transport services and rail transport services.

To facilitate the growth in Indian shipping industry, Government of India has been taking several measures. In the past, under Sec. 33AC of the Income Tax Act 1961, shipping companies have been permitted 100% tax exemption on their profits transferred to a special reserve created under this Section. Introducing tonnage tax in lieu of corporate tax from 2004-05 and the inclusion of dredgers in the tonnage tax regime in 2005-06 and also allowing 100% FDI in the shipbuilding sector are some of the measures taken for the development of the industry. The Tonnage Tax system helps Indian ship owners to even out their tax burden in the industry, which is highly cyclical in nature. Also, cargo support is extended by the Government by centralizing shipping arrangements through chartering wing (TRANSCHART), finalizing all import contracts on FOB (Free on Board), in respect of Government owned or controlled cargoes, so as to retain control over the shipping arrangements in the country, and providing support to the vessels.

The Government of India has proposed the following tax incentives in the Budget 2016-17 for strengthening and promoting the Indian maritime sector:

i) **Exclusion of services of transportation of import cargo by ships on voyage charter from Negative List.**

Freight charged by shipping companies for import of goods into India has been excluded from the Negative List and permitted availment of CENVAT credit on inputs used for providing such service. This will bridge the competitive gap between Indian and foreign shipping lines in the taxation sphere.This positive change puts India on par with the major progressive maritime jurisdictions, which already give full credit of taxes paid on inputs used for import cargo.

ii) **Zero rating of services of transportation of export cargo by Indian ships.**

The transport service for export of cargo was not being treated as export and CENVAT credit was also not available for export of goods, which made the service costlier for Indian flag ships.It has now been proposed that the services provided by Indian shipping lines by way of transportation of goods by a vessel to outside India shall be zero rated with effect from March 1, 2016 along with the availability of CENVAT credit for inputs used in providing the service. This will reduce transportation cost and put India at par with the major progressive maritime jurisdictions which have zero rates of taxation on maritime services and also provide full credit of taxes paid on inputs used in the maritime services.

iii) **Reduction of service tax incidence on coastal shipping.**

Realizing the need for encouraging transportation of goods through coastal shipping rather than road or rail, the Government, in the Union Budget 2015-2016, had brought the abatement of service tax at par with road and rail i.e. 70%. However, due to lack of CENVAT credit on inputs used in the service in case the benefit of abatement is availed, the shipping companies were not able to provide services to the customers at lower costs.In the present budget, the Government has rectified this anomaly and allowed shipping companies to charge service tax at abated rate on freight income and avail CENVAT credit on input services.

iv) **Reduction of Central Excise duty on capital goods, raw materials and spares used for repair of ocean going vessels.**

This would reduce the material cost used for repair of the ocean going vessels by 4%, if domestically procured.This amendment also permits the shipyards to procure capital goods for ship repair of ocean going vessels at NIL rate of duty as against the existing 12.5%.With the proposed amendment, cost of ship repair and dry-docking in India will reduce.

v) **Simplification of procedure to avail Customs and Central Excise duty exemption on procurement of goods for shipbuilding and ship repair.**

The procedure for procuring goods at concessional/NIL rate of Central Excise and Customs duty for the ship building and ship repair has been considerably streamlined. The new procedure only requires intimation to be sent to the Excise Department instead of their approval for procuring goods at a concessional/NILrate.This would enable the ease of doing business.

vi) Rationalization of Interest rates on delayed payments of all indirect taxes.

It is felt that lower interest rates will reduce fiscal burden of maritime sector.

Further, in order to provide the Indian shipping industry a level playing field and make it competitive at international level, the government has earlier implemented certain policies as mentioned below:

i) Infrastructure status for shipyards.

The Institutional Mechanism on Infrastructurehas on December 21, 2015 recommended inclusion of shipyards undertaking shipbuilding and ship-repair under the Harmonized List of Infrastructure sectors.

ii) Financial assistance and eligibility support for Indian shipyards.

The Government has on December 9, 2015 approved Financial Assistance Policy for Indian shipyards for ten years commencing from April 1, 2016. Government has also approved that all government departments or agencies including CPSUs have to provide Right of First Refusal to Indian shipyards while procuring or repairing vessels.

iii) Parity between indigenously built ships and imported ships.

Government has on November 24, 2015 exempted Customs and Central Excise duty on inputs used in manufacture of ships to provide a level playing field between indigenously built ships vis-à-vis imported ships.

iv) Ease of Doing Business for Indian shipyards.

Government has on November 24, 2015 relaxed the limitation to operate shipyards under customs control under Section 65 of the Customs Act, 1962 to avail duty free imports or domestic procurement of inputs used in shipbuilding.

v) Boost to movement of containerised cargo through coastal route.

Government has on September 17, 2015, exempted Customs and Central Excise duty leviable on bunker fuels, namely IFO 180 CST and IFO 380 CST, used in Indian flag vessels carrying a mix of EXIM, empty and domestic containers between two ports in India.This tax incentive will reduce operational costs of coastal transportation and will encourage growth of Indian tonnage as well as promote development of transhipment hub in India.

vi) **Boost availability of special vessels in Indian market.**

In order to promote Coastal Shipping and decongesting roads and railways Inland water transportation, Government has, on September 2, 2015, relaxed cabotage for special vessels such as Roll-On Roll-Off (Ro-Ro), Hybrid Roll-On Roll-Off (Hybrid Ro-Ro), Roll-On Roll-Off cum Passenger (Ro-Pax), Pure Car Carriers, Pure Car and Truck Carriers, LNG vessels and Over-Dimensional cargo or Project Cargo Carriers for a period of five years.

vii) **Parity for Indian seafarers employed on Indian flag ships vis-à-vis those employed on foreign flag ships.**

Government has, on August 17, 2015, brought parity in the tax regime of Indian seafarers employed on Indian flag ships vis-à-vis those on foreign flag ships and mandated that the period of stay in India shall be counted as per the entries made in his/her Continuous Discharge Certificate (CDC).This would benefit around 35,000 seafarers presently employed on Indian flag ships. This would not only change the perception of Indian seafarers with regard to serving on Indian ships, but would also reduce the additional cost burden on Indian companies and help retain quality officers.

viii) **Simplification in collection and assessment of light dues.**

E-payment of light dues was put in place on May 5, 2015. For the collection of light dues, a simplified mechanism has already been adopted on November 26, 2014 for container ships whereby collections shall be made on TEU (Twenty feet Equivalent Unit) basis instead of net tonnage basis. This would facilitate faster clearance of ships and reduce detention time of vessels for payment of light dues.

ix) **Unhindered Right of First Refusal (RoFR) for Indian flag vessels and Indian dredgers while working on Indian coast.**

Keeping in view of the Government's policy of strengthening and promoting the Indian shipping and dredging industry in a competitive framework, Government has, on March 26, 2015, extended the ambit of the Right of First Refusal (RoFR) for Indian flag vessels by removing the earlier 10% price band cap with respect to L1 for operation in coastal waters. Similar benefit has been extended to Indian dredgers for undertaking dredging works in non-major ports. This would help Indian flag vessels as well as dredgers to get more business.

x) **Simplification of procedure for registration of Ship Repair Units.**

As a step towards creating a climate of ease of doing ship repairing business in the country, Government has, on February 13, 2015, simplified the procedure for registration of Ship Repair Units by dispensing with the requirement for their registration with the Director General of Shipping, Mumbai with immediate effect. This would encourage establishment of more ship-repair units which would maximise employment potential.

xi) Use of re-rolled steel obtained from ship-breaking for the purposes of ship-building.

To bring down the cost of construction of barges, river sea vessels (RSV Types 1 & 2) and port and harbour crafts and to meet demand for steel by ship and barge builders, the Government has, on February 9, 2015, decided that re-rolled steel obtained from re-cycling yards/ship breaking units would be certified for use in construction of these vessels.

xii) Simplifying legal paradigm

13 rules out of 67 under M. S. Act, 1958 are being rescinded. The draft Merchant Shipping Bill is under circulation consisting of 16 parts and 267 sections as against 25 parts and 581 sections of the present M. S. Act in vogue.

xiii) Promotion of e-governance for permissions.

- Facility for online application for chartering permission and for e-payment of requisite fee for the charterer has been introduced on December 8, 2015.
- Facility for online application for Multi-modal Transport Operator license and for e-payment of requisite fee for the operators has been introduced on November 30, 2015.
- Facility for online application and for e-payment of requisite fee for issuance of fresh CDC and renewal/replacement/duplicate CDCs has been introduced on June 15, 2015.
- Facility for online application for registration and for e-payment of requisite fee for the shipowners has been introduced on March 20, 2015.
- Facility for online application and assessment for the Certificate of Competency examinations has been introduced on January 12, 2015.

MODULE V

Legal Research Methodology and Project Writing Techniques

INTRODUCTION

Legal Research alone can enable a person to have in-depth insight and knowledge of the legal principles and precedents. It requires immense patience and research skills. Research, especially, in the field of law, occupies a significant place because law is not only an instrument to maintain law and order in the society but it also provides social, political and economical justice by effectively implementing welfare schemes. Law operates in society which is itself influenced by various factors such as social structure, economic condition, nature and functions of Government. With the advancement of scientific and technological spheres, social dimensions such as means of communications have widened and brought different cultures together to give birth to new thoughts and ways of life. This has further increased the complexities of the modern societies bringing with it its own challenges. Therefore, to cope with these problems, it must have the capability to face, tackle and resolve the same. This quality of law can be acquired only through legal research.

Research, in legal science, is a continuous process which is carried on not only by the students of law but also by the judges and the legal practitioners. It would, probably, be more appropriate to say that the judges and legal practitioners are better researchers than law teachers and law students. Every problem undertaken by legal practitioner demands a lot of thinking and study so that the problem may be resolved to the satisfaction of the social scientist and the legal philosopher. The judge is not wholly dependent on what has been said by the parties; he does his own research and study before arriving at a particular decision. Both judges and legal practitioners obtain their materials from the socio-legal history as well as from Statutes before they formulate an opinion to arrive at a conclusion. And what is, propounded is neither the legal history nor the Statute, but a new thesis in the process of the development of jurisprudence. It is on going research which order to keep the water of the legal stream fresh and pure, otherwise it becomes stagnant.

History of jurisprudence evinces different approaches and sometimes paradoxically divergent views on law and legal principles. It is, therefore, a unique and difficult task for a researcher in law to propound his thesis with utmost care and caution because there is hardly any legal principle which may not be challenged by its opposite tomorrow. G.W. Paton is right in illustrating that a principle which is valid today may be discarded by its opposite tomorrow. For the legal researcher the important thing to remember is that the subject matter of his research is in a state of flux. In this sense he is in a disadvantageous position as compared to the researcher in physical and natural sciences, whose subject matter and principles are not subject to change. A principle of chemistry or biology is equally true in India and in the other part of the world. But a legal rule in one society is only valid in the place of its origin and application.

Legal Research

‘Legal Research’ embraces in its ambit that branch of knowledge which deals with the principles of law, legal institution and social facts as reflected and substantiated by law and the society. Today law does not emanate solely from the traditional sources, viz., customs, legislation and judicial precedence. The principle of law and legal theory in modern times are evolving, and due to the recognition of human personality.

Objective of Legal Research

The object of legal research, therefore, is to find out lacunae or deficiencies in the existing laws and to suggest suitable measures to eliminate them. A legal researcher, therefore, must always keep in mind the changing social trends to keep his theory in conformity with the emerging social problem so that expectations and demands of the society from law may justifiably be met.

If there is an area in which there is no law at all the objective of legal research would be to suggest suitable legislation for that area, but if there is a law for that area but due to one reason or the other, it does not work, its aim would be to suggest reform in the existing law so as to make it workable.

Thus the significance of legal research lies in the submission of proposals for reform in the existing law be it enacted, customary or judicial. However, this should not be the end or the sole objective of legal research. When research is undertaken as a part of the process of law reform, it is undertaken for making suggestions for improvements in the law on concrete and easily identifiable matters and the formulation of those proposals in precise terms

Therefore the following are some of the objectives of legal Research:

i) to look for facts hitherto unknown; to compare and contrast these facts with the existing ones;
ii) these facts have to be analyzed in the light of existing socio-legal context;
iii) a careful study of the legal precepts and principles as they exist today from historical perspective;
iv) legal techniques have to be compared and contrasted with research techniques in social sciences;
v) legal principles and precepts must be researched from the point of view of their origin, evolution and development;
vi) legal research must be objective and purposive;
vii) legal research must weigh the legislative, executive and judicial pressure on legal theory and analyze it in the socio-legal context; and
viii) legal research must comprehend in its ambit the interpretational jurisprudence.

Research Methodology

There are several research methodologies in practice, viz., i) Doctrinal method of research; ii) Non-doctrinal method of research; iii) Questionnaire method of research; iv) Interviewing method of research; v) Sampling method of research; vi) Scaling techniques of research; and vii) Story-telling method of research.

Following are the most used research methodologies in the legal research:

i) Doctrinaire or Principled research; and
ii) Fact based or Empirical research.

Doctrinaire or Principled research

In legal research, the methodology is approximately the same as in the field of Social Sciences. Social Sciences and law have common subject of their research but the points of view and the angle with which the legal researcher looks upon law are certainly different and unique. Therefore, the traditional doctrinaire method does not answer the needs of a legal researcher. However doctrinaire approach ensures universality which is desired by every scientist but in the

field of law search for universality eludes the researcher. It is with this view that legal thinkers have always felt the need for review and revision of the decisions of highest judicial tribunals.
In India the Supreme Court from its very inception has utilized the provisions of review, and revision, leading to reversal of its previous judgments. It is because of this fact that the Supreme Court has added a new chapter on the constitutional substantive features which are considered the essence of the Constitution. These features are the forms which have permanent character within the ambit of which constitutional principles are framed and reframed. If we take the doctrinaire method in this sense that certain principles or features are permanent then the legal researcher can follow the method in his/her research. It will help the researcher to delimit and define the area of the research in hand. It is useful to elucidate and amplify the subject matter of research. Therefore, this type of research is given the name of Doctrinaire or Principled research.

<u>Characteristics of Doctrinaire Research</u>

1. A legal researcher draws his plan of research on the basis of legal precepts. Legal precepts and principles govern the given factual situation and propound the principle for future situations. Legal principles always change and a principle even laid down and validated by the apex body may come to an end abruptly, for example, in Sanakari Prasad v. Union of India (1952) SCR 89. The Supreme Court laid down the principle while interpreting the Constitution that the Preamble to the Constitution is not a part of the Constitution. But the same court in Kesavananda v. State of Kerala (1973) Supp. SCR 1, popularly known as “the fundamental rights case”, affirmed an opposite principle that Preamble to the Constitution is a part of the Constitution.
2. Legal principles are embodied in the decisions of the appellate Court and legal treatises. In principled approach the researcher is benefited in approaching the subject matter of his research which he can analyse and deduce his conclusions. The material is available to him in law reports, legal journals and treatises.

<u>Advantages of Doctrinaire Research</u>

1. In doctrinaire research the principle or rule is a tool in the hands of the lawyers and the judges and through the process of interpretation it can be matched to in a situation demanding solution.
2. The researcher may in this method mould his thesis in the light of the legal principles and analyse them in the social context.
3. Doctrinaire method of research is like an experiment in a laboratory which may be tried and tested in different places and times and if found sound will automatically become universal.
4. There are certain principles of interpretation which are of universal application like the doctrine of ‘ultra vires’, ‘golden rules’ of interpretation etc. which have universal application in legal theory.
5. This method is best suited in the changing situations. It is through this method that the law keeps developing without producing the adverse impact on social thinking.

<u>Disadvantages of Doctrinaire Research</u>

1. Principles deduced from this method of research are short lived. To illustrate, this point Gopalan’s case is an eye opener that how in the field of personal liberty. The legal principles have evolved and changed every time to comprehend various aspects of human

personality to bring them within the concept of personal liberty. In this context the property right kept fluctuating till it was not removed from part three of the Constitution.

2. This method of research being devoid of social dimension lacks the merit of being tried and tested in different times and places.
3. This method of research cannot be fruitful because the validity of a legal principle depends upon its application to a given fact situation. This is not possible in doctrinaire research.
4. In this method the analysis of principles is made either in the light of the legislative policy or the factual situation under which the Court was called upon to lay down the rule. Thus, doctrinaire research is historical in character.
5. Interpretational jurisprudence is capable of giving more than one meaning to a legal principle which depends on the personal philosophy of the judge. The researcher also deduces his conclusion according to his own views and presumptions. Therefore, his conclusions are likely to be subjective.

Conclusion

Notwithstanding the flaws in principled research the method is useful and occupies a very important place as a tool of the researcher. No researcher can undertake a research in law without first mastering the principles of legal theory and legal concepts which are the bye product and explanations of factual situation. For example, the principle of possession or the theory of possession is nothing but the factual explanation and justification of a given factual situation. Therefore, a researcher must always remember this truth that the legal principle originated in the soil of facts.

Fact based or Empirical research

The second method of legal research is the empirical method. The empirical method of research is on facts as distinguished from principles. In empirical research, the researchers are concerned with a problem which is immediately faced and demands answer. The researcher identifies the issues, makes the inventory of those issues, analyses them in the context of the problem and investigates deeply into the causes which give rise to such a problem, for example, if a legal researcher intends to ascertain the reasons of increase in divorce cases in an area then his research will not be completed without actually collecting information directly from the divorced couples. This direct knowledge obtained from the interview of divorced couples will enable the researcher through the method of analyzing his information, to reach a definite conclusion, on the basis of which necessary and relevant suggestions could be made. It is in fact context oriented research. As already said in the legal field what is appropriate in one place and time may not be so in another place and, therefore, the conclusion of legal research based on empirical method cannot produce universal principles. Empirical research is intimately related to the actual social situations which demand legal solutions.

Empirical research or call it a fact based research is not conditioned by a theory or a principle. In this type of research the researcher studied the facts of a given situation and their interrelations and consequences. These consequences or resulting implications of the fact situation constitute the product of fact situations. The researcher analyses and searches for the reason of those results. On the basis of those reasons he draws a conclusion based essentially empirical. His study or observations provides him with the result. These results constitute principle and precepts of his study.

Characteristics of Empirical or fact based Approach

i) Law is a social science and empirical research in law is, therefore, fact oriented.
ii) It is concerned with the problems touching the socio-legal sphere.
iii) This method concerns more with the factual situations than the justification and reliance on principles and precepts.
iv) Empirical research is dependent on the research perspective of the researcher and his approach to legal principles and concepts.

Advantages of Empirical Research

i) Empirical research is important in understanding law in action. It is through empirical research that the researcher determines the attitude, impact and viability of a social situation which demands a legal principle. A legal principle devoid of social relevance, however pure and perfect is barren.
ii) Researcher can provide valuable and effective information on the basis of his observations regarding the viability and otherwise of legal principles and precepts by pointing out its non conformity with actual social life and facts.
iii) It is through this method alone that the views of people on a question of law may be effectively ascertained.
iv) A principle tried and tested in experience is better than a principle based on logic.

Disadvantages of Empirical Research

i) Empirical method of research is considered difficult as it requires field study.
ii) This method cannot be successful without co-operation of the persons who the researcher relies upon. Their conduct and character are beyond the control of researcher. Their attitude and personality determines the quality of the research conclusion.
iii) Empirical research can be effectively carried on only after mastering the principles of jurisprudence and legal concepts.
iv) The weakness of this theory is its application to a single given situation which runs the risk of failure when applied in general.

Conclusion

Therefore, some times conclusions of empirical research proved weak in giving definite direction for legal development or reform. This method is subjective and therefore suffers from the weaknesses inherent in this approach.

Imperatives of Research

Legal Research has a distinguishing characteristic which separates it from the research methodology other social sciences. Legal research can be made within the limited parameter of a legal system. Social context is only relevant when it impinges on legal principles. A legal researcher should not forget that law is minimum morality. Therefore, what is important for a legal researcher is to limit himself to the legal contents only and leave the field of moral activities to the other social sciences.

The Research must be carried on with proper understanding of the problem whether it is doctrinaire or non doctrinal or an empirical research.

The researcher must approach the subject with perfectly unbiased mind without prejudices, likes or dislikes. Without this bent of mind no research, whether doctrinaire or empirical can succeed. The aptitude for research determines the quality of the research. Research must not be undertaken as a pastime.

The quality of research is improved, if the research is undertaken with full awareness of history of the subject, whether doctrinaire research or empirical research. The researcher must be aware of the reasons for the emergence of the rule and its present, and reasons as to why he undertakes research and his objective? Similar requirements are expected from empirical researcher.

It is not possible to demarcate the lines of separation between the doctrinaire and empirical methods of research; in fact the two methods are complementary. Fact based research is non-productive if it is not based on principles and precedents, and doctrinaire method is barren if it is devoid of social dimensions. Therefore what is necessary is that the extremes must be avoided.

Steps in Preparing Research Report/Project/ Dissertation/ Thesis

The Chapter Outline

The preparation of a chapter outline is a useful first step in writing the rough draft. The chapters in most research papers, projects, dissertations and thesis follow a fairly standard format. There is an introductory chapter and usually there is a chapter reviewing previous research called as Conclusion. Thereafter next few chapters, the body of the paper or project will follow. The empirical research study form or constitute frequently has one or more chapters on procedures and techniques (hypotheses, sample, tests, research design) and one or more chapters on results of the study. The analytical research study frequently has chapters according to a chronological development (for instance, early stone age, middle stone age, late stone age; early years, the formative years, and so on) or a logical development (poetry, drama, fiction satire). The final chapter is for conclusions.

Within each chapter there are major sub-headings and there are minor sub-headings. These headings often derive from the headings used in note taking or from some of the points described above.

(i) Spacing

The body of the text is normally double spaced, though longer research papers or projects sometimes use 1½ spacing. Convention requires different spacing for quotations, footnotes, tables and figures, and appendices.

(ii) Pagination

Every page in an assignment, project report or research paper is given a number, although not every page has its page number typed on it.

All other pages beginning with the fist page of Chapter-I and including bibliography, appendixes, and pages of tables and figures are numbered in Arabic numerals. This number normally appears without punctuation on the top right-hand corner of the page, one inch from the top and one inch in from the right-hand edge of the paper. The exception to this is the first page of each chapter which, like the title page, may have no page number appearing or may have the page number centered, one inch from the bottom of the page.

(iii) Margins

The margin recommended at the left of the page is 1½ inches which allows for binding. It is not possible to keep a constant margin on the right-hand side of the page but a margin of approximately one inch allows a length of line that is easy to read. Margins of 1¼ inches at the top and bottom of the page give a balanced appearance to the whole. It is important to maintain these margins because binders often trim papers. Researchers are required to use A4 size Executive Bond plain white paper only.

(iv) Binding

Pages of your research paper may get misplaced or lost if they are left unattached or merely folded down at a corner. Although a plastic folder or some other kind of binder may seem an attractive finishing touch, most instructors find such devices a nuisance in reading and commenting on researcher's work. Many prefer that a paper be secured with a simple paper clip, which can be easily removed and replaced.

Citing Cases

Cases are used as authority for propositions of law. They should be cited in your written work in accordance with the following rules. These citations should be placed in footnotes or end notes, not in the text. Broadly speaking, cases are referred to in either of the following two ways:
The case name may be used in the text (main body of the research). In such instances, only its citation will appear in the footnote or end note.
For example: According to the Court of Appeal in Carlill v. Carbolic Smoke Ball Company an offer can be made to the world at large.
The principle laid down in the case may not be mentioned in the text, but merely cited as authority for a proposition. In such instances, both the case name and its citation will appear in the footnote or end note.

For example: An offer can be made to the world at large1.

1. Carlill v. Carbolic Smoke Ball Company (1893) 1 QB 256.

Names of the parties: A case should be cited using the names of the parties as these appear in the heading on the first page of the report of the case. Thus:

Kudupudi Lakshmi Veera Venkataratnam v. Kudupudi Sri Krishna Veera Prasad
Not as:
K L V Venkataratnam v. K S K V Prasad
However, the following exceptions are allowed:

(i) Repeat References

If a case has been cited in the text of your work, subsequent references to that case can be abbreviated where they are located so close to the original citation, or are used so frequently, that the reader will understand which case is being referred to. Thus:

Hedley Byrne & Co. Ltd v. Heller & Partners Ltd
Becomes
Hedley Byrne

(i) Un-named Parties

Where additional parties are referred to in the heading of a law report as “Another”, or “Others”, the citation should not include “Another”, or “Others”.

Name of the Law report

The name of the law report in which the case is reported should not be given in full; instead, the prescribed abbreviation should be used. This can usually be found in the introductory pages of the volume in which the case is reported.

The mode of citation of this volume of the All India Reporter will be :

AIR

Use of Italics

The names of the parties are not italicised in the heading of a law report. However, when the case is cited in judgments, or other written work, they are written in italics. On the other hand, the law report reference remains in Roman.

In traditional style guides, the “v” separating the names of the parties was not italicised. However, India adopts the growing practice of italicising that symbol.

Thus, cases should be cited as: Harjinder Singh v. Karnail Singh AIR 1998 SC 1648.

Preferred Reports

Where a case is reported in several law reports, an authorised report should be cited. A non-authorised report of a case should be cited only when the case is not otherwise reported, or you are not able to gain access to an authorised report having made all reasonable efforts to do so. The following table categorises some of the more common law reports.

	Authorised	**Secondary**
India	SCR	DLR, ALJ, ALJ, AIR, SCC
Australia	CLR, FCR	ALR, ALJ
England	AC	All ER, QB, WLR

Internet Citation Formats

As the Internet is used increasingly for research purposes, the question often arises as it how to cite the documents found there. Listed below is a citation guide for Internet resources available on the World Wide Web to help you compile a bibliography of online sources. As in all serious research, careful documentation of Internet sources is extremely important. When using Internet sources, because of the ephemeral nature of information and URLs on the World Wide Web, it is wise to save any document that you are citing, either to disk or by making a printout, as proof that you have cited an authentic source.

Ex: http://www.chawlapublications.com/rrr12.htm (date on which web site was visited-to be mentioned here)

for

Chawla Publications (P) Ltd, Chandigarh, India.

Footnotes

Footnotes are conventional valedictory and explanatory procedures which should be used sparingly and only when the material being presented clearly needs amplification or acknowledgment. Footnotes should appear only in the body of a research paper or dissertation, never in an abstract. As the name implies, footnotes are usually found at the foot of a page although in some manuscripts they appear at the end of each chapter or at the end of the paper. Footnotes can be a distraction if they are so numerous and frequent that they persistently impinge upon the reader's attention. Therefore, it becomes essential, before including any footnotes in a research paper or project, to assess whether the material relegated to a footnote is important enough to be incorporated into the main body of the text, or whether it is essential to include it at all. Once a decision is reached on this point, there are a number of guidelines that can be followed for appropriate footnoting.

Use of Footnoting

Footnotes are commonly used to:

1. Validate a point, statement or argument. In the interests of academic honesty, the source or authority should be acknowledged through the use of a footnote.
2. Explain, supplement, or amplify material that is included in the main body of a paper. Such a practice avoids the inclusion of material that is not strictly relevant to the main argument but yet is too important to be omitted entirely.
3. Provide cross-reference to other sections of a paper.
4. Acknowledge a direct quotation or indirect quotation.
5. Provide the reader with sufficient information to enable him to consult sources independently.

The following information is usually included in footnotes

1. Source of information, usually the name of the author.
2. Title of the source.
3. Exact page(s) of the source of reference.
4. Number of edition and year of publication.
5. Publisher and place of publication (optional).

Placement of Footnotes

Footnotes may be placed:

1. at the foot of a page;
2. at the end of a chapter;
3. at the end of a paper; and
4. both footnotes and end notes can be eliminated. Notes should be limited into the text itself if it helps clarity.

Reference to footnotes wherever they may be placed is made by the use of superscripts (that is, numerals raised one-half space) in the body of the text where the particular reference is given. There is generally less interruption to the text if the superscript is placed at the end of the sentence in which the reference has been made. However, such a procedure may not always be clear, in which case the superscript should follow immediately the word or phrase to which reference is made. With quotations the footnote reference is always placed at the end of the quotation. The superscript appears without any punctuation and without any space intervening between it and the preceding word or punctuation mark.

When footnotes are placed at the foot of the page, they are separated from the text by a line drawn from the left-hand margin and one double space below the last line of the text. Now a days Microsoft Word software takes care of the margin automatically.

Format of Footnotes

The recommended practice is to indent the first line of the footnote in the same way as paragraphs. Footnotes occupying more than one line are single spaced and only the first line is indented. Footnotes are usually numbered consecutively throughout a chapter or continuously through a research paper or project. In works containing very few footnotes, a new numbering system may begin on each page. In mathematical and scientific theses and papers, where Arabic numerals may be confusing, special symbols (such as asterisks and daggers) are often used.

Conventions in Footnoting

There are number of conventions used in footnoting:

1. In the first footnote referring to each source, it is usual to give the full name of the author in its normal order (that is first name (or initial) and second initial precede surname).

I) Example, Shive Dutta Sharma, ADMINISTRATION OF JUSTICE IN ANCIENT INDIA, 1st ed. 1988, Harman Publishing House, New Delhi 64.

II). Example, Shive Dutta Sharma, ADMINISTRATION OF JUSTICE IN ANCIENT INDIA, 1st ed. 1988, Harman Publishing House, New Delhi 64.

2. In citing the reference details, bibliographical procedures are followed: titles of complete works are underlined or in capital letters; names of articles and similar material are enclosed by double quotation marks or in Italics.

3. After the first reference is spelled out in a footnote, it is not necessary to repeat the name of the author, publisher, and so on. There are accepted abbreviations which avoid repetitions and lengthy documentation.

(a) ibid. If reference is made to a different page of a source supplied immediately above it is possible to use the term ibid.

(b) Example: I) S.D. Sharma, ADMINISTRATION OF JUSTICE IN ANCIENT INDIA, 1st ed. 1988, Harman Publishing House, New Delhi, pp. 64-65.

II) Ibid, p. 66.

(c) loc. cit. If reference is made to the same page as a preceding but not immediately preceding reference, the last name of the author and the phrase loc. cit are used.

Example: Sharma, loc. cit.

(d) Op. cit. If reference is made to the same work as preceding but not immediately preceding reference, op. cit. precedes page reference but follows author's name.

Example: Sharma op. cit, p. 129.

4. The abbreviation p. for page and pp. for pages is the acceptable method of citing page references.

Same rules apply for multiple works by the same author(s) or multiple sets of authors. For citation from author(s) just previously cited, (ibidem: Page no).

Problems in Footnoting:

A number of problems may arise in the footnoting of more complex material.

1. Footnotes which are continued over more than one page need to be continued in mid-sentence so that the reader realises additional material is to be found on the bottom of the following page.
2. Footnotes in tables or figures should be placed one single space below the table or figure. A dividing line is not needed, but a double space is used to separate footnotes. Where

lower case letters are used rather than asterisks or daggers, the lettering is consecutive only for each table or figure, not for the whole paper or project.

3. If numerous short footnotes occur at the foot of any one page, these may be quoted on one line, provided there are three spaces between each citation and the next, and provided the entry on each line is complete and does not overflow to the following line. The reason for this type of footnoting is to economize on space and to improve the balance of the setting out.

Some Points to Remember

1. Decide whether a footnote strengthens or validates a point in your paper.
2. Include footnotes in your first draft.
3. Check each footnote for accuracy and for correct format.
4. Having adopted any one method of footnoting which needs to be followed consistent throughout the whole research paper, project or assignment.
5. Footnotes should be concise, but clarity and readability should never be sacrificed for brevity.
6. All footnotes are single - spaced, no matter where they appear on a manuscript, but are separated by a double space.
7. All footnotes regardless of length are terminated by a full stop.
8. The same bottom margin should be maintained on each page of the typescript or the computerized, regardless of the number of footnotes.
9. A footnote may be continued on consecutive pages, but where a footnote is very long an assessment should be made as to whether an appendix, table, might be more appropriate than a footnote.