Law

DR. MCR HRD INSTITUTE OF TELANGANA

91st FOUNDATION COURSE

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SYLLABUS OF LAW

Law I

Semester I

Course: L 101

Total Course credits: 2.5

- **End Semester Exam:** 1.25 credits
- **Internal Assessment:** 1.25 credits for the Mid-term Examination

Introduction

The purpose behind teaching Law at the Academy is to sensitize the Officer Trainees with the basics of Law. It is a skill-based training where the Officer Trainees are taught how to implement the laws and to execute them on behalf of the State. They are also required to act as administrators of districts and implement certain legislations that require necessary foundations in law. It is with this vision that the entire syllabus of Law taught in a span of two years at the Academy is more generic and geared towards familiarizing the Officer Trainees with the relevant provisions of Law which they are required to implement as Collector/ head of sub-division or districts. This is the reason which is why the pedagogy of teaching Law is based on Order-writing exercises, role plays, class-lectures, videos and field training.

Course Objectives

- The objective of teaching law in Semester I is that the Officer Trainees should be able to understand and apply the basic principles of law, understand the structure and hierarchy of courts and alternate dispute redressal mechanisms, distinguish principles of contract from tort, discuss some important social legislations and get introduced to procedural practices under civil and criminal codes in India.

Pedagogy

- Lectures with the aid of power-point presentations, videos and illustrations, Case Studies, Order-writing Exercises, Role-play exercises.

Course Structure

Unit I: General Principles of Law

- Basic principles of law are introduced particularly for the benefit of students from non-law background
- Idea of Justice- A Case Study
- The sources of law, legal meaning of 'rights and duties' and characteristics of various types of rights and duties
- Concepts of criminal and civil wrong and the liability of master in crime
- Principles of natural justice and subsidiary principles of natural justice and exceptions to principles of natural justice with the help of illustrations and leading cases
- Theories of Punishment

Unit II: Administration of Justice

- The civil and criminal court structure in India, hierarchy of courts and judicial system in India
- Basics of Administrative Law and grounds for judicial review of administrative actions through case law.
- What are Tribunals, the need behind having Tribunals
- What is delegated legislation and the need for delegating the powers
- Jurisdiction of Supreme Court and High Courts in India
- Objectives of Alternate Dispute Resolution and settlement of disputes outside the courts, Lok Adalats, procedure with regard to Arbitration, Conciliation and Mediation, Online Dispute Resolution, e-governance and constitutional provisions in light of the concept of justice
- Contempt of Court, distinction between civil and criminal contempt and provisions under the Contempt of Courts Act.

Unit III: Criminal Laws (Substantive)

- Introduction to the Indian Penal Code, concept of crime and stages of crime in light of the Code
- General Exceptions under the Indian Penal Code
- Punishments under the Indian Penal Code
- The Prevention of Corruption Act and relevant provisions

Unit IV: Procedural Laws (Civil and Criminal)

- Introduction to the Civil Procedure Code and its application, jurisdiction of courts, how to write a plaint and who can be parties to a suit
- Various procedures with regard to pleadings, service of summons, framing of issues, withdrawal of suit and consequences of non-appearance
- Interlocutory orders, injunctions and its various types, receiver, right to lodge a caveat, decree, judgment, execution of decrees, appeal, reference, review and revision
- Civil Legal remedies with an objective to familiarize with various reliefs under the Specific Relief Act
- Arrest, Bail and search and types of Bail
- Introduction to the Code of Criminal Procedure and various classification of offences as given under the Code, the procedure relating to trial, investigation and inquiry
- Concept of Plea Bargaining
- Objectives of Police Act, 1861, police reforms in India, salient features of the Model Police Act, features of Prisons Act, 1894 and the administrative set-up of the prison system in India.

- Introduction to the Law of Evidence, its application and significance, various kinds of evidence and the admissibility of evidence.

Unit V: Social Legislations

- Provisions relating to offences of dowry under the Dowry Prohibition Act, 1961
- Sexual Harassment under the Protection of Women from Sexual Harassment at Workplace Act, 2013, duties of the employer under the Act and the complaint procedure under the Act, 2013
- The Maintenance and Welfare of Parents and Senior Citizens Act, 2007
- Provisions relating to Protection of Women from Domestic Violence Act, 2005.
- Laws relating to Privacy in India including the Information Technology Act, 2000.
- Societies Registration Act, 1860
- The Protection of Children from Sexual Offences Act, 2012
- The Indian Forest Act, 1927
- Intellectual Property Rights and Cyber Law
- Privacy Laws
- Information Technology Act

Unit VI: Basics of Law of Contracts and Law of Torts

- Introduction to the Law of Contracts and its essentials and an overview of agreements
- The kinds of contracts and agreements, breach of contract and remedies for breach of contract with the help of illustrations and case law
- Introduction to the Law of Torts: meaning of Tort through illustrations, various kinds of Torts, remedies and defences under the Law of Torts.

Suggested Readings

Code of Criminal Procedure

- Bare Act: The Code of Criminal Procedure, 1973.
- Ratanlal Dhirajlal, The Code of Criminal Procedure (2013) (Student Edition), Twenty First edition, Lexis Nexis Publishers, Delhi.
- R.V. Kelkar's Lectures on Criminal Procedure (2015), Eastern Book Company, Delhi.
- R.V. Kelkar, Criminal Procedure Code, (2014), Sixth Edition, Eastern Book Company, Delhi.
- Ratanlal Dhirajlal, The Code of Criminal Procedure with the Criminal Law Amendment Act, 2013 (Hardcover 2013), Lexis Nexis, Delhi.

Code of Civil Procedure

- Code of Civil Procedure, 1908: Bare Act
- Vinay Kumar Gupta, Mulla The Key to Indian Practice, A Summary of Code of Civil Procedure (Abridged) (2012), Student Edition, Tenth Edition, LexisNexis, Delhi.
- C.K. Takwani, Specifications of Civil Procedure with Limitation Act, 1963, (2013), Eastern Book Company,Delhi.

Law of Evidence

- Bare Act: Indian Evidence Act, 1872.
- M.Monir, Textbook on the Law of Evidence, (2013), Ninth Edition, (Student Edition), Universal Law Publishing Co, Delhi.
- Ratanlal & Dhirajlal, The Law of Evidence (2011), 24th Edition (Student Edition), Lexis Nexis Butterworths Wadhwa, Delhi.

Indian Penal Code

- Bare Act: Indian Penal Code, 1860 with 2013 amendments.
- Ratanlal Dhirajlal, The Indian Penal Code as amended by Criminal Law Amendment Act (2013), 34th Edition (Student Edition), Lexis Nexis, Delhi.
- K.D. Gaur, Textbook on Indian Penal Code, (2014), Fifth Edition, Universal Law Publishers, Delhi.

ABBREVIATIONS

AIR	All India Reporter
Cr. L J	Criminal Law Journal
Cr. P C	Criminal Procedure Code
I.E. Act	Indian Evidence Act
ILR	Indian Law Reporter
IPC	Indian Penal Code
M.V. Act	Motor Vehicles Act
PW	Prosecution Witness
QB	Queens Bench
SC	Supreme Court
SCR	Supreme Court Reports
Sec. / S.	Section
SS.	Sections
v.	Versus

GENERAL PRINCIPLES OF LAW

1: GENERAL PRINCIPLES OF LAW

1.1 GENERAL PRINCIPLES OF LAW – CONCEPT & SOURCES

(A) Jurisprudence – An Introduction

Jurisprudence literally means the knowledge of law. Literally, it is a compound of two Latin terms.

"Juris" → Law

"Prudentia" → Knowledge

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

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

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

(I) Nature and Purpose of Law

Administrators, Policy makers and even ordinary citizens have at one point of time or the other faced the question of what is law or why is law there in the first place. In other words, what is the nature and purpose of law?

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

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

While this approach would actually cover most of the situations in the life of most of us, there will occur instances when this approach would not suffice. In certain historical situations the and why is the central issue. e.g., were the Nazi social laws targeting Jews "laws"? Did those public officials who acted in accordance with them act legally?

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

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

The answers need not be the same for all the questions. Each one of you even when arriving at the same answer will discover that your reasons for it will be different. The following discussion on issues like nature and purpose of law, sources of law and rule of law will perhaps seem more relevant if we keep in mind that what is being discussed is designed to provide an analytical tool for resolving some real life problems. It would be interesting to note down your responses and relook them at the end of the course.

(i) **Positive Law**

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

(1) Legal Positivism

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

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

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

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

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

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

Rules that define law need not make refer to justice or social good. However, fear of punishment alone is not enough for obedience to law. E.g. traffic laws may be followed to ensure coordination by road users and not fear of fine alones.

(ii) **Natural Law**

Apart from the differences like those between legal positivists and Hart apart, all positivists agree that law has nothing to do with morality.

The question arises that are we then obligated to obey all laws whether or not they are morally just. Proponents of natural law would disagree.

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

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

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

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

The renaissance period saw scholars like Vitoria use natural law as a basis to defend Indians against Spanish colonialists.

Limitations of Natural Law

(i) While physical facts are verifiable, for instance, water boils at 100^0C, moral judgments cannot be proved in the same way. Thus, for instance, whether capital punishment is the right punishment for murder?

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

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

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

Sources of Law

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

The following are the sources of law in order of their primacy.

(A) Legislation

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

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

While the discussion below relates to how judicial interpretation of statutes is done it enunciates certain rules/principles which are extremely useful for civil servants in understanding statutes/policies and interpreting them in the process of implementation.

Statutory Interpretation

(a) The Literal Rule

It states that a statute must be given its "plain and obvious meaning" in the context of the Act. While it is the rule that is most followed and is the most straight forward and simple, the complexity of implementing the literal rule has been brought out in a series of Supreme Court

cases involving imposition of sales tax on certain commodities. For instance, in the following case the issue was whether green ginger is a vegetable.

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

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

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

Another rule modifying the literal rule is that in tax statutes wherever two constructions are possible the one in favour of the citizen is to be followed.

Not only is the rule of law sometimes difficult to implement sometimes it can lead to ridiculous and unintended results. An instance is given below:

Whiteley* v. *Chappell (1869-69) LR 4 QB 147

Under s 3 of Poor Law Amendment Act 1851 a person impersonating 'any person entitled to vote at an election' of guardian of the poor was guilty of an offence punishable by a maximum sentence of three months in prison. The appellant, Chappell, had been charged with impersonating J Marston, a person entitled to vote at an election for guardians of the poor for Bradford. Marston had indeed been entitled to vote but he had died before the election was held. Chappell was convicted of the offence under s. 3 by the Magistrates' Court. On appeal to the Queen's Bench Division, the judges held that Chappell could not have been guilty. Since a dead man cannot vote Chappell, had not impersonated 'a person entitle vote' and therefore his conviction should be quashed.

b) The Golden Rule

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

A classical case, which expounds this rule is:

***Smith* v *Hughes* [1960] 1 WLR 830**

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

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

(c) The Mischief Rule

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

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

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

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

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

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

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

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

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

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

no person other than-

(i) the State Government,

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

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

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

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

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

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

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

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

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

The court thus overturned the decision of the Government.

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

- **The *ejusdem generis* rule**: Where a specific list of words is followed by general word, the general words will follow the same meaning.
- **Expression *unius est exclusion alterius*** (English translation: 'the mention of one thing excludes all others'). Where there is a list of words, the Act applies to these words only.
- ***Noscitur a sociis*** (English translation: 'a words is known by the company it keeps'). Words are looked at in the context of the words surrounding them.

(II) Precedent

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

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

The essential ingredients of precedent for a court are:

- *The hierarchy of the courts*. If a precedent comes from a decision of a higher court then the lower courts must follow it in the present case (it is a binding precedent). If a precedent is previous decision of a lower court, it will have persuasive force only and the present court is not bound to follow it.
- *Ratio decidendi.* For a precedent to be binding, the principle of law that it establishes must form part of the *ratio decidendi* (the essential reason for the decision) of the judgment and not be *dictum* (something said 'by the way' that is incidental to the actual decision) i.e. *obiter dicta.*
- *Applicable.* For a precedent to be binding, the principle of law it establishes must be relevant to the facts of the present case (distinguishing the facts of the present case from the previous one- the precedent case- is the standard way of avoiding being bound by a precedent).
- *Valid.* For precedent to be binding, it must not have been repealed or altered by Statute or by the higher court (i.e. a higher court which has power to overrule the decision).

1.2 IDEA OF JUSTICE- SPELUNCEAN EXPLORER'S CASE

Speluncean Explorers v. Court of General Instances of the County of Stowfield

The case of Speluncean Explorers v. Court of General Instances of the County of Stowfield is about five cave explorers who got trapped underground, whilst on an expedition, following the collapse of a cave wall. Any scope of rescue was at least 10 days away and the last radio transmission received by them was from a doctor (following which the radio; their only means of communicating with the outside world ran out of battery), conveyed to them that the only manner in which they could survive till the arrival of the rescue team would be if they were to consume one of their own, given that they had run out of food and water supplies.

One of the explorers, Whetmore, suggested that they throw dice to determine (i.e. random probability) who amongst them should be the sacrifice. This was held as reasonable by everyone after which, they all agreed to follow through with the plan of action. However, just before the dice was thrown, Whetmore backed out of the agreement. He was outvoted, and a dice was thrown on his behalf. Whetmore lost.

About ten members of the rescue team also died while trying to remove the rocks from the opening of the cave and when they finally reached the explorers, they found that Whetmore had been killed and eaten.

The remaining explorers were put on trial for murder in the Supreme Court under the jurisdictions statute, "Whoever shall wilfully take the life of another shall be punished by death."

ISSUE: THW acquit them all.

Discuss from the point of view of justice.

1.3 LEGAL THEORY

Definition of Law:

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

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

Legal Sanctions:

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

Territorial Nature of Law:

The enforcement of law is territorial in the same way as a State is territorial. The territoriality of law flows from the political divisions of the world. As a general rule, no State allows other States to exercise powers of government within it. The enforcement of law is confined to the territorial boundaries of the State enforcing it.

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

Purpose and Function of Law

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

Uses or Advantages of Law

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

Disadvantages of Law

Law has not only advantages but also disadvantages. One disadvantage is the rigidity of law. An ideal legal system keeps on changing according to the changing needs of the people. Law must adjust itself to the needs of the people and cannot isolate itself from them. However, law is not usually changed to adjust itself to the needs of the people. The lack of flexibility in law results in

hardship and injustice in several cases. Another disadvantage of law is its conservative nature. Both the lawyers and judges favour the continuation of the existing law. The result is that very often law is static. This is not desirable for a progressive society. Another defect of law is formalism. More emphasis is put on the form of law than its substance. A lot of time is wasted in raising technical objections of law which have nothing to do with the merits of the case in dispute. While an innocent person may suffer, the clever and the crooked may profit thereby. Another defect of law is undue and needless complexity. It is true that every effort is made to make law as simple as possible but it is not possible to make every law simple. That is due to the complex nature of modern society.

Meaning of Sources of Law:

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

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

Legal Sources of English Law:

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

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

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

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

1. Enacted law having its source in legislation

2. Case law having its source in precedent

3. Customary law having its source in custom

4. Conventional law having its source in agreement.

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

Legal Theory

i) Analytical Legal Positivism & Pure Theory of Law

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

H.L.A.Hart has differentiated five meanings of "positivism". First, the contention that laws are commands of human beings; second, the contention that there is no necessary connection between law and morals or law as it is and ought to be; third, the connection that the analysis (or study of meaning) of legal concepts is (a) worth pursuing and (b) to be distinguished from historical inquires into the causes and origins of laws, from sociological inquiries into the relation of law and other social phenomena, and from the criticism and appraisal of law whether

in terms of morals, social aims, "functions", or otherwise; fourth, the contention that a legal system is a 'closed logical system' in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards; fifth the contention that moral judgments cannot be established or defended, as statements of fact can, by rational argument, evidence or proof.

ii) Positivism in Law

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

H.L.A.Hart (1907)

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

meaning and in some cases it may be difficult to imagine a dispute as to the meaning of a rule breaking out.

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

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

iv) Historical School of Law

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

F.K.Von Savigny (1779-1861)

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

v) The Philosophical School of Law

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

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

chiefly with the relation of law to certain ideals which law is meant to achieve. It investigates the purpose of law and the measure and manner in which that purpose is fulfilled. The philosophical jurist regards law neither as the arbitrary command of a ruler nor the creation of historical necessity. Law is the product of human reason and its purpose is to elevate and ennoble human personality.

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

vi) Sociological School

Auguste Comte (1798-1875)

Isidore Auguste Marie François Xavier Comte (19 January 1798-5 September 1857), better known as Auguste Comte, was a French philosopher. He was a founder of the discipline of sociology and of the doctrine of positivism. He may be regarded as the first philosopher of science in the modern sense of the term.

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

vii) Natural Law

Thomas Hobbes of Malmesbury (5 April 1588 -4 December 1679), in some older texts was an English philosopher, best known today for his work on political philosophy. His 1651 book *Leviathan* established the foundation for most of Western political philosophy from the perspective of social contract theory.

1.4 LEGAL CONCEPTS: RIGHTS AND DUTIES

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

Meaning and definition of Right

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

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

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

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

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

The Characteristics of Legal Right

Every legal right possesses the following five characteristics:

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

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

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

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

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

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

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

Meaning and definition of Duty

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

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

Duties are of two kinds, legal and moral.

Duties may be positive or negative.

Duties can also be primary and secondary.

Meaning of Legal Wrong

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

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

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

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

According to Salmond, a wrong is simply a wrong act- an act contrary to the rule of right and justice.

A wrong may be described as anything done or omitted contrary to legal duty, considered in so far as it gives rise to liability. Wrongs are of two kinds, legal and moral.

Jural Relations

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

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

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

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

Classification of rights according to their objects

i) There can be rights over material things.
ii) There are rights in respect of one's own person.
iii) There is also the right of reputation.
iv) There are rights in respect of domestic relations.
v) There are rights in respect of other rights.
vi) There are rights over immaterial property.
vii) There are rights to services as well.

Kinds of Legal Rights

i) ***Perfect and Imperfect Rights:*** A perfect right is one which corresponds to a perfect duty; and a perfect duty is one which is not merely recognized by the law, but enforced. An imperfect right is a right recognized by law, but could not be enforceable due to its form or some other defects.

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

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

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

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

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

vi) ***Inheritable and uninhabitable rights***: A right is inheritable if it survives its owners. It is unheritable if it dies with him.

vii) ***Rights in re propria and rights in re aliena:*** The ownership of a material thing means the ownership of a *jus in re propria* in respect of that thing. The ownership of a *jus in re aliena* is always incorporeal, even though the object of that right is a corporeal thing. In its full and normal compass a *jus in re propria* over a material object is a right to the entirety of the lawful uses of that object. It is a general right of use and disposal, all *jura in re aliena* being merely special and limited rights derogating from it in special respects. It is only this absolute and comprehensive right, this *universum jus,* that is, identified with its object.

viii) ***Principal and Accessory rights:*** Principal rights exist independently of other rights where as accessory rights are appurtenant to other rights.

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

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

xi) ***Public and private rights:*** A public right is possessed by every member of the public. When one of the persons connected with the right is the state and the other is a private

person, the right is called a public right. A private right is concerned only with individuals.

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

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

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

xv) ***Rights at rest and rights in motion***: When a right is stated with reference to its 'orbit' and its 'infringement', it is a right at rest. The meaning of the term 'orbit' is the sum or the extent of the averages conferred by the enjoyment of the rights.

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

1.5 LEGAL CONCEPTS – CRIME & CIVIL WRONGS

Concept of Crimes - An Introduction

1. Crime - What it is?

(a) The term 'Crime' has not been defined in any statute. No Act of any Indian Legislature gives us a definition of it.

(b) It is difficult to define 'Crime'. That does not mean that nobody has attempted any definition.

(c) Jurists, social scientists, criminologists and thinkers have no doubt endeavoured and evolved definitions of 'Crime'.

(d) Each one of them has emphasised upon a particular aspect, because he has looked at 'Crime' from his own angle. The result is that none of the definitions appears to be very precise and fully satisfactory.

(e) Actually, 'Crime' is what a particular society at a given time says it is. It reflects the values of the society.

(f) I am going to place before you some definitions of crime as constructed by some eminent persons just to give you an idea as to what the concept of crime is, at least definitionally and to acquaint you with their formulations.

2. Definitions of crimes

I have chosen those definitions which are founded upon "Law" and adopt those authorities who carry greater weight.

(a) Black stone

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

(b) Sir James Stephen

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

(c) Prof. Kenny

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

(d) Halsbury's Laws of England

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

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

3. Marxian hypothesis of crime

Our study of the concept of crime can not be complete unless we expose ourselves to the Marxian hypothesis of crime. You may or may not accept such theory but you should know it at least. Please think and try to find out for yourself whether there is any truth in it. I quote from the authorities:-

(a) "An act is criminal because it is in the interests of the ruling class to define them as such".

(b) "Persons are labeled criminals, because so defining them serves the ruling class".

(c) "Crime varies from society to society depending on political and economic structures of the Society".

(d) "Crime directs the hostility of the oppressed away from the oppressors and towards their own class.

4. **Elements of crime**

(a) Broadly speaking, it has two elements.

i. physical
ii. mental

(b) The physical element is known as "*Actus Reus*". The mental element is called "*Mens Rea*".

(c) The literal meaning of "*Actus Reus*" is as given below :

Actus - deed

Reus - forbidden

(d) The literal meaning of *Mens Rea* is "guilty mind"

(e) According to Prof. Kenny, "*Actus Reus*" means "such result of human conduct as the law seeks to prevent.

(f) Strictly speaking, *Actus Reus* is constituted by the event and not by the activity which caused the event.

(g) *Actus Reus* may consist of both consequences and circumstances.

(h) In case of murder, the *actus reus* is the death of a human being, which is the event, caused by another human being (i) Death may be caused by various means, such as shooting, stabbing, poisoning etc. *Actus Reus* will really refer to the event, that is, the causing the death of a human being by a human being, (ii) That does not mean that whenever death of a human being is caused by another human being, it shall constitute 'Murder'.

(i) The act alone is not sufficient. The act and the intent must combine together to constitute crime.

(j) The "intent" here is the mental component of crime, which is called "*Mens Rea*".

(k) *Mens Rea* is, therefore, an essential ingredient of crime, which refers to the condition of Mind. In other words, there must be a blame-worthy condition of mind, otherwise there shall not be a crime (subject to certain exceptions).

(l) There were so many water-proofs hanging outside your class-room. It was raining heavily. You had also brought your own water proof. While leaving the class, you took away a water-proof believing bona fide that it was yours. Ultimately, it was found that it belonged to another probationer, although it looked like the one you had.

Did you commit theft,

No, No

Why ? There was no "*Mens Rea*". You did not and could not have the dishonest intention" to take.

(m) We may, therefore, formulate:

Crime = *Actus Reus* + *Mens Rea*

This equation holds good in respect of all conventional and traditional crimes. We shall discuss the exceptions later on.

5. Concept of Crime - An analysis

From what has already been stated, it will appear that crime is

(a) either an act or an omission

(b) the act should be something forbidden by law.

(c) the omission must relate to something not performed, although Law commanded its performance;

(d) "omission" must be an illegal omission, that is, there must be a legal duty to do but it is not done. Example: The Officer-in-Charge of Mussoorie Police Station, sees an accused in the police lock-up being beaten up by a Head Constable. The O.C. does not do anything. It is not only an omission but it is also an illegal omission because it is his legal duty to prevent such act. The O.C. commits a crime.

(e) The act alone is not sufficient. The mind must be at fault. In other words, *Mens Rea* must be there.

(f) Law dubs an act or omission as crime, when the society perceives the same to be injurious. The question of injury, either actual or threatened, is, therefore, associated with the concept of crime.

In this context, it is relevant to mention that according to the Russian Criminal Procedure, "A socially dangerous act shall be deemed to be a crime". Hence, social danger is a test of criminality.

(g) Crime is something, which must have resulted from human behaviour. If an 'ox' gores you and thereby breaks your bone, in circumstances where its master is not in anyway responsible for negligence or rashness etc, then crime cannot be said to have been committed, although you suffered a fracture.

(h) Crime is a violation of that branch of public law, which may be described as "criminal law".

(i) The sanction prescribed for commission of crime is 'punishment'. Examples: If your servant steals your wrist watch, he may be jailed and also fined. Here, imprisonment and fine are the punishments.

If a husband poisons his wife to death with intention to kill her, he commits murder. He may be sentenced to death or imprisonment for life. These are the alternative punishments prescribed for murder.

STAGES OF CRIME

1. Introduction

I have already introduced the concept of crime to you. You may please advert to the Part-I of my lecture note on that topic. Today, I propose to cover another area relating to crime. That is what may be described as "Stages of a Crime".

2. Stages of a Crime

There are four stages of a crime, from conception to commission. They are called :

(i) Intention

(ii) Preparation

(iii) Attempt

(iv) Commission

3. Intention

(a) Intention is a condition of mind.

(b) Intention is the design with which a crime is committed.

(c) It may be resolved into two components, namely foresight and desire.

(d) Suppose you are in a position to foresee the consequence of your act and at the same time, desire such consequence to happen, then your doing of that act will be intentional. In other words, you will be said to have intended it.

(e) Hence, the combination of foresight and desire is what constitutes Intention.

(f) Every person is presumed to know the natural and probable consequences of his own action and he is responsible for the same.

(g) Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice (Stephen).

4. Motive

(a) Intention is, however, not to be confused with Motive.

(b) Motive is what prompts a person to form an intention.

(c) A crime is generally not committed for the sake of crime itself. There is always an ulterior objective. In the context of a crime, if you ask why it was committed the answer is what may be called as "Motive".

(d) 'X' was murdered. Why ?

Ans. For gain

For revenge

Here, gain or revenge, as the case may be, is the motive behind the murder.

(e) Evidence of motive is relevant but not essential for the establishment of a crime.

(f) Motive is relevant, because it throws or tends to throw light over "Intention" which is covered by the expression "*Mens Rea*". An evil intention is a form of *Mens Rea.*

(g) Absence of Intention may be a defence at a criminal trial but absence of motive is not. Sometimes, Motive is known only to the criminal. That apart, a motiveless crime is also a crime.

(h) Motive does not affect criminal liability, although it may be taken into account in determining the nature and quantum of punishment to be inflicted upon the guilty person.

(i) Motive, however, pure or laudable it may be, will not exonerate the criminal.

Examples:

A mother kills her minor son, who is suffering from an incurable disease and having extreme unbearable pain, out of compassion. She is as much guilty of murder as any other person.

A low paid employee, while under severe financial strain, has not money. His wife is critically ill and will die if a particular injection is not administered to her immediately. He steals that medicine from a pharmacy in order to save the life of his wife. His motive, however, pure it may be, will not excuse him from the criminal charge of theft.

5. Preparation

It consists in devising or arranging means or measures for the commission of a crime.

Example :

Two young men, A and B, want to marry 'X' a girl. A intends to kill B, so that he may marry X. A procures poison, and mixes the poison with food. These are preparation.

6. Attempt

(a) It is the direct movement towards the commission of a crime after the preparation has been completed.

(b) It really means that with the intention still subsisting, and after the preparation has been completed, the accused does something more in the direction of the commission of the crime but for circumstances beyond his control, he does not succeed in committing the crime aimed at.

(c) Intention followed by preparation and completion of preparation followed by an act done towards the commission of the crime is what is called "attempt".

(d) Attempt begins where the preparation ends.

(e) Attempt need not necessarily be the penultimate act towards the completion of the offence.

7. Punishments

(i) Is mere intention to commit a crime punishable?

Ans. No, A bare intention, an intention simpliciter unaccompanied by any overtact is not punishable under the law.

It is said that thoughts of men are not triable. Intention, so long as it remains confined within the four walls of the mind, is not punishable.

An agreement to commit an offence is a kind of criminal conspiracy. A criminal conspiracy of this kind is punishable even if no overt act is done in pursuance thereof. It should, however be noted that the gist of the offence of criminal conspiracy is agreement of two or more persons.

Hence, it will not be correct to say that mere intention is what has been made punishable in the context, of the offence of criminal conspiracy.

Example:

'A' intends to kill 'B'. So long as his intention rests in his mind, it is not punishable, although the offence comtemplated is murder.

But if A holds out a threat to B by saying "I shall kill you".

That threat is punishable under the name "Criminal Intimidation" vide the definition as given in Section 503 IPC. Here again, what is punished is not the intention to kill but the threat to the person coupled with the intent to cause alarm.

(ii) Is mere preparation to commit an offence punishable ?

Ans. Generally not, But there are certain exceptional cases where mere preparations have been made punishable under the Indian Penal Code.

Three glaring examples are :

(a) Preparation to wage war against the Government of India (Sec.122 IPC).

(b) Preparation to commit depredation on the territory of any power at peace with the Govt. of India (Sec. 126 IPC).

(c) Preparation to commit docoity (Sec. 399 IPC).

(iii) Is attempt to commit an offence punishable ?

Ans. Generally Yes, attempt to commit those offences under the IPC which are punishable only with fine are not covered by Sec.511 IPC, which is the general or residuary section in the IPC for the punishment of attempts.

In the IPC, attempts have been dealt with in three different ways. They are as indicated below :

i) The first group consists of those cases where the principal offence and the attempt to commit that offence have been dealt with and made punishable by same section. As for Example : Waging war against the Govt. of India and attempt to wage war against the Govt. of India are covered by the same section,

namely, Sec. 121 IPC and made punishable to the same extent. Some other examples are : 161, 162, 163, 213, 121, 124 etc. IPC.

ii) The second group relates to those cases where the principal offence and the attempt to commit that offence have been dealt with by separate sections and different punishments have been prescribed.

As for example, Murder is punishable under section 302 IPC, but attempt to commit murder under Sec. 307 IPC.

Other Examples are : 304 and 308 IPC

392 and 393 IPC

iii) Third group refers to those cases of attempts which have not been expressly provided for, that is, those attempts, which do not fall either under group I or under group II.

Sec 511 IPC is the residuary or general section for attempts.

Even Sec. 511 IPC does not apply to those offences which are punishable with fine only.

Sec. 511 IPC cannot also be attracted to the Non-IPC offences. In other statutory offences, attempts will be punishable only when they have been made punishable thereunder but not otherwise vide Sec. 40 IPC.

1.6 RULE OF LAW

Rule of Law

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

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

Dicey's conception emphasizes on the following features:

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

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

Points to ponder

1. **Faced with the social unrest, political bickering and slow economic development and the resultant chaos and relatively slow rate of development, many (including civil**

servants) are liable to remark how dictatorships are so much more effective in maintaining "rule of law". Do you agree?

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

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

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

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

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

Many of us have doubts as to how rule of law is compatible with affirmative action, e.g. reservations. Is this not a violation of the principle of equality before law? The answer lies in the relation between law and justice referred above. Law to be just should treat equals equally. Thus, rule of law is compatible with treating those different people having varying capabilities

differently. Thus, those socially or educationally disadvantaged need to be treated in a manner that offsets the challenges faced by them to provide a level playing field.

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

Rule of Law and Democracy

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

Concluding Remarks: Features of Rule of Law

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

1. Law should be:
   i. Prospective
   ii. Relatively stable
   iii. Should be intended to advance the interest of everyone (common good) rather than only dominant groups.
   iv. Should not be substantially unjust in as much that they target a group or violate the fundamental rights of a person.
   v. Applied by an independent judiciary.
   vi. Susceptible to judicial review by higher courts.

Rule of Law in India:

Does the rule of law exist in India?

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

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

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

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

1. **Red tape**—Excessive and complex rules without a clear purpose slow down decision making and makes the administrative machinery unresponsive. The citizenry and at times public officials themselves feel disillusioned with the rules and follow them more out of habit or fear than genuine obligation. This compliance is therefore more in name than in reality.
2. **Corruption**—This is partly linked to the earlier point red tape, since once rules are followed for the sake of it with no genuine appreciation of their purpose or need the tendency to bypass them increases. When combined with pecuniary greed it leads to corruption.

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

1.7 PRINCIPLES OF NATURAL JUSTICE

I) Natural Justice: Why and What?

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

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

- Should the courts be allowed to impose their own standards of justice on administration? Would it not be frustrating and self defeating if administrative action was tied down to complex and slow moving judicial procedure?
- However, if no check regarding procedure was to be impose, would it not lead to gross abuse of power? For procedure is not a matter of secondary importance. Procedural fairness is essential to observance of substantive law.

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

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

II) Principles of Natural Justice

a. Nemo Judex in Causa Sua

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

In essence, it is the **Rule against Bias**.

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

- Bias is a condition of mind that influences or tends to influence decision.
- Bias may be of several kinds—personal, pecuniary, related to subject matter, etc.
  - ❖ **It is significant to note that justice should not only be done but should seem to have been done.** Thus, it is not enough that the decision maker was not actually biased. Bias would be supposed even when there is "reasonable likelihood of bias"
    - ➢ Seminal case:

    Dimes* v. *Grand Junction Canal (1852)

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

b. Audi Alteram Partem

Literally means, "*Hear the other side*"

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

➢ Seminal case:

***R* v. *University of Cambridge* (1723)**

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

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

c. Requirement of passing speaking/reasoned order

- Committee on Ministers' Powers (Donoughmore Committee) in its report in 1932 recommended that " any party affected by a decision should be informed of the reason on which the decision is based".
- In India, Law Commission in its Fourteenth report noted that administrative decisions should be accompanied by reasons. This would help in testing the validity of these decisions.
- Justice Subba Rao "if tribunals can make orders without giving reasons, the said power in the hands of unscrupulous or dishonest officers may turn out to be a potent weapon for abuses. But if reasons are given it will be an effective restraint on abuse....it discloses extraneous and irrelevant considerations".

➢ Seminal Case

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

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

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

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

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

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

d. Right to Rebut Adverse Evidence

i. The right to cross examination

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

ii. Legal representation

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

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

Having understood the principles of natural justice conceptually, the next step is to complicate the topic somewhat by demonstrating that in real life complex situations arise which do not allow for neat implementation of theoretical principles. The attempt in this section would be to demonstrate through a couple of Supreme Court cases how the principles have to be implemented in practice so that they do not lose their essence but also implementation is not impracticable.

In administration complex situations arise which do not allow for neat implementation of theoretical principles. This section demonstrates through Supreme Court cases how the principles have to be implemented in practice so that they do not lose their essence but also implementation is not impracticable.

A) Rule against Bias

Ashok Kumar Yadav* v. *State of Haryana (1997, SC)

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

Some of the rejected candidates challenged the recruitment on the grounds that they were not selected inspite of high scores in the written exam. In their contention, they noted that two of the selected candidates were related to a member and 1 other was related to another. While the members did not sit in the interviews of their relatives, it was alleged that they gave other candidates low marks to favour their relatives.

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

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

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

Right to Hearing

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

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

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

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

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

C. Right to Cross Examination

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

Facts: Appellants were students of Medical College. On a particular night they entered the girls hostel and misbehaved with the inmates. Four of the intruders were recognized by the girls. An enquiry was conducted with due notice to the four boys. They were provided with a copy of charges. Statements of the girls and the boys were recorded. The boys were found guilty and expelled. They moved court alleging violation of natural justice in as much that they had not been allowed to cross examine the witnesses.

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

ADMINISTRATION OF JUSTICE

2. ADMINISTRATION OF JUSTICE

2.1 STRUCTURE OF THE COURTS - CIVIL & CRIMINAL (SUBSTANTIVE AND PROCEDURAL LAWS)

Administration of Justice

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

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

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

   (d) It involves :-

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

   or

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

   or

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

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

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

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

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

2. **System of Courts in India**

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

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

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

3. **Jurisdiction of the Supreme Court**

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

   (b) Original Jurisdiction (Article 131).

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

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

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

(f) Advisory Jurisdiction (Article 143).

4. **Authority of the Supreme Court**

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

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

5. **Jurisdiction of the High Courts**

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

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

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

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

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

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

6. **Administration of Justice - Division**

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

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

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

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

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

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

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

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

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

7. **Organisation of the Courts at the district levels**

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

8. **Civil Courts subordinate to the High Court**

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

First Grade

District Judge

Additional District Judge

Second Grade

Assistant District Judge

Subordinate Judge

Civil Judge, Grade I

Third Grade

Munsif

Civil Judge, Grade II

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

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

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

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

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

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

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

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

9. **Small Causes Courts**

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

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

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

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

10. Criminal Courts subordinate to the High Court

(a) Court of Sessions

(b) Chief Judicial Magistrate

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

(d) Judicial Magistrates of the Second Class.

(e) Executive Magistrates.

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

11. Court of Sessions

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

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

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

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

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

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

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

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

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

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

13. Offences - by which Court triable

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

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

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

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

(i) Exclusively triable by the Court of Sessions.

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

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

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

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

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

(a) Sessions Judge	any sentence authorised by law, including death, imprisonment for life and fine of any amount as may be authorised by that particular penal section of Law (no upper ceiling for him) but a sentence of death shall be subject to confirmation by the High Court.
(b) Additional Sessions Judge	Same as the Sessions Judge.
(c) Assistant Sessions Judge	(i) Imprisonment for a term not exceeding 10 years. (ii) Fine as authorised by Law - no upper ceiling for him.
(d) Chief Judicial Magistrate	(i) Imprisonment upto seven years. (ii) Fine - as authorised by Law - not upper ceiling for him.
(e) Judicial Magistrate, First Class	(i) Imprisonment upto three years. (ii) Fine not exceeding 5,000/-
(f) Judicial Magistrate, Second Class	(i) Imprisonment upto one year. (ii) Fine not exceeding 1,000/-
(g) Chief Metropolitan	Same as Chief Judicial Magistrate.

Magistrate

(h) Metropolitan Magistrate — Same as Judicial Magistrate, First Class.

15. Schemes of Separation of the Judiciary from the EXECUTIVE

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

(i) Judicial Magistrates.

(ii) Executive Magistrates.

16. Broad Division of the Magisterial Functions

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

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

17. Revised set-up of Criminal Courts

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

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

18. Appointment of Executive Magistrates

Executive Magistrates are to be appointed by the State Government.

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

19. Absence of gradation amongst the Executive Magistrates

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

20. Division of Executive Magistrates

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

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

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

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

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

(5) Special Executive Magistrate - Sec.21.

21. Subordination of Executive Magistrates

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

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

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

REFERENCE: Sec. 23(1)

22. Territorial Jurisdiction of the Executive Magistrates

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

23. Distribution and Allocation of Business

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

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

24. Jurisdiction of a Court

(a) It may be of three kinds namely :

(i) in respect of subject-matter

(ii) Territorial

(iii) Pecuniary

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

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

25. Combination of designations

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

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

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

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

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

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

2.2 ADMINISTRATIVE LAW & TRIBUNALS

Administrative Law

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

Definition of Administrative Law

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

Administrative Law is that branch of Constitutional Law which deals with powers and duties of administrative authorities, the procedure followed by them in exercising the powers and

discharging the duties and the remedies available to an aggrieved person when his rights are affected by an action of such authorities.

Nature and Scope of Administrative Law

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

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

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

Administrative Tribunals

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

The traditional theory of "laissez faire" has been given up and the old "police state" has now become a "welfare state", and because of this radical change in the philosophy of the role to be played by the State, its functions have expanded. Today it exercises not only sovereign functions, but, as a progressive democratic State, it also seeks to ensure social security and social welfare for the common masses. It regulates industrial relations, exercises control over production, initiates enterprises. The issues arising there from are not purely legal issues. It is not possible for the ordinary courts of law to deal with all these socio-economic problems.

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

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

In *Bharat Bank Ltd.* v. *Employees,* the Supreme Court observed that hough tribunals are clad in many of the trappings of a court and though they exercise quasi-judicial functions, they are not full-fledged courts. Thus, a tribunal is an adjudicating body which decides controversies between the parties and exercises judicial powers as distinguished from purely administrative functions and thus possesses some of the trappings of a court, but not all.

The status of tribunals has been recognized by the Constitution. Article 136 of the Constitution empowers the Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order passed or made by any tribunal in India. Likewise, Article 227 enables every High Court to exercise power of superintendence over all tribunals throughout the territories over which it exercises jurisdiction.'

According to Wade, the expression "Administrative Tribunals" is misleading for various reasons. *First,* every tribunal is constituted by an Act of Parliament and not by government. *Second,* decisions of such tribunals are judicial rather than administrative. A tribunal reaches a finding of fact, applies law to such fact and decides legal questions objectively and not on the basis of executive policy. Third, all tribunals do not deal with cases in which government is a party. Some tribunals adjudicate disputes between two private parties, *e.g.* disputes between landlords and tenants; employers and employees, etc. Fourth, such tribunals are independent. "They are in no way subject to administrative interference as to how they decide any particular case."

M.P. Jain, therefore, suggests that it is better to designate these bodies as "tribunals" by discarding the word "administrative"

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

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

2.3 DELEGATED LEGISLATION)

Delegated Legislation

[Did you know that the Parliamentary Act to regulate the Recruitment and the conditions of service of persons appointed to All India services in only one page long having only four sections? How does it then govern the complex process of recruitment and the detailed and complicated conditions of service. The answer, if you have not guessed it, is at the end of this chapter.]

What is Delegated Legislation?

Delegated legislation is used in two different senses;

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

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

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

"Generally, the statues provide for power to make rules where the general policy has been specified in the statue but the details have been left to be specified by the rules. Usually, technical or other matters, which do not affect the policy of the legislation, are included in regulations, byelaws are usually matters of local importance, and the power to make byelaws is generally given to the local or self-governing authorities."

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

Why do we need Delegated Legislation?

The theory of separation of powers is something we are all familiar with simply put it means that the legislature, executive and judiciary should be independent of each other and perform the tasks assigned to them independent of each other. This would mean that the

legislature (In India, the Parliament or State legislature) should alone perform the task of legislation. However, in practice this is not possible as modern state performs such a diverse set of complex, technical tasks that the legislature would be overwhelmed were it to try and frame detailed rules for all of these. Practically therefore demands that the power to frame specific guidelines/rules/regulations be left to the specific executive department which is entrusted with the implementation of the law.

Limits of Delegated Legislation

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

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

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

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

2.4 JUSTICE DELIVERY SYSTEM

Criminal Justice Delivery System

Administration of Justice

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

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

Administration of justice involves:

(i) Two parties -

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

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

Plaintiff and defendant (in a civil case)

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

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

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

Administration of Justice – Division

(a) Justice is administered by the Courts according to law.

(b) Administration of Justice is divided into two branches, namely:

(i) Civil Justice

(ii)Criminal Justice

(c) Criminal Justice aims at punishment of the offenders whereas the civil justice is concerned with the enforcement of rights.

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

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

(f) The wrongs which give rise to and form the subject matters of Civil proceedings are known as "Civil Wrongs".

Oral Evidence

A ----------B

X Y

X - Defence witness

Y - Prosecution witness

Decisions in criminal cases - Based on oral evidence.

Material Interest

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

Policy

1. 100 guilty persons can be let free but no innocent shall be punished.
2. The accused is presumed to be innocent till the guilt is proved. (presumptions have evidentiary value).
3. The burden of proof is on the prosecution.
4. The accused must be given a BENEFIT OF DOUBT.
5. In Civil cases, decisions are on the basis of preponderance of probabilities. In Criminal cases prosecution must prove beyond reasonable doubt. (from the side of accused, it is enough if he creates a doubt in the mind of the Court as to his innocence).
6. Punishment shall reform/cure the offender.

` Functionaries

- First stage -

1. Investigating Police Officer

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

Judge of Trial Court.

- **2nd Stage (Appeal) -**

- Public Prosecutor
- Judge

PROOF - a difficult question

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

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

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

Other Issues

1. INTENTION as an ingredient for crime.
2. Opportunity for witnesses to turn HOSTILE.
3. Low evidentiary value attached to statements recorded by police.
4. Power of Govt. to withdraw cases.

Conspiracy Angle

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

Factors affecting the Criminal Justice Deliver System

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

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

Alternate Dispute Redressal Mechanisms

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

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

Justice delivery institutions in India are currently confronted with serious crises, mainly on account of delay in the resolution of the disputes. This situation has eroded public trust and public confidence in the justice delivery institutions. It obstructs economic growth, development and social justice to the citizens in a country. The crises therefore, call for an urgent solution.

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

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

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

In order to encourage this recourse, Section 89 has been incorporated in The Civil Procedure Code, 1908 which provides that where it appears to the court that there exists an element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be

made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the section and if, the parties do not agree, the court shall refer them to one or the other of the said modes. In landmark Judgment titled *Afcons Infrastructure Limited* v. *Cherian Varkey Construction Company Private Limited*, 2010 (8) SCC 24, Hon'ble Supreme Court has held that, although actual reference of all cases to an ADR process is not mandatory but, considering recourse to ADR process u/s 89 CPC is mandatory. If a case is unsuited for reference to any of the ADR processes, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under Section 89 of the Code.

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

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

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

Following are the advantages of ADR:

i) It can be used at any time, even when a case is pending before a Court of Law.
ii) It can be used to reduce the number of contentious issues between the parties; and it can be terminated at any stage by any of the disputing parties.
iii) It can provide a better solution to dispute more expeditiously and at less cost than regular litigation.

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

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

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

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

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

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

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

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

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

Lok Adalat

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

> "To no man will we deny, to no man will we sell, or delay, justice or right."

The Parliament amended the Legal Services Authorities Act, 1987 with the intention to constitute 'Permanent *Lok Adalat'* for deciding the disputes concerning 'Public Utility Services' which means transport services; postal or telephone services; supply of power, light or water;

system of public conservancy or sanitation; services in hospital or dispensary; Insurance services.

In 1987 Legal Service Authorities Act was enacted to give a statutory base to legal aid programmes throughout the country on a uniform pattern. This Act was finally enforced on 1995 after certain amendments were introduced therein by the Amendment Act of 1994. National Legal Service Authority (NALSA) was constituted on 5th December, 1995. It is a statutory body constituted under the National Legal Services Authorities Act, 1986 as amended by the Act of 1994, is responsible for providing free legal assistance to poor and weaker sections of the society on the basis of equal opportunity. NALSA is engaged in providing legal services, legal aid and speedy justice through *Lok Adalats*. The Authority has its office at New Delhi and is headed by the Chief Justice of India, who is the *ex-officio* Patron-in-Chief.

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

Arbitration

According to Russell, "the essence of arbitration is that some disputes are referred by the parties for settlement to a tribunal of their own choice instead of to a court." Arbitration is a procedure for the resolution of disputes on a private basis through the appointment of an arbitrator, an independent, neutral third person who hears and considers the merits of the dispute and renders a final and binding decision called an award. The parties to the arbitration have some control over the design of the arbitration process. In the Indian context the scope of the rules for the arbitration process are set out broadly by the provisions of the Arbitration and Conciliation Act, 1996 and in the areas uncovered by the Statute the parties are free to design an arbitration process appropriate and relevant to their disputes. There is more flexibility in the arbitration process than in the traditional courts system as the parties can facilitate the creation of an arbitral process relevant to their disputes. Once the process is decided upon and within the parameters of

the Statute, the Arbitrator assumes full control of the process. Among the advantages of the arbitration process are considerable saving in time and money compared to a trial; the limited possibility for challenging the award which again contribute the lower costs and finality of outcome; and greater participation by the parties than is case in the courts/tribunal system. Arbitration may be *ad-hoc*, contractual, institutional or statutory.

Conciliation

Conciliation is a private, informal process in which a neutral third person helps disputing parties reach an agreement. This is a process by which resolution of disputes is achieved by compromise or voluntary agreement. Here the parties, together with the assistance of the neutral third person or persons, systematically isolate the issues involved in the dispute, develop options, consider alternatives and reach a consensual settlement that will accommodate their needs. In contrast to arbitration, the conciliator does not render a binding award. The parties are free to accept or reject the recommendations of the conciliator. The conciliator is, in the Indian context, often a Government official whose report contains recommendations. The conciliation process is sometimes considered synonymous to mediation. Where a third party is informally involved without a provision under any law, which is mediation. In other words a non-statutory conciliation is what mediation is. Essentially however in effect and structure, conciliation and mediation are substantially identical strategies where assistance is provided to parties to a dispute by a stranger to the dispute. Both the conciliator and mediator are required to bring to the process of dispute resolution fairness, objectivity, neutrality, independence and considerable expertise, to facilitate a resolution of the conflict.

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

Mediation

It is an informal process in which a neutral third party without the power to decide or usually to impose a solution helps the parties resolve a dispute or plan a transaction. Mediation is voluntary and non-binding, although the parties may enter into a binding agreement as a result of mediation. It is not an adjudicative process. The process of mediation aims to facilitate their

negotiations. The mediator has no independent decision-making power, jurisdiction or legitimacy beyond what is voluntarily offered by the parties themselves. Mediation is a process of structured negotiation conducted by a facilitator with skill, training and experience necessary to assist the litigating parties in reaching a resolution of their dispute. It is a process that is confidential, non-coercive and geared to aid them in arriving at a mutually acceptable resolution to their dispute of any nature. One of the advantages of the mediation process is its flexibility. It is not as if one party wins and the other party looses. But the parties arrive at an equitable solution that is why mediation is said to be a win-win situation. Mediation employs several strategies, sub-strategies and techniques to encourage the parties to reach an agreement.

Mediation like many ADR strategies has distinct advantages over the traditional courts/ tribunals format of dispute resolution. The advantages of ADR including mediation are the informality of the process, the speed in dispute resolution, relatively low cost, the ability of the process to focus on the disputing parties interests and concern rather than exclusively on their legal rights; encouragement to the parties to fashion their own solutions; much greater involvement of the parties in the process; the essential confidentiality of the process and the high success rate.

The appropriate case for mediation are those where-

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

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

Concept of Online Dispute Resolution

Online Dispute Resolution (ODR) was born from the synergy between Alternative Dispute Resolution (ADR) and Information & Communication Technology (ICT) as a method for resolving dispute that were arising online, and for which traditional means of dispute resolution

were inefficient or unavailable. Online Dispute Resolution is an automatised platform or rather a trendy tool for the development of e-commerce and to solve dispute easily. Due to increasing use of the Internet worldwide, the number of disputes arising from Internet commerce is on arises. Numerous websites have been established to help resolve these Internet disputes, as well as to facilitate the resolution of disputes that occur offline. It is becoming an increasingly effective mechanism for resolving disputes as technology advances.

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

2.6 CONTEMPT OF COURT

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

1. **Source of the law of Contempt of Courts**

   i). Common Law of England.

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

   iii). Statutes :

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

   b) Cr. P.C. - 345.

   c) Contempt of Courts Act, 1971.

   iv). Constitution of India.

   a) Supreme Court - Article 129.

   b) High Court - Article 215.

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

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

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

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

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

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

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

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

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

   e) It has a legal duty to act judicially.

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

   (Reference : *Nihalauddin* v. *Tej Pratap Singh*, 1966 All. LJ 460).

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

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

3. **Contempt of Courts - Object**

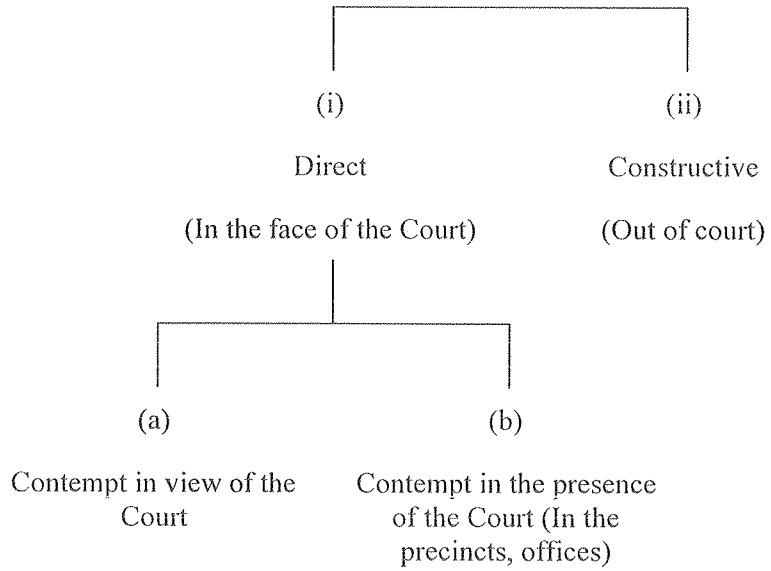
i) To uphold the majesty and dignity of the Court (Ref.: AIR 1969 Delhi 214, 1979 Cr. LJ NOTC 148 J&K)

ii) To maintain the continuity of the crystal clear flow of the stream of justice by sustaining the confidence of the public at large in the administration of Justice (Ref. AIR 1954 SC 10, AIR 1968 SC 1050).

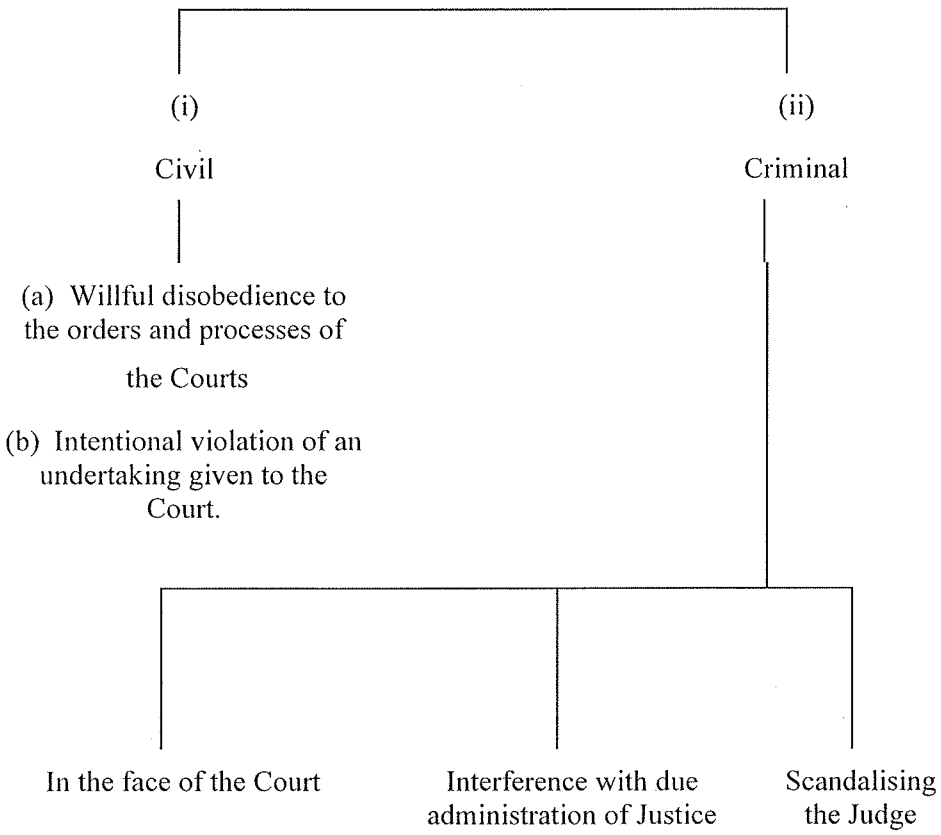
Note : It is neither to protect an individual Judge or Magistrate nor to vindicate his/her prestige for which the proper remedy lies in an action for libel or defamation. Contempt is a wrong done to the public. It is an offence against the free society.

4. **Classification of Contempt**

I. **First Classification**



II. Second Classification



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

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

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

It means "publication" -

i) by words, spoken or written

ii) by signs

iii) by visible representation

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

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

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

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

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

i) Secretary of the Congress Committee wrote a recommendatory letter to the District Magistrate about the facts of the case (AIR 1953 SC 185).

ii) Use of threats by letters or otherwise to a party while his case is subjudice or abusing in letters to persons likely to be witnesses (AIR 1962 SC 1172).

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

Unnecessary delay in dealing with them may well furnish grounds for an inference that it was due to a natural disinclination and may constitute contempt. (AIR 1969 SC 189)

iv) The Chief Minister delivers a speech on a subject which is subjudice in a writ petition before the High Court with full knowledge - it amounts to interference with administration of Justice (AIR 1970 SC 1821).

v) Circular directing Magistrates to ignore the decisions of the High Court tantamount to Contempt of Court (AIR 1961 SC 1315).

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

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

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

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

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

xi) Assault on Magistrate.

xii) Insult to a Magistrate.

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

xiv) Threatening a counsel in a case.

xv) Bullying witnesses.

xvii) Destroying documents in the custody of the Court.

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

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

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

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

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

9. **Defences to a charge of Contempt**

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

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

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

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

v) Publication of information relating to proceedings in chambers or Camera (Section 7)

vi) An order passed by a Court without jurisdiction is void *ab intio*. Violation of such order is not contempt (1981 Cr.LJ 1880 and 1985 Cr.LJ 359)

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

Section 345 Cr. P.C. - an outline

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

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

iii) Basic principles of Natural Justice must be observed.

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

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

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

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

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

ix) The sentence which is limited to:-

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

No sentence of substantive imprisonment.

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

i) Offence committed must be one of the following:-

175 IPC, 178 IPC, 179 IPC, 180 IPC and 228 IPC.

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

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

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

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

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

vii) The Court must record.

(a) facts constituting the offence.

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

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

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

b) the nature of the interruption or insult.

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

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

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

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

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

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

13. **Offences under Section 228 IPC - three choices**

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

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

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

(i) and (iii) - after taking cognizance.

14 **Court of Record**

A Court of record is one where the acts and judicial proceedings are enrolled for perpetual memory and testimony and which has the authority to fine and imprison for contempt

of itself as well as of subordinate courts (*Delhi Judicial Service Association* v. *State of Gujarat* (1991) 4 SCC 406).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16. Contempt - Scandalising Court -

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

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

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

17. Contempt Proceedings - Nature -

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

1977 CR. L.J. (NOTC) 253 Orissa.

18. Contempt - Standard of Proof.

Ingredients should be proved beyond reasonable doubt.

1984 Cr. L.J. 992 (Kant)

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

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

Reference : AIR 1987 SC 1554.

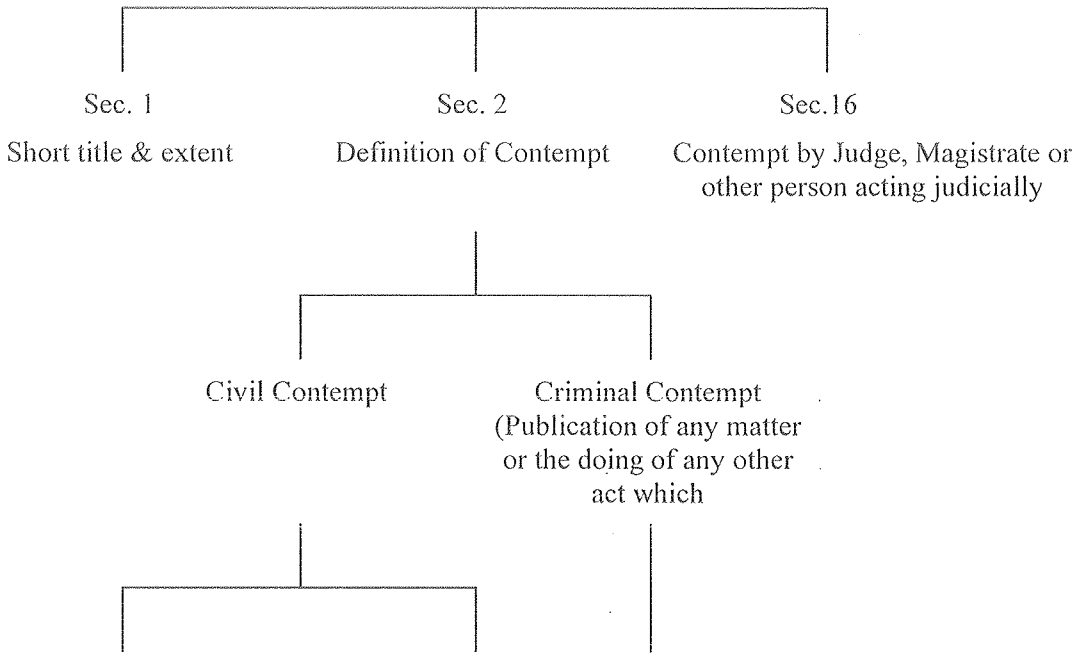
20. **Media and Court - right to make fair criticism of subordinate judiciary.**

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

Reference : 1994 Supreme Court Cases (Criminal) 1485

21. **Contempts of Courts - at a Glance**

Table I



Willful disobedience to any judgement, decree, direction, order, writ or other process of a court

Willful breach of an undertaking given to a court.

(i)

Scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court.

(ii)

Predudices, or interferes or tends to interfere with, the due course of any judicial proceeding

(iii)

Interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner

Table -II

Not Contempt

Sec. 3

Innocent publication and distribution of matter not contempt

Sec. 4

Fair and accurate report of judicial proceeding not contempt

Sec. 5

Fair criticism of judicial act not contempt

Sec. 6

Complaint against presiding officers of subordinate courts when not contempt

Sec. 7	Sec. 13	Sec. 8 other defences not affected
Publication of information relating to proceedings in chambers or in camera not contempt except in certain cases.	Contempts not punishable in certain cases	

Table - III

Power and Procedure

Sec. 9	Sec. 10	Sec. 11	Sec. 12
Act not to imply enlargement of scope of contempt	Power of High Court to punish contempts of subordinate courts	Power of High Court to try offences committed or offenders found outside jurisdiction	Punishment for contempt of court

Sec.14	Sec. 15	Sec. 17	Sec. 18
Procedure where contempt is in the face of the Supreme Court or a High Court	Cognizance of criminal contempt in other cases	Procedure after cognizance	Hearing of cases of criminal contempt to be by Benches.

Table - IV

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

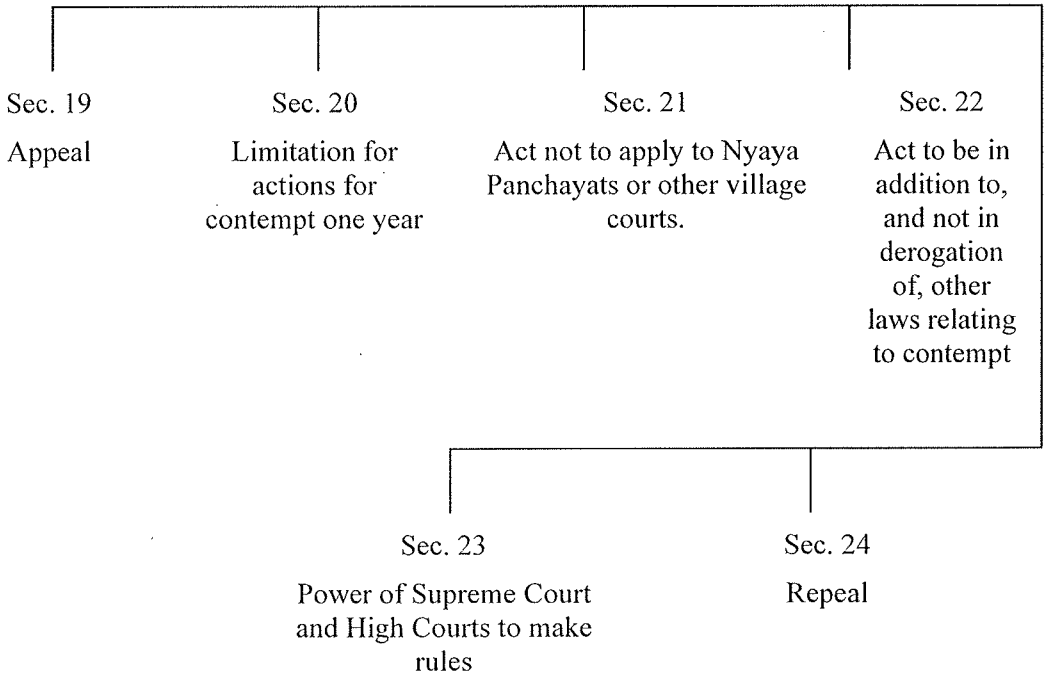


Table – V

Power of the Courts to punish for contempt

Power of subordinate courts (Civil, Criminal & Revenue Courts). May punish under section 345(1) Cr.PC for offences u/s 175, 178, 179, 180 & 228 IPC; Fine not exceeding Rs. 200/- and in default; SI for a terms extending to 1 month

Or

thereafter discharge the offender or remit the punishment u/s 348 Cr. PC on submission to the order or on apology being tendered.

Power of the High Court.

(1) to punish for contempt of itself (Article 215 of the Constitution)

(2) to punish for contempt of subordinate courts except for these contempts where such contempt is an offence under IPC (vide Sec. 10 Contempt of Courts Act)

(3) SI upto 6 months or fine upto 2000/- or both (Sec. 12, Contempt of Courts Act.)

Power of the Supreme Court

(1) To punish for contempt of itself (Article 129, Constitution of India).

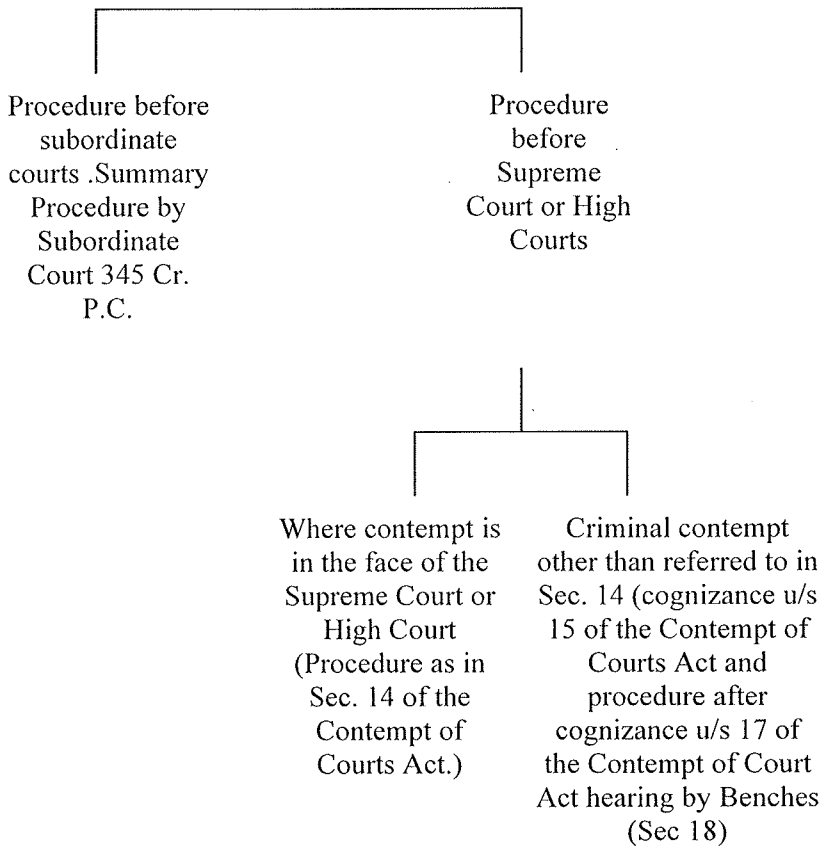
(2) It being a Court of record, it has inherent power to punish for Contempt of a Subordinate Court.

(3) To deal with any contempt case in the exercise of its appellate jurisdiction under the constitution or under section 19 of the Contempt of Courts Act.)

(4) SI upto 6 months or fine of Rs. 2000/- or both (Section 12 of the Contempt of Courts Act.)

Table - VI

Procedure for Contempt of Court



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

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

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

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

LEGAL REMEDIES

a. LEGAL REMEDIES

3.1 THEORIES OF PUNISHMENT & PUNISHMENTS UNDER IPC

Criminal Law reflects those fundamental social values expressing the way people live and interact with each other in the society. It uses the 'stick' of punishment as a means of reinforcing those values and securing compliance therewith. In this way criminal law seeks to protect not only the individual, but also the very structure and fabric of society from undesirable, nefarious and notorious activities and behavior of such individuals and organizations who try to disrupt and disturb public peace, tranquility and harmony in the society. The object of criminal legislation is to prevent perpetration of acts classified as a criminal because they are regarded as being socially damaging. The transgression of such harmful acts in modern times is prevented by a threat or sanction of punishment administered by the State. In other words, punishment is the sanction imposed on an accused for the infringement of the established rules and norms of the society.

The object of punishment has been summarized by Manu, the Great Hindu law-giver, in the following words:

Punishment governs all mankind; punishment alone preserves them; punishment wakes while their guards are asleep; the wise considers the punishment (danda) as the perfection of justice.

The protection of society and security of person's life, liberty and property is an essential function of the state. This could be achieved through instrumentality of criminal law by imposing appropriate sentence and stamping out criminal proclivity. The aim of protecting society is sought to be achieved by application of the principle of deterrence, prevention, retribution and reformation. Of these, deterrence is virtually regarded as the main function of punishment, the others being merely secondary.

(i) Deterrent Theory

According to this theory, the object of punishment is not only to prevent the wrong-doer from doing a wrong a second time, but also to make him an example to others who have criminal tendencies. Salmond considers deterrent aspects of criminal justice to be the most important for control of crime. Thus, the commission of every offence must be made a bad bargain.

The deterrent theory was the basis of punishment in England in the medieval period. The culprits were subjected to the severe punishment of death by stoning and whipping. In India, the penalty of a death sentence or mutilation of the limbs was imposed even for petty offences of forgery and stealing, etc., during the Mughal period. Even today in most of the Muslim countries, such as Pakistan, Iran, Iraq and Saudi Arabia, the deterrent theory is the basis of penal jurisprudence.

(ii) Preventive Theory

Another object of punishment is prevention or disablement. Offenders are disabled from repeating the crime by awarding punishments, such as death, exile or forfeiture of an office. By putting the criminal in jail, he is prevented from committing another crime. According to Paton on Jurisprudence 'The preventive theory concentrates on the prisoner and seeks to prevent him from offending again in the future. The death penalty and exile serve the same purpose of disabling the offender.'

(iii)Retributive Theory

In primitive society, punishment was mainly retributive. The person wronged was allowed to have revenge against the wrong doer. The principle of 'eye for an eye', 'a tooth for a tooth', 'a nail for a nail', 'limb for limb', was the basis of criminal administration. According the Justice Holmes: 'It is commonly known that the early forms of legal procedure were grounded in vengeance.'

The advocates of this theory plead that the criminal deserves to suffer. Retributive punishment gratifies the instinct for revenge or retaliation, which exists not merely in the individual wronged, but also in society at large. However, in modern times the idea of private revenge has been forsaken and the State has come forward to effect revenge in place of the private individual.

(iv)Reformative Theory

According to the reformative theory, the object of punishment is the reformation of criminals. It is maintained that punishment tends to reform criminals and that it accomplishes this by instilling in them a fear of repetition of the punishment and a conviction that crime does not pay, or by breaking habits that the criminals have formed, especially if the penalty is a long period of imprisonment which gives the prisoner no opportunity for improvement.

The object of punishment should be to reform the offender. The criminal must be educated and taught some art or craft or industry during his term of imprisonment, so that he may be able to lead a good life and become a responsible and respectable citizen after release from jail.

(v) Multiple Approach Theory

A perfect system of criminal justice could never be based on any single theory of justice. It would have to be a combination of all. Every theory has its own merits and every effort should be made to extract the good points of each and integrate it so that best of all could be achieved. Punishment should be proportionate to the nature and gravity of the crime. A first offender should be leniently treated. Special treatment should be given to a juvenile delinquent. A criminal should be able to secure his release by showing improvement in his conduct.

The Supreme Court in *Narotam Singh* v. *State of Punjab*, has said that reformative approach to punishment should be the object of criminal law, in order to promote rehabilitation without offending community conscience and to secure social justice.

However, Justice Krishna Iyer in *M.H. Hoskot* v. *State of Maharashtra,* cautioned that the Court should not confuse the correctional approach with prison treatment and nominal punishment verging on decriminalization for serious social and economic offences. Soft-sentence justice is gross injustice when many innocents are the potential victims.

Punishment under the Indian Penal Code

The Indian Penal Code in sections 53 to 75 has provided for a graded system of punishment to suit the different categories of offences for which the offenders are accountable under it. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. Section 53 prescribes five types of punishments to be meted out to a person convicted of a crime under the Code, depending on the nature and gravity of the offence, viz. (i) Death; (ii) Imprisonment for life; (iii) Imprisonment, rigorous with hard labour or simple; (iv) Forfeiture of property; and (v) Fine.

Death Penalty under the Indian Penal Code

The sentence of death is the most extreme punishment provided under the Code in eight cases. Regarding 'death' as a punishment, the authors of the Code have categorically stated that it ought to be very sparingly inflicted in exceptional cases where either murder or the highest offence against the State has been committed. Death sentence under the Code to which offenders may be sentenced are:

(1) Waging or attempting to wage war or abetting waging of war against the Government of India (Section 121)

(2) Abetting mutiny actually committed (Section 132)

(3) Giving or fabricating false evidence upon which an innocent person suffers dealth (Section 194)

(4) Murder which may be punished with death or life imprisonment (Section 302)

(5) Abetment of suicide of a minor or insane or intoxicated person (Section 305)

(6) Attempt to murder by a person under sentence of imprisonment for life, if hurt is caused (Section 307)

(7) Kidnapping for ransom, etc (Section 364A)

(8) Dacoity accompanied with murder (Section 369)

(9) Punishment for causing death or resulting in persistent vegetative state of victim (Section 376A)

In addition to the above stated cases, IPC, provides for death sentence in the following conditions:

(10) Criminal conspiracy to commit any offence punishable with death if committed in consequence thereof for which no punishment is prescribed (Section 120B)

(11) Joint liability extending the principle of constructive liability on all the persons who conjointly commit an offence punishable with death, if committed in furtherance of common intention or common object of all (Section 34 and 149)

(12) Abetment of offences punishable with death (Section 109)

Delay in execution of Death Sentence does not by itself entitle commutation to life imprisonment

In Sher Singh v. State of Punjab (AIR 1983 SC 465), the apex Court held that delay in execution of death sentence, exceeding two years, by itself does not violate Article 21 of the Constitution to entitle a person under sentence of death to demand quashing of sentence and converting it into sentence of imprisonment. Finally, the constitutional bench of the Apex Court held that the prolonged delay in execution of death sentence does not automatically entitle the accused to a lesser sentence of life imprisonment.

Power of pardon

The Constitution of India has empowered the President of India and the Governors of the States under Articles 72 and 161 respectively with the power to grant pardon (absolute or conditional), reprieve (temporary suspension of punishment fixed by law), respite (postponement to a future date of execution of a death sentence), remission (to reduce the amount of punishment without changing the character of the punishment), or to suspend, remit or commute the sentence of any person convicted of offences (i) against the Union laws (ii) sentence by Court Martial, and (iii) in all cases of death sentence.

The prerogative of mercy is in essence an executive function to be exercised by the head of the State after taking into consideration a number of factors which may not be germane for consideration by a court of law.

Imprisonment

The Code does not in general prescribe for imposition of minimum penalty for offences punishable under the Penal Code except in a few cases, such as murder, waging war against the Government, dowry death, sexual offences, such as rape etc. A wide discretion has been accorded to the courts, within the maximum limits of punishment prescribed for different offences, to award sentence in each case on its individual merit. The severity of punishment is not uniform in all cases. It varies according to the nature of the offence, the intention, age, mental condition of the accused and the circumstances in which the offence is committed.

Imprisonment for life: This means a sentence of imprisonment running throughout the remaining period of a convict's natural life. As regards, the nature of punishment, the Supreme Court of India in the case of *KM Nanavati* v. *State of Maharashtra* held that imprisonment in such a case meant rigorous imprisonment for life and not simple imprisonment.

Section 57 does not state that imprisonment for life shall be reckoned as imprisonment for 20 years. It is only the government that can remit, suspend or commute the sentence. A sentence for life would endure for the lifetime of the accused, as it is not possible to fix a particular period of a prisoners' death, so any remission given under the rules cannot be regarded as a substitute for a sentence for life.

Solitary Confinement

Solitary confinement is an isolation of the prisoner from other co-prisoners and complete segregation from society. It is an extreme measure and is to be rarely invoked in exceptional cases, of unparalleled brutality and atrocity. The Supreme Court in *Kishore Singh Ravinder Dev* v. *State of Rajasthan* (AIR 1981 SC 625) held that solitary confinement or putting fetters could be imposed only in exceptional cases for security reasons.

The Supreme Court has held in Sunil Batra that any harsh isolation of a prisoner from the society of fellow prisoners by cellular detention under the Prison's Act, 1894 (Section 29 and 30) is penal and it must be inflicted only in accordance with fair procedure and in the absence of which the confinement would be violative of Article 21 of the Constitution.

Fine

In imposing a fine it is necessary to have as much regard for the pecuniary circumstances of the accused as for the character and magnitude of the offence, and where a substantial term of imprisonment is inflicted, an excessive fine should not accompany except in exceptional cases. Offence and penalty must be proportionate to the nature of crime. However a heavy fine that the accused is unable to pay should not be imposed. The paying capacity of the accused should be taken into account while awarding fine. The court should not ignore the youth of the offender since, without doubt, the fine imposed on a child will have to be paid by the parent. Imprisonment in default of payment of a fine can only be simple imprisonment.

3.2 THE LIMITATION ACT, 1963

The Law of Limitation specifies the cut-off date for different legal actions within which a person aggrieved can advance suit before the court for remedy or righteousness. Where a suit is initiated after the bar of limitation, it will be hit by the law of limitation. The fundamental aim of the law of limitation is to protect the lengthy and recognized user and to penalize persons indirectly. The primary law relating to the Law of Limitation in India is the Limitation Act, 1859 and subsequently Limitation Act, 1963 was enacted on October 5, 1963 and came into force on January 1, 1964 for the purpose of consolidating and amending the legal principles relating to limitation of suits and other legal proceedings.

The object of Law of Limitation is is accordance with the maxim, *interest reipublicae ut sit finis litium*- the interest of the state requires that there should be an end to litigation. Supreme Court in Rajinder v. Santa[2] spoke about object of Law of Limitation is to prevent disturbance and deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by party's own inaction, negligence or laches.

Law of Limitation is basically and prima facie, a rule of procedure, stating thereby that the remedy can be exercised only within a limited period and not subsequently. It does not create any right or create cause of action. Similarly it should be read in the sense that limitation as distinguished from prescription merely bars remedy but does not destroy the right. In Bombay Dyeing and Mfg Co. Ltd. v. State of Bombay[3], it was held that the law of limitation only bars the remedy of approaching the court of law. However, it does not extinguish the right as such. Law of Limitation is applicable only to courts and not to tribunals.[4] So the Law of Limitation gives the clarion call that the court cannot assist those who are lethargic, apathetic or prone to sleeping over the matter. Thus, the Law of Limitation is a statute of peace and repose and is based on the principle of public policy and a principle of vigilance.

Difference between Limitation and Prescription - The Indian Limitation Act deals with the Law of Prescription as well the Law of Limitation. A Law of Prescription prescribes the period

[2] AIR 1973 SC 2537
[3] AIR 1958 SC 328 = 1958 SCR 1122 (SC Constitution Bench)
[4] Nityanand M Joshi v. LIC - AIR 1970 SC 209 = (1970) 1 SCR 396 = 36 FJR 324 (SC)

at the expiry of which not only the judicial remedy is barred but a substantive right is acquired or extinguished. A Law of Limitation limits the time after which a suit or other proceeding cannot be maintained in a Court of Justice. It simply bars the judicial remedy but it neither affects the extrajudicial remedies nor the substantive right itself.

Prescription is the acquisition of title by possession of property for the prescribed period provided that possession was neither forcible nor clandestine (hidden) nor permissive. Such possession acquires its title chiefly on account of the fact that those who had interest in the property have allowed their rights to get barred by not caring to pursue their remedies within the time allowed by law to enforce those remedies.

The following are some of the main differences of the law of limitation and prescription:

1. The law of limitation is a part of `adjective law' being barring the remedy after expiry of the period of limitation, while the law of prescription is a part of the substantive law and it effects the substantive right of a person;

2. The Limitation Act prescribes the period after the expiry of which a suit cannot be filed in the court, while a right through prescription arises after the expiry of definite period of time.

3. The law of limitation imposes restrictions only on the judicial remedies and not on extra judicial remedies, while a right extinguished due to prescriptions cannot be enforced by any judicial or extra judicial method.

Limitation and laches : The differences between limitation and laches are as under:

1. In case of limitation, the knowledge of the ignorance of the plaintiff, with reference to his right, is deemed immaterial, while the knowledge of the plaintiff about right if proved, defeats the claim due to laches. The term laches here means, negligence or slackness. The doctrine of laches is based on the principle that `delay defeats equity.'

In ***Roop Chand v. Madan Mohan***[5] it was observed that the basis of doctrine of limitation is public policy while basis of the doctrine of laches is `equity'. Laches like limitation no doubt deprive plaintiff of his remedy but it depends upon general principles of justice and fair play while limitation depends upon express law. A positive rule of limitation cannot be depended

[5] AIR 1960 Cal. 351

whether there is laches or not and except in the case of discretionary order, the defence of laches or acquiescence cannot prevail when a statutory period of limitation is prescribed for action.

2. Limitation prescribes a period of time within which a suit must be filed in the court, whereas period time is not fixed for laches. In case of laches, it is the duty of a court to see (a) Whether the evidences of the case have been lost or destroyed due to the delay caused by plaintiff (b) Whether the plaintiff caused unreasonable delay and (c) Whether the defendant has been induced by the plaintiff by causing delay or commission to alter his position or to incur an expense.

The doctrine of laches is applied in India in the following cases:

(i) Cases relating to the Specific Relief Act;

(ii) Cases of temporary injunction;

(iii) Cases of interlocutory orders;

(iv) Cases relating to marriage and divorce;

(v) Cases relating to limitation.

3. The law of limitation is based on public policy and general utility while laches is based on equity.

4. The law of limitation is based on expression while laches is based on the doctrine of impartial judicial behaviour.

5. The plea of limitation is raised by the defendant against the plaintiff while the plea of laches can be raised against both i.e. plaintiff or defendant.

Limitation and Acquiescence : Acquiescence implies an active consent of a party. It widely differs from limitation particularly on the following points:

1. Limitation indicates towards the provision against which a suit cannot be filed in a court after the expiry of the prescribed time. While acquiescence refers to a position in which an objection is not raised by person against an act done by another person having a right to do so; provided that it is not inconsistent with the right of the former.

2. The right of a person to file a suit or initiate a proceeding is extinguished after the expiry of period of time while acquiescence is most wide in comparison to that because a consent is involved in it.

3. The acquiescence can either be direct or indirect but it is not so in case of limitation.

4. The acquiescence is based on knowledge and conduct of the concerning party while it is not so in case of limitation.

5. When acquiscence is proved a person who did so loses his right to file a suit in the court irrespective of the fact that the time for filing a suit has since expired or not.

The Courts in India are bound by the specific provisions of the limitation Act and are not permitted to move outside the ambit of these provisions. The Act prescribed the period of limitation in Articles in schedule to the Act.

Bar of Limitation

Sec 3- The Act provides that any suit, appeal or application if made beyond the prescribed period of limitation, it is the duty of the court not to proceed with such suits irrespective of the fact whether the plea of limitation has been setup in defence or not. The provision of sec 3 ais mandatory. The court can take note suo moto. The effect of sec 3 is not to deprive the court of its jurisdiction. Therefore, decision of a court allowing a suit which had been instituted after the period prescribed is not vitiated for want of jurisdiction.

Extension of Time in Certain Cases

Doctrine of sufficient cause- Sec 5 allows the extension of prescribed period in certain cases on sufficient cause being shown for the delay. This is known as doctrine of "Sufficient cause" for condonation of delay which is embodied in sec 5 of the Limitation Act. 1963. Sec 5 provides that any application other than application under provision of order XXI of the code of civil procedure 1908 may admitted after the period of limitation if the appellant satisfies the court that he had sufficient cause for not preferring the appeal. However it must be a cause which is beyond the control of the party.

Person under legal disability

Section 6 is an enabling section to enable persons under disability to exercise their legal rights within a certain time. Section 7 supplements section 6, section 8 controls these section, which served as an exception to sec 6 and 7. The combined effect of section 6 and 8 is that where the prescribed limit expires before the cessation of disability, for instance, before the attainment of majority, the minor will no doubt be entitled fresh period of limitation.

Computation of period of limitation:

i) Section 12 to 24 deals with computation of period limitation. As per section 12 the day to be excluded in computing period is the day from which the period is to be reckoned and the time requisite for obtaining a copy of decree shall be excluded.

ii) Time which leave to sue or appeal as a pauper is applied for also excluded.

iii) The time which a suit or application stayed by an injunction and the continuance of the injunction and the time taken for obtaining sanction or consent.

iv) First day or day of judgment is to be excluded. **[section 12(1)]**

v) Time for getting copy of judgment or decree or order or award (against which appeal or application has to be filed is to be excluded. **[Section 12(3)]**

vi) Time when leave to sue or appeal as pauper is applied for and is pending **[section 13]** (d) Time spent (by mistake or misunderstanding) in proceeding bona fide in the Court without jurisdiction **[Section 14]**

vii) If stay or injunction was granted, that period will be excluded. **[Section 15(1)]**

viii) If consent/sanction of Government or some authority was required to be obtained for filing suit/application or notice was required to be given to Government in accordance with law, the period spent in obtaining the consent/sanction or time in giving notice is excluded. **[Section 15(2)]**

Effect of Fraud or Mistake

Period of limitation starts only after fraud or mistake is discovered by affected party. **[Section 17(1)]**. In Vidarbha Veneer Industries Ltd. v. UOI[6], it was held that limitation starts from the

[6] 1992 (58) ELT 435 (Bom HC)

date of knowledge of mistake of law. The cardinal principal enshrined in section 17 of Limitation Act is that fraud nullifies everything. Thus, appeal against the party can be admitted beyond limitation, if party has committed fraud (in submitting non-genuine documents at adjudication)

Effect of Acknowledgment in Writing

If acknowledgment of any property is right or liability is obtained in writing duly signed by the party against whom such property, right or liability is claimed, before the expiration of period of limitation, a fresh period of limitation is computed from date of acknowledgment. **[section 18(1)]**, Acknowledgment can be signed either personally or by an agent duty authorised in this behalf. **[section 18(2)].**

[That is why Banks and Financial Institutions insist on confirmation of balance every year].

Continuing Breaches and Torts

In case of continuous breaches and torts, a fresh period of limitation begins to run at every moment of time during which the breach or tort continues. **[section 22].**

Limitation is a question of law and can be raised at any stage i.e. even at the time of appeal.

Limitation in Criminal Matters

As per section 468 of Cr PC, Court cannot take cognizance of offence after expiry of following limitation period - (a) Six months, if the offence is punishable only with fine (b) One year, if the offence is punishable with imprisonment for a term not exceeding one year (c) three years, if the offence is punishable with imprisonment for a term not exceeding three years. However, in case of economic offences, there is no time limit.

3.3 CIVIL LEGAL REMEDIES- SPECIFIC RELIEF ACT

Civil Legal Remedies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. **Restoration of possession**

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

2. **Specific performance of contracts**

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

3. **Injunction(sections 36-42)**

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

   (i) the preventive remedy of injunction;

   (ii) the retrospective remedy of mandatory injunction.

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

4. **Declaratory Relief (section 34 and 35)**

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

5. **Rectification of instruments (Sec. 26)**

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

6. **Rescission of contract (Sections 27-30)**

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

7. **Cancellation of instruments (Sections 31-33)**

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

Specific Relief is not for Enforcing Penal Law

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

Recovery of Possession of Immovable Property on the Strength of the Title

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

According to Section 5 there should be:-

a) person, and

b) he should be entitled to possession, and

c) this possession should be of immovable property, and

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

Meaning of Possessory Action

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

Chattel

Section 8 deals with movable property i.e ; *chattel. Chattel* is a French word signifying 'goods' '*Chattel*' is more comprehensive than 'goods' and includes animate as well as inanimate property. Every movable thing which can be weighed, measured or counted is included under the general term *chattel.*

Applicability or conditions or requisites of Section 8

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

i) The defendant has possession or control of the particular article claimed;
ii) Such article is movable property i.e. capable of being seized and delivered to the successful party;
iii) The defendant is not the owner of the article;
iv) The plaintiff must be one who should be entitled to immediate possession;
v) The thing claimed is held by the defendant:-
    (a) As plaintiff's agent or trustee;
    (b) When the compensation is not adequate relief;
    (c) To ascertain the actual damage is extremely difficult;

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

Specific Performance of Contract

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

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

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

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

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

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

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

i) When part unperformed is small and compensation can be estimated.

ii) Part unperformed is large but compensation can be estimated

iii) Where a contract consists of independent parts i.e. divisible parts.

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

i) When compensation in money is adequate- According to Section 14(1) (a) of the Specific Relief Act, a contract for the non-performance of which compensation in money is an adequate relief cannot be specifically enforced.

ii) Contracts involving personal service

iii) Contract in its nature determinable

iv) Contracts involving continuous supervision of the Court

v) Contract for arbitration

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

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

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

COURT PROCEDURE IN CIVIL CASES

4. COURT PROCEDURE IN CIVIL CASES

4.1 THE CODE OF CIVIL PROCEDURE, 1908

An Introduction

1. **C.P.C. - What it is?**

   (a) It is a piece of legislation.

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

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

2. **C.P.C. - its scheme**

   (a) It has two parts.

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

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

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

3. **Body and Rules - Distinction**

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

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

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

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

4. **Suit - what it is?**

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

5. **Plaint - what it is ?**

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

6. **Plaint - what it should contain**

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

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

7. **Plaintiff - who he is ?**

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

8. **Defendant - who he is?**

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

9. Written Statement

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

10. Pleadings

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

11. Pleadings - what they should contain

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

12. Basic Rules of Pleadings

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

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

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

(iv) It must state facts in concise form.

13. Pleading of Law

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

14. Pleadings - their object

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

15. Pleadings - their implications

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

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

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

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

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

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

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

16. Elements of a Judicial Procedure

(i) Summons

(ii) Pleadings

(iii) Proof

(iv) Judgement

(v) Execution.

*Note : **Proof is the Effect of Evidence***

17. **Essentials of a Suit**

(i) opposing parties

(ii) a subject in dispute

(iii) a cause of action

(iv) a demand for relief

18. **Cause of Action**

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

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

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

(i) Presentation of the plaint.

(ii) Preliminary scrutiny by the Court.

(iii) Registration/Return/Rejection.

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

(iv) Summons to the defendant.

(v) Appearance of the defendant.

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

(vii) Attendance of the parties in the Court.

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

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

(x) Settlement of issues.

(xi) Summoning and attendance of witnesses.

(xii) Adjournments, if any.

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

(xiv) Delivery of the Judgement.

(xv) Drawl of the decree.

(xvi) Appeal, if any.

(xvii) Execution.

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

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

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

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

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

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

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

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

(h) An order for return of plaint is appealable save and except where the procedure specified in Order 7 Rule 10A has been followed. There is not second appeal. Rejection of a plaint being a decree is always appealable and what is more, second appeal also lies.

21. **Decree - its chief element**

(i) Formal expression of adjudication.

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

(iii) Conclusive determination of rights.

(iv) Must be in a suit.

22. **Order - its elements**

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

(b) it is given by a Civil Court.

(c) it is other than a decree.

23. **Decree and Order - distinction**

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

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

	Decree	Order
(a)	Every decree is appealable except a decree on consent vide Section 96.	Orders are generally not appealable except those specified in Section 104(1)
(b)	Second appeal lies on certain grounds vide Section 100.	There is not second appeal
(c)	Decree adjudicates and conclusively determines the rights of the parties.	May or may not finally determine the rights of the parties.
(d)	Decree may be preliminary or final.	Order cannot be preliminary.
(e)	Must be in a suit.	Need not necessarily be in a suit.
(f)	One decree is passed in a suit.	Several orders may be passed suit.

24. Decree - What it should contain (vide Order 20 Rule 6 CPC)

(a) Number of the suit.

(b) Description of the parties.

(c) Particulars of the claims.

(d) Reliefs granted or other determination of the suit.

(e) Costs - by whom and to whom payable.

25. Judgement - what it should contain (vide Order 20 Rule 4)

(a) Concise statements of the cases of the contending parties.

(b) Points for determination.

(c) Decisions thereon.

(d) Reasons for such decisions.

(e) Reliefs granted, if any.

26. Judgement and Decree - their co-relation

(a) Decree follows the judgement.

(b) Decree should accord with the judgement.

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

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

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

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

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

28. **Examples of Preliminary Decree**

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

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

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

29. **Interlocutory Order - What it is?**

(a) "Interlocutory" means "provisional", interim, 'temporary', not final.

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

(c) Examples -

(i) order appointing a receiver

(ii) order granting a temporary injunction

(iii) order issuing a commission for examination of witnesses

(iv) order directing sale of perishable goods

(v) orders relating to interrogatories, inspection, etc

30. Non-joinder and Mis-joinder of parties

(a) "Non-joinder of parties" - it means omission to join some person as a party to a suit, either as plaintiff or as defendant.

(b) "Mis-joinder of parties" - it means improper joining together of parties to a suit as plaintiffs or defendants.

(c) Objections as to non-joinder or mis-joinder of parties should be taken at the earliest opportunity (Order 2 Rule 13).

(d) A mis-joinder or non-joinder of parties is not fatal to the suit. The Court may deal with the rights of the parties actually before it (vide Order 1 Rule 9).

(e) The suit is, however, liable to be dismissed for non-joinder of a necessary party (vide the proviso to Rule 9 of Order 1).

(f) In case of mis-joinder of parties, the name of the plaintiff or the defendant improperly joined may be struck out under Order 1 Rule 10(2).

(g) In case of non-joinder of parties, a person may be added as a party provided that he ought to have been joined but actually not joined and without whose presence, the questions in suit cannot be completely decided Vide Order 1 Rule 10(2).

31. Necessary and Proper Parties

(a) Necessary parties are those parties whose presence is essential and in whose absence, no effective decree can be passed. They are parties who ought to have been joined within the meaning of Order 1 Rule 10(2).

(b) Proper parties are those parties whose presence is a matter of convenience to enable the Court to adjudicate more effectively and completely.

(c) Examples -

(i) In a suit for partition, all the co-owners are necessary parties.

(ii) In a suit against the Railway, Union of India is a necessary party.

(iii) The sub-tenant is a proper party and not a necessary party in a suit for eviction of the tenant on the ground of sub-letting.

LAW OF CRIMES

5. LAW OF CRIMES

5.1 INDIAN PENAL CODE, 1860 – AT A GLANCE

Indian Penal Code - An Introduction

1. **Title - Its meaning**

(a) It consists of three words, namely:

- Indian
- Penal
- Code

(b) Out of these three, the key word is "code".

Code - What is means?

It is systematic, complete, written collection of a body of laws, arranged methodically in a coherent manner. A Code is the end product of codification. Codification is a process which consists of compilation arrangement, systemization and promulgation of a body of laws by the authority competent to do so.

Examples:

i. Code of Menu

ii. Code of Napolean

iii. Code of Justinian

iv. Hindu Code

v. Indian Penal Code

vi. Criminal Procedure Code

vii. Civil Procedure Code

(c) Codification - its advantages

i. Simplicity

ii. Symmetry

iii. Intelligibility

iv. Logical coherence

v. Certainty

(d) Penal - What it means ?

It is an adjective. It qualifies the noun "code". It means "relating to punishment".

Indian Penal Code is a penal statute, because it not only defines offences but also prescribes punishments for commission of such offences.

(e) "Indian"

The term "Indian" signifies that it is the penal code for India. The preamble indicates that the I.P.C. was enacted to provide a General Penal Code for India.

(f) India in the context of the IPC

IPC extends to the whole of India except the State of Jammu & Kashmir.

Article 1(3) of the Constitution of India, read with the First Schedule, will tell you the extent of the territory of India.

2. Historical Background

(a) The year 1833 was very crucial in the history of development of law in British India.

(b) The Charter Act of 1833 was passed by the British Parliament with a view to facilitating codification of Indian Laws.

(c) The Charter Act of 1833

(i) established an All India Legislature namely Governor General in Council, for the whole of British India.

(ii) created the office of Law Member in that Council.

(iii) provided for the appointment of a Law Commission.

(d) Mr. T.B.Macaulay was appointed to fill the office of the Law Member.

(e) In Pursuance of the Charter Act of 1833, the first Law Commission was set up in 1834.

(f) Mr. Macaulay, later on Lord Macaulay, became its President.

(g) The first task assigned to the Law Commission was to prepare a draft penal code for India.

(h) A draft Code was drawn up and submitted to the Governor-General in Council on the 14th October 1837.

(i) The draft was then circulated to the Judges and the Legal Advisers of the crown for eliciting their comments and views.

(j) It was thereafter revised thoroughly.

(k) The Bill so revised remained pigeon-holed for many years.

(l) It was ultimately passed and placed on the statute book on the 6th October, 1860.

3. Date of commencement of the Indian Penal Code

The IPC was brought into force on the first day of January 1862. Hence, its date of commencement is 1.1.1862.

It has, therefore, been in force for more than 152 years.

4. I.P.C. its nature

(i) It is a codifying statute.

(ii) It contains the general law of crimes in India.

(iii) It is a substantive law. The Code of Criminal Procedure is an adjective law.

(iv) It is exhaustive in respect of the matters covered by it. It is a complete Code.

(v) It lays down the general principles of criminal liability.

(vi) It also provides for general exceptions to criminal liability.

(vii) It defines specific offences and prescribes punishments therefor.

5. **Scheme of the Code**

(a) The Code is broadly divided into twenty-three Chapters.

(b) To be more precise, the Code at present contains 26 Chapters, because three Chapters, namely, VA, IXA and XXA have been added subsequently.

(c) Each Chapter is again sub-divided into several Sections.

(d) Each Section has been given a numeral figure for distinguishing it from the others.

(e) The last Section of the IPC bears the number 511.

(f) That, however, does not imply that the IPC has 511 Sections.

(g) Many Sections have been added and several Sections have been omitted.

6. **Arrangement**

(a) There are two broad divisions of the Code, they are:

(i) General Principles and

(ii) Specific offences.

(b) Specific offences may be roughly categorised under two heads, namely (i) offences against the State and the public and (ii) Offences against the person and the property.

(c) The general principles are embodied in Chapters I, II, III, IV, V, VA and XXIII as detailed below:

Chapter I	-	Title and extent of operation of the Code.
Chapter II	-	Definition of certain terms.
Chapter III	-	Punishments. (General)
Chapter IV	-	General Exceptions
Chapter V	-	Abetment of offences
Chapter VA	-	Criminal conspiracy
Chapter XXIII	-	Criminal Attempts

(d) Specific offences

Chapter VI to	-	Offences against the State and the public

Chapter XV	-	Offences Relating to Religion
Chapter XVI	-	Offences affecting human body.
Chapter XVII	-	Offences against the properties (corporeal and Incorporeal)
Chapter XIX	-	to Chap. XXII

7. **Jurisdiction**

(a) IPC has two kinds of jurisdiction, namely,

(i) Intra-territorial (Sec.2).

(ii) Extra-territorial (Sec.3 and 4).

(b) If any offence under the IPC is committed by a person within the territory of India, whether Indian or foreigner, he is liable to be prosecuted and punished by the Court in India having jurisdiction.

(c) If an Indian commits an act of commission or omission outside India, which is an offence under the IPC, he may still be prosecuted and punished under the IPC by a competent Indian Court, even though the act may not constitute an offence under the law of that land.

(d) If any offence under the IPC is committed on any ship or aircraft, registered in India, the person committing it shall be liable to be dealt with under the IPC by a competent Indian Court, even though the ship or aircraft, at the time of commission of such offence has remained outside India.

Note : i. In this context, reference may be made to Sec.188 of the Criminal Procedure Code.

ii. A person can not however, be prosecuted and punished twice for the same offence, one under the IPC and the other under the Foreign Law.

5.2 GENERAL EXCEPTIONS UNDER IPC

Meaning of General Exceptions

Certain acts, or acts in particular circumstances have been removed from the ambit of being treated as offences under the IPC by virtue of Chapter IV of the IPC. The provisions of the IPC must be read in such a manner so as to be subject to the exceptions contained in Chapter IV.

Burden of Proving Exception

The onus of proving that an act lies within an exception is on the accused. Under S. 105 of the Indian Evidence Act, 1872, the burden of proving the existence of circumstances bringing the case within exceptions lies on the accused, and the court shall presume the absence of such circumstances.

In *Nanavati*, the Court said that it shall regard the non-existence of such circumstances as proved, until they are disproved. (*K. M.Nanavati* v. *State of Maharashtra*, AIR 1962 SC 605)

Standard of Proof for Proving Exception

The Supreme Court has held that the standard of proof required for an accused to discharge his burden of proving that his acts come within a general exception is that of preponderance of probabilities. (*Vijayee Singhand others* v. *State of Uttar Pradesh*, (1990) 3 SCC 190). The test is not whether the accused has proved beyond all reasonable doubt that he comes within an exception, but whether in setting up the defence, he has established a reasonable doubt in the case of the prosecution and thereby earned his right of acquittal. (*Kanali Barui* v. *Subhas Das*, 1983 Cri. L. J. 1474)

Although an exception must normally be proved in trial by the accused, the Supreme Court in *Vadilal Panchal* v. *Dattatraya Dulaji Ghadigaonker and Another*, AIR 1960 SC 1113, has recognized that where an act falls within one of the exceptions provided in the IPC, and this is apparent on the complaint itself, the Magistrate is within her powers to decline to issue process.

The Supreme Court held:

> "*The short question before us is - was the High Court right in its view that when a Magistrate directs an enquiry under S.202 of the Code of Criminal Procedure for ascertaining the truth or falsehood of a complaint and receives a report from the enquiring officer supporting a plea of self-defence made by the person complained against, it is not open to him to hold that the plea is correct on the basis of the report and the statements of witnesses recorded by the enquiring officer?*Must he, as a matter of law, issue process in such a case and leave the

person complained against to establish his plea of self-defence at the trial? *It may be pointed out here that the High Court itself recognised that it would not be correct to lay down a proposition in absolute terms that whenever a defence under any of the exceptions in the Indian Penal Code is pleaded by the person complained against, the Magistrate would not be justified in dismissing the complaint and must issue process. Said the High Court: "As we have already observed, if there is a complaint, which itself discloses a complete defence under any of the exceptions, it might be a case where a Magistrate would be justified in dismissing such a complaint finding that there was no sufficient ground to proceed with the case."*

Exceptions Provided under Chapter IV: General Categories

Mistake of Fact

S.76 of the IPC excuses a person who has done what by law is an offence under a mistake of facts (and not under a mistake of law), that lead her to believe in good faith that she was bound by law to do such an act.

Illustration: A, soldier, fires on a mob by the order of his superior officer, in conformity with the command of the law. A has committed no offence.

Illustration: A, an officer of a court, being ordered by that court to arrest Y, and after due enquiry, believing Z to be Y, arrests Z. A has committed no offence.

S.79 of the IPC

S.79 of the IPC excuses a person who has done what by law is an offence under a mistake of fact (and not under a mistake of law) that lead her to believe in good faith that she was justified in law to do such an act.

Illustration: A sees Z commit what appears to A to be a murder. A, in the exercise, to the best of his judgment exerted in good faith, of the power which the law gives to all person of apprehending murderers in the act, seizes Z,in order to bring Z before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self-defence.

S.76 and 79 of the IPC are based on the principle that ignorance of a fact may be excused, but ignorance of the law cannot be excused. The distinction between Ss.76 and 79of the IPC is that in the former, a person is assumed to be *bound*, and in the latter to be *justified*, by law.

Judicial Acts

S.77 of the IPC protects acts done by a Judge while acting judicially and in exercise of the powers given to him by law.

S.78 of the IPC protects acts done in pursuance of, or in consequence of the judgment of order of a Court.

Accident

S.80 of the IPC exempts the commission of any innocent or lawful act, done in an innocent or lawful manner, which has led to an unforeseen result that may have ensued from an accident or misfortune. For the accused to avail of this exception, it must be shown that due care and caution were exercised at the time of commission of the act. *Bhupendrasinh A. Chudasama* v. *State of Gujarat*, AIR 1997 SC 3790.

Absence of Criminal Intent

These exceptions, including for unsoundness of mind and intoxication, are based on the premise that the accused, while committing the acts in question had no criminal/*malafide* intent. For instance, under S.82 of the IPC, acts done by a child under the age of seven are not offences.

Unsound Mind

S.84 of the IPC lays down the test of responsibility in cases of alleged unsoundness of mind. There is no definition of unsoundness of mind' under the IPC. However, courts have treated this term as being equivalent to insanity.

Insanity itself, however, has no precise definition and is a term used to describe varying degrees of mental disorder. Therefore, every person suffering from some sort of a mental ailment is not ipso facto exempted from criminal responsibility and thereby come within the ambit of the protection provided by S.84 of the IPC. (*Bapu and Gajraj Singh* v. *State of Rajasthan*, (2007) 8 SCC 66)

A person is exonerated from liability or doing an act on the ground of unsoundness of mind, if she, at the time of doing the act, is either incapable of knowing the nature of the act, or that she is doing what is either wrong or contrary to law.

In *Nanney Khan* v. *State (Delhi Administration)*, (1986) 2 Crimes 328 (Del), since no questions were put to witnesses regarding the alleged insanity of the accused at the time of the commission

of the crime, and since the accused didn't set up any defence of insanity, the Court held that a plea of insanity before the appellate court taken for the first time cannot prevail, and the accused is not entitled to the benefit of S.84 of the IPC.

In *Jagdish* v. *State of M.P.*, JT 2009 (12) SC 300, the Supreme Court rejected a plea of insanity under S. 84 of the IPC that was taken by the accused/convict for the first time before the Supreme Court.

Intoxication

Under S.85 of the IPC, a person will be exonerated from liability for doing an act while in a state of intoxication, if at the time of the act, the person (due to intoxication) was incapable of knowing the nature of his act, or that he was doing what was either wrong or contrary to law.

Consent

S.87 of the IPC provides that nothing is an offence if the person to whom harm is caused is above eighteen years of age and has given consent to suffer such harm. The provision however, provides that the act for which consent is offered should not be intended to cause death or grievous hurt.

Illustration: A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence.

Trifling Acts

S.95 of the IPC provides that if the harm caused by an act is so slight that a person of ordinary sense and temper would not complain of such harm, the act would not be an offence. This defence is often known as the 'defence of triviality'.

The High Court in revision came to the conclusion that the injuries were trivial and the case was one in which the injury intended to be caused was so slight that a person of ordinary sense and temper would not complain of the harm caused thereby and accordingly set aside the conviction and acquitted the accused.

While upholding the decision of the High Court, the Supreme Court held:

> *"The next question is whether, having regard to the circumstances, the harm caused to the appellant ... ..was so slight that no person of ordinary sense and*

temper would complain of such harm. S.95 is intended to prevent penalisation of negligible wrongs or of offences of trivial character. Whether an act, which amounts to an offence, is trivial would undoubtedly depend upon the nature of the injury, the position of the parties, the knowledge or intention with which the offending act is done, and other related circumstances. There can be no absolute standard or degree of harm which may be regarded as so slight that a person of ordinary sense and temper would not complain of the harm. It cannot be judged solely by the measure of physical or other injury the act causes ... An assault by one child or another, or even by a grown-up person on another, which causes injury may still be regarded as so slight, having regard to the way and station of life of the parties, relation between them, situation in which the parties are placed, and other circumstances in which harm is caused, that the victim ordinarily may not complain of the harm". (Neelam Mahajan Singh v. *Commissioner of Police & Others, 1994 (2) Crimes 75)*

Private Defence

Ss.96 to 106 of the IPC deal with the right of private defence and are a recognition of the right of a person to protect his or her life and property against the unlawful aggression of others.

S.96 of the IPC states that nothing is an offence which is done in the exercise of the right of private defence. S.97 of the IPC defines the right of private defence of the body and property. Every person has a right to defend his own body and the body of any other person against any offence affecting the human body, subject to the restrictions contained in S. 99 of the IPC.

Among the restrictions stated in S.99 of the IPC, the provision stipulated the extent to which the right of private defence may be exercised, namely that it in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. Further, S. 100 details instances in which the right of private defence of the body extends to causing death.

For the plea of right to defence to succeed in totality, it must be proved by the accused that there existed a right to private defence in favour of the accused, and that this right extended to causing death. Hence, if the Court were to reject this plea, there are two possible ways in which this may be done. On one hand, it may be held that there existed a right to private defence of the body. However, more harm than necessary was caused or, alternatively, this right did not extend to causing death. The other situation is where, on appreciation of facts, the right of private defence is held not to exist at all. (*Bhanwar Singh* v. *State of MP,* (2008) 16 SCC 657)

5.3 THE PREVENTION OF CORRUPTION ACT, 1988, THE CENTRAL VIGILANCE COMMISSION (CVC) ACT, 2003 AND THE LOKPAL AND LOKAYUKTAS ACT, 2013

THE PREVENTION OF CORRUPTION ACT, 1988

"Corruption debases democracy, undermines rule of law, distorts market, stifles economic growth and denies many, their rightful share of economic resources of life- saving aid" - Kofi Anan

In the pre-independence period, the Indian penal Code (IPC) was the main tool to combat corruption in public life. The Code had a chapter on 'Offences by Public Servants'. Sections 161 to 165 provided the legal framework to prosecute corrupt public servants. At that time the need for a special law to deal with corruption was not felt.

Corruption may be alternatively defined as unlawful practices. Thus, Section 161[7] of the *Indian Penal Code*, defines **corruption** as follows:

> "Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain gratification whatever, other than legal remuneration as a motive or a reward for doing or forbearing to do any official **act** or for showing or forbearing to show, in exercise of his official functions, favour or disfavor to any person with the Central or State Government or Parliament or Legislature of any State or with any public servants as such....."

Corruption as viewed in Criminal Law

Corruption has always been considered a serious type of anti-social act in criminal law. In India, the first codified criminal law i.e. the Indian Penal Code, 1860, contained a full chapter which dealt with corruption. However, it confined its operation to those defined as public servants under Section 21 of the code. Mainly misconduct and abuse of power by public servants were covered under this chapter. Being governed by the traditional rules of criminal liability, the provisions in the I.P.C. could not successfully combat corruption by public servants to supplement and strengthen law against corruption, the Prevention of Corruption Act, 1947, entered the statute book. The Act being social legislation aimed at eradicating corruption,

[7] Rep. by the *Prevention of Corruption Act*, 1988.

changed the traditional rules of criminal liability by presuming *mens rea* on the part of public servant if *actus reus* was proved.

***Prevention of Corruption Act*, 1947**

The *Prevention of Corruption Act*, 1947 did not redefine nor expand the definition of offences related to corruption in the already existing IPC. Similarly, it has adopted the same definition of 'Public Servant' as in the IPC.

The Criminal Law (Amendment) Act, 1952 brought some changes in laws relating to corruption. The punishment specified under Section 165 of IPC was enhanced to three years instead of existing two years. Also a new Section 165A was inserted in the IPC, which made abetting of offences, defined in Sections 161 and 165 of IPC. It was also stipulated that all corruption related offences should be tried only by Special Judges.

The *Prevention of Corruption Act,* 1947, was amended in 1964 based on the recommendations of the Santhanam Committee. There are provisions in Chapter IX of the Indian Penal Code to deal with public servants and those who abet them by way of criminal misconduct. There are also provisions in the Criminal Law Amendment Ordinance, 1944 to enable attachment of ill gotten weather obtained through corrupt means, including from transferees of such wealth. The Bill seeks to incorporate all these provisions with modifications so as to make the provisions more effective in combating corruption among public servants.

***Prevention of Corruption Act*, 1988**

The *Prevention of Corruption Act,* 1988 consolidates the provisions of the Prevention of Corruption Act, 1947, the Criminal Law Amendment Act, 1952 and sections 161 to 165 of IPC. Besides, it has certain provisions intended to effectively combat corruption among public servants. The salient features of the Act are as follows:

i) The term 'Public Servant' is defined in the Act. The definition is broader than what existed in the IPC.
ii) A new concept – 'Public Duty' is introduced in the Act.
iii) Offences relating to corruption in the IPC have been brought in Chapter 3 of the *Prevention of Corruption Act*, and they have been deleted from the *Indian Penal Code*.
iv) All cases under the Act are to be tried only by Special Judges.
v) Proceedings of the court have to be held on a day-to-day basis.

vi) Penalties prescribed for various offences are enhanced.

vii) Criminal Procedure Code (for the purpose of this Act only) to provide for expeditious trial (Section 22 of the Act provides for amended Sections 243,309,317 and 397 of Cr.P.C).

viii) It has been stipulated that no court shall stay the proceedings under the Act on the grounds of any error or irregularity in the sanction granted, unless in the opinion of the court it has led to failure of justice.

ix) Other existing provisions regarding presumptions, immunity to bribegiver, investigation by an officer of the rank of Dy.S.P., access to bank records etc have been retained.

In the statements of objects and reasons it is expressly mentioned that the object of the Act is to amend the existing anti-corruption laws with a view to making them more effective by extending the scope and ambit of the definition of "public servant" and to bring within its sweep each and every person who held an office by virtue of which he was required to perform any public duty.

Section 2 of the *PC Act*, 1988 defines "Public Servant" broadly. It covers 12 categories of persons irrespective of the fact weather they have been appointed by Government or not they are under purview of the public servant. These categories are as follow.

i) Any person in the service or pay of the Government or remunerated by the Government by fees or commission for the performance of any public duty;

ii) Any person in the service or pay of a Local Authority;

iii) Any person in the service or pay of a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956;

iv) Any Judge, including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions;

v) Any person authorized by a Court of Justice to perform any duty, in connection with the administration of justice, including a liquidator, receiver or commissioner appointed by such court;

vi) Any arbitrator or other person to whom any cause or matter has been referred for decision or report by a court of justice or by a competent public authority.

vii) Any person who holds an office by virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election.

viii) Any person who holds an office by virtue of which he is authorised or required to perform any public duty.

ix) Any person who is the President, Secretary or other office bearer of a registered co-operative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the Central Government or a State Government or from any corporation established by or under a Central, Provincial or State Act, or any authority or body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956.

x) Any person who is a chairman, member or employee of any Service Commission or Board, by whatever name called, or a member of any selection committee appointed by such Commission or Board for the conduct of any examination or making any selection on behalf of such Commission or Board.

xi) Any person who is a Vice-Chancellor or member of any governing body, professor, reader, lecturer or any other teacher or employee, by whatever designation called, of any University and any person whose services have been availed of by a University or any other public authority in connection with holding or conducting examinations.

xii) Any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance form the Central Government or any State Government, or local or other public authority.

Penal Provision

If a public servant takes gratification other than his legal remuneration in respect of an official act or to influence public servants is liable to minimum punishment of six months and maximum punishment of five years and fine. The Act also penalizes a public servant for taking gratification to influence the public by illegal means and for exercising his personal influence with a public servant.

If a public servant accepts a valuable thing without paying for it or paying inadequately from a person with whom he is involved in a business transaction in his official capacity, he shall be penalized with minimum punishment of six months and maximum punishment of five years and fine.

It is necessary to obtain prior sanction from the central or state government in order to prosecute a public servant.

Investigation of Cognizable offence

Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of the Criminal Procedure Code, 1973.

According to Section 17 of the *Prevention of Corruption Act*, 1988 investigation into cases under this Act should be done by police officers not below the rank of Deputy Superintendent of Police and it also enumerates the police officers who are entitled to investigate.

Speeding up of Trials

In order to ensure speedy trial of corruption cases, the *Prevention of Corruption Act*, 1988 made the following provisions:

i) All cases under the Act are to be tried only by a Special Judges.
ii) The proceedings of the court should be held on a day-to-day basis.
iii) No court shall stay the proceedings under the Act on the grounds of any error or irregularity in the sanction granted, unless in the opinion of the court it has led to failure of justice.

Power to appoint Special Judges

The Central and the State Governments are empowered to appoint Special Judges by placing a notification in the Official Gazette, to try the following offences:

i) Any offence punishable under this Act.
ii) Any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a).
iii) A person shall not be qualified for appointment as a Special Judge under this Act unless he is or has been a Sessions Judge or an Additional Session Judge or an Assistant Sessions Judge. under the code of Criminal Procedure Code, 1973 (2 of 1974).

Powers of Special Judge

A Special Judge is a creature of the Criminal Law (Amendment) Act, 1952. He enjoys a special status under the Act and is clothed with such powers as have been given to him by the provisions of the Act. The provisions of Sections 326 and 475 of the Cr.P.C. shall apply to the proceedings before a Special Judge and for purpose of the said provisions, a Special Judge shall be deemed to be a Magistrate. A Special Judge may pass a sentence authorized by law for the punishment of the offence of which a person is convicted. A Special Judge, while trying any offence punishable under the Act, shall exercise all powers and functions exercised by a District Judge under the Criminal Law Amendment Ordinance, 1944.

Other Laws and Provisions to tackle Corruption

GOI has created a number of offices promulgating anti-corruption measures, such as the Administrative Vigilance Division in the Department of Personnel and Training, CBI, Vigilance Units in the Ministries and departments of the Government of India, disciplinary authorities, and the CVC. The CVC, CBI and ACB work to eradicate the offenses laid out in the PCA.

Apart from the Prevention of Corruption Act, 1988, the Law makers have enacted the following Laws and Provisions to eradicate the corruption in India.

Indian Penal Code, 1860:

i) The IPC defines "public servant" as a government employee, officers in the military, navy or air force; police, judges, officers of Court of Justice, and any local authority established by a central or state Act.

ii) Section 169 pertains to a public servant unlawfully buying or bidding for property. The public servant shall be punished with imprisonment of upto two years or with fine or both. If the property is purchased, it shall be confiscated.

iii) Section 409 pertains to criminal breach of trust by a public servant. The public servant shall be punished with life imprisonment or with imprisonment of upto 10 years and a fine.

The Benami Transactions (Prohibition) Act, 1988

The Act prohibits any benami transaction (purchase of property in false name of another person who does not pay for the property) except when a person purchases property in his wife's or unmarried daughter's name.

Any person who enters into a benami transaction shall be punishable with imprisonment of upto three years and/or a fine.

All properties that are held to be benami can be acquired by a prescribed authority and no money shall be paid for such acquisition.

The Prevention of Money Laundering Act, 2002

The Act states that an offence of money laundering has been committed if a person is a party to any process connected with the proceeds of crime and projects such proceeds as untainted property. "Proceeds of crime" means any property obtained by a person as a result of criminal activity related to certain offences listed in the schedule to the Act. A person can be charged with the offence of money laundering only if he has been charged with committing a scheduled offence.

The penalty for committing the offence of money laundering is rigorous imprisonment for three to seven years and a fine of upto Rs 5 lakh. If a person is convicted of an offence under the Narcotics Drugs and Psychotropic Substances Act, 1985 the term of imprisonment can extend upto 10 years.

The Adjudicating Authority, appointed by the central government, shall decide whether any of the property attached or seized is involved in money laundering. An Appellate Tribunal shall hear appeals against the orders of the Adjudicating Authority and any other authority under the Act.

Every banking company, financial institution and intermediary shall maintain a record of all transactions of a specified nature and value, and verify and maintain records of all its customers, and furnish such information to the specified authorities.

***The Right to Information Act,* 2005**

The RTI Act represents one of the country's most critical achievements in the fight against corruption. Under the provisions of the Act, any citizen may request information from a "public authority" which is required to reply within 30 days.

The Act also requires every public authority to computerize its records for wide dissemination and to proactively publish certain categories of information for easy citizen access. This Act provides citizens with a mechanism to control public spending. Many anticorruption activists have been using the RTI to expose corruption.

THE CENTRAL VIGILANCE COMMISSION (CVC) ACT, 2003

The CVC was established in 1964 by an administrative order of the Government pursuant to the recommendation of the Santhanam Committee on the prevention of corruption. The CVC was established for the purpose of inquiring into and investigating offenses under the Prevention of Corruption Act, 1988 by certain categories of public servants of the Central Government, corporations established by or under any Central Act, government companies, societies and local authorities owned or controlled by the Central Government.

The CVC is comprised of a Central Vigilance Commissioner and not more than two Vigilance Commissioners. Their appointment is intended to be a political and bi-partisan. Accordingly, the Commissioners are appointed by the President of India upon the recommendation of a committee comprised of the Prime Minister, the Minister of Home Affairs and the leader of the opposition in the Lok Sabha (Lower House).

Chief Vigilance Officer

At the organizational level, the vigilance function is discharged by the Chief Vigilance

Officer ("CVO") in that organization. The primary responsibility for maintenance of ethical purity, integrity and efficiency in the organization vests, as the case may be, with the secretary of the concerned ministry, or the head of the department, or the chief executive of the public sector enterprise. Such person however is, in the discharge of vigilance functions, assisted by the Chief Vigilance Officer (CVO). The CVO acts as a special assistant or advisor to the chief executive, and reports directly to him in all matters relating to vigilance. He heads the vigilance division of the organization concerned and provides a link between his organization and the Central Vigilance Commission and the Central Bureau of Investigation.

The Chief Vigilance Officers in all government departments and organizations are appointed after prior consultation with the Central Vigilance Commission, and no person whose appointment in that capacity is objected to by the Commission may be so appointed.

The vigilance functions to be performed by the CVO are of wide sweep and include collecting intelligence about the corrupt practices committed, or likely to be committed by the employees of his organization; investigating or causing an investigation to be made into verifiable allegations reported to him; processing investigation reports for further consideration by the disciplinary authority concerned; referring vigilance related matters to the Central Vigilance

Commission for advice wherever necessary, taking steps to prevent commission of improper practices and misconduct. Thus, the CVO's functions can broadly be divided into three parts: (i) preventive vigilance; (ii) punitive vigilance; and (iii) surveillance and detection.

Functions and Powers of the Central Vigilance Commission under the Central Vigilance Commission Act, 2003

1. Exercise superintendence over the functioning of the Delhi Special Police Establishment (CBI) insofar as it relates to the investigation of offences under the Prevention of Corruption Act, 1988; or an offence under the Cr.PC for certain categories of public servants – section 8(1)(a);
2. Give directions to the DSPE in Special Police Establishment (CBI) for superintendence insofar as it relates to the investigation of offences under the Prevention of Corruption Act, 1988 – section 8(1)(b);
3. To inquire or cause an inquiry or investigation to be made on a reference by the Central Government – section 8(1)(c);
4. To inquire or cause an inquiry or investigation to be made into any complaint received against any official belonging to such category of officials specified in sub-section 2 of Section 8 of the CVC Act, 2003 – section 8(1)(d);
5. Review the progress of investigations conducted by the DSPE into offences alleged to have been committed under the Prevention of Corruption Act, 1988 or an offence under the Cr.P.C. – section 8(1)(e);
6. Review the progress of the applications pending with the competent authorities for sanction of prosecution under the Prevention of Corruption Act, 1988 – section8(1)(f);
7. Tender advice to the Central Government and its organizations on such matters as may be referred to it by them – section 8(1)(g);
8. Exercise superintendence over the vigilance administrations of the various Central Government Ministries, Departments and organizations of the Central Government – section 8(1)(h);
9. Shall have all the powers of a Civil court while conducting any inquiry – section 11;
10. Respond to Central Government on mandatory consultation with the Commission before making any rules or regulations governing the vigilance or disciplinary matters relating to the persons appointed to the public services and posts in connection with the affairs of the Union or to members of the All India Services – section 19;

11. The Central Vigilance Commissioner (CVC) is also the Chairperson of the two Committees, on whose recommendations, the Central Government appoints the Director of the Delhi Special Police Establishment and the Director of Enforcement –section 25 and section 26;
12. The Committee concerned with the appointment of the Director CBI is also empowered to recommend, after consultation with the Director (CBI), appointment of officers to the posts of the level of SP and above in DSPE –section 26;
13. The Committee concerned with the appointment of the Director of Enforcement is also empowered to recommend, after consultation with the Director of Enforcement appointment of officers to the posts of the level of Deputy Director and above in the Directorate of Enforcement – section 25.

THE LOKPAL AND LOKAYUKTAS ACT, 2013

The Lokpal and Lokayuktas Act, 2013 provide for the establishment of a body of Lokpal for the Union and Lokayukta for States to inquire into allegations of corruption against certain public functionaries and for matters connected therewith or incidental thereto.

Salient Features of the Act

(a) Establishment of the institution of Lokpal at the Centre and Lokayuktas at the level of the States, thus providing a uniform vigilance and anti-corruption road-map for the nation, both at the Centre and the States.

(b) The Lokpal to consist of a Chairperson and a maximum of eight Members, of which fifty percent shall be judicial Members. Fifty per cent of members of Lokpal shall be from amongst SC, ST, OBCs, Minorities and Women.

(c) The selection of Chairperson and Members of Lokpal shall be through a Selection Committee consisting of –

i) Prime Minister;

ii) Speaker of Lok Sabha;

iii) Leader of Opposition in the Lok Sabha;

iv) Chief Justice of India or a sitting Supreme Court Judge nominated by CJI;

v) An eminent jurist to be nominated by the President of India

(d) A Search Committee will assist the Selection Committee in the process of selection. Fifty per cent of members of the Search Committee shall also be from amongst SC, ST, OBCs, Minorities and Women.

(e) Prime Minister was brought under the purview of the Lokpal with subject matter exclusions and specific process for handling complaints against the Prime Minister. (Section 14)

(f) Lokpal's jurisdiction will cover all categories of public servants including Group 'A', 'B', 'C' & 'D' officers and employees of Government. On complaints referred to CVC by Lokpal, CVC will send its report of Preliminary enquiry in respect of Group 'A' and 'B' officers back to Lokpal for further decision. With respect to Group 'C' and 'D' employees, CVC will proceed further in exercise of its own powers under the CVC Act subject to reporting and review by Lokpal.

(g) A high powered Committee chaired by the Prime Minister will recommend selection of the Director, CBI.

(h) Attachment and confiscation of property of public servants acquired by corrupt means, even while prosecution is pending.

(i) Clear time lines for:-

i) Preliminary enquiry – three months extendable by three months.

ii) Investigation – six months which may be extended by six months at a time.

iii) Trial – one year extendable by one year and, to achieve this, special courts to be set up.

(j) Enhancement of maximum punishment under the Prevention of Corruption Act from seven years to 10 years. The minimum punishment under sections 7, 8, 9 and 12 of the Prevention of Corruption Act will now be three years and the minimum punishment under section 15 (punishment for attempt) will now be two years.

Process followed to investigate and prosecute corrupt public servants

The three main authorities involved in inquiring, investigating and prosecuting corruption cases are the Central Vigilance Commission (CVC), the Central Bureau of Investigation (CBI) and the state Anti-Corruption Bureau (ACB). Cases related to money laundering by public servants are investigated and prosecuted by the Directorate of Enforcement and the Financial Intelligence Unit, which are under the Ministry of Finance.

The CBI and state ACBs investigate cases related to corruption under the Prevention of Corruption Act, 1988 and the Indian Penal Code, 1860. The CBI's jurisdiction is the central government and Union Territories while the state ACBs investigates cases within the states. States can refer cases to the CBI.

The CVC is a statutory body that supervises corruption cases in government departments. The CBI is under its supervision. The CVC can refer cases either to the Central Vigilance Officer (CVO) in each department or to the CBI. The CVC or the CVO recommends the action to be taken against a public servant but the decision to take any disciplinary action against a civil servant rests on the department authority.

Prosecution can be initiated by an investigating agency only after it has the prior sanction of the central or state government. Government appointed prosecutors undertake the prosecution proceeding in the courts.

All cases under the Prevention of Corruption Act, 1988 are tried by Special Judges who are appointed by the central or state government.

PROCEDURE IN CRIMINAL CASES

6. PROCEDURE IN CRIMINAL CASES

6.1 ARREST, BAIL, SEARCH

Arrest

Arrest means deprivation of the personal liberty of a person by a person having legal authority to do so. S.60A of the Cr.P.C. (added by way of amendment in 2009) now provides that no arrest shall be made except in accordance with the provisions of the Code or any other law, for the time being in force that provides for arrest.

The police exercise its powers of arrest in two cases, either with the use of a warrant, or without such warrant. S.87 of the Cr.P.C. also empowers a Magistrate to issue warrants, regardless of whether the case is a summons case or a warrants case. S.204 of the Cr.P.C. provides that after taking cognizance of a warrant case, a Magistrate may issue warrants of arrest.

It is important to remember that the words 'arrest' and 'custody' are not synonymous.

(*Niranjan Singh* v. *Prabhakar Raja Ram Kharote*, (1980) 2 SCC 559) A person can be in custody not merely when the police arrests him/her, but also when the police produces him/her before a Magistrate and gets a remand to judicial or other custody.

A person can be stated to be in the custody of the Court (judicial custody) when s/he surrenders before Court and submits to its directions. Arrest is therefore a form of custody.

Illustration: A is accused of a cognizable offence and surrenders before the Court. A is now in judicial custody.

A is accused of a cognizable offence and is arrested by the police. A is now in police custody.

S.41: Power to Arrest Without a Warrant

S.41 deals with cases where the police is empowered to arrest without a warrant. The police have no powers to arrest a person without a warrant in a non-cognizable case, except in certain specified circumstances.

A person can also be arrested by a police officer under S.42 of the Cr.P.C. if she has committed a non-cognizable offence in the presence of such police officer, and has failed to give the police officer her name and residence.

S. 43 provide that in certain limited circumstances, a private person may arrest a person or cause such person to be arrested. S. 44 provides for powers of a Magistrate to effect arrest.

S.46: Arrest how made

S.46 provides that in making an arrest, a police officer must actually touch or confine the body of a person arrested, unless the person to be arrested submits to custody by words or by action.

S.46 empowers a police officer to use all means necessary to effect arrest. The Section further provides that officer is barred to cause the death of a person who is not accused of an offence punishable with death or imprisonment for life.

Bail

Once an accused is arrested, she has a right to be considered for release on bail. Bail connotes the process of procuring the release of an accused charged with certain offences by ensuring her future attendance in the court for trial, and to compel her to remain within the jurisdiction of the court.

During the course of trial, an accused has a right to be presumed to be innocent until proven guilty. Pre-trial detention is the anti- thesis to this proposition. While balancing the rights of the accused and the right of society to protect itself from crime, however, it becomes necessary at times to continue pre-trial detention of the accused person. This pre-trial detention is open to challenge by the accused, who can seek bail under various provisions of the Code. Bail seeks to restore liberty to the arrested person without compromising the objective of his arrest. Release on bail, apart from release where conditions under S.167 (2) of the Cr.P.C. are satisfied, is a matter of discretion of a court and varies in each fact situation.

Chapter XXXIII contains provisions as to bails and bail bonds. Apart from Chapter XXXIII, bail can also be granted under various provisions of the Code, including Ss.81(1), 167 (2), and 389 of the Cr.P.C.

Illustration: T is arrested on a charge of theft. On the 59th day of her custody, the police express their inability to file a charge sheet against her within 60 days. T is now entitled to be released on bail under S.167 of the Cr.P.C.

S.436 of the Cr.P.C.

Under S.436 of the Cr.P.C., when any person, other than a person accused of a non bailable offence, is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before the court and is prepared to give bail, such person shall be released on bail. It has been held in *Rasik Lal* v. *Kishore Khan Chand Wadhwani*, AIR 2009 SC 1349, that the right to claim bail under S.436 of the Cr.P.C. in a bailable offence is an absolute and indefeasible right. The Supreme Court further held that in a bailable offence, there can be no question of discretion in granting bail since the words of S.436 of the Cr.P.C. are imperative in nature.

Illustration: P is arrested for a charge under S. 471 (using as genuine a forged document) of the IPC. The offence is cognizable but bailable. P ought to be granted bail under S.436 of the Cr.P.C. at the time of her arrest, subject to P being willing to comply with the bail conditions.

S.436(A) of the Cr.P.C.: Maximum Period for which an Under-trial can be Detained

This provision was inserted by way of an amendment in 2005 (with effect from March 26, 2006). This provision provides that when a person has, during the period of investigation, inquiry, or trial of an offence under any law, undergone detention for a period extending up to one half of the maximum period of imprisonment specified for that offence under that law, she shall be released on her personal bond. This provision will not apply to cases where a person is undergoing detention for an offence for which the punishment of death has been specified as one of the punishments of that law.

Ss.437 and 439 of the Cr.P.C.: Bail in Non-Bailable Offences

S.437 of the Cr.P.C. gives a court (other than a High Court or a Court of Sessions) or a police officer the power to release the accused on bail in a non-bailable case, unless there appears reasonable grounds that the accused has been guilty of an offence punishable with death or with imprisonment for life.

S.439 of the Cr.P.C. grants special powers to the High Court or Court of Sessions to direct the release of a person on bail. The power to grant bail under S.437 of the Cr.P.C.is granted to Courts other than the High Court or the Court of Session, and the powers under S.437 of the Cr.P.C. cannot be treated at par with the powers of the Sessions Court and High Court under S.439 of the Cr.P.C.

In *State of Rajasthan* v. *Balchand*, AIR 1977 SC 2447, the Supreme Court held that the basic rule is bail not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating utter troubles in the shape of repeating offences or intimidating witnesses. Grant of bail is the rule and its refusal is the exception. (*Moti Ram* v. *State of Madhya Pradesh*, (1978) 4 SCC 47)

In *Jayendra Saraswati Swamigal* v. *State of Tamil Nadu*, AIR 2005 SC 716, the considerations, which normally the Court weighs while granting bail in non-bailable offences, were set out as the following:

i) The nature and seriousness of offence;
ii) The character of the evidence;
iii) Circumstances which are peculiar to the accused;
iv) A reasonable possibility of the presence of the accused not being secured at the trial;
v) Reasonable apprehension of witnesses being tampered with; and
vi) The larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case.

These considerations are not exhaustive, and bail ought to be considered on the basis of the facts of each case and the circumstances in which bail is being sought by the accused.

Illustration: A is arrested in a cognizable offence after having evaded summons and non-bailable warrants in the case and having absconded for many years. The fact that A had absconded will be looked into by the Court while considering A's fresh application for bail.

Decisions of the Supreme Court in relation to grant/refusal of bail include *Ram Govind Upadhyay* v. *Sudarshan Singh*, (2002) 3 SCC 598, *Puran*v. *Ram Bilas*, (2001) 6 SCC 338, *Kalyan Chandra Sarkar*v. *Rajesh Ranjan & Pappu Yadav*,(2004) 7 SCC 528.

Bail granted under S.437 of the Cr.P.C. can also be cancelled under S.437(5) of the Cr.P.C. Any Court may direct that a person granted bail under S.437(1) or (2) of the Cr.P.C. be arrested and committed to custody. Bail granted under S.439 of the Cr.P.C. can be cancelled by the Court granting bail under S. 439(2) of the Cr.P.C.

The Supreme Court has held that once bail has been granted, it can only be cancelled based on cogent and overwhelming circumstances. Proceedings for the cancellation of bail are not in the nature of an appeal from the grant of bail, and therefore, a court must look for circumstances that

warrant cancellation of bail such as interference or attempt to interfere with the due course of justice, or abuse of concession of bail granted to the accused in any manner.(*Dolat Ram* v. *State of Haryana*, (1995) 1 SCC 349).

An accused has the right to file successive bail applications; however, after the bail application has been dismissed, a secondapplication must be filed only upon a change of circumstances that warrants a fresh application. (*Kalyan Chandra Sarkar*v. *Rajesh Ranjan & Pappu Yadav*, (2005) 1SCC 801). It may be noted that efflux of time alone is not a circumstance that always warrants grant of bail.

S.438 of the Cr.P.C.: Anticipatory Bail

An order under S.438 of the Cr.P.C. comes into effect only upon the arrest of a person. Such an order is usually taken/granted where a person has reason to believe that she is about to be arrested in connection with a case. Upon consideration of such an application, a High Court or a Court of Session can direct the Investigating Authority to release the applicant on bail in the event of the applicant's arrest. It is reiterated that an order under S.438 of the Cr.P.C. takes effect only upon arrest.

The power under S.438 Cr.P.C. is extraordinary in character and is to be exercised only in exceptional cases where it appears that a person may be falsely implicated, or where there are reasonable grounds to hold that a person accused of an offence is not likely to otherwise misuse his liberty. The *sine qua non* for an application seeking relief under S.438 of the Cr.P.C.is a reason to believe that a person may be arrested on an accusation of having committed a non-bailable offence (*Gurbaksh Singh Sibia* v. *State of Punjab*, 1978 Cri.L.J. 20)

Search and Seizure (References only)

Search Procedure:

(1) Section - 47 Cr. P.C.

(2) Section - 100 Cr. P.C.

(3) Section - 165 Cr. P.C.

Search of a Person:

(1) Section - 51 Cr. P.C.

(2) Section - 52 Cr. P.C.

Power of Police to Seize without Warrant:

Section - 102 Cr. P.C.

Search Warrants (References only)

1) SECTION - 93 Cr. P.C. GENERAL SEARCH

2) SECTION - 94 Cr. P.C. STOLEN PROPERTY FORGED DOCUMENTS

3) SECTION - 95 Cr. P.C. FORFEITED PUBLICATIONS

4) WRONGFULLY CONFINED PERSONS - Section 97 Cr. P.C.

Search without Warrants (References only)

1) MAGISTRATE

- SECTION 103 Cr. P.C.

2) POLICE OFFICER

- SEC. 165 Cr. P.C.
- SEC. 166 Cr. P.C.
- SEC. 153 Cr. P.C.

6.2 GENERAL PROVISIONS OF THE CODE OF CRIMINAL PROCEDURE, 1973 (Act-II of 1974)

Introductory Concepts and Basic Principles

1. **Cr.PC - What it is ?**

   (a) It is a Central Act, which means, it is an Act passed by the Indian Parliament.

   (b) It is described as a Code.

2. **Code- its meaning**

   (a) A Code is the end product of codification

   (b) Codification is a process which consists of compilation, arrangement, systemisation and promulgation of a body of laws by an authority competent to do so.

   (c) Examples of Code - Indian Penal Code, Civil Procedure Code and Criminal Procedure Code.

   (d) Advantages of codification - simplicity, symmetry, intelligibility and certainty.

3. **Cr. P.C. - its nature**

   (a) Basically, it is a procedural or adjective law.

   (b) It consolidates and amends the law relating to Criminal Procedure.

4. **Cr.PC - its main scope**

   (a) It provides for a machinery for the prevention and punishment of offences under the Indian Penal Code and other substantive criminal law of the Land.

   (b) It lays down the procedures for investigation, inquiry and trial.

Note : Substantive Criminal Law - it is that part of the Criminal Law which creates offences and prescribes punishments for the same, such as Indian Penal Code, Dowry Prohibition Act, Arms Act, Civil Rights Protection Act. etc.

5. **Cr. P.C. - its basic objectives :**

   (a) to further the ends of Criminal Justice.

   (b) to ensure the observance of the basic principles of Natural Justice.

(c) to complement and actualise the substantive Criminal Law.

(d) to afford to the accused reasonable opportunity, fair deal and just trial.

(e) to expedite investigation, inquiry and trial.

(f) to provide for safeguard against misuse and abuse of the process of criminal law.

6. An outline of the historical background

(a) The year 1882 was crucial in the history of development of Criminal Procedure in India.

(b) Before 1882, law relating to Criminal Procedure was not uniform.

(c) The Criminal Procedure Code, 1882, was enacted to introduce for the whole of British India, as it was at that time, a uniform criminal procedure.

(d) The Cr.PC of 1882 was replaced by a new Code of Criminal Procedure in the year 1898.

(e) The Cr.PC of 1898 was amended from time to time. It was subjected to drastic changes in 1923 and again in 1955.

(f) The Cr.PC of 1898 was repealed by the existing Code of Criminal Procedure, 1973(Act II of 1974).

(g) The new Cr.PC, 1973 was substantially founded upon the recommendations of the Law Commission of India, as embodied in its 14th and 48 reports.

(h) The Cr.PC 1973 itself has suffered amendments several times. Mention may be made of the following Amending Acts:-

i) Act 45 of 1978
ii) Act 63 of 1980
iii) Act 43 of 1983
iv) Act 46 of 1984
v) Act 43 of 1986
vi) Act 32 of 1988
vii) Act 10 of 1990
viii) Act 43 of 1991
ix) Act 41 of 2010
x) Act 13 of 2013

7. **Commencement:**

It came into force on the 1st April, 1974.

8. **Extent of its operation:**

(a) It extends to the whole of India except the State of Jammu and Kashmir

(b) Exceptions have also been made in favour of the State of Nagaland and Tribal areas of Assam. The whole of Cr.PC does not apply there. Only certain chapters, Chapters VIII, X and XI are applicable. The concerned State Government may, however, make applicable the other provisions of the Cr.PC.

(c) The State of Jammu and Kashmir is governed by a different, though substantially identical, code of Criminal Procedure.

9. **Offence - how defined**

(a) Cr.PC being the procedural part of the Criminal Law, it touches the people at many points. The Criminal law centers round the concept of crime. The term "crime" has not been defined in any Act but a definition of the expression "offence" has been given in Sec. 2(n) Cr.PC.

(b) It may be noted that "offence" is the genus of which crime is a species. In other words, all crimes are offences but all offences are not crimes.

(c) Simply speaking, offence means any act or omission made punishable by any law for the time being in force. It may be resolved into components as detailed below:-

(i) An act is a deed, that is, doing of something positive such as assaulting, killing, stealing. It should be something prohibited under the law.

(ii) Omission means a negative act, non-doing of something which the Law commands the person to do. When a Jailor omits to give food to the prisoner under his charge, he commits an illegal omission. If the officer-in-charge of a police station stands by and looks on when an accused is beaten up by a Head Constable in the thana Lock-up, he indulges in illegal omission, because he has a legal duty to prevent such a happening.

(iii) The act or omission must be something punishable under the Law. Punishment contemplated in one that should be inflicted by a competent Court of Law and it should be something authorised by the Law.

(iv) That law must have been in force when the alleged offence was committed. It should have been validly made by a competent Legislature.

(v) Law generally does not punish an act or omission unless it is accompanied by a guilty mind. There are, however, exceptions to this rule. Offences where guilty mind or *mens rea* is not an essential ingredient are known as strict liability offences. Illustrative case: *Cundy* v. *Le Coq.*

The accused had a licence, for sale of liquor in his premises. He sold liquor to a drunken person, which was against the Licensing Act, 1872. His defence was that he did not know that the customer was drunk. The Court accepted that fact but held that absence of his knowledge was immaterial. The offence was decided to be one of strict liability. The accused was found guilty.

By way of illustration, it may be cited that in India, kidnapping from lawful guardianship, an offence u/s 363 IPC and sale of an adulterated article of food, an offence under the Prevention of Food Adulteration Act, do not require any mens rea (an evil intention or a knowledge of the wrongfulness of the act.).

10. Classification of offences

Under the Cr.PC, offences have been classified on the basis of four different criteria. They are :-

(i) Cognizable and Non-cognizable.

(ii) Bailable and non-bailable.

(iii) Offence triable as summons case and offence triable as warrant case.

(iii) Offence exclusively triable by a Court of Sessions and offence not exclusively triable by a Court of Sessions, that ordinarily means an offence which may be tried by a Judicial Magistrate of competent jurisdiction.

11. Cognizable and Non-cognizable offences

(a) This division has been made with reference to police power.

(b) Cognizable offence means an offence for which a Police Officer may arrest without any warrant vide Sec. 2(c)

(c) Non-cognizable offence means an offence for which a police officer has not authority to arrest without warrant vide Sec. 2(e).

(d) Another formulation that flows out of Sessions 155 and 156 Cr.PC is that cognizable offence is where the police may investigate on their own without any order of any judicial authority but they can not do so when the offence is non-cognizable. In such a case, order of the competent Magistrate is necessary in order to enable the police to investigate.

(e) Examples - Murder, Kidnapping, Dacoity, etc. are cognizable offences while simple hurt, defamation, bigamy, etc. are non-cognizable offences.

(f) Column No. 4 of the First Schedule to the Cr.PC will show whether a particular offence is cognizable or non-cognizable.

(g) The first schedule has two parts, namely (I) relating to the IPC and (II) concerning non-IPC offences

Note : IPC stands for Indian Penal Code, which contains the general law of crimes, so far as India is concerned.

12. Bailable and Non-bailable offence

(a) Bailable offence is an offence where the accused, after arrest, is entitled to be released on bail as a matter or right.

(b) In non-bailable offence, bail is not a matter of right for the accused but it is a matter of discretion for the authority competent to grant bail, that is, the Court of the Police Officer.

(c) It should not be supposed that bail can not be granted in a non-bailable offence.

(d) Each application for bail made by an accused in a non-bailable offence has to be decided by the competent Court or the Police Authority, on its own merits, due

regards being had to the relevant facts and circumstances of the case and bearing in mind the limitation imposed by law, if any, upon their powers.

(e) When an accused is granted bail, he is released from legal custody, upon his furnishing a bond, with or without surety, for his/her attendance at the time and place mentioned therein. The place is generally a specified Court.

(f) Ordinarily, the question of bail arises when a person has been arrested or detained or some kind of restraint has been imposed upon him.

(g) To find out, whether a particular IPC offence is bailable or non-bailable, you should refer to Part-I of the 1st Schedule to the Cr.PC and check up the entry under the column No. 5. As for example, rioting, an offence punishable u/s 147 IPC is bailable, whereas theft, an offence punishable u/s 379 IPC is non-bailable.

(h) For any non-IPC offence, examine that particular Act which has created the offence. If that Act declares the offence to be bailable or non-bailable, then accept that position. If that Act is silent on that point, then decide the matter in terms of punishment prescribed for that offence and in the light of the principle enunciated in Part-II of the 1st schedule. If the offence is punishable with imprisonment for three years or more, it is non-bailable. Where the punishment is less than three years or with fine only, it is bailable.

13. Investigation

(a) This term has been defined in Sec. 2(h) of the Cr.PC. The definition is, however, not exhaustive.

(b) Literally investigation means, following up step by step by observation, examination and inquisition.

(c) Investigation implies ascertainment of facts, shifting of materials and search for relevant data.

Reference : AIR 1968 Orissa 20.

(d) Under the Cr.PC, Investigation may be conducted either by a Police Officer or by any person, other than a Magistrate.

(e) The object of investigation is collection of evidence.

(f) Police Investigation generally consists of the following steps :

(i) Proceeding to the spot.

(ii) Ascertainment of the facts and circumstance of the case.

(iii) Discovery and arrest of the suspected offender.

(iv) Collection of evidence by the processes indicated below or any other lawful means :-

- Examination of various persons including the accused.
- Reduction of the statements of such persons to writing (discretionary and optional).
- Seizure of things considered necessary.
- Search of places

(v) Formation of opinion as to whether on the material collected, there is a case to place the accused for trial and if so, taking necessary steps for the same by filling of a charge-sheet u/s 173(2) Cr.PC.

Reference: (i) AIR 1955 SC 196

(ii) AIR 1959 SC 707

(g) Police investigation commence when a Police Officer takes steps for the same after having come to know of the commission of a cognizable offence.

Reference : (1972) 74 Punjab LR(D) 228

14. Inquiry

(a) Inquiry, according to Sec. 2(g) Cr.PC, means every inquiry, other than a trial, conducted under the Code, by a Magistrate or a Court.

(b) It follows that Inquiry, as contemplated in the Cr.PC can be held either by a Magistrate or by a Court.

(c) What is done by a Police Officer under the Cr.PC can never be described as Inquiry.

(d) Inquiry is distinct and different from trial. In practice, trial begins when the Inquiry ends.

(e) The object of inquiry is determination of truth or falsehood of certain allegations with a view of taking further action according to law.

Reference : (i) AIR 1920 Patna 563

(ii) AIR 1940 Calcutta 97

(f) Inquiry may be of different kinds, such as:-

(i) Judicial Inquiry

(ii) Non-Judicial/Administrative Inquiry

(iii) Preliminary Inquiry

(iv) Local Inquiry

(v) Inquiry into an offence

(vi) Inquiry relating to a matter other than an offence.

(g) Inquiry may involve examination of witnesses and inspection of the locale.

15. Investigation and Inquiry - differences

The points of difference between them are:-

16. Trial

(a) Cr.PC has not defined "trial".

(b) Judiciary, through its process of interpretation, has endeavoured to supply that omission. It is :-

" A trial is a judicial proceeding which ends in conviction or acquittal" vide AIR 1940 Calcutta 97, AIR 1929 Patna 644.

(c) A trial is a proceeding different from inquiry vide 1987 Cr.LJ 55.

(d) When inquiry stops, trial may begin vide 1957 Cr.LJ 937.

(e) Trial means whole of the proceedings including sentence vide 24 Cr.LJ 886.

(f) The right to reasonably speedy trial is a fundamental right conferred by Article 21 of the Constitution of India vide AIR 1979 SC 1177.

(g) The Cr.PC in Sections 167, 209 and 309 has emphasised the importance of expeditious disposal of cases including investigations and trials vide AIR 1979 SC 1518.

17. **Court - What it is?**

(a) It has not been defined in the Cr.PC, although the classes of Criminal Courts have been enumerated in Sec. 6 Cr.PC.

(b) In order to constitute a court in the strict sense of the term, an essential condition is that the Court should have, apart from having some of the trappings of a judicial tribunal, power to give a decision or a definitive judgement which has finality and authoritativeness which are the essential tests of a judicial pronouncement.

Reference : 1955(2) S.C.R.955.

(c) For the sake of brevity, the Criminal Procedure Code uses "Court" and "Magistrate" generally, it not always, as convertible terms.

Reference : AIR 1953 Madras 953.

(d) A Magistrate is not a court unless he is acting in a judicial capacity vide ILR 36 Calcutta 433.

18. **Meaning of Judicial**

The work "Judicial" has two meanings.

It may refer to the discharge of duties exercised by a Judge or by Justices in Court or to administrative duties which need to be performed in Court but in respect of which it is necessary to bear a Judicial mind - that is a mind to determine what is fair and just in respect of matters under consideration.

(1892) 1 QB 431

Quoted in AIR 1980 Kerala 18 Full Bench

POLICE ACT AND PRISONS ACT

The Police Act and Police Reforms in India

The Police Act 1861 governs the Indian police. Most state governments have a police law that adopts or reflects the basic ideas of the Police Act 1861. However, major developments in the last decade have led to drafting of a new Model Police Act by the Soli Sorabjee Committee in 2006, and many states are now modifying their police laws accordingly.

The events leading to the new Police Act, were that many commissions and committees had recommended reforms in policing since the 1970s. The major among these being National Police Commission (1977-81) which produced eight reports, including a Model Police Act, between 1979 and 1981.

In 1996 former senior police officer Prakash Singh and others, filed a Public Interest Litigation (PIL) in the Supreme Court, asking for the Court to direct governments to implement the recommendations of the National Police Commission. The Supreme Court directed the government to set up a committee to review the Commission's recommendations, and thus the Ribeiro Committee was formed. The Committee, under the leadership of J. F. Ribeiro, a former chief of police worked in 1998 -1999, and produced two reports.

In 2000, the government set up a third committee on police reform, this time under the stewardship of a former union Home Secretary, K. Padmanabhaiah. This Committee released its report in the same year.

The Supreme Court studied various reports on police reforms. On 22 September 2006, the Supreme Court of India delivered a historic judgment in *Prakash Singh vs. Union of India*, instructing central and state governments to comply with a set of seven directives that laid down practical mechanisms to kick-start police reform. The Court's directives sought to achieve functional autonomy for the police (through security of tenure, streamlined appointment and transfer processes, and the creation of a "buffer body" between the police and the government) and enhanced police accountability (both for organisational performance and individual misconduct.)

Several measures were identified as necessary to professionalise the police in India:

i) A mid or high ranking police officer must not be transferred more frequently than every two years.

ii) The state government cannot ask the police force to hire someone, nor can they choose the Chief Commissioner.

iii) There must be separate departments and staff for investigation and patrolling.

Three new authorities will be created in each state, to prevent political interference in the police and also to make the police accountable for their heavy-handedness, which will include the creation of:

i) A *State Security Commission*, for policies and direction

ii) A *Police Establishment Board*, which will decide the selection, promotions and transfers of police officers and other staff

A *Police Complaints Authority*, to inquire into allegations of police misconduct.

Meanwhile in 2005, the government had set up a committee under Dr. Soli Sorabjee to draft a Model Police Act. The committee submitted a Model Police Act to the union government in late 2006.

Thus the central legislation on police is in transition between the old Police Act of 1861 and the new Model Police Act. Therefore the provisions of both the old and the new Police Acts are discussed below.

THE POLICE ACT, 1861

The Police Act was enacted for the regulation of police in 1861.

The purpose was to reorganize the police and to make it a more efficient instrument for the prevention and detection of crime.

Certain definitions given therein include the following:

"Magistrate of the district" shall mean the chief officer charged with the executive administration of a district and exercising the powers of a Magistrate, by whatever designation the chief officer charged with such executive administration is styled:

The word "Magistrate" shall include all persons within the general police-district, exercising all or any of the powers of a Magistrate.

The word "police" shall include all persons who shall be enrolled under this Act : the words "general police-district" shall embrace any 1* presidency, State, or place, or any part of any presidency, State or place, in which this Act shall be ordered to take effect.

The words "District Superintendent" and "District Superintendent of Police" shall include any Assistant District Superintendent, or other person appointed by general or special order of the State Government to perform all or any of the duties of a District Superintendent of Police under this Act in any district.

The Provisions of the Act cover a wide area and only selected few are mentioned here.

Constitution of the Force

The entire police- establishment under a State Government shall; for the purposes of this Act, be deemed to be one police force, and shall be formally enrolled and shall consist of such number of officers and men, and shall be constituted in such manner, as shall from time to time be ordered by the State Government. Subject to the provisions of this Act the pay and all other conditions of service of members of the subordinate ranks of any police force shall be such as may be determined by the State Government.

Superintendence and Administration

The superintendence of the police throughout a general police-district shall vest in and shall be exercised by the State Government to which such district is subordinate; and except as authorized under the provisions of this Act, no person, officer, or Court shall be empowered by the State Government to supersede, or control any police functionary.

The administration of the police throughout a general police district shall be vested in an officer to be styled the Inspector-General of Police, and in such Deputy Inspectors-General and Assistant Inspectors-General as to the State Government shall seem fit.

The administration of the police throughout the local jurisdiction of the Magistrate of the district shall, under the general control and direction of such Magistrate, be vested in a District Superintendent and such Assistant District Superintendents as the State Government shall consider necessary.

The Inspector-General, Deputy Inspectors-General, Assistant Inspector-General and District Superintendents of Police may at any time dismiss, suspend or reduce any police-officer of the subordinate ranks whom they shall think remiss or negligent in the discharge of his duty,

or unfit for the same; or may award punishments to any police-officer of the subordinate ranks who shall discharge his duty in a careless or negligent manner, or who by any act of his own shall render himself unfit for the discharge thereof. The other conditions of service for the Police Force are also laid down in the Act.

The Police Act 1861 also provides for quartering of additional police in disturbed or dangerous districts. It shall be lawful for the State Government, by proclamation to be notified in the Official Gazette, and in such other manner as the State Government shall direct, to declare that any area subject to its authority has been found to be in a disturbed or dangerous state, or that, from the conduct of the inhabitants of such area or of any class or section of them, it is expedient to increase the number of police. It shall thereupon be lawful for the Inspector-General of Police, or other officer authorized by the State Government in this behalf, with the sanction of the State Government, to employ any police-force in addition to the ordinary fixed complement to be quartered in the area specified in such proclamation as aforesaid. The cost of such additional police-force shall be borne by the inhabitants of such area described in the proclamation.

The Magistrate of the district, after such enquiry as he may deem necessary, shall apportion such cost among the inhabitants who are, as aforesaid, liable to bear the same and who shall not have been exempted by the State Governments under the provisions of this Act.

Section 15A of the Act makes provisions for awarding compensation to sufferers from misconduct of inhabitants or persons interested in land, if any such disturbed or dangerous so notified, death or grievous hurt or loss of, or damage to, property has been caused by or has ensued from the misconduct of the inhabitants of such area. It shall be lawful for any person, being an inhabitant of such area, who claims to have suffered injury from such misconduct to make, within one month from the date of the injury or such shorter period as may be prescribed, an application for compensation to the Magistrate of the district or of the sub-division of a district within which such area is situated. It shall thereupon be lawful for the Magistrate of the district, with the sanction of the State Government after such enquiry as he may deem necessary, and whether any additional police force has or has not been quartered in such area under the last preceding section, to- (a) declare the persons to whom injury has been caused by or has ensued from such misconduct; (b) fix the amount of compensation to be paid to such persons and the manner in which it is to be distributed among them; and (c) access the proportion in which the same shall be paid by the inhabitants of such area other than the applicant who shall not have

been exempted from liability to pay under the next succeeding sub-section: Provided that the Magistrate shall not make any declaration or assessment under this sub-section, unless he is of opinion that such injury as aforesaid has arisen from a riot or unlawful assembly within such area, and that the person who suffered the injury was himself free from blame in respect of the occurrences which led to such injury.

It shall be lawful for the State Government, by order, to exempt any persons or class or section of such inhabitants from liability to pay any portion of such compensation. Every declaration or assessment made or order passed by the Magistrate of the district shall be subject to revision by the Commissioner of the Division of the State Government, but save as aforesaid shall be final. No civil suit shall be maintainable in respect of any injury for which compensation has been awarded under this section.

Special Police-Officers

When it shall appear that any unlawful assembly, or riot or disturbance of the peace has taken place, or may be reasonably apprehended, and that the police-force ordinarily employed for preserving the peace is not sufficient for its preservation and for the protection of the inhabitants and the security of property in the place where such unlawful assembly or riot or disturbance of the peace has occurred, or is apprehended, it shall be lawful for any police-officer not below the rank of Inspector to apply to the nearest Magistrate to appoint so many of the residents of the neighbourhood as such police-officers may require to act as special police-officers for such time and within such limits as he shall deem necessary; and the Magistrate to whom such application is made shall, unless he see cause to the contrary, comply with the application.

Police- officers enrolled under this Act shall not exercise any authority, except the authority provided for a police-officer under this Act and any Act which shall hereafter be passed for regulating criminal procedure.

Duties of Police Officers

Police-officers always on duty and may be employed in any part of district. Every police-officer shall, for all purposes in this Act contained, be considered to be always on duty, and may at any time be employed as a police-officer in any part of the general police-district.

It shall be the duty of every police-officer promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority; to collect and communicate

intelligence affecting the public peace; to prevent the commission of offences and public nuisances; to detect and bring offenders to justice and to apprehend all persons whom he is legally authorized to apprehend, and for whose apprehension sufficient ground exists; and it shall be lawful for every police-officer, for any of the purposes mentioned in this section, without a warrant, to enter and inspect any drinking-shop, gaming-house or other place of resort of loose and disorderly characters.

It shall be lawful for any police-officer to lay any information before a Magistrate, and to apply for a summons, warrant, search warrant or such other legal process as may by law issue against any person committing an offence.

Police-officer to take charge of unclaimed property, and subject it to Magistrate's orders as to disposal. After taking charge of all unclaimed property, the police officer has to furnish an inventory thereof to the Magistrate of the district.

Regulation of public assemblies and processions and licensing of the same is provided for by Section 30 of the Police Act. The District Superintendent or Assistant District Superintendent of Police may, as occasion requires, direct the conduct of all assemblies and processions on the public roads, or in the public streets or thoroughfares, and prescribe the routes by which, and the times at which, such processions may pass. He may also, on being satisfied that it is intended by any persons or class of person to convene or collect an assembly in any such road, street or thoroughfare, or to form a procession which would, in the judgment of the Magistrate of the district, or of the sub-division of a district, if uncontrolled, be likely to cause a breach of the peace, require by general or special notice that the persons convening or collecting such assembly or directing or promoting such procession shall apply for a licence.

Section 31 requires police to keep order in public roads. It shall be the duty of the police to keep order on the public roads, and in the public streets, thoroughfares, ghats and landing-places, and at all other places of public resort, and to prevent obstructions on the occasions of assemblies and processions on the public roads and in the public streets, or in the neighbourhood of places of worship, during the time of public worship, and in any case when any road, street, thoroughfare, ghat or landing-place may be thronged or may be liable to be obstructed.

Penalty for disobeying such orders for related to assemblies, processions and keeping order on roads is provided under Section 32. A fine not exceeding two hundred rupees could be imposed.

Section 34 provides for punishment for certain offences on roads. Any person who, commits any of the following offences on road, to the obstructions inconvenience, annoyance, risk, danger or damage of the residents or passengers shall, on conviction before a Magistrate, be liable to fine not exceeding fifty rupees, or to imprisonment with or without hard labour not exceeding eight days; and it shall be lawful for any police-officer to take into custody, without a warrant, any person who within his view commits any of such offences, namely.

1. Slaughtering cattle, furious riding, etc.
2. Cruelty to animals.
3. Obstructing passengers.
4. Exposing goods for sale.
5. Throwing dirt into street.
6. Being found drunk or riotous.
7. Indecent exposure of person.
8. Neglect to protect dangerous places.

Limitation of Actions

All actions and prosecutions against any person, which may be lawfully brought for anything done or intended to be done under the provisions of this Act, or under the general police-powers hereby given shall be commenced within three months after the act complained of shall have been committed, and not otherwise; and notice in writing of such action and of the cause thereof shall be given to the defendant, or to the District Superintendent or an Assistant District Superintendent of the District in which the act was committed, one month at least before the commencement of the action.

Records and Returns

It shall be the duty of every officer in charge of a police-station to keep a general diary in such form shall, from time to time, be prescribed by the State Government and to record therein all complaints and charges preferred, the names of all persons arrested, the names of the complainants, the offences charged against them, the weapons or property that shall have been taken from their possession or otherwise, and the names of the witnesses who shall have been examined. The Magistrate of the district shall be at liberty to call for and inspect such diary.

State Government may prescribe form of returns. The State Government may direct the submission of such returns by the Inspector- General and other police-officers as to such State Government shall seem proper, and may prescribe the form in which such returns shall made.

The Police Acts of 1888 and 1949

The Police Act 1888 was enacted to relax provisions of Acts for regulation of Police which restricted employment of Police officers to the Presidency, State of Police of the Police Establishment. It extended to the whole of India. It also provided for constitution of Police Forces for Special Purposes.

Notwithstanding anything in the Madras District Police Act, 1859 (Act XXIV of 1859), the Indian Police Act 1861 (5 of 1861), the Bombay District Police Act, 1890 (Bom. Act 4 of 1890) or any Act relating to the Police in any presidency town, the Central Government may, by notification in the official Gazette, create a special police district embracing parts of two or more States, and extend to every part of the said district the powers and jurisdiction of members of a police force belonging to a State specified in the notification.

It also extended employment of police-officers beyond the State to which they belong by Central Government with consent of State.

After independence of India in 1949 another Act Central Act the Police Act 1949 was enacted for creation of a general police district embracing two or more Union Territories for establishment of Police Force therein.

The Police Act 1949 extends to all the Union Territories.

It provides for constitution of police force in Union Territories and for the superintendence and administration of Police in Union Territories.

The Police Act 1949 extended the application of the Police Act 1861 to the Police Force in the Union Territories. Though for Delhi the applicable Act is the Special Police Establishment Act 1946.

New Police Act

The Ministry of Home Affairs, Government of India set up a Committee of Experts, under the Chairmanship of Dr. Soli J. Sorabjee, in September 2005 to draft a new Police Act that could meet, the growing challenges to policing and fulfill the democratic aspirations of the people. The Committee comprised of six non-official Members and four ex-officio Members, besides a full-time Secretary.

The Committee went through the reports of the past Commissions/Committees and also surveyed the legislations on policing abroad. It looked at comparative experience of policing in both developed and developing countries. The committee also sought suggestions / inputs from public and put the draft chapters on web for transparency.

The proposed Act has 16 chapters, consisting, in all, 221 sections. The Committee was guided by the need to have a professional police 'service' in a democratic society, which is efficient, effective, responsive to the needs of the people and accountable to the Rule of Law.

The Act provides for social responsibilities of the police and emphasizes that the police will be governed by the principles of impartiality and human rights norms, with special attention to protection of weaker sections including minorities. It also contains a provision that the composition of the police will reflect social diversity.

The other ***Salient Features of the Model Act*** includes:

Functional Autonomy

While recognising that the police is an agency of the State and therefore accountable to the elected political executive, the Committee has specifically outlined the role of Superintendence of the State Government over the police. The Model Police Act creates the following mechanisms and processes which will help the police perform its functions more efficiently as also enhance its credibility in the eyes of the public:

(i) Creation of a State Police Board under the Chairmanship of State Home Minister, the Chief Secretary.

(ii) Merit-based selection and appointment of the Director General of Police.

(iii) Security of tenure by mandating a minimum tenure of two years for the Director General of Police and other key functionaries such as the District Superintendent of Police and the Station House Officer.

(iv)Establishment Committee would be a departmental body comprising the Head of the Police and other senior officers, being created at the state as well as district levels, to consider transfers and postings of police officers at different levels.

Encouraging Professionalism

To ensure an efficient, responsive and professional police service, the Model Act introduces the concept of preparing plans that lay down the policing objectives to be achieved in a given period, and provides mechanisms to streamline criminal investigation and the training processes for police officers. For encouraging professionalism following measures were suggested:

(i) Earmarking dedicated staff for crime investigation: To streamline criminal investigations, the Act mandates earmarking of staff in each police station specifically for investigating heinous and other specified offences, who shall be trained in scientific and other methods of investigation.

(ii) Civil Police Officer: Keeping in view the fact that the civil police- as against the armed wing of the police- needs better-educated personnel to exercise discretionary powers in dealing with people and investigating cases, the Act stipulates that the rank of constabulary be done away within the Civil Police.

Accountability of Police

Realizing that what matters most to the people is accountability of the police, the Act prioritises police accountability, both for their performance and their conduct by following means:

(i) Performance evaluation: The Act provides detailed mechanism comprising the State Police Board, assisted by an Inspectorate of Performance Evaluation, to evaluate the police service at the state, district and police station levels. The police shall be evaluated against identified performance indicators (including operational efficiency, public and victim satisfaction, accountability, optimum utilisation of resources, and observance of human rights standards), the targets let out in the Annual Plan, and the resources available with the police.

(ii) Accountability Commission and District Authorities: The Act creates independent civilian oversight agencies chaired by retired judges at the state and district level to inquire into public complaints against the police for serious misconduct and to generally monitor internal departmental inquiries in other cases of misconduct.

(iii)Offences by the police: The Act introduces criminal penalties for the common defaults committed by the police including non-registration of FIRs, unlawful arrest, detention, search, or seizure to bring into sharp focus for the police personnel that some of their practices are not only illegal, but also criminal offences under the law of the land.

Improved Service Conditions

The Act also aims to provide better service conditions to the police personnel including rationalising their working hours, one day off in each week, or compensatory benefits in lieu. It creates a Police Welfare Bureau to take care, inter alia, of health care, housing, and legal facilities for police personnel as well as financial security for the next of kin of those dying in service. It further mandates the government to provide insurance cover to all officers, and special allowances to officers posted in special wings commensurate with the risk involved.

Role in Protecting Internal Security in light of New Threats

As per the terms of reference of the Committee, the Act also deals with police preparedness to manage threats to internal security from activities of terrorists, militants, insurgents and organised crime groups. The police are not granted any special powers in the Act to deal with these threats; rather the Act provides for systematic preparation and meticulous compliance of Internal Security and Standard Operation Procedures Schemes to handle the threats as well as creation of Special Security Zones with in a State and where need arises, in contiguous areas of neighbouring states, that facilitate different police structure and command, control and response system, and cooperation between different agencies of the state(s).

Some other Salient features of the new Police Act includes:-

(i) Defines Organised crime, Insurgency, Terrorist activity, Internal Security & militant activities, thus taking note of these threats.

(ii) Differentiates between core functions & non core functions of the police. Core functions mean duties related to sovereign functions of the State including arrests, search, seizure, crime investigation, crowd control and allied functions that can only be performed by the police as the agency of the State.

(iii)The Act elaborates functions of Director General of Police, mode of selection and security of tenure.

(iv)It also provides for Legal Advisor and a Financial Advisor to aid and advise the Director General of Police on legal and financial matters respectively and suggests in every District Police Unit and City Police Commissionerate one or more Legal Advisors to advise the police on legal issues and matters including the adequacy or otherwise of the available evidence as deemed necessary in various cases investigated by them.

(v) Separate system of policing for Administration of Police in Metropolitan Areas, Major Urban Areas and other Notified Areas. The administration of police in metropolitan areas, other major urban areas with a population of 10 lakhs or more, and in such other areas as may be notified for the purpose by the State Government, from time to time, shall be in accordance with the provisions of Chapter VIII of the Act.

(vi)Police station to have certain facilities: The State Government shall ensure availability of adequate strength of staff at each police station, duly based on the population, incidence of crime, law and order-related workload, and the geographical area.

The State Governments shall provide, as early as possible, each Police Station with all essential amenities including a reception-cum-visitors' room, separate toilets for men and women and separate lock-ups for men and women.

Each Police Station shall have a Women and Child Protection Desk, staffed, as far as possible, by women police personnel, to record complaints of crimes against women and children and to deal with the tasks relating to administration of special legislations relating to women and children.

Each Police Station shall prominently display all the relevant information required to be made public, including the Supreme Court guidelines and directions, as also departmental orders on arrests, and the details regarding the persons arrested and held in lock-ups

(vii) General Offences, Penalties, and Responsibilities are listed in Chapter XV of the Act.

As regards order in streets and public places it provides for regulation of public assemblies and processions. Assemblies and processions violating prescribed conditions can be stopped and order to be dispersed as it is deemed to an unlawful assembly. The District Superintendent or any officer not below the rank of Assistant/ Deputy Superintendent of Police may regulate the time and the volume at which music and other sound systems are used in

connection with any performances and other activities in or near streets or any public place that cause annoyance to the residents of the neighbourhood. The Police officers can give directions to keep order on public roads.

Penalty for disobeying such orders or directions regarding orders in streets and public places is that person may be arrested and on conviction by a court of law, shall be liable to a fine. The Act empowers police to reserve public places & erect barriers.

(viii) Certain offences against Police are listed as follows:

(a) Obstruction in police work.

(b) Unauthorised use of police uniform.

(c) Refusal to deliver up certificate etc. on ceasing to be police officers.

(d) False or misleading statement made to the police.

(ix)The draft Act also lists offences by the public as: Any person who commits any of the following offences on any road, or street or thoroughfare, or any open place, within the limits of any area specially notified by the State Government or a Local Government for the purpose of this Section, to the inconvenience, annoyance or danger of the residents or passers-by shall, on conviction by a court, be liable to a fine:

(a) Allowing any cattle to stray, or keeping any cattle or conveyance of any kind standing longer than is required for loading or unloading or for taking up or setting down passengers, or leaving any conveyance in such a manner as to cause inconvenience or danger to the public;

(b) Being found intoxicated and riotous;

(c) Neglecting to fence in or duly protect any well, tank, hole or other dangerous place or structure under his charge or possession; or otherwise creating a hazardous situation in a public place;

(d) Defacing, or affixing notices, or writing graffiti on walls, buildings or other structures without the prior permission of the custodian of the property;

(e) Wilfully entering or remaining without sufficient cause in or upon any building belonging to the Government or land or ground attached thereto, or on any vehicle belonging to Government;

(f) Knowingly spreading rumours or causing a false alarm to mislead the police, fire brigade or any other essential service or;

(g) Wilfully damaging or sabotaging any public alarm system;

(h) Knowingly and wilfully causing damage to an essential service, in order to cause general panic among the public;

(i) Acting in contravention of a notice publicly displayed by the competent authority in any government building: Provided that the police shall take cognizance of this offence only upon a complaint made by an authorised functionary of the concerned office.

(j) Causing annoyance to a woman by making indecent overtures or calls or by stalking: Provided that the police shall take cognizance of this offence only upon a complaint made by the victim.

(x) Police Accountability is covered under a separate chapter. For Accountability for conduct of Police there would be a Police Accountability Commission at State level consisting of a Chairperson, Members and such other staff as may be necessary, to inquire into public complaints supported by sworn statement against the police personnel for serious misconduct and perform such other functions laid down.

The Commission shall have five members with a credible record of integrity and commitment to human rights and shall consist of:

(a) A retired High Court Judge, who shall be the Chairperson of the Commission;

(b) A retired police officer from another state cadre, superannuated in the rank of Director General of Police;

(c) A person with a minimum of 10 years of experience either as a judicial officer, public prosecutor, practicing advocate, or a professor of law;

(d) A person of repute and standing from the civil society; and

(e) A retired officer with experience in public administration from another state: Provided that at least one member of the Commission shall be a woman and not more than one member shall be a retired police officer.

The Functions of the Commission

(1) The Commission shall inquire into allegations of "serious misconduct" against police personnel, as detailed below, either *suo moto* or on a complaint received from any of the following:

(a) A victim or any person on his behalf;

(b) The National or the State Human Rights Commission;

(c) The police; or

(d) Any other source.

Explanation: "Serious misconduct" for the purpose of this chapter shall mean any act or omission of a police officer that leads to or amounts to:

(a) Death in police custody;

(b) Grievous hurt, as defined in Section 320 of the Indian Penal Code, 1860;

(c) Rape or attempt to commit rape; or

(d) Arrest or detention without due process of law

At district level there would be a **District Accountability Authority**

(1) The State Government shall establish in each police district or a group of districts in a police range, a District Accountability Authority to monitor departmental inquiries into cases of complaints of misconduct against police personnel.

(2) The District Accountability Authority shall have three members with a credible record of integrity and commitment to human rights and shall consist of a retired District and Sessions Judge, who shall be the Chairperson of the Authority; a retired senior police officer, and a person with a minimum of 10 years total experience as a judicial officer, public prosecutor, practicing advocate, professor of law, or a person with experience in public administration, as Members.

Functions of District Accountability Authority would be to:

(a) Forward the complaints of "serious misconduct", received directly by it, to the Commission for further action;

(b) Forward for further action, the complaints of "misconduct" received directly by it, to the District Superintendent of Police or DGP.

(c) Monitor the status of departmental inquiries or action on the complaints of "misconduct" against officers below the rank of Assistant/ Deputy Superintendent of Police, through a quarterly report obtained periodically from the District Superintendent of Police;

(d) Issue appropriate advice to the District Superintendent of Police for expeditious completion of inquiry, if, the inquiry is getting unduly delayed in any such case;

(e) Report cases to the Commission where departmental enquiry into "misconduct" is not concluded in time by the police department.

(xi)The draft Act also lists certain Rights of the complainant as follows:

(1) The complainant may lodge his complaint relating to any "misconduct" or "serious misconduct" on the part of police personnel with either the departmental police authorities or with the Commission or the District Accountability Authority.

(2) In cases where a complainant has lodged a complaint with the police authorities, he may inform the Commission or the District Accountability Authority at any stage of the departmental inquiry about any undue delay in the processing of the inquiry.

(3) The complainant shall have a right to be informed of the progress of the inquiry from time to time by the inquiring authority (the concerned police authority Commission or the District Accountability Authority). Upon completion of inquiry or departmental proceedings, the complainant shall be informed of the conclusions of the same as well as the final action in the case at the earliest.

(4) The complainant may attend all hearings in an inquiry concerning his case. The complainant shall be informed of the date and place of each hearing.

(5) All hearings shall be conducted in a language intelligible to the complainant. In a case where hearings cannot be conducted in such a language, the services of an interpreter shall be requisitioned if the complainant so desires.

(6) Where upon the completion of the departmental inquiry, the complainant is dissatisfied with the outcome of the inquiry on the grounds that the said inquiry violated the principles of natural justice, he may approach the Commission or the Authority for appropriate directions.

THE PRISON ACT, 1894

The Prisons Act (hereinafter called the Act) contains the law relating to prisons. Certain important provisions of that Act are given below:

Under Section 3 of the Act certain important definitions are given

Under the Act, "prison" means any jail or place used permanently or temporarily under the general or special orders of a State Government for the detention of prisoners, and includes all lands and buildings appurtenant thereto, but does not include:

(a) Any place for the confinement of prisoners who are exclusively in the custody of the police;

(b) Any place specially appointed by the State Government under its powers to appoint place of imprisonment under Code of Criminal Procedure,

(c) Any place which has been declared by the State Government, by general or special order, to be a subsidiary jail.

"Criminal prisoner" means any prisoner duly committed to custody under the writ, warrant or order of any Court or authority exercising criminal jurisdiction, or by order of a Court-martial:

"Convicted criminal prisoner" means any criminal prisoner under sentence of a Court or Court-martial, and includes a person detained in prison under the provisions of Chapter VIII of the Code of Criminal Procedure,

"Civil prisoner" means any prisoner who is not a criminal prisoner.

Administrative Set Up

An Inspector General appointed for prisons exercises the general control and superintendence of all prisons situated in a state. The District Magistrate can issue orders from time to time to the Superintendent.

For every prison there shall be a Superintendent, a Medical Officer a Medical Subordinate, a Jailer and such other officers as the State Government thinks necessary.

Role of Superintendent

The Superintendent shall manage the prison in all matters relating to discipline, labour, expenditure, punishment and control.

He is required to obey all orders which may be given respecting the prison by the District Magistrate, and shall report to the Inspector General all such orders and the action taken thereon.

The Superintendent shall keep, or cause to be kept, the following records:-

(a) A register of prisoners admitted;

(b) A book showing when each prisoner is to be released;

(c) A punishment-book for the entry of the punishments inflicted on prisoners for prison-offences;

(d) A visitors' book for the entry of any observations made by the visitors touching any matters connected with the administration of the prison;

(e) A record of the money and other articles taken from prisoners; and all such other records as may be prescribed by rules.

Role of Jailer

(a) The Jailer shall be responsible for the safe custody of the records, for the commitment warrants and all other documents confined to his care, and for the money and other articles taken from prisoners.

(b) The Jailer shall not be absent from the prison for a night without permission in writing from the Superintendent; but, if absent without leave for a night from unavoidable necessity, he shall immediately report the fact and the cause of it to the Superintendent.

(c) Upon the death of a prisoner, the Jailer shall give immediate notice thereof to the Superintendent and the Medical Subordinate.

(d) The Jailer shall reside in the prison, unless the Superintendent permits him in writing to reside elsewhere.

Prisoners are to be Examined on Admission

(a) Whenever a prisoner is admitted into prison, he shall be searched, and all weapons and prohibited articles shall be taken from him.

(b) Every criminal prisoner shall also, as soon as possible after admission, be examined under the general or special orders of the Medical Officer, who shall enter or cause to be entered in a book, to be kept by the Jailer, a record of the state of the prisoner's health, and of any wounds or marks on his person, the class of labour he is fit for if sentenced to rigorous imprisonment, and any observations which the Medical Officer thinks fit to add.

(c) In the case of female prisoners the search and examination shall be carried out by the matron under the general or special orders of the Medical Officer.

Effects of Prisoners

All money or other articles in respect whereof no order of a competent court has been made, and which may with proper authority be brought into the prison by any criminal prisoner or sent to the prison for his use, shall be placed in the custody of the Jailer.

Solitary Confinement

No cell shall be used for solitary confinement unless it is furnished with the means of enabling the prisoner to communicate at any time with an officer of the prison, and every prisoner so confined in a cell for more than twenty-four hours, whether as a punishment or otherwise, shall be visited at least once a day by the Medical Officer or Medical Subordinate.

Prisoners under Sentence of Death

(a) Every prisoner under sentence of death shall, immediately on his arrival in the prison after sentence, be searched by, or by order of, the Jailer and all articles shall be taken from him which the Jailer deems it dangerous or inexpedient to leave in his possession.

(b) Every such prisoner shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under the charge of a guard.

Employment of Prisoners

(a) Civil prisoners may, with the Superintendent's permission, work and follow any trade or profession.

(b) Civil prisoners finding their own implements, and not maintained at the expense of the prison, shall be allowed to receive the whole of their earnings; but the earnings of such as are furnished with implements or are maintained at the expense of the prison shall be

subject to a deduction, to be determined by the Superintendent, for the use of implements and the cost of maintenance.

(c) No criminal prisoner sentenced to labour or employed on labour at his own desire shall, except on an emergency with the sanction in writing of the Superintendent, be kept to labour for more than nine hours in any one day.

(d) The Medical Officer shall from time to time examine the labouring prisoners while they are employed, and shall at least once in every fortnight cause to be recorded upon the history-ticket of each prisoner employed on labour the weight of such prisoner at the time.

(e) When the Medical Officer is of opinion that the health of any prisoner suffers from employment on any kind or class of labour, such prisoner shall not be employed on that labour but shall be placed on such other kind or class of labour as the Medical Officer may consider suited for him.

Removal and Discharge of Prisoners

(a) All prisoners, previously to being removed to any other prison, shall be examined by the Medical Officer.

(b) No prisoner shall be removed from one prison to another unless the Medical Officer certifies that the prisoner is free from any illness rendering him unfit for removal.

(c) No prisoner shall be discharged against his will from prison, if labouring under any acute or dangerous condition, nor until, in the opinion of the Medical Officer, such discharge is safe.

Separation of Prisoners

(a) In a prison containing female as well as male prisoners, the females shall be imprisoned in separate buildings, or separate parts of the same building,

(b) Unconvicted criminal prisoners shall be kept apart from convicted criminal prisoners; and

(c) Civil prisoners shall be kept apart from criminal prisoners.

In every prison a hospital or proper place for the reception of sick prisoners shall be provided. The health of prisoners is carefully monitored in prison.

Visit to Prisons

(a) Prisoners under trial may see their duly qualified legal advisers without the presence of any other person.

(b) Search of visitors is to be done for security purpose.

Offences in Relation to Prisons

Introduction or removal of prohibited articles into or from prison and communication with prisoners is an offence under Section 42 of the Act.

Publication of penalties

The Superintendent shall cause to be affixed, in a conspicuous place outside the prison, a notice setting forth the acts prohibited under section 42 and the penalties incurred by their commission.

Prison-offences

The following acts are declared to be prison-offences when committed by a prisoner:

(a) Such wilful disobedience to any regulation of the prison as shall have been declared by rules made under section 59 to be a prison-offence;

(b) Any assault or use of criminal force;

(c) The use of insulting or threatening language;

(d) Immoral or indecent or disorderly behaviour;

(e) Wilfully disabling himself from labour;

(f) Contumaciously refusing to work;

(g) Filing, cutting, altering or removing handcuffs, fetters or bars without due authority;

(h) Wilful idleness or negligence at work by any prisoner sentenced to rigorous imprisonment.

(i) Wilful mismanagement of work by any prisoner sentenced to rigorous imprisonment;

(j) Wilful damage to prison-property;

(k) Tampering with or defacing history-tickets, records or documents;

(l) Receiving, possessing or transferring any prohibited article;

(m) Feigning illness;

(n) Wilfully bringing a false accusation against any officer or prisoner;

(o) Omitting or refusing to report, as soon as it comes to his knowledge, the occurrence of any fire, any plot or conspiracy, any escape, attempt or preparation to escape, and any attack or preparation for attack upon any prisoner or prison-official; and

(p) Conspiring to escape, or to assist in escaping, or to commit any other of the offences aforesaid.

Report on Death of Prisoner

On the death of any prisoner, the Medical Officer shall forthwith record in a register the following particulars, so far as they can be ascertained, namely:

(a) The day on which the deceased first complained of illness or was observed to be ill,

(b) The labour, if any, on which he was engaged on that day,

(c) The scale of his diet on that day,

(d) The day on which he was admitted to hospital,

(e) The day on which the Medical Officer was first informed of the illness,

(f) The nature of the disease,

(g) When the deceased was last seen before his death by the Medical Officer or Medical Subordinate,

(h) When the prisoner died, and

(i) (In cases where a post-mortem examination is made) an account of the appearances after death, together with any special remarks that appear to the Medical Officer to be required.

LAW OF EVIDENCE

7. LAW OF EVIDENCE

7.1 THE INDIAN EVIDENCE ACT, 1872

General Principles

1. Extent of Operation

It extends to the whole of India except the State of Jammu and Kashmir.

2. Date of Commencement

It came into force on 1st September, 1872.

3. Applicability

It applies to all judicial proceedings in or before a court.

4. Court : What it includes

(a) The "Court" includes all Judges and Magistrates.

(b) It also includes all persons, other than Arbitrators, legally authorised to take evidence.

5. Judicial Proceeding : What it means

(a) It is not defined in the I.E. Act.

(b) Section 2(i) Cr.PC has given a definition of it.

(c) It includes any proceeding in the course of which evidence is or may be legally taken on oath.

6. I.E. Act where not applicable

The provisions of I.E. Act are not applicable to :

(a) Departmental Disciplinary Proceedings

Note : Rules of Natural Justice must, however, be observed in departmental proceedings, Fundamental Principles underlying certain provisions of the Indian Evidence Act, which are based on fair play, equity, good conscience and Justice, should however be followed in departmental inquiries. Ordinary rules of proof, not the strict and sophisticated rules of evidence, are however, applicable.

AIR 1963 S.C. 375

AIR 1969 S.C. 983

AIR 1976 S.C. 1080

(b) Domestic Tribunals.

(c) Proceedings before Arbitrators.

(d) Affidavits presented to court or an officer.

7. **Nature of the I.E. Act**

(a) The I.E. Act is basically a branch of "Adjective" Law. In its essence, it is procedural by nature.

(b) It deals with the establishment of the facts in issue by production of evidence.

(c) The object of every judicial proceeding is to determine either a right (as in a Civil case) or a liability (as in a criminal trial).

(d) Evidence Act tells us :

i) What are facts-in-issue.

ii) What facts are relevant.

iii) What facts are admissible.

iv) What facts may be proved.

v) What facts may not be proved.

vi) What kind of evidence may be given of a fact which is to be proved.

vii) Who is to produce such evidence.

viii) How it is to be given.

8. **Basic rules of Evidence.**

i) Best evidence must be produced.

ii) Hearsay evidence is not admissible.

iii) Evidence may be given of facts in issue and relevant facts (Sec.5).

iv) All facts, except the contents of documents, may be proved by oral evidence (Sec. 59).

v) Facts judicially noticeable need not be proved (Sec. 56).

vi) Facts admitted need not be proved (Sec. 58).

vii) Oral evidence must be direct (Sec. 60).

9. **Evidence - What it is?**

a) It is the usual means of proving or disproving a fact under trial or inquiry.

b) It does not include arguments.

c) It tends to convince the court of the truth or otherwise of the matter

Note : The definition of evidence as given in Section 3 of the Indian Evidence Act is a narrow one. It does not include real evidence.

A Court is to consider the matters before it while deciding whether or not a particular fact has been proved.

10. **"Matters before Court"**

They include evidence and also certain non-evidence material, such as,

i) Material objects.

ii) The demeanor of witnesses

iii) Local inspection held by a Judge/Magistrate.

iv) Answers given by the accused in course of examination u/s 313 Cr.PC.

v) A confession made by a prisoner u/s 30.

11. Evidence and Proof

a) Evidence means all the legal means exclusive of mere arguments, which tend to prove or disprove any fact, the truth of which is submitted for judicial determination.

b) It is the instrument by which the court is convinced of the truth or otherwise of the matter under inquiry/trial.

c) Proof is the result of appreciation of evidence by the Court.

d) Proof signifies the belief of the Court in the existence of a fact - a belief arrived at upon consideration of the matters before it including the evidence.

e) Evidence is produced before the court in order to prove the facts in issue. Hence, evidence is the means whereas proof is the end. Proof is the effect of evidence.

12. Facts in Issue

Facts in issue mean the matters in dispute. They are the facts which a party to a litigation must prove in order to succeed in his claim or defence. They are to be found in pleadings or charge, as the case may be. They are sometimes called the principal facts.

Facts in Issue - Example :

"A" is charged with having murdered "B". "A" pleads not guilty.

The facts in issue are :-

i) that "B" died.

ii) that it was a homicidal death.

iii) that "A" caused B's death

iv) that "A" intended to kill "B" (*Mens rea*)

"X" was an eye-witness to the occurrence.

The testimony of "X" was direct evidence.

13. Disproved and Not Proved

The Evidence Act has drawn a clear distinction between these two expressions. The definitions given in Section 3 describe the degree of certainty to be arrived at before a fact may be said to be disproved or not proved.

A fact is said to be "not proved" when it is neither proved not disproved. It is, therefore, neither positive nor negative. On the other hand, a fact is said to be "disproved" when its non-existence is either believed or accepted by the court as highly probable. "Not proved" implies that the material on record falls short, of the requisite proof. " Disproved", on the other hand, means that the material is sufficient to establish the non-existence of the fact asserted.

14. Proved

The Evidence Act while defining "proved" provides for two conditions of mind. First that in which a man and (it includes a woman) feels absolutely certain of a fact in other words "he believes it to exist". Secondly, in which though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would under the circumstances act on the assumption of its existence.

AIR 1990 SC 1459.

15. **Evidence - Classification**

a) Oral

b) Documentary

c) Real

16. i) Oral Evidence is evidence from persons, namely, witnesses.

ii) Documentary evidence is evidence from documents.

iii) Real evidence is evidence from things other than documents.

17. Oral Evidence - Statements made by the witnesses in Court

18. **Documentary Evidence**

Documents produced for inspection of the Court - such as :

a) a letter

b) a sale-deed

c) a deed of agreement

d) a seizure memo

e) an inquest report

19. **Real evidence - material objects other than documents, produced for inspection by the court**

Examples

a) Dagger,

b) Revolver,

c) Blood stained clothes,

d) A torn garment

20. **All legal Evidence is either Direct or Circumstantial**

Direct Evidence: When the principal fact is attested directly by witnesses, things or documents.

To all other forms of evidence, the term circumstantial evidence is applied.

21. **Circumstantial Evidence**

Ordinarily means evidence of a fact form which some other fact is inferred.

In circumstantial evidence, facts in issue are indirectly inferred rather than directly perceived.

Examples :

Motive, preparation, conduct, opportunity, position of the parties etc.

22. Circumstantial Evidence (Example)

"A" was charged with the murder of "B"

"PW1" proved than "A" had enmity with "B"

"PW2" testified that "B" was last seen in the company of "A"

"PW3" deposed than "B" was wearing ornaments (a ring and chain)

"PW4" stated that "A" was sharpening a knife.

"PW5" (Autopsy Surgeon) opined that the injury sustained by "B" might have been caused by that knife.

"PW6" (a Jeweller) gave out that "A" sold the above ornaments to him on the day next to murder.

Result: "A" was found guilty of the charge. The case hinged entirely on circumstantial evidence.

23. Circumstantial Evidence - three tests to be satisfied

i) the circumstances must be cogently and firmly established.

ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.

iii) the circumstances taken collectively should form a chain so complete that there is not escape from the conclusion that within all human probability the crime was committed by the accused and none else.

References :

AIR 1960 SC 500

AIR 1976 SC 917

AIR 1977 SC 1116

24. Document

Reference :

Section 29 IPC

Section 3 I.E. Act.

Section 3 (18) General Clauses Act.

Document means :

a) any matter

b) expressed or described upon any substance by letters, figures or marks intended to be used or may be used for recording that matter.

Documents : (Examples) :

i) a writing

ii) a map

iii) a plan

iv) a summons

v) a notice

vi) an order

vii) a sale-deed

viii) a receipt

ix) a blue-print

x) an X-ray plate

xi) a book of account

xii) a caricature

xiii) an inscription on a stone

xiv) a tape

25. **Contents of a Document**

How to prove? (Section 61)

by primary evidence which the Law requires to be given. It means the document itself produced for inspection of the Court.	by secondary evidence which the Law permits to be given in absence of primary evidence after due explanation.

26. **Documentary Evidence**

Chapter - V

Proof of contents	:	Section 61
Primary evidence	:	Section/62/64
Secondary evidence	:	Section 63/65
Proof of writing etc.	:	Section 67
Public Documents	:	Section 74
Certified copies of Public Documents	:	Section 76

27. **Secondary Evidence (Section 63)**

a) A certified copy

b) Copy made from the original by mechanical process

c) Copy made from or compared with the original

d) Counter-parts of documents

e) Oral accounts of the contents.

28. Public Documents

a) Documents forming the acts or records of the acts.

i) of sovereign authority

ii) of official bodies and tribunals

iii) of public officers - legislative judicial or executive

b) Public Records kept in any state of private documents.

Public Documents : (Examples) -

i) a charge-sheet u/s 173 Cr.PC.

ii) Birth and Death Register

iii) F.I.R.

iv) Judgement of a Court

v) Order Sheet

vi) An Income-Tax return

vii) Permit under M.V. Act.

viii) Ballot paper

ix) Compromise petition

29. Expert Evidence

Reference :

a) Section 45 and 46 of Indian Evidence Act.

b) Section 291, 291 and 293 Cr.PC.

Expert - Who is ?

a) He is a person specially skilled in that subject.

b) Expert is one who possesses superior knowledge and practical experience.

Note : It may not depend upon any degree.

An Excise Inspector who has served as such for 21 years and has tested may many samples of liquor may be treated as an Expert (AIR 1974 Supreme Court 639).

Generally speaking a witness is to testify as to facts falling within his personal knowledge vide Section 60 of the Evidence Act.

30. Expert - Examples (Illustrative and not exhaustive)

i) Medical Expert

ii) Finger Print Expert

iii) Foot Print Expert

iv) Handwriting Expert

v) Arms Expert

vi) Explosives Expert

vii) Public Analyst

viii) Chemical Examiner

ix) Serologist

x) Ballistics Expert (Science of protectiles in motion)

xi) Officers of MINT

xii) Motor Vehicle Expert

xiii) Physicist

xiv) Entomologist

xv) Toxicologist

xvi) Photographer

31. Relevancy and Admissibility

a) These two expressions are not identical.

b) Relevancy is determined by logic whereas admissibility is founded upon Law.

c) When we say that a particular evidence is admissible, we prosuppose that it is also relevant.

d) Roughly speaking, what is relevant is generally admissible.

e) Strictly, all relevant facts are, however, not admissible.

f) Relevant facts are those which have some sort of connection or relationship with the Facts-in-issue.

(g) In an inquiry or trial, the basic idea is to establish facts-in-issue but when direct evidence to prove fact-in-issue is not available, then evidence is or may be given of relevant facts, with a view to substantiating the facts-in-issue.

(h) In order to find out whether or not a particular fact is relevant, you are to check up whether or not it falls within the purview of any of the sections 6 to 55 of the Indian Evidence Act.

(i) If it comes within the ambit of any such section, then it is relevant.

(j) Then the question to be addressed is:

- Has its reception been expressly barred under any of the provisions of the Indian Evidence Act, as for example, Sections 122, 123, 124 and 126 etc. (Privileged Communications).

(k) If it is barred under the provisions of Indian Evidence Act, then it becomes inadmissible, notwithstanding its relevancy.

(l) There is certain facts which may not be relevant but the Indian Evidence Act permits them to be received in Evidence, as for example - questions to test the veracity of a witness and to discover who he is and what is his position in life vide Section 146 Indian Evidence Act.

(m) Admissibility, therefore, signifies that a particular fact is relevant u/s 6 to 55 Indian Evidence Act and also that its reception in evidence is not prohibited.

(n) Admissibility should be determined with reference to the provisions of the Indian Evidence Act.

32. Relevancy

Sections 6 to 55 Indian Evidence Act - a broad division

(i) Connected facts (Sections 6 - 16)

(ii) Statements

(a) Sections 17-31

(b) Sections 32-33

(c) Sections 34-39

(iii) Judgements (Sections 40-49)

(iv) Opinions of third persons (Sections 45-51)

(v) Character of Persons (Sections 52-55)

33. Admissibility

A fact, in order to be admissible, should not only be relevant u/s 6-55 Indian Evidence Act, but must not also be prohibited under the Indian Evidence Act, as for example :

(i) Contents of documents can not generally be proved by oral evidence (S.59)

(ii) Oral evidence must be direct (S. 60) Hearsay is not admissible.

(iii) Contents of documents may be proved either by primary or secondary evidence and not otherwise (S.61)

(iv) Documents must be proved by primary evidence except in cases falling under Section 65(vide S.64)

(v) Contents of public documents are proved by production of certified copies (S.77)

(vi) Proof of other official documents (S. 78)

(vii) Presumptions (S.79-90 and S.114)

(viii) Exclusion of oral by documentary evidence (S.91-100)

(ix) Estoppel (S.115-117)

(x) Competency and compellability (S.118-121)

(xi) Privileged communications (S.122-129, 132 and 133 etc.)

(xii) Lending questions can not be asked during the Examination-in-chief (S.142)

(xiii) Questions not to be asked without reasonable grounds (S.149)

(xiv) Indecent and scandalous questions may be forbidden (S.151)

(xv) Question intended to insult of annoy may be prohibited (S.152)

(xvi) Exclusion of evidence to contradict answers (S.152)

(xvii) Question that may be asked to a Hostile witness by the party which called him (S.154)

34. Standard of Proof

While Civil case may be proved by mere preponderance of evidence, in criminal case prosecution must prove the charge beyond reasonable doubt (AIR 1990 SC 209)

Note : Only proof beyond reasonable doubt and not conclusive proof is required for conviction (Ref. AIR 1987 SC 482)

LAW OF CONTRACTS

8. LAW OF CONTRACTS

8.1 THE INDIAN CONTRACT ACT, 1872

Law of Contract – An Outline

1. What is Law Relating to Contract?

Prior to the enactment of Indian Contract Act, 1872 the personal law of the parties was applied in all matters relating to contracts viz in case of Hindus the Hindu law and in case of Mohamedans, the Mohamedan law was applied and wherever the parties belonged to different religions, it was the law of the defendant which was made applicable.

The Indian Contract Act, however, was enacted in the year 1872 and it came into operation on 1st day of September, 1872.

The Indian Contract Act does not affect provisions of any other Statute, Act or Regulation nor any usage or custom of trade unless such usages or customs are inconsistent with the provisions of the Act.

2. What is Contract?

A contract under the American law has been defined as a promise or a set of promises for the breach of which law gives a 'remedy' or the performance of which the law in some way recognises as a 'duty'.

Section 2 (h) of the Indian Contract Act defines "Contract" as follows:-

"AN AGREEMENT ENFORCEABLE BY LAW IS A CONTRACT"

3. What is an Agreement?

For understanding the Contract we must know what is an "Agreement". Section 2 (e) defines "Agreement" as under:-

"Every promise and every set of promises, forming the consideration for each other is an agreement."

A promise on the other hand has been defined as an "Accepted Proposal" under section 2 (b).

The process of Contract therefore, can be simplified as under:-

(i) There should be an offer or proposal from one person signifying his willingness to do or to abstain from doing something.

(ii) The proposal must be communicated

(iii) After communication it must be accepted by the person to whom the proposal was made.

(iv) As soon as a proposal is accepted it becomes a promise and this promise is nothing but an "Agreement".

(v) Any agreement which is enforceable by law is a "Contract".

4. Essentials of Valid Proposal

(i) "An offer must be intended to create and be capable of creating legal relationship" is a settled principle under the English law. Although there is no such express provision under the Indian Contract Act but the contracts are not and must not be the sport of an ideal hour, mere matters of pleasantary and badinage, never intended by the parties to have any serious effect whatsoever as stated by "Lord Stowell" in *Darlymple* v. *Darlymple* (1811) 161 ER 665.

(ii) Mere invitation does not constitute a binding promise. An invitation to traders to make tenders, display of goods for sale in a shop, holding of an auction are all an invitation to make a 'proposal' and not a proposal by themselves.

Examples:

a) An invitation to dinner

b) An agreement to take a walk together

c) An invitation of a company to the public to subscribe for its shares.

(iii) An offer must be made for the purpose of being agreed to.

(iv) An offer may be made to a particular person or to the people in general but no contract can come into existence until it has been accepted by an ascertained person.

5. Essentials of a Valid Acceptance (Section 7)

In order to convert a proposal into a promise the acceptance must be:-

(i) Absolute and unqualified;

(ii) It should be made in the prescribed manner only and if the manner has not been prescribed it may be made in some usual and reasonable manner.

"The Contract is only complete when the acceptance is received by the proposer and the Contract is made at the place, where the acceptance is received"

6. Revocation of proposal/acceptance

(i) A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer but not afterwards.

(ii) Acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor but not afterwards.

Thus a proposal can be revoked before it is accepted by the acceptor and acceptance can be revoked before it becomes known to the proposer.

7. Consideration

What Does It Mean?

The conception of "Consideration" in English Law is some "Detriment" to the promisee (in that he may suffer something or give something of value) or some 'benefit' to the promisor (in that he receives something of value).

The consideration is necessary for formation of every Contract.

A promise made without any consideration is not a contract.

Section 2 (d) defines consideration as under:-

"When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise:

Certain Rules Relating to Consideration

(i) The consideration must move at the desire or request of the promisor. An act done at the desire of the third party is not a consideration.

(ii) The consideration may, however, move from even a third party but under the modern English law, it must move from the promisee.

(iii) The past consideration is no consideration under the English law but it is not so in case of Indian law.

(iv) The adequacy of consideration is not relevant except for the purpose of determining whether the consent of the promisor was freely given or not.

Exception to the Rule "No Consideration No Contract"

(i) An agreement reduced in writing and registered under the law, if such agreement is made on account of natural love and affection between the parties standing in near relation to each other.

(ii) A promise to compensate for past services rendered.

(iii) Promise made in writing to pay a time-barred debt.

(iv) Gift transactions lawfully made.

(8) **What Agreements are Contracts?**

All agreements are contracts if they are made:-

(i) By the free consent of the parties (section 13-22);

(ii) Competent to contracts (section 11-12);

(iii) For a lawful consideration with lawful object (section 23);

(iv) Not expressedly declared to be void (section 20, 26, 27, 28, 29, 30 and 56); and

(v) In writing if required by law (e.g. Article 299 (1) of the Constitution of India, Section 17 of the Indian Registration Act, the Companies Act etc.

9. Consent what it is?

When two or more persons agree upon the same thing in the same sense, they are said to "Consent".

A Consent is free when it is not caused by-

(i) Coercion, as defined in Section 15, or

(ii) Undue influence, as defined in Section 16, or

(iii) Fraud, as defined in Section 17, or

(iv) Misrepresentation, as defined in Section 18, or

(v) Mistake as to fact or Law (Section 20, 21, and 22).

10. Persons not Competent to Contract

(i) Infants (who have not attained the prescribed age of majority).

But there is no bar to a minor being admitted to the benefits of a partnership.

Similarly, a Contract of insurance by a *de-facto* guardian of a minor for the minor's benefit would be valid and enforceable by minor.

A surety bond jointly executed by a minor and an adult will be void vis-à-vis the minor, but it can be enforced against the surety.

But minor's property is liable for necessaries supplied to him, as this is covered by section 68.

(ii) An insane person, while he is insane.

(iii) Subject to disqualification under any other law.

11. Unlawful Objects or Considerations (Section 23)

The consideration or object of an agreement is lawful, unless-

i) It is forbidden by law; or

ii) Is of such a nature that, if permitted it would defeat the provisions of any law; or

iii) Is fraudulent

iv) Involves or implies injury to person or property of another, or

v) The Court regards it as immoral or opposed to public policy

12. Kinds of Agreements

(a) ***Valid***

A valid agreement is one which is enforceable by law. When an agreement fulfills all the requirements of enforceability and is given effect to by law, it is a valid agreement. It is called a contract.

(b) ***Void***

When an agreement violates some essential conditions of enforceability, it is a void agreement. A void agreement is one which is not enforceable at law. A void agreement has no legal existence.

Example:-

A promises to pay Rs. 10,000/- to B if he kills C.

Here the object is illegal and hence such an agreement can not be enforced and is void.

The various kinds of void agreements under the Indian Contract Act are:-

i) Agreements made by incompetent persons: S 11.

ii) Agreements made under mutual mistake as to a matter of fact or law (see 20 and 22).

iii) Agreements of which consideration or object is unlawful: S. 23.

iv) Agreements of which consideration or object is unlawful in part; S.24.

v) Agreements without consideration: S.25.

vi) Agreements in restraint of marriage: S.26.

vii) Agreements in restraint of trade: S.27.

viii) Agreements in restraint of legal proceedings: S.28

ix) Agreements the meaning of which is uncertain or not capable of being made certain: S.29.

x) Agreements by way of wager: S.30.

xi) Agreements contingent on an event happenings, and the event becoming impossible: SS. 32, 36.

xii) Where the agreement is to do an act impossible in itself: S.56.

xiii) Where the agreement is to do an act which subsequently becomes impossible or unlawful: S.56.

(c) *Voidable*

A voidable agreement is one which is enforceable at law at the option of one or more of the parties thereto, but not at the option of the other. Thus an agreement induced by coercion, undue influence, fraud, or misrepresentation is voidable.

Example:

If A's consent to an agreement is obtained by fraud, A has the option to treat the agreement valid and binding or not. B who obtained the consent by fraud does not have that option. Such an agreement is voidable.

(13) Contingent Contract

i) Contingent contract is a contract to do or not to do something if some event collateral happens or does not happen. (Section 13).

ii) The contract may be subject to a condition precedent or a condition subsequent or a condition concurrent.

(14) Quasi Contract

i) The term 'quasi' is a prefix implying appearance without reality. It means 'as if', 'sort of', 'resembles like'.

ii) The quasi contract, therefore, means a kind of obligation, which is not really contractual in that it does not rest on any agreement but which the law treats as if it is a contract.

iii) It is, therefore, contractual in law, but not in fact, that is to say there is no contract in fact but there is one in the contemplation of law. Such contracts are called quasi contracts.

Example

Thus if A pays a sum of money to B believing him to be his creditors when as a matter of fact, B was not, B is bound to return the money to A on the assumption that the above sum was given to him by way of loan.

Section 68 to 72 of the Act deal with quasi contracts and these are of five kinds viz:-

(i) Claim for necessaries supplied to person incapable of entering into a contract (Section 68).

A supplies to B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.

(ii) Reimbursement of person paying money due by another in payment of which he is interested (Section 69).

(iii) Obligation of person enjoying benefit of non-gratuitous Act (Section 70)

A, a tradesman leaves goods at B's house by mistake B treats the goods as his own. He is bound to pay A for them.

(iv) Rights and Liabilities of finder of goods (Section 71).

(v) Liability of person to whom money is paid or thing delivered by mistake or under coercion (Section 72).

15. Performance of Contract

i) The parties to a Contract must either perform or offer to perform their respective promises unless such performance is dispensed with or excused under the provisions of this Act or of any other law.

ii) Promises also bind the representatives of the promisors in case of death unless different intention appears in the Contract.

16. Essentials of Valid Performance

(i) It should be unconditional (sec. 38);

(ii) It should be performance by promisor or by his representatives (sec. 40);

(ii) It should be performed at proper time specified in the agreement or within a reasonable time (secs. 46-47).

(iii) It should be performed at the place specified in the agreement.

(iv) The promises must have reasonable opportunity to ascertain:

(a) the thing offered; and

(b) whether the performance is of the whole or of a part [s.38(1)]

The performance of the Contract amounts to discharge and the non-performance of contract amounts to breach of Contract.

The other means of discharge of Contract are as follows:-

(a) When performance becomes impossible or unlawful (s.56)

(b) By death of the contracting party if the contract is personal in its character (s.37).

(c) By recession (s.62)

(d) By novation (s.62)

(e) By remission (s.63)

(f) By accord and satisfaction (s.63)

(g) By operation of other laws such as Presidency Towns Insolvency Act, Provincial Insolvency Act, Agricultural Debtors Relief Act, Rent Restriction Act, C.P. and Berar Reduction of Interest Act, etc.

17. Breach of Contract and its Consequences

When a party commits a breach of Contract the law entitles other party three remedies. He may seek to obtain:-

(i) Damages for the loss sustained, or

(ii) A decree for specific performance, or

(iii)An injunction

The law as to damages is regulated by the Contract Act whereas the law as to specific performance and injunction is regulated by Specific Relief Act.

(i) ***Damages***

Section 77 of the Contract Act provides that the party who suffers by such breach of Contract is entitled to receive compensation for any loss or damage caused by breach. But such compensation is for:-

(a) Any loss or damage caused to him which naturally arose in the usual course from such breach;

(b) Which the party knew to be likely to result from the breach of it; or

(c) Such compensation can not be given for remote or indirect loss.

(ii) ***Specific Performance***

It can be grated only when the damages are an adequate remedy, or when the court can supervise the execution of the Contract.

Specific performance can not be enforced for contract of personal service.

Example

A agrees to buy and B agrees to sell a picture by a dead painter. A may compel B specifically to perform the contract.

(iii) ***Injunction***

It is used as a means of enforcing a contract, generally by way of enforcing the "promise to forbear"

Example

A, a singer contracts with B, a manager of a theatre, to sing at his theatre for a year and to abstain from singing at other theatre during the period. She absents herself. B can not compel A, to sing at his theatre, but he may sue her for an injunction restraining her from singing at other theatre.

LAW OF TORTS

9. LAW OF TORTS

9.1 Law of Torts

Meaning of Tort

Tort is a civil wrong. It is derived from Latin term *Tortum* which implies conduct that is twisted. Tortious liability arises from a breach of duty fixed by law. This duty is towards persons generally. Its breach is redressed by civil action for unliquidated damages.

Essentials of a Tort

i) There must be a wrongful act committed by a person

ii) It must result in legal damage to another

iii) Injury (Infringement of a legal right) without damage (actual loss) is actionable. (*Injuria sine damno)*

iv) Damage without injury is not actionable. (*Damnum sine Injuria)*

v) It must give rise to a legal remedy. (*Ubi jus ibi remedium*- Where there is a right, there is a remedy)

Distinction between a Tort and a Breach of Contract

Tort	Breach of Contract
Duty impost by Law	Duty imposed by the parties to the contract
Violation of a right in *rem*	Violation of a right in *personam*
Intention, sometimes is taken into consideration	Intention is irrelevant
Damages are unliquidated	Damages are liquidated

Distinction between a Tort and a Crime

i) Both are violations of rights in *rem*.

ii) In both the cases, duties are imposed by law.

Tort	Crime
Private Wrong	Public Wrong
Breach of Private Duties	Breach of Public Duties
Object of action is compensation	Object of action is punishing the wrong doer
Individual has to approach a Civil Court for redressal	State initiates prosecution against the wrong doer

Definition of certain terms

- Feasance- doing of a thing
- Mal-feasance- doing an unlawful act
- Mis-feasance- improper performance of a lawful act
- Intention- desire to bring about certain consequences
- Motive- ultimate object intended to be achieved
- Malice in law- doing a wrongful act without just cause or excuse
- Malice in fact- doing an act with ill-will, spite or hatred
- Torts actionable per se- wrongs which are actionable without proof of actual damage e.g. Trespass, libel
- Torts actionable only on proof of actual damage e.g. Nuisance, Malicious Prosecution

Kinds of Torts

Torts affecting the person

- Assault- Intentionally creating an apprehension in another person that force would be used against him
- Battery- Intentional application of force to another without lawful justification
- False Imprisonment- Total restraint on the liberty of the person without lawful justification

Torts affecting reputation

- Defamation- Publication of a statemaent which is false and defamatory by the defendant which refers to the plaintiff
  - Libel- Defamatory statement which is addressed to the eye and is actionable *per se*
  - Slander- Defamatory statement which is addressed to the ear and is actonable only on proof of damage
- Malicious Prosecution
  - Defendant instituting prosecution
  - With malice and without reasonable and probable cause
  - Against the plaintiff thereby affecting his liberty, property and reputation and
  - The prosecution must have ended in plaintiffs favour

Torts affecting Immovable Property

- Trespass- Unlawful entry upon the land of another or unlawful interference with the possession of land of another
- Dispossession – Withholding the possession of land from the rightful owner
- Injury to easements- Injury to a right to support of land and building, right to light and air, right to way, right of water and right of privacy

Torts affecting Moveable Property

- Trespass to goods- Wrongfully taking goods out of plaintiff's possession or forcibly interfering with the goods
- Detention – Wrongfully withholding the immediate possession of goods from one who is entitled to it.
- Conversion – Willful interference without lawful justification with goods in a manner inconsistent with the rights of the owner

Torts affecting both person and property

- Negligence- Breach of duty of care owned by the defendant to the plaintiff resulting in harm to the plaintiff
- Nuisance- Unlawful interference with the use or enjoyment of property or with the exercise of common right
- Fraud- Making a false statement knowingly or recklessly with an intention that another person should rely and act to his detriment and the other does so act

Remedies

Extra-judicial remedies- Remedies by the act of the parties

- Self help (re-entering the land, recapturing the goods, ejecting the trespasser)
- Abatement of Nuisance (removing the thing causing the nuisance or stopping it)
- Distress damage feasant (withholding the thing that caused damage, till the owner compensates for the loss)

Judicial Remedies- Remedies available from the Courts

- ***Damages***- Pecuniary compensation. They may be nominal, substantial, contemptuous or exemplary

  -Nomianal – damages in recognition of a right

  - Substantial – compensation for the actual loss

  - Contemptuous – marks a disapproval of the plaintiff's conduct

  - Exemplary- punitive in nature

- ***Specific Restitution of property***- Direction to restore the specific property instead of compensation for the loss of it,
  - When the nature of the property is such that the loss cannot be properly ascertained or
  - When compensation is not an adequate relief
- ***Injunctions*** – May be temporary, permanent, mandatory or prohibitory.
  - Temporary (ordering *status quo* till the case pending in a court is finally decided) or
  - Permanent (preventing the harm caused to the property by the act or omission of the defendant on a permanent basis),
  - Mandatory (direction to do something) or
  - Prohibitory (direction not to do something)

Substantive and Procedural Laws

- ***Substantive Laws***- Those which define rights, duties and liabilities (civil law) and those which define offences and prescribes punishment. (Criminal Law)
  - Substantive Criminal Law is contained in the Indian Penal Code and various Special and Local Laws

- Substantive Civil Laws is contained in Acts like Indian Contrast Act, Hindu Marriage Act, and Transfer of Property Act etc.

- ***Procedural Laws or Adjective Laws***- Those which define the pleading and procedure by which substantive laws are applied in practice.
- ***The examples of Procedural Laws are:***
  - Criminal Procedure Code (prescribe procedure for investigation, inquiry and trial of criminal cases)
  - Civil Procedure Code (prescribes procedure for trial of civil cases) and
  - Indian Evidence Act (prescribes procedure for adducing evidence and is applicable to both civil and criminal cases.)

OTHER LEGISLATIONS (NEED FOR SOCIAL LEGISLATIONS)

10. OTHER LEGISLATIONS

10.1 THE DOWRY PROHIBITION ACT, 1961

Legislation cannot by itself normally solve deep rooted, social problems. One has to approach them in other ways too, but legislation is necessary and essential, so that it may give that push and that educative factor as well as the legal sanctions behind it which it help public opinion to be given a certain shape.

- **J.L. Nehru**

Traditionally, the dowry was considered to be an integral part of marriage of the daughter by the father, for two reasons. Firstly, the ancient marriage rites in the *vedic* period are associated with *kanyadan.* It is laid down in *dharamshastra* that the meritorious act of *kanyadan* is not complete till the bridegroom was given a *dakshina.* So when a bride is given over to the bridegroom, he has to be given something in cash or kind which constitutes *varadakshina.* Thus, *kanyadan* became associated with *varadakshina, i.e.*, the cash or gifts in kind by the parents or guardian, of the bride to the bridegroom. The *varadakshina* was offered out of affection and did not constitute any kind of compulsion or consideration for the marriage. It was a voluntary practice without any coercive overtones. In the course of time, the voluntary element in dowry has disappeared and the coercive element has crept in. It has taken deep roots not only in the marriage ceremony but also post- marital relationship. What was originally intended to be a token *dakshina* for the bridegroom has now gone out of proportions and has assumed the nomenclature 'dowry'. Secondly, such customary gifts were also given because the daughter then was not entitled to a share in the joint family properties when she had a brother The right of the father to give a small portion of even the family property as gift to the daughter at the time of her marriage was recognised.

New Dimensions of the Dowry Problem

The price tags attached to eligible bachelor vary according to the bridegroom's qualification, and his status in society.

Three occasions Related to Dowry

One is before the marriage, second is at the time of marriage and the third is 'at any time' after the marriage. The third occasion may appear to be an unending period. But the crucial words are 'in connection with the marriage of the said parties'- *Narayanamurthy* v. *State of Karnataka and another* (AIR 2008 SC 2377).

Law relating to Dowry

Sind Deti Leti Act,1939

The *Bihar* Dowry Restraint Act, 1950

The *Andhra Pradesh* Dowry Prohibition Act, 1958

24th April, 1959 introduced - Dowry Prohibition Act, 1959

The Dowry Prohibition Act, 1961

According to National Crime Record Bureau, Crime in India, 2013, **Dowry Prohibition Act** (Incidence-10,709) The incidents of cases registered under this Act have increased by 17.9% during the year 2013 as compared to the previous year (9,038 cases). 18.8% of such cases were reported from Odisha (2,014) followed by Bihar (1,893 cases) accounting for 17.7% of total cases at the national level.

Section 2 defines dowry as any property or valuable security given or agreed to be given by any party before or at the time of marriage or subsequently, either directly or indirectly, but does not include *dower* or *mehr* in the case of persons to whom the Muslim Personal Law (*Shariat*) applies.

Section 3 provides penalty for giving or taking dowry for five years imprisonment and fine not less than rupees fifteen thousand.

Section 4 provides penalty for demanding dowry which shall not be imprisonment for less than six months but which may extend to two years and with fine which may extend to ten thousand rupees.

Ban on the Advertisement - Section 4-A

Section 5 deals with the invalidity of an agreement for giving or taking dowry it declares such agreement void.

Section 6 provides that the dowry by way of gifts or presents shall be for the benefit of the wife or her heirs.

Sections 7 and 8 pertaining to cognizance of offences relating to the dowry.

Dowry Prohibition Officers

Section 8-B- State Government may appoint as many dowry prohibition officers as it deems fit and specify the area in respect of which they shall exercise their jurisdiction, powers and functions. The State Government is further empowered under Section 8-B(3) to appoint an advisory board of not more than five social welfare workers.

Traditional Presents are not Barred under the law, this was held in *Vinod Kumar Sethi* v. *State*, AIR 1982 P. & H. 372 and also in *Satvir Singh* v. *State of Punjab*, 2001(4) A.I. C.L.R. 787

The Dowry Prohibition Act has made punishable the giving or taking or abetting the dowrythis was held in *Reena Aggarwal* v. *Anupam*, AIR 2004 SC 1418.

The Apex Court has held that demand of money in financial stringency is not dowry in *Appasaheb and another* v. *State of Maharashtra,* AIR 2007 SC 763.

Provisions under Indian Penal Code, 1860

According to National Crime Record Bureau, Crime in India, 2013, **Torture (cruelty by husband or his relatives) (Sec. 498-A IPC)** *(Incidence-1,18,866)* The cases of 'Torture' committed on women in the country have increased by 11.6% during 2013 over the previous year (1,06,527 cases). Most of these cases (40.8%) were reported from West Bengal (18,116 cases) followed by Rajasthan 12.7% (15,094 cases) and Andhra Pradesh 12.7% (15,084).

The Parliament has amended the Indian Penal Code, 1860 in the year 1983 by inserting a new Chapter XX-A containing Section 498-A which provides punishment to the husband or relatives of the husband for committing cruelty to the wife. It also provides for dealing effectively with those responsible for dowry death therefore inserted Section 304-B in the I.P.C. in the year 1986.

Cruelty to Wife

The essential ingredients of section 498A are:

a) The woman must be married;
b) She must be subjected to cruelty or harassment; and
c) Such cruelty or harassment must have been shown either by husband of the woman or by the relative of her husband.

Constitutionality of Section 498-A

In *Inder Raj* v. *Sunita* (1986 Cr. L.J. 1510) and *Krishan Lal* v. *Union of India* (1994 Cri. L.J. 3472) it was contended that Section 498-A of the I.P.C. was violative of Article 14 of the

Constitution inasmuch as it gave an arbitrary power to the police as well as to the Court. The word 'cruelty' occurring in the said provision was very vague. The word 'harassment' was equally vague and as such any person could be arbitrarily hauled up for committing an act of harassment. It was further contended that Section 498-A of I.P.C. offended against the principle of "double jeopardy" enshrined in Article 20 of the Constitution inasmuch as demand of dowry or any property was punishable both under Section 4, Dowry Prohibition Act, 1961 because in the latter mere demand of dowry is punishable and existence of element of cruelty is not necessary. Section 498-A of I.P.C. deals with the aggravated form of the offence. Hence, a person can be prosecuted in respect of both the offence punishable under Section 4, Dowry Prohibition Act and Section 498-A of I.P.C. While the discretion is given to punish a person for the same offence up to ten years, it can be said that element of arbitrariness can creep in. But, it is well established principle of law that such discretion cannot be said to be arbitrary and thus does not come into conflict with Article 14 of the Constitution. Section 498-A is *intra vires* of the Constitution.

Misuse of Dowry provisions

Section 498-A, IPC was introduced with the avowed object to combat the menace of dowry deaths and harassment to women at the hands of her husband or his relatives. Nevertheless, the provision should not be used as a device to achieve oblique motives - *Omkar Nath Mishra* v. *State*, 2008 Cri. L.J. 1391 (SC). In Arnesh Kumar v. *State of* Bihar, Criminal Appeal no. 1277 of 2014, the SC has issued the following directions:-

i) All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Cr.PC;

ii) All police officers be provided with a check list containing specified sub- clauses under Section 41(1)(b)(ii);

iii) The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

iv) The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

v) The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing;

vi) Notice of appearance in terms of Section 41A of Cr.PC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;

vii) Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdiction.

viii) Authorising detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

Provisions under the Code of Criminal Procedure, 1973

The offence under the Act relating to demand, agreement, giving or taking dowry, *etc.* shall be cognizable under the Code of Criminal Procedure, 1973 to the extent of investigation and arrest of the person without warrant.

Committee on Reforms of Criminal Justice System had suggested that the offence under Section 498-A should be made bailable and compoundable.

Indian Evidence Act, 1872

Section 113-B enables a court to presume that a commission of suicide by a woman has been abetted by her husband or by his relatives if the following conditions are fulfilled:

i) The question before the Court must be whether the accused has committed the dowry death of a woman. This means that the presumption can be raised only if the accused is being tried for the offence under Section 304-B of I.P.C.

ii) The woman was subjected to cruelty or harassment by her husband or his relatives.

iii) Such cruelty or harassment was for in connection with any demand for dory.

iv) Such cruelty or harassment was taking place soon before her death. It clearly shows that the legislature has imbibed the necessary *mens rea* for the offence of dowry death.

Burden of Proof

Burden of proof primarily lies on the accused. By the conventional standard of burden of proof for the raising of a mandatory presumption against the accused in a dowry death case may appear to be too harsh and somewhat unfair.

10.2 THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013

Introduction

Beauty of the woman is her most valuable jewel. Everyone has a word of praise for that. But taking woman as sex-symbol and a beautiful thing to play with is legally wrong. Women's rights and well-being are under threat all the time, either within the family or outside its confines. In India, the Supreme Court on issue of sexual harassment of women at the work place, seek the help from the various International instruments including CEDAW to which Indian government is a party, and finally gave exhaustive guidelines to protect the women. In the year 1993, India had ratified the United Nation Convention on Elimination of all Forms of Discrimination against Women. One of the requirements of the said UN Convention is that "*State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights....*" The International law shows the path on the human rights enactments to the states.

In *Vishakha* v. *State of Rajasthan,* the Supreme Court relied on the Convention on the Elimination of All Forms Discrimination Against Women, adopted by the General Assembly of the United Nations, in 1979, which India has both signed and ratified, acknowledges sexual harassment at the workplace as a human rights violation and outlined the Guidelines making it mandatory for employers to provide for sympathetic and non-retributive mechanisms to enforce the right to gender equality of working women. Even then according to National Crime Record Bureau in 2012 total crimes against women are 2,44,270. Out of which 9,173 are the cases of insult to the modesty of a women and 45351 for the assault on women with intent to outrage her modesty. Whereas the convection rate for these offences is 36.9 and 24 percent only. The present paper is an analysis of the of the law relating to the sexual harassment in the light of the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act,* 2013 and suggests the means and ways for the elimination of the sexual harassment of women at workplace.

Meaning of Sexual Harassment

Sexual harassment is described as unsolicited nonreciprocal male behaviour that asserts a women's sex role over her function as a worker. The problem of sexual harassment relates not so much to the actual biological differences between men and women, but to the gender or social roles which are attributed to men and women in social and economic life, and perceptions about male and female sexuality in society. However it's not that only women are victims of this malpractice but males also face it, though the percentage is low. Indian judiciary has given a new revolutionary approach to the issues related to women in the case of *Bodisattwa Gautam* v. *Subhra Chakraorty,* by stating that rape is not merely an offence under *Indian Penal Code,* 1860 but it is a violation of woman's right to live with dignity and personal freedom. Sexual harassment is wrong not just because it involves discrimination against women, but because it involves a significant form of harassment. It isn't the sex that makes sexual harassment wrong; to the contrary, it's the harassment that makes sexual harassment wrong.

Sexual harassment as defined in section 2(n) of the Sexual Harassment of Women at Workplace Act, 2013 as to include any one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely:-

i) physical contact and advances; or
ii) a demand or request for sexual favours; or
iii) making sexually coloured remarks; or
iv) showing pornography; or
v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature

The common tendency of victim blaming often causes the harassed to end up virtually as the accused. As in the case of sexual assault and rape, the dress, lifestyle and private life of the victim seem to become more important than the behaviour being investigated. The victim may be very embarrassed by the events, or afraid of ridicule or revenge, and is likely to wait until matters become unbearable before she complains. She may then be blamed of having played along or condoned the behaviour initially.

Effects of Sexual Harassment

Of all the forms that violence against women can assume, sexual harassment is the most ubiquitous. It affects women in all settings whether public or private and has psychological, medical, social, political, legal and economic implications. Instances of sexual harassment

should not be viewed as isolated incidents; rather they should be construed as a gendered aggression against the rights and dignity of women. The impact of sexual harassment is not only on the victim but also on the organization. It is important to understand that sexual harassment is a socio-legal issue surrounded by shame, stigma and confusion.

On the victim

The impact of sexual harassment on an individual is very intense in almost all the cases. It affects an individual's potential of work, leads to anxiety, frustration, anger and many more such feelings of tension and a person lives in a state of constant stress. The victim also feels ashamed, guilty, stressed, anxious or depressed, they lose trust on co employees. They mostly want to stay away from work. Lack of confidence and self-esteem in one self and the work they do. They also suffer from physical symptoms of stress such as headaches, backaches, and sleep problems. Their social life also gets ruined. An increasing number of victims suffer from sexual harassment syndrome.

On the organization

Many think that the effect of sexual harassment is only on the one who is the victim of it but this is not true. It affects the organization tremendously. The whole atmosphere of the set up becomes unhealthy and unfit for work relations, the co-workers and the colleagues also get affected severely. It leads to lower productivity, lower efficiency, and decline in work place morals. On the whole sexual harassment at workplace has a negative impact on the organization.

Legislative Provisions for the Protection of Woman

Constitution of India

Perhaps no Constitution is so much soaked with gender sensitivity and gender justice as the Indian Constitution in conformity with Gandhian ethos and ideal of social and political reforms to uplift women. It aims at gender legality by removing gender inequalities as enshrined in Articles 14, 15 and 16. While Article 14 enshrines core promise of equality, Article 15(3) provides an exception to equality rule for the benefit of women. The rights of women have the originating source in the Constitution of India from where all other laws emerged and clothed with sanctity by Constitution. The Indian Constitution guarantees equality of status and opportunity to men and women. The fundamental rights are enshrined in the Constitution of India. It must be borne in the mind that when the fundamental rights are infringed, the natural

basic human rights, inherent in human beings, are violated. The relevant Articles of the Constitution of India, which bestow legal rights upon women, are Article 14, 15 (1), 15 (3), 16 (1) and (2), 19 (1)(g) and 21.

Indian Penal Code

The rape laws in India are wider in comparison, to the existing laws on sexual harassment and are to be found under Section 375 and Section 376 of the *Indian Penal Code.* The laws on sexual harassment as mentioned earlier are enlisted under Section 294, Section 354 and Section 509 of the *Indian Penal Code.* The major flaw of this is that it does not take into account the employer's liability and also it does not provide for compensation to the victim. In *Major Singh* v. *State of Punjab (*AIR 1967 SC 63), the apex court held that the essence of a woman's modesty is in her sex, young or old, intelligent or imbecile, awake or sleeping, the women possesses modesty capable of being outraged. Sections 354 and 509 of I.P.C. deal with the sexual harassment of women. It protects the modesty of a woman and sexual harassment of women by the men. But if her colleague at the work place is harassing a working woman in the name of her promotion and other official perks then these sections are not sufficient to protect the women. Taking the strict note of the situation the Supreme Court of India in *Vishaka* v. *State of Rajasthan (*AIR 1997 SC 3014), issued the guidelines to protect the women from sexual harassment at the work place.

Indecent Representation of Women (Prohibition) Act, 1987

The use of women as 'bait' in the sale of products ranging from cosmetics to liquor or motor cars is noted in countries as diverse as China, Norway, the United States, Yugoslavia, the Philippines, India and others. In going through all advertisements, it has been found that the function of almost all campaigns in any country is to use woman's body or part of the body in an erotic attraction appealing to male viewers. Women are used as sex-commodity and sex symbol in the magazines, advertisements, films, *etc.* The exposure of the women in the media has direct relation with the morality of the society. The morality of the society changes with time and place. There should be a balance between exposure of the women in public and morality of the society. The aim of the *Indecent Representation of Woman (Prohibition) Act*, 1986 and Sections 292 to 294 of the *Indian Penal Code* is to check the indecent representation of women. This Act deals with harassment through indecent material. Section 7 of the Act holds companies responsible in case of display of pornographically matter on premises. This is punishable with imprisonment of

a minimum of two years. These laws should be interpreted in a way which makes a balance between the liberty of women and decency in public life.

Protection of Human Right Act, 1993

According to the *Protection of Human Rights Act, 1993* human rights means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India. Women rights are also Human rights and have to be protected to allow them to live with dignity without fear of their safety and security. In *Madhu Kishwar* v. *State (1996) 5 SCC 125,* the Supreme Court considered the provisions of the Convention on the Elimination of All forms of Discrimination Against Woman, 1979 (CEDAW) and held the same to be integral scheme of the Fundamental Rights and the Directive Principles. Article 2(e) of CEDAW enjoins the state parties to breathe life into the dry bones of the Constitution, International Conventions and the Protection of Human Rights Act, to prevent gender based discrimination and to effectuate right to life including empowerment of economic, social and cultural rights. Article 2(f) read with Articles 14 and 15 of the CEDAW embodies concomitant right to development as an integral scheme of the Indian Constitution and the Human Rights Act.

***The Sexual Harassment of Women at Workplace Act,* 2013**

The objective of the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act*, 2013 is to provide protection against sexual harassment of women at the workplace and for the prevention and redressal of the complaints of sexual harassment. The *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act*, 2013 stipulates that a woman shall not be subjected to sexual harassment at any workplace. As per the statute, presence or occurrence of circumstances of implied or explicit promise of preferential treatment in employment; threat of detrimental treatment in employment; threat about present or future employment; interference with work or creating an intimidating or offensive or hostile work environment; or humiliating treatment likely to affect the lady employee's health or safety may amount to sexual harassment.

Salient features of the Sexual Harassment Act, 2013

Scope of the Sexual Harassment Act

The Sexual Harassment Act is very wide and is applicable to the organized sector as well as the unorganized sector. In view of the wide definition of workplace, the statute, inter alia, applies to government bodies, private and public sector organisations, non-governmental organisations, organisations carrying on commercial, vocational, educational, entertainmental, industrial, financial activities, hospitals and nursing homes, educational institutes, sports institutions and stadiums used for training individuals. As per the Sexual Harassment Act, a workplace also covers within its scope places visited by employees during the course of employment or for reasons arising out of employment, including transportation provided by the employer for the purpose of commuting to and from the place of employment.

Section 2(f) of the Act defines 'employee' which includes regular, temporary, ad hoc employees, individuals engaged on daily wage basis, either directly or through an agent, contract labour, co-workers, probationers, trainees, and apprentices, with or without the knowledge of the principal employer, whether for remuneration or not, working on a voluntary basis or otherwise, whether the terms of employment are express or implied including probationer and trainee.

Complaint of Sexual Harassment

A complaint is to be made in writing by an aggrieved woman within three months of the date of the incident. The time limit may be extended for a further period of three months if, on account of certain circumstances, the woman was prevented from filing the complaint. If the aggrieved woman is unable to make a complaint on account of her physical or mental incapacity or death, her legal heirs may do so.

Internal and Local Complaints Committee

The Act contemplates the constitution of Internal Complaints Committee which comprises all branches or administrative units where the number of employee is more than ten. The government is required to set up a Local Complaints Committee at district and block levels. A District Officer (District Collector or Deputy Collector) shall be responsible for facilitating and monitoring the activities under the Act. The Sexual Harassment Act also sets out the constitution of the committees, process to be followed for making a complaint and inquiring into the complaint in a time bound manner.

Transfer and Leave as Interim Reliefs

The Sexual Harassment Act empowers the Internal Complaints Committee and the Local Complaints Committee to recommend to the employer, at the request of the aggrieved woman, following interim measures:-

i) transfer of the aggrieved woman or the respondent to any other workplace; or
ii) granting leave to the aggrieved woman up to a period of three months in addition to her regular statutory/ contractual leave entitlement; or
iii) any other relief.

Provision for Conciliation

The Sexual Harassment Act makes the provision for the conciliation in order to settle the matter before initiating the inquiry at the request of the aggrieved woman but monetary settlement should not be made as a basis of such conciliation.

Action against Frivolous and Malicious Complaints

The Sexual Harassment Act also ensures that the provisions of the Act should not be misused and penalized the aggrieved woman if she files a frivolous and malicious complaint. But the inability to substantiate a complaint will not magnetize action against complainant.

Prohibition on Publications of Identity

The Act prohibits the disclosure of the identity and addresses of the victim, respondent and witnesses. Section 16 gives the overriding effect on the *Right to Information Act*, 2005 and any information relating to the conciliation and inquiry proceedings or recommendations cannot be communicated to public through any means and in case of any contraventions with this provision the person entrusted with such information will face penal consequences.

Employer's Obligations

There are certain duties of the employer fixed by the Act. These are to:-

i) provide a safe working environment.
ii) display conspicuously at the workplace, the penal consequences of indulging in acts that may constitute sexual harassment.
iii) inform about the composition of the Internal Complaints Committee.

iv) organise workshops and awareness programmes for sensitizing employees on the issues and implications of workplace sexual harassment and organizing orientation programmes for members of the Internal Complaints Committee.

v) assist the committee in securing the attendance of witnesses and respondents.

vi) assist the woman to file a complaint under IPC or any other law

vii) treat sexual harassment as a misconduct under the service rules and initiate action for misconduct.

viii) monitor the timely submission of reports by the internal committee.

If an employer fails to constitute an Internal Complaints Committee or does not comply with any provisions contained therein, the Sexual Harassment Act prescribes a monetary penalty. A repetition of the same offence could result in the punishment being doubled and / or de-registration of the entity or revocation of any statutory business licenses.

Analysis of the Sexual Harassment Act, 2013

The Sexual Harassment Act is a much awaited development and a significant step towards ensuring women a safe and healthy work environment. However there are some issues which require some consideration in relation to this new legislation.

i) The Act should be made applicable to all employees, irrespective of gender. The Sexual Harassment Act only addresses the issue of protection of women employees and is not gender neutral. Male employees, if subjected to sexual harassment, cannot claim protection or relief under the law. The Act should be gender neutral.

ii) The definition of the sexual harassment in section 2(n) seems to be very narrow in the present information and communication age, the words 'verbal, textual, physical, graphic or electronic actions' should have been added to make is wide and for the purposes of clarity.

iii) It is also a challenge for employers to constitute an Internal Complaint Committee at all administrative units or offices.

iv) Section 4(2)(a) provides the constitution of the Internal Complaint Committee comprising of '*a Presiding Officer who shall be a women employed at a senior level at workplace from amongst the employees*' but there is also a lack of clarity as to who shall be a Presiding Officer in the absence of a senior level female employee.

v) Section 4(2)(c) provides that there is a needs to involve '*one member from amongst non-governmental organisations or associations committed to the cause of women or who have had experience in social work or have legal knowledge.*" We have to see how employers are comfortable with such an external representation, considering the sensitivities surrounding this issue and the need to maintain strict confidentiality as provided under the Act.

vi) According to section 4(3) the Presiding Officer and every member of the Internal Committee shall hold office not exceeding three years. It may also become necessary for the employer to spend more time and efforts in training members of the Internal Committee who are to be replaced after three years.

vii) The Act further casts an obligation upon the employer to address the grievances in respect of sexual harassment at workplace in a time bound manner, which again is the grey area for the employers intentionally or unintentionally not addressing the grievances in a time bond manner.

viii) Section 14 of the Act punishes the complainant in case of a false or malicious complaint. Such inventions are only ever peculiar to gender-specific legislations which relate to women and violence. This provision, although meant to protect the interest of the employer but is likely to deter the victims from reporting such incidents and filing complaints of sexual harassment, which may in turn defeat the objective for which the law was enacted.

ix) As referred above, provisions of the Indian Penal Code are very much available for the same offense of sexual harassment and can also be easily applied when the harasser is not an employee. Hope that the investigating agency will not refuse to register an FIR and start conciliation the victim is the employee of the accused (employer). Although section 28 specifies that this Act is in addition to the other provision of the law and not in derogation.

Conclusion

The New Law provides the much needed grievance redressal process working women require at their workplaces. The Act has given itself a wide scope, so as to include all women, including domestic help, as the household is her workplace. However, looking at the rising number of reported complaints of sexual harassment it is evident that the new law has at least served to improve awareness about the obligations of employers and rights of employees in case of

workplace sexual harassment. Perhaps this legislation will help the silenced voice of women audible by taking off the feet that coerce women's necks. As observed by Justice Saghir Ahmad, *"Unfortunately a woman in our country belongs to a class or group of society who are in an disadvantaged position on account of several social barriers and impediments and have therefore, been victims of tyranny at the hands of men with whom they, unfortunately, under the Constitution enjoy equal status."*

Some preventive steps to keep a check on the cases of sexual harassment are quite necessary. This goal can be achieved when sexual harassment is completely prohibited so that such incidents may be notified and circulated. Provisions for appropriate working conditions for women should also be made. Legal mechanisms cannot be the sole solution in curbing the increasing incidents of sexual harassment. At some place and time it is very much required that the apathy and fear of the public concerned with such events should last. If people will be always frightened to speak to demand their rights, then law cannot come for them as a savior. An initiative on the part of public is also required. It is of utmost necessity that such values are to be promoted which detest and vociferously oppose such decadent practices existing in the society. People must be conscious of their rights so that they can avail full benefit out of them.

10.3 THE MAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZENS ACT, 2007

An Act to provide for more effective provisions for the maintenance and welfare of parents and senior citizens guaranteed and recognised under the Constitution and for matters connected therewith or incidental thereto.

It extends to the whole of India except the State of Jammu and Kashmir and it applies also to citizens of India outside India In this Act, the following definitions are important in Section 2.

2 (b) **"maintenance"** includes provision for food, clothing, residence and medical attendance and treatment

2 (d) **"parent"** means father or mother whether biological, adoptive or step father or step mother, as the case may be, whether or not the father or the mother is a senior citizen

2 (h) **"senior citizen"** means any person being a citizen of India, who has attained the age of sixty years or above

2 (k) **"welfare"** means provision for food, health care, recreation centres and other amenities necessary for the senior citizens

As per section 3, the provisions of this Act shall have overriding effect, notwithstanding anything inconsistent therewith contained in any enactment other than this Act, or in any instrument having effect by virtue of any enactment other than this Act. While Section 4 mentions about maintenance of parents and senior citizens, sections 5 and 6 lay down the procedure for application and its processing by the tribunal.

Maintenance of Parents and Senior Citizens (section 4)

1. A senior citizen including parent who is unable to maintain himself from his own earning or property owned by him, shall be entitled to make an application under section 5 in case of –
    i. parent or grand-parent, against one or more of his children not being a minor
    ii. a childless senior citizen, against such of his relative referred to in clause (g) of section 2 (Therein "relative" means any legal heir of the childless senior citizen who is not a minor and is in possession of or would inherit his property after his death)

2. The obligation of the children or relative, as the case may be, to maintain a senior citizen extends to the needs of such citizen so that senior citizen may lead a normal life.

3. The obligation of the children to maintain his or her parent extends to the needs of such parent either father or mother or both, as the case may be, so that such parent may lead a normal life.

4. Any person being a relative of a senior citizen and having sufficient means shall maintain such senior citizen provided he is in possession of the property of such senior citizen or he would inherit the property of such senior citizen:

5. Provided that where more than one relatives are entitled to inherit the property of a senior citizen, the maintenance shall be payable by such relative in the proportion in which they would inherit his property.

Application for Maintenance (section 5)

1. An application for maintenance may be made –

    a. By a senior citizen or a parent, as the case may be; or

    b. If he is incapable, by any other person or organisation authorised by him; or

    c. The Tribunal may take cognizance *suo moto*.

2. The Tribunal may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this section, order such children or relative to make a monthly allowance for the interim maintenance of such senior citizen including parent and to pay the same to such senior citizen including parent as the Tribunal may from time to time direct.

3. On receipt of an application for maintenance, after giving notice of the application to the children or relative and after giving the parties an opportunity of being heard, the Tribunal should hold an inquiry for determining the amount of maintenance

4. An application filed for the monthly allowance for the maintenance and expenses for proceeding shall be disposed of within ninety days from the date of the service of notice of the application to such person.

5. If, children or relative so ordered fail, without sufficient cause to comply with the order, any such Tribunal may, for every breach of the order, issue a warrant for levying the

amount due in the manner provided for levying fines, and may sentence such person for the whole, or any part of each month's allowance for the maintenance and expenses of proceeding, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if made sooner , whichever is earlier

Jurisdiction and Procedure (section 6)

1. The proceedings under section 5 may be taken against any children or relative in any district-
   a. Where he resides or last resided, or
   b. Where children or relative resides.
2. On receipt of the application under section 5, the Tribunal shall issue a process for procuring the presence of children or relative against whom the application is filed.
3. For securing the attendance of children or relative the Tribunal shall have the power of a Judicial Magistrate of first class as provided under the Code of Criminal Procedure, 1973.
4. All evidence to such proceedings shall be taken in the presence of the children or relative against whom an order for payment of maintenance is proposed to be made, and shall be recorded in the manner prescribed for summons cases. Provided that if the Tribunal is satisfied that the children or relative against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Tribunal, the Tribunal may proceed to hear and determine the case ex parte.
5. Where the children or relative is residing out of India, the summons shall be served by the Tribunal through such authority, as the Central Government may by notification in the official Gazette, specify in this behalf.
6. The Tribunal before hearing an application under section 5 may, refer the same to a Conciliation Officer and such Conciliation Officer shall submit his findings within one month and if amicable settlement has been arrived at, the Tribunal shall pass an order to that effect.

Explanation- For the purposes of this sub-section "Conciliation Officer" means any person or representative of an organisation (authorised by senior citizen or parent) or the Maintenance

Officers designated by the State Government under subsection (1) of section 18 or any other person nominated by the Tribunal for this purpose.

Maintenance Tribunal (to be constituted under section 7)

1. The State Government shall within a period of six months from the date of the commencement of this Act, by notification in the Official Gazette, constitute for each Sub-division one or more Tribunals as may be specified in the notification for the purpose of adjudicating and deciding upon the order for maintenance.
2. The Tribunal shall be presided over by an officer not below the rank of Sub-Divisional Officer of a State.
3. Where two or more Tribunals are constituted for any area, the State Government may, by general or special order, regulate the distribution of business among them.

Summary Procedure in case of Inquiry (section 8)

1. In holding any inquiry under section 5, the Tribunal may, subject to any rules that may be prescribed by the State Government in this behalf, follow such summary procedure as it deems fit.
2. The Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.
3. Subject to any rule that may be made in this behalf, the Tribunal may, for the, purpose of adjudicating and deciding upon any claim for maintenance, choose one or more persons possessing special knowledge of any matter relevant to the inquiry to assist it in holding the inquiry.

   It is worth noting that as per section 17 of this Act it is specifically mentioned that no party to a proceeding before a Tribunal or Appellate Tribunal shall be represented by a legal practitioner.

Order for Maintenance (section 9)

1. If children or relatives, as the case may be, neglect or refuse to maintain a senior citizen being unable to maintain himself, the Tribunal may, on being satisfied of such neglect or refusal, order such children or relatives to make a monthly allowance at such monthly rate for the maintenance of such senior citizen, as the Tribunal may deem fit and to pay the same to such senior citizen as the Tribunal may, from time to time, direct.
2. The maximum maintenance allowance which may be ordered by such Tribunal shall be such as may be prescribed by the State Government which shall not exceed ten thousand rupees per month.

Enforcement of order of Maintenance (section11)

1. A copy of the order of maintenance and including the order regarding expenses of proceedings, as the case may be, shall be given without payment of any fee to the senior citizen or to parent, as the case may be, in whose favour it is made and such order may be enforced by any Tribunal in any place where the person against whom it is made, such Tribunal on being satisfied as to the identity of the parties and the non-payment of the allowance, or as the case may be, expenses, due.
2. A maintenance order made under this Act shall have the same force and effect as an order passed under Chapter IX of the Code of Criminal Procedure, 1973 and shall be executed in the manner prescribed for the execution of such order by that Code.

Maintenance Amount

When an order for maintenance is issued, the children or relative who is required to pay any amount in terms of such order shall, within thirty days of the date of announcing the order by the Tribunal, deposit the entire amount ordered in such manner as the Tribunal may direct. Interest can be awarded where any claim is allowed.

Constitution of Appellate Tribunal (section 15)

1. The State Government may, by notification in the Official Gazette, constitute one Appellate Tribunal for each district to hear the appeal against the order of the Tribunal.
2. The Appellate Tribunal shall be presided over by an officer not below the rank of District Magistrate.

Appeals

1. Any senior citizen or a parent, as the case may be, aggrieved by an order of a Any senior citizen or a parent, as the case may be, aggrieved by an order of a Tribunal may, within sixty days from the date of the order, prefer an appeal to the Appellate Tribunal.

   Provided that on appeal, the children or relative who is required to pay any amount in terms of such maintenance order shall continue to pay to such parent the amount so ordered, in the manner directed by the Appellate Tribunal:

   The Appellate Tribunal shall make an endeavour to pronounce its order in writing within one month of the receipt of an appeal.

Maintenance Officer (section18)

1. The State Government shall designate the District Social Welfare Officer or an officer not below the rank of a District Social Welfare Officer, by whatever name called as Maintenance Officer.
2. The Maintenance Officer referred to in sub-section (1), shall represent a parent if he so desires, during the proceedings of the Tribunal, or the Appellate Tribunal, as the case may be.

Establishment of Old Age Homes (section 19)

1. The State Government may establish and maintain such number of old age homes at accessible places, as it may deem necessary, in a phased manner, beginning with at least one in each district to accommodate in such homes a minimum of one hundred fifty senior citizens who are indigent.
2. The State Government may, prescribe a scheme for management of old age homes, including the standards and various types of services to be provided by them which are necessary for medical care and means of entertainment to the inhabitants of such homes.

Medical support for Senior Citizens (section 20)

The State Government shall ensure that –

1. The Government hospitals or hospitals funded fully or partially by the Government shall provide beds for all senior citizens as far as possible;
2. Separate queues be arranged for senior citizens;

3. Facility for treatment of chronic, terminal and degenerative diseases is expanded for senior citizens;
4. Research activities for chronic elderly diseases and ageing is expanded;
5. There are earmarked facilities for geriatric patients in every district hospital duly headed by a medical officer with experience in geriatric care.

Publicity, Awareness and Sensitization Training

State government shall take all measures for publicity, awareness, etc. for welfare of senior citizens and shall also take all measures to ensure that –

i. The Central Government and State Government Officers, including the police officers and the members of the judicial service, are given periodic sensitization and awareness training on the issues relating to this Act;

ii. Effective co-ordination between the services provided by the concerned Ministries or Departments dealing with law, home affairs, health and welfare, to address the issues relating to the welfare of the senior citizens and periodical review of the same is conducted.

Authorities who may be specified for implementing the provisions of this Act

1. The State Government may, confer such powers and impose such duties on a District Magistrate as may be necessary, to ensure that the provisions of this Act are properly carried out and the District Magistrate may specify the officer, subordinate to him, who shall exercise all or any of the powers, and perform all or any of the duties, so conferred or imposed and the local limits within which such powers or duties shall be carried out by the officer as may be prescribed.
2. The State Government shall prescribe a comprehensive action plan for providing protection of life and property of senior citizens.

Transfer of Property can be declared Void in certain cases

1. Transfer of property done by senior citizen when such transfer was subject to the condition that the transferee shall provide the basic amenities and basic physical needs to the transferor and if such transferee refuses or fails to provide such amenities and physical needs, the said transfer of property shall be deemed to have been made by fraud

or coercion or under undue influence and shall at the option of the transferor be declared void by the Tribunal.

2. Where any senior citizen has a right to receive maintenance out of an estate and such estate or part , thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitous; but not against the transferee for consideration and without notice of right.

Exposure and abandonment of senior citizen is punishable under Section 24 with imprisonment of either description for a term which may extend to three months or fine which may extend to five thousand rupees or with both.

As per section 25 every offence under this Act shall be cognizable and bailable and shall be tried summarily by a Magistrate.

Jurisdiction of Civil Courts is barred.

Power of Central Government to give directions & review (sections 30 & 31).

The Central Government may give directions to State Governments as to the carrying into execution of the provisions of this Act. It may make periodic review and monitor the progress of the implementation of the provisions of this Act by the State Governments.

10.4 INFORMATION TECHNOLOGY ACT

In today's techno-savvy environment, the world is becoming more and more digitally sophisticated and so are the crimes. Internet was initially developed as a research and information sharing tool and was in an unregulated manner. As the time passed by it became more transactional with e-business, e-commerce, e-governance and e-procurement etc. All legal issues related to internet crime are dealt with through cyber laws. As the number of internet users is on the rise, the need for cyber laws and their application has also gathered great momentum. The reasons and jurisprudence behind the Act has been clearly indicated by the intention of legislature which is given in the beginning of the Information Technology Act *per se*.

Need of the IT Act

a) To provide legal recognition of e-records & e-signature

b) To provide legal rights and obligations through e-transactions

c) To prevent misuse arising out of e-transactions

d) To create civil & criminal liability

e) To facilitates e-governance

f) To resolve domain name disputes and Trademarks

g) To facilitate e-commerce

The basic aim of the Information Technology Act, 2000, is to provide legal recognition to the transactions which are carried out by means of electronic data interchange and by other means of electronic communication. This is usually termed as that of e-commerce which deals with the alternatives to paper based methods of communication and the storage of information in a physical form. The Act has also been brought in to provide for and facilitate the electronic filing of documents with that of the government agencies. The filing of the documents electronically has been the latest trend in the modern times and this is how the system has changed over a period of time.

The salient features of the Information Technology Act, 2000 may briefly be stated as follows:—

i) The Act provides legal recognition to e-commerce, which facilitates commercial e-transactions.

ii) It recognises records kept in electronic form like any other documentary record. In this way, it brings electronic transactions at par with paper transactions in documentary form.

iii) The Act also provides legal recognition to e-signatures which need to be duly authenticated by the certifying authorities.

iv) Cyber Law Appellate tribunal has been set up to hear appeal against adjudicating authorities.

v) The provisions of the I.T. Act have no application to negotiable instruments, power of attorney, trust, will and any contract for sale or conveyance of immovable property.

vi) The Act applies to any cyber offence or contravention committed outside India by a person irrespective of his/her nationality.

vii) As provided under Section 90 of the Act, the State Government may, by notification in 'Official Gazette' make rules to carry out the provisions of the Act.

viii) Consequent to the passing of this Act, the SEBI had announced that trading of securities on the internet will be valid in India.

Section 1 deals with Extra territorial Jurisdiction

Section 4 deals with E-records

Section 6 deals with E-signatures

Section 8 deals with E-gazette

Types of Offences

Cyber crime as a term was not defined in the Act. It only delved with few instances of computer related crime. These acts as defined in Chapter XI of the Act which includes:

a) Illegal access, introduction of virus, denial of services, causing damage and manipulating computer accounts (Section 43). Act of causing denial of service, introduction of virus

etc as defined in section 43 only amounts to payment of damages which could be upto one crore.

b) Tampering, destroying and concealing computer code (Section 65)
c) Acts of hacking leading to wrongful loss or damage (Section 66). Punishment in section 65 and 66 is three years or fine up to two lakh rupees or both.
d) Acts related to publishing, transmission or causing Publication of obscene/ lascivious in nature (section 67). For the first time offenders can be punished up to 5 years with fine up to one lakhs of rupees. Subsequent offence can lead to ten years of punishment and fine up to two lakhs of rupees.

Phishing and Spam

While this has not been mentioned specifically but this can be interpreted in the provisions mentioned here in section 66 A. Through this section sending of menacing, annoying messages and also misleading information about the origin of the message has become punishable with imprisonment up to three years and fine.

Sending of Offensive Messages (S.66A)

The introduction of S.66A to the IT Act, 2000 unarguably expands the scope of the Act to deal with instances of cyber stalking, threat mails, spam and phishing mails, with an attempt to strengthen the law and circumscribe aspects of unlawful cyber conduct that were left untouched under the old legislation, but a few flagrant issues do emerge on closer inspection of the provision.

But, in Shreya Singhal v. Union of India (24.03.2015) Section 66A of the Information Technology Act, 2000 IS STRUCK DOWN IN ITS ENTIRETY BEING VIOLATIVE OF ARTICLE 19(1)(a).

Stolen Computer Resource or Communication Device

Section 66B has been introduced to tackle with acts of dishonestly receiving and retaining any stolen computer resource. This has also been made punishable with three years or fine of one lakh rupees or both.

Misuse of e-Signature (Section 66C)

Dishonest use of somebody else's e-signature has been made punishable with imprisonment which may extend to three years and shall also be liable to fine with may extend to rupees one lakh.

Theft of Computer Resource (S.66B)

S.66B deal with situations where there has been theft of a '*computer resource*' or '*communication device*'. Under this section, an individual who receives a stolen computer, cellphone or any other electronic device maybe imprisoned for up to three years.

Identity Theft and Impersonation (S. 66C and S. 66D)

An examination of identity theft protection laws for internet users indicates that the harm sought to be prevented is not radically different from the territorial crime of the same nature. The basic nature of the crime involves the use of identifying information of someone to represent oneself as the individual for fraudulent purposes, essentially, the wrongful appropriation of one's identity by another.

Voyeurism (S. 66E)

The offence of voyeurism would locate itself under the heading 'content-related offences' and based on the subject of the crime, may be slotted into the category of crimes against individuals, specifically, against their person.

Cyber Terrorism (S.66F)

The convergence of terrorism and cyberspace. Terrorism, by itself is not a new phenomenon, but with the development of modern technologies, the creation of laws specifically dealing with the same or related acts, conducted through the medium of cyberspace, was imminent.

Sexually Explicit Content and Child Pornography (S.67A and S.67B)

Section 67 B attempts to address the issue of child pornography. Through this section it has made the publication or transmission of material in any electronic form which depicts children engaged in sexually explicit act or conduct, anyone who creates, facilitates or records these acts and images punishable with imprisonment of five years and fine which may extend up to ten lakhs in first offence and seven years and fine of ten lakhs on subsequent offence.

Intermediary's Liability

It is mandatory for the Intermediaries to retain any information in the format that Central government prescribes. (Sections 67C) and are punishable for any violation with a punishment of imprisonment of 3 years and fine. In case of any act which affects national sovereignty intermediaries are liable to seven years (Section 69(4).

Cognizance of Cases

All cases, which entail punishment of three years or more, have been made cognizable. Offences with three years punishment have been made bailable (Section 77B).

Investigation of Offences

Inspectors are the investigating officers for offences defined in this Act (section 78).

10.5 THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005

Domestic violence is every body's business. It is a basic human right and must not be left to the victim to find solution alone. It is a community issue and a concerted effort on the part of lawmakers and the public is the only means to address this issue. In almost all over the world in the recent past, there has been persistent and frequent commission of crimes in different shape and size violating their basic right and outraging their dignity and modesty. Domestic violence is a very pervasive, serious social malady and a major health problem. It has been inexistence for a very long time. It bluntly, strips women of their most basic human rights, the right to safety in their homes and community and, carried to the extreme, it may kill. Despite its cost in lives, health, emotional well-being and work productivity and its impact on other socioeconomic variables, domestic violence tended and still tends to be a 'crime of silence'.

Even before birth women suffer from sex selective abortion, at infancy they may face female infanticide, as young children they will have to put up with incest and son preference, as adolescents they may be sexually abused or trafficked, as young women they may suffer rape, sexual harassment, acid attacks; as wives they may experience domestic violence, dowry related violence, marital rape or honour killings, and as widows they may be required to self immolate or be deprived of property and dignity. These are not the only crime against woman but it is a crime which has adverse effect on the family and the society as a whole, and the worst thing is that, in most of these cases the offender is in the close relation with the victim or the family member.

Violence against women has become a global problem. According to United Nations Report, S. M. Jane Connors, Law Lecturer at London School of Oriental and African Studies and author of UN Reports says, "it is a popular misconception that the home is a place of safety, violence in the street does not occur, but the more likely place for it to happen is in the home. The person most likely to perpetrate the assaults is the husband."

Violence against women also takes place in the most intimate of places, the family. Though the family is often a site of nurture and care, it can also be a place where male power is brutally expressed and where women are socialised to accept their inferiority and vulnerability. It is the family that often first teaches women to have negative, disempowering self-images and it is in the family that young men first learn about female subordination.

The United Nations Declaration on the Elimination of Violence Against Women states in its preamble that violence against women is a product of the "unequal power relations" that characterize gender relations in all parts of the world. Economic and social exploitation of women and their labour also contributes to violence against women. Recommendation 19 of Convention on the Elimination of Violence Against Women (CEDAW) and the United Nations Declaration on Violence Against Women calls on States to take immediate steps with regard to ending gender-based violence in the family. The so-called "responsibilities" of due diligence duty as spelled out in international instruments involve:-

a) The duty to pass legislation and other measures that provide a framework for preventing and punishing crimes of violence against women;

b) The duty to enact effective procedures and to train and sensitise the criminal justice system to ensure that they are aware of the issues and that they take violence against women to be a serious issue that demands concerted action. Included in the criminal justice process are the police, prosecutors, judiciary and forensic medical professionals;

c) The duty to provide support services for victims of violence such as shelters, legal and psychological counseling, training in income generating endeavours, etc, with the assistance of NGOs and other civil society organisations;

d) The duty to collect data and conduct research into what is often an invisible phenomenon so as to identify the problems related to violence against women in any given society; and

e) The duty to comply with international obligations and the duty to report to international treaty bodies.

India too has taken positive measures with regard to violence against women. With regard to sex selective abortions, in 1994, India adopted the Pre-Conception and Pre-Natal Diagnostic Techniques Act and this has been amended twice as recently as 2003. Not only this Indian Parliament has enacted Domestic Violence Act, 2005 but also amended various provisions of the Cr. P. C. so as to protect the rights of the women in a better way.

i) Domestic Violence

Domestic Violence may be of various forms and kinds. According to Women's Aid Federation, 'Violence can mean, among other things, threats, intimation, manipulation, isolation, keeping a women without money, locked in, deprived of food, or using (and abusing) her children in

various ways to frighten her or enforce compliance. It can also include systematic and belittling comments.'

Dowry as Domestic Violence

Research in India have treated dowry as a serious threat to conjugal relationship and it was considered as the main factor for family quarrels. Dowry is an age-old institution and dowry giving is a custom in India. Dowry deaths or dowry murder might have been in existence in India ever since dowry system came into being. But the problem captured public attention only in the nineteenth century when wives are burnt alive and statistics on women dying in the families shows that they are the recently married wives than the mother-in-law or sister-in-law. Under the Dowry Prohibition Act, 1961 a demand made for dowry is an offence; it will also be an offence if it is demanded after the marriage. Demand of dowry is prohibited, it is a kind of domestic violence and action can be taken against such an illegal demands.

Sati as Domestic Violence

The voluntary immolation of widow's on the funeral pyres of their husbands is known as sati. It is an act of self-immolation by a widow on the pyre of the death body of her husband. It is manifestation of the barbaric attitude of man in violation of the human rights of a woman. The practice has the social and religious sanctions. A widow's status was looked upon as an unwanted burden that prevented her from participating in the household work. Her touch, her voice, her very appearance was considered unholy, impure and something that was to be shunned and abhorred. A woman was considered pure if she committed Sati. Sati is the violation of the fundamental right envisaged under Article 21 of the Constitution.

Wife Battering

The term battered women will be used to describe women who have experienced physical injurious behavior at the hands of men with whom they once had, or were continuing to have, an intimate relationship i.e., married, cohabitated, separated, or divorced. Wife beating constitute the most unreported crime in the country, police response to this deplorable practice is also far commensurate regarding the seriousness of the crime.

Women are the most frequent victims of inmate partner violence. It affects women in every social and economic stratum; similarly, it may be perpetrated by persons regardless of their economic, education, or professional status. Wife battering was given little recognition in the legal

system, leaving battered women who sought legal protection from abuse with few options. One problem was that of 109 women who reported a total of 32,000 assaults during their marriage, only 517 or less than 2%, were reported to the police. The offence against married women (wife battering) are normally committed within their homes, therefore direct evidence is not available, or even if some complaint has been registered with the police the same was unable to form any charges against the accused persons.

It is very difficult to estimate exactly how frequent a problem of wife battering is. However there is clear evidence that wife battering knows no boundaries. Researchers has found various reasons of violence i.e., the young age of marriage, and young wives and those having no child or a large number of children were at higher risk of being victims of physical violence. A key factor appears to be the employment status of husband, with wife battering more likely in unemployed, as compared to employed men, or in men with low job satisfaction. On of the reasons for wife battering is the lust for dominating position of man in the family.

Outraging the Modesty of a Women

Modesty is defined as the quality of being modest and in relation to woman, "womanly propriety of behavior; scrupulous chastity of thought, speech and conduct." According to Collins Cobuild English dictionary, modesty means "behavior in which you avoid talking your abilities, qualities and shyness or embarrassment, especially when relating to nudity or sex." Modesty is the biggest asset of womanhood. The Indian Penal Code had adequate provision to punish a person if he outrages the modesty of a woman.

Marital Rape

Marital rape is a serious and prevalent form of intimate violence. The legal definition of marital rape varies from one state to the next; however, marital rape is generally defined as unwanted intercourse or penetration (oral, anal, or vaginal) obtained by force or threat of force or when the wife is unable to give consent. Many women who have been raped by their partners have difficulty disclosing their experiences of violence, and if their disclosure is met with disbelief, resistance, or recrimination, women may not chose to disclose again or seek help to end the violence. Rape in marriage is a prevalent and serious problem in contemporary society. While there have been many challenges to the historical existence of a husband's "licence to rape," rape in marriage is still treated as a lesser crime in the majority of laws all over the world.

Violence is an act carried out by the spouse against spouse with an intention of hurting the other. Further the violence has been divided into four types, which includes, withdrawal, psychological, verbal and physical. Withdrawal is as a type of violence designates withdraw from normal interaction with the spouse one resource to such acts with an intention of harming or making the other spouse uneasy e.g., stoppage of normal communication, not eating, crying or growing out of the house and drinking. Psychological violence means mental torture or agony which may be sometimes more damaging for the conjugal relation e.g., humiliation, etc. Verbal violence stands for use of abusive language calling names or even verbal threats of resorting to physical violence. Physical violence stands for the use of physical force with intent to harm or inflict injury on the other person.

Domestic violence includes all types of violence against women including abuse of all kinds: physical, psychological, sexual, economic, emotional and verbal. It includes denial of basic necessity and the additional emotional blackmail where there are children concerned and the threat of dispossession from the matrimonial home. It is generally denying the women her right as an individual. In simple words the denial of basic human needs includes within the definition of domestic violence.

ii) Why we need a separate law on Domestic Violence

There is neither any specific definition of domestic violence nor there is any law which covers the various aspects of domestic violence. There are various laws in India which covers these different kinds of domestic violence like dowry is covered by Dowry Prohibition Act, 1961, the demand for the same and any harassment can led to criminal offence under the Indian Penal Code. Sati is the violation of the fundamental right of the women and there is the same is prohibited under the Commission of Sati Act, 1987. Outraging the modesty of a woman is covered by the Indian Penal Code but there is no specific law for the protection of all these offences because these crimes are committed within the four walls of the home and the offender is the near and dear one of the victim.

Criminalisation of domestic violence in India was brought about in the early 1980s after a sustained campaign by feminist groups and women activists all over the country. The IPC was thus amended in 1983 and Sec 498A was added so as to cover violence within the four walls of the family. The text of Sec 498A was wide enough to apply to other situations of domestic violence. However, it applies only to violence faced by married women at the hands of their husbands or

husband's relatives. Section 304B and section 498A of the IPC, make 'dowry deaths' within seven years of marriage punishable as also cruelty and intimidation within the marital family (this includes the offence of driving a woman to commit suicide). Section 174 of the Criminal Procedure Code provides for all unnatural deaths to be investigated, post-mortems done in most cases and inquests held by an executive magistrate (who is outside the police set-up). But these measures are not adequate for the protection of the rights of the women hence the Domestic Violence Act has been passed by the Parliament.

iii) Object of the Protection of Women from Domestic Violence Act, 2005

Before the enactment of the Domestic Violence Act, 2005, we have different laws for the protection of the rights of the woman, but there are still many offences which are not covered under various provisions of the law hence the aggrieved person can't complain it to anybody because there is no such law which specifically protect their fundamental rights. For the effective protection of the rights of the women which are provided in the Constitution of India there is need to have effective law on the same. Research shows that violence of any kind occurs within the family and by the family members Domestic violence Act aims to protect the rights of the women within the domestic relationship.

The Domestic Violence Act provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto. The Act gives the wide power to the Magistrate for the protection of the rights of the women. The Act widely interprets the definition of domestic violence under section 3 which includes any kind of physical, sexual, verbal and emotional or economic abuse by any person who lives in a domestic relationship with the victim.

iv) Definition of Woman

The Act aims at the protection of the rights of the woman. Section 2(a) defines the term "aggrieved person" which means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent. Under this Act, the person who is residing in the four walls of the home and who is subjected to the violence has been widely elaborated. Not only the legally wedded wife but it also includes any woman who lives in the domestic relationship with the respondent. Section 2(f) defines "domestic relationship" which means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity,

marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.

v) Definition of Domestic Violence

The Protection of Women from Domestic Violence Act, 2005 defines domestic violence as, any act, omission or commission or conduct of any person who is, or has been, in a domestic relationship with the aggrieved person shall constitute domestic violence if s/he causes any harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse,[8] sexual abuse,[9] verbal and emotional abuse[10] and economic abuse;[11] or harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or has the effect of threatening the aggrieved person or any person related to her by any conduct; or otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Domestic violence in India has many aspects: apart from violence between the spouses, there is violence between siblings, between the other cohabits, abuse of children by parents and vice versa. Many researchers believe that child neglect, or a failure to provide for some basic need of a child, is one of the most common forms of child abuse. Domestic violence is all about power relation and the abuse of power in a household. It is perpetrated by one member or members collectively on another to gain control. In India, men commit majority of such crimes, though we

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[8] "Physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force.

[9] "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman.

[10] "verbal and emotional abuse" includes:-

(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

(b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

[11] "economic abuse" includes:-

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

must accept that it is also caused by women on women. In determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration.

Women are in the position somewhat of the slave of old who did not know that he could or ever had to be free and when freedom came, for the movement he felt helpless. Women have been thought to regard themselves as slaves of men. In Ancient India, women enjoyed a very high status in the society. Women were held in great respect; they were honored in the home and respected outside. But with the passage of time men took the dominating position and started dictating upon women.

vi) Analysis of Domestic Violence

Domestic violence is a term, which refers to violence against women especially in matrimonial homes. The most pervasive form of gender violence is abuse of women by intimate male partners. The majority of these women are beaten at least three times a year with many experiencing persistent psychological and sexual abuse as well. Often rape is accompanied by beating and verbal abuse is constantly present. Negligence or failure in performing duties expected of wives or daughters-in-law also lead to violence.

An attempt was made to probe the issue on which the couple had arguments. It was noted that issues related to money matters resulted into arguments between the partners in 50% of the cases understudy. The other issues, which led to arguments, were matters related to child care, drinking behavior pattern, suspicion regarding extra marital relations of the spouse, house keeping and relations with parents-in-law. Hence, one factor cannot be held responsible for such arguments. It is also found that verbal arguments over different issues had resulted into some form of quarrel or fight with their spouses. There is no such exhaustive list over which the couple had arguments but it varies from person to person.

Withdrawal as a form of violence may not be physically harmful to the spouse through psychologically it may be. If one spouse intentionally stops talking to other or starts avoiding his or her company it may be treated as a type of violence. It is expected that wife would be resorting to withdrawal more frequently than husband because these methods are socially accessible to her. Women have been since time immemorial, the subject and the victim of male.

Psychological violence is still another form of violence used in the conjugal relationship. More husbands were found to be indulging in psychological violence against their wives.

Psychological abuse includes intimidation, harassment, damage to property, threats of physical, sexual or psychological abuse, and (in relation to a child) causing or allowing the child to witness the physical, sexual or psychological abuse of another person. The perpetrator may be a woman's husband, boyfriend, partner, lover, cohabitee, ex-partner, or ex-husband, son, father, brother, uncle or other close family members. The victim may still love the perpetrator, hoping that he/she will change.

Husbands to maintain their dominant position would be resorting to verbal violence more as compared to their wives. Verbal assault was in the form of calling names, using foul language, blaming parents of the women for their inability to manage the house efficiently or not attending to the needs of children or other members of the family.

Physical violence as against wives of young age groups, it may be due to the fact that young couples are still learning to make adjustment with each other and addition of children in the family puts enormous demands and stress on the young peoples. Indian women have internalized inferiority to such an extent that some even feel that they deserve to be beaten when they have done something wrong, such as not cooked meals on time or cooked them badly. Women, therefore, accept beatings as part of their subservient role. While physical violence against a woman is an assault on her body, it is also used to negate her integrity and personhood. Husbands perpetrate most such violence against women. Other members of the family may not directly beat the young married woman but may instigate the husbands to do so.

It is very rare for women to experience physical violence which is not accompanied by emotional abuse and threats. The use of intimidating threats of injury, beating up, a broken arm, harm to children, and sexual violence are used by men to exert control. Inadequate payment of dowry and excessive consumption of alcohol by men are often viewed as significant factors accounting for violence against women. Domestic violence was an issue that impacted on most women but one which remained wrapped up in a shroud of silence. Sometimes the shroud was not just metaphorical. Many women were killed, and several others driven to suicide in increasing incidents of domestic violence. Domestic violence is one of the central issues for contemporary women's movement in India. At various moments in the last two decades, it has been understood as dowry-violence, wife-beating and/or a human rights violation.

Newly married adolescent girls have little power and social status in their marital family and are rarely able to negotiate their first pregnancy in arranged marriages. The young girl in the marital

family has the least power, least voice, no capacity to negotiate or influence decisions, including that of delaying pregnancy. Newspapers are full of tales of domestic violence. Violence by intimate family members is one of India's darkest legacies. Fourty per cent of all sexual abuse cases in India are about incest and many such incidents are go unreported.

vii) Domestic Violence as a Human Right Issue

Human rights are fundamental to our very existence and they constitute what might be called 'sacrosanct rights' from which no derogation can be permitted in the civilized society. Domestic violence thus contravenes the Universal Declaration of Human Rights. Article 3 of the Declaration states that, 'Every one has a right to life, liberty and security of persons.' Section 2(d) of the Protection of the Human Rights Act, 1993 defines human rights as the right relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by the Courts in India. Immune from law, domestic violence perpetuates beyond legal boundaries, constantly challenging the Universality of Human Rights i.e., their applicability in all places and domains.

The irony of the situation is not only that the women are incapable to reach the law, but the law has been unable to break the barriers to reach her behind the closed doors of the family. The fact that Domestic Violence is not recognized as a Human Right issue has prevented the search for serious social and legal remedies. The failure to deal with dowry leads to grievous Human Right Violations. This is equally true to violation within the family, which goes legally unaddressed and lead to gross domestic violence and abuse of human rights.

Family violence is a global problem effecting families of all classes and cultures. The term Domestic Violence is most commonly employed to describe the incidents of familial or intimate battering. Violence is an act of aggression that crosses the boundary of other person's autonomy and identity. It is a coercive instrument "to assert ones will over another, to prove or feel a sense of power".

viii) Protection Officers

Section 2(n) defines "Protection Officer" as an officer appointed by the State Government. Section 8 makes provisions for the appointment of Protection Officers in each district. The Protection Officers shall as far as possible be women. The Protection Officer assists the Magistrate and performs other functions as may be necessary for the protection and promotion of the rights of the women under the Act.

Duties of Protection Officer, Police Officers, Service Providers and Magistrate

A police officer, Protection Officer, service provider or Magistrate who has received a complaint of domestic violence or is otherwise present at the place of an incident of domestic violence or when the incident of domestic violence is reported to him, shall inform the aggrieved person of her right to make an application for obtaining a relief by way of a protection order, an order for monetary relief, a custody order, a residence order, a compensation order or more than one such order under this Act; of the availability of services of service providers; of the availability of services of the Protection Officers; of her right to free legal services under the Legal Services Authorities Act, 1987 (39 of 1987); of her right to file a complaint under section 498A of the Indian Penal Code.

Penal provision against Protection Officer

Section 33 provides that if any Protection Officer fails or refuses to discharge his duties as directed by the Magistrate in the protection order without any sufficient cause, he shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both. Section 34 provides that no prosecution or other legal proceeding shall lie against the Protection Officer unless a complaint is filed with the previous sanction of the State Government or an officer authorised by it in this behalf. Section 35 protects the Protection Officer for action taken in good faith. It provides that no suit, prosecution or other legal proceeding shall lie against the Protection Officer for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act or any rule or order made thereunder.

ix) Service Provider

Section 2(r) defines "service provider" as an entity registered with the objective of protecting the rights and interests of women by any lawful means for providing legal aid, medical, financial or other assistance shall register itself with the State Government as a service provider for the purposes of this Act. Section 10(1) defines an entity which can register themselves for the said purposes, these entity includes any voluntary association registered under the Societies Registration Act, 1860 or a company registered under the Companies Act, 1956 or any other law for the time being in force.

Powers of the Service Provider

A service provider shall have the power to-

(i) record the domestic incident report in the prescribed form if the aggrieved person so desires and forward a copy thereof to the Magistrate and the Protection Officer having jurisdiction in the area where the domestic violence took place;

(ii) get the aggrieved person medically examined and forward a copy of the medical report to the Protection Officer and the police station within the local limits of which the domestic violence took place;

(iii) ensure that the aggrieved person is provided shelter in a shelter home, if she so requires and forward a report of the lodging of the aggrieved person in the shelter home to the police station within the local limits of which the domestic violence took place.

Section 10(3) further provides that no suit, prosecution or other legal proceeding shall lie against any service provider or any member of the service provider who is, or who is deemed to be, acting or purporting to act under this Act, for anything which is in good faith done or intended to be done in the exercise of powers or discharge of functions under this Act towards the prevention of the commission of domestic violence.

x) Duties of the Shelter Homes

Section 6 provides the duties of the person in charge of a shelter home. If an aggrieved person or on her behalf a Protection Officer or a service provider requests the person in charge of a shelter home to provide shelter to her, such person in charge of the shelter home shall provide shelter to the aggrieved person in the shelter home.

xi) Duties of a Medical Officer

Section 7 provides the duties of the person in charge of medical facilities. If an aggrieved person or, on her behalf a Protection Officer or a service provider requests the person in charge of a medical facility to provide any medical aid to her, such person in charge of the medical facility shall provide medical aid to the aggrieved person in the medical facility.

xii) Women's Rights under the Domestic Violence Act

Right to Claim Compensation

The woman who is aggrieved by the act of the respondent can move an application to the Magistrate seeking one or more reliefs under the Domestic Violence Act. The relief sought for may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent.

Residential Rights

Section 17 envisages that every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same. It further envisages that the aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent.

Right to live in a Violence free Environment

The Domestic Violence Act provides that it is the right of the woman who lives in the domestic relationship to live in a violence free environment; if her right is violated she has the right to claim that by making an application under various provisions of the Act.

Right over Stridhan or any Valuable Security

Stri, i.e., woman, and *dhan* i.e., property. *Stridhan* means woman's property. The woman has the right over her stridhan but if the same was in possession of any other person she can claim the same by making an application for seeking the possession of the same. On receiving an application the Magistrate may direct the respondent to return to the possession of the aggrieved person her stridhan or any other property or valuable security to which she is entitled to.

Right to claim Monetary Expenses

The woman has the right to claim monetary relief to meet the expenses incurred and losses suffered by her. There is no such limit but the monetary claim includes:-

(i) the loss of earnings;

(ii) the medical expenses;

(iii) the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and

(iv) the maintenance for herself as well as her children.

The monetary relief granted under section 20 shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed. The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require.

Right to claim Damages

The woman has the right to claim damages from the respondent. The Magistrate may on an application being made by the aggrieved person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by that respondent.

xiii) Procedure to be followed by the Magistrate

When an application under the Act has been received by the Magistrate, he shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider. The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the court. The Magistrate shall endeavour to dispose of every application made for seeking relief within a period of sixty days from the date of its first hearing.

A notice of the date of hearing fixed shall be given by the Magistrate to the Protection Officer, who shall get it served by such means as may be prescribed on the respondent, and on any other person, as directed by the Magistrate within a maximum period of two days or such further reasonable time as may be allowed by the Magistrate from the date of its receipt. A declaration of service of notice made by the Protection Officer in such form as may be prescribed shall be the proof that such notice was served upon the respondent and on any other person as directed by the Magistrate unless the contrary is proved.

Under section 14 of the Act, the Magistrate may direct aggrieved person or the respondent to undergo counseling. Section 15 further provides that the Magistrate may secure the services of such person, preferably a woman, whether related to the aggrieved person or not, including a person

engaged in promoting family welfare as he thinks fit, for the purpose of assisting him in discharging his functions. The Magistrate may direct the proceedings to be in camera, if either party to the proceedings so desires.

xiv) Duties of the Government

Section 11 provides that the Central Government and every State Government, shall take all measures to ensure that-

(i) the provisions of this Act are given wide publicity through public media including the television, radio and the print media at regular intervals;

(ii) the Central Government and State Government officers including the police officers and the members of the judicial services are given periodic sensitization and awareness training on the issues addressed by this Act;

(iii) effective co-ordination between the services provided by concerned Ministries and Departments dealing with law, home affairs including law and order, health and human resources to address issues of domestic violence is established and periodical review of the same is conducted;

(iv) protocols for the various Ministries concerned with the delivery of services to women under this Act including the courts are prepared and put in place.

xv) Powers of the Central Government to make Rules

The Central Government may, by notification, make rules for carrying out the provisions of this Act. Such rules may provide for all or any of the following matters:-

a) the qualifications and experience which a Protection Officer;

b) the terms and conditions of service of the Protection Officers and the other officers subordinate to them;

c) the form and manner in which a domestic incident report may be made;

d) the form and the manner in which an application for protection order may be made to the Magistrate;

e) the form in which a complaint;

f) the other duties to be performed by the Protection Officer;

g) the rules regulating registration of service providers;

h) the form in which an application for seeking reliefs under this Act may be made and the particulars which such application shall contain;

i) the means of serving notices;

j) the form of declaration of service of notice to be made by the Protection Officer;

k) the qualifications and experience in counselling which a member of the service provider shall possess;

l) the form in which an affidavit may be filed by the aggrieved person;

m) any other matter which has to be, or may be, prescribed.

Every rule made under this Act shall be laid before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be. However, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

xvi) Remedies available to a Woman

Payment of Compensation or Damages

The aggrieved woman can sought a relief in the form of compensation or damages for the loss occur to her by the acts of domestic violence committed by the respondent.

Right to reside in a shared household

Every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same. The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.

Protection from Domestic Violence

Section 18 contemplates that after hearing aggrieved person and the respondent, on being satisfied that domestic violence has taken place or is likely to take place, the Magistrate has to pass a

protection order in favour of the aggrieved person and prohibit the respondent from committing any act of domestic violence.

Restraining respondent from entering in Share Household

The Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order under section 19(1):-

(a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;

(b) directing the respondent to remove himself from the shared household;

(c) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides.

Injunction from Alienating Property

The Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order restraining the respondent from alienating or disposing off the shared household or encumbering the same or restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate.

Implementation of orders

The Magistrate may impose on the respondent obligations relating to the discharge of rent and other payments, having regard to the financial needs and resources of the parties. The Magistrate may direct the officer in-charge of the police station in whose jurisdiction the Magistrate has been approached to assist in the implementation of the protection order.

Possession of Stridhan or other Valuable Security

The Magistrate may direct the respondent to return to the possession of the aggrieved person her stridhan or any other property or valuable security to which she is entitled to.

Monetary Reliefs

The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require. The respondent shall pay the monetary relief granted to the aggrieved person within the period specified in the order. Upon the failure on the part of the respondent to make payment in terms of the order the Magistrate

may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person or to deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent.

Custody of Children's

The Magistrate may, at any stage of hearing of the application for protection order or for any other relief under this Act grant temporary custody of any child or children to the aggrieved person or the person making an application on her behalf. The Magistrate may also specify the arrangements for visit of such child or children by the respondent, but if the Magistrate is of the opinion that any visit of the respondent may be harmful to the interests of the child or children, the Magistrate shall refuse to allow such visit.

Damages

The Magistrate may on an application being made by the aggrieved person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by that respondent.

Interim and Ex-parte Orders

The Magistrate may pass such interim order as he deems just and proper. If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit of the aggrieved person.

Alteration, Modification or Revocation of Orders

A protection order made shall be in force till the aggrieved person applies for discharge. If the Magistrate, on receipt of an application from the aggrieved person or the respondent, is satisfied that there is a change in the circumstances requiring alteration, modification or revocation of any order made under this Act, he may, for reasons to be recorded in writing pass such order, as he may deem appropriate.

xvii) Effective Remedies

The Protection Officers and members of service providers, while acting or purporting to act in pursuance of any of the provisions of this Act or any rules or orders made thereunder shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code (45 of

1860). A breach of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

xviii) Impact of Domestic Violence on Children

Exposure to domestic violence may include children witnessing actual incidents of violence between parents or parent figures or seeing the aftermath of an incident such as a parent's arrest, injures, or emotional distress. Children may feel responsible for "causing" the fight, especially when a domestic violence incident appears to begin with a dispute over disciplining the child, money for children's needs, or other child-related issues. Children exposed to domestic violence may show more aggressive behavior in their school and community. They may display depression, anxiety, fears, phobias, insomnia, tics, bed-wettings, and low self-esteem. In school, problems with impaired ability to concentrate and difficulty with schoolwork can occur, as well as lower overall achievement. Children exposed to domestic violence are likely to do more poorly when uprooted from their homes and separated from their family members and have to experience the sight of their mothers responding poorly under conditions of great stress. There is over all negative impact of domestic violence on the children. It not only hurdles the growth but it also effects the overall development of the child.

xix) **Recommendations of the Ministry of Women and Child Development, Government of India for the Implementation of the Protection of Women from Domestic Violence Act, 2005**

The National Commission for Women along with the Lawyers Collective, organized workshops at Mumbai, Bangalore, Chandigarh, Kolkota, North East and Jaipur with respect to stocktaking of the State Governments' action regarding the Implementation of the Protection of Women from Domestic Violence Act. The recommendations of the Ministry of Women and Child Development, Government of India for the Implementation of the Protection of Women from Domestic Violence Act, 2005 are:-

(i) A separate support system consisting of exclusive Protection Officers (POs) should be set up for the implementation of the Protection of Women from Domestic Violence Act, so as to be able to achieve the ends of justice expeditiously. This set up could also help to implement other acts such as the Dowry Prohibition Act, as cases filed generally involve more than one

legislation. The police Crimes Against Women (CAW) cells could be activated for the purpose and the **Andhra Model** could be followed.

(ii) NGOs could be considered as Protection Officers and paid honorarium for the task being performed by them subject to basic minimum facilities such as office, transport, staff, etc.

(iii) There should be one Protection Officers for each taluka equipped with adequate office space, machinery and staff and the feasibility of every panchayat having a women justice committee could be considered.

(iv) Accessibility of Protection Officers - The office of Protection Officers should be in a centrally located place which is easily accessible. The address, phone number of the Protection Officers should be widely publicized and put up in public places.

(v) The services have to be accessible to women in remote areas.

(vi) A directory of facilities of Government and Government aided services across different geographical regions should be prepared.

(vii) Criteria for selection of Service Providers (SPs) must include NGOs who have adequate infrastructure such as shelter homes, medical care facilities, etc.

(viii) The forms under the Act have not been provided to the Service Providers; translation of forms must also be undertaken.

(ix) Provision for honorarium to counselors.

(x) Alternate Dispute Resolution could play an important role in the implementation of the Protection of Women from Domestic Violence Act, 2005 Act.

(xi) The law is also silent as to evidentiary value, which is to be attached to the reports given by the Protection Officers or their mode of proof. Laws such as Land Acquisition Act, the sale deed is read as evidence. The report of Protection Officers should have evidentiary value.

10.6 INDIAN FOREST ACT 1927

Constitutional Provisions to conserve environment including forests and wildlife

Article 48-A, Part IV of the Directive Principles

"The state shall Endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.

Article 51-A (g) Fundamental Duty

"To protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures"

The Indian Forest Act 1927 governs the country's forests, forest produce and its transit. Most state government has a forest act that adopts or reflects the basics of the Indian forest act. The act primarily deals with reservation of forests, forest produce such as timber and non-timber forest produce in transit and the duty leviable. During pre-independence period the forests were looked as economic resource. The same was followed in post -independence period also for some time till 1980.Then the forest governance changed into Conservation era till 1990 further into Joint forest management which eventually led into the sharing the benefits of forests with the local communities.

The definition forest is nowhere mentioned in this Act or any other act. The Hon'ble Supreme court of India in its judgment in WP 202/1995 dated 12.12.1996 held that the word "forest" must be understood according to the dictionary meaning.

The definition of forest produce is given in section 2 of the act as follows:

"**Forest Produce**" includes-

a. The following whether found in, or brought from, a forest or not, that is to say timber, charcoal, caoutchouc, catechu, wood-oil, resin, natural varnish, bark, lac, mahua flowers, mahua seeds, kuth and myrobolans and
b. The following when found in, brought from a forest, that is to say

i) trees and leaves, flowers and fruits, and all other parts or produce not herein before mentioned, of trees

ii) plants not being trees(including grass, creepers, reeds, and moss) and all parts or produce of such plants

iii) wild animals and skins, tusks, horns, bones, silk, cocoons, honey and wax, and all other parts or produce of animals and

iv) peat, surface soil, rock and minerals(including lime-stone, laterite, mineral oils and all products of mines and quarries

"Timber "includes tress, when they have fallen or have been felled and all wood whether cutup or fashioned or hollowed out for any purpose or not and

"Tree" includes palms, bamboos, stumps, brushwood and canes.

"Forest Offence" means an offence punishable under this act or any rule made thereunder;

Constitution of Reserve forests

Section 3 empowers the state government to reserve forests by constituting any forest land or waste land which is property of government or which the government has proprietary rights. Whenever it has been decided to constitute any land as reserve forest, the state government issues a notification in official gazette under section 4 of the act about the government's decision to constitute such reserve forests with limitations and appoints a forest settlement officer. The forest settlement officers are not forest officers. They are revenue officers not below the rank of SDM/RDO etc.

Once, after the notification is issued under section 4, there is a bar of accrual of forest rights and the forest settlement officer shall follow the due process of settling the rights with the right holders the state government shall issue the notification of declaration of reserved forests in its official gazette. For the purpose of settling the rights the forest settlement officer has been conferred with the power of civil courts and also powers of Collector to acquire the rights over any land as per the Land acquisition Act 1894.

Acts prohibited in reserved forests

The following acts are prohibited inside the reserved forests unless permitted by the competent authority.

Fresh clearing, setting up or kindling of the fire, trespasses or pasturing cattle or allowing cattle to trespass, causing any damage by felling any tree or cutting and dragging any timber, felling, girdling, lopping or burning any tree or striping the bark or leaves, quarrying the stone or burning of lime stone, charcoal or removal of any forest produce, clearing and breaking up any land for cultivation or for any other purpose, hunting, shooting, fishing, poisoning the water, setting trap and snares and killing the elephants.

The above acts are punishable with imprisonment for a term which extends to six months or with fine which extend to five hundred rupees or with both, in addition to the compensation for damage done to the forest.

Power to arrest without warrant

Any Forest officer or Police officer without orders from the magistrate and without a warrant arrest any person against who reasonable suspicion exists of his having been concerned in any forest offence punishable with imprisonment for one month or upwards.

Seizure of property liable to confiscation

When a forest offence has been committed in respect of any forest produce, the forest produce along with the produce the tools, boats, carts, vehicle and animals involved in committing the offence may be seized by any forest or police officer.

All timber or forest produce which is not the property of the government involved in a forest offence and tools, boats, carts, vehicles and animals involved is liable to confiscation.

The confiscation proceeding is a quasi-judicial one and confiscation orders passed by the authorized officer is in addition to the punishment prescribed for such offence.

Power to Compound forest offence

Generally, the forest offences are compoundable except wrongful seizure, counterfeiting or defacing the trees and timbers and altering the forest boundary which is punishable with imprisonment which extends to 2 years or fine or with both. Whenever such forest offences are compounded, the property seized liable to confiscation is released on payment of value estimated by the forest officer. Forest officers not below the rank of Ranger are empowered to compound the forest offences.

10.7 THE SOCIETIES REGISTRATION ACT, 1860

The purpose of the Societies Registration Act is to provide for registration of literary, scientific and charitable societies. The Act is of importance for administrators as it deals with the registration of non- governmental organisations and societies making important contributions to the philanthropic effort in the community. The growth of NGOs in India has been phenomenal in the last decade and they are raising issues such as Welfare and Development of Children, Youth, Girls, Women, Old Age persons, Persons with disability, Child Rights, Women Empowerment, Education, Health, Natural Resource Management, Agriculture Development, Development of Art, Craft and Culture, Protection and Conservation of Heritage, Traditional and Historical Places, Research and Development, Environment Conservation and Protection, Human Rights etc.

The Societies Registration Act is a central legislation. The matters related to the Societies Registration Act are within the domain of the Ministry of Corporate Affairs of the Government of India for the purpose of monitoring. Many States have also enacted their own legislations for the registration of societies they are:-

The Jammu and Kashmir Societies Registration Act, 1998

The Andhra Pradesh Societies Registration Act, 2001

The Karnataka Societies Registration Act, 1960

The Manipur Societies Registration Act, 1989

The Mizoram Societies Registration Act, 2005

The Societies Registration Act, 1860 (Gujarat, Kerala, Maharashtra, Tamil Nadu, UP)

The Haryana Registration and Regulation of Societies Act, 2012

The Karnataka Societies Registration Act, 1960

The Tamil Nadu Societies Registration Act, 1975

The West Bengal Societies Registration Act, 1961

The Travancore-cochin Literary, Scientific and Charitable Societies Registration Act, 1955

Provisions of the Societies Registration Act

The Act lays down a system for how, when and where the societies can be registered. It lays down requirement for memorandum of association, registration fees, governing body, bye laws, annual list of managing body to be filed by societies, vesting of property of society, suits by and against societies, how societies can alter, extend or abridge their purposes and for dissolution of societies and adjustment of their affairs.

Societies that may be Registered under the Act

As per Section 20 the following societies may be registered under this Act:

Charitable societies, the military orphan funds or societies established at the several presidencies of India, societies established for the promotion of science, literature, or the fine arts, for Instruction, the diffusion of useful knowledge, the diffusion of political education, the foundation or maintenance of libraries or reading-rooms for general use among the members or open to the public, or public museums and galleries of paintings and ether works of art, collections of natural history, mechanical and philosophical inventions, instruments, or designs.

How a society can be formed and registered?

As per section 1 of the Act seven or more persons associated for any literary, scientific, or charitable purpose, or for any such purpose as is described in section 20 of this Act, may, by subscribing their names to a memorandum of association, and filing the same with Registrar of Joint-stock Companies form themselves into a society under this Act.

There is a separate central legislation for registration of cooperative societies, namely the Co-operative Societies Act, 1912, wherein there is a requirement of atleast ten members apart from other requirements for a cooperative society. There is a Registrar of Cooperative Societies appointed under that Act. The two legislations are separate and their scope should not be confused.

Memorandum of Association

Memorandum of association is comprised of the following things-

i) the name of society;

ii) the object of the society;

iii) the names, addresses, and occupations of the governors, council, directors, committee, or other governing body to whom, by the rules of the society, the management of its affairs is entrusted.

A copy of the rules and regulations of the society should be filed with the memorandum of association.

Society as a separate Legal Entity

The society shall have a name and its property, whether movable or immovable, shall, if not vested in trustees, be deemed to be vested in the governing body of the society. The society may sue or be sued in the name of the president, chairman or principal secretary or trustees, as may be determined by the society, and the execution of a decree obtained against the society shall be levied only against the property of the society. The annual list of managing body is to be filed after the Annual General Meeting and in case of no such Annual General Meeting (if the rules not provide Annual General Meeting) than in the month of January the list of managing body needs to be filed with the Registrar of Joint Stock Companies.

Any pecuniary penalty imposed by a bye-law for breach of that bye-law may be recovered by the society from a member, and any member who is, *inter alia*, in arrears with his subscriptions, or who is wrongfully in possession of the society's property or who steals, embezzles or wilfully damages that property, may be sued by the society as though he were a stranger.

Power to frame Rules/Regulations

Section 12 of the Societies Registration Act, 1860 invests a society with the power to frame rules/Regulations to govern the body of any society under the Act, which has been established for any particular purpose or purposes and the authority to alter or abridge such power.

Non-abatement of Suits or Proceedings

Section7 provides for non-abatement of suits or proceedings and the continuance of such suits or proceedings in the name of or against the successor of the person by or against whom the suit was brought. Section 8 says that if a judgment is recovered against a person or officer named on behalf of the society, such judgment shall not be put in force against the property, movable or immovable, or against the body of such person or officer, but against the property of the society.

Section 10 provides that in certain circumstances mentioned therein a member of the society may be sued by the society; but if the defendant shall be successful in any such suit brought at the instance of the society and shall be adjudged to recover his costs, he may elect to proceed to recover the same from the officer in whose name the suit was brought, or from the society. Sections 13 and14 provide for dissolution of societies and the consequences of such dissolution.

Dissolution of Society

Provision is also made in the Act for the dissolution of the society and the adjustment of its affairs. Any number not less than three-fifths of the members of any society may determine that it shall be dissolved, and thereupon it shall be dissolved forthwith, or at the time then agreed upon, and all necessary steps shall be taken for the disposal and settlement of the property of the society, its claims and liabilities, according to the rules of the said society applicable thereto, if any, and, if not then as the governing body shall find expedient, provided that, in the event of any dispute arising among the said governing body or the members of the society, the adjustment of its affairs shall be referred to the principal court of Original civil jurisdiction of the district in which the chief building of the society is situate, and the Court shall make such order in the matter as it shall deem requisite:

> Provided that no society shall be dissolved unless three-fifths of the members shall have expressed a wish for such dissolution by their votes delivered in person, or by proxy, at a general meeting convened for the purpose:
>
> Provided that whenever any Government is a member of, or a contributor to, or otherwise interested in any society registered under this Act, such society shall not be dissolved, without the consent of the Government of the State of registration.

Expulsion of Member

Section 15 does not postulate expulsion of any member from the membership of the Society. All that it postulates, is that a member once admitted to membership, shall continue to be a member of the Society. It also postulates that a person whose .subscription is in arrears for a period exceeding three months, shall not be entitled to vote or to be counted as a member.

Governing Body

Under s. 16 the governing body shall be the governors, council, directors, committee, trustees or other body to whom by the rules and regulations of the society the management of its affairs is entrusted.

Registration of the Societies formed before Act

Section 17 of the Act provides that even in case of societies which were established before the Act came into force assent of three-fifths of its members has got to be given for purpose of its being registered under the Act This would show that there is an insistence on the part of the legislature on a majority of three-fifths in respect of all fundamental changes with regard to a society. These provisions, it appears to us, have been framed for public benefit and it is obvious that their contravention is likely to endanger public interest.

Section 18 provides that if any society which was established before the Act came into existence wants to get, registered it must file with the Registrar of Joint stock Companies a memorandum showing the name of the society, the object of the society and the names, addresses and occupations of the governing body together with a copy of the rules and regulations of the society certified as provided in Section 2 and a copy of the report of the proceedings of the general meeting at which the registration was resolved on.

Inspection of Records and for obtaining Certified Copy

Section 19 of the Act provides that any person may apply for inspection and for obtaining certified copy of the records of any society which may be filed with the Registrar, duly certified by the Registrar. It does not confine to the documents registered with the Registrar which clearly implies that all documents available with the Registrar whether registered or not and merely filed can be inspected and certified copies obtained thereof.

10.8 THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

As per the rights available to children, they have the right to protection from abuse, neglect, exploitation and discrimination. Children shall be protected against all forms of neglect, cruelty and exploitation. They shall not be the subject of traffic, in any form. The governments must protect children from sexual abuse and exploitation. Sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.

The Government of India acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State parties. Moreover, the State parties to the Convention on the Rights of the Child are required to undertake all appropriate national, bilateral and multilateral measures to prevent-

a. the inducement or coercion of a child to engage in any unlawful sexual activity;

b. the exploitative use of children in prostitution or other unlawful sexual practices;

c. the exploitative use of children in pornographic performances and materials.

Hence the Parliament enacted the Protection of Children from Sexual Offences Act in 2012, extending it to the whole of India, except the State of Jammu and Kashmir.

It is an Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of special courts for trial of such offences and for matters connected therewith or incidental thereto. Keeping in view that it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child, certain procedures have been incorporated in the Act to protect the child during such trials.

The Act defines sexual offences against children and lays down punishment thereof.

These offences include:- sexual assault, penetrative sexual assault, aggravated penetrative sexual assault, sexual harassment, using child for pornographic purposes and storage of pornographic material involving child.

Reporting of offences

Section19 lays down the procedure for reporting offences:

1. Any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to:

    a. The Special Juvenile Police Unit, or

    b. The local police.

2. Every such report shall be:

    a. Ascribed an entry number and recorded in writing;

    b. Be read over to the informant;

    c. Shall be entered in a book to be kept by the Police Unit.

3. Where the report is given by a child, the same shall be recorded in a simple language so that the child understands contents being recorded.

4. In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, shall be provided to the child if he fails to understand the same.

5. Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection (including admitting the child into shelter home or to the nearest hospital) within twenty-four hours of the report, as may be prescribed.

6. The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

An obligation is also imposed on media, studio and photographic facilities to report cases under Section 20:

Any personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities, shall, on coming across any material or object which is sexually exploitative of the child (including pornographic, sexually-related or making obscene representation of a child or

children) through the use of any medium, shall provide such information to the Special Juvenile Police Unit or to the local police, as the case may be.

Section 21 days down provision for punishment for failure to report or record a case. The punishment prescribed is imprisonment upto six months or fine or both.

Provision for punishments under the Act

Sexual assault shall be punished with imprisonment for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine. The quantum of punishment prescribed increases with severity of sexual assault. Therefore, whoever commits penetrative sexual assault shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine. For aggravated penetrative sexual assault punishment shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.

Punishments under the Act

Sexual harassment upon a child shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

Whoever, uses a child or children for pornographic purposes shall be punished with imprisonment of either description which may extend to five years and shall also be liable to fine and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also be liable to fine.

Punishment for storage of pornographic material involving child: Any person, who stores, for commercial purposes any pornographic material in any form involving a child shall be punished with imprisonment of either description which may extend to three years or with fine or with both.

Punishments for abetment and attempt are provided for in the Act: Whoever abets any offence under this Act, if the act abetted is committed in consequence of the abetment, shall be punished with punishment provided for that offence. Whoever attempts to commit any offence punishable under this Act or to cause such an offence to be committed, and in such attempt, does any act towards the commission of the offence, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one half of the imprisonment for life or,

as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both.

System of Special Courts and Special Public Prosecutors

For the purposes of providing a speedy trial, the State Government shall in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, designate for each district, a Court of Session to be a Special Court to try the offences under the Act under Section 28 of the Act.

The State Government shall, as per section 32 of the Act, appoint a Special Public Prosecutor for every Special Court for conducting cases only under the provisions of this Act.

Section 33 lays down the procedure and powers of special court. A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts. The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial. The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court. The Special Court shall ensure that the child is not called repeatedly to testify in the court. The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial. The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial. (Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.)

In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court. The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence.

The Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate. If required, the Special Court may record the statement of a child through video conferencing or by utilising single visibility mirrors or curtains or any other device.

The Special Court shall try cases in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence.

The State Government shall prepare guidelines for use of non-governmental organisations, professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and child development to be associated with the pre-trial and trial stage to assist the child.

The family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice for any offence under this Act. Provided that if the family or the guardians of the child are unable to afford a legal counsel, the Legal Services Authority shall provide a lawyer to them.

Presumption as to certain offences (Section 29)

Where a person is prosecuted for committing or abetting or attenuating to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

Presumption of culpable mental state (Section 30)

In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Public Awareness

As per section 43 of the Act, the Central Government and every State Government, shall take all measures to ensure that the provisions of this Act are given wide publicity through media including the television, radio and the print media at regular intervals to make the general public, children as well as their parents and guardians aware of the provisions of this Act. The officers of the Central Government and the State Governments and other concerned persons should be imparted periodic training on the matters relating to the implementation of the provisions of the Act.

Monitoring of implementation of the Act

The Act provides a mechanism for monitoring implementation under section 44 .The National Commission for Protection of Child Rights or as the case may be, the State Commission for Protection of Child Rights constituted under the Commissions for Protection of Child Rights Act, 2005, shall, in addition to the functions assigned to them under that Act, also monitor the implementation of the provisions of this Act in such manner as may be prescribed.

10.9 INTELLECTUAL PROPERTY RIGHTS

The term 'Intellectual property' refers to unique, value-adding creations of the human intellect those results from the human ingenuity, creativity and inventiveness. An intellectual property right is thus a legal right, which is based on the relevant national law encompassing that particular type of intellectual property rights. Such a legal right comes into existence only when the requirements of the relevant intellectual property law are met. It is granted or registered after following the prescribed procedure under the law.

Intellectual property was known as Vidyaa which means a property, which has been invented or make known, to spread with Gurukuls, which were established throughout India. This sages invented effective and forceful weapon, which they give to their disciples free of cost, for instance, Lord Ram was given divine weapons by *Vishwamitra*. Those sages invented scriptural trusts like Upanishads, which they imparted to the world for no costs. Even in the Middle Ages, the Sanskrit poets created their works for the development of the language itself, such as *Kalidas*, the Great poet, dedicated his drama *Abhigyan Shakuntalam*, for the mere purpose "*Saraswati Struti Mahatee Mahityam*". The Great Hindi Poet Tulsi Das wrote "*Ramcharit Manas*" for his soul's enjoyment and not for money or property. They did not ask for any money or other benefit for their Great works. *Vidyaa* (new knowledge) was unsaleable but transferable without any cost therefor. It was supposed to be a sin to the knowledge. Even in modern India up to nineteenth century authors of Sanskrit works, the *Acharyas* gave their manuscripts to the publishers simply for their publication without charging any amount or retaining any copyright.

In *Comm. Hindu Religious Endowment* v. *Swamiar AIR 1954 SC 282,* it was held by the Supreme Court that the word "property" as used in the Article 31 of the Indian Constitution, should be a liberal meaning and should be extended to all those well recognized type of interest which has the insignia or characteristic of property right. It includes both corporeal and incorporeal right. Article 300-A of the Indian Constitution provides that "no person shall be deprived of his property save by authority of law". In *Jilubhai Nanbhai Khachar* v. *State of Gujarat AIR 1995 SC 142,* it was held by the Supreme Court that the right the right to property granted by Article 300-A is a Constitutional right.

Patent Laws

The earliest of the legislation for the protection of intellectual property rights was in the area of Patents. In 1474 the Venetian Senate voted the first Ordinance in patents. Thus it can be seen that the patent system has evolved over 500 years. **Patent is a statutory right, which is provided to the owner for a fixed period of time, to exclude other persons from manufacturing, using, selling a patented product or utilize the patented process or method.** According to Section 2(m) of The Patents Act, 1970, "Patent" means a patent for any invention granted under this Act.

The object of patent Law is to encourage the scientific research, new technology and industrial progress. Grant of exclusive privilege to own, use or sell the method or the product patented for a limited period stimulates new invention of commercial utilization. The price of the grant of the monopoly is the discloser of the invention at the Patent office, which after the expiry of the fixed period of the monopoly, passes into the public domain.

The need for the comprehensive Law is to ensure more effectively that patent rights are not worked to the detriment of the consumer or to the prejudice of the trade. In the year 1872, the Patent and Designs Protection Act was enacted, and in the year 1883 the Protection of Inventions Act was enacted. In the year 1888 both the Act were consolidated as the Inventions and Designs Act. In 1911 the Indian Patent and Design Act was came into force. After independence the national government decided to change the colonial Patent Act as amended in 1911.The industrial development of the country was felt as early as in the year 1948 and that year the Government appointed the Patents Enquiry Committee to review the working of the patents law in India. The Committee submitted its final report in 1950. The Patent Bill, 1953, based largely on the United Kingdom Patent Act, 1949 and incorporating some of the recommendations of the Committee was introduced in the Lok Sabha on 7th December 1953. The Bill, however, lapsed on the dissolution of the First Lok Sabha.

In 1957 the Government of India appointed Justice N. Rajagopala Ayyanagar to examine afresh and review the Patents Law in India and advise the Government on changes necessary. The Judge submitted a comprehensive Report on Patents Law Revision in September 1959. The Patents Bill, 1965, based mainly on the

recommendations contained in his detailed report and incorporating a few more changes in the light of further examination made particularly with reference to patents for food, drugs and medicines, was introduced in the Lok Sabha on 21st Sepetember, 1965. The Bill was referred on 25th November 1965 to a Joint Committee of Parliament. The Joint Committee, after considering of the matter, adopted a number of Amendments to the Bill. The Report of the Joint Committee with the Amended Bill was presented to the Lok Sabha on 1st November 1966. The Patent Bill, 1965, as reported by the Joint Committee was formally moved in the Lok Sabha on 5th December, 1966, but could not be proceeded with for want of time and eventually lapsed with the dissolution of the Third Lok Sabha on 3rd March, 1967. The study made by two committees headed by Justice Bakshi Tek Chand and Justice N. Rajagopala Ayyenger led to the emergence of the new Patent Act. The Patent Act (Act 39 of 1970) came into force on 20th April 1972, which was later amended in the year 1999, 2002, and in the year 2005.

Trade Marks

Trademark is intended to protect companies investment in the "goodwill" they have development in their name or mark and protect consumer from confusion. Around 2000 B.C. Egyptians branded livestock in the earliest found proof of existence of trademark. In 600 B.C. the Babylonian merchants placed signs outside their shops to designate activities and distinguish their goods from other merchants. In 300 B.C. the Roman merchants used symbols to specify the manufacturer or seller of products such as pottery. In Medieval Ages, sword and Armour bore marks of their manufacturers so as to trace their origin. Between 1200 -1600 abbeys and monasteries across Europe begin attaching brands to beers and liqueurs they produce as a guarantee of origin and quality. The first trademark to be registered in U.K. was in 1876.

Trademark has been defined as any signs, or any combination of signs capable of distinguishing the goods or services of one undertaking from those of other undertaking. Such distinguishing marks constitute protectable subject matter under the provisions of the TRIPS Agreement. The agreement provides that initial registration and each renewal or registration shall be for a term of not less then seven years and the registration shall be renewable indefinitely. The Trade and Merchandise Marks Act, 1958 for the first time codified the Law relating to trade mark and provided for the registration of the trademarks already in use and even those proposed to be used.

Since 1958 it has been amended several times. In view of the development in trading and commercial practice, increasing globalization of trade and industry, the need to encourage investment flows and transfer of technology and the need to simplify and harmonize trademark management system, it has been considered by the Parliament that it is necessary to bring out a comprehensive Legislation on the subject. Accordingly the Trade Marks Act, 1999 was passed to replace the Act of 1958.

The most significant development in the trademark law is the coming into force of the Trademark Act, 1999. The Act came into force on the 15th September 2003. This will enable service marks and collective marks to be protected under the law in addition to the improved protection for the well-known marks. The object of the Trade Mark Act, 1999 is to provide for the registration, better protection of Trade Mark for the goods or services; and the prevention of the use of fraudulent marks on the goods and service.

Trademark can be a word, slogan, design, picture, or any other symbol, which is used to identify and distinguish goods with a view to indicate to the consumers that they are goods manufactured or otherwise dealt in by a particular person or particular organization as distinguished from similar goods manufactured or dealt in by others. It may be a symbol, including a work, design, or shape of a product or container, which qualifies for legal status as a trademark, service mark or trade name. It is a peculiar distinguishing mark or device affixed by a manufacturer or a merchant on his goods. The important function of the trademark is to identify one seller's goods from others so as to distinguish one merchant's goods from the others. It indicates the source of origin of the goods and of particular quality as desired by the customers it helps the holder to advertise and promote in selling the goods and also provide protection to the owner of the mark by ensuring the exclusive right to use it to identify goods and services, or to authorize another to use it in return for payment. The period of the protection of the trademark varies, but a Trademark can be renewed indefinitely beyond the time limit on the payment of additional fees.

The owner of the Trademark does not have to register with his trademark for using it; hence, a trademark can be legally used even without registration. However, registration of trademark gives certain additional rights, which are not available to one

who is an unregistered trademark owner. Registration gives the owner, the right to sue the trademark infringer (*which is available to the unregistered user under the common law provisions of "passing off").* The best marks are the invented, non-descriptive distinctive words. Marks, which are purely descriptive words or laudatory expressions, do not form formidable trademark thus, it is advisable that in choosing a trademark, one should avoid words, which are directly descriptive of the goods, common surnames or geographical names. Hence, the best trademarks are the words, which are invented.

Copyrights

The origin of Copyright itself is to protect the commercial interests of the publishers. After printing was invented, a printer or publishing entrepreneur entered the risk of investing on printing such creative idea. These entrepreneurs were considered to be the forefathers of present publishers. They were first to propose to acquire the exclusive copyrights over such ideas and printable creativity. The stationers first support from the Crown. In 1534 they secured protection against the import of foreign books and in1556, the Queen gave power to the stationer through a charter, to destroy the books printed in contravention of statute or proclamation. Thus a licensing system was introduced. Ultimately it evolved into legislation providing and protecting copyright in 1709. 'Copyright' is the term we use for the bundle of exclusive rights, which the laws of most countries confer on authors to exploit the works, which they create. In ancient days creative persons like artists, musicians and writers made, composed or wrote their works for fame and recognition rather than to earn a living thus, the question of Copyright never arose.

The importance of the copyright was recognized only after the invention of the printing press, which enabled the reproduction of books in large quantity practicable. In India the first Legislation of its kind, The Indian Copyright Act was passed in the year, 1914, which was mainly based on The United Kingdom Copyright Act, 1911. India has one of the most modern copyright protection laws in the world. India's copyrights law laid down in The Indian Copyright Act, 1957 as amended by The Copyright Act, 1999, fully reflects the Berne Convention on Copyright, to which India is a party. Additionally, India is party to the Geneva Convention for the protection of rights of producers of phonograms and to the Universal Copyright Convention. India is an active member of the WIPO, Geneva and UNESCO. Copyright protects the expression (form) of an idea and not itself. It also

cannot be used to protect the procedure, process, system, method of operation, concept principle or discovery. Copyright law is not supposed to create monopolies. Copyright subsists in the original works that are capable of being reproduced from a fixed medium.

The existing law relating to copyright's contained in the Copyright Act, 1911 of the United Kingdome as modified by the Indian Copyright Act, 1914. Apart from the fact that the United Kingdom Act does not fit in with the changed Constitutional status of India, it is necessary to enact on independent self-contained law on the subject of copyright in the light of growing public consciousness of the rights and obligation of author in the light of the experience gained in the working of the existing law during the last forty years. New and advanced means of communications like broadcasting, litho-photography, etc., also call for the certain amendments in the existing laws. Adequate provision has also to be made for the fulfillment of the International Obligations in the field of copyright, which India might accept. A complete revision of law of copyright, therefore, seemed inevitable and the Copyright Bill 1957 attempt such revision. In preparing the Copyright Bill 1957, the British Copyright Report, 1952, the suggestion of the various ministries of the Government of India, the State Governments, the Universities and certain interested industries and association, who were invited to send their comment on the subject have been take into consideration.

Both the houses of the Parliament, which received the assents of the President on 4th June 1957, have passed the Copyright Bill, 1957. It came into force on the 21st January 1958 as The Copyright Act, 1957 (14 of 1957) which has been amended time and again by the Copyright Amendment Act, 1983 (23 of 1983), The Copyright Amendment Act, 1984, The Copyright Amendment Act, 1992, The Copyright Amendment Act, 1994 which has provided protection to all original literary, dramatic, musical and artist work, cinematography films and sound recordings. It also brought sectors such as satellite broadcasting, computer software and digital technology under the Indian copyright protection. Major development in the area of Copyright Act, 1957 is to make it fully compatible with the provision of the TRIPS Agreement called the Copyright Amendment Act, 1999, this Amendment was signed by the President of India on December 30, 1999 and came into force on Jan15, 2000. The other important development during 1999 was the issuance of the International Copyright Order, 1999 which extends the provisions of the Copyright Act to the nationals of the World Trade Origination (WTO).

Geographical Indications

Geographical Indication indicates that particular goods originate from a country, region or locality and has some special characteristics, qualities or reputations, which are attributable to its place of origin. These special characteristics, qualities or reputation, may be due to various factors, e.g. natural factors such as raw materials, soil, regional climate, temperature, moisture etc; or the method of manufacture or preparation of the product such as traditional production methods; or other human factors such as concentration of similar business in the same region, specialization in the production or preparation of certain products and the maintaining of certain quality standards. The connection between the goods and place becomes so famous that any reference to the place reminds the goods being produced there and vice versa. Geographical indications are valuable property to producers from particular geographical regions. They basically perform three functions:

i) they identify goods as originating in a particular territory, or a region or locality in that territory;
ii) they suggest to the consumers that the goods come from an area where a given quality, reputation or other characteristics of the goods is essentially attributable to their geographic origin;
iii) they promote the goods of producers of a particular area.

In consonance with the TRIPS obligations the Geographical Indications Act 1999 came in to effect on 15th September 2003 in India. The Act has strengthened the protection of Geographical Indications in India, which was eagerly awaited. Before the advent of the TRIPS Agreement there were no multinational or multilateral agreements, which dealt with the protection of Geographical Indications. There were, of course International Treaties, like Paris Convention, Lisbon Agreement, which aimed at protecting Geographical Indications. However, the protection under these Treaties was limited and there were a restricted number of signatory countries, it did not prevent worldwide infringement of various Geographical Indications. Though the inclusion of Geographical Indications in the TRIPS Agreement was marred by controversy, it heralded its entry in Intellectual Property Law.

Designs

Designs are also an important component of intellectual property rights, which are worthy of protection. **"Design" indicates any aspect of the features of shape, configuration, pattern or ornament applied to any article by any industrial process, whether external or internal of the whole or part of an article.** A new or novel design can be registered as per the provisions of the Designs Act and such registration gives the proprietor a copyright in the design for five years, which can be renewed for two further terms of five years each. Those who wish to purchase an article for use are influenced not only by the practical efficiency and utility of the article but also by its appearance. Many consumers look out for artistic merit and some are attracted to strange and bizarre eye-catching designs. Much thought, creativity, time and expense usually goes into devising new and innovative designs, which would increase the appeal of the product. Therefore, the object of the design registration is to see that others applying it to their goods do not deprive the originator of a profitable and innovative design of his reward.

The purpose of the Designs Act, 2000 is to protect novel designs to be applied to, or governing the shape and configuration of a particular article to be manufactured and marketed commercially. It is a right to prevent the manufacture and the sale of articles of a design not substantially different from a registered design. The emphasis, therefore, is upon the visual image conveyed by the manufactured article. The Designs Act is to preserve for the owner of the design the commercial value resulting from customers preferring the appearance of articles which have new and innovative designs reproduced upon articles on a mass scale, application being done by the industrial process or mechanical and chemical means.

Registration and term of protection

IPR	Term of protection	Registration required
Patents	20 years	Yes
Trademark	Will be renewed (unlimited number of times)	No
Copyright	60 years after the death of author (in general)	No
Geographical Indication	Will be renewed (unlimited number of times)	Yes
Design	10 years	Yes

Intellectual Property Rights have always been recognized as an important civil right under Indian laws and in case of infringement of such right the infringer has to bear civil as well as criminal liability for the same. Recourse to Court by law is a well-recognized concept world over and firmly entrenched in the Constitutional and other laws of India. Therefore, any person can claim a statutorily or customarily recognized right to property.

10.10 PRIVACY LAW

Introduction

India, a country of 1.2 billion, is the largest democracy in the world. It has a federal structure and its society is pluralistic and stratified on the basis of caste and class. The Constitution of India guarantees to all its citizens "justice – social, economic and political"; "equality" before law and equal protection of the laws and "liberty" implying absence of arbitrary restraint on the freedom of individual action. The higher judiciary has proactively promoted and enhanced the scope of the fundamental human rights recognized under the Constitution. Progressive governments have enacted laws in order to make basic rights enforceable and to ensure that all citizens have an equal opportunity of exercising the rights guaranteed to them by the Constitution.

India today is also among the fastest growing large economies in the world. Technological development is beginning to embrace all spheres of life; however, it is still not ubiquitous. A little over a-tenth of its people have access to internet (137 million as per Internet World Stats, 2012) and around three-quarters (935 million as per TRAI, 2012) to mobile telephony. The government is also adopting the path of e-governance for its development programmes. While the country is moving towards a more digitized and interlinked society, the architecture for protection for the individual's right to privacy is still not in place. If the Government of India (GOI) is committed to safeguarding and enforcing the right to privacy for the country's multitudes and providing equal protection to all residents against exploitation, it must enact a privacy legislation to pre-empt the technological challenges which it will have to surmount, as have the nations of the developed world.

Constitutional basis for privacy protection in India

The Right to Privacy is not expressly mentioned as a Fundamental Right under the Constitution; however, the Courts have been reading this right into Article 21 of the Constitution which guarantees the Right to Life and Personal Liberty. The Supreme Court of India has adjudicated on the multiple dimensions of privacy but has refrained from defining it in a straight-jacketed way and has allowed it to evolve on a case to case basis.

It was in *Kharak Singh's case* (Supreme Court, 1964) that the Supreme Court first laid down the parameters of the right to privacy in India. The case related to the constitutionality of

certain police regulations which allowed for domiciliary visits and surveillance of persons with criminal records. The Court by majority held that "The right of privacy is not a guaranteed right under our Constitution, and therefore the attempt to ascertain the movements of an individual is merely a manner in which privacy is invaded and is not an infringement of a fundamental right guaranteed in Part III." The minority view, however, was that although "the Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty". This minority view was later upheld in *Govind's case* (Supreme Court, 1975) which too dealt with the issue of surveillance by the police. The judgment recognized Right to Privacy as a Fundamental Right though qualified by a caveat that it could be curtailed in cases of "compelling public interest". However, this "compelling public interest" was also circumscribed by the Court. In *PUCL Vs Union of India* (Supreme Court, 1997) the State action of intercepting telephone calls was challenged. Although the Court did not strike down the provision of interception in the Telegraph Act of 1885 it held that telephone-tapping was a very serious invasion of an individual's privacy and therefore curtailed the number of authorities approving surveillance and also mandated the constitution of oversight committees. Further, while deciding on the issue of telephone-tapping in the case of PUCL v. Union of India , the Supreme Court observed that telephone-tapping would be a serious invasion of an individual's privacy. Thus, telephone-tapping would infract Article 21 of the Constitution, unless it is permitted under the procedure established by law.

The need for stand-alone privacy legislation was felt in the wake of leak of the Nira Radia tapes in the year 2010, raising serious threats and concerns over the privacy of individuals and its protection. Subsequent to this infamous leak, Mr. Ratan Tata, the then Chairman of the Tata Group had approached the Supreme Court for a violation of the fundamental right to privacy. The Planning Commission paved way for a 12 member Shah Committee to identify privacy issues.

The Privacy (Protection) Bill, 2013

The bill does not provide any definition of "privacy"; however, it focuses on the protection of personal and sensitive personal data of persons. This Bill shall have an overriding effect on all existing provisions directly or remotely related to privacy as section 3 provides that "*no person shall collect, store, process, disclose or otherwise handle any personal data of another person except in accordance with the provisions of this Act an d any rules made thereunder.*" However,

it provides an exception to this rule under section 4 by stating that "nothing in this Act shall apply to the collection, storage, processing or disclosure of personal data for personal or domestic use."

It is important to understand the proposed new legislation in the offing and examine if it will serve the purpose of the day and age when privacy concerns are violated everyday in social media and public places. Even the government projects like UIDAI that is collecting sensitive personal data of citizens have not been able to ensure protection of privacy.

1. The domain of personal data

"Personal data" has been described to mean any data, which relates to a natural person if that person can, whether directly or indirectly in conjunction with any other data, be identified from it and includes sensitive personal data. Sensitive personal data are the personal data as to the data subject's:

(i) Biometric data;

(ii) Deoxyribonucleic acid data;

(iii) Sexual preferences and practices;

(iv) Medical history and health;

(v) Political affiliation;

(vi) Commission, or alleged commission, of any offence;

(vii) Ethnicity, religion, race or caste; and

(viii) Financial and credit information.

This definition is different from the definition provided under The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 that came into effect from April 13, 2011. Though the reasons for difference are unknown, yet the ambit of sensitive personal data has been enhanced, which is a good step. However, it does not seem logical why a person would generally keep political affiliation and caste and religion details sensitive and personal.

2. Protection of personal data

There are specific provisions related to collection, storage, processing, transfer, security, confidentiality, and disclosure of sensitive personal data in the Bill. Consent of the data provider is a must for undertaking all the aforesaid activities. However, there are several exceptions to this rule, which are as follows:

(i) Personal data may be collected without the prior consent of the data subject if it is:

(a) necessary for the provision of an emergency medical service to the data subject;

(b) required for the establishment of the identity of the data subject and the collection is authorized by a law in this regard;

(c) necessary to prevent a reasonable threat to national security, defense or public order; or

(d) necessary to prevent, investigate or prosecute a cognizable offence.

(ii) Any personal data may be processed for a purpose other than for which it was collected or received if:

(a) the data subject grants the consent to the processing and only that personal data that is necessary to achieve the other purpose is processed;

(b) it is necessary to perform a contractual duty to the data subject;

(c) it is necessary to prevent a reasonable threat to national security, defense or public order; or

(d) it necessary to prevent, investigate or prosecute a cognizable offence.

(iii) Prior to a disclosure of personal data, the data controller or data processor, as the case may be, seeking to disclose the personal data, shall inform the data subject of the following details in respect of his personal data, namely:

(a) when it will be disclosed;

(b) the purpose of its disclosure;

(c) the security practices, privacy policies and other policies that will protect it; and

(d) the procedure for recourse in case of any grievance in relation to it.

In addition to the above requirement of consent, no person shall collect, receive, store, process or otherwise handle any personal data without implementing measures, including, but not restricted to, technological, physical and administrative measures, adequate to secure its confidentiality, secrecy, integrity and safety, including from theft, loss, damage or destruction. Plus, the data collector has to ensure the quality, accuracy and the fact that the data is up to date.

Further, for the protection of sensitive personal information the Bill provides that notwithstanding anything contained in herein and the provisions of any other law for the time being in force:

(a) no person shall store sensitive personal data for a period longer than is necessary to achieve the purpose for which it was collected or received, or, if that purpose has been achieved or ceases to exist for any reason, for any period following such achievement or cessation;

(b) no person shall process sensitive personal data for a purpose other than the purpose for which it was collected or received;

(c) no person shall disclose sensitive personal data to another person, or otherwise cause any other person to come into the possession or control of, the content or nature of any sensitive personal data, including any other details in respect thereof.

No person shall carry out any surveillance or intercept any communication of another person without implementing measures, including, but not restricted to, technological, physical and administrative measures, to secure the confidentiality and secrecy of all information obtained as a result of the surveillance or interception of communication, as the case may be, including from theft, loss or unauthorized disclosure. Any person who carries out any surveillance or interception of any communication, or who obtains any information, including personal data, as a result of surveillance or interception of communication, shall be subject to a duty of confidentiality and secrecy in respect of it.

Every competent organization shall, before the expiry of a period of 100 days from the enactment of this Bill, designate as many officers as it deems fit as Privacy Officers who shall be administratively responsible for all interceptions of communications carried out by that competent organization. No person shall disclose to any other person, or otherwise cause any other person to come into the knowledge or possession of, the content or nature of any

information, including personal data, obtained as a result of any surveillance or interception carried out under this Bill. Notwithstanding anything contained in this section,

(a) if the disclosure of any information, including personal data, obtained as a result of any surveillance or interception of any communication is necessary to prevent a reasonable threat to national security, defense or public order, or

(b) prevent, investigate or prosecute a cognizable offence, an authorized officer may disclose the information, including personal data, to any authorized officer of any other competent organization.

3. Punishment for offences related to personal data

If someone collects, receives, stores, processes or otherwise handles any personal data without following the provisions of the Bill, he/she shall be punishable with imprisonment and may also be liable to fine. The two crucial elements of crime are mens rea and actus reus. When in an offence it is not necessary to establish mens rea, they are strict liability offence and are generally the rare crimes. However, this principle has not been followed in the Bill, wherein a clear reading of the provisions related to offences provides that violation of the privacy conditions is a strict liability criminal offence requiring no assessment of either intent or consequence of the violation. Even the abetment and repeat offences and offences by companies have been made cognizable and non bailable under the Bill.

When offence is committed by companies, every person who, at the time of the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. However, such person cannot be held liable if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. So, if it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence, and shall be liable to be proceeded against and punished accordingly.

Privacy in law of Tort

The Right to Privacy is further encompassed in the field of Torts which include the principles of nuisance, trespass, harassment, defamation, malicious falsehood and breach of confidence. The tort of Defamation involves the right of every person to have his reputation preserved inviolate. It protects an individual's estimation in the view of the society and its defenses are 'truth' and 'privilege', which protect the competing right of freedom of speech.

Privacy in law of Contract

Under Indian laws, the governing legislation for contractual terms and agreements is the Indian Contract Act. There exist certain other means by which parties may agree to regulate the collating and use of personal information gathered, viz. by means of a "privacy clause" or through a "confidentiality clause". Accordingly, parties to a contract may agree to the use or disclosure of an individual's personal information, with the due permission and consent of the individual, in an agreed manner and/or for agreed purposes, but, any unauthorized disclosure of information, against the express terms of the agreement would amount to a breach of contract inviting an action for damages as a consequence of any default in observance of the terms of the contract.

Privacy obligations under Specific Relations

There are instances of specific inter-personal relationships wherein one party might be obligated to maintain a certain measure of confidentiality. A doctor-patient, husband-wife, customer-insurance company or an attorney-client relationship; are instances where there exists a strong ethical obligation on the part of one party to protect the privacy of information relating to an individual which may expose him to social humiliation and/or ridicule. The above principle also receives legal recognition in Ss. 123-126 of the Indian Evidence Act, 1871.

Other relevant provisions-

1. Information Technology Act, 2000: The (Indian) Information Technology Act, 2000 deals with the issues relating to payment of compensation (Civil) and punishment (Criminal) in case of wrongful disclosure and misuse of personal data and violation of contractual terms in respect of personal data. The said Act creates personal liability for illegal or unauthorized use of computers, computer systems and data stored therein. However, the said section is silent on the liability of

internet service providers or network service providers, as well as entities handling data. The liability of the entities is further diluted in Section 79 by providing the criteria of "knowledge" and "best efforts" before determining the quantum of penalties. This means that the network service provider or an outsourcing service provider would not be liable for the breach of any third party data made available by him if he proves that the offence or contravention was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence or contravention.

The law makes no differentiation based on the 'intentionality' of the unauthorized breach, and no criminal penalties are associated with the breach. Section 65 offers protection against intentional or knowing destruction, alteration, or concealment of computer source code while Section 66 makes alteration or deletion or destruction of any information residing in a computer an offence. Both sections 65 and 66 are punishable with criminal penalties including imprisonment up to 3 years

2. Indian Penal Code: The Indian Criminal law does not specifically address breaches of data privacy. Under the Indian Penal Code, liability for such breaches must be inferred from related crimes. For instance, Section 403 of the India Penal Code imposes criminal penalty for dishonest misappropriation or conversion of "movable property" for one's own use.

3. Intellectual Property Laws: The Indian Copyright Act prescribes mandatory punishment for piracy of copyrighted matter commensurate with the gravity of the offence. Section 63B of the Indian Copyright Act provides that any person who knowingly makes use on a computer of an infringing copy of computer program shall be punishable for a minimum period of six months and a maximum of three years in prison.

4. Credit Information Companies Regulation Act, 2005 ("CICRA"): As per the CICRA, the credit information pertaining to individuals in India have to be collected as per privacy norms enunciated in the CICRA regulation. Entities collecting the data and maintaining the same have been made liable for any possible leak or alteration of this data. CICRA has created a strict framework for information pertaining to credit and finances of the individuals and companies in India.

The urgency for such a statute is augmented by the absence of any existing regulation which monitors the handling of customer information databases, or safeguards the Right to Privacy of individuals who have disclosed personal information under specific customer contracts viz. contracts of insurance, credit card companies or the like. The need for a globally compatible Indian privacy law cannot be understated, given that trans-national businesses in the services sector, who find it strategically advantageous to position their establishments in India and across Asia. For instance, India is set to emerge as a global hub for the setting up and operation of call centers, which serve clients across the world. Extensive databases have already been collated by such corporates, and the consequences of their unregulated operations could lead to a no-win situation for customers in India who are not protected by any privacy statute, which sufficiently guards their interests.

Conclusion

The Bill has been proposed by the Centre for Internet and Society. Though it has expanded the scope of sensitive personal data, it has not covered all the aspects, like, passwords or other personal details within its ambit. The exceptions to the rule of privacy are also wide. It should be clearly stated that the one who receives, stores, processes or otherwise handles any personal data includes government or anybody/person authorized by the government on its behalf and that the liability of the government and its officials would be similar in cases of unauthorized collection, storage, processing or handling. As stated before the violation of the privacy conditions is a strict liability criminal offence requiring no assessment of either intent or consequence of the violation is a severe step and be considered revision. Intent should be an element along with the carelessness or negligence of the person.

SUGGESTED READINGS IN LAW

(Latest edition of each)

1.	Jurisprudence and Legal Theory	-	By V.D. Mahajan
2.	Salmond on Jurisprudence	-	By P.J. Fitzgerald
3.	Outlines of Criminal Procedure Code	-	By R.V. Kelkar
4.	The Code of Criminal Procedure (Ratanlal and Dhirajlal)	-	Revised by M. Hidyatullah & S.P. Sathe
5.	The Indian Panel Code (Ratanlal & Dhirajlal)	-	Revised by M. Hidyatullah and R. Deb
6.	The Indian Evidence Act	-	By Ratanlal and Dhirajlal
7.	Industrial Relationas and Labour	-	By S.C. Srivastava
8.	Administrative Law	-	By. I.P. Massey
9.	Administrative Law	-	By. S.P. Sathe
10.	Mulla's Code of Civil Procedure (Abridged edition for Students)	-	By P.M. Bakshi
11.	Introduction to the Constitution of India	-	Justice D. Basu
12.	Constitutional Law of India	-	Justice D. Basu
13.	Shorter Constitution of India	-	Justice D. Basu
14.	V.N. Shukla's Constitution of India	-	By Mahendra P. Singh,
15.	Mulla's Law of Contract	-	By J.H. Dalal
16.	The Indian Contract Act	-	By Avtar Singh
17.	Law of Contempt of Court	-	By B.R. Verma
18	V.M. Shukla's Legal Remedies	-	By Avtar Singh
19.	Law and Poverty : Critical Essays	-	Edited by Prof. Upendra Baxi

20.	Crisis of Indian Legal System	-	Prof. Upendra Baxi
21.	Indian Justice- Perspective and Problems	-	Justice V.R. Krishna Iyer
22.	Law, Society and Collective Consciousness of Law and Life	-	Justice V.R. Krishna Iyer
24.	Law and the People	-	Justice V.R. Krishna Iyer
25.	What next in the Law	-	Lord Denning
26.	Discipline of Law	-	Lord Denning
27.	Law of Limitation	-	Hari Dev Kohli

Note : (a) The Officer-Trainees are expected and advised to read as many of the books, suggested above as possible. They will do well to buy some of these books for their personal and permanent use.

(b) The Officer-Trainees should also borrow bare texts of the following enactments from the Library and read them in conjunction with the relevant reading material as contained in the Law Compendium.

i) Civil Procedure Code, 1908
ii) Constitution of India
iii) Criminal Procedure Code, 1973
iv) Indian Contract Act, 1872
v) Indian Evidence Act, 1872
vi) Indian Penal Code, 1860
vii) Industrial Disputes Act, 1947
viii) The Contempt of Courts Act, 1971
ix) The Dowry Prohibition Act, 1961
x) The Environment Protect Act, 1986
xi) The Information Technology Act, 2000
xii) The Limitation Act, 1971

xiii) The Maintenance and Welfare of Parents and Senior Citizens Act, 2007

xiv) The Prison Act, 1894

xv) The Protection of Children from Sexual Offences Act, 2012

xvi) The Protection of Women from Domestic Violence Act, 2005

xvii) The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

xviii) The Societies Registration Act, 1860

IMPORTANT WEBSITES

http://indiacode.nic.in

http://nalsa.gov.in

http://supremecourtofindia.nic.in

http://www.cvc.nic.in

www.manupatra.com