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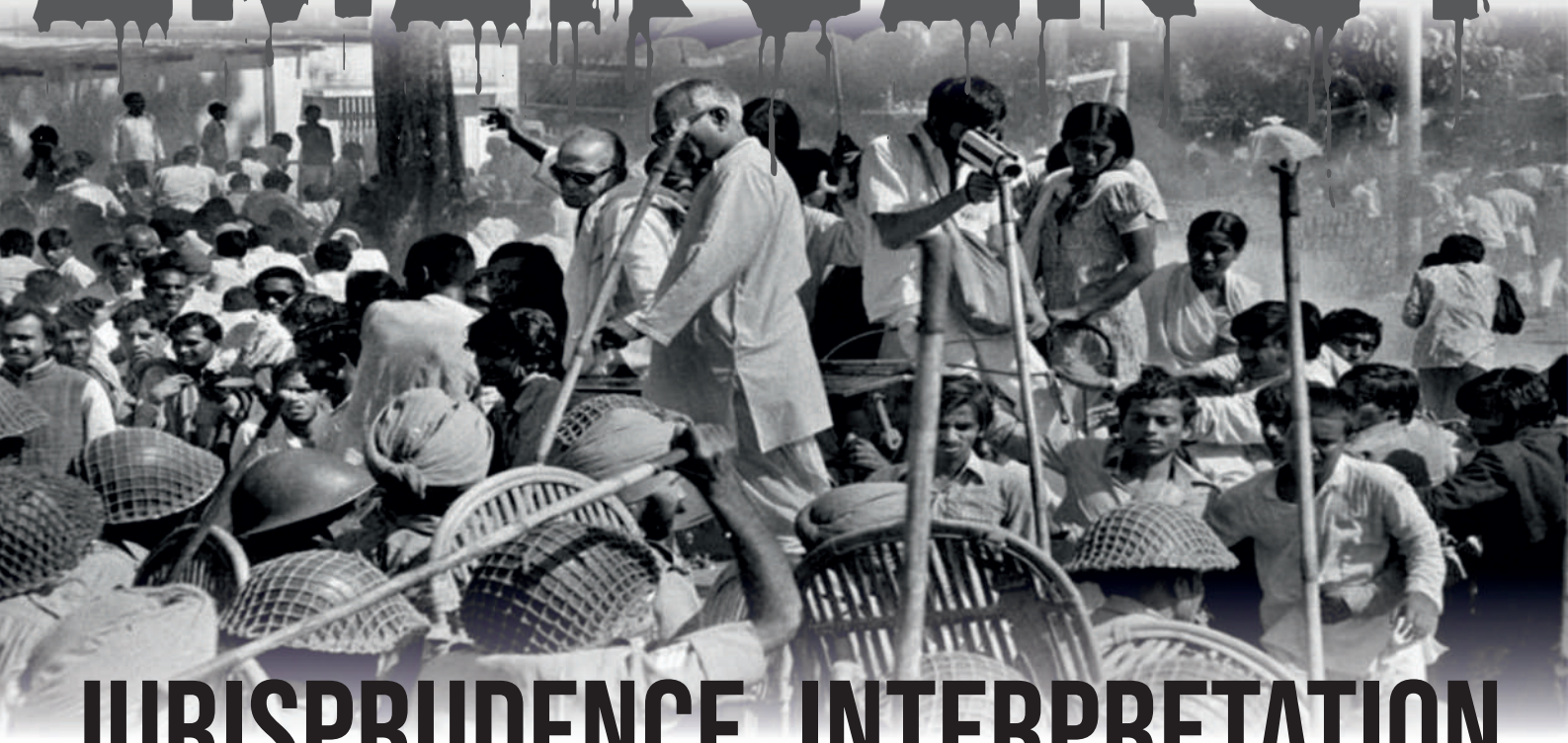

JURISPRUDENCE, INTERPRETATION & GENERAL LAWS

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On behalf of **TEAM YES**

CS Vikas Vohra CA CS Harish A. Mathariya
Founders

JURISPRUDENCE

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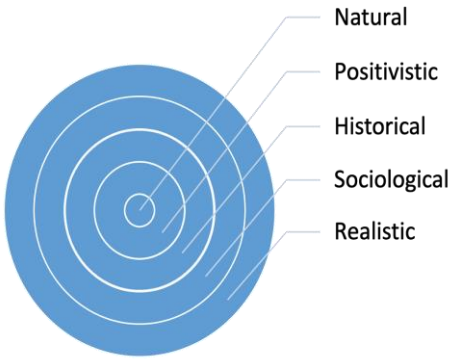
1 SOURCES OF LAW

INTRODUCTION

The nature and meaning of the law have been described by several jurists. However, there is no consensus on the true nature and meaning of the law. The reason for the lack of unanimity on this issue is that this issue was considered and considered by different lawyers to formulate a general theory of law and order at different times and from different points of view, that is, from the point of view of the nature, the source, the function and the purpose of the right, for example. Satisfy the needs of a certain period of legal development.

For the purpose of clarity and a better understanding of the nature and meaning of the law, we may classify various definitions into **five** broad classes:



- **Natural**
- **Positivistic**
- **Historical**
- **Sociologist**
- **Realistic**

NATURAL LAW

Natural Law is a moral theory of jurisprudence which maintains that the law should be based on morality and ethics. In other words, natural law is a universal standard that applies to all mankind throughout all time. This school consists of most ancient definitions.

Under this school fall most of the ancient definitions given by Roman and other ancient Jurists.

Ulpine defined Law as "the art or science of what is equitable and good."

Cicero said that Law is "the highest reason implanted in nature."

Justinian's Digest defines Law as "the standard of what is just and unjust."

In all these definitions, propounded by Romans, "justice" is the main and guiding element of the law.

The ancient Hindu views were that the "law" is the mandate of God and not of any political sovereign. Everyone, including the ruler, must obey. Therefore, the "law" is part of the "Dharma". The idea of "justice" is always present in the Hindu concept of law.

Natural School of Law	
Jurist	**Definition**
Ulpine	Art or Science of Equitable & good
Cicero	Highest reason implanted in nature
Justinian's Digest	Standard of just & unjust
Salmond	Body of Principles recognized & applied by the state in the administration of justice.
Vinogradoff	Set of rules imposed & enforced by society with regard to attribution & exercise of power over persons & tilings.

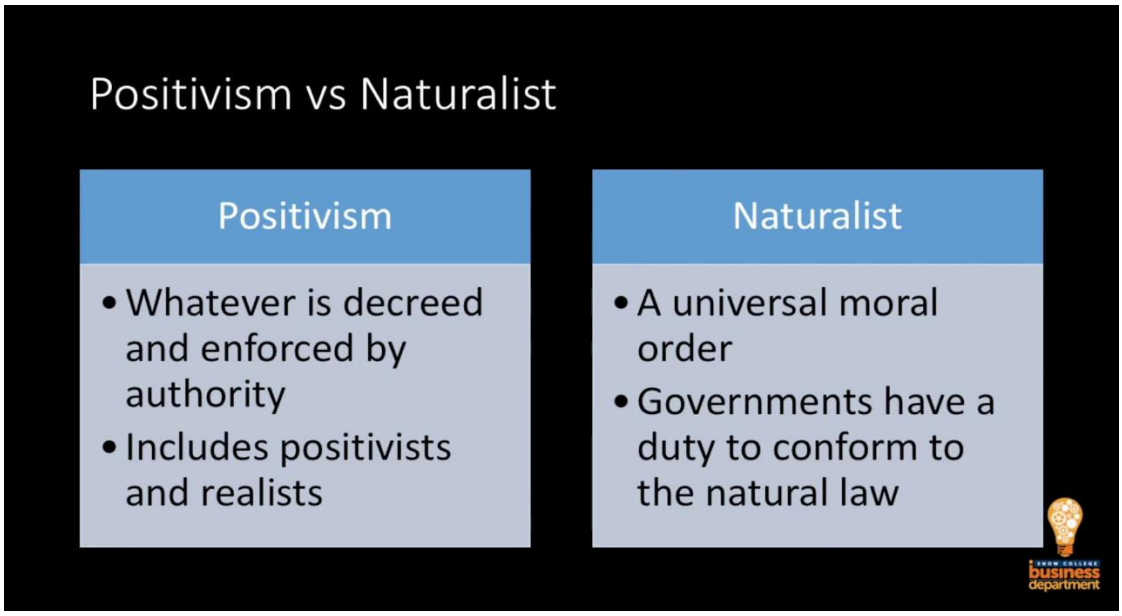
POSITIVISTIC

Legal positivism is a school of jurisprudence whose advocates believe that the only legitimate sources of law are those written rules, regulations, and principles that have been expressly enacted, adopted, or recognized by a governmental entity or political institution, including administrative, executive, legislative, and judicial bodies.

The Positivist Theory says that there should be a superior Governmental entity that is not subject to question or challenge. This entity is responsible for determining what is right & what is wrong as a matter of law.

According to John Austin, "Law is the aggregate of rules set by man as politically superior, or sovereign, to men as a political subject." In other words, law is the "command of the sovereign". It obliges a certain course of conduct or imposes a duty and is backed by a sanction. Thus, the command, duty, and sanction are the three elements of law.

Kelsen gave the **'pure theory of law'.** According to him, law is a 'normative science'. The legal norms are 'Ought' norms as distinct from 'Is' norms of physical and natural sciences. Law does not attempt to describe what actually occurs but only prescribes certain rules. The science of law to Kelson is the knowledge of the hierarchy of normative relations. All norms derive their power from the ultimate norm called Grund norm.



HISTORICAL DEFINITION OF LAW

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

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

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

SOCIOLOGICAL SCHOOL OF LAW

Duguit defines law as "essentially and exclusively as a social fact."

Inhering defines law as "the form of the guarantee of the conditions of life of society, assured by State's power of constraint".

Essential elements of the above definition are as follows:-

1. Law is treated as only one means of social control.
2. Law is to serve a social purpose.
3. It is coercive or forced in character.

Roscoe Pound analyzed the term "law" in the 20th-century background as predominantly an instrument of social engineering in which conflicting pulls of political philosophy, economic interests, and ethical values constantly struggled for recognition against the background of history, tradition, and legal technique. Roscoe Pound thinks of law as a social institution to satisfy social wants - the claims and demands and expectations involved in the existence of civilized society by giving effect to as much as may be satisfied or such claims given effect by ordering of human conduct through politically organized society.

So in short, Roscoe Pound thinks of law as a social institution to satisfy social wants.

REALIST DEFINITION OF LAW

Realists define law in terms of the judicial process.

According to Holmes, "Law is a statement of the circumstances in which public force will be brought to bear upon through courts."

According to Cardozo, "A principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged, is a principle or rule of law."

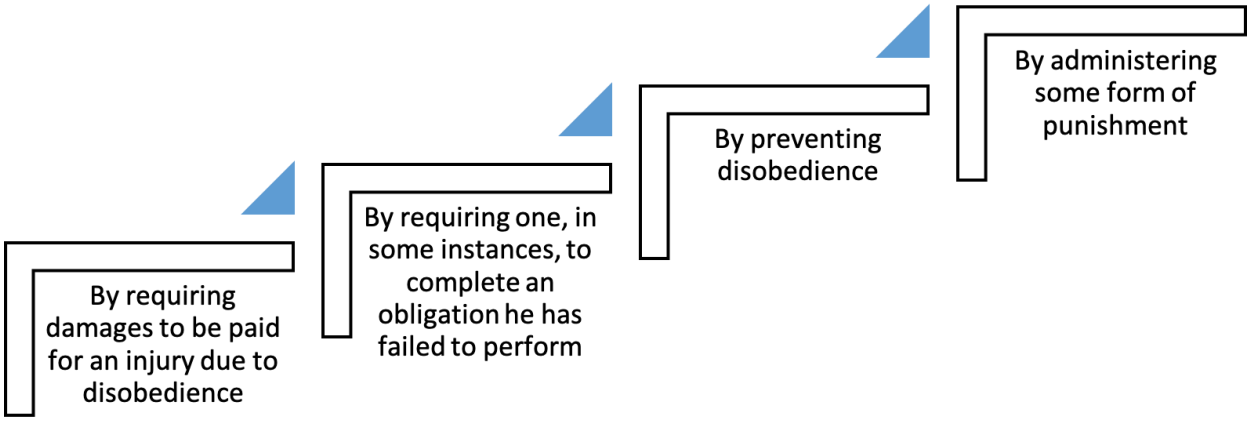
To summarise, following are the main characteristics of law and a definition to become a universal one, must incorporate all these elements:

- Law pre-supposes a State.
- The State makes or authorizes to make, or recognizes or sanctions rules which are called law.
- For the rules to be effective, there are sanctions behind them.
- These rules (called laws) are made to serve some purpose. The purpose may be a social purpose, or it may be simply to serve some personal ends of a despot (*a person who enjoys absolute power).*

The law and it's systems, has developed over many centuries combination of statutes, judicial decisions, customs, and conventions. The State (Country) formulates certain rules of conduct to be followed by people, is called Laws.

How Laws are made effective?

1. Remedial Measure - By requiring to pay damages for the injury caused due to disobedience.
2. Specific Performance - By requiring to complete the obligation which the person failed to perform.
3. Preventive Measure - By preventing the disobedience.
4. Penal Measures - By imposing penalties and punishments.



SIGNIFICANCE OF LAW

The law does not stop changing and as circumstances and conditions change in society, the laws also change according to the requirements of society. At any time, the law of the prevailing society must comply with the general statements, customs, and aspirations of its people.

Modern science and technology have opened enormous perspectives and created new and greater ambitions for men. Materialism and individualism prevail in all areas of life. These events and changes tended to transform the law patently and lately. Therefore, the law has undergone tremendous transformations - conceptual and structural. The idea of abstract justice has been replaced by social justice.

The purpose of the law is order, which, in turn, gives hope of security for the future. The law is expected to guarantee socio-economic justice and eliminate existing disparities in the socio-economic structure and play a special role in achieving the various socio-economic objectives enshrined in our Constitution. It should serve as a means of social change and a precursor of social justice.

SOURCES OF INDIAN LAW

The expression "sources of law" has been used to convey different meanings. There are as many interpretations of the expression "sources of law" as there are schools and theories about the concept of law. The general meaning of the word "source" is origin.

There is a difference of opinion among the jurists about the origin of law :

Austin contends that law originates from the sovereign.

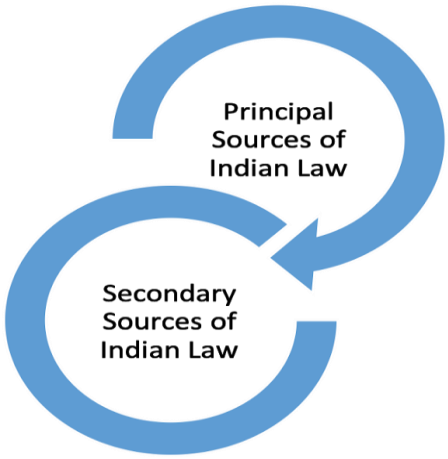
Savigny traces the origin in the general consciousness of the people.

The sociologists find law in numerous heterogeneous factors.

For theologians, law originates from God and from the Vedas and the Quran which are the primary sources of Hindu and Mohammedan Law respectively, which are considered to have been revealed by God. Precisely, whatever source of origin may be attributed to law, it has emanated from almost similar sources in most of the societies.

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

- **PRINCIPAL SOURCES**
- **SECONDARY SOURCES**



PRINCIPLE SOURCES OF INDIAN LAWS

- Customs or Customary Law
- Judicial Decisions or Precedents
- Statutes or Legislations
- Personal Law e.g., Hindu and Mohammedan Law etc.

CUSTOMS

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

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

Customs have played an important role in molding the ancient Hindu Law. Most of the law given in Smritis and the Commentaries had its origin in customs. The Smritis have strongly recommended that the customs should be followed and recognized. Customs worked as a re-orienting force in Indian Law.

Classification of Customs

The customs may be divided into two classes:

- Customs without sanction.
- Customs having sanction.

- Customs without sanction are those customs which are non-obligatory and are observed due to the pressure of public opinion. These are called as "positive morality".
- Customs having sanction are those customs which are enforced by the State. It is with these customs that we are concerned about here.

These may further be divided into two classes: (i) Legal, and (ii) Conventional.

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

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

- Geographical Local Customs
- Personal Local Customs

These customs are law only for a particular locality, section or community.

(b) General Customs: A general custom is that which prevails throughout the country and constitutes one of the sources of law of the land.

Common Law in England is an example of general customs

(ii**) Conventional Customs:** They are also called "usages." These customs regulations are binding by agreement of the parties and not by any legal authority. Before a Court treats the conventional custom as incorporated in a contract, following conditions must be satisfied:

- It must be demonstrated that it is totally personalized and is fully known by the contracting parties. There is no fixed term for which it was accepted.

- The convention can not change the general law of the country.

- It must be reasonable.

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

Requisites of a Valid Custom

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

- **Immemorial (Antiquity)**

A custom to be valid must be proved to be immemorial; it must be ancient. According to Blackstone, "A custom, in order that it may be legal and binding must have been used so long that the memory of man runs not to the contrary, so that, if anyone can show the beginning of it, it is no good custom.

- **Certainty**

The custom must be certain and definite, and must not be vague and ambiguous.

- **Reasonableness**

A custom must be reasonable. It must be useful and convenient for the society. A custom is unreasonable if it is opposed to the principles of justice, equity and good conscience.

- **Compulsory Observance**

A custom to be valid must have been continuously observed without any interruption from times immemorial and it must have been regarded by those affected by it as an obligatory or binding rule of conduct.

- **Conformity with Law and Public Morality**

A custom must not be opposed to morality or public policy nor must it conflict with statute law. If a custom is expressly forbidden by legislation and abrogated by *a statute, it is inapplicable.

- **Unanimity of Opinion**

The custom must be general or universal. If a practice is left to individual choice, it cannot be termed as custom.

- **Peaceable Enjoyment**

The custom must have been enjoyed peaceably without any dispute in a law court or otherwise.

- **Consistency:** There must be consistency among the customs. Custom must not come into conflict with the other established customs.

JUDICIAL DECISIONS OR PRECEDNTS

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

Judicial precedents are an important source of law. They enjoyed great prestige at all times and in all countries. This is especially true in the case of England and other countries influenced by English jurisprudence. The principles of law, expressed for the first time in judicial decisions, become precedents that must be followed as a law to solve problems and cases identical to them in the future. The rule that a judgment becomes a precedent in such cases is known as the doctrine of the gaze.

The reason for accepting a precedent is that the court's decision is considered correct. The practice of the following precedents creates trust in the minds of the parties.

Law becomes certain and known and that in itself is a great advantage. Administration of justice becomes equitable and fair.

High Courts

(i) The decisions of the High Court are binding on all the subordinate courts and tribunals within its jurisdiction.

The decisions of one High Court have only a persuasive value in a court which is within the jurisdiction of another High Court. But if such decision is in conflict with any decision of the High Court within whose jurisdiction that court is situated, it has no value and the decision of that High Court is binding on the court.

In case of any conflict between the two decisions of co-equal Benches, generally, the later decision is to be followed.

(ii) In a High Court, a single judge constitutes the smallest Bench. A Bench of two judges is known as Division Bench. Three or more judges constitute a Full Bench. A decision of such a Bench is binding on a Smaller Bench.

One Bench of the same High Court cannot take a view contrary to the decision already given by another coordinate Bench of that High Court. Though the decision of a Division Bench is wrong, it is binding on a single judge of the same High Court.

Thus, a decision by a Bench of the High Court should be followed by other Benches unless they have reason to differ from it, in which case the proper course is to refer the question for decision by a Full Bench.

(iii) The High Courts are the Courts of co-ordinate jurisdiction. Therefore, the decision of one High Court is not binding on the other High Courts and have persuasive value only.

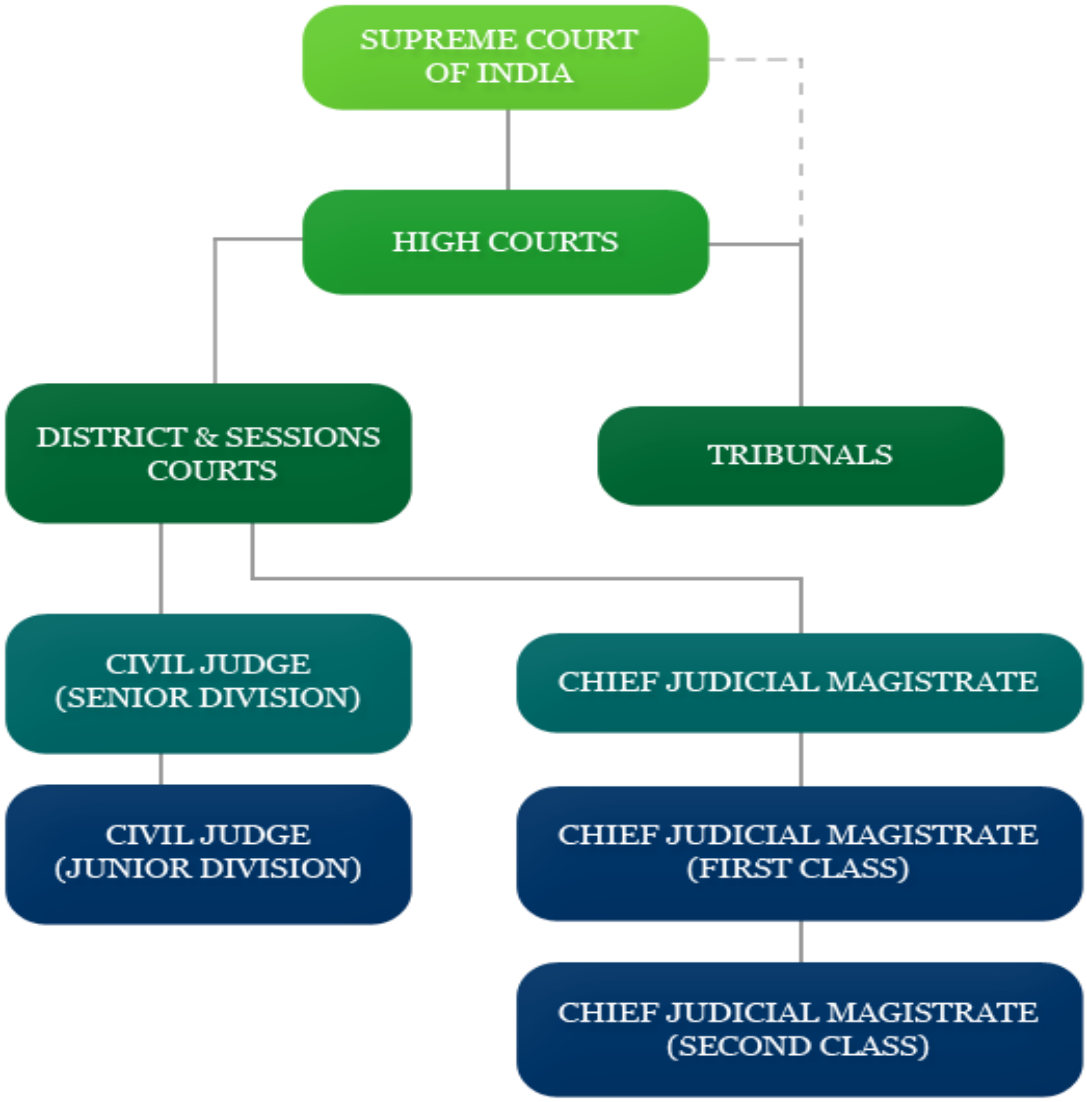
(iv) The Supreme Court is the highest Court and its decisions are binding on all courts and other judicial tribunals of the country. Article 141 of the Constitution makes it clear that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The words "law declared" includes an obiter dictum provided it is upon a point raised and argued (Bimladevi v. Chaturvedi, AIR 1953 All. 613).

However, it does not mean that every statement in a judgment of the Supreme Court has the binding effect. Only the statement of ratio of the judgment is having the binding force.

Supreme Court

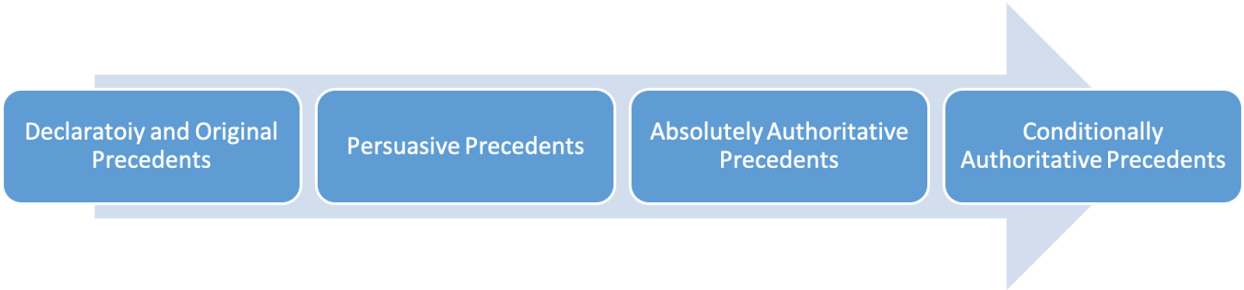
The expression 'all courts' used in Article 141 refers only to courts other than the Supreme Court. Thus, the Supreme Court is not bound by its own decisions. However, in practice, the Supreme Court has observed that the earlier decisions of the Court cannot be departed from unless there are extraordinary or special reasons to do so (AIR 1976 SC 410). If the earlier decision is found erroneous and is thus detrimental to the general welfare of the public, the Supreme Court will not hesitate in departing from it.

English decisions have only persuasive value in India. The Supreme Court is not bound by the decisions of Privy Council or Federal Court. Thus, the doctrine of precedent as it operates in India lays down the principle that decisions of higher courts must be followed by the courts subordinate to them. However, higher courts are not bound by their own decisions (as is the case in England).



KINDS OF PRECEDENTS

Precedents may be classified as:



(a) **Declaratory and Original Precedents:** A declaratory precedent is one which is merely the application of an already existing rule of law. In declaratory precedent, the rule is applied because it is already a law.

The initial precedent is the one that creates and applies the new rule of law. The original cases are made when there was no prior judicial decision on the law. In the case of the initial precedent, this is the law of the future, because now it is applied.

Example: Harish sued a Hard drink company, the defendant after a friend of harish bought him a hard drink from the defendant. The hard drink contained decomposed snail and harish became ill after drinking it. In this case, the company was held responsible (had a duty of care) towards their customers although the customers did not have any contract with the manufacturers. If this decision is new, then it is treated as original precedents.

So, the difference between the two is that declaratory precedents declare an already existing rule of law, whereas the original precedent declares a new rule of law for future reference.

(b) Persuasive Precedents (Influential Precedents): A persuasive precedent is one which the judges are not obliged to follow but which they will take into consideration and will give great weight.

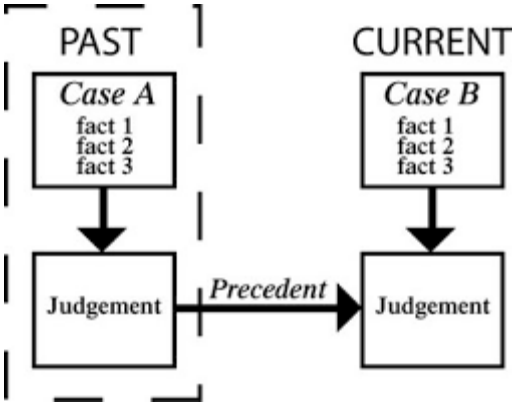
In India, the decisions of one High Court are only persuasive precedents in the other High Courts. Another example, like the rulings of England and American Courts can be considered by the Indian Courts but not obligatory to follow.

Persuasive Precedent may come from a number of sources such as lower courts, foreign courts, treatises or law reviews. In other words, Persuasive Precedent is precedent or other legal writing that is related to the case at hand but is not a binding precedent on the court.

(c) Absolutely Authoritative Precedents: An authoritative precedent is one which judges must follow whether they approve of it or not. It is binding on the judge and he has to apply it even if he considers it wrong. The judge has no discretion at all.

In India, the subordinate courts are bound to follow the decisions of the High Court to which they are subordinate. All courts are absolutely bound by decisions of the Supreme Court.

In other words, an absolutely authoritative precedent is absolutely binding and must be followed without any question.



(d) Conditionally Authoritative Precedents: A conditionally authoritative precedent is one which generally is binding on the court but can be disregarded in certain circumstances and conditions.

In India, the decision of a Single Judge of the High Court is only conditionally authoritative when before a Division Bench of the same High Court.

IMPORTANT DOCTRINES

Doctrine of Stare Decisis

The doctrine of stare decisis means "adhere to the decision and do not unsettle things which are established". It is a useful doctrine intended to bring about certainty and uniformity in the law. Under the stare decisis doctrine, a principle of law which has become settled by a series of decisions generally is binding on the courts and should be followed in similar cases.

In simple words, the principle means that like cases should be decided alike. This rule is based on public policy and expediency. Although generally the doctrine should be strictly adhered to by the courts, it is not universally applicable. The doctrine should not be regarded as a rigid and inevitable doctrine which must be applied at the cost of justice.

FEATURES OF STARE DECISIS

1. To stand by the things decided
2. Courts will look to the past similar issues to guide their Decisions.
3. In other words, "Adhere to the decision & do not unsettle things"
4. Past Judgement on similar issue obliges the future judges & puts an authoritative instruction on them to follow the judgment

Ratio Decidendi

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

Prof. Goodhart says that **ratio decidendi** is nothing more than the decision based on the material facts of the case.

FEATURES OF RATIO DECIDENDI

1. Judge's reason for coming to the decision
2. Reason for Decision (Rationale)
3. It is the legal rule used by the judge to determine the final decision
4. Court use Legal, Political & Social principles with its reasoning
5. Set precedents are binding

If the question requires an answer about the principles, the principles derived from abstracting the essential facts of the case, eliminating intangible elements, are called "ratio decidendi", and this principle applies not only to this case, but also to others cases. That have a similar nature.

Obiter Dicta

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

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

To sum up obiter dicta :

Latin phrase

(+)

Said by the way

(+)

Judicial utterances in the course of delivering a Judgement which was necessary for the decisions

(+)

Causal opinion of judges

(+)

No authoritative force

(+)

Persuasive in Nature

STATUTES OR LEGISLATION

Statute law or statutory law is what is created by legislation, for example, Acts of Parliament or of State Legislature. It is written law (Jus scriptum) against the customary law which is unwritten law (Jus non- scriptum).

Example: the Companies Act, 2013 is a law passed by the parliament of India and assented given by President of India.

The Parliament of India possesses the power of supreme legislation. A draft bill is passed by both the Houses of Parliament and assented by President before it becomes a Law or Central Act.

Legislation is either supreme or subordinate (delegated).

Supreme Legislation is that which proceeds from the sovereign power in the State or which derives its power directly from the Constitution. It cannot be repealed, annulled or controlled by any other legislative authority.

Subordinate Legislation is that which proceeds from any authority other than the sovereign power. It is dependent for its continued existence and validity on some superior authority. The Parliament of India possesses the power of supreme legislation. Legislative powers have been given to the judiciary, as the superior courts are allowed to make rules for the regulation of their own procedure. The executive, whose main function is to enforce the law, is given in some cases the power to make rules. Such subordinate legislation is known as executive or delegated legislation.

PERSONAL LAW

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

Hindu Law	Sources	• Shruti, and • Smritis
	Matters governed by Hindu Law in case of Hindus	Hindus are governed by their personal law in all matters relating to inheritance, succession, marriage, adoption, co-parcenary, partition of joint family property, pious obligations of sons to pay their father's debts, guardianship, maintenance and religious and charitable endowments.
Muslim Law	Sources	• The holy Koran. • Hadis. • Ijmas. • Kiyas. • Digests and Commentaries on Mohammedan law.

	Matters governed by Muslim Law in case of Mohammedans	Mohammedans are governed by their personal law in all matters relating to inheritance, wills, succession, legacies, marriage, dowry, divorce, gifts, wakfs, guardianship and pre-emption.

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

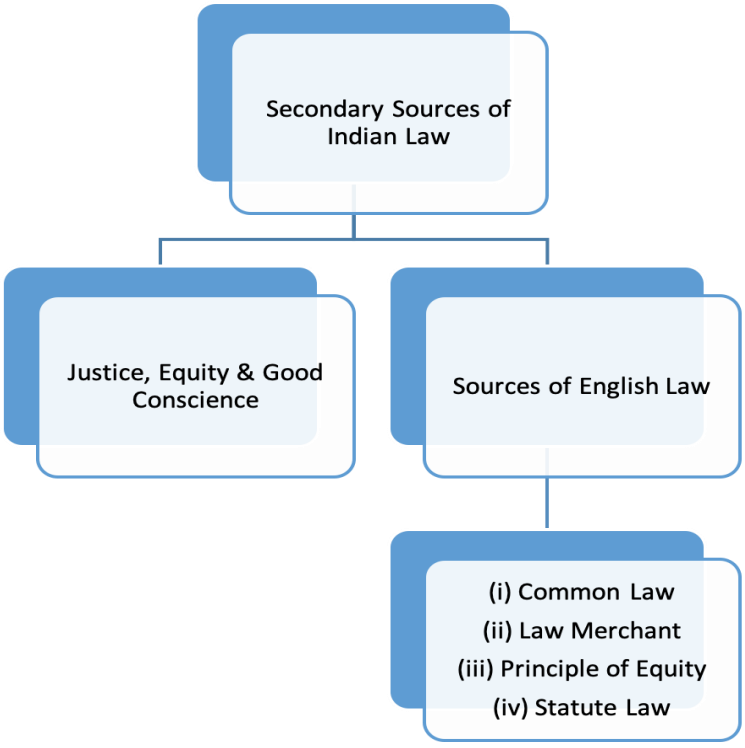
In the case of Hindus, for instance, their personal law is to be found in:

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

The personal law of Mohammedans is to be found in: —

- The holy **Koran.**
- The actions, percepts, and sayings of the Prophet Mohammed which though not written during his lifetime were preserved by tradition and handed down by authorized persons. These are known as **Hadis.**
- **Ijmas,** i.e., a concurrence of the opinion of the companions of the Prophet and his disciples.
- **Kiyas** or reasoning by analogy. These are analogical deductions derived from a comparison of the Koran, Hadis, and Ijmas when none of these apply to a particular case.
- Digests and Commentaries on Mohammedan law.

SECONDARY SOURCES OF LAW



1. **Justice, Equity and Good Conscience**

In the absence of any rule of a statutory law or custom or personal law, the Indian courts apply to the decision of a case justice, equity and good conscience.

2. **Sources of English Law**

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

(b) Law Merchant: The Law Merchant is the most important source of the Merchantile Law. Law Merchant means those customs and usages which are binding on traders in their dealings with each other.

(c) Principle of Equity: In cases where there was no remedy or inadequate remedy at common Law or Statute, principle of equity is applied. The King is considered as the head of justice who referred the case to Chancellor who was known as 'Equity' and such courts as 'Equity Courts'.

These 'Equity Courts' acted on a number of maxims e.g.

- "He who seeks equity must do equity",
- "He who comes to equity must come with clean hands".

(d) Statute Law: "Statute law is that portion of the law which is derived from the legislation or enactment of Parliament or the subordinate and delegated legislative bodies." English statutes becomes a secondary source of law.

MERCANTILE OR COMMERCIAL LAW

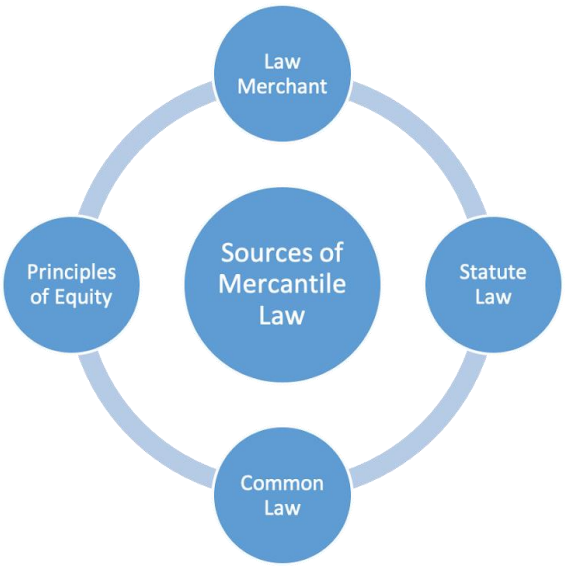
There are many branches of law; viz.,

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

The Mercantile Law or Law Merchant or Lex Mercatorla is the name given to that part of law which grew up from the customs and usages of merchants or traders in England which eventually became a part of Common Law of England.

SOURCES OF MERCHANTILE LAW

The following are the main sources of Mercantile Law:



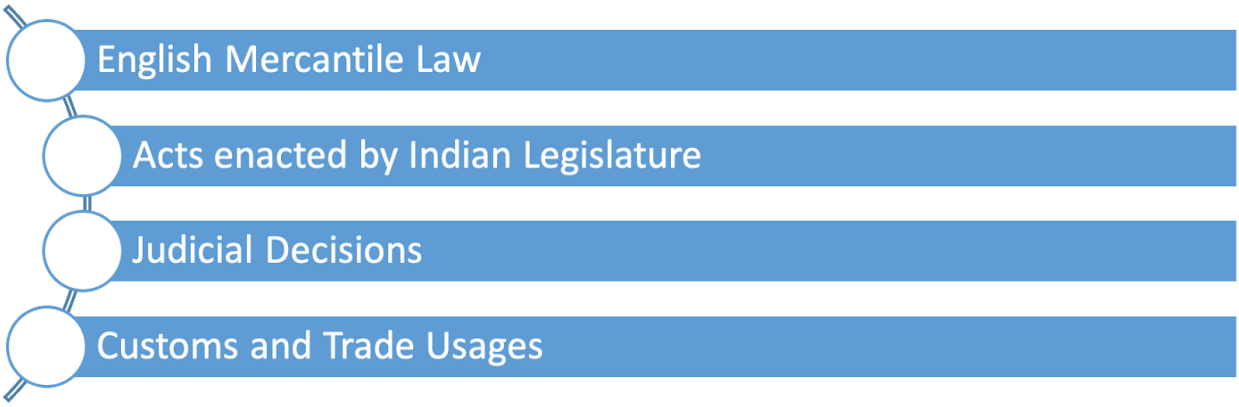
Mercantile Law in India

Prior to 1872, mercantile transactions were regulated by the law of the parties to the suit (i.e., Hindu

Law, Mohammedan Law, etc.). In 1872, the first attempt was made to codify and establish uniform principles of mercantile law when The Indian Contract Act, 1872 was enacted. Since then, various Acts have been enacted to regulate transactions regarding partnership, sale of goods, negotiable instruments, etc.

Sources of Indian Mercantile Law

The main sources of Indian Mercantile Law are:



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

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

(iii) Judicial Decisions: Judges interpret and explain the statutes. Whenever the law is silent on a point, the judge has to decide the case according to the principles of justice, equity and good conscience. It would be accepted in most systems of law that cases which are identical in their facts, should also be identical in their decisions. That principle ensures justice for the individual claimant and a measure of certainty for the law itself. The English legal system has developed a system of judicial precedent which requires the extraction of the legal principle from a particular judicial decision and, given the fulfillment of certain conditions, ensures that judges apply the principle in subsequent cases which are indistinguishable. The latter provision being termed "binding precedents". Such decisions are called as precedents and become an important source of law (See Judicial Precedents at p.7). Prior to independence, the Privy Council of Great Britain was the final Court of Appeal and its decisions were binding on Indian Courts. After independence, the Supreme Court of India is the final Court of Appeal. But even then, the decisions of English Courts such as Privy Council and House of Lords are frequently referred to as precedents in deciding certain cases and in interpreting Indian Statutes.

(iv) Customs and Trade Usages: Most of the Indian Law has been codified. But even then, it has not altogether done away with customs and usages. Many Indian statutes make specific provisions to the effect that the rules of law laid down in a particular Act are subject to any special custom or usages of trade. For example, Section 1 of the Indian Contract Act, 1872, lays down that, "Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act". Similarly, Section 1 of the Negotiable Instruments Act, 1881, lays down that, "nothing herein contained... affects any local usage relating to any instrument in any oriental language". It may be noted that the whole law relating to Hundis and the Kachhi and Pakki Adat Systems of Agency is based on custom and usage of trade as recognized and given legal effect to by courts of law in India.

JURISPRUDENCE

Introduction and Meaning

- The word Jurisprudence is derived from the word 'juris' meaning law and 'prudence' meaning knowledge. Jurisprudence is the study of the science of law. The study of law in jurisprudence is not about any particular statute or a rule but of law in general, its concepts, its principles and the philosophies underpinning it.
- Different jurists/ legal philosophers have used the term in different ways. The meaning of 'jurisprudence' has changed over a period of time as the boundaries of this discipline are not rigid.
- Howsoever the term jurisprudence is defined: it remains a study relating to law. The word Taw' itself is used to refer to more than one thing. Hence one of the first tasks cf jurisprudence is to attempt to throw light on the nature of law. However, various theorists define law in their own ways and this leads to a corresponding jurisprudential study.

Different Interpretations of Jurisprudence by various Jurists

1. B.E.King

According to **B.E. King, jurisprudence is not concerned with the exposition of law but with disquisitions about law.** For example, substantive laws teach us about our right, duties and obligations and the procedural laws talk about the legal process through which those rights can be enforced or obligations met but jurisprudence would go into the analysis of what rights, duties, and obligations: how and why do they emerge in a society? Jurisprudence also **improves the use of law** by drawing upon insights from other fields of study.

2. Justice Salmond

According to **Salmond** in the widest of its applications the term **jurisprudence means the science of law,** using the word law in that vague and general sense, in which **it includes all species of obligatory rules of human action.** He said that jurisprudence in this sense can be further divided into three streams: civil jurisprudence, international jurisprudence, and natural jurisprudence.

3. Jurist Bentham

English jurist **Jeremy Bentham** had used 'jurisprudence' in **two senses** - one as **'law'** referring to the substance and interpretative **history** of a given legal norm, consisting of **case laws,** precedents, and other legal **commentary** and the other as **'theory'** or the study of general theoretical questions about the **nature of laws and legal systems.**

4. Stone

Prof. Julius Stone defined 'jurisprudence' as the lawyer's extraversion. According to him, jurisprudence is the **lawyer's examination of the precepts, ideas, and techniques of the law** in the light derived from present knowledge in disciplines other than the law.

5. Paton

According to **Prof.** G.W. **Paton,** jurisprudence is founded on the attempt, not to find universal principles of law, but **to construct a science which will explain the relationship between law, its concepts, and the life of society.**

LEGAL THEORIES

INTRODUCTION AND MEANING

Legal theory is a field of intellectual enterprise within jurisprudence that involves the development and analysis of the foundations of law.

Two most prominent legal theories are the normative legal theory and the positive legal theory. Positive legal theory seeks to explain what the law is and why it is that way, and how laws affect the world, whereas normative legal theories tell us what the law ought to be.

There are other theories of law like the sociological theory, economic theory, historical theory, critical legal theory as well.

AUSTIN'S THEORY OF LAW

John Austin a noted English legal theorist was the first occupant of the chair of Jurisprudence at the University of London. Austin is known for the Command Theory of law. Austin was a positivist, meaning that he concerned himself on what the law was instead of going into its justness or fairness.

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

Thus Law has three main features:

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

Criticism of Austin's Command Theory of law

- Welfare states pass a number of social legislation that does not command the people but confers rights and benefits upon them. Such laws are not covered under the command theory.
- According to Austin, the sovereign does not have to obey anyone but the modem states have their powers limited by national and international laws and norms.
- Austin does not provide for judges made laws. He said that judges work under the tacit command of the sovereign but in reality judges make positive laws as well.
- Since the presence of sovereign is a pre-requisite for a proposition to called law, Austin did not recognize international laws as such because they are not backed by any sovereign.

PROF. HLA HART'S POSITIVE THEORY OF LAW

British Legal Philosopher listed many meanings associated with the term 'positivism' as follows:

- Laws are commands.
- The analysis of legal concepts is (a) worth pursuing, (b) distinct from sociological and historical inquiries into law, and (c) distinct from critical evaluation.
- Decisions can be deduced logically from predetermined rules without recourse to social aims, policy or morality.
- Moral judgments cannot be established or defended by rational argument, evidence or proof.
- The law as it is laid down should be kept separate from the law that ought to be.
- Positivism is most commonly understood as the fifth description above. Natural law theory claims that a proposition is 'law' not merely because it satisfies some formal requirement but by virtue of an additional minimum moral content. According to it, an immoral rule cannot be 'law' even if it satisfies all the formal requirements.

JEREMY BENTHAM

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

Bentham was of the initial contributors on the function that laws should perform in a society. He claimed that nature has placed man under the command of two sovereigns- pain and pleasure. 'Pleasure' in Bentham's theory has a somewhat large signification, including altruistic and obligatory conduct, the 'principle of benevolence'; while his idea of 'interest' was anything promoting pleasure. The function of laws should be to bring about the maximum happiness of each individual for the happiness of each will result in the happiness of all. The justification for having laws is that they are an important means of ensuring the happiness of the members of the community generally. Hence, the sovereign power of making laws should be wielded, not to guarantee the selfish desires of individuals, but consciously to secure the common good.

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

1. Source: The source of law is the will of the sovereign, who may conceive laws which he personally issues, or adopt laws previously issued by sovereigns or subordinate authorities, or he may adopt laws to be issued in future by subordinate authorities. Sovereign according to Bentham is any person or assemblage or person to whose will a whole political community is supposed to be in a disposition to pay obedience and then in preference to the will of any other person.
2. Subjects: These may be persons or things. Each of these may be active or passive subjects, i.e., the agent with which an act commences or terminates.
3. Objects: The goals of a given law are its objects.

4. Extent: Direct extent means that law covers a portion of land on which acts have their termination; indirect extent refers to the relation of an actor to a thing.
5. Aspects: Every law has 'directive' and a 'sanctional' part. The former concerns the aspects of the sovereign will towards an act-situation and the latter concerns the force of law. The four aspects of the sovereign will are command, prohibition, non-prohibition, and non-command and the whole range of laws are covered under it. These four aspects are related to each other by opposition and concomitancy.
6. Force: The motivation to obey a law is generated by the force behind the law.
7. Remedial appendage: These are a set of subsidiary laws addressed to the judges through which the judges cure the evil (compensation), stop the evil or prevent future evil.
8. Expression: A law, in the ultimate, is an expression of a sovereign's will. The connection with will raises the problem of discovering the will from the expression.

Having listed the eight different respects through which a law can be considered, Bentham went on to analyze the 'completeness' of law in a jurisprudential sense. He said that a complete law would have the features of integrality as well as unity. Integrality means that a law should be complete in expression, connection, and design. A law is complete in expression when the actual will of the legislation has been completely expressed. A law is complete when various parts of it dealing with various aspects are well coordinated. If a law does not cover a specific situation that it might have wanted to cover while being enacted, it is incomplete in design. According to Bentham, the unity of law would depend upon the unity of the species of the act which is the object of the law.

Criticism of Bentham's theory of law

- Due to Bentham's strait-jacketing of laws into an imperative theory- all laws have to be either command or permission, it does not take proper account of laws conferring power like the power to make contracts, create a title, etc.
- Bentham did not give fair treatment to custom as a source of law. He said customs could never be 'complete'.
- Bentham's theory did not allow for judge make laws and hoped that such laws gradually eliminated by having 'complete laws'.
- It is not always true that an increase in the happiness of a certain segment of society will lead to an increase in the overall happiness level because it might be associated with a diminution in the happiness of some other rival section of the society.

ROSCOE POUND

A distinguished American legal scholar was a leading jurist of the 20th century and was one of the biggest proponents of sociological jurisprudence which emphasized taking into account of social facts in making, interpretation and application of laws.

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

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

According to Roscoe Pound, for determining the scope and the subject matter of the legal system, the following five things are required to be done:

1. Preparation of an inventory of interests and their classification.
2. Selection of the interests which should be legally recognized.
3. Demarcation of the limits of securing the interest so selected.
4. Consideration of the means whereby laws might secure the interests when these have been acknowledged and delimited, and
5. Evolution of the principles of valuation of interests.

Roscoe Pound's classification of interests are as follows:

1. Individual interest: These are claims or demands determined from the standpoint of an individual's life and concern. They are-

(i) Interest of personality: This includes physical integrity, freedom of will, honor, and reputation, privacy and freedom of conscience.

(ii) Interest in domestic relations: This includes relationships of parents, children, husbands, and wives.

(iii) Interest of substance: This includes interests of property, freedom of association, freedom of industry and contract, continuity of employment, inheritance and testamentary succession.

2. Public interest: These interests are asserted by an individual from the standpoint of political life. They are:

(i) Interests of the state as a juristic person: It includes integrity, freedom of action and honor of the state's personality, claims of the politically organized society as a corporation to property acquired and held for corporate purposes.

(ii) Interests of the state as the guardian of social interest.

3. Social interests: These are claims or demands thought of in terms of social life and generalized as claims of the social group. It is from the point of view of protecting the general interest of all members of society. Social interests include-

(i) Social interest in the general security: This includes general safety, peace and order, general health, the security of acquisition and transaction.

(ii) Social interest in the security of social institutions such as domestic, religious, political and economic institutions.

(iii) Social interest in general morals like laws dealing with prostitution, gambling, bigamy, drunkenness.

(iv) Social interest in the conservation of social resources like natural and human resource. This social interest clashes to some extent with the individual interest in dealing with one's own property as one pleases.

(v) Social interest in general progress. It has three aspects- economic, political and cultural.

(vi) Social interest in individual life. It involves self-assertion, opportunity, and conditions of life. Society is interested in individual life because individuals are its building blocks.

Having given various interest recognized by law, Roscoe Pound applied himself to figure out to balance competing interests. He said that interests should be weighed on the same plane. According to him, one cannot balance an individual interest against a social interest, since that very way of stating them may reflect a decision already made. Thus all the interests should be transferred to the same place, most preferably to the social plane, which is the most general, for any meaningful comparison.

Criticism of Roscoe Pound's theory of law

1. Pound said that interest pre-exists laws and the function of the legal system should be to achieve a balance between competing interests but we see that a lot of interests today are a creation of laws.
2. The theory does not provide any criteria for the evaluation of interest. It is not interesting as such, but the yardstick with reference to which they have measured that matter. It may happen that some interest is treated as an ideal in itself by society, in which case it is not the interest as an interest, but as an ideal that will determine the relative importance between it and other interests.
3. Pound's theory of balancing interests can be effectuated most effectively by judges because the judges get to translate the activity involved in the cases before them in terms of interests and select the ideal with reference to which the competing interests are to be measured. Thus his theory gives more importance to the judiciary in comparison to the legislature.
4. Pound's distinction between Public Social interests is doubtful and even the distinction between Individual and Social Interest is of minor significance. It is the ideal with reference to which any interest is considered that matters, not so much the interest itself, still less the category in which it is placed.
5. The recognition of a new interest is a matter of policy. The mere presence of a list of interests is, therefore, of limited assistance in helping to decide a given dispute.

KELSEN'S PURE THEORY OF LAW

- Hans Kelsen was an Austrian philosopher and jurist who is known for his 'Pure Theory of Law'.
- Kelsen believed that the contemporary study and theories of law were impure as they were drawn upon from various other fields like religion and morality to explain legal concepts.
- Kelson, like Austin, was a positivist, in that he focused his attention on what the law was and divested moral, ideal or ethical elements from law.
- He discarded the notion of justice (given by Salmond) as an essential element of law because many laws, though not just, may still continue as law',
- Kelsen described law as a "normative science' as distinguished from natural sciences which are based on cause and effect, such as law of gravitation.
- Like Austin, Kelsen also considered sanction as an essential element of law but he preferred to call it 'norm'. According to Kelsen, 'law is a primary norm which stipulates sanction'.

Criticism of Kelsen's Pure Theory

- It is difficult to trace 'grundnorm' in every legal system. Also, there is no rule or yardstick to measure the effectiveness of grundnorm.

- The Pure Theory also did not give the timeframe for which the effectiveness should hold for the requirement of validity to be satisfied.
- Kelsen's theory ceases to be 'pure' the moment one tries to analyze the grundnorm because then one will have to draw upon subjects other than law like sociology, history, and morality.
- International law does not sit well with Kelsen's Pure theory. He advocated a monist view of the relationship between international and municipal law and declared that the grundnorm of the international system postulated the primacy of international law. The actual experience has been to the contrary and the countries of the world mostly give primacy to municipal laws over international laws.

JOHN WILLIAM SALMOND

He was a law professor in New Zealand who later also served as a judge of the Supreme Court of New Zealand. He made a seminal contribution in the field of jurisprudence, law of torts and contracts law.

Salmond claimed that the purpose of law was the deliverance of justice to the people and in this sense, he differed from Bentham and Austin who went into the analysis of law as it stood without going into its purpose. But Salmond also necessitated the presence of the state for implementation of laws just like Bentham and Austin.

Salmond differentiated between 'a law' and 'the law' and said that the former refers to the concrete and the latter to the abstract. According to him, this distinction demands attention for the reason that the concrete term is not co-extensive with the abstract in its application. In its abstract application, we speak of civil law, the law of defamation, criminal law, etc. Similarly, we use the phrases law and order, law and justice, courts of law. In its concrete sense, on the other hand, we talk about specific laws like the Indian Penal Code or the Right to Information Act. Law or the law does not consist of the total number of laws in force.

According to Salmond law is the body of principles which are recognized and applied by the state in the administration of justice. His other definition said that law consists of a set of rules recognized and acted on in courts of justice. 'Law' in this definition is used in its abstract sense. The constituent elements of which the law is made up are not laws but rules of law or legal principles.

Since law was defined by a reference to the administration of justice, it needs to be understood as well. Salmond says that human experience has made it clear that some form of compulsion is required to maintain justice. It is in the nature of things to have conflict, partly real, partly apparent, between the interests of man and man, and between those of individuals and those of society at large; and men cannot be left to do what they believe is right in their own eyes. Therefore, if a just society is to be maintained, it is necessary to add compulsion so as to complement to walk on the desired path. Hence, there exists various regulative or coercive systems, the purpose of which is the upholding and enforcement of right and justice by some instrument of external constraint. One of the most important of such systems is the administration of justice by the state. The administration of justice may, therefore, be defined as the maintenance of right within a political community by means of physical force of the state. Another is the control exercised over men by the opinion of the society in which they live. Censure, ridicule, contempt are the sanctions by which society (as opposed to the state) enforces the rules of morality.

Salmond argued that the administration of justice was the primary task of a state and the laws were made to achieve that objective. Administration of justice was thus antecedent to the laws. Laws thus are secondary, accidental, unessential. Law consists of the pre-

established and authoritative rules which judges apply in the administration of justice, to the exclusion of their own free will and discretion. Salmond further said that the administration of justice is perfectly possible without laws through such a system is not desirable. A court with unfettered discretion in the absence of laws is capable of delivering justice if guided by equity and good conscience.

Salmond says that the development and maturity of a legal system consist in the progressive substitution of rigid pre-established principles for individual judgment, and to a very large extent these principles grow up spontaneously within the courts 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 fit. Gradually from various sources- precedent, custom, statute—there is a collected body of fixed principles which the courts apply to the exclusion of their private judgment. Justice becomes increasingly justice according to law, and courts of justice become increasingly courts of law.

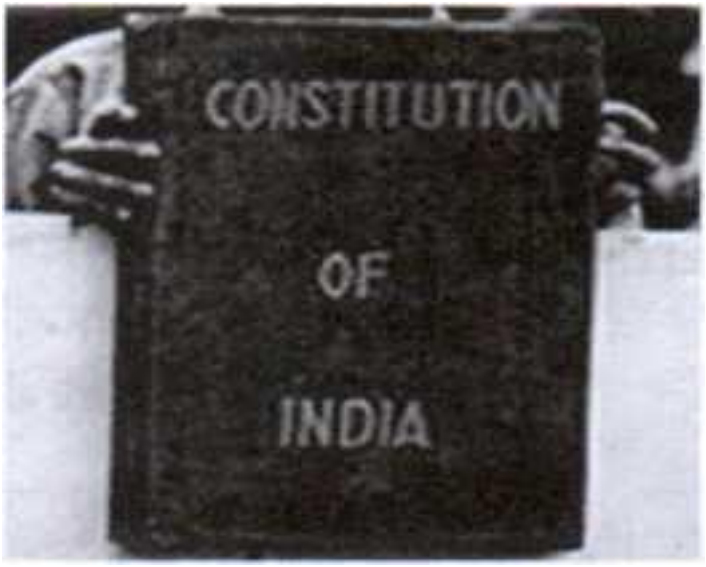
Criticism of Salmond's theory.

1. Salmond's assertion that justice is the end and law is only a medium to realize it does not always hold true because there are a number of laws that can be called 'unjust'.
2. The pursuit of justice is not the only purpose of law, the law of any period serves many ends and these ends themselves change with the passage of time.
3. There is a contradiction when Salmond says that the purpose of law is the administration of justice but limits 'jurisprudence' to the study of the 'first principles' of civil law of a national legal system because justice is a universal concept, the jurisprudential analysis of law should not be constrained by national boundaries.

2 CONSTITUTION OF INDIA

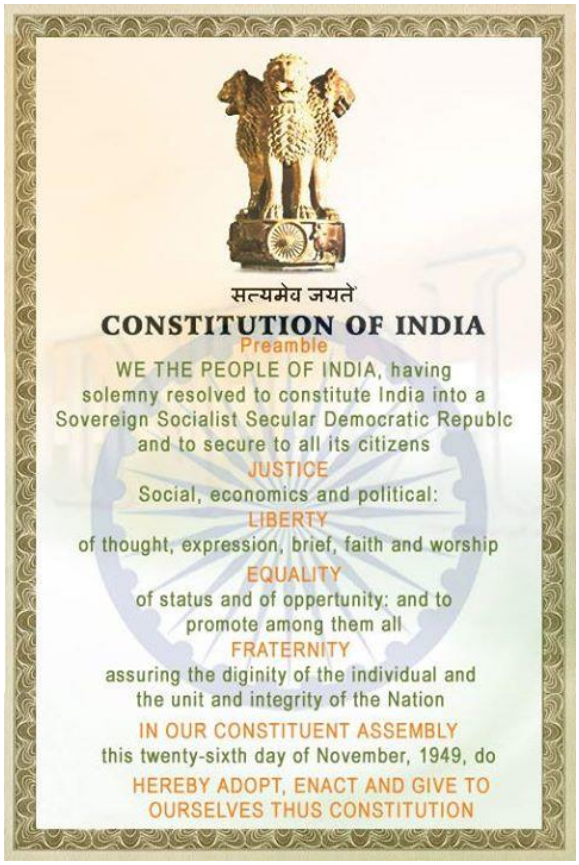
INTRODUCTION

The Constitution of India is the Supreme Law of India. The Constitution of India is popularly known as 'Mother of all the laws' as all other laws derive their authority and force from the Constitution. The Constituent Assembly under the Chairmanship of Dr. B.R. Ambedkar, took almost 3 years to draft the Constitution. It was adopted on 26th November, 1949 and came into force on 26th January, 1950. With the adoption of the Constitution, India became modern Republic of India. It is a comprehensive document containing 395 Articles (divided into 22 Parts) and 12 Schedules. The Constitution of India is the longest written constitution of any sovereign country in the world.



PREAMBLE

Preamble sets out the main objective which the legislation intended to achieve. It is a kind of introduction to the statute and at times very helpful to understand the intention of the legislature. Preamble is an insight to the legislation. Supreme Court has held in Berubari Case, that preamble to Constitution is a key to understand mind of the makers. Preamble is the most sacred part of the Constitution and is considered as soul of the Constitution. Any ambiguity in the Constitution is interpreted in the sense which satisfies the Preamble.



Meaning of Important Terminology in Preamble

Establishment of Sovereign, Socialist, Secular, Democratic Republic

- **Sovereign** - The word sovereign emphasizes that India is no more dependent upon any outside authority. It is independent all around, within and without the borders of the country.

- **Socialist** - This word was inserted in the Preamble by the Constitution (42nd Amendment) Act, 1976.

- **Secular** - The term Secularism means a State has no religion of its own. It treats all religion equally.

- **Democratic** - Democratic means that our Government has derived its authority from the will of the people. In a Democratic character of the Indian polity is illustrated by the provisions conferring on the adult citizens the right to vote and by the provisions for elected representatives and responsibility of the executive to the legislature.

- **Republic** - Republic State has an elected head of the State who will govern it for a specific period of time. Means that our government is *of the people, by the people and for the people.*

Is preamble part of the Constitution?

The question that whether the Preamble is a part of the Constitution or not has been discussed in following leading cases:-

- Berubari Case
- Keshav Ananda Bharti Case
- LIC of India versus Consumer Education & Research Centre Case

➢ **Berubari Case**

In Berubari Union (I), (1960) 3 SCR 250, the Supreme Court held that no doubt the Preamble is a key to open the mind of makers. Preamble show the general purposes for drafting several provisions in the Constitution but nevertheless the Preamble is not a part of the Constitution.

➢ **Keshav Ananda Bharti Case**

In the case of Keshav Ananda Bharti v. State of Kerala (1973) 4 SCC 225, the Supreme Court changed its stand and decided

i. That the Preamble of the Constitution is a part of the Constitution.

ii. The Preamble has a significant role in interpretation of the Constitution.

➢ **Union of India versus LIC of India**

In 1995 in the case of Union of India versus LIC of India, the Supreme Court again upheld the decision made in Keshav Ananda Bharti Case and treated Preamble as an integral part of Constitution.

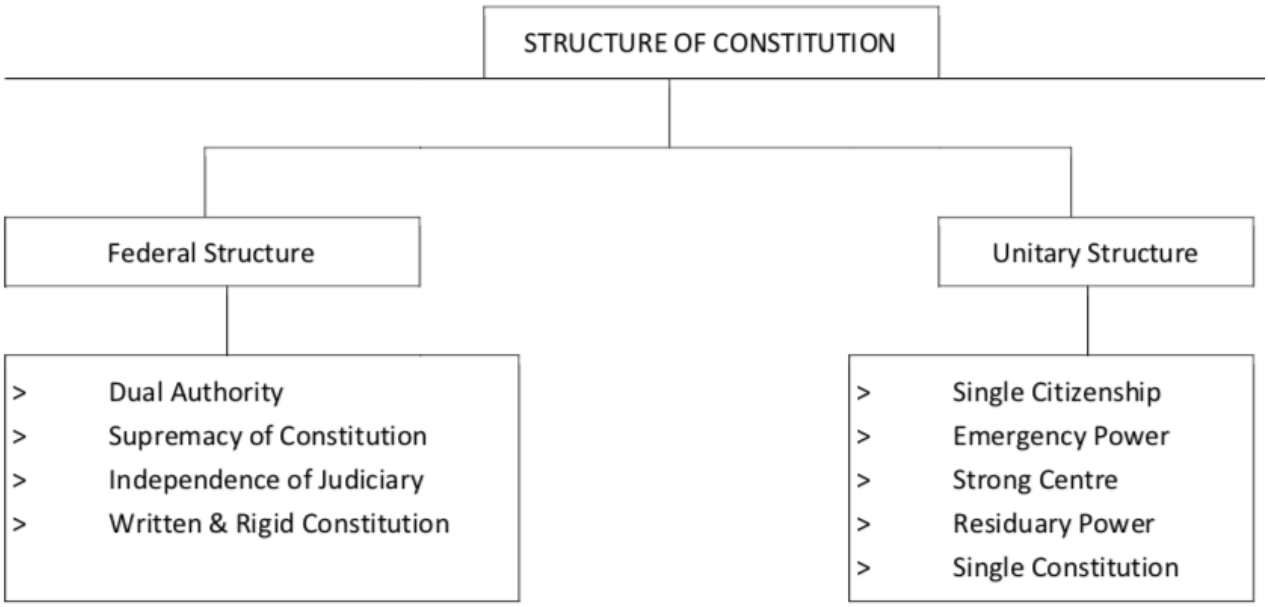
Conclusion

From the above decided case laws, we can safely presume that Preamble which lays down the basic structure of the Constitution is an Integral Part of the Constitution.

Can Preamble be amended?

In Keshav Ananda Bharti Case, it was decided that Preamble being a part of the Constitution can be amended like any other provision of the Constitution. Though the amending power in Article 368 is limited in case of Constitution. The preamble contains the basic elements or fundamental features of the Constitution. Consequently, amending power cannot be used to destroy these basic features. Therefore Preamble being a part of Constitution can be amended but subject to the condition that the basic features in the preamble cannot be removed.

STRUCTURE



The structure of the Constitution can be either Unitary or Federal.

- **Federal Constitution**

  In a federal setup there is two tier Government. There is a clear division of powers between the Central and the State Governments. Both of them work independently and does not interfere in others sphere. The Country like USA is having Federal Structure.

- **Unitary Constitution**

  In a federal setup all powers of the Government are centralized in one Government that is Central Government. The most famous example of Unitary Constitution is UK.

Whether the Constitution of India is a Federal or Unitary Constitution can be decided by going through features of both the structures.

The Federal features of Indian Constitution are as follows:-

Dual Authority	The authority is divided into two parts: Central Government at the Centre and State Government at the State level.
Distribution of Power	Powers to make laws have been suitably distributed among the Centre and the State by way of Union List - Only Union Government can make laws State List - Only State Government can make laws Concurrent List - Both Union and State can make laws
Supremacy of the Constitution	The three pillars of Legal System i.e. Legislature, Executive and Judiciary are all subordinate to the Constitution and derives their power from the Constitution. None of them should dare to violate provisions of the Constitution and the dignity of the Constitution must be upheld in every situation.
Independence of Judiciary	The judiciary is kept absolutely independent and does not depend upon Parliament or Executive.
Written and Rigid Constitution	An important feature of federalism is written and rigid Constitution. The amendment of the Constitution in a federal state is deliberately made difficult, hence rigid.

The Unitary features of Indian Constitution is as follows:-

Single Citizenship	Citizens are granted only Indian Citizenship and no separate State citizenship. All citizens of India irrespective of the State in which they are born or reside enjoy the same rights all over the country. Countries like US, Switzerland and Australia have dual citizenship that means national citizenship as well as State citizenship.

Emergency Powers	During an emergency the States go into the total control of the Centre. The federal structure coverts into a unitary one without a formal amendment of the Constitution. This kind of transformation is not found in any other federation.
Strong Centre	Centre is stronger than State due to following reasons:- Union List contains more subjects than the State List. More important subjects have been included in the Union List. Will of the Centre shall prevail over State in case of contradiction in the Concurrent List.
Residuary Power	The residuary power have also been left with the Union List. It means that only Parliament has power to make laws on a new subject matter.
Single Constitution	In a federal State usually the States have the right to frame their own Constitution separate from that of the Centre but in India no such power is given to the States.

Conclusion

From the above it can be concluded that the Constitution of India is neither purely federal nor purely unitary but is a combination of both. It is a federal Constitution which have a novel and unique feature of becoming unitary at the time of national emergencies.

PECULIAR FEATURES OF INDIAN FEDERALISM

Indian Constitution differs from the federal systems of the world in certain fundamental aspects, which are as follows:

- **The Mode of Formation:** A federal Union, as in the American system, is formed by an agreement between a number of sovereign and independent States, surrendering a defined part of their sovereignty or autonomy to a new central organization. But there is an alternative mode of federation, as in the Canadian system where the provinces of a Unitary State may be transformed into a federal union to make themselves autonomous. India had a thoroughly Centralized Unitary Constitution until the Government of India Act, 1935 which for the first time set up a federal system in the manner as in Canada viz., by creation of autonomous units and combining them into a federation by one and the same Act.

- **Position of the States in the Federation:** In a federal system, a number of safeguards are provided for the protection of State's rights as they are independent before the formation of

federation. In India, as the States were not previously sovereign entities, the rights were exercised mainly by Union, e.g., residuary powers.

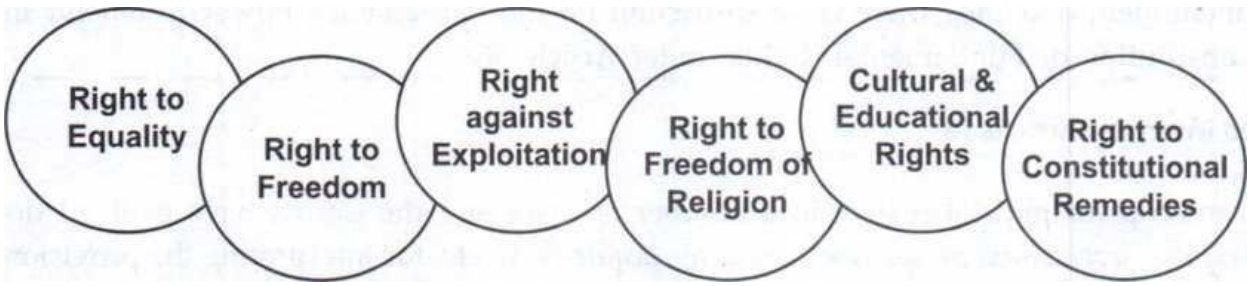
- **Citizenship etc.:** The framers of the American Constitution made a logical division of everything essential to sovereignty and created a dual polity with dual citizenship, a double set of officials and a double system of the courts. There is, however, single citizenship in India, with no division of public services or of the judiciary.

- **Residuary Power:** Residuary power is vested in the Union. In other words, the Constitution of India is neither purely federal nor purely unitary. It is a combination of both and is based upon the principle that "In spite of federalism the national interest ought to be paramount as against autocracy stepped with the establishment of supremacy of law".

FUNDAMENTAL RIGHTS

Fundamental rights are the very basic rights that are universally recognized as most essential for human existence and indispensable for human development. These are required for the attainment of intellectual, moral, spiritual status of an individual. Articles 12 to 35 contained in Part III of the Constitution deal with Fundamental Rights. Fundamental Rights are described as Magna Carta of India. Few fundamental rights are given only to citizens.

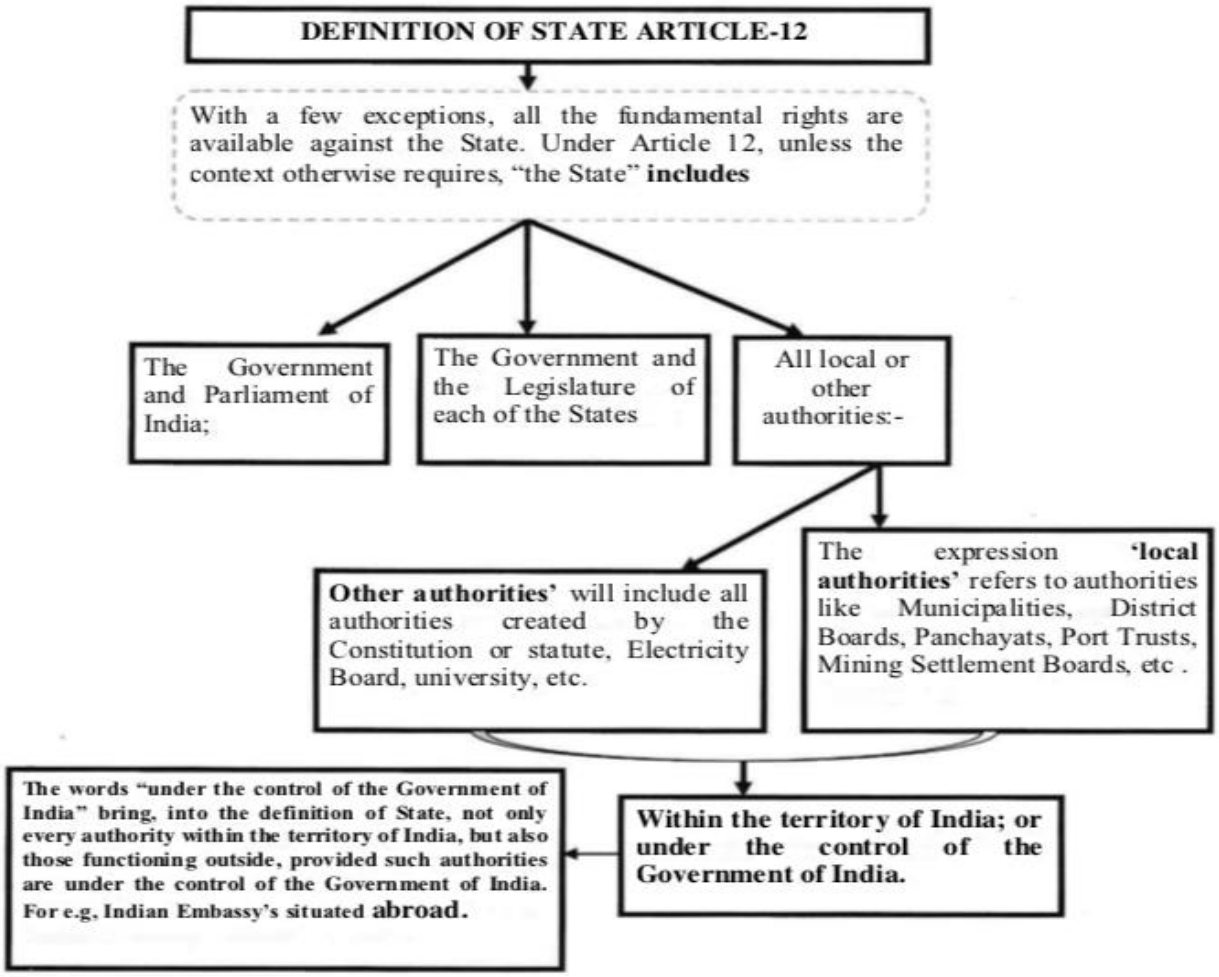
Classification of Fundamental Rights



Article 12- Fundamental Rights available against State and not against private Individual

Fundamental rights are available to individuals against the State. It means it is enforceable against the State. It is the responsibility of the State to respect and guarantee the fundamental rights given to an Individual. All the laws should be consistent with the Fundamental Rights.

DEFINITION OF STATE ARTICLE-12



Article 13: Laws inconsistent with or in derogation of the fundamental rights

Article 13 states that any law shall be void to the extent of its conflict with fundamental rights. For this purpose the laws can be divided into two parts Pre-Constitutional Laws and Post-Constitutional Laws.

Pre-Constitutional Laws	Post-Constitutional Laws
• All the pre-constitutional laws which are inconsistent with the Fundamental Rights will become void to the extent they are inconsistent with the Fundamental Rights. • (Note: They will become void only after the commencement of the Constitution and are not void ab initio)	• State is prohibited from making any law which contradicts with the Fundamental Rights. • If any such law is made by the state, it will be treats as ultra-vires and void to the extent they are inconsistent with the Fundamental Rights. • (Note: They are void ab initio)

Note: The word 'Law' mentioned above will mean:

- Permanent Laws - made by Parliament or State Legislature
- Temporary Laws - like ordinances
- Laws made by Statutory Bodies - Bye Laws, Rules, Regulation, Notification

Earlier it was laid down that Constitutional Amendment is not a law challenged even if they are inconsistent with Fundamental Rights. But later in Gokal Nath case it was decided that even a Constitutional amendment would be void to the extent it contradicts with the fundamental rights. In order to nullify this judgment, the Parliament amendment the Constitution and added that "Nothing in this article shall apply to any amendment of this Constitution under article 368". Means the Constitution can be amended even if it contradicts with the Fundamental Rights.

Conclusion: The present position is that the word "law" does not include a constitutional amendment and thus there is no restriction on the Parliament's power to amend the Constitution or Fundamental Rights under Article 368.

CASE LAWS

S.NO.	CASE NAME	PROVISONS
1	Electricity Board Rajasthan v. Mohanlal	The Supreme Court has held that 'other authorities' will include all authorities created by the Constitution or statute on whom powers are conferred by law and it is not necessary that the authority should engage in performing government functions
2	Angur Bala Parui	The Calcutta High Court has held that the electricity authorities being State within the meaning of Article 12, their action can be judicially reviewed by this Court under Article 226 of the Constitution of India.
3	University of Madras v. Shanta Bai	It has also been held that a university is an authority
4	Haroobhai v. State of Gujarat	The Gujarat High Court has held that the President is "State" when making an order under Article 359 of the Constitution
5	A.R. Antualay v. R.S. Nayak	It was held that a Court can be considered as state under Article-12 only, if it exercises non-judicial functions

6	R.D. Shetty v. International Airports Authority & in Ajay Hasia v. Khalid Mujib	Supreme Court has pointed out that corporations acting as instrumentality or agency of government would become 'State' under Article 12 if • The entire share capital of the Corporation is held by the Government • The financial assistance of the State is so much as to meet almost the entire expenditure of the corporation it would afford some indication of the corporation being impregnated with government character. • The corporation enjoys a monopoly status which is conferred or protected by the State. • The state exercises deep and pervasive control in corporations. • The functions of the corporation are of public importance and closely related to government functions, If a department of government is transferred to a corporation.

AMENDIBILITY OF FUNDAMENTAL RIGHTS

Article 13 provides that any Law (pre/post constitution) will be invalid if the law is against the Fundamental rights. It provides that, State shall not make any law which takes away, amend or abridges the Fundamental rights.

The issue came up before the Supreme Court as to whether a Constitutional Amendment by which a fundamental right is taken away or abridged is also a law within the meaning of Article 13. The Court in the famous Golaknath case took the view that it includes such an amendment and, therefore, even a Constitutional amendment would be void to the extent it takes away or abridges any of the fundamental rights.

Finally in Keshav Anand Bharti v. State of Kerala Supreme Court had held that the fundamental rights can be affected by Constitutional Amendment provided basic structure of Constitution is not amended.

Doctrines to interpret Article 13

Article 13 came up for judicial review in a number of cases and the Courts have evolved doctrines like doctrine of eclipse, severability, prospective overruling, acquiescence etc. for interpreting the provisions of Article 13.

Doctrine of Severability	Doctrine of Eclipse	Doctrine of Waiver
• Only that part of the law will be declared invalid which is inconsistent, with the fundamental rights and the rest of the law will stand. • If after separating the invalid part the valid part is capable of giving effect to the legislature's intent, then only valid part will survive. • If after separating invalid part, valid part is unable to survive the Court shall declare the entire law as invalid.	• The pre-constitutional laws which are inconsistent with the Fundamental Rights shall become inoperative just like an eclipse. • The inconsistent part will revive only once the conflict has been cured. • Basically, the inconsistent part will become eclipsed or dormant and will not be dead altogether. It will become effective once the inconsistency is removed.	• It is not open to citizens to waive any of the fundamental rights. • Fundamental Rights are not absolute and are subject to certain reasonable restrictions and hence an individual cannot chose to get his fundamental rights waived, relinquished or abandoned.

Note: There is a dispute regarding whether the doctrine of eclipse is applicable to both Pre-Constitution and Post-Constitution laws or only to Pre-Constitution laws. Some decisions were in favour of both laws and some were in favour of Pre-Constitution laws only. There is no judicial pronouncement yet to conclude this.

RIGHT TO EQUALITY ARTICLE 14-18

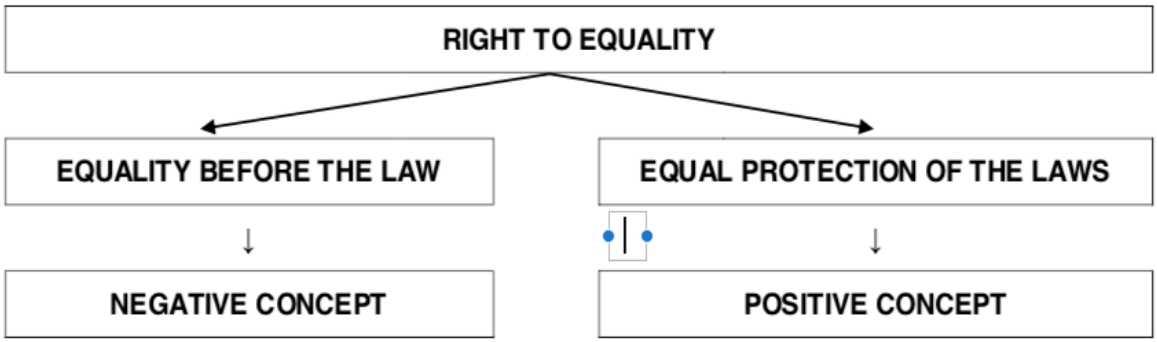
ARTICLE 14: EQUALITY BEFORE THE LAW AND EQUAL PROTECTION OF THE LAWS

Article 14 of the Constitution says that "the **State** shall **not deny** to any person **equality before the law** or the **equal protection of the laws** within the territory of India".

Article 14 guarantees to every person the right to equality before the law or the equal protection of the laws.

The expression **'equality before the law'** is a declaration of equality of all persons within the territory of India, implying thereby the absence of any special privilege in favour of any individual. The second expression **"the equal protection of the laws"** implies equal treatment in equal circumstances. In other words same law shall be applicable to equal and shall not be applicable to unequal. In other words right to equal treatment in similar circumstances makes sense. Thus if there is reasonable basis of classification the legislature would be entitled to treat different classes differently.

Article 14 applies to all persons and is not limited to citizens, A corporation, which is a juristic person, is also entitled to the benefit of this Article.



Legislative classification

Equals are to be governed by the same laws. But as regards unequals, the same laws are not complemented.

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

The expression **'equality before the law'** is a declaration of equality of all persons within the territory of India, implying thereby the absence of any special privilege in favour of any individual.

The equal protection of the laws" implies equal treatment in equal circumstances. In other words same law shall be applicable to equal and shall not be applicable to unequal. In other words right to equal treatment in similar circumstances make sense. Thus if there is reasonable basis of classification the legislature would be entitled to treat different classes differently.

The rules with respect to permissible classification as evolved in various decisions have been summarized by the Supreme Court in Ram Kishan Dalmiya v. Justice Tendulkar, as follows:-

Article 14 forbids class legislation, but does not forbid classification.

Permissible classification must satisfy **two conditions, namely:-**

a. It must be founded on an intelligible differentia which distinguishes persons.

b. The differentia must have a relation to the object sought to be achieved by the statute in question.

- The classification may be founded on different basis, namely geographical, or according to objects or occupations or the like.

- Even a single individual may be treated a class by himself on account of some special circumstances or reasons applicable to him and not applicable to others; a law may be constitutional even though it relates to a single individual who is in a class by himself.

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

ARTICLE 15: PROHIBITION OF DISCRIMINATION ON GROUNDS OF RELIGION ETC.

Article 15(1) prohibits the State from discriminating against any citizen on grounds only of:

(I) Religion
(II) Race
(III) Caste
(IV) Sex
(V) place of birth or
(VI) any of them

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

- access to shops, public restaurants, hotels and places of public entertainment; or

- the use of wells, tanks, bathing Ghats, roads and places of public resort, maintained wholly or partially out of State funds or dedicated to the use of the general public.

Article 15(3) and 15(4) create certain exceptions to the right:-

- Under Article 15(3) the State can make special provision for women and children.

- Article 15(4) permits the State to make special provision for the advancement of—(i) Socially and educationally backward classes of citizens; (ii) Scheduled casts; and (iii) Scheduled tribes

ARTICLE 16: EQUALITY OF OPPORTUNITY IN MATTERS OF PUBLIC EMPLOYMENT

Article 16 guarantees to all citizens' equality of opportunity in matters relating to employment or appointment of public office under the State.
However, there are certain exceptions provided in Article. These are as under:-

- Parliament can make a law requiring residential qualifications within that State or Union Territory prior to such employment or appointment for e.g. - domicile requirements.
- A provision can be made for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State is not adequately represented in the services under the State.
- A law shall not be invalid if it provides that the incumbent of an office in connection with the affair of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

ARTICLE 17: ABOLITION OF UNTOUCHABILITY

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

ARTICLE 18: ABOLITION OF TITLES

Article 18 abolish all the titles conferred on various Indian citizens by British government and the use of those titles is prohibited as it results in creating superior and inferior classes of citizens. No title, not being a military or academic distinction, shall be conferred by the State. No citizen of India shall accept any title from any foreign State.

RIGHT TO FREEDOM [ARTICLES 19 TO 22]

ARTICLE 19: PROTECTION OF CERTAIN RIGHTS REGARDING FREEDOM OF SPEECH ETC

Article 19 guarantees the following six freedoms to the citizens of India:

1. Right to freedom of **speech** and expression.
2. Right to **assemble** peacefully and without arms.
3. Right to form **associations** or unions.

4. Right to **move** freely throughout the territory of India.

5. Right to **reside** and settle in any part of territory of India.

6. Right to practice any profession or to carry on any trade, business or **occupation.**

It may be noted that the aforesaid rights are not absolute and hence reasonable restrictions may be imposed on them. In determining the reasonableness of statute, the court would see both the nature of the restrictions and procedures prescribed by the statute for enforcing the restrictions on the individual freedom.

The reasonableness of restriction has to be determined in an objective manner and from the point of view of the interest of the general public and not from the point of view of the persons upon whom the restrictions are imposed. The court is required to ascertain the reasonableness of the restrictions and not of the law which permits the restrictions.

[Articles 19(1)(a)] Right to freedom of Speech and Expression

Freedom of speech and expression is a very important aspect of democracy, the freedom of speech and expression means the right to express one's convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode.

The right speech and expression includes right to make good or bad speech. One may express oneself even by signs. It also includes the expression of idea through dramatic performance, cinematographic and any other mode of expression.

The freedom cannot be misused, i.e. it cannot be used to disturb public order or contempt of court cannot be done.

- **Case Law Menaka Gandhi v Union of India**

  In Menaka Gandhi v Union of India, it was decided that the freedom of speech and expression includes the freedom of press and thus **imposition of pre-censorship on publication of views**, ideas, analysis, etc. is **violative** of freedom of speech and expression.

- **Case Law Bijoe Emmanuel v State of Kerala**

  In the case of **Bijoe Emmanuel v State of Kerala,** it was held that the right to freedom of speech and expression also includes the **right to remain silent.** It was decided that a person cannot be compelled to sing a National Anthem if he does not want to do so because of some religious objections.

- **Case Law K.A. Abbas v UOI**

  Dramatic performance is also form of speech and expression. In K.A. Abbas v UOI, the Supreme Court held that Censorship of films including pre-censorship is justified under Article 19 but with reasonable restrictions.

Permissible Restrictions

- Sovereignty (autonomy) and integrity (honors and pride) of India
- Security of the State
- Friendly relations with foreign States
- Public order
- Decency and Morality
- Contempt of Court
- Defamation (Offence or Slander)
- Incitement (provocation or encouragement) to an offence.

[Article 19(1)(b)] Right to Assemble Peacefully and Without Arms

It is the right to citizens to assemble peacefully and lawfully without arms. **An unlawful assembly can be dispersed.** However reasonable restrictions may be imposed on this right in the interest of:

- The sovereignty and integrity of India.
- Public order.

[Article 19(1)(c)] Right to Form Association and Union

Every person has a right to become or not to become a member of any union.

- **Case Law- Sitharamachary v Deputy Inspector of School**

  Right to form associations and union is guaranteed so that the people can form a group of people having the similar view. In **Sitharamachary v Deputy, Inspector of School**, it was held that this right necessarily implies a right not to be a member of an association. Thus, no one can be compelled to become member of an association.
  The right is subject to reasonable restrictions which may be imposed in an interest of:

- Sovereignty and integrity of India.
- Public order

- Morality

[Articles 19(1)(d)] Right to Move Freely Throughout the Territory of India

Right to move freely is confirmed only to the territory of India and it cannot be extended to travel abroad. This right can be restricted to:

- Maintain public order or in national interest.
- For the protection of interest of any scheduled tribe.

[Article 19(1)(e)] Right to Reside and Settle in Any Part of Territory of India

The right to freedom of residence is intended to remove internal barriers within the territory of India to enable every citizen to travel freely and settle down in any part of the State or Union territory.

This freedom is also subject to reasonable restrictions which may be imposed:

- In the interest of general public.
- For the protection of interest of any scheduled tribe.

[Article 19(1)(g)] Right to Practice Any Profession or Carry on Any Trade, Business or Occupation

Article 19 (1) (g) provides that all citizens shall have the right to practice any profession or to carry on any occupation, trade or business.
This right is also subject to reasonable restrictions which may be imposed:

- In the interest of the general public.
- To prescribe professional or technical qualification necessary for carrying on any profession, trade or business. For example, Membership of ICSI to work as a CS.
- To enable the State to carry on any trade or business to the exclusion of private citizens. This means that the creation of State monopoly shall not be considered to deprive a citizen of the freedom of trade and occupation.

➢ **Case Law- R.C. Cooper v Union of India**

In one of the leading case of R.C. Cooper v Union of India, the facts discussed are given below:

'Banking Business will be done only by the state and not by any private person' was challenged before the Supreme Court. However the Supreme Court rejected the petition and held that the law is valid as State can restrict a person and has got the power to create a monopoly in its favour.

Monopoly

The Supreme Court's decision in Chintamana Rao v. State of M.P., AIR 1951 S.C. 118; is a leading case on the point where the constitutionality of Madhya Pradesh Act was challenged. The State law prohibited the manufacture of bidis in the villages during the agricultural season. No person residing in the village could employ any other person nor engage himself, in the manufacture of bidis during the agricultural season. The object of the provision was to ensure adequate supply of labour for agricultural purposes. The bidi manufacturer could not even import labour from outside, and so, had to suspend manufacture of bidis during the agricultural season. Even villager's incapable of engaging in agriculture, like old people, women and children, etc., who supplemented their income by engaging themselves manufacturing bidis were prohibited without any reason. The prohibition was held to be unreasonable.

However, after the Constitutional (Amendment) Act, 1951, the State can create a monopoly in favour of itself and can compete with private traders. It has been held in Assn. of Registration Plates v. Union of India, (2004) SCC 476 that the State is free to create monopoly in favour of itself. However the entire benefit arising therefrom must ensure to the benefit of the State and should not be used as a clock for conferring private benefit upon a limited class of persons.

ARTICLE 20: PROTECTION IN RESPECT OF CONVICTION FOR OFFENCES

Article 20 guarantees to all persons, whether **citizens or non-citizens, three rights.** They are as follows:

1. **Protection against ex-post facto laws:** Ex post facto laws are laws which punish what had been unlawful when done. If a particular **act was not an offence** according to the law of the land **at the time when the person did that act, then he cannot be convicted** under a law which with retrospective declares that act as an offence. Even the penalty for the commission of an **offence** cann**ot be increased** with **retrospective** effect.

   Thus, the meaning of the above two provisions is that so far as criminal law creates a new offence or increases the penalty, it shall be applicable only to those **offences** which are **committed after its coming into force** and cann**ot cover** those **offences** which have already been **committed in the past.**

Exception: Protection under this Article is available only for offences and their punishments under criminal law and not for any **civil liability**, where **retrospective law can be passed.**

2. **Protection against double jeopardy:** No person can be prosecuted and punished for the same offence more than once. It is however, to be noted that the conjunction and is used

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

3. **Protection against self-incrimination:** A person accused of any offence cannot be compelled to be a witness against himself. In other words, an accused cannot be compelled to state anything which goes against him.

But it is to be noted that a person is entitled to this protection only when all three conditions are fulfilled:

- That he must be accused of an offence.
- That there must be compulsion to be witness.
- Such compulsion should result in his giving evidence against himself.

Article 20 - It guarantees 3 protections-

i. **Double Jeopardy** - No person can be compelled to be punished twice for the same offence. E.g. To be hanged

ii. **Self-Incrimination** - No person can be compelled to be witness against himself. In other words, no accused can be forced to confess or admit his offence.

iii. **No ex post facto laws in criminal Law** - No retrospective effect to any criminal law.

- Civil Law **-** They can be made both with prospective or retrospective effect i.e. they can be applied from the day of formation or from earlier date also.
- Criminal Law **-** They are always of prospective nature i.e. they will be applied from day of formation and not from earlier date.

ARTICLE 21: RIGHT TO LIFE AND PERSONAL LIBERTY

Article 21 of the constitution confers on every person the fundamental right to life and personal liberty. It says that **"No person shall be deprived of his life or personal liberty except according to the procedure established by law."**

Every person has a **right to life** which shall not be denied by the state. However if due procedure is followed then the right to life can be denied. So, this is not an absolute right. For example, Imprisonment or death sentence to criminal.

Liberty means dignity of a person, so **right to life is available with dignity.**

Thus Article 21 seeks to prevent encroachment upon personal liberty by the executive except in accordance with law and in conformity with the provisions of the law. The scope, application and effect of Article 21 may be well understood through the following important judicial decisions:

- **Case Law- Philips Alfred Malvin v Y.J. Gonsalvis**
  It was held that right to life includes those things which make life meaningful. For instance, the right of a couple to adopt a son.

- **Case Law- A.K. Gopalan v State of Madras**

  In this case a very narrow meaning was given to the expression personal liberty confining it to the liberty of the persons, i.e. of the body of a person.

- **Case Law- Kharak Singh v State of U.P**

  That the expression "personal liberty" is not limited to bodily restraint or to confinement to prison only is well illustrated by Kharak Singh v State of U.P. In this case, the question raised was of the validity of the police regulation authorizing the police to conduct what are called domiciliary visits against bad characters and to have surveillance over them. The court held that such visits were an invasion on the part of the police, of the sanctity (purity or holiness) of a man's house and interruption into his personal security and his right to sleep, and therefore violative of personal liberty of the individual, unless authorized by a valid law.

- **Case Law- Satwant Singh Sawhney v Assistant Passport Officer, New Delhi**

  In this case it was held that right to travel abroad is included within the expression 'personal liberty' and therefore, no person can be deprived of his right to travel except according to the procedure established by law. Since a passport is essential for the enjoyment of this right, the denial of a passport amounts to deprivation of personal liberty. At present, personal liberty includes various other liberties like right to bail, public interest, litigation, right to free legal aid, right to speedy trial, etc. The expression "procedures establish law" means procedure laid down by statute or prescribed by the law of the State.

ARTICLE 21A: RIGHT TO EDUCATION

This was introduced by the Constitution (Eighty sixth Amendment) Act, 2002. According to this, the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

ARTICLE 22: PROTECTION AGAINST ARBITRARY ARREST AND DETENTION

Article 22 provides the following safeguards against arbitrary arrest and detention: -

i. A person who is arrested cannot be detained in custody unless he has been informed, as soon as may be, of the grounds for such arrest.

ii. Such person shall have the right to consult and to be defended by a legal practitioner of his choice.

iii. A person who is arrested and detained must be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time of journey. And such a person shall not be detained in custody beyond twenty-four hours without the authority of magistrate.

However, Article 22 does not apply to following persons: -

- alien enemies,
- person arrested or detained under preventive detention law.

Preventive detention

Preventive detention means detention of a person without trial. The object of preventive detention is not to punish a person for having done something but to prevent him from doing it.

Safeguards against Preventive Detention

Article 22 contains following safeguards against preventive detention: -
Such a person cannot be detained for a longer period than **three months** unless an **Advisory Board** constituted of persons who are or have been or are qualified to be High Court judges has reported, before the expiration of the said period of three months that there is, in its opinion sufficient cause for such detention. The authority ordering the detention of a person under the preventive detention law shall communicate to him, as soon as may be, the grounds on which the order for his detention has been made, and afford him the earliest opportunity of making the representation against the order.It may, however, be noted that while the grounds for making the order are to be supplied, the authority making such order is **not bound** to disclose those facts which it considers to be against the **public interest.**

ARTICLES 23: PROHIBITION OF TRAFFIC IN HUMAN BEINGS AND FORCED LABOUR

Article 23 imposes a complete ban on traffic in human beings, federal and other similar forms of forced labour. The contravention of these provisions is declared punishable by law.
'Traffic' in human beings means to deal in men and women like goods, such as to sell or let or otherwise dispose them off. 'Begar' means involuntary work without payment.

ARTICLE 24: PROHIBITION OF EMPLOYMENT OF CHILDRENIN FACTORIES ETC

Article 24 prohibits the employment of children below the age of fourteen in any factory or mine.

ARTICLE 25: RIGHT TO FREEDOM OF RELIGION

Article 25 gives to every person the freedom of conscience, and the right freely to profess practice and propagate religion. But this freedom is subject to restrictions imposed by the State on the grounds of-public order, morality and health.

ARTICLE 26: FREEDOM TO MANAGE RELIGIOUS AFFAIRS

It grants to every religious denomination or any sect thereof the right:

- To establish and maintain institutions of religious and charitable purposes;
- To manage its own affairs in matters of religion;
- To own and acquire movable and immovable property; and
- To administer such property in accordance with law.

All these rights are subject to public order, morality

ARTICLE 27: FREEDOM AS TO PAYMENT OF TAX FOR THE PROMOTION OF ANY PARTICULAR RELIGION

According to Article 27, no person can be compelled to pay any taxes, the proceeds of which are specially appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

ARTICLE 28: FREEDOM AS TO ATTENDANCE AT RELIGIOUS INSTRUCTION OR RELIGIOUS WORSHIP IN EDUCATIONAL INSTITUTIONS

Article 28 states that no religious instruction can be provided in any educational institution wholly maintained out of State funds. However, this prohibition does not extend to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

ARTICLES 29: PROTECTION OF INTERESRS OF MINORITIES

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

Article 29 guarantees two rights: -

Any section of the citizens residing in the territory of Indian or any part thereof having a distinct language, script or culture of its own has the right of conserve the same.

No citizen can be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language, or any of them.

An exception is made to this right to the effect that if a special provision is made for the admission of persons belonging to educationally or/and socially backward classes or scheduled castes or scheduled tribes it shall be valid.

ARTICLE 30: RIGHT OF MINORITIES TO ESTABLISH AND ADMINISTER EDUCATIONAL INSTITUTIONS

All minorities, whether based on religion or on language, shall have the **right to establish** and **administer educational institutions** of their choice.

The State cannot, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

CASE LAWS

S.NO.	CASE NAME	PROVISONS
1	DAV College v. State of Punjab,	It was held that any community—religious or linguistic, which is numerically less than 50 percent of the population of that State, is a minority within the meaning of Article 30. The expression minority in Article 30(1) is used as distinct from 'Any sections of citizens' in Article 29(1) which lends support to the view that Article 30(1) deals with national minorities or minorities recognized in the context of the entire nation.

2	Delhi High Court in Delhi Abibhavak Mahasangh v. U.O.I	Article 30(1) of the Constitution does not permit, minorities to indulge in commercialization of education in the garb of constitutional protection. For the application of this right minority institutions are divided into three classes: (i) institution which neither seek aid nor recognition from the State; (ii) institution that seek aid from the State; and (iii) institutions which seek recognition but not aid. While the institutions of class (i) cannot be subjected to any regulations except those emanating from the general law of the land such as labour, contract or tax laws, the institutions in classes (ii) and (iii) can be subjected to regulations pertaining to the academic standards and to the better administration of the institution, in the interest of that institution itself.
3	T.M.A. Pai Foundation v. State of Karnataka	While interpreting Article 30, the Supreme Court held that minority includes both linguistic and religious minorities and for determination of minority status, the unit would be the State and not whole of India. Further, the right of minorities to establish and administer educational institutions (including professional education) was not absolute and regulatory measures could be imposed for ensuring educational standards and maintaining excellence thereof. Right of minorities included right to determine the procedure and method of admission and selection of students, which should be fair and transparent and based on merit.

ARTICLE 31: RIGHT TO PROPERTY

Right to property is no more a fundamental right which was previously guaranteed under Part III of the Constitution by Article 31. But the right to property has been inserted by Article 300A under Part XII of the Constitution. Article 300A reads – "No person shall be deprived of his property save by authority of law."

Article 31A: Saving of Laws Providing for Acquisition of Estates etc.

Then follows Article 31A which is an exception to the right of equality as guaranteed in Article 14 and to the six freedoms as guaranteed in Article 19, if they come into conflict with any law mentioned in Article 31A. Such laws are those which provide for –

i. The acquisition by the State of any estate or any rights therein or the extinguishment or modification of any such rights. 'Estate' here means the property included within that expression according to the land tenures applicable in the area where it is situated. And 'rights' in relation to an estate means proprietary and other intermediary rights. In short, such laws are those which related to agrarian reforms, or

ii. The taking over of the management of any property by the State for a limited period in the public interest or in order to secure the proper management of the property, or

iii. The amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

iv. The extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors or managers of corporations, or of any voting rights of shareholders thereof, or

v. The extinguishment or modification of any rights accruing by virtue of any agreement, lease or license for the purpose of searching for, or winning any mineral or mineral oil or the premature termination or cancellation of any such agreement, lease or license.

However, limitations have been imposed with respect to the laws relating to the acquisition of the estates. They are:

a. If such a law is made by a State Legislature then it cannot be protected by the provisions of Article 31A unless such law having been reserved for the consideration of the President has received his assent, and

b. If the law provides for the acquisition of (i) any land within the ceiling limit applicable in that area, (ii) any building or structure standing thereon or apartment thereto, it (law) shall not be valid unless it provides for payment of compensation at a rate which shall not be less than the market value thereof. This provision, however, has been amended by the Constitution (29th Amendment) Act.

Article 31B: Validation of certain Acts and Regulations

Article 31B protects certain laws against attack on the ground of violation of any fundamental rights. The laws so protected are specified in the Ninth Schedule to the Constitution. These laws also relate mainly to land reforms.

Article 31C: Saving of Laws giving effect to certain Directive Principles

Article 31C added by 25th Amendment of the Constitution lifted to the constitutional limitations on the powers of State, imposed by Article 14 (equality before law) and Article 19 (freedoms) as regards law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of Article 39. These principles are—

i. that the ownership and control of the maternal resources of the community are so distributed as best to sub serve the common good, and

ii. that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The issue whether the 24th, 25th and 29th Amendments made by Parliament were valid or not was raised in the Supreme Court. In [Kesavananda Bharti v. State of Kerala, (1973) S.C.C. 225], the majority judgment (of a full bench of 13 judges) upheld the power of Parliament to amend the Constitution provided it did not alter its basic framework.

By the 42nd Amendment in Article 31-C for the words the principles specified in clause (a) or clause (c) of Article 39 the words in all or any of the principles laid down in Part IV were substituted. But this substitution was held to be void by the Supreme Court in Minerva Mills v. Union of India, (1980) 2 SCC 591.

ARTICLE 32: RIGHT TO CONSTITUTIONAL REMEDIES

Article 32 guarantees the enforcement of Fundamental Rights.

Article 32 makes it a fundamental right that a person whose fundamental right is violated has the right to move the Supreme Court by appropriate proceedings for the enforcement of this fundamental right.

A person need not first exhaust the other remedies and then go to the Supreme Court. On the other hand, he can directly raise the matter before highest Court of the land and the Supreme Court is empowered to issue directions or orders or writ.

The right guaranteed by Article 32 cannot be suspended except as provided in the Constitution. Constitution does not contemplate such suspension except by way of President's order under Article 359 when a proclamation of Emergency is in force.

Supplementary provisions

Articles 33-35 — contain certain supplementary provisions.

Article 33 authorizes Parliament to restrict or abrogate the application of fundamental rights in relation to members of armed forces, para-military forces, police forces and analogous forces.

Article 34 is primarily concerned with granting indemnity by law in respect of acts done during operation of martial law. The Constitution does not have a provision authorizing proclamation of martial law. Article 34 says that Parliament may by law indemnify any person in the service of the Union or of State or any other person, for an act done during martial law.

Article 35 provide that wherever Parliament has by an express provision been empowered to make a law restricting a fundamental right Parliament alone can do so, (and not the state legislature).

Amendability of the Fundamental Rights

A. Since 1951, questions have been raised about the scope of amending process contained in Article 368 of the Constitution. The basic question raised was whether the Fundamental Rights are amendable. The question whether the word 'Law' in Clause (2) of Article 13 includes amendments or not or whether amendment in Fundamental Rights guaranteed by Part III of the Constitution is permissible under the procedure laid down in Article 368 had come before the Supreme Court in Shankari Prasad v. Union of India, A.I.R. 1951 S.C. 458, in 1951 where the First Amendment was challenged. The Court held that the power to amend the Constitution including the Fundamental Rights, was contained in Article 368 and that the word 'Law' in Article 13(2) did not include an amendment to the Constitution which was made in exercise of constituent and not legislative power. This decision was approved by the majority judgement in Sajjan Singh v. State of Rajasthan, A.I.R. 1965 S.C. 845. Thus, until the case of I.C. Golak Nath v. State of Punjab, A.I.R. 1967, S.C. 1643, the Supreme Court had been holding that no part of our Constitution was unamendable and that Parliament might, by passing a Constitution Amendment Act, in compliance with the requirements of Article 368, amend any provision of the Constitution, including the Fundamental Rights and Article 368 itself.

B. But, in Golak Nath's case, a majority overruled the previous decisions and held that the Fundamental Rights are outside the amendatory process if the amendment takes away or abridges any of the rights. The majority, in Golak Nath's case, rested its conclusion on the view that the power to amend the Constitution was also a legislative power conferred by Article 245 by the Constitution, so that a Constitution Amendment Act was also a 'law' within the purview of Article 13(2).

C. To nullify the effect of Golak Nath's case, Parliament passed the Constitution (Twenty-Fourth Amendment) Act in 1971 introducing certain changes in Article 13 and Article 368, so as to assert the power of Parliament (denied to it in Golak Nath's case) to amend the Fundamental Rights. The Constitutional validity of the 24th Amendment was challenged in the case of Kesavanand Bharti v. State of Kerala, A.I.R. 1973 S.C. 1461. The Supreme Court upheld the validity of 24th Constitutional Amendment holding that Parliament can amend

any Part of the Constitution including the Fundamental Rights. But the Court made it clear that Parliament cannot alter the basic structure or framework of the Constitution. In Indira Gandhi v. Raj Narain, AIR 1975 S.C. 2299, the appellant challenged the decision of the Allahabad High Court who declared her election as invalid on ground of corrupt practices. In the meantime, Parliament enacted the 39th Amendment withdrawing the control of the S.C. over election disputes involving among others, the Prime Minister. The S.C. upheld the challenge and held that democracy was an essential feature forming part of the basic structure of the Constitution. The exclusion of judicial review in Election disputes in this manner damaged the basic structure. The doctrine of 'basic structure' placed a limitation on the powers of the Parliament to introduce substantial alterations or to make a new Constitution.

To neutralize the effect of this limitation, the Constitution (Forty-Second Amendment) Act, 1976 added to Article 368 two new clauses. By new clause (4), it has been provided that no amendment of the Constitution made before or after the Forty-Second Amendment Act shall be questioned in any Court on any ground. New clause (5) declares that there shall be no limitation whatever on the Constitutional power of parliament to amend by way of addition, variation or repeal the provisions of this Constitution made under Article 368.

The scope and extent of the application of the doctrine of basic structure again came up for discussion before the S.C. in Minerva Mill Ltd. v. Union of India, (1980) 3 SCC, 625. The Supreme Court unanimously held clauses (4) and (5) of Article 368 and Section 55 of the 42nd Amendment Act as unconstitutional transgressing the limits of the amending power and damaging or destroying the basic structure of the Constitution.

- In Waman Rao v. Union of India, (1981) 2 SCC 362 the Supreme Court held that the amendments to the Constitution made on or after 24.4.1973 by which Ninth Schedule was amended from time to time by inclusion of various Acts, regulations therein were open to challenge on the ground that they, or any one or more of them are beyond the constitutional power of Parliament since they damage the basic or essential features of the Constitution or its basic structure. [See also Bhim Singh Ji v. Union of India (1981)1 SCC 166.]

- In L. Chandra Kumar v. Union of India (1997) 3 SCC 261 the Supreme Court held that power of judicial review is an integral and essential feature of the Constitution constituting the basic part, the jurisdiction so conferred on the High Courts and the Supreme Court is a part of in- violable basic structure of the Constitution.

- In I.R. Coelho v. State of T.N., (2007) 2 SCC 1, Article 31-B as introduced by the Constitution (First amendment) Act 1951 was held to be valid by the Supreme Court. The fundamental question before the nine Judge Constitution Bench was whether on or after 24.4.1973 (i.e. when the basic structure of the Constitution was propounded) it is permissible for the Parliament under Article 31-B to immunize legislations from fundamental rights by inserting them into the Ninth Schedule and if so what is the effect on the power of judicial review of the court. The challenge was made to the validity of the Urban Land (Ceiling and Regulation) Act, 1976 which was inserted in the Ninth Schedule.

The Supreme Court held that all amendments to the Constitution made on or after 24.4.1973 by which Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touch stone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19 and the principles under lying them. So also, any law included in Schedule IX does not become part of the Constitution. They derive their validity on account of being included in Schedule IX and this exercise is to be tested every time it is undertaken. If the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law on the principles declared in this judgment. However, if a law held to be violative of any rights of Part III is subsequently incorporated in the Ninth Schedule after 24.4.1973 such a violation shall be open to challenge on the ground that it destroys or damages the basic structure doctrine.

- In Glanrock Estate (P) Ltd. v. State of Tamil Nadu (2010) 10 SCC 96, the Supreme Court upheld constitutional validity of Constitution (Thirty-fourth) Amendment Act, 1974. By Constitution (Thirty-fourth) Amendment Act, 1974 Gudalur Janman Estates (Abolition & Conversion into Ryotwari) Act, 1969 was inserted in the Ninth Schedule as item 80. It was alleged that the 1969 Act violated the principle of equality because by the T N Land Reforms (Fixation of Ceiling on Land) Act, 1961 only ceiling surplus forest lands vested in the State but by the 1969 Act all forests vested in the State. The constitutional amendment was further challenged on the ground that it validated the 1969 Act by inserting it in the Ninth Schedule in spite of Section 3 of the 1969 Act having been declared as unconstitutional in Balmadies case, (1972) 2 SCC 133, thereby violating the principles of judicial review, rule of law and separation of powers. (Section 3 had been declared unconstitutional in Balmadies case because it could not be shown how vesting of forest lands was an agrarian reform.)

  Upholding the constitutional validity of the amendment, the Supreme Court held:

  None of the facets of Article 14 have been abrogated by the Constitution (Thirty fourth Amendment) Act, 1974, which included the 1969 Act in the Ninth Schedule. When the 1969 Act was put in the Ninth Schedule in1 974, the Act received immunity from Article 31(2) with retrospective effect.

  It is only that breach of the principle of equality which is of the character of destroying the basic framework of the Constitution which will not be protected by Article 31-B. If every breach of Article 14, however egregious, is held to be unprotected by Article 31-B, there would be no purpose in protection by Article 31-B.

  In the present case, not even an ordinary principle of equality under Article 14, leave aside the egalitarian equality as an overarching principle, is violated. Even assuming for the sake of argument that Article 14 stood violated, even then the 1969 Act in any event stood validated by its insertion in the Ninth Schedule vide the Constitution (Thirty-fourth Amendment) Act, 1974.There is no merit in the submission that the Constitution (Thirty fourth Amendment) Act, 1974 by which the 1969 Act was inserted in the Ninth Schedule as item 80 seeks to confer naked power on Parliament and destroys basic features of the Constitution, namely, judicial review and separation of powers as well as rule of law.

The doctrine of basic structure provides a touchstone on which validity of the constitutional amendment Act could be judged. Core constitutional values/ overarching principles like secularism; egalitarian equality etc. fall outside the amendatory power under Article 368 of the Constitution and Parliament cannot amend the constitution to abrogate these principles so as to rewrite the constitution.

DIRECTIVE PRINCIPLES OF STATE POLICY

The Sub-committee on Fundamental Rights constituted by the Constituent Assembly had suggested two types of Fundamental Rights — one which can be enforced in the Courts of law and the other which because of their different nature cannot be enforced in the law Courts. Later on, however, the former was put under the head 'Fundamental Rights' as Part III which we have already discussed and the latter were put separately in Part IV of the Constitution under the heading 'Directive Principles of State Policy' which are discussed in the following pages.

The Articles included in Part IV of the Constitution (Articles 36 to 51) contain certain Directives which are the guidelines for the future Government to lead the country. Article 37 provides that the 'provisions contained in this part (i) shall not be enforceable by any Court, but the principles therein laid down are nevertheless (ii) fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws. The Directives, however, differ from the Fundamental Rights contained in Part-III of the Constitution or the ordinary laws of the land in the following respects:

i. The Directives are not enforceable in the courts and do not create any justiciable rights in favour of individuals.

ii. The Directives require to be implemented by legislation and so long as there is no law carrying out the policy laid down in a Directive neither the state nor an individual can violate any existing law.

iii. The Directives per-se does not confer upon or take away any legislative power from the appropriate legislature.

iv. The courts cannot declare any law as void on the ground that it contravenes any of the Directive Principles.

v. The courts are not competent to compel the Government to carry out any Directives or to make any law for that purpose.

vi. Though it is the duty of the state to implement the Directives, it can do so only subject to the limitations imposed by the different provisions of the Constitution upon the exercise of the legislative and executive power by the state.

Conflict between a Fundamental Right and a Directive Principle

The declarations made in Part IV of the Constitution under the head 'Directive Principles of State Policy' are in many cases of a wider import than the declarations made in Part III as 'Fundamental Rights'. Hence, the question of priority in case of conflict between the two classes of the provisions may easily arise.

What will be the legal position if a law enacted to enforce a Directive Principle violates a Fundamental Right?

Initially, the Courts adopted a strict view in this respect and ruled that a Directive Principle could not override a Fundamental Right, and in case of conflict between the two, a Fundamental Right would prevail over the Directive Principle. When the matter came before the Supreme Court in State of Madras v. Champakram Dorairajan, AIR 1951 S.C. 226, where the validity of a Government order alleged to be made to give effect to a Directive Principle was challenged as being violative of a Fundamental Right, the Supreme Court made the observation that:

"The Directive Principles of State Policy have to conform to and run as subsidiary to the chapter of Fundamental Rights."

The Court ruled that while the Fundamental Rights were enforceable, the Directive Principles were not, and so the laws made to implement Directive Principles could not take away Fundamental Rights.

The Supreme Court also pointed out that looking at Directive Principles, we find as was envisaged by the Constitution makers, that they lay down the ideals to be observed by every Government to bring about an economic democracy in this country. Such a democracy actually is our need and unless we achieve it as soon as possible, there is a danger to our political and constitutional democracy of being overthrown by undemocratic and unconstitutional means.

Important Directive Principles:

The important Directive Principles are enumerated below:

a. State to secure a social order for the promotion of welfare of the people:

1. The State must strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political should inform all the institutions of the national life (Article 38).

2. The State shall, in particular, strive to minimize the inequalities in income and endeavor to eliminate inequalities in status, facilities, and opportunities, not only amongst individuals but also among groups of people residing in different areas or engaged in different vocations. (introduced by Constitution 44th Amendment Act).

b. Certain principles of policy to be followed by the State. The State, particularly, must direct its policy towards securing:

i. that the citizens, men and women equally, have the right to an adequate means of livelihood;

ii. that the ownership and control of the material resources of the community are so distributed as best to sub serve the common goods;

iii. that the operation of the economic systems does not result in the concentration of wealth and means of production to the common detriment;

iv. equal pay for equal work for both men and women;

v. that the health and strength of workers and children is not abused and citizens are not forced by the economic necessity to enter a vocation unsuited to their age or strength

vi. that childhood, and youth are protected against exploitation and against moral and material abandonment (Article 39).

bb. the State shall secure that the operation of legal system promotes justice on a basis of equal opportunity, and shall, in particular provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities (Article 39A).

c. The State must take steps to organize the Village Panchayats and enable them to function as units of self-government (Article 40).

d. Within the limits of economic capacity and development the State must make effective provision for securing the right to work, to education and to public assistance in case of unemployment, old age, etc. (Article 41).

e. Provision must be made for just and humane conditions of work and for maternity relief (Article 42).

f. The State must endeavor to secure living wage and good standard of life to all types of workers and must endeavor to promote cottage industries on an individual of co-operative basis in rural areas (Article 43).

(ff) The State take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organizations engaged in any industry (Article 43A).

g. The State must endeavor to provide a uniform civil code for all Indian citizens (Article 44).

h. Provision for free and compulsory education for all children up to the age of fourteen years (Article 45).

i. The State must promote the educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections (Article 46).

j. The State must regard it one of its primary duties to raise the level of nutritional and the standard of living and to improve public health and in particular it must endeavor to bring about prohibition of the consumption, except for medicinal purposes, in intoxicating drinks and of drugs which are injurious to health (Article 47).

k. The State must organize agriculture and animal husbandry on modern and scientific lines and improve the breeds and prohibit the slaughter of cows and calves and other milch and draught cattle (Article 48).

(kk) The State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country (Article 48A).

l. Protection of monuments and places and objects of national importance is obligatory upon the State (Article 49).

m. The State must separate executive from judiciary in the public services of the State (Article 50).

n. In international matters the State must endeavor to promote peace and security, maintain just and honourable relations in respect of international law between nations, treaty obligations and encourage settlement of international disputes by arbitration (Article 51).

FUNDAMENTAL DUTIES

Article 51A imposing the fundamental duties on every citizen of India was inserted by the Constitution Forty- second Amendment) Act, 1976.

The objective in introducing these duties is not laid down in the Bill except that since the duties of the citizens are not specified in the Constitution, so it was thought necessary to introduce them.

These Fundamental Duties are:

a. To abide by the constitution and respect its ideals and institutions, the National Flag and the National Anthem;

b. To cherish and follow the noble ideals which inspired our national struggle for freedom;

c. To uphold and protect the sovereignty, unity and integrity of India;

d. To defend the country and render national service when called upon to do so;

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

f. To value and preserve the rich heritage of our composite culture;

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

h. To develop the scientific temper, humanism and the spirit of inquiry and reform;

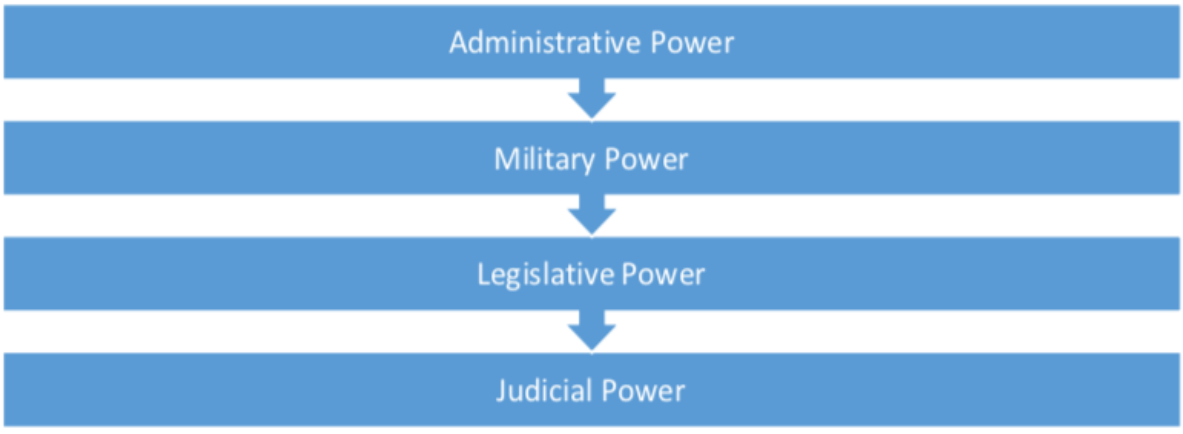
i. To safeguard public property and to abjure violence;

j. To strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavor and achievement;

k. To provide opportunities for education to one's child or, as the case may be, ward between the age of six and fourteen years.
Since the duties are imposed upon the citizens and not upon the States, legislation is necessary for their implementation. Fundamental duties can't be enforced by writs (Surya Narain v. Union of India, AIR 1982 Raj 1). The Supreme Court in AIIMS Students' Union v. AIIMS (2002) SCC 428 has reiterated that though the fundamental duties are not enforceable by the courts, they provide a valuable guide and aid to the interpretation of Constitutional and legal issues. Further, in Om Prakash v. State of U.P. (2004) 3 SCC 402, the Supreme Court held that fundamental duties enjoined on citizens under Article 51-A should also guide the legislative and executive actions of elected or non-elected institutions and organizations of citizens including municipal bodies.

ORDINANCE MAKING POWERS

In Article 53 the Constitution lays down that the "executive power of the Union shall be vested in the President". The President of India shall, thus, be the head of the 'executive power' of the Union. The executive power may be defined as the power of "carrying on the business of Government" or "the administration of the affairs of the state" excepting functions which are vested in any other authority by the Constitution. The various powers that are included within the comprehensive expression 'executive power' in a modern state have been classified under various heads as follows:



i. Administrative power, i.e., the execution of the laws and the administration of the departments of Government.

ii. Military power, i.e., the command of the armed forces and the conduct of war.

iii. Legislative power, i.e., the summoning; prorogation, etc. of the legislature.

iv. Judicial power, i.e., granting of pardons, reprieves etc. to persons convicted of crime.

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

1. Ordinance-making power of the President

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

The ambit of this Ordinance-making power of the President is co-extensive with the legislative powers of Parliament, that is to say it may relate to any subject in respect of which parliament has the right to legislate and is subject to the same constitutional limitations as legislation by Parliament.

According to Article 13(3)(a) "Law" includes an "Ordinance". But an Ordinance shall be of temporary duration. It may be of any nature, i.e., it may be retrospective or may amend or repeal any law or Act of Parliament itself.

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

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

ii. the power is to be exercised by the President on the advice of his Council of Ministers.

iii. the President must be satisfied about the need for the Ordinance and he cannot be compelled

iv. the Ordinance must be laid before Parliament when it re-assembles, and shall automatically cease to have effect at the expiration of 6 weeks from the date of re-assembly or before resolutions have been passed disapproving the Ordinance.

v. the period of six weeks will be counted from the latter date if the Houses reassemble on different dates.

2. Ordinance making power of the Governor

The executive power of the State is vested in the Governor and all executive action of the State has to be taken in the name of the Governor. Normally there shall be a Governor for each State but the same person can be appointed as Governor for two or more States. The Governor of a State is not elected but is appointed by the President and holds his office at the pleasure of the President. The head of the executive power to a State is the Governor just as the President for the Union.

Powers: The Governor possesses executive, legislation and judicial powers as the Presidents except that he has no diplomats or military powers like the President. This power is exercised under the head of 'legislative powers. The Governor's power to make Ordinances as given under Article 213 is similar to the Ordinance making power of the President and has the force of an Act of the State Legislature. He can make Ordinance only when the State Legislature or either of the two Houses (where it is bicameral) is not in session. He must be satisfied that circumstances exist which render it necessary to take immediate action. While exercising this power Governor must act with the aid and advice of the Council of Ministers. But in following cases the Governor cannot promulgate any Ordinance without instructions from the President:

a. if a Bill containing the same provisions would under this Constitution have required the previous section of the President.

b. he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President.

c. an Act of the State legislature containing the same provisions would under this Constitution have been invalid under having been reserved for the consideration of the President, it had received the assent of the President.

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

LEGISLATIVE POWERS OF THE UNION AND THE STATES

1. Two Sets of Government

The Indian Constitution is essentially federal. Dicey, in the "Law of Constitution' has said "Federation means the distribution of the force of the State among a number of co-ordinate bodies, each originating in and controlled by the Constitution". The field of Government is divided between the Federal and State Governments which are not subordinate to one another but are co-ordinate and independent within the sphere allotted to them. The existence of co-ordinate authorities independent of each other is the gist of the federal principle.

A federal constitution establishes a dual polity as it comprises two levels of Government. At one level, there exists a Central Government having jurisdiction over the whole country and

reaching down to the person and property of every individual therein. At the other level, there exists the State Government each of which exercises jurisdiction in one of the States into which the country is divided under the Constitution. A citizen of the federal country thus becomes subject to the decrees of two Government — the central and the regional.

The Union of India is now composed of 29 States and both the Union and the States derive their authority from the Constitution which divides all powers-legislative, executive and financial, between them. The result is that the States are not delegates of the Union and though there are agencies and devices for Union control over the States in many matters, the States are autonomous within their own spheres as allotted to them by the Constitution. Both the Union and States are equally subject to the limitations imposed by the Constitution, say, for example, the exercise of legislative powers being limited by Fundamental Rights. However, there are some parts of Indian Territory which are not covered by these States and such territories are called Union Territories.

The two levels of Government divide and share the totality of governmental functions and powers between themselves. A federal constitution thus envisages a division of governmental functions and powers between the center and the regions by the sanction of the Constitution.

Chapter I of Part XI (Articles 245 to 255) of the Indian Constitution read with Seventh Schedule thereto covers the legislative relationship between the Union and the States. Analysis of these provisions reveals that the entire legislative sphere has been divided on the basis of: (a) Territory with respect to which the laws are to be made, and (b) Subject matter on which laws are to be made.

2. Territorial Distribution

The Union Legislature, i.e., Parliament has the power to make laws for the whole of the territory of India or any part thereof, and the State Legislatures have the power to make laws for the whole or any part of the territory of the respective States. Thus, while the laws of the Union can be enforced throughout the territory of India, the laws of a State cannot be operative beyond the territorial limits of that States. For example, a law passed by the legislature of the Punjab State cannot be made applicable to the State of Uttar Pradesh or any other state. However, this simple generalization of territorial division of legislative jurisdiction is subject to the following clarification.

(A) Parliament

From the territorial point of view, Parliament, being supreme legislative body, may make laws for the whole of India; or any part thereof; and it can also make laws which may have their application even beyond the territory of India. A law made by Parliament is not invalid merely because it has an extra-territorial operation. As explained by Kania C.J. in A.H. Wadia v. Income-tax Commissioner, A.I.R. 1949 F.C. 18, 25 "In the case of sovereign Legislature, questions of extra-territoriality of any enactment can never be raised in the municipal courts as a ground for challenging its validity. The legislation may offend the rules of International law,

may not be recognized by foreign courts, or there may be practical difficulties in enforcing them but these are questions of policy with which the domestic tribunals are not concerned".

A Union Territory is administered directly by the Central Executive. Article 239(1) provides save as otherwise provided, by Parliament by law, every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an Administrator to be appointed by him with such designation as he may specify. Article 239A empowers Parliament to create local Legislatures or Council of Ministers or both for certain Union Territories with such constitutional powers and functions, in each case, as may be specified in the law. Article 246(4) provides that Parliament can make a law for a Union Territory with respect to any matter, even if it is one which is enumerated in the State List. With regard to Union Territories, there is no distribution of legislative powers. Parliament has thus plenary powers to legislate for the Union Territories with regard to any subject. These powers are, however, subject to some special provisions of the Constitution.

(B) State Legislature

A State Legislature may make laws only for the state concerned. It can also make laws which may extend beyond the territory of that State. But such law can be valid only on the basis of "territorial nexus". That is, if there is sufficient nexus or connection between the State and the subject matter of the law which falls beyond the territory of the State, the law will be valid. The sufficiency of the nexus is to be seen on the basis of the test laid down by our Supreme Court in State of Bombay v. R.M.D.C., A.I.R. 1957 S.C. 699, according to which two conditions, must be fulfilled:

i. the connection must be real and not illusory; and

ii. the liability sought to be imposed by that law must be pertinent to that connection.

If both the conditions are fulfilled by a law simultaneously then only it is valid otherwise not. To illustrate, in the case cited above a newspaper in the name of "Sporting Star" was published and printed at Bangalore in Mysore (now Karnataka) State. It contained crossword puzzles and engaged in prize competitions. It had wide circulation in the State of Bombay (now Maharashtra) and most of its activities such as the standing invitations, the filling up of the forms and the payment of money took place within that State. The State of Bombay imposed a tax on the newspaper. The publishers challenged the validity of the law on the ground that it was invalid in so far it covered a subject matter falling beyond the territory of that State because the paper was published in another State. The Supreme Court, applying the doctrine of territorial nexus, held that the nexus was sufficient between the law and its subject-matter to justify the imposition of the tax. So in this way, the state laws may also have a limited extra-territorial operation and it is not necessary that such law should be only one relating to tax-matters.

3. **Distribution of Subject Matter of Legislation**

In distributing the subjects on which legislation can be made, different constitutions have adopted different pattern. For example, in the U.S.A. there is only one short list on the subject. Either by their express terms or by necessary implication some of them are

exclusively assigned to the Central Government or the others concurrent on which Centre and the States both can make laws. The subjects not enumerated in this list, i.e., residuary subjects, have been left for the States. Similar pattern has been followed in Australia but there is one short list in which a few subjects have been exclusively assigned to the Centre and there is a a longer list in which those subjects are enumerated on which Centre and States both can make laws. By necessary implication a few of these concurrent subjects have also become exclusively Central subjects. The unremunerated subjects fall exclusively within the State jurisdiction. A different pattern has been adopted in Canada where there are three lists of subjects, one consists of subjects exclusively belonging to the Centre,the other consists of those exclusively belonging to the States and the third where both can make law. Thus, residuary subjects fall within the central jurisdiction. The Government of India Act, 1935 followed the Canadian pattern subject to the modification that here the lists of subjects were much more detailed as compared to those in the Canadian Constitution and secondly, the residuary subjects had been left to the discretion of the Governor-General which he could assign either to Centre or to the States.

The Constitution of India, substantially follows the pattern of the Government of India Act, 1935 subject to the modification that the residuary subjects have been left for the Union as in Canada. To understand the whole scheme, the Constitution draws three long lists of all the conceivable legislative subjects. These lists are contained in the VIIth Schedule to the Constitution. List I is named as the Union List. List II as the State List and III as the Concurrent List. Each list contains a number of entries in which the subjects of legislation have been separately and distinctly mentioned. The number of entries in the respective lists is 97, 66 and 47. The subjects included in each of the lists have been drawn on certain basic considerations and not arbitrarily or in any haphazard manner.

Thus, those subjects which are of national interest or importance, or which need national control and uniformity of policy throughout the country have been included in the Union List; the subjects which are of local or regional interest and on which local control is more expedient, have been assigned to the State List and those subjects which ordinarily are of local interest yet need uniformity on national level or at least with respect to some parts of the country, i.e., with respect, to more than one State have been allotted to the Concurrent List. To illustrate, defense of India, naval, military and air forces; atomic energy, foreign affairs, war and peace, railways, posts and telegraphs, currency, coinage and legal tender; foreign loans; Reserve Bank of India; trade and commerce with foreign countries; import and export across customs frontiers; interstate trade and commerce, banking; industrial disputes concerning Union employees; coordination and determination of Standards in institutions for higher education are some of the subjects in the Union List. Public Order; police; prisons; local Government; public health and sanitation; trade and commerce within the State; markets and fairs; betting and gambling etc., are some of the subjects included in the State List. And coming to the Concurrent List, Criminal law; marriage and divorce; transfer of property; contracts; economic and social planning; commercial and industrial insurance; monopolies; social security and social insurance; legal, medical and other professions; price control, electricity; acquisition and requisition of property are some of the illustrative matters included in the Concurrent List.

Apart from this enumeration of subjects, there are a few notable points with respect to these lists, e.g.:

i. The entries relating to tax have been separated from other subjects and thus if a subject is included in any particular List it does not mean the power to impose tax with respect to that also follows. Apart from that, while other subjects are in the first part of the List in one group, the subjects relating to tax are given towards the end of the List.

ii. Subject-matter of tax is enumerated only in the Union List and the State List. There is no tax subject included in the Concurrent List.

iii. In each List there is an entry of "fees" with respect to any matter included in that List excluding court fee. This entry is the last in all the Lists except List I where it is last but one.

iv. There is an entry each in Lists I and II relating to "offences against laws with respect to any of the matters" included in the respective List while criminal law is a general subject in the Concurrent List.

So far we have discussed the general aspect of the subject matters of legislation or of the items on which Legislation could be passed. The next question that arises is, who will legislate on which subject? Whether, it is both Centre and the States that can make laws on all subjects included in the three Lists or there is some division of power between the two to make laws on these subjects? The answer is that the Constitution makes clear arrangements as to how the powers shall be exercised by the Parliament or the State Legislatures on these subjects. That arrangement is mainly contained in Article 246, but in addition to that, provisions have also been made in Articles 247 to 254 of the Constitution. A wholesome picture of this arrangement is briefly given below.

4. **Powers of the Union and the States with respect to Legislative Subjects**

The arrangement for the operation of legislative powers of the Centre and the States with respect to different subjects of legislation is as follows:

a. With respect to the subject enumerated in the Union i.e., List I, the Union Parliament has the exclusive power to make laws. The State Legislature has no power to make laws on any of these subjects and it is immaterial whether Parliament has exercised its power by making a law or not. Moreover, this power of parliament to make laws on subjects included in the Union List is notwithstanding the power of the States to make laws either on the subjects included in the State List or the Concurrent List. If by any stretch of imagination or because of some mistake — which is not expected — the same subject which is included in the Union List is also covered in the State List, in such a situation that subject shall be read only in List I and not in List II or List III. By this principle the superiority of the Union List over the other two has been recognized.

b. With respect to the subjects enumerated in the State List, i.e., List II, the legislature of a State has exclusive power to make laws. Therefore, Parliament cannot make any law on any of these subjects, whether the State makes or does not make any law.

c. With respect to the subjects enumerated in the Concurrent List, i.e., List III, Parliament and the State Legislatures both have powers to make laws. Thus, both of them can make a law even with respect to the same subject and both the laws shall be valid in so far as they are not repugnant to each other. However, in case of repugnancy, i.e., when there is a conflict between such laws then the law made by Parliament shall prevail over the law made by the State Legislature and the latter will be valid only to the extent to which it is not repugnant to the former. It is almost a universal rule in all the Constitutions where distribution of legislative powers is provided that in the concurrent field the Central law prevails if it conflicts with a State law. However, our Constitution recognizes an exception to this general or universal rule. The exception is that if there is already a law of Parliament on any subject enumerated in the Concurrent List and a state also wants to make a law on the same subject then a State can do so provided that law has been reserved for the consideration of the President of India and has received his assent. Such law shall prevail in that State over the law of Parliament if there is any conflict between the two. However, Parliament can get rid of such law at any time by passing a new law and can modify by amending or repealing the law of the State.

d. With respect to all those matters which are not included in any of the three lists, Parliament has the exclusive power to make laws. It is called the residuary legislative power of Parliament. The Supreme Court has held that the power to impose wealth-tax on the total wealth of a person including his agricultural land belongs to Parliament in its residuary jurisdiction (Union of India v. H.S. Dhillon, A.I.R. 1972 S.C. 1061).

5. Power of Parliament to make Laws on State List

We have just discussed that the State legislatures have the exclusive powers to make laws with respect to the subjects included in the State List and Parliament has no power to encroach upon them. However, our Constitution makes a few exceptions to this general rule by authorizing Parliament to make law even on the subjects enumerated in the State List. Following are the exceptions which the Constitution so recognizes:

a. In the National Interest (Article 249)

Parliament can make a law with respect to a matter enumerated in the State List if the Council of States declares by a resolution supported by two-thirds of its members present and voting, that it is necessary or expedient in the national interest that Parliament should make a law on that matter. By such declaration Parliament gets the authority to legislate on that matter for the whole or part of the country so long as the resolution of the Council of States remains in force. But such resolution shall remain in force for a period not exceeding one year. However, a fresh resolution can be passed the end of one year to give extended lease to the law of Parliament and that way the law of Parliament can be continued to remain in force for any number of years.

The laws passed by Parliament under the provision cease to have effect automatically after six months of the expiry of the resolution period. Beyond that date, such Parliamentary law becomes inoperative except as regards the thing done or omitted to be done before the expiry of that law.

b. **During a proclamation of emergency (Article 250)**

While a Proclamation of Emergency is in operation, Article 250 of the Constitution of India removes restrictions on the legislative authority of the Union Legislature in relation to the subjects enumerated in the State List. Thus, during emergency, Parliament shall have power to make laws for the whole or any part of the territory of India with respect to all matters in the State List. These laws will cease to have effect on the expiration of six months after the proclamation ceases to operate. After that date, such Union laws shall become inoperative, except in respect of things done or omitted to be done before the expiry of the said period. Under Article 352, if the President is satisfied that a grave emergency exists where-by the security of India or any part of the territory thereof is threatened whether by war, or external aggression or armed rebellion, he may by proclamation make a declaration to that effect in respect of the whole of India or of such part of the territory thereof as may be specified in the proclamation. It is not necessary that there is an actual war or armed rebellion. It is enough that the President is satisfied that there is an imminent danger of such war or armed rebellion as the case may be. The proclamation of emergency shall not be issued except when the decision of the Union Cabinet that such proclamation may be issued, has been communicated to the President in writing. Every such proclamation shall be laid before each House of Parliament and unless it is approved by both the Houses by a majority of not less than two-thirds of the members present and voting within a period of 30 days thereof, such proclamation shall cease to operate. If any such proclamation is issued at a time when the House of People (Lok Sabha) has been dissolved, or the dissolution of the House of People takes place during the period of one month referred to above but before passing the resolution, and if a resolution approving the proclamation has been passed by the Council of State (Rajya Sabha), the proclamation shall cease to operate at the expiry of thirty days from the date on which the House of the People (Lok Sabha) first sits after it's reconstitution, unless before the expiration of the said period of thirty days a resolution approving the proclamation has also passed by the House of the People.

A proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of passing of the second resolution approving the proclamation. But this period of six months may be extended by a further period of six months, if, within the first six months, both the Houses of Parliament pass a resolution approving the continuance in force of such proclamation. Prior to the Constitution 44th Amendment Act, the position was that the proclamation when approved by both the Houses of Parliament would remain in the force for an indefinite period unless and until the President chose to revoke the proclamation in exercise of the power conferred by the then Article 352(2)(a).

Article 353 provides that while a proclamation of emergency is in operation, the Parliament shall have the power to make laws conferring powers and imposing duties or authorizing the conferring of powers and the imposition of duties upon the Union or officers and authorities of the Union as respects that matter, notwithstanding, that it is one which is not enumerated in the Union List.

c. **Breakdown of Constitutional Machinery in a State (Article 356 and 357)**

In case the Governor of a State reports to the President, or he is otherwise satisfied that the Government of a State cannot be carried on according to the provisions of the Constitution, then he (President) can make a proclamation to that effect. By that proclamation, he can assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or anybody or authority in the State, and declare that the powers of Legislature of that State shall vest in Parliament. Parliament can make laws with respect to all State matters as regards the particular State in which there is a breakdown of constitutional machinery and is under the President's rule. Further it is not necessary that the legislature of the concerned State should be suspended or dissolved before it is brought under the President's rule, but practically it so happens. It is important to note that the President cannot, however, assume to himself any of the powers vested in or exercisable by a High Court or to suspend, either in whole or in part, the operation of any provision of the Constitution relating to the High Courts.

Under the Constitution of India, the power is really that of the Union Council of Ministers with the Prime Minister as its head. The satisfaction of the President contemplated by this Article is subjective in nature. The power conferred by Article 356 upon the President is a conditional power. It is not an absolute power. The existence of material-which may comprise of, or include, the report(s) of the Governor — is a pre-condition. The satisfaction must be formed on relevant materials. Though the power of dissolving the Legislative Assembly can be said to be implicit in Clause (1) of Article 356, it must be held, having regard to the overall Constitutional scheme that the President shall exercise it only after the proclamation is approved by both the Houses of Parliament under Clause (3) and not before. Until such approval, the President can only suspend the Legislative Assembly by suspending the provisions of the Constitution relating to the Legislative Assembly under Sub-clause (c) of Clause (1). The proclamation under Clause (1) can be issued only where the situation contemplated by the clause arises. Clause (3) of Article 356, is conceived as a control on the power of the President and also as a safeguard against its abuse (S.R. Bommai v. Union of India, AIR 1994 SC 1918).

Clause 2 of Article 356 provides that any such proclamation may be revoked or varied by a subsequent proclamation. It may, however, be noted that the presidential proclamation is valid only for six months at a time and that also if approved by both the Houses of Parliament within a period of two months from the date of proclamation. A fresh proclamation can be issued to extend the life of the existing one for a further period of six months but in no case such proclamation can remain in force beyond a consecutive period of three years. The Constitution (Forty-Second) Amendment Act, 1976 inserted a new clause (2) in Article 357. It provides that any law made in exercise of the Power of the Legislature of the State by Parliament or the President or other Authority referred to in Sub-clause (a) of Clause (1) which Parliament or the President or such other Authority would not, but for the issue of a proclamation under Article 356 have been competent to make shall, after the proclamation has ceased to operate, continue in force until altered, or repealed or amended by a competent Legislature or other authority. This means that the laws made during the subsistence of the proclamation shall continue to be in force unless and until they are altered or repealed by the State Legislature. So, an express negative act is required in order to put an end to the operation of the laws made in respect of that State by the Union.

The action of the President under Article 356 is a constitutional function and the same is subject to judicial review. The Supreme Court or High Court can strike down the proclamation if it is found to be mala fide or based on wholly irrelevant or extraneous grounds. If the Court strikes down the proclamation, it has the power to restore the dismissed government to office and revive and reactivate the Legislative Assembly wherever it may have been dissolved or kept under suspension. (S.R. Bommai's case).

d. On the request of two or more States (Article 252)

Article 252 of the Constitution enumerates the power of Parliament to legislate for state. The exercise of such power is conditional upon an agreement between two or more States requesting Parliament to legislate for them on a specified subject. This Article provides that, if two or more States are desirous that on any particular item included in the State List there should be a common legislation applicable to all such State then they can make a request to Parliament to make such law on that particular subject. Such request shall be made by passing a resolution in the legislatures of the State concerned. If request is made in that form then parliament can make law on that subject as regards those States. The law so made may be adopted by other States also, by passing resolutions in their legislatures. Once, however, such law has been made, the power of those State legislatures which originally requested or which later on adopted such law is curtailed as regards that matter; and only Parliament can amend, modify or repeal such a law on similar request being made by any State or States. If any of the consenting States makes a law on that subject then its law will be invalid to the extent to which it is inconsistent with a law of Parliament. To take an example, Parliament passed the Prize Competitions Act, 1955 under the provisions of the Constitution.

e. Legislation for enforcing international agreements (Article 253)

Parliament has exclusive power with respect to foreign affairs and entering into treaties and agreements with foreign countries and implementing of treaties and agreements and conventions with foreign countries. But a treaty or agreement concluded with another country may require national implementation and for that purpose a law may be needed. To meet such difficulties, the Constitution authorizes Parliament to make law on any subject included in any list to implement:

i. any treaty, agreement or convention with any other country or countries, or

ii. any decision made at any international conference, association or other body.

These five exceptions to the general scheme of distribution of legislative powers on the basis of exclusive Union and State Lists go to show that in our Constitution there is nothing which makes the States totally immune from legislative interference by the Centre in any matter. There remains no subject in the exclusive State jurisdiction which cannot be approached by the Centre in certain situations. But by this, one must not conclude that the distribution of legislative power in our Constitution is just illusory and all the powers vest in the Centre. On the other hand, the distribution of legislative powers is real and that is the general rule but to face the practical difficulties the Constitution has made a few exceptions which are to operate within the circumscribed sphere and conditions.

f. Interpretation of the Legislative Lists

For giving effect to the various items in the different lists the Courts have applied mainly the following principles:

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

"It is an elementary cardinal rule of interpretation that the words used in the Constitution which confer legislative power must receive the most liberal construction and if they are words of wide amplitude, they must be interpreted so as to give effect to that amplitude. A general word used in an entry ... must be construed to extend to all ancillary or subsidiary matters which can fairly and reasonably be held to be included in it (Jagannath Baksh Singh v. State of U.P., AIR 1962 SC 1563).

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

ii. **Harmonious Construction:** Different entries in the different lists are to be interpreted in such a way that a conflict between them is avoided and each of them is given effect. It must be accepted that the Constitution does not want to create conflict and make any entry nugatory. Therefore, when there appears a conflict between two entries in the two different lists the two entries should be so interpreted, that each of them is given effect and, for that purpose the scope and meaning of one may be restricted so as to give meaning to the other also.

iii. **Pith and Substance Rule:** The rule of pith and substance means that where a law in reality and substance falls within an item on which the legislature which enacted that law is competent to legislate, then such law shall not become invalid merely because it incidentally touches a matter outside the competence of legislature. In a federal Constitution, as was observed by Gwyer C.J. "it must inevitably happen from time to time that legislation though purporting to deal with a subject in one list touches also upon a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere" (Prafulla Kumar v. Bank of Khulna, AIR 1947 PC 60). Therefore, where such overlapping occurs, the question must be asked, what is, "pith and substance" of the enactment in question and in which list its true nature and character is to be found. For this purpose, the enactment as a whole with its object and effect must be considered. By way of illustration, acting on entry 6 of List II which reads "Public Health and Sanitation". Rajasthan Legislature passed a law restricting the use of sound amplifiers. The law was challenged on the ground that it dealt with a matter which

fell in entry 81 of List I which reads: "Post and telegraphs, telephones, wireless broadcasting and other like forms of communication", and, therefore, the State Legislature was not competent to pass it. The Supreme Court rejected this argument on the ground that the object of the law was to prohibit unnecessary noise affecting the health of public and not to make a law on broadcasting, etc. Therefore, the pith and substance of the law was "public health" and not "broadcasting" (G. Chawla v. State of Rajasthan, AIR 1959 SC 544).

iv. **Colourable Legislation:** It is, in a way, a rule of interpretation almost opposite to the one discussed above. The Constitution does not allow any transgression of power by any legislature, either directly or indirectly. However, a legislature may pass a law in such a way that it gives it a color of constitutionality while, in reality, that law aims at achieving something which the legislature could not do. Such legislation is called colorable piece of legislation and is invalid. To take an example in Kameshwar Singh v. State of Bihar, A.I.R. 1952 S.C. 252, the Bihar Land Reforms Act, 1950 provided that the unpaid rents by the tenants shall vest in the state and one half of them shall be paid back by the State to the landlord or zamindar as compensation for acquisition of unpaid rents. According to the provision in the State List under which the above law was passed, no property should be acquired without payment of compensation. The question was whether the taking of the whole unpaid rents and then returning half of them back to them who were entitled to claim, (i.e., the landlords) is a law which provides for compensation. The Supreme Court found that this was a colorable exercise of power of acquisition by the State legislature, because "the taking of the whole and returning a half means nothing more or less than taking of without any return and this is naked confiscation, no matter in whatever specious form it may be clothed or disguised". The motive of the legislature is, however, irrelevant for the application of this doctrine. Therefore, if a legislature is authorized to do a particular thing directly or indirectly, then it is totally irrelevant as to with what motives — good or bad — it did that.

These are just few guiding principles which the Courts have evolved, to resolve the disputes which may arise about the competence of law passed by Parliament or by any State Legislature.

FREEDOM OF TRADE, COMMERCE AND INTERCOURSE

This heading has been given to Part XIII of the Constitution. This part originally consisted of seven articles — Articles 301 to 307 — of which one (Art. 306) has been repealed. Out of these articles it is the first, i.e., 301 which, in real sense, creates an overall comprehensive limitation on all legislative powers of the Union and the State which affect the matters covered by that Article. This Article guarantees the freedom of trade, commerce and intercourse and runs in the following words:

"Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free".

The opening words of this Article clearly show, and it has been so held by the Supreme Court, that except the provisions contained under this Part, i.e., Articles 302 to 307 under no other provision of the Constitution the free flow of trade and commerce can be interfered with. The

object of the freedom declared by this Article is to ensure that the economic unity of India may not be broken by internal barriers.

The concept of trade, commerce and intercourse today is so wide that from ordinary sale and purchase it includes broadcasting on radios, communication on telephone and even to non-commercial movement from one place to another place. If such is the scope of trade and commerce then any law relating to any matter may affect the freedom of trade, commerce and intercourse, e.g., it may be said that the law which imposes the condition of license for having a radio violates the freedom of trade and commerce, or a law which regulates the hours during which the electricity in a particular locality shall be available may be called as affecting the freedom of trade and commerce because during those hours one cannot use the radio or television or one cannot run this factory. If that view is taken then every law shall become contrary to Articles 301 and unless saved by Articles 302 to 307 shall be unconstitutional. To avoid such situations the Supreme Court in the very first case on the matter (Atiabari Tea Co. v. State of Assam, A.I.R. 1951 S.C. 232) declared that only those laws which "directly and immediately" restrict or impede the freedom of trade and commerce are covered by Article 301 and such laws which directly and incidentally affect the freedom guaranteed in that article are not within the reach of Article 301. The word 'intercourse' in this article is of wide import. It will cover all such intercourse as might not be included in the words 'trade and commerce'. Thus, it would cover movement and dealings even of a non-commercial nature (Chobe v. Palnitkar, A.I.R. 1954 Hyd. 207). The word, free in Article 301 cannot mean an absolute freedom. Such measures as traffic regulations licensing of vehicles etc. are not open to challenge.

It was further held in the next case (Automobile Transport Ltd. v. State of Raj., A.I.R. 1962 S.C. 1906) that regulations that facilitate the freedom of trade and commerce and compensatory taxes are also saved from the reach of Article 301. About compensatory taxes the Supreme Court has doubted the correctness of its own views in a later case Khyerbari Tea Co. v. State of Assam, A.I.R. 1964 S.C. 925.

With respect to regulatory laws also, we may say that if they are the laws which facilitate the freedom of trade and commerce then they are not at all laws which impede the free flow of trade and commerce directly or indirectly. The freedom of trade and commerce guaranteed under Article 301 applies throughout the territory of India; it is not only to inter-state but also to intra- state trade commerce and intercourse. But in no way it covers the foreign trade or the trade beyond the territory of India. Therefore, the foreign trade is free from the restriction of Article 301.

Trade and commerce which are protected by Article 301 are only those activities which are regarded as lawful trading activities and are not against policy. The Supreme Court held that gambling is not "trade". Similarly, prize competitions being of gambling in nature, cannot be regarded as trade or commerce and as such are not protected under Article 301 (State of Bombay v. RMDC, AIR 1957 SC 699).

The freedom guaranteed by Article 301 is not made absolute and is to be read subject to the following exceptions as provided in Articles 302-305.

a. Parliament to Impose Restriction in the Public Interest

According to Article 302 Parliament may, by law, impose such restrictions on the freedom of trade, commerce and intercourse as may be required in the public interest.

b. Parliament to make Preference or Discrimination

Parliament cannot by making any law give preference to one State over the other or make discrimination between the States except when it is declared by that law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India [Article 303 (1) and (2)].

c. Power of the State Legislature

The Legislature of a State may by law:

i. impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

ii. impose such reasonable restrictions on the freedom of trade, commerce or intercourse within the State as may be required in the public interest.

However, no bill or amendment for making a law falling in this provision can be introduced or moved in the Legislature of a State without the previous sanction of the President. [Article 304]

- In Kalyani Stores v. State of Orissa, (AIR 1966 SC 1686) Supreme Court held that Article 304 enables State legislature to impose taxes on goods from other States, if goods produced within the state are subjected to such taxes. A subsequent assent of President is also sufficient, as held in State of Karnataka v. M\S Hansa Corpn., (1981) AIR SC 463.

iii. Saving of Existing Laws

The law which was already in force at the commencement of the Constitution shall not be affected by the provisions of Article 301 except in so far as the President may, by order, otherwise direct (Art 305).

iv. Saving of Laws providing for State Monopoly

The laws which create State monopoly in any trade, etc. are saved from attack under Article 301, i.e., they are valid irrespective of the fact that they directly impede or restrict the freedom of trade and commerce. So, if the State creates a monopoly in road, transporters cannot complain that their freedom of trade and commerce has been affected or if the State

created monopoly in banking then other bankers cannot complain that their freedom of trade and commerce has been restricted.

The last provision (Article 307) in Part XIII authorizes Parliament to appoint by law such authority as it considers appropriate for carrying out purposes of Articles 301 to 304 and to confer on the authority so appointed such powers and duties as it thinks necessary.

CONSTITUTIONAL PROVISIONS RELATING TO STATE MONOPOLY

Creation of monopoly rights in favour of a person or body of persons to carry on any business prima facie affects the freedom of trade. But in certain circumstances it can be justified.

After the Constitution (Amendment) Act, 1951, the States create a monopoly in favour of itself, without being called upon to justify its action in the Court as being reasonable.

Sub-clause (ii) of clause (6) of Article 19 makes it clear that the freedom of profession, trade or business will not be understood to mean to prevent the state from undertaking either directly or through a corporation owned or controlled by it, any trade, business, industry or service, whether to the exclusion, complete or partial, citizens or otherwise.

If a law is passed creating a State monopoly the Court should enquire what are the provisions of the said law which are basically and essentially necessary for creating the state monopoly. Sub- clause (ii) of clause (6) protects only the essential and basic provisions. If there are other provisions which are subsidiary or incidental to the operation of the monopoly, they do not fall under Article 19(6)(ii). It was held by Shah, J. in R.C. Cooper v. Union of India, (1970) 1 SCC 248, that the impugned law which prohibited the named banks from carrying the banking business was a necessary incident of the business assumed by the Union and hence was not liable to be challenged under Article 19(6)(ii) in so far as it affected the right of a citizen to carry on business.

THE JUDICIARY

1. The Supreme Court

The Courts in the Indian legal system, broadly speaking, consist of (i) the Supreme Court, (ii) the High Courts, and (iii) the subordinate courts. The Supreme Court, which is the highest Court in the country (both for matters of ordinary law and for interpreting the Constitution) is an institution created by the Constitution. Immediately before independence, the Privy Council was the highest appellate authority for British India, for matters arising under ordinary law. But appeals from High Courts in constitutional matters lay to the Federal Court (created under the Government of India Act, 1935) and thence to the Privy Council. The Supreme Court of India, in this sense, has inherited the jurisdiction of both the Privy Council and the Federal Court. However, the jurisdiction of the Supreme Court under the present Constitution is much more extensive than that of its two predecessors mentioned above.

The Supreme Court, entertains appeals (in civil and criminal and other cases) from High Courts and certain Tribunals. It has also writ jurisdiction for enforcing Fundamental Rights. It can advise the President on a reference made by the President on questions of fact and law. It has a variety of other special jurisdictions.

2. High Courts

The High Courts that function under the Constitution were not created for the first time by the Constitution. Some High Courts existed before the Constitution, although some new High Courts have been created after 1950. The High Courts in (British) India were established first under the Indian High Courts Act, 1861 (an Act of the U.K. Parliament). The remaining High Courts were established or continued under the Constitution or under special Acts. High Courts for each State (or Group of States) have appellate, civil and criminal jurisdiction over lower Courts. High Courts have writ jurisdiction to enforce fundamental rights and for certain other purposes.

Some High Courts (notably) Bombay, Calcutta and Delhi, have ordinary original civil jurisdiction (i.e. jurisdiction to try regular civil suits) for their respective cities. High Courts can also hear references made by the Income Tax Appellate Tribunal under the Income Tax Act and other tribunals.

It should be added, that the "writ" jurisdiction vested at present in all High Courts by the Constitution was (before the Constitution came into force) vested only in the High Courts of Bombay, Calcutta and Madras (i.e. the three Presidency towns).

3. **Subordinate Courts**

Finally, there are various subordinate civil and criminal courts (original and appellate), functioning under ordinary law. Although their nomenclature and powers have undergone change from time to time, the basic pattern remains the same. These have been created, not under the Constitution, but under laws of the competent legislature. Civil Courts are created mostly under the Civil Courts Act of each State. Criminal courts are created mainly under the Code of Criminal Procedure.

4. Civil Courts

In each district, there is a District Court presided over by the District Judge, with a number of Additional District Judges attached to the court. Below that Court are Courts of Judges (sometimes called subordinate Judges) and in, some States, Munsiffs. These Courts are created under State Laws.

5. Criminal Courts

Criminal courts in India primarily consist of the Magistrate and the Courts of Session. Magistrates themselves have been divided by the Code of Criminal Procedure into 'Judicial' and 'Executive' Magistrates. The latter do not try criminal prosecutions, and their jurisdiction is confined to certain miscellaneous cases, which are of importance for public tranquility and the like. Their proceedings do not end in conviction or acquittal, but in certain other types of restrictive orders. In some States, by local amendments, Executive Magistrates have been vested with powers to try certain offences.

As regards Judicial Magistrates, they are of two classes: Second Class and First Class. Judicial Magistrates are subject to the control of the Court of Session, which also is itself a Court of original jurisdiction. The powers of Magistrates of the two classes vary, according to their grade. The Court of Session can try all offences, and has power to award any sentence, prescribed by law for the offence, but a sentence of death requires confirmation by the High Court. In some big cities (including the three Presidency towns and Ahmedabad and Delhi), the Magistrates are called Metropolitan Magistrates. There is no gradation inter se. Further, in some big cities (including the three Presidency towns and Ahmedabad and Hyderabad), the Sessions Court is called the "City Sessions Court", its powers being the same as those of the Courts of Session in the districts.

6. Special Tribunals

Besides these Courts, which form part of the general judicial set up, there are hosts of specialized tribunals dealing with direct taxes, labour, excise and customs, claims for accidents caused by motor vehicles, copyright and monopolies and restrictive trade practices. For the trial of cases of corruption, there are Special Judges, appointed under the Criminal Law Amendment Act, 1952.

WRIT JURISDICTION OF HIGH COURTS AND SUPREME COURT

In the words of Dicey, prerogative writs are 'the bulwark of English Liberty'. The expression 'prerogative writ' is one of English common law which refers to the extraordinary writs granted by the sovereign, as fountain of justice on the ground of inadequacy of ordinary legal remedies. In course of time these writs were issued by the High Court as extraordinary remedies in cases where there was either no remedy available under the ordinary law or the remedy available was inadequate. Under the Constitution by virtue of Article 226, every High Court has the power to issue directions or orders or writs including writs in the nature of Habeas corpus, Mandamus, Prohibition, Quo warranto and Certiorari or any of them for the enforcement of Fundamental Rights stipulated in Part III of the Constitution or for any other purpose. This power is exercisable by each High Court throughout the territory in relation to which it exercises jurisdiction. Where an effective remedy is available, the High Court should not readily entertain a petition under Article 226 of the constitution of India e.g. under the Companies Act, a shareholder has very effective remedies for prevention of oppression and mismanagement. Consequently, High Court should not entertain a petition under the said Article (Ramdas Motors Transport Company Limited v. T.A. Reddy, AIR 1997 SC 2189).

The Supreme Court could be moved by appropriate proceedings for the issue of directions or orders or writs, as referred to under Article 226 for the enforcement of the rights guaranteed by Part III of the Constitution.

Article 32 itself being a fundamental right, the Constitutional remedy of writ is available to anyone whose fundamental rights are infringed by state action. Thus, we see the power of the High Courts to issue these writs is wider than that of the Supreme Court, Whereas:

a. an application to a High Court under Article 226 will lie not only where some other limitation imposed by the Constitution, outside Part III, has been violated, but, an application under Article 32 shall not lie in any case unless the right infringed is 'Fundamental Right' enumerated in Part III of the Constitution;

b. while the Supreme Court can issue a writ against any person or Government within the territory of India, a High Court can, under Article 226, issue a writ against any person, Government or other authority only if such person or authority is physically resident or located within the territorial jurisdiction of the particular High Court extends or if the cause of action arises within such jurisdiction.

As stated earlier, the Supreme Court has been assigned by the Constitution a special role as "the protector and guarantor of fundamental rights" by Article 32 (1). Although the Constitution has provided for concurrent writ jurisdiction of the High Courts it is not necessary, that an aggrieved petitioner should first apply to the High Court and then to the Supreme Court (Romesh Thappar v. State of Madras) AIR 1950 SC 124)

The jurisdiction of the High Court also extends to the enforcement of rights other than Fundamental Rights provided there is a public duty. The Supreme Court's jurisdiction to issue writs extends to all Fundamental Rights (Common Cause v Union of India, A.I.R. 1999 SC 2979).

TYPES OF WRITS

WRIT OF HABEAS CORPUS

The words 'Habeas Corpus' literally mean "to **have the body".**

The writ of habeas Corpus is in the nature of an order calling upon the person who has detained another, to produce the latter before the court in order to let the court know the ground of his detention and to set him free if there is no legal justifications. The writ of Habeas corpus is a remedy available to a person who is confined without legal justification.

WRIT OF CERTIORARI

It is a writ issued by the Supreme Court and High Court to an inferior court forbidding the later to continue proceedings in excess of its jurisdiction.

All Courts can issue the writ of certiorari throughout their territorial jurisdiction when the subordinate judicial authority acts:-

(i) Without or in excess of jurisdiction or in

(ii) Contravention of the rules of natural justice or

(iii) Commits an error apparent on the face of the record.

Although the object of both the writs of prohibition and of certiorari is the same, **prohibition** is available at an **earlier stage** whereas **certiorari** is available at a **later stage** i.e. Certiorari is issued after authority has exercised its powers.

WRIT OF MANDAMUS

The word 'Mandamus' literally means-command. The writ of mandamus is, a command issued to direct any person, corporation, inferior court, or Government requiring him or it do a particular thing specified therein which pertains to his or its office and is further in the nature of a public duty.

Mandamus can be issued against any public authority. The writ is used for securing judicial enforcement of public duties.

WRIT OF OUO WARRANTO

Under this the holder of the office has to show to the court under what authority he holds the office. It is issued when:-

- The office is of public and of a substantive nature, or is
- Created by statute or by the Constitution itself, and
- The respondent has asserted his claim to the office.

It can be issued even though he has not assumed the charge of the office.

WRIT OF PROHIBITION

A writ of prohibition is issued to an Inferior Court preventing the latter from usurping jurisdiction which is not legally vested in it. When a tribunal acts without or in excess of jurisdiction, or in violation of rules or law, a writ of prohibition can be asked for. It is generally issued before the trial of the case.

It is available only against judicial or quasi judicial authorities and is not available against a public officer who is not vested with judicial functions.

DELEGATED LEGISLATION

The increasing complexity of modern administration and the need for flexibility capable of rapid readjustment to meet changing circumstances which cannot always be foreseen, in implementing our socio-economic policies pursuant to the establishment of a welfare state as contemplated by our Constitution, have made it necessary for the legislatures to delegate its powers. Further, the Parliamentary procedure and discussions in getting through a legislative measure in the Legislatures is usually time consuming.

The three relevant justifications for delegated legislation are:

- the limits of the time of the legislature;
- the limits of the amplitude of the legislature, not merely its lack of competence but also, its sheer inability to act in many situations, where direction is wanted; and
- the need of some weapon for coping with situations created by emergency.

The delegation of the legislative power is what Hughus, Chief Justice called, flexibility and practicability (Currin v. Wallace 83 L. ed. 441).

CLASSIFICATION OF SUBORDINATE LEGISLATION

1. Executive Legislation

The tendency of modem legislation has been in the direction of placing in the body of an Act only few general rules or statements and relegating details to statutory rules. This system empowers the executive to make rules and orders which do not require express confirmation by the legislature. Thus, the rules framed by the Government under the various Municipal Acts fall under the category

2. Judicial Legislation

Under various statues, the High Courts are authorized to frame rules for regulating the procedure to be followed in courts. Such rules have been framed by the High Courts under the Guardians of Wards Act, Insolvency Act, Succession Act and Companies Act, etc.

3. Municipal Legislation

Municipal authorities are entrusted with limited and sub-ordinate powers of establishing special laws applicable to the whole or any part of the area under their administration known as bye- laws.

4. Autonomous Legislation

Under this head fall the regulations which autonomous bodies such as Universities make in respect of matters which concern themselves.

5. Colonial Legislation

The laws made by colonies under the control of some other nation, which are subject to supreme legislation of the country under whose control they are.

Principles applicable

A body, to which powers of subordinate legislation are delegates, must directly act within the powers which are conferred on it and it cannot act beyond its powers except to the extent justified by the doctrine of implied powers. The doctrine of implied powers means where the legislature has conferred any power, it must be deemed to have also granted any other power without which that power cannot be effectively exercised.

Subordinate legislation cannot take effect unless published. Therefore, there must be promulgation and publication in such cases. Although there is no rule as to any particular kind of publication.

Conditional legislation is defined as a statute that provides controls but specifies that they are to come into effect only when a given administrative authority finds the existence of conditions defined in the statue. In other words in sub-ordinate legislation the delegate completes the legislation by supplying details within the limits prescribed by the statue and in the case of conditional legislation, the power of legislation is exercised by the legislature conditionally, leaving to the discretion of an external authority, the time and manner of carrying its legislation into effect (Hamdard Dawa Khana v. Union of India, AIR, 1960 SC 554).

While delegating the powers to an outside authority the legislature must act within the ambit of the powers defined by the Constitution and subject to the limitations prescribed thereby. If an Act is contrary to the provisions of the Constitution, it is void. Our Constitution embodies a doctrine of judicial review of legislation as to its conformity with the Constitution.

In England, however, the position is different. Parliament in England may delegate to any extent and even all its power of law-making to an outside authority. In U.S.A., the Constitution embodies the doctrine of separation of powers, which prohibits the executive being given law making powers. On the question whether there is any limit beyond which delegation may not go in India, it was held in ire-Delhi Laws Act, 1912 AIR 1951 SC 332, that there is a limit that essential powers of legislation or essential legislative functions cannot be delegated. However, there is no specific provision in the Constitution prohibiting the delegation. On the question whether such doctrine is recognized in our Constitution, a number of principles in various judicial decisions have been laid down which are as follows:

a. The primary duty of law-making has to be discharged by the Legislature itself. The Legislature cannot delegate its primary or essential legislative function to an outside authority in any case.

b. The essential legislative function consists in laying down the 'the policy of the law' and 'making it a binding rule of conduct'. The legislature, in other words must itself lay down the legislative policy and principles and must afford sufficient guidance to the rule-making authority for carrying out the declared policy.

c. If the legislature has performed its essential function of laying down the policy of the law and providing guidance for carrying out the policy, there is no constitutional bar against delegation of subsidiary or ancillary powers in that behalf to an outside authority.

d. It follows from the above that an Act delegating law-making powers to a person or body shall be invalid, if it lays down no principles and provides no standard for the guidance of the rule- making body.

e. In applying this test, the court could take into account the statement in the preamble to the act and if said statements afford a satisfactory basis for holding that the legislative policy or principle has been enunciated with sufficient accuracy and clarity, the preamble itself would satisfy the requirements of the relevant tests.

f. In every case, it would be necessary to consider the relevant provisions of the Actin-relation to the delegation made and the question as to whether the delegation made is intra vires or not will have to be decided by the application of the relevant tests.

g. Delegated legislation may take different forms, viz. conditional legislation, supplementary legislation subordinate legislation etc., but each form is subject to the one and same rule that delegation made without indicating intelligible limits of authority is constitutionally incompetent.

SEPARATION OF POWERS

It is generally accepted that there are three main categories of governmental functions - (i) the Legislative, (ii) the Executive, and (iii) the Judicial. At the same time, there are three main organs of the Government in State i.e. legislature, executive and judiciary. According to the theory of separation of powers, these three powers and functions of the Government must, in a free democracy, always be kept separate and exercised by separate organs of the Government. Thus, the legislature cannot exercise executive or judicial power; the executive cannot exercise legislative or judicial power of the Government.

Article 50 of the Constitution of India dealing with Separation of judiciary from executive. It provides that the State shall take steps to separate the judiciary from the executive in the public services of the State.

Montesquieu said that if the Executive and the Legislature are the same person or body of persons, there would be a danger of the Legislature enacting oppressive laws which the executive will administer to attain its own ends, for laws to be enforced by the same body that enacts them result in arbitrary rule and makes the judge a legislator rather than an interpreter of law. If one person or body of persons could exercise both the executive and judicial powers in the same matter, there would be arbitrary powers, which would amount to complete tyranny, if the legislative power would be added to the power of that person. The value of the doctrine lies in the fact that it seeks to preserve human liberty by avoiding the concentration of powers in one person or body of persons. The different organs of government should thus be prevented from encroaching on the province of the other organ.

In India, the executive is part of the legislature. The President is the head of the executive and acts on the advice of the Council of Ministers.

The Constitution of India does not recognize the doctrine of separation of power in its absolute rigidity, but the functions of the three organs of the government have been sufficiently differentiated (Ram Jawaya v. State of Punjab, AIR 1955 SC 549). None of the three of organs of the Government can take over the functions assigned to the other organs.(Keshanand Bharti v. State of Kerala, AIR 1973 SC 1461, Asif Hameed v. State of J&K 1989 AIR, SC 1899) In State of Bihar v. Bihar Distillery Ltd., (AIR 1997 SC 1511) the Supreme Court has held that the judiciary must recognize the fundamental nature and importance of the legislature process and must accord due regard and deference to it. The Legislative and Executive are also expected to show due regard and deference to the judiciary. The Constitution of India recognizes and gives effect to the concept of equality between the three organs of the Government. The concept of checks and balance is inherent in the scheme.

LEGISLATIVE FUNCTIONS

1. Bill

A Bill is a draft statute which becomes law after it is passed by both the Houses of Parliament and assented to by the President. All legislative proposals are brought before Parliament in the forms of Bills.

Types of Bills and their Specific Features

i. Bills may be broadly classified into Government Bills and Private Members' Bills depending upon their initiation in the House by a Minister or a Private Member.

ii. Content wise, Bills are further classified into:

- Original Bills which embody new proposals, ideas or policies,
- Amending Bills which seek to modify, amend or revise existing Acts,
- Consolidating Bills which seek to consolidate existing law/enactments on a particular subject,

- Expiring Laws (Continuance) Bills which seek to continue Acts which, otherwise, would expire on a specified date,
- Repealing and amending Bill to cleanse the Statute Book,
- Validating Acts to give validity to certain actions,
- Bills to replace Ordinances,
- Money and Financial Bills, and
- Constitution Amendment Bills.

iii. However, procedurally, the Bills are classified as-

- Ordinary Bills
- Money Bills and Financial Bills
- Ordinance Replacing Bills and
- Constitution Amendment Bills.

iv. Money Bills are those Bills which contain only provisions dealing with all or any of the matters specified in sub-clauses (a) to (f) of clause (1) of article 110 of the Constitution. Financial Bills can be further classified as Financial Bills Categories A and B. Category A Bills contain provisions dealing with any of the matters specified in sub-clauses (a) to (f) of clause (1) of article 110 and other matters and Category B Bills involve expenditure from the Consolidated Fund of India.

Except Money Bills and Financial Bills, Category A, which can be introduced only in the Lok Sabha, a Bill may originate in either House of Parliament. As per the provisions of article 109 of the Constitution, the Rajya Sabha has limited powers with respect to Money Bills. A Money Bill after having been passed by the Lok Sabha, and sent to Rajya Sabha for its recommendations, has to be returned to Lok Sabha by the Rajya Sabha, with in a period of fourteen days from the date of its receipt, with or without recommendations. It is open for the Lok Sabha, to either accept or reject all or any of the recommendations of the Rajya Sabha. If the Lok Sabha accepts any of the recommendations of the Rajya Sabha, the Money Bill is deemed to have been passed by both Houses with the amendments recommended by the Rajya Sabha and accepted by the Lok Sabha. If the Lok Sabha does not accept any of the recommendations of the Rajya Sabha, the Money Bill is deemed to have been passed by both Houses in the form in which it was passed by the Lok Sabha without any of the amendments recommended by the Rajya Sabha. In case a Money Bill is not returned by the Rajya Sabha to the Lok Sabha within a period of fourteen days from the date of its receipt, it is deemed to have been passed by both Houses in the form in which it was passed by the Lok Sabha after the expiry of said period.

v. Financial Bill Category A can only be introduced in the Lok Sabha on the recommendation of the President. However, once it has been passed by the Lok Sabha, it is like an ordinary Bill and there is no restriction on the powers of the Rajya Sabha on such Bills.

vi. Financial Bill Category B and Ordinary Bills can be introduced in either House of Parliament.

vii. Ordinance replacing Bills are brought before Parliament to replace an Ordinance, with or without modifications, promulgated by the President under article 123 of the Constitution of a subject. To provide continuity to the provisions of the Ordinance, such a Bill has to be passed by the Houses of Parliament and assented to by the President within six weeks of the reassembly of Parliament.

viii. As per the procedure laid down in the Constitution, Constitution Amendment Bills can be of three types viz.,

- requiring simple majority for their passage in each House;
- requiring special majority for their passage in each House i.e., a majority of the total membership of a House and by a majority of not less than two-thirds of the members of that House present and voting (article 368); and
- requiring special majority for their passage and ratification by Legislatures of not less than one- half of the States by resolutions to that effect passed by those Legislatures (proviso to clause (2) of article 368). A Constitution Amendment Bill under article 368 can be introduced in either House of Parliament and has to be passed by each House by special majority.

ix. Under provisions of article 108 of the Constitution, if after a Bill passed by one House and transmitted to the other House: -

- is rejected by the other House; or
- the Houses have finally disagreed as to the amendments to be made in the Bill; or
- more than six months elapse from the date of its receipt by the other House without the Bill being passed by it, the President may, unless the Bill has elapsed by reason of a dissolution of the Lok Sabha, summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill. If at the joint sitting of the two Houses, the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the total number of members of both Houses present and voting, it shall be deemed to have been passed by both Houses. However, there is no provision of joint sittings on a Money Bill or a Constitution Amending Bill.

x. After the dissolution of Lok Sabha all Bills except the Bills introduced in the Rajya Sabha and pending therein, lapse.

xi.

Law making process (How a Bill becomes an Act)

i. A Bill undergoes three readings in each House of Parliament. The First Reading consists of the Introduction of a Bill. The Bill is introduced after adoption of a motion for leave to introduce a Bill in either of the House. With the setting up of the Department-related Parliamentary Standing Committees, invariably all Bills, barring Ordinance replacing Bills; Bills of innocuous nature and Money Bills, are referred to these Committees for examination and report within three months. The next stage on a Bill i.e., second reading start only after the Committee summits its report on the Bill to the Houses. The Second Reading consists of two stages: the 'first stage' consists of discussion on the principles of the Bill and its provisions generally on any of the following motions: that the Bill be taken into consideration; that the Bill be referred to a Select Committee of the Rajya Sabha ; that the Bill be referred to a Joint Committee of the Houses with the concurrence of the Lok Sabha; that it be circulated for the purpose of eliciting opinion thereon; and the 'second stage' signifies the clause-by clause consideration of the Bill as introduced or as reported by the Select/Joint Committee. Amendments given by members to various clauses are moved at this stage. The Third Reading refers to the discussion on the motion that the Bill (or the Bill as amended) be passed or returned (to the Lok Sabha, in the case of a Money Bill) wherein the arguments are based against or in favour of the Bill. After a Bill has been passed by one House, it is sent to the other House where it goes through the same procedure. However, the Bill is not again introduced in the other House, it is laid on the Table of the other House which constitutes its first reading there.

ii. After a Bill has been passed by both Houses, it is presented to the President for his assent. The President can assent or withhold his assent to a Bill or he can return a Bill, other than a Money Bill, for reconsideration. If the Bill is again passed by the Houses, with or without amendment made by the President, he shall not withhold assent there from. But, when a Bill amending the Constitution passed by each House with the requisite majority is presented to the President, he shall give his assent thereto.

iii. A Bill becomes an Act of Parliament after being passed by both the Houses of Parliament and assented to by the President.

PARLIAMENTARY COMMITTEES

The work done by the Parliament in modern times is not only varied in nature, but considerable in volume. The time at its disposal is limited. It cannot, therefore, give close consideration to all the legislative and other matters that come up before it. A good deal of its business is, therefore, transacted by what are called the Parliamentary Committees.

Parliamentary Committees play a vital role in the Parliamentary System. They are a vibrant link between the Parliament, the Executive and the general public. The need for Committees arises out of two factors, the first one being the need for vigilance on the part of the Legislature over the actions of the Executive, while the second one is that the modern Legislature these days is over-burdened with heavy volume of work with limited time at its disposal. It thus becomes

impossible that every matter should be thoroughly and systematically scrutinized and considered on the floor of the House. If the work is to be done with reasonable care, naturally some Parliamentary responsibility has to be entrusted to an agency in which the whole House has confidence. Entrusting certain functions of the House to the Committees has, therefore, become a normal practice. This has become all the more necessary as a Committee provides the expertise on a matter which is referred to it. In a Committee, the matter is deliberated at length, views are expressed freely, and the matter is considered in depth, in a business-like manner and in a calmer atmosphere. In most of the Committees, public is directly or indirectly associated when memoranda containing suggestions are received, on-the-spot studies are conducted and oral evidence is taken which helps the Committees in arriving at the conclusions.

The Committees aid and assist the Legislature in discharging its duties and regulating its functions effectively, expeditiously and efficiently. Through Committees, Parliament exercises its control and influence over administration. Parliamentary Committees have a salutary effect on the Executive. The Committees are not meant to weaken the administration, instead they prevent misuse of power exercisable by the Executive. It may, however, be remembered that Parliamentary control in the context of the functioning of the Committees may mean influence, not direct control; advice, not command; criticism, not obstruction; scrutiny, not initiative; and accountability, not prior approval. This, in brief, is the rationale of the Committee System. The Committees have functioned in a non-partisan manner and their deliberations and conclusions have been objective. This, in a large measure, accounts for the respect in which the recommendations of the Parliamentary Committees are held.

Ad hoc and Standing Committees

Parliamentary Committees are of two kinds: Ad hoc Committees and the Standing Committees. Ad hoc Committees are appointed for a specific purpose and they cease to exist when they finish the task assigned to them and submit a report. The principal Ad hoc Committees are the Select and Joint Committees on Bills. Others like the Railway Convention Committee, the Committees on the Draft Five Year Plans and the Hindi Equivalents Committee were appointed for specific purposes. Apart from the Ad hoc Committees, each House of Parliament has Standing Committees like the Business Advisory Committee, the Committee on Petitions, the Committee of Privileges and the Rules Committee, etc.

Other Committees

Of special importance is yet another class of Committees which act as Parliament's 'Watch Dogs' over the executive. These are the Committees on Subordinate Legislation, the Committee on Government Assurances, the Committee on Estimates, the Committee on Public Accounts and the Committee on Public Undertakings and Departmentally Related Standing Committees (DRSCs). The Committee on Estimates, the Committee on Public Accounts, the Committee on Public Undertakings and DRSCs play an important role in exercising a check over governmental expenditure and Policy formulation.

Parliamentary Committees: -

Ad hoc Committees and the standing Committees	• Ad hoc Committees are appointed for a specific purpose and they cease to exist when they finish the task assigned to them and submit a report.Apart from the Ad Hoc Committees, Each House of Parliament has Standing Committees like the Business Advisory Committee, the Committee on petitions, theCommittee of Privileges and the Rules Committee, etc.
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3 INTERPRETATION OF STATUTES

INTRODUCTION

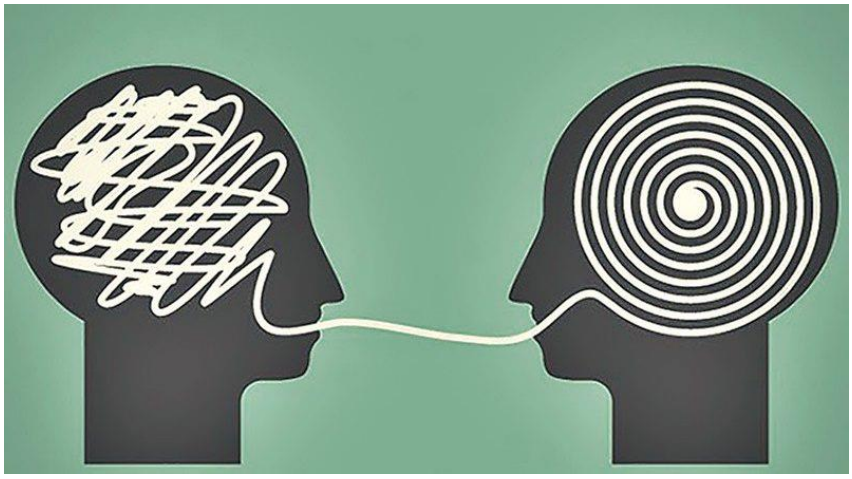
Meaning of 'Statute'

A statute has been defined as "the written will of the legislature". Normally, it denotes the Act enacted by the legislature. In simple terms, a written law passed by a legislative body (i.e. Parliament or State Assemblies). Though the Constitution of India does not use the term 'statute' but it uses the term "law". As per Article 13(3)(a) of Constitution of India, Law includes any ordinance, order, bye-law, rule, regulation, notification, custom or usages made by Legislature. Statutes are commonly divided into following classes:

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

Meaning of 'Interpretation'

Interpretation is the process of establishing the true meaning of the words of the Law. It is through interpretation that the Court applies the true intent of Legislature. Rule of Interpretation is not required if the words of a statute have a plain and straightforward meaning. But in circumstances when more than one meaning of the statutes are possible, Rules of Interpretation will be applied to understand the intention of the Law. To put into other words: A judge should ask himself the question: If the makers of the Act had themselves come across this luck in the texture of it, how would they have straight ended it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.



NEED FOR INTERPRETATION /CONSTRUCTION

1	The enacted Laws are drafted by legal experts, but they are expressed in language. No language is so perfect as to leave no ambiguities.
2	A statute is an edict of the legislature. The intent of the legislature has to be gathered not only from the language but also from the surrounding circumstances that prevailed at the time when that particular law was enacted.
3	If any provision of the statute is open to two interpretations, the Court has to choose that interpretation which represents the true intention of the legislature.
4	is not within human powers to foresee the manifold set of facts which may arise in the future and even if it were, so it is not possible to provide for them in terms free from all ambiguity.

PRESUMPTION IN THE INTERPRETATION OF STATUTE

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

(a)	That the words in a statute are used in literal sense unless otherwise defined.
(b)	Liability attaches only where there is mens rea.
(c)	That the state and govt. Institutions are deemed to be exempted.

(d)	That the legislature does not make mistake.
(e)	The statue has been made with a view to exercise the powers given through it fairly.

RULES OF INTERPRETATION

RULES OF INTERPRETATION	
Primary Rules	**Secondary Rules**
1.Literal Construction Rule	
2.Reasonable Construction Rule	1. Expressio Unis Est Exclusio Alterius
3.Mischief Rule	2. Contemporanea Expositio Est Optima Et Fortissima in Lege
4.Rule of Harmonious Construction	3. Noscitur a Sociis 4. Strict and Liberal Construction
5.Rule of Ejusdem Generis	

1. Rule of Literal Construction/Interpretation

According to this rule, the words, phrases and sentences of a statute are ordinarily to be understood in their natural, ordinary or popular and grammatical meaning unless such a construction leads to an absurdity or the content or object of the statute suggests a different meaning.

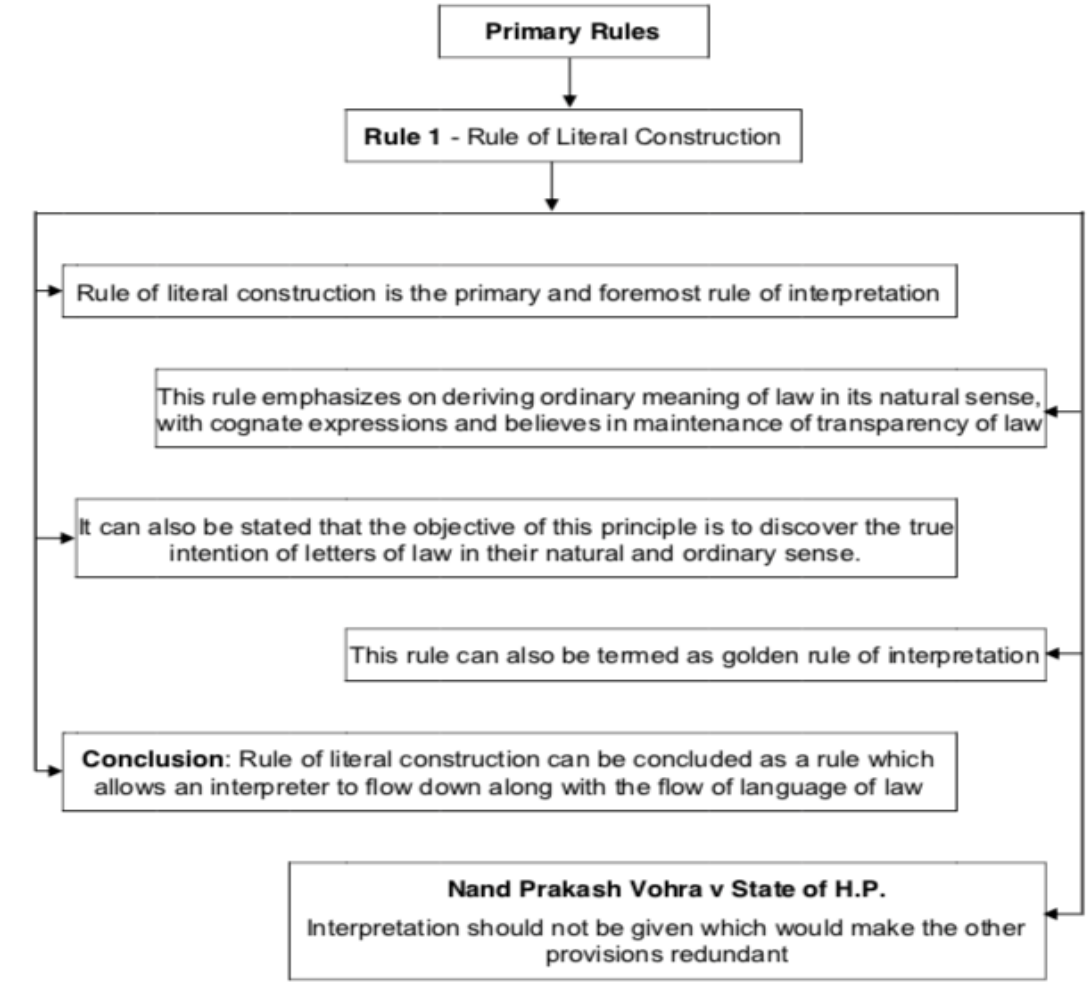
- **Case Law Nand Prakash Vohra v State of HP**

Held-Interpretation should not be given which would make other provisions redundant. A law cannot be interpreted word to word in a different language. In this, the common and normal meaning is given to rules. The objectives, natural, ordinary and popular are used

interchangeably. They mean the grammatical or literal meaning, except when the words are technical because technical words have technical meanings.

In simple words, this rule means to give simple straight forward and fair meaning to the provisions of law. It is the simplest form of interpretation and also known as golden or primary rule of interpretation.

Quick Recap

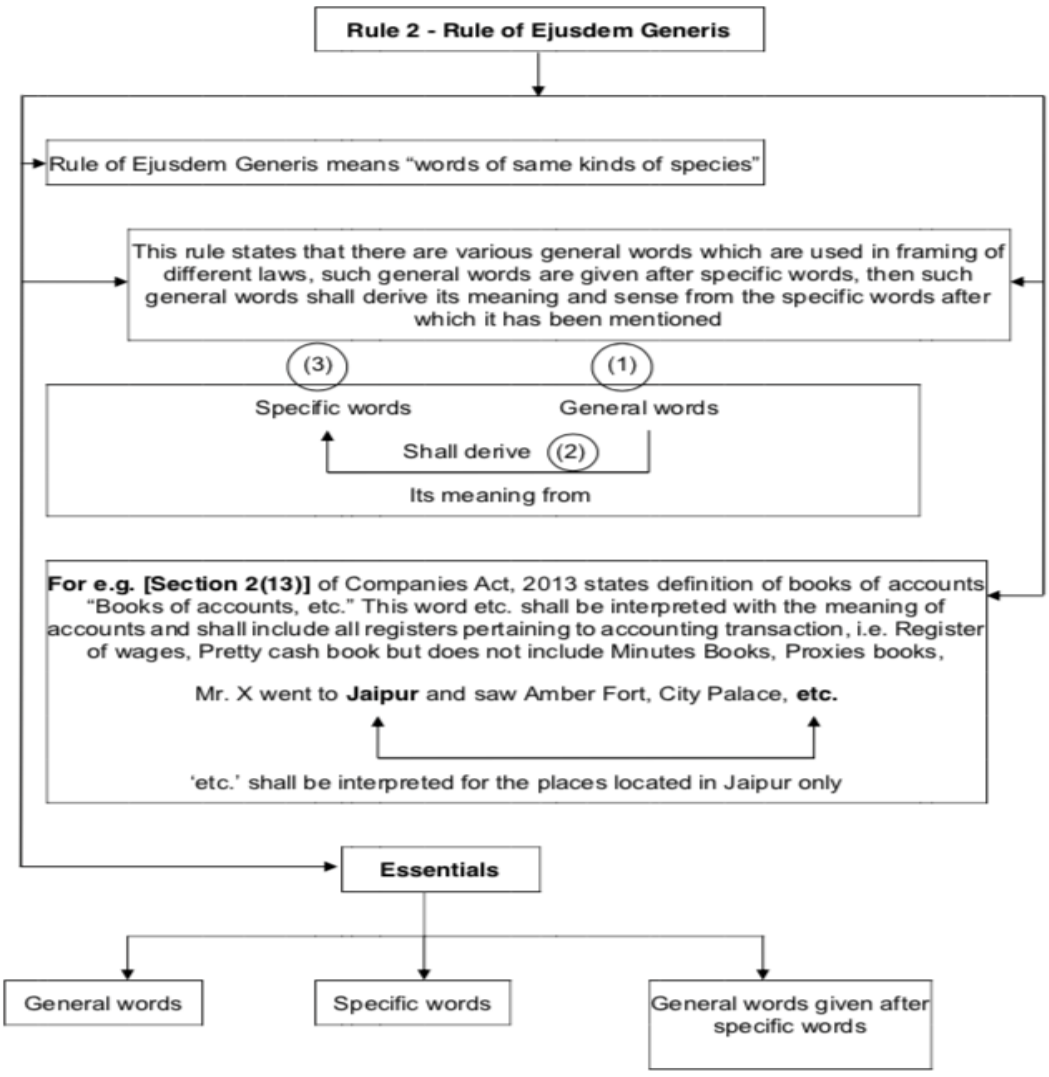


2. **Rule of Ejusdem Generis**

The literal meaning of the term ejusdem generis is "of the same kind or species". It literally means, that while interpreting the provisions of law, if general words are given after some specific words then while interpreting the general words, they must be treated as applying to the matters previously mentioned. If any general words such a 'like', 'so on' etc. follow specific words, the general words should include only those meaning which can be given to the specific words. The rule requires that where specific words are all of one genus, meaning of the general words shall be restricted to that genus only, unless there is something to show that a wider meaning was intended.

The rule of Ejusdem Generis applies only when the following conditions are satisfied:

- The statute contains an enumeration of specific words.
- The members of enumeration constitute a class or category.
- The class or category is not exhausted by the enumeration.
- There is no indication of different legislative intent.



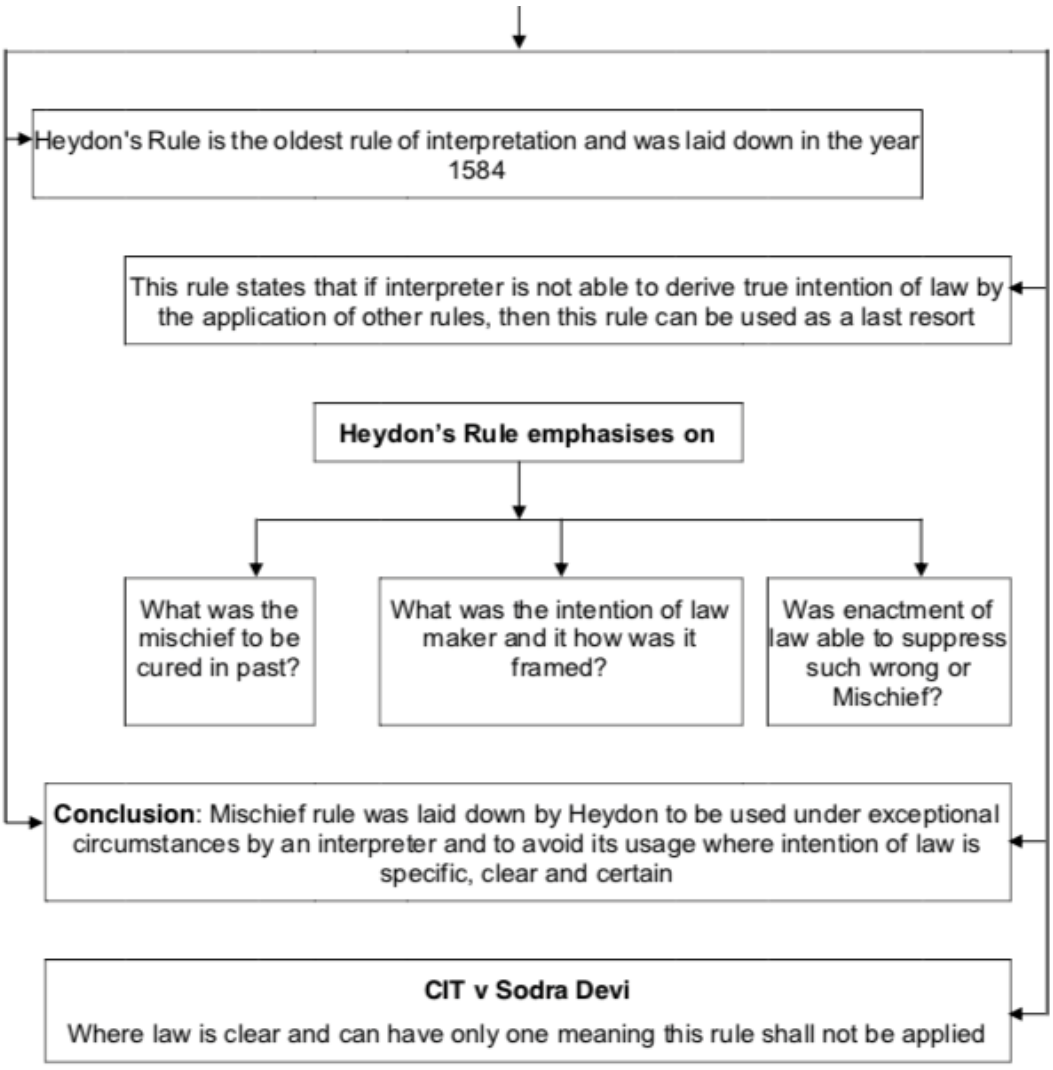
3. Mischief Rule or Heydon's Rule

Numbers of laws are made to cure a mischief. The mischief rule of interpretation is based on this reason and it states that interpretation should be made in such way that it is able to cure that mischief for which the law had been made. Thus, law should be interpreted in such a way so that it suppresses the mischief and advances the remedy.

It may be noted that mischief rule is applicable only when a particular rule is ambiguous and capable of different meanings. In such a case, the meaning which can suppress the mischief and advance the remedy should be taken and other meaning should be discarded.

In CIT v/s Sodra Devi it was held that where a law is clear and can have only one meaning, this rule shall not apply.

MISCHIEF RULE



4. **Rule of Reasonable Construction or Doctrine of Ut Res Magis Valeat Quam Pareat.**

The maximum Ut Res Magis Valeat Quam Pareat, i.e., the rule of reasonable construction implies that Statute must be constructed sensibly and reasonably. Case Law Tirath Singh v Bachittar Singh (1955). A statute or any enacting provision therein must be so constructed so as to make it effective and operative. A construction should be rejected if it results in hardship, serious inconvenience, injustice, absurdity, etc.

- In simple words, this rule means that if any word in a law can be given more than one meaning, then the court gives the reasonable meaning relevant to the circumstances.
- The scope of law should not be broadened unnecessarily.
- While interpreting the intention, the Court must match with the desired result.

If the litera-Iegis, i.e., the letter of the law is not clear, the interpretation must be according to the purpose, policy, object or spirit of law.

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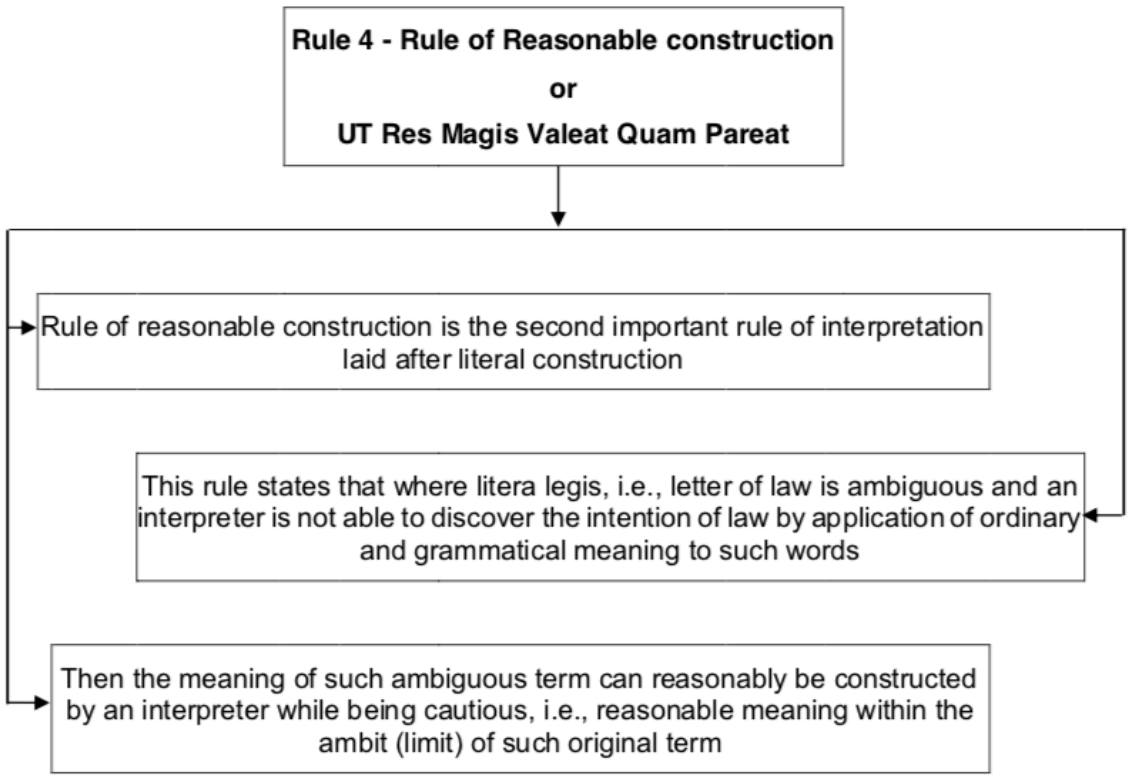


5. **Harmonious Construction**

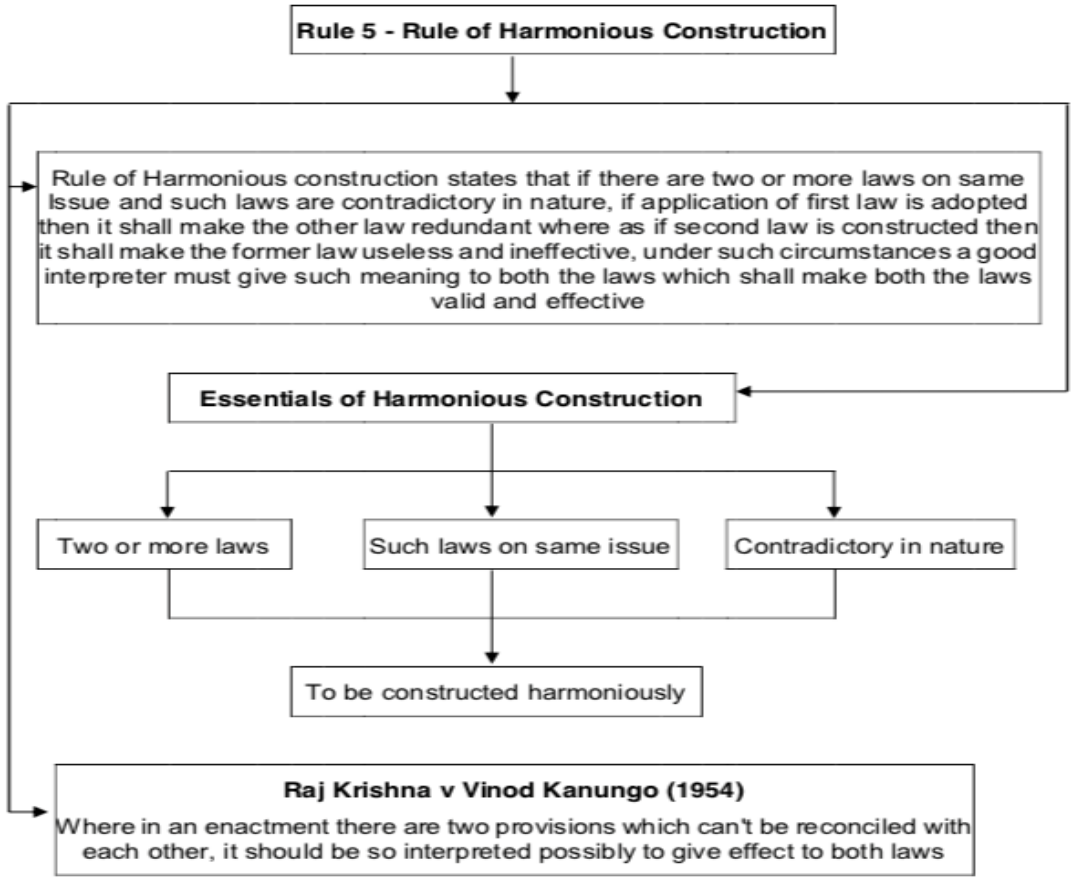
When one rule or provision is interpreted then it must be interpreted along with other provisions of law. There must not be conflict between the various provisions of law. When a different section in an enactment is to be interpreted, it should be done in such a way that the Act as a whole serves a useful purpose. It may be possible that different sections may appear to mean contrary to each other or contradicting each other. Under such circumstances, an attempt should be made to reconcile the provisions of the Act and an effect should be made to give the effect to both the apparently contradictory provisions. Thereby a head on clash between sections of the Act is avoided. This is known as harmonious construction.

Effect should be given to both the laws, is the very essence of the rule of harmonious construction. Thus, a construction that reduces one of the provisions to a dead letter is not harmonious construction.

- **Case Law- Raj Krishna v Vinod Kanungo in 1954**

Where, in an enactment, there are two provisions which cannot be reconciled with each other, they should be so interpreted, that if possible, effect may be given to both.

Quick Recap

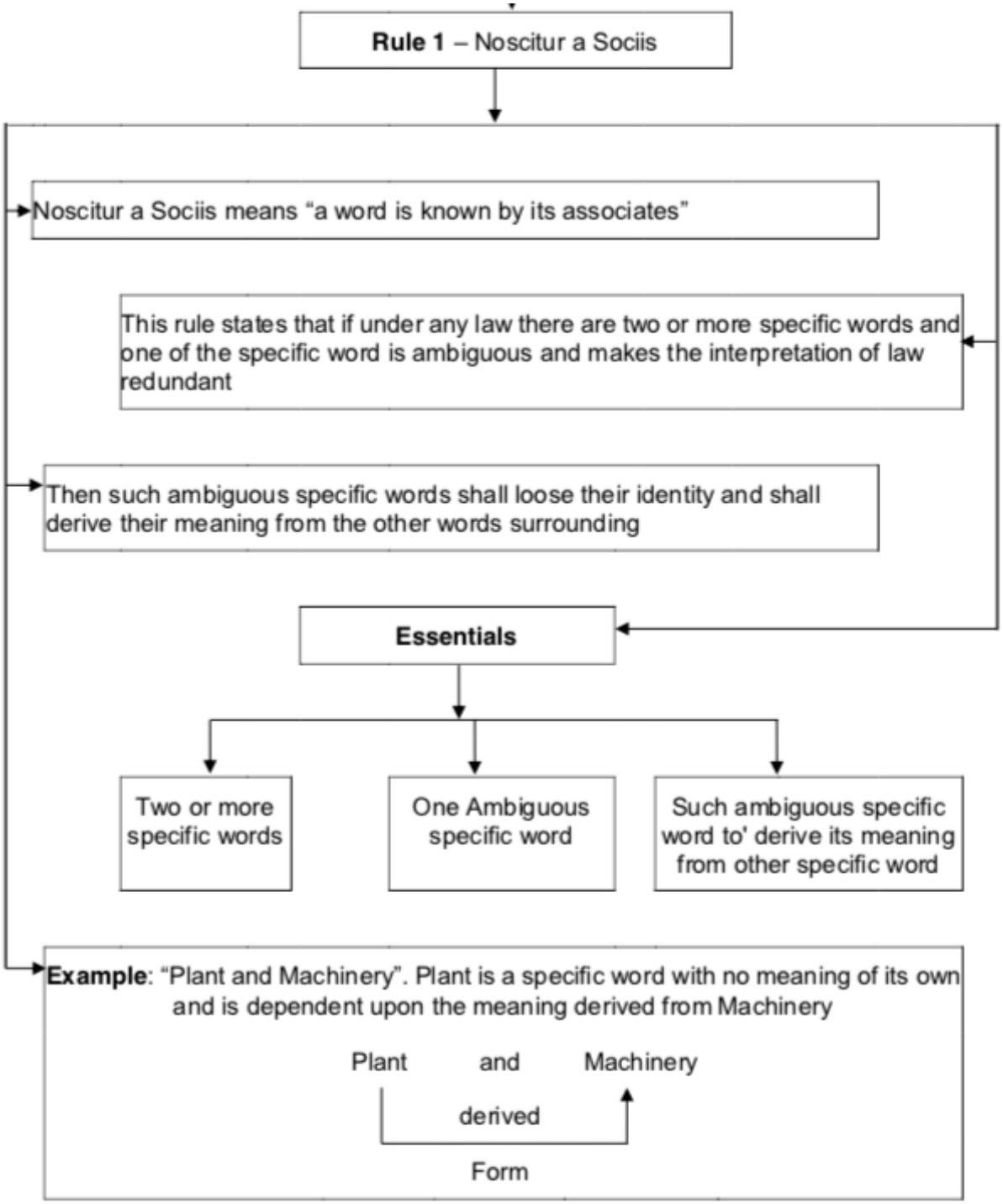


SECONDARY RULES OF INTERPRETATION

1. **Noscitur A Sociis**

The rule literally means that "a word is known by its associates". In other words, the meaning of the word is to be judged by the company it keeps. When two or more words having the analogous meaning are coupled together, then one word shall be constructed in the manner deriving its meaning from other.

Quick Recap



2. Expressio Unis Est Exdusio Alterius

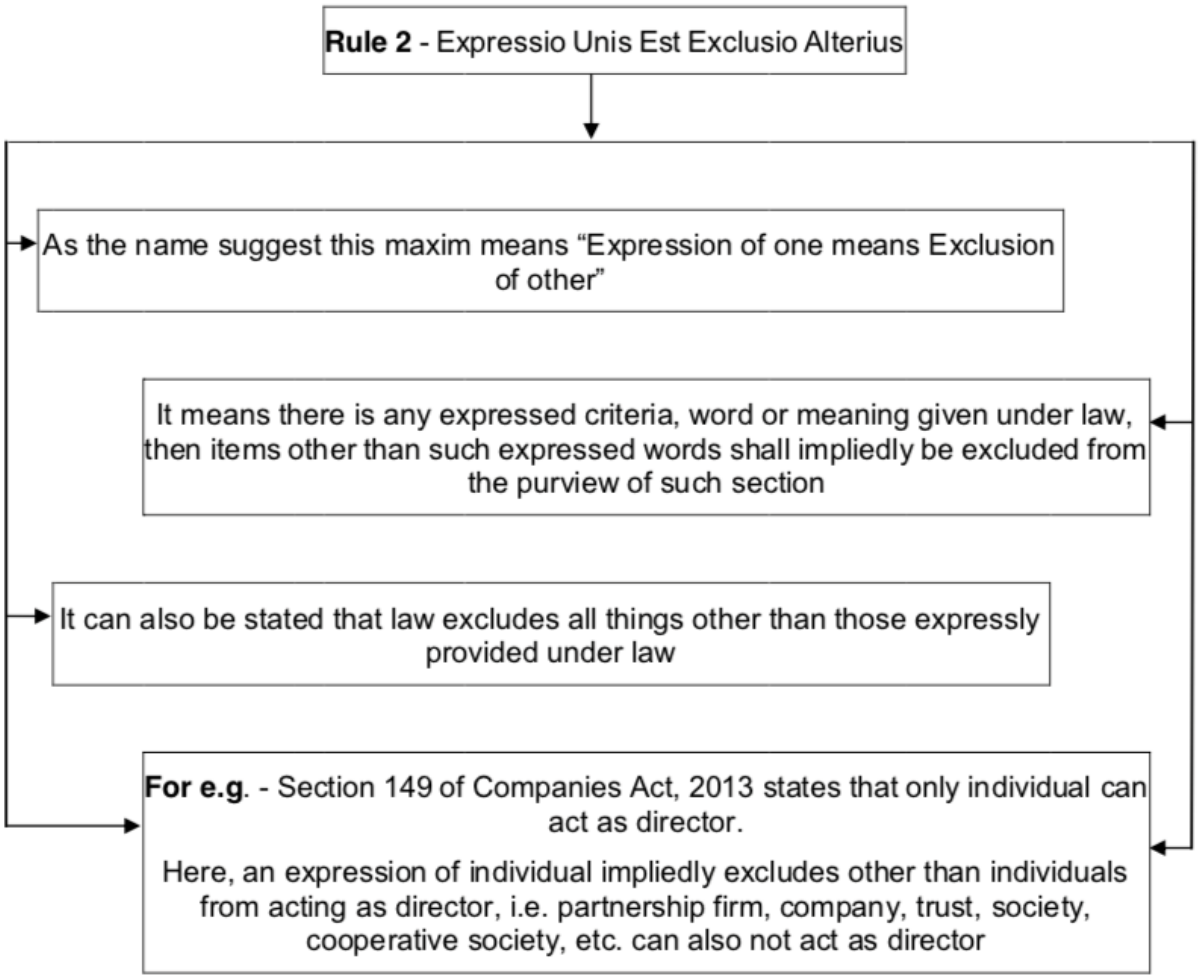
The rule literally means that express mention of one thing implies the exclusion of another. In other words, mention of one or more things of a particular class may be regarded as silently excluding all other members of the class. Thus, where a statute uses two words or expressions, one of which generally includes the other, the more general term is taken in a sense excluding the less general one.

For example, Section 149 of Companies Act, 2013 mentions that individual can be a director.

It means any person other than individual cannot be a director.

It may be noted that this maxim ought not to be applied, where its application leads to inconsistency or injustice.

Quick Recap

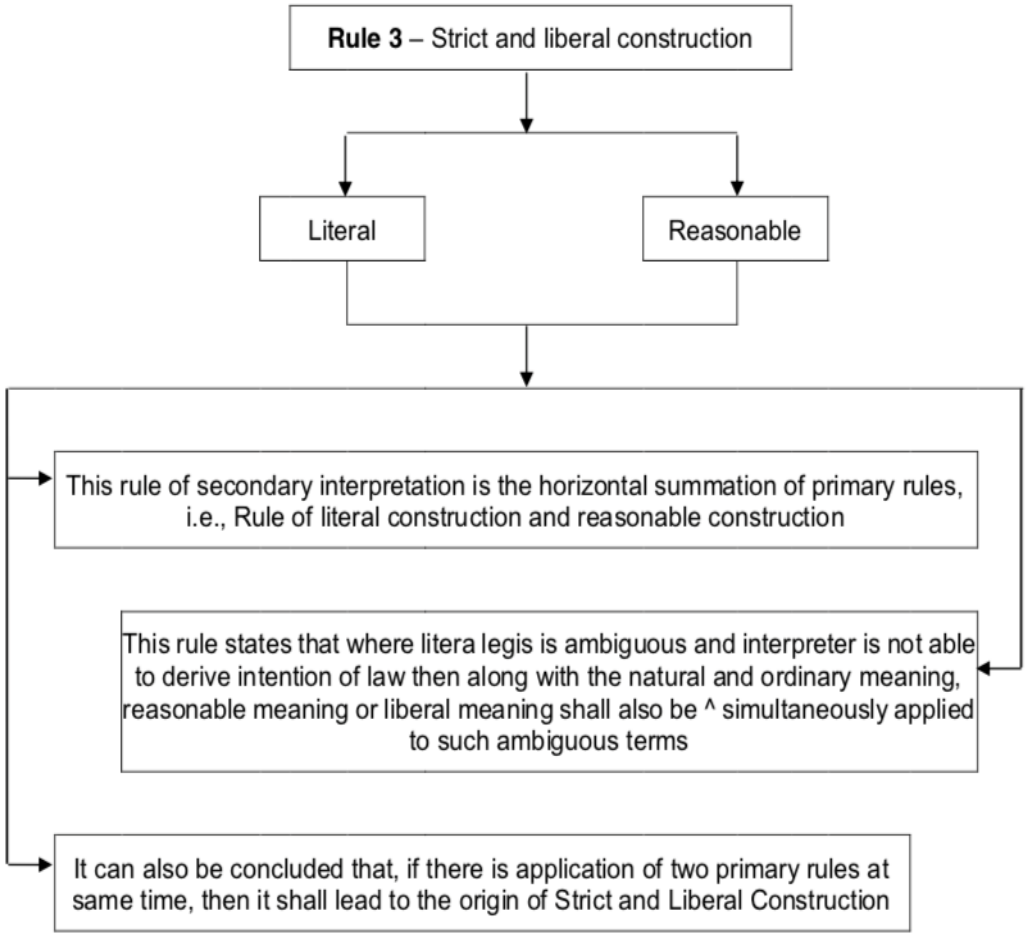


3. Strict and Liberal Construction

The words of a statute are to be constructed in the manner in which they are stated in the Act. The statute is not to be regarded as including anything which is not within its letter and its spirit and which is not clearly and manifestly described in the words of the statute itself.

In other words, the law is interpreted by strict interpretation and spirit of law is to be used strictly.

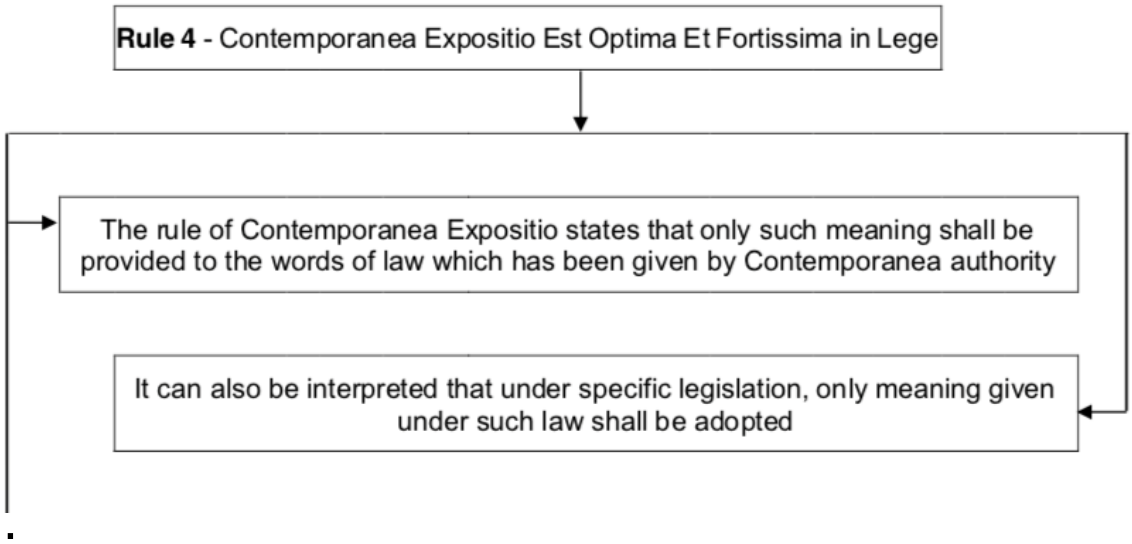
Where the usual meaning of the words falls short of the object of the legislature, a more extended meaning may be attributed to them. It has been held in many cases that it is the duty of the judge to make such construction of a statute as shall suppress the mischief and advance the remedy or which fulfills the objective thought behind in enactment of that law. This is called liberal construction.



4. Contemporanea Expositio Est Optima Et Fortissima in Lege

The rule literally means that a contemporaneous exposition is the best and strongest in the law. It is said that the best exposition of the statute or any other document is that which it has received from contemporary authority. The language of the statute must be understood in the sense in which it was understood when it was made.

It may be noted that the application of this doctrine is confined to the construction of ambiguous language used in very old statutes where indeed the language itself might have had a rather a different meaning on those days,



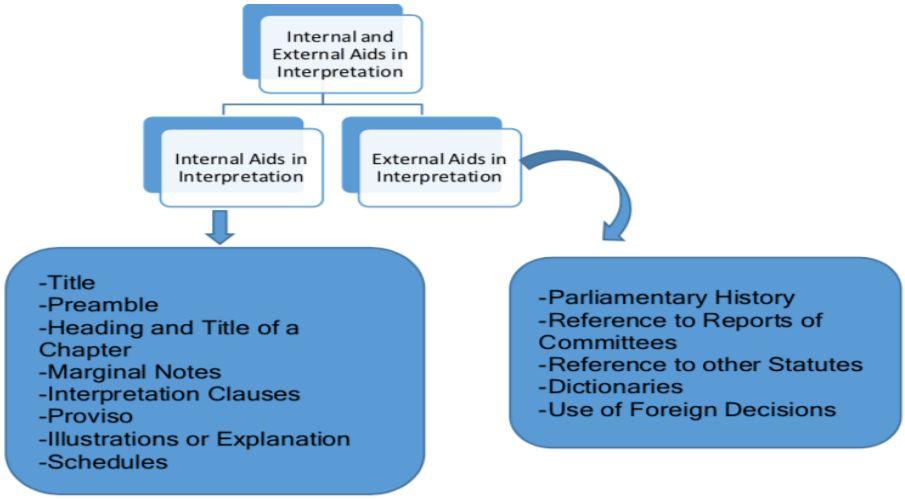
For e.g. Under Section 2(13) of Bonus Act, 1965 employee means and includes workers receiving salary not exceeding Rs. 21,000 per month, it means that general meaning of employee shall not be applied under Bonus Act and meaning given by contemporary authority i.e. Person not drawing salary exceeding Rs. 21,000 shall be considered under the definition of employee

INTERNAL AND EXTERNAL AIDS IN INTERPRETATION

In coming to a determination as to the meaning of a particular Act, it is permissible to consider two points, namely,

a. The external evidence derived from extraneous circumstances, such as, previous legislation and decided cases etc.

b. The internal evidence derived from the Act itself. Internal Aids in Interpretation



Internal Aids in Interpretation

Title	The long title is set out at the head of the statute and gives a fairly full description of the general purpose, object and scope of the Act. It is now settled that the long title of an Act is the part of the Act and it is legitimate to use it for the purpose of interpreting the Act as a whole.
Preamble	A preamble may afford useful light as to what a statute intends to reach and another that, if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment".
Heading and Title of a Chapter	The heading and title of a chapter may be referred to by the courts to resolve any doubt as to ambiguous words used therein. However, they cannot be resorted to restrict the plain or ordinary meaning of the words in the Chapter,
Marginal Notes	Marginal notes are often found printed at the side of the sections in an Act. They purport to summarize the effect of the sections and have sometimes be used as an aid to interpretation.
Interpretation on Clauses	It is common to find in statutes "definitions" of certain words and expressions used elsewhere in the body of the statute. The object of such a definition is to avoid the necessity of frequent repetitions in describing all the subject-matter to which the word or expression so defined is intended to apply. When a word has been defined in the interpretation clause, prima facie that definition governs whenever that word is used in the body of the statute.

Proviso	The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to the case.

Illustrations	Illustrations attached to sections are part of the statute and they are useful so far as they help to furnish same indication of the presumable intention of the legislature.
Explanation	An explanation is at times appended to a section to explain the meaning of words contained in the section. It becomes a part and parcel of the enactment.
Schedules	The schedules form a part of the statute and must be read together with it for all purposes of construction. Schedules are added in any statue giving details of certain things which a section refers. This avoids making a section unnecessary lengthy. But if there is any conflict between the enactment / provisions and schedule, the enactment shall prevail. [Ramchand Textiles v. Sales Tax Officer]
Statement of Objects and Reasons	The fact that the Parliament has passed the provisions of the statement of objects and reasons gives sanction to them and thus they are a valid aid in the interpretation of provisions.

External Aids in Interpretation

Parliamentary History	Court is entitled to take into account "such external or historical facts as may be necessary to understand the subject-matter of the statute", or to have regard to "the surrounding circumstances" which existed at the time of passing of the statute.
Historical facts and Circumstances	It has already been established that the court is entitled to take into account such external or historical facts as may be necessary to understand the subject matter of the statute.

Reference to Reports of Committees	The report of a Select Committee or other Committee on whose report an enactment is based, can be looked into "so as to see the background against which the legislation was enacted.
Reference to other Statutes	It has already been stated that a statute must be read as a whole as words are to be understood in their context. Extension of this rule of context, permits reference to other statutes in "Pari materia" i.e. statutes dealing with the same subject matter or forming part of the same system.
Pari Materia	Pari materia: means dealing with same matter. Statutes are in Pari Materia when the subject matter of the statutes are same or similar. It is not that the two statute should be identical before considering one to be Pari Materia with others.
Dictionaries	When a word is not defined in the Act itself, it is permissible to refer to dictionaries to find out the general sense in which that word is understood in common parlance.
Use of Foreign Decisions	Use of foreign decisions of countries following the same system of jurisprudence as ours and rendered on statutes in Pari Materia has been permitted by practice in Indian Courts.
Public policy	The statutes are intended to accord with the established principles of public policy. Therefore, if legislation lends itself to double interpretation, the interpretation that achieves this objective should be preferred.

How to Use – 'OR' / 'AND'

'OR' is normally considered disjunctive and 'AND' is normally regarded conjunctive.

However, in certain situations they may have to be read as vice-versa to give effect to the manifest intention of the legislature as disclosed from the context. This would be so where the literal reading of the words produces an unintelligible or absurd result.

In such special situation, 'AND' may be read for 'OR' and 'OR' for 'AND' even though the result of so modifying the words is less favorable to the subject, provided that the intention of the legislature is otherwise quite clear.

4 GENERAL CLAUSES ACT, 1897

INTRODUCTION

The General Clauses Act, 1897 was enacted on March 11, 1897. The general definitions provided under the Act is applicable to all Central Acts and Regulation where there is no definition in the Act that conflicts with the provisions of the Central Acts or regulations. It does not confine to a particular branch of law rather extends to various enactments and branches of law.

This Act provides various definitions and interpretation rules which shall be applicable to all Central Acts if there is no specific definition in that particular Act. The General Clauses Act, 1897 applies to Central legislature. It does not apply to any State enactments, as every State has its own General Clauses Act that will apply to the legislature of the State.

OBJECT/PURPOSE/IMPORTANCE OF GENERAL CLAUSES ACT

- To shorten the language of Central legislations.
- To provide uniformity by defining common legal terminology.
- To provide for various definitions which help to interpret various statutes.
- To avoid unnecessary repetitions of same words in various enactments.
- To provide for general definitions of words which are not specifically defined under a given Act.
- This Act also helps to resolve any conflict between 2 or more Central legislation.

KEY DEFINITIONS

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

S.NO.	DEFINITION	PROVISIONS
1	Abet	Abet with its grammatical variations and cognate expressions, shall have the same meaning as in the Indian Penal Code
2	Act	Act used with reference to an offence or a civil wrong, shall include a series of acts, and words which refer to acts done extend also to illegal omissions
3	Affidavit	Affidavit shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing
4	Barrister	Barrister shall mean a barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland
5	British India	British India shall mean, as respects the period before the commencement of Part III of Government of India Act, 1935, all territories and places within His Majesty's dominions which were for the time king governed by His Majesty through the Governor General of India or through any Governor or Officer subordinate to the Governor General of India, and as respects any period after that date and before the date of establishment of the Dominion of India means all territories for the time being comprised within the Governor' Provinces and the Chief Commissioners' Provinces, except that a reference to British India in an Indian law passed or made before the commencement of Part III of the Government of India Act,1935, shall not include a reference to Bearer
6	British possession	British possession shall mean any part of Her Majesty's dominions exclusive of the United Kingdom, and where parts of those dominions are under both a Central and a Local Legislature, all part under the Central Legislature shall, for the purposes of this definition, be deemed to be one British possession

7	Central Act	Central Act shall mean an Act of Parliament and shall include a. Act of the Dominion legislature or of the Indian Legislature passed before the commencement of the Constitution, and b. An Act made before such commencement by the Governor General in Council or the Governor General, acting in a legislative capacity.
8	Chapter	Chapter' shall mean a Chapter of the Act or Regulation in which the word occurs;
9	Chief Controlling Revenue Authority	Chief Controlling Revenue Authority" or "Chief Revenue Authority" shall mean a. In a State where there is a Board of Revenue, that Board; b. In a State where there is a Revenue Commissioner, that Commissioner; c. In Punjab, the Financial Commissioner; and d. elsewhere, such authority as, in relation to matters enumerated in List I in the Seventh Schedule to the Constitution, the Central Government, and in relation to other matters, the state Government, may by notification in the Official Gazette, appoint
10	Collector	Collector shall mean, in a Presidency-town, the Collector of Calcutta, Madras or Bombay, as the case may be, and elsewhere the chief officer-in-charge of the revenue-administration of a district

11	Central Government	Central Government shall, - a. In relation to anything done before the commencement of the Constitution, mean the Governor General or the Governor General in Council, as the case may be; and shall Inc. hide, - • In relation to functions entrusted under sub-section (1) of Section 124 of the Government of India Act, 1935, to the Government of a Province, the Provincial Government acting within the scope of the authority given to it under that sub-section; and • in relation to the administration of a Chief Commissioner's Province, the Chief Commissioner acting within the scope of the authority given to him under sub-section (3) of section 94 of the said Act; and b. In relation to anything done or to be done after the commencement of the Constitution, mean the President; and shall include, - • in relation to Functions entrusted under clause (1) of article 258 of the Constitution, to the Government of a State, the State Government acting within the scope of the authority given to it under that clause; • In relation to the administration of a Part C State before the Commencement of the Constitution (Seventh Amendment) Act, 1956, the Chief Commissioner or the Lieutenant- governor or the Government of a neighboring State or other authority acting within the scope of the authority acting within the authority given to him or it under Article 239 or Article 243 of the Constitution, as the case may be; (and) In relation to the administration of a Union territory, the administrator thereof acting within the scope of the authority given to him under article 239 of the Constitution

12	Colony	(a) In any Central Act passed after the commencement of Part III of the Government of India Act, 1935, shall mean any part of His Majesty's dominions exclusive of the British Islands, the Dominions of India and Pakistan (and before the establishment of those Dominions, British India), any Dominions as defined in the Statute of Westminster, 1931, any Province or State forming part of any of the said Dominions, and British Burma; and (b) In any Central Act passed before the commencement of Part III of the said Act, mean any part of His Majesty's dominions exclusive of the British Islands and of British India and in either case where parts of those dominions are under both a Central and Local Legislature, all parts under the Central Legislature shall, for the purposes of this definition, be deemed to be one colony.
13	Commencement	Commencement used with reference to an Act or regulation, shall mean the day on which the Act or regulation comes into force;
14	Commissioner	Commissioner shall mean the chief officer-in-charge of the revenue administration of a division
15	Constitution	Constitution shall mean the Constitution of India
16	Consular Officer	Consular officer" shall include consul-general, consul, vice-consul, consular agent, pro-consul and any person for the time being authorized to perform the duties of consul-general, consul, vice-consul or consular agent
17	District Judge	District Judge shall mean the Judge of a principal civil court of original jurisdiction, but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction

18	Document	Document shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter

19	Enactment	Enactment shall include a regulation (as hereinafter defined) and any regulation of the Bengal, Madras or Bombay Code, and shall also include any provision contained in any Act or in any such regulation as aforesaid
20	Father	Father in the case of any one whose personal law permits adoption, shall include an adoptive father
21	Financial year	Financial year" shall mean the year commencing on the first day of April
22	Government	Government or the Government" shall include both the Central Government and any State Government
23	Government securities	Government securities" shall mean securities of the Central Government or of any State Government, but in any Act or regulation made before the commencement of the Constitution shall not include securities of the government of any Part B State
24	High Court	High Court used with reference to civil proceedings, shall mean the highest civil court of appeal (not including the Supreme Court) in the part of India in which the Act or regulation containing the expression operates
25	Immovable property	Immovable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth
26	Imprisonment	Imprisonment" shall mean imprisonment of either description as defined in the Indian Penal Code
27	India	India shall mean- a. as respects any period before the establishment of the Dominion of India, British India together with all territories of Indian Rulers then under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, and the tribal areas;

		b. as respects any period after the establishment of the Dominion of India and before the commencement of the Constitution, all territories for the time being included in that Dominion; and c. as respects any period after the commencement of the Constitution, all territories for the time being comprised in the territory of India;
28	Indian law	Indian law shall mean any Act, ordinance, regulation, rule, order, bye-law or other instrument which before the commencement of the Constitution had the force of law in any Province of India or part thereof, or thereafter has the force of law in any Part A State or Part C State or Part thereof, but does not include any Act of Parliament of the United Kingdom or any Order in Council, rule or other instrument made under such Act
29	Indian State	Indian State shall mean any territory which the Central Government recognized as such a State before the commencement of the Constitution, whether described as a State, an Estate, a Jagir or otherwise

30	Local authority	local authority shall mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the government with the control or management of a municipal or local fund
31	Magistrate	Magistrate shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force
32	Master	Master used with reference to a ship, shall mean, any person (except a pilot or harbor-master) having for the time being control or charge of the ship
33	Merged territories	Merged territories shall mean the territories which by virtue of an order made under section 290A of the Government of India Act, 1935, were immediately before the commencement of the Constitution being administered as if they formed part of a Governor's Province or as if they were a Chief Commissioner's Province

34	Month	Month shall mean a month reckoned according to the British calendar
35	Movable property	Movable property shall mean property of every description, except immovable property
36	Oath	Oath shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing
37	Offence	Offence shall mean any act or omission made punishable by any law for the time being in force
38	Official Gazette	Official Gazette" or "Gazette" shall mean the Gazette of India or the Official Gazette of a State
39	Person	Person shall include any company or association or body of individuals, whether incorporated or not
40	Political Agent	Political Agent shall mean, - a. in relation to any territory outside India, the Principal Officer, by whatever name called, representing the Central Government in such territory; and b. in relation to any territory within India to which the Act or regulation containing the expression does not extend, any officer appointed by the Central Government to exercise all or any of the powers of a Political Agent under that Act or regulation
41	Presidency- town	Presidency-town shall mean the local limits for the time being of the ordinary original civil jurisdiction of the High Court of Judicature at Calcutta, Madras or Bombay, as the case may be
42	Province	Province" shall mean a Presidency, a Governor's Province, a Lieutenant Governor's Province or a Chief Commissioner's Province
43	Provincial Act	Provincial Act shall mean an Act made by the Governor in Council, Lieutenant Governor in Council or Chief Commissioner in Council of a Province under any of the Indian Councils Acts or the Government of India Act, 1915, or an Act made by the Local Legislature or the Governor of a Province under the Government

		of India Act, or an Act made by the Provincial Legislature or Governor of a Province or the Coorg Legislative Council under the Government of India Act, 1935
44	Provincial Government	Provincial Government shall mean, as respects anything done before the commencement of the Constitution, the authority or person authorized at the relevant date to administer executive government in the Province in question
45	Public Nuisance	Public nuisance shall mean a public nuisance as defined in the Indian Penal Code
46	Year	Year shall mean a year reckoned according to the British calendar.
47	Ship	Ship shall include every description of vessel used in navigation not exclusively propelled by oars; "Sign", with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include "mark", with its grammatical variations and cognate expressions
48	State Government	State Government; a. As respects anything done before the commencement of the Constitution, shall mean, in a Part A State, the Provincial Government of the corresponding Province, in a Part B State, the authority or person authorized at the relevant date to exercise executive government in the corresponding Acceding State, and in a Part C State, the Central Government; b. As respects anything done after the commencement of the Constitution and before the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a Part A State, the Governor in a Part B State, the Rajpramukh, and in a Part C State, the Central Government; c. As respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a State, the Governor, and in a Union Territory, the Central Government; and shall, in relation to functions entrusted under Article 258A of the Constitution to the Government of India, include the Central Government acting within the scope of the authority given to it under that article;

Section 4- Application of foregoing definitions to previous enactments

1. Application of terms/expression to all Central Acts made after the 3rd day of January, 1868, and to all regulations made on or after the 14th day of January, 1887.The definitions in section 3 of the following words and expressions, that it to say, "affidavit", "immovable property", "imprisonment", "month", "movable property', "oath", "person", "section", and "year" apply also, unless there is anything repugnant in the subject or context, to all Central Acts made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.

2. Application of terms/expression to all Central Acts and Regulations made on or after the 14th day of January, 1887.The definitions given in section 3, of the following words and expressions, that is to say, "commencement", "financial year", "offence", "registered", "schedule", "sub-section" and "writing" apply also, unless there is anything repugnant in the subject or context, to all Central Acts and Regulations made on or after the fourteenth day of January, 1887.

Section 9- Commencement and Termination of time

1. In any Central Act or Regulation, it shall be sufficient,

a. for the purpose of excluding the first in a series of days, to use the word "from"; and for the purpose of including the last in a series of days, to use the word "to".

b. to all Regulations made on or after the fourteenth day of January. 1887.

2. This section applies also to all Central Acts made after the third day of January, 1868, and

Example: If a Company declares dividend for its Shareholders in its Annual General Meeting held on 30/09/2016. Under the provisions of the Companies Act, 2013 Company is required to pay declared dividend within 30 days from the date of declaration i.e. from 01/10/2016 to 30/10/2016. In this series of 30 days, 30/09/2016 will be excluded and last 30th day i.e. 30/10/2016 will be included.

Section 10-Computation of Time

1. Where, by any Central Act or regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open:

   Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877, applies.

2. This section applies also to all Central Acts and Regulations made on or after the fourteenth day of January, 1887.

   Example: Mr. A defaulted in making payment to Mr. B on 3l$^{s!}$ December, 2016. The right of Mr. B to institute a legal suit against Mr. A immediately starts from the day succeeding the day of default i.e. from 1st January, 2017 till 31st December, 2019 i.e. 3 years from the date of default. It means that Mr. B can file petition to the court of law on or before 31st December, 2019 and if such day seems to be Sunday then the Limitation period shall be deemed as extended to 1st January, 2020.

- Case Law K. Soosalrathnam v Div. Engineer N.H.C. Tirunelveli (1995)

  Since the last date of the prescribed period was subsequent to the date of notification declared to be a holiday on the basis of the principles laid down in this section the last date of prescribed period for obtaining the lender schedules was extended to the next working day.

Section 11- Measurement of Distance

In the measurement of any distance, for the purpose of any Central Act or Regulation made after the commencement of this Act, that distance shall, unless a different intention appears, be measured in a straight line on a horizontal plane.

Section 12- Duty to be taken pro rata in enactments

Where, by any enactment now in force or hereafter to be in force, any duty of customs or excise, or excise, or in the nature thereof, is leviable on any given quantity, by weight, measure or value of any goods or merchandise, then a like duty is leviable according to the same rate on any greater or less quantity.

Section 13- Gender and Number

In all Central Acts and Regulations, unless there is anything repugnant in the subject or context-

1. words importing the masculine gender shall be taken to include females;
2. words in the singular shall include the plural, and vice versa.

   Example: The word "He" includes "She" similarly the word "Employee" includes "all employees"

RETROSPECTIVE AMENDMENTS

The 'rule' means rule made in exercise of the authority of any legislation and the regulation issued as a rule framed under the legislation.

Effective date	Where legislation is not specifically mentioned to come into force on a prescribed date, it shall be implemented on the day that it receives the assent of the Governor General before the commencement of the Indian Constitution and thereafter of the President. The regulation shall come into force instantly on the ending of the day prior to its commencement unless expressly provided.	
A particular date of enforcement of the Act specified	The Act will become effective on the given specified date	
No particular date of enforcement of the Act specified	Section 5 of the General Clauses Act will apply which lays down that effective date of enforcement of the Act will be as follows:	
	If the Central Act is made before the commencement of Constitution of India	The Act will become effective on the date it received assent of the Governor General
	If the Central Act is made after the commencement of Constitution of India	The Act will become effective on the date it received assent of the President

Example 1: The Companies (Amendment) Act, 2017 received assent of the President on 3rd January 2018 and in absence of specific date for a given section the date of assent of President i.e. 3rd January will be treated as effective date for those sections.

Example 2: SEBI (Prohibition of Insider Trading) Regulations, 2015 was notified on 15th January, 2015 and clearly laid down that the Regulations will be effective on expiry of 120 days of the notification i.e. on 15th May, 2015. So the effective date of enforcement will be 15th May, 2018.

POWERS AND FUNCTIONARIES

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

- Section 16: Power to appoint to include power to suspend or dismiss
- Section 15: Power to appoint to include power to appoint ex officio
- Section 17: Substitution of functionaries
- Section 18: Successors
- Section 19: Officials chiefs and sub-ordinates

1. Powers conferred to be exercisable from time to time

- Where, by any Central Act or Regulation made after the commencement of this Act, any power is conferred, then unless a different intention appears that power may be exercised from time to time as occasion requires.
- This section applies also to all Central Acts and Regulations made on or after the fourteenth day of January, 1887. [Section 14]

2. Power to appoint to include power to appoint ex officio

Where, by any Central Act or Regulation, a power to appoint any person to fill any office or execute any function is conferred, then, unless it is otherwise expressly provided, any such appointment, if it is made after the commencement of this Act, may be made either by name or by virtue of office. [Section 15]

3. Power to appoint to include power to suspend or dismiss

Where, by any Central Act or Regulation, a power to make any appointment is conferred, then, unless a different intention appears, the authority having for the time being power to make the appointment shall also have power to suspend or dismiss any person appointed whether by itself or any other authority in exercise of that power. [Section 16]

4. Substitution of functionaries

- In any Central Act or Regulation, made after the commencement of this Act, it shall be sufficient, for the purpose of indicating the application of a law to every person or number of persons for the time being executing the function of an office, to mention the official title of

the officer at present executing the functions, or that of the officer by whom the functions are commonly executed.

- This section applies also to all Central Acts made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887. [Section 17]

5. Successors

- In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of indicating the relation of a law to the successors of any functionaries or of corporations having perpetual succession, to express its relation to the functionaries or corporations.

- This section applies also to all Central Acts made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887. [Section 18]

6. Officials chiefs and sub-ordinates

- In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of expressing that a law relative to the chief or superior of an office shall apply to the deputies or subordinates lawfully performing the duties of that office in the place of their superior, to prescribe the duty of the superior.

- This section applies also to all Central Acts made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887. [Section 19]

7. Power as to Orders, Rules etc., made under Enactments

- Section 21 of the General Clause Act deals with power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules or bye-laws.

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

GENERAL RULE OF CONSTRUCTION

Rule of Construction is a rule used for interpreting legal instruments, especially contracts and statutes. Very few states have codified the rules of construction. Most states treat the rules as mere customs not having the force of law.

When ambiguous language is given its exact and technical meaning, and no other equitable considerations or reasonable implications are made, there has been a strict or literal construction of the unclear term.

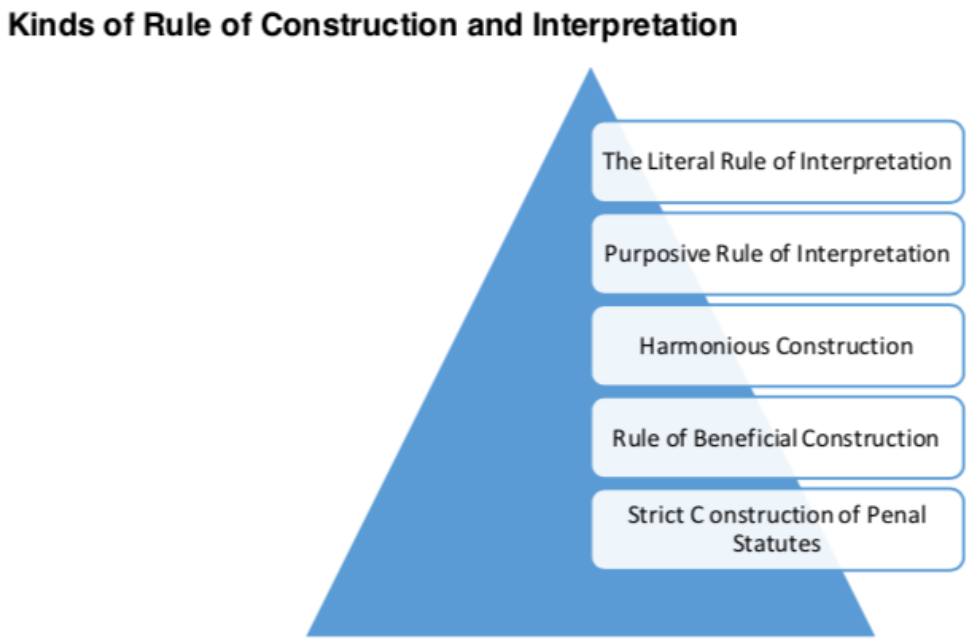
A liberal or equitable construction permits a term to be reasonably and fairly evaluated so as to implement the object and purpose for which the document is designed. This does not mean that the words will be strained beyond their natural or customary meanings.

A rule of construction is a principle that either governs the effect of the ascertained intention of a document or agreement containing an ambiguous term or establishes what a court should do if the intention is neither express nor implied. A regular pattern of decisions concerning the application of a particular provision of a statute is a rule of construction that governs how the text is to be applied in similar cases.

Example

Contra proferentem and **Ejusdem Generic** are two examples of rules of construction. According to Contra Proferentem Rule, if a clause in a contract appears to be ambiguous, it should be interpreted against the interests of the person who insisted that the clause be included. Likewise, Ejusdem Generis Rule states that where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed.

KINDS OF RULES OF CONSTRUCTION AND INTERPRETATION



1. **Kinds of Rule of Construction and Interpretation the Literal Rule of Interpretation**

   The Primary and important rule of interpretation is called the Literal Rule. This rule stated that the only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in then serves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the law giver.

   But if any doubt arises from the terms employed by the Legislature, it has always been held a safe mean of collecting the intention to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer is "a key to open the minds of the makers of the Act, and the mischiefs which they intend to redress".

2. **Purposive Rule of Interpretation**

   In Halsbury's Laws of England, it is stated

   "Parliament intends that an 'enactment shall remedy a particular mischief and it is therefore presumed that Parliament intends that the court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment corresponds to its legal meaning, should find a construction which applies the remedy provided by it in such a way as to suppress that mischief

   Numbers of laws are made to cure a mischief. The mischief rule of interpretation is based on this reason and it states that interpretation should be made in such way that it is able to cure

that mischief for which the law had been made. Thus, law should be interpreted in such a way so that it suppresses the mischief and advances the remedy.

- **Case Law- CIT v Sodra Devi CIT v Sodra Devi**

It may be noted that mischief Rile is applicable only when a particular rule is ambiguous and capable of different meanings. In such a case, the meaning which can suppress the mischief and advance the remedy should be taken and other meaning should be discarded. Thus, where a law is clear and can have only one meaning, this rule shall not apply.

This Rule has been applied for the first time in Heydon's Case and thus it is also popularly known as Heydon's Rule.

3. **Harmonious Construction**

According to the principle of harmonious interpretation, when there are two provisions in a statute, which are in apparent conflict with each other, they should be interpreted such that effect can be given to both and that construction which renders either of them inoperative and useless should not be adopted except in the last resort,

- **Case Law- Raj Krishna v Binod Kanungo**

This principle is illustrated in the case of Raj Krishna v Binod Kanungo

In this case, two provisions of Representation of People Act, 1951, which were in apparent conflict, were brought forth. Section 33(2) says that a Government Servant can nominate or second a person in election but section 123(8) says that a Government Servant cannot assist any candidate in election except by casting his vote. The Supreme Court observed that both these provisions should be harmoniously interpreted and held that a Government Servant was entitled to nominate or second a candidate seeking election in State Legislative assembly. This harmony can only be achieved if Section 123(8) is interpreted as giving the Government servant the right to vote as well as to nominate or second a candidate and forbidding him to assist the candidate in any other manner.

4. **Rule of Beneficial Construction**

Beneficent construction involves giving the widest meaning possible to the statutes. When there are two or more possible ways of interpreting a section or a word, the meaning which gives relief and protects the benefits which are purported to be given by the legislation, should be chosen. A beneficial statute has to be construed in its correct perspective so as to fructify the legislative intent. Although beneficial legislation does receive liberal interpretation, the courts try to remain within the scheme and not extend the benefit to those not covered by the scheme. It is also true that once the provision envisages the conferment of benefit limited in point of time and subject to the fulfillment of certain conditions, their non-compliance will have the effect of nullifying the benefit. There should be due stress and emphasis to Directive Principles of State Policy and any international convention on the subject.

5. **Strict Construction of Penal Statutes**

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

5 ADMINISTRATIVE LAW

INTRODUCTION

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

There is no single universal definition of 'administrative law' because it means different things

To different theorists.

According to Albert Venn Dicev, the great British constitutional scholar, administrative law relates to that portion of a nation's legal system which determines the legal status and liabilities of all state officials, which defines the rights and liabilities of private individuals in their dealings with public officials, and which specifies the procedure by which those rights and liabilities are enforced.	Ivor Jennings defined administrative law as the law relating to administration. It determines the organization, powers and duties of administrative authorities. This formulation is too broad and general as it does not differentiate between administrative and constitutional law. It excludes the manner of exercise of powers and duties.

Need for Administrative Law

The modem state typically has three organs- legislative, executive and judiciary. Traditionally, the legislature was tasked with the making of laws, the executive with the implementation of the laws and judiciary with the administration of justice and settlement of disputes.

However, this traditional demarcation of role has been found wanting in meeting the challenges of present era. The legislature is unable to come up with the required quality and quantity of legislations because of limitations of time, the technical nature of legislation and the rigidity of their enactments. The traditional administration of justice through judiciary is technical, expensive and dilatory. The states have empowered their executive (administrative) branch to fill in the gaps of legislature and judiciary. This has led to an all-pervasive presence of administration in the life of a modem citizen. In such a context, a study of administrative law assumes great significance.

The ambit of administration is wide and embraces following elements within its ambit: -

1. It makes policies

2. It exercises legislative powers and issues rules, bye- laws and orders of a general nature

3. It executes, administers and adjudicates the law

Sources of Administrative Law

There are four principal sources of administrative law in India: -

a. Constitution of India

It is the primary source of administrative law. Article 73 of the Constitution provides that the executive power of the Union shall extend to matters with respect to which the Parliament has power to make laws. Similar powers are provided to States under Article 62. The Constitution also envisages tribunals, public sector and government liability which are important aspects of administrative law.

b. Acts or Statutes

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

c. Ordinances, Administrative directions, notifications and Circulars

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

d. Judicial decisions

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

Administrative Discretion

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

The government cannot function without the exercise of some discretion by its officials. It is necessary because it is humanly impossible to lay down a rule for every conceivable eventuality that may arise in day-to-day affairs of the government. It is, however, equally true that discretion is prone to abuse. Therefore, there needs to be a system in place to ensure that administrative discretion is exercised in the right manner.

Administration has become a highly complicated job needing a good deal of flexibility apart from technical knowledge, expertise and know-how. Freedom to choose from various alternatives allows the administration to fashion its best response to various situations. If a certain rule is found to be unsuitable in practice, the administration can change, amend or abrogate it without much delay. Even if the administration is dealing with a problem on a case to case basis it can change its approach according to the exigency of situation and the demands of justice.

Judicial Control over Administrative Actions

Any country which claims to have a rule of law cannot have a government authority which has no checks on its power. Administrative organs have wide powers and their exercise of discretion can be vitiated by a number of factors. Therefore, the government must also provide for proper redressed mechanism. For India, it is of special significance because of the proclaimed objectives of Indian polity to build a socialistic pattern of society that has led to huge proliferation of administrative agencies and processes.

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

A. Constitutional

B. Statutory

C. Equitable

A. CONSTITUTIONAL

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

Judicial Review

The biggest check over administrative action is the power of judicial review. Judicial review is the authority of Courts to declare void the acts of the legislature and executive, if they are found in violation of provisions of the Constitution. Judicial Review is the power of the highest Court of a jurisdiction to invalidate on Constitutional grounds, the acts of other Government agency within that jurisdiction.

S.NO.	CASE NAME	PROVISIONS
1	Mansukhlal Vithal das Chauhan v State of Gujarat, AIR 1997	While exercising the power of judicial review it does sit as a court of appeal but merely reviews the manner in which the decision was made, particularly as the court lacks the expertise to correct the administrative decision and if a review of the administrative decision is permitted, it will be substituting its own decision which itself maybe fallible. The court is to confine itself to the question of legality. Its concern should be: • whether a decision-making authority exceeding its power • committed an error of law • committed a breach of rules of natural justice • reached a decision which no reasonable tribunal would have reached, • abused its power

<u>JUDICIAL REVIEW IS EXERCISED AT TWO STAGES</u>

At the stage of delegation of discretion

at the stage of exercise of administrative discretion.

i. **Judicial review at the stage of delegation of discretion**

Any law can be challenged on the ground that it is violative of the Constitution and therefore laws conferring administrative discretion can thus also be challenged under the Constitution. In the case of delegated legislation, the Constitutional courts have often been satisfied with vague or broad statements of policy, but usually it has not been so in the cases where administrative discretion has been conferred in matters relating to fundamental rights.

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

ii. **Administrative Discretion and Article 14**

Article l4 of the Constitution of India provides for equality before law. It prevents arbitrary discretion being vested in the executive. Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. Right to equality affords protection not only against discretionary laws passed by legislature but also prevents arbitrary discretion being vested in the executive. Often executive or administrative officer of government is given wide discretionary power.

In a number of cases, the statute has been challenged on the ground that it conferred on an administrative authority wide discretionary powers of selecting persons or objects discriminately and therefore, it violated Article 14.

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

CASE LAW

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

iii. **Administrative Discretion and Article 19**

Article 19 guarantees certain freedoms to the citizens of India, but they are not absolute. Reasonable restrictions can be imposed on these freedoms under the authority of law. The reasonableness of the restrictions is open to judicial review. These freedoms can also be afflicted by administrative discretion.

A number of cases have come up involving the question of validity of law conferring discretion on the executive to restrict the right under Article 19(l)(b) and 19(l)(e) (the right to assemble peacefully and without arms and the right to reside and settle in any part of the territory of India). The government has conferred powers on the executive through a number of laws to extern a person from a particular area in the interest of peace and safety.

VALIDITY OF THE DISCRETION

No law can clothe administrative action with a complete finality even if the law says so, for the courts always examine the ambit and even the mode of its exercise to check its conformity with fundamental rights. The courts in India have developed various formulations to control the exercise of administrative discretion, which can be grouped under two broad heads, as under:

1. Authority has not exercised its discretion properly- **abuse of discretion**
2. Authority is deemed not to have exercised its discretion at all - **non-application of mind.**

1. Abuse of Discretion

- Mala fides: If the discretionary power is exercised by the authority with bad faith or dishonest intention, the action is quashed by the court. Mala fide exercise of discretionary power is always bad and taken as abuse of discretion. Mala fide (bad faith) may be taken to mean dishonest intention or corrupt motive. In relation to the exercise of statutory powers it may be said to comprise dishonesty (or fraud) and malice. A power is exercised fraudulently if its repository intends to achieve an object other than that for which he believes the power to have been conferred. The intention may be to promote another public interest or private interest.

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

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

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

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

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

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

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

2. <u>Non-Application of Mind</u>

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

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

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

B. **<u>STATUTORY JUDICIAL CONTROL</u>**

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

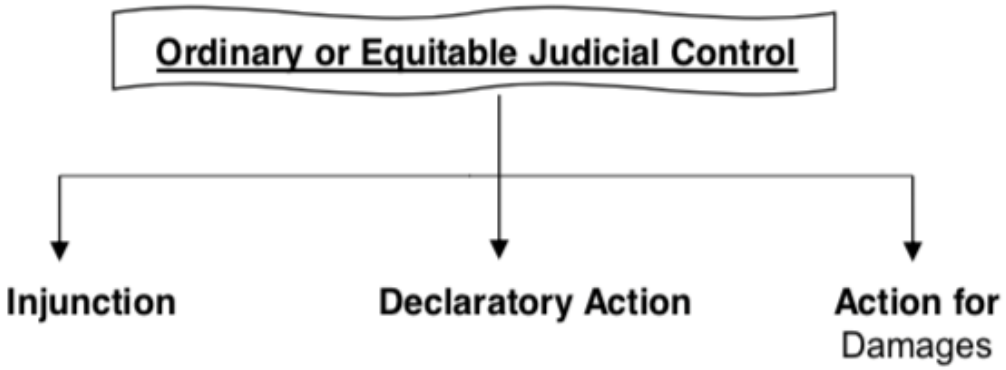
i. **Statutory appeals**: There are some Acts, which provide for an appeal from statutory tribunal to the High Court on point of law. e.g. Section 30 Workmen's Compensation Act, 1923.

ii. **Reference to the High Court or statement of case**: There are several statutes, which provide for a reference or statement of case by an administrative tribunal to the High Court.

Under Section 256 of the Income-tax Act, 1961 where an application is made to the Tribunal by the assessee and the Tribunal refuses to state the case the assessee may apply to the High Court and if the High Court is not satisfied about the correctness of the decision of the Tribunal, it can require the Tribunal to state the case and refer it to the Court.

C. **ORDINARY OR EQUITABLE JUDICIAL CONTROL**

Apart from the remedies as discuss above there are certain ordinary remedies, which are available to person against the administration, the ordinary courts in exercise of the power provide the ordinary remedies under the ordinary law against the administrative authorities. These remedies are also called equitable remedies and include:



1. Injunction

An injunction is a preventive remedy. It is a judicial process by which one who has invaded or is threatening to invade the rights of another is restrained from continuing or commencing such wrongful act. In India, the law with regard to injunctions has been laid down in the Specific Relief Act, 1963.

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

An injunction can be issued to both administrative and quasi-judicial bodies. Injunction is highly useful remedy to prevent a statutory body from doing an ultra vires act, apart from the cases where it is available against private individuals e.g. to restrain the commission or torts, or breach of contract or breach of statutory duty. Injunction may be prohibitory or mandatory.

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

i. **Interlocutory or temporary injunction:** Temporary injunctions are such as to continue until a specified time or until the further order of the court. (Section 37 for the Specific Relief Act). It is granted as an interim measure to preserve status quo until the case is heard and decided. Temporary injunction may be granted at any stage of a suit. Temporary injunctions are regulated by the Civil Procedure Code and are provisional in nature. It does not conclude or determine a right. Besides, a temporary injunction is a mere order. The granting of temporary injunction is a matter of discretion of the court.

ii. **Perpetual injunction:** A perpetual injunction can only be granted by decree made at the hearing and made upon the merits of the suit. It is granted only after full trial of hearing of the case, when a right is firmly established.

b. **Mandatory injunction:** When to prevent the breach of an obligation it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of and also to compel performance of the requisite acts. The mandatory injunction may be taken as a command to do a particular act to restore things to their former condition or to undo, that which has been done.

2. **Declaratory Action**

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

3. **Action for damages**

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

PRINCIPLES OF NATURAL JUSTICE

- One of the most important principles in the administration of justice is that justice must not only be done but also seen to be done.
- This is necessary to inspire confidence in the people in the judicial system.
- Natural justice is a concept of Common Law and represents procedural principles developed by judges. Though it enjoys no express constitutional status, it is one of the most important concepts that ensure that people retain their faith in the system of adjudication.
- Principles of natural justice are not precise rules of unchanging content; their scope varies according to the context.
- It provides the foundation on which the whole super-structure of judicial control of administrative action is based.

Rule against bias (Nemo Judex in Causa Sua)

- According to this rule no person should be made a judge in his own cause.
- Bias means an operative prejudice whether conscious or unconscious in relation to a party or issue.
- It is a presumption that a person cannot take an objective decision in a case in which he has an interest.
- The rule against bias has two main aspects:
    1. That the judge must not have any direct personal stake in the matter at hand
    2. There must not be any real likelihood of bias.

Bias can be of the following three types:

a. **Pecuniary bias**

The judicial approach is unanimous on the point that any financial interest of the adjudicatory authority in the matter, howsoever small, would vitiate the adjudication.

b. **Personal bias**

There are number of situations which may create a personal bias in the Judge's mind against one party in dispute before him. He may be friend of the party, or related to him through family, professional or business ties. The judge might also be hostile to one of the parties to a case. All these situations create bias either in favour of or against the party and will operate as a disqualification for a person to act as a Judge.

c. **Subject matter bias**

A judge may have a bias in the subject matter, which means that he himself is a party, or has some direct connection with the litigation. To disqualify on the ground of bias there must be intimate and direct connection between adjudicator and the issues in dispute.

Rule of fair hearing (Audi Alteram Partem)

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

Following are the ingredients of the rule of fair hearing:

1. **Right to notice**

Hearing starts with the notice by the authority concerned to the affected person. Therefore, before the proceedings start, the authority concerned is required to give to the affected person the notice of the case against him. However, the omission to serve notice would not be fatal if the notice has not been served on the concerned person on account of his own fault.

2. Right to present case and evidence

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

3. Right to rebut (deny) adverse evidence

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

4. Disclosure of evidence

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

5. Speaking orders

Reasoned decision may be taken to mean a decision which contains reason in its support. When the adjudicatory bodies give reasons in support of their decisions, the decisions are treated as reasoned decision. It is also called speaking order. In such condition the order speaks for itself or it tells its own story.

EXCEPTIONS TO NATURAL JUSTICE

Though the normal rule is that a person who is affected by administrative action is entitled to claim natural justice, that requirement may be excluded under certain exceptional circumstances.

1. **Statutory Exclusion:** The principle of natural justice may be excluded by the statutory provision. Where the statute expressly provides for the observance of the principles of natural justice, the provision is treated as mandatory and the authority is bound by it. Where the statute is silent as to the observance of the principle of natural justice, such silence is taken to imply the observance thereto. However, the principles of natural justice are not incapable of exclusion. The statute may exclude them. When the statute expressly or by necessary implication excludes the application of the principles of natural justice the courts do not ignore the statutory mandate.

2. **Emergency:** In exceptional cases of urgency or emergency where prompt and preventive action is required the principles of natural justice need not be observed. In *Maneka Gandhi v. Union of India* the Supreme Court observed that a passport may be impounded in public interest without compliance with the principles of natural justice but as soon as the order impounding the passport has been made, an opportunity of post decisional hearing, remedial in aim, should be given to the person concerned. In the case, it has also been held that "public interest" is a justiciable issue and the determination of administrative authority on it is not final.

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

4. **Academic evaluation:** Where a student is removed from an educational institution on the grounds of unsatisfactory academic performance, the requirement of pre-decisional hearing is excluded. The Supreme Court has made it clear that if the competent academic authority assesses the work of a student over the period of time and thereafter declare his work unsatisfactory the rule of natural justice may be excluded but this exclusion does not apply in the case of disciplinary matters.

5. **Impracticability:** Where the authority deals with a large number of persons it is not practicable to give all of them opportunity of being heard and therefore in such condition the court does not insist on the observance of the rules of natural justice. In P. Radha krishnav. Osmania University, the entire M.B.A. entrance examination was cancelled on the ground of mass copying. The court held that it was not possible to give all the examinees the opportunity of being heard before the cancellation of the examination.

EFFECT OF FAILURE OF NATURAL JUSTICE

When an authority required observing natural justice in making an order fails to do so, should the order made by it be regarded as void or voidable?

Generally speaking, a voidable order means that the order was legally valid at its inception, and it remains valid until it is set aside or quashed by the courts, that is, it has legal effect up to the time it is quashed.

On the other hand, a void order is no order at all from its inception; it is nullity and void ab initio. In most cases a person affected by such an order cannot be sure whether the order is really valid or not until the court decided the matter.

Therefore, the affected person cannot just ignore the order treating it as a nullity. He has to go to a Court for an authoritative determination as to the nature of the order is void. For example, an order challenged as a nullity for failure of natural justice gives rise to the following crucial question: Was the authority required to follow natural justice?

Usually, a violable order cannot be challenged in collateral proceedings. It has to be set aside by the court in separate proceedings for the purpose. Suppose, a person is prosecuted criminally for infringing an order. He cannot then plead that the order is voidable. He can raise such a plea if the order is void. In India, by and large, the judicial thinking has been that a quasi- judicial order made without following natural justice is void and nullity.

CASE LAWS

S.NO.	CASE NAME	PROVISIONS
1	Nawab khan v. Gujarat	Section 56 of the Bombay Police Act, 1951 empowers the Police Commissioner to extern any undesirable person on certain grounds set out therein. An order passed by the Commissioner on the petitioner was disobeyed by him and he was prosecuted for this in a criminal court. During the pendency of his case, on a writ petition filed by the petitioner, the High Court quashed the internment order on the ground of failure of natural justice. The trial court then acquitted the appellant. The government appealed against the acquittal and the High Court convicted him for disobeying the order. The High Court took the position that the order in question was not void ab initio; the appellant had disobeyed the order much earlier than date it was infringed by him; the High Court's own decision invalidating the order in question was not retroactive and did not render it a nullity from its inception but it was invalidate only from the date the court declared it to be so by its judgment. However, the matter came in appeal before the Supreme Court, which approached the matter from a different angle. The order of internment affected a Fundamental Right (Article 19) of the appellant in a manner which was not reasonable. The order was thus illegal and unconstitutional and hence void. The court ruled definitively that an order infringing a constitutionally guaranteed right made without hearing the party affected, where hearing was required, would be void ab initio and ineffectual to bind the parties from the very beginning and a person cannot be convicted for non-observance of such an order. The Supreme Court held that where hearing is obligated by statute which affects the fundamental right of a citizen, the duty to give the hearing sound in constitutional requirement and failure to comply with such a duty is fatal.

LIABILITY OF GOVERNMENT

The liability of the government can either be contractual or tortious.

Contractual Liability of Government

The Constitution of India allows the central and the state governments to enter into contracts. In this regard, Article 299(1) provides that all the contracts of Central Government will be in the name of President of India and that of State Government shall be in the name of its Governor:

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

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

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

Tortious Liability of Government

In India, the Government is liable for the acts and defaults, of its employees and servants, done in the exercise of its non-sovereign functions. If it is a sovereign function, it could claim immunity from the tortious liability, otherwise not. Generally, the activities of commercial nature or those which can be carried to by the private individual are termed as non-sovereign functions.

6 LAW OF TORTS

INTRODUCTION

The word 'Tort' is a French word which is derived from a Latin word 'Tortum'. Tort means 'Civil Wrong'. But every wrong or wrongful act is not a tort. Tort is really a kind of civil wrong as opposed to criminal wrong. Example: A car accident where one driver hurts another driver because he or she was not paying attention could be a tort.

Important elements of torts:

a. It is a species of civil injury of wrong as opposed to a criminal wrong, and

b. Every civil wrong is not a tort.

GENERAL CONDITIONS TO FORM A TORT

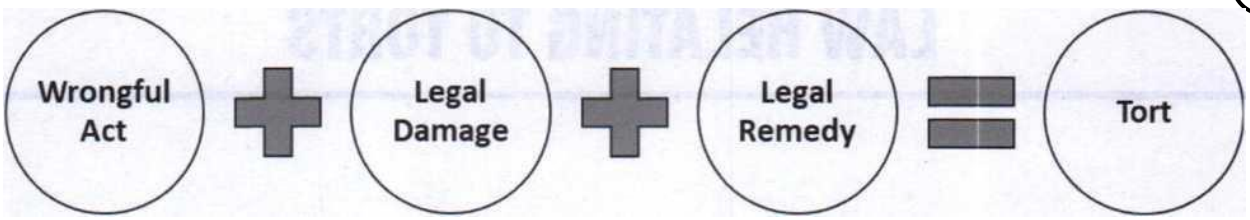
There is no specific list of the Civil Wrong that will amount to Tort. A civil wrong becomes a tort only if it satisfies some conditions. In general, a tort consists of some act or omission done by the Tortfeasor whereby he has without just cause or excuse caused some harm to the other party.

i. Tort has following components: -
a wrongful act or omission done by the Tortfeasor. (Tortfeasor is the party who commits a tort);

ii. the wrongful act must cause legal damage to another; and

iii. the wrongful act must be of such a nature that a legal remedy can be offered.

Note: If any of the three conditions are missing, then it will not amount to Tort.



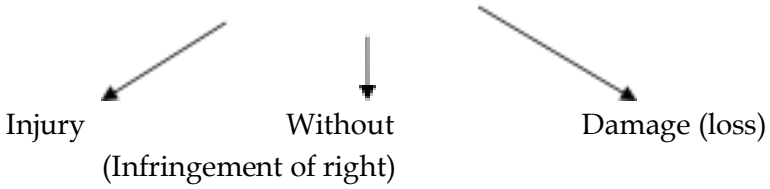
1. **WRONGFUL ACT/ OMISSION**
The act complained of should under the circumstanced be legally wrongful as regards the party complaining.

2. **LEGAL DAMAGES**
It means a damage which the law recognizes as such there should be injury to the party.

A. <u>INJURIA SINE DAMNUM</u>

It means injury without damage, i.e., where there is no damage resulted yet it is an injury or wrong in tort i.e., where there is infringement of a legal right not resulting in harm, but plaintiff can still sue in tort. Thus, the act of trespassing upon another's land is actionable even though it has not caused the plaintiff even the slightest harm.

Doctrine of Injuria Sine Damno



Infringement of private right without actual loss or damage

- **Case Law- Ashby v White (1703)**

In the leading case of Ashby v White (1703), the defendant, Polling officer wrongfully refused to register a duly tendered vote of plaintiff, a legally qualified voter at parliament election and the candidate for whom the vote was to be tendered was elected and no loss suffered by election of vote, nevertheless it was held that an action lay and the plaintiff was entitled to recover compensation.

B. <u>DAMNUM SINE INJURIA</u>

The maxim means that in a given case, a man has suffered damage and yet have no action in tort, because the damages not to an interest protected by the law of torts. Therefore, causing damage, however substantial to another person is not actionable in law unless there is also violation of a legal right of the plaintiff. Thus, if I own a shop and you open a shop in neighborhood, as a result of which I lose, same customers and my profits fall off. I cannot sue you for the loss in profits, because you are exercising your legal rights.

3. **LEGAL REMEDY**

This means that to constitute a tort, the wrongful act must come under the law i.e., there should be remedies to the sufferer against the tortfeasor (defendant). There are two types of remedies i.e., judicial remedies and extrajudicial remedies.

REMEDIES IN TORTS

Remedies in tort

JUDICIAL REMEDIES	EXTRA JUDICIAL REMEDIES
• Injunction • Damages • Specific restitution of property	• Self defense • Prevention of trespass • Re-entry on land • Abatement of nuisance

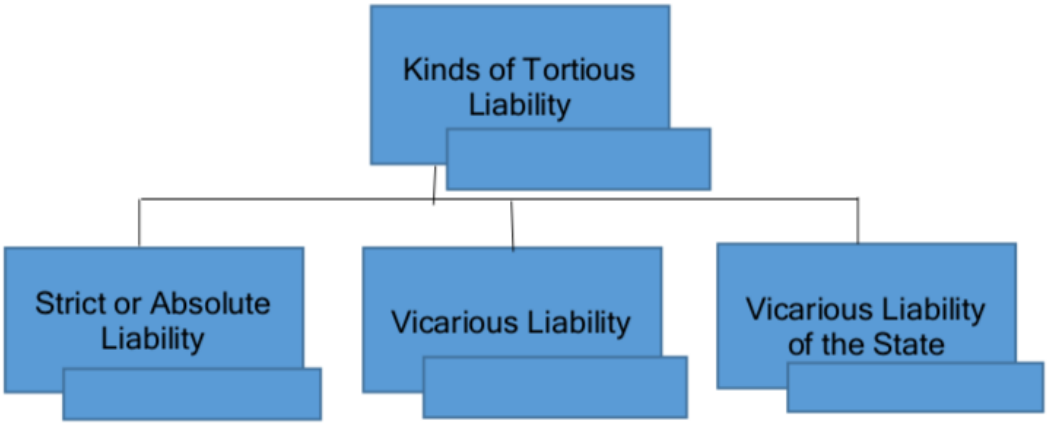
Extra judicial remedies

These remedies could be self-defense. For e.g., if A finds a drunken stranger in his room who has no business to be there in it, and is thus a trespass, he(a) is entitled to get rid of him, if possible without force but if that be not possible with such force as the circumstances of the case may warrant.

Mens Rea

How far a guilty mind of a person is required for liability for tort? The general principle lies in the maxim, "actus non facit reum nisi mens sit res" i.e., the act itself creates no guilt in the absence of guilty mind. It does not mean that for the law' of torts, the act must be done with an evil motive, but simply means the act must be done either with wrongful intention or negligence.

KINDS OF TORTIOUS LIABILITY



A. Strict or Absolute liability

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

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

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

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

❖ **Rule in Rylands v. Fletcher - VERY IMPORTANT**

The rule in Rylands v. Flethcer (1868) L.R. 3 H.L. 330 is that a man acts at his peril and is the insurer of the safety of his neighbour against accidental harm. Such duty is absolute because it is independent of negligence on the part of the defendant or his servants. It was held in that case that: "If a person brings or accumulates on his land anything which, if it should escape may cause damage to his neighbours, he does so at his own peril. If it does not escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent damage."

The facts of this case were as follows: B, a mill owner employed independent contractors, who were apparently competent to construct a reservoir on his land to provide water for his mill. There were old disused mining shafts under the site of the reservoir which the contractors failed to observe because they were filled with earth. The contractors therefore, did not block them. When the water was filled in the reservoir, it bursts through the shafts

and flooded the plaintiff's coal mines on the adjoining land. It was found as a fact that B did not know of the shafts and had not been negligent, though the independent contractors, had been, B was held liable. Blackburn, J., observed; "We think that the true rule of law is that the person, who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and if, he does not do so is, prima facie answerable for all the damage which is the natural consequence of its escape."

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

i. Escape from a place of which the defendant has occupation or over which he has a control to a place which is outside his occupation or control or something likely to do mischief if it escapes; and

ii. Non-natural use of Land: The defendant is liable if he makes a non-natural use of land.

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

Exception to the rule of Strict Liability

- Damage due to natural use of land.
- Act of God, i.e., extraordinary rain, storm etc.
- Plaintiff's own default.
- Consent of the plaintiff.
- An act done under the authority of a statute.
- Act of third party.

B. **Vicarious Liability**

Vicarious liability refers to a situation where someone is held responsible for the actions or omissions of another person. Example: An employer can be liable for the acts or omissions of its employees, provided it can be shown that they took place in the course of their employment.

In short, a person is liable for his own wrongful acts and one does not incur any liability for the acts done by others is known as Vicarious liability. Following are Vicarious Liability: –

i. **Principal and Agent:** This is based on the maxim Qui facit per alium facit per se - he who acts through another is acting himself, so that the act of the agent is the act of

the principal. When an agent commits a tort in the ordinary course of his duties as an agent, the principal is liable for the same.

ii. **Partners:** All the partners are liable for tort committed by partner in the ordinary course of the business of the firm. The liability of the partners is joint and several.

iii. **Master and Servant:** A master is liable for the tort committed by his servant while acting in the course of his employment. The servant, of course, is also liable; their liability is joint and several. The basis of the rule is in the maxim Respondent Superior (Let the principal be liable) or on the maxim Qui facit per alium facit per se (he who does an act through another is deemed to do it himself).

iv. **Employer and Independent Contractor:** An employer is vicariously liable for the torts of his servants committed in the course of their employment, but he is not liable for the torts of those who are his independent contractors.

C. **Vicarious Liability of the State**

The position in England

At common law the crown could not be sued in tort either for wrongs actually authorized by it or committed by its servants, in the course of their employment with the passing of crown Proceedings Act 1947 the crown is liable for the tort committed by its servants just like a private individual.

The position in India

When a case of government liability in tort comes before the courts, the question is whether the particular government activity, which government rise to the tort, was the sovereign function or non-sovereign function. If it is a sovereign function, it could claim immunity from tortuous liability otherwise not.

TORTS OR WRONGS TO PERSONAL SAFETY AND FREEDOM

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


BATTERY


ASSAULT


BODILY HARM


FALSE IMPRISONMENT



MALICIOUS PROSECUTION NERVOUS SHOCK DEFAMATION

Battery
Any direct application of force on another individual without his consent or lawful justification is a wrong of battery. Even though the force used is very trivial and does not cause any harm, the wrong is committed. Thus, even to touch a person in anger or without lawful justification is battery.
Assault
Assault is any act of the defendant which directly causes the plaintiff immediately to apprehend a contract with his person.
To point a loaded gun at the plaintiff or to curse him in a threatening manner is to assault him clearly if the defendant by his act intends to commit a battery and the plaintiff apprehends it is an assault.
False imprisonment

It means imposition of local restraint for some period, however short upon liberty of another, without sufficient lawful justification. It means unauthorized restraint on a person's body. If a man is restrained by a threat of force from leaving his own house or an open field there is false imprisonment.
Malicious prosecution
It means instigating judicial proceedings against another, maliciously and without reasonable and probable cause, which terminate in favor of that other and which results in damage to his reputation personal freedom or property.
Nervous shock
Under this relief may be provided when a person gets some nervous shock through what he has seen or heard. But mere shock is not enough to make it an actionable tort, some inquiry or illness must take place as are a result of the emotional disturbance, fear etc.

CONEPT OF DEFAMATION

DEFAMATION

Defamation is the publication of a statement which tends to affects the reputation of a person. Actually, it is attack on the reputation of person. It may be classified into two heads

LIBEL	SLANDER
Libel is a representation made in some permanent form. E.g., written words, pictures etc.	Slander is the publication of a defamatory statement in a transient form: statement of temporary nature such as spoken words or gestures.

Judicial Remedies

Three types of judicial remedies are available in tort:

i. Damages or Compensation,

ii. Injunction, and

iii. Specific Restitution of Property.

Extra Judicial Remedies

Following Extra Judicial remedies are available: -

1. **Self Defense:** A person can use reasonable force to protect himself, or any other person against any unlawful use of force.

2. **Prevention of Trespass:** An occupier of land or any authorized person may use reasonable force to prevent trespassers from entering the land or eject them if they have already entered the land.

3. **Re-entry on Land:** A person wrongfully disposed of land may retake possession of land in a peaceful and reasonable manner.

4. **Re-caption of Goods:** A person who is entitled to possession of goods can take it back either peacefully or by applying reasonable force.

5. **Abatement of Nuisance:** The occupier of land may lawfully abate or terminate any nuisance.

6. **Distress Damage Pheasant:** Distress Damage Feasant means to detain things which are doing damage. Therefore, an occupier of land may lawfully detain cattle or other things on his land doing damage until the compensation is paid.

7 LAW OF LIMITATION, 1963

INTRODUCTION

The Law of the Limitation Act, 1963 applies to whole of India except J&K**.**

The object of the Limitation Act, 1963 is to prescribe the period within existing rights can be enforced in courts of law.

The principal on which the law of limitation is based is "'Vigilantibuset Non Dormientibus Jura Subveniunt" i.e. the, law aids the diligent (Active) and not the indolent (LAZY). Its purpose is to prevent hearing of claims beyond a reasonable time because with passage of time all evidence of the facts may be lost.

Limitation Bars Remedy, But Does Not Extinguish Rights

The Law of limitation put restriction on the remedy in a Court of law when the period of limitation has expired, but it does not extinguish/end the right.

In simple words, the right of the party to seek legal remedy expires after expiry of period of limitation. But it does not put an end to the rights of the party. Therefore, a claim can be settled outside the Court even after period of limitation expired. So, it does not destroy the right of the parties, it only bars remedy.

Example: Nathu Ram sells goods to Neeta on credit period of 6 months. Neeta did not paid the amount within agreed time. The Law of Limitation provides 3 years after the expiry of agreed time to Nathu Ram to file a suit. If Nathu Ram fails to file the suit within 3 years he will never be able to recover money from Neeta from the legal route, as his right to get remedy is over. But if Neeta after many years decides to pay money to Nathu Ram, he can accept it as the right to get money is not extinguished, only right to file a suit was extinguished.

BAR OF LIMITATION

Section 3 of the Act, states that every suit instituted, appeal filed and application made after the expiry of the limitation period given under Schedule shall be dismissed by the Court. It is not required that the defense should raise a point regarding expiry of limitation period. Rather it is the duty of Court to reject such suit, application or appeal.

This section is applicable to:

- Suit
- Appeal

Q 1.	San jap instituted a suit against Manoj beyond the prescribed period of limitation. Manoj did not raise the objection that the suit was beyond the period of limitation. The Civil Court allowed the suit for a hearing and decreed. Would the decree be treated valid in the suit? Give reasons.
A1.	Section 3 of the Act, states that every suit instituted, appeal filed and application made after the expiry of the limitation period given under Schedule shall be dismissed by the Court. It is not required that the defense should raise a point regarding expiry of limitation period. Rather it is the duty of Court to reject such suit, application or appeal. In this case it was duty of the court to reject the suit. Any decree passed by the court with context to a suit which has exceeded the time of limitation will make Limitation Act unfruitful, and hence not enforceable.
Q2.	Mr. Sleepy went to make an application in the court but the same could not be filed as the Court was closed for a week for summers. The limitation period ended during this week. Please guide Mr. Sleepy regarding filing an application.
A2.	Section 4 states that if the period of limitation ends on a day when the Court is closed, it will extend up to the day when the Court re-opens. In this case Mr. Sleepy can make the application on the day when the Court re-opens.

Application Special Note: Section 4 of the Act states that if the period of limitation ends on a day when the court is closed, it will extend up to the day when the court re-opens.

EXTENSION OF TIME IN CERTAIN CASES

❖ DOCTRINE OF SUFFICIENT CAUSE

Meaning

Section 5 lays down that an appeal or application may be admitted by the Court even after expiry of prescribed period if the appellant or applicant satisfies the Court that he has sufficient cause for not filing an appeal or making an application within prescribed time.

Applicability and Non-applicability

The extension under this section applies only to appeals and applications. It does not apply to suit. Means the Court has no power to admit a time barred suit even if there is a sufficient

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

Discretion of the Court

It is the Court's discretion to extend or not to extend the period of limitation even after the sufficient cause has been shown. So, the Court is not bound to give extension even after sufficient cause. However, the Court should exercise its discretion judicially and not arbitrarily.

What is Sufficient Cause?

The term 'sufficient cause' has not been defined in the Limitation Act. It depends on the circumstances of each case and no two cases can be treated same. Although following are considered as sufficient causes in judicial pronouncements: -

- Wrong practice of High Court which misled the appellant or his counsel in not filing the appeal;
- Wrong advice given by advocate can give rise to sufficient cause in certain cases;
- Mistake of law is sufficient cause, though ignorance of law is not an excuse;
- Imprisonment of the party;
- Serious illness of the party;
- Time taken for obtaining certified copies of the decree of the judgment necessary to accompany the appeal or application;
- Ailment of father during which period the defendant was looking after him has been held to be a sufficient and genuine cause.

Q3.	Ramendra prefers an appeal for setting aside the arbitral award on the ground that he was not given a proper notice of arbitral proceedings and thereby not being able to present his case. He also furnishes sufficient proof and pleads before the Court that he received the arbitral award just 10 days back. Advice with reasons - (i) Whether Ramendra will succeed in his prayer; and (ii) Whether the law of limitation will not be a bar? (June 2014) (5 marks)
A3.	Section 34 of the Arbitration Act provides that an arbitral award may be set aside by a court on certain grounds specified therein which includes the ground of party not given proper notice of arbitral proceedings. Therefore Mr. Ramendra will succeed in his prayer. Further law of limitation will not be a bar as the same is covered by Section 5 of the Limitation Act which states that the court may extend the period of limitation in case of appeals and application if sufficient cause is present.

Q4.	While going to the court for filing a suit Sona met with an accident. As a consequence, Sona remains unconscious for 15 days. The period of limitation for filing the suit expires during its duration. Can Sona claim extension of time?
A4.	The matter in issue relates to extension of time period discussed under section 5 of the Limitation Act. The section states that the court may extend the period of limitation in case of appeals and application if sufficient cause is present. This section does not apply to suits. Since Sona was going to file a suit, this section is not applicable and therefore delay cannot be condoned. No extension of limitation period will be granted by the courts.

SECTION 6- PERSONS UNDER THE LEGAL DISABILITY

Section 6 provides that a person's is under a legal disability if such person is a minor (minor includes child in the womb) insane, and idiot. In such cases the persons will be entitled to fresh starting point of limitation from the date on which legal disability ceases to exit subject to the following conditions: -

- Such a legal disability must be existing at the time from which the period of limitation is to be commenced.
- The persons under legal disability must be entitled to institute the suit or make an application

Section 6 further provides that -

- If a person is affected by several disability at one point of time then the person may file a suit or make an application after disability have ceased (ending).
- If one legal disability is followed by another ten the person may institute a suit after all disabilities have ceased.
- If the legal disabilities continue up to the death of the person then his legal representative may institute the suit and make an application within the same period after the death as would otherwise have been allowed from the time specified in the schedule to the Act.

It may be noted that Section 6 does not apply to appeals.

SECTION 7

Section 7 is applicable where several persons are jointly entitled to file the suit or make an application for execution of a decree and out of several persons one or some of them are affected by legal disability.

The period of limitation in such a case is to be reckoned depending upon whether discharge can be made with or without consent of the person under legal disability if discharge can be made or given with the consent of such person the period of limitation will start only after the disability is removed. On the other hand, where consent of person under legal disability is not required, time will run against them all. It may be noted section 7 is not be applicable to appeals.

SECTION 8

Section 8 is an exception to Sec.6 and Sec.7 and controls both these Section. According to Sec.8 the period of limitations cannot extend beyond 3 years from the date of cessation of legal disability. However, if the ordinary period of limitation computed from the original approval of the cause of action express more than 3 years from the cessation of legal disability such period will be allowed.

SECTION 9- CONTINUES RUNNING OF TIME

Section 9 provides that where the limitation period has started, no subsequent disability or inability to file a suit or make an application can stop it. This section embodies the principle that once the time for filing a suit or an application starts running, it will continue to run till it has exhausted the file prescribed period. The running process can only will stop by statutory exceptions.

Where once time has begun to run no subsequent disability or inability to file a suit or make an application can stop it".

Disability means legal disability. Inability means wants of physical power to act for e.g. poverty, illness etc.

EXCLUSION OF TIME

Exclusion of time in legal proceedings -

1. **In computing the period of limitation for an appeal the following period shall be excluded.**
   - The day on which period begins to run.
   - The day on which judgment was pronounced.
   - The time required for obtaining the copy of decree order, and;
   - The time required for obtaining the copy of judgment.
2. **In computing the period of limitation prescribed for an application for revision or review or leave to appeal. The following shall be excluded.**
   - The day on which the period begins to run
   - The day on which judgment pronounced.
3. **In computing the period of limitation prescribed for an application to set aside an award the following shall be excluded: -**
   - The day on which the period begins to run
   - The term required for obtaining for the copy of award
4. **In computing the period of limitation prescribed for any other application only the day on which time begins to run shall be excluded.**
5. **In computing the period of limitation for any suit, appeal or application the day from which such period is to be record shall be excluded.**

EFFECT OF ACKNOWLEDGEMENT ON THE PERIOD OF LIMITATION -

Sometimes a liability may be acknowledged by the party against whom the liability is alleged within the period of limitation. If this acknowledgment is made in writing, it would give rise to fresh period of limitation and it would run from the date of acknowledgment.

The following requirements should be present for a valid acknowledgment as per sec.18: -

- There must be an admission or acknowledgement
- It must be made before the expiry of period of limitation
- It must be in writing and signed by the party.
  E.g. - A borrows money from B on 1/1/91. The debt will become time barred after the expiry of 3 yrs. on 1/7/93. A write a letter to B saying that he is wrong that he has not been able to pay to B saying that promise to pay the full amount within 3 months. In this case a fresh period of limitation (3 yrs.) shall start from 1/7/93.

EFFECT OF PAYMENT ON ACCOUNT OF DEBT OR OF INTEREST

As per Sec. 19 of the Act where payment on account of a debt or of interest is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time the payment was made. Thus, according to this Section a fresh period of limitation becomes available to the creditor when part-payment of debt is made by the debtor before the explanation of period of limitation.

ACQUISITION OF OWNERSHIP BY POSSESSION

Section 25 applies to acquisition of easement. It provides that right to access and use of light or air, way, watercourse, use of water or any other easement which have been peaceably enjoyed without interruption for 20 years (30 years if property belongs to government) shall be absolute.

IMPORTANT LIMITATION PERIODS

- Suits relating to movable property - 3 years.
- Suits for money payable or money lent - 3 years from the time when the loan rent - 3 years.
- Suit for arrears of rent - 3 years.
- Suit relating to contracts - 3 years.
- Suits for an account and a share out of profits of partnership firm - 3 years.
- Suits in respect of wage due to seaman - 3 years.

- Suits in respect of wages due to other employees - 3 years.
- Suits in respect of price of food or drink sold by a hotel, restaurant, lodging, house etc. - 3 years.
- Suit for possession of immovable property - 30 years.
- Suit in respect of compensation tor false imprisonment - 1 year,
- Suit in respect of compensation for malicious persecution - 1 year.
- Suit for law permission to appear and defend a suit under summary procedure - 10 years.
- Appeal against the sentence of death passed by the session court or by the High Court in exercise of its original jurisdiction - 30 days. \

CLASSIFICATION OF PERIOD OF LIMITATION

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

1. **PERIOD OF 30 YEARS**

   The maximum period of limitation prescribed by the Limitation Act is 30 years and it is provided only for three kinds of suits: -

   - Suits by mortgagors for the redemption or recovery of possession of immovable property mortgaged;
   - Suits by mortgagee for foreclosure;
   - Suits by or on behalf of the Central Government or any State Government including the State of Jammu and Kashmir.

2. **PERIOD OF 12 YEARS**

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

3. **PERIOD OF 3 YEARS**

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

4. **PERIOD VARYING BETWEEN 1 TO 3 YEARS**

The period from 1 to 3 years has been prescribed for suits relating to torts and other miscellaneous matters and suits for which no period of limitation is provided in the schedule to the Act.

5. **PERIOD IN DAYS VARYING BETWEEN 90 TO 10 DAYS**

The minimum period of limitation of 10 days is prescribed for application for leave to appear and defend a suit under summary procedure from the date of service of the summons.

LIMITATION AND WRITS UNDER THE CONSTITUTION

The subject of limitation is dealt with in entry 13, List III of the Constitution of India. The Legislature may, without violating the fundamental rights, enact statutes prescribing limitation within which actions may be brought or varying or changing the existing rules of limitation either by shortening or extending time provided a reasonable time is allowed for enforcement of the existing right of action which would become barred under the amended Statute.

The Statute of Limitation is not unconstitutional since it applies to right of action in future. It is a shield and not a weapon of offence.

CASE LAWS

S.NO.	CASE NAME	PROVISONS
1	Tilokchand Motichand v. H.P. Munshi	The State cannot place any hindrance by prescribing a period of limitation in the way of an aggrieved person seeking to approach the Supreme Court of India under Article 32 of the Constitution. To put curbs in the way of enforcement of Fundamental Rights through legislative action might well be questioned under Article 13(2) of the Constitution. It is against the State action that Fundamental Rights are claimed).
2	State of M.P. v. Bhai Lal Bhai	The Limitation Act does not in terms apply to a proceeding under Article 32 or Article 226 of the Constitution. But the Courts act on the analogy of the statute of limitation and refuse relief if the delay is more than the statutory period of limitation

3	Tilokchand Motichand v. H.P. Munshi	Where the remedy in a writ petition corresponds to a remedy in an ordinary suit and latter remedy is subject to bar of a statute of limitation, the Court in its writ jurisdiction adopts in the statute its own rule of procedure and in absence of special circumstances imposes the same limitation in the writ jurisdiction. If the right to property is extinguished by prescription under Section 27 of the Limitation Act, 1963, there is no subsisting right to be enforced under Article 32 of the Constitution. In other case where the remedy only, not the right, is extinguished by limitation the Court will refuse to entertain stale claims on the ground of public policy

Q5.	On 30th November, 2008, Mohan took a loan of 20,000 from Sohan. He paid 5,000 to him on 31st August, 2011, towards part-payment. After that, Sohan did not receive any amount from Mohan. Subsequently, Sohan instituted a suit for recovery of the dues from Mohan after the expiry of 2 years from the date of last part-payment. Advise, whether (i) the suit is maintainable; and (ii) the part- payment is an acknowledgement of payment. (6 marks) (June 2014)

A5.	As per section 19 a fresh period of limitation becomes available to the creditor from the date of part payment when part-payment or interest payment of debt is made by the debtor before the expiration of the period of limitation. Further it would be considered an acknowledgement of payment. Since in this case Mohan made part-payment on 31st August, 2011, a fresh period of limitation of years will commence from 31st August, 2011. As per Schedule limitation period for money lent is 3 years. So, a fresh period of limitation will commence from 31st August, 2011 and since he filed suit within 3 years, the suit will be accepted.

Q6.	Arpit took a debt of Rs. 10,000 from Bharat on January, 1998 and promised to pay by 31st December, 2003. He could not pay such debt within the stipulated time. On 1st December, 2006, Arpit paid Rs.500 as interest against such debt to Bharat against receipt. Bharat filed a suit against Arpit to recover such debt on 15th December, 2008. Whether the suit filed by Bharat is zvithin the period of limitation? Decide with reasons citing relevant provisions of the law. (5 marks) (June 2009)
A6.	As per section 19 a fresh period of limitation becomes available to the creditor from the date of part- payment when part-payment or interest payment of debt is made by the debtor before the expiration of the period of limitation. Further it would be considered an acknowledgement of payment. Since in this case Arpit paid interest on 1st December, 2006, a fresh period of limitation of years will commence from 1st December, 2006. As per Schedule limitation period for money lent is 3 years. So a fresh period of limitation will commence from 1st December, 2006 and since he filed suit within 3 years, the suit will be accepted.

SOME PRACTICAL QUESTIONS

1. **Star Hotel arranged food, etc., for a marriage party of Richie consisting of 60 persons on 30th June, 2000 at the rate of Rs. 200 per person. Rs. 10,000 remained unpaid. Advise Star Hotel about the period of limitation for filing a suit.**

Answer: The Limitation Act, 1963 prescribes different periods of limitation for suits, appeals and applications. The prescribed limitation period has been envisaged in the Schedule appended to the said Act: Part (I) of the Schedule stipulates period of limitation for suits relating to contracts. In case of a suit for the price of food or drink sold by the keeper of a hotel, travel or lodging house, the period of limitation prescribed there under is three years from the date when the food or drink is delivered. In the light of the legal provisions stated above, Star Hotel can file a suit for the recovery of unpaid money within a period of 3 years commencing from 1st July, 2000.

2. **On 31st December, 1995, Govind took loan from Ghanshyam. On 16th June, 1999, Govind made only part payment. After that no payment was made. Ghanshayam subsequently filed a suit against Govind for recovery of the debt after the expiry of two years from the date of part payment. Is the suit maintainable?**

Answer: Part payment is acknowledgement by conduct, but under Section 19 of the Limitation Act it should be made before the expiry of the period of limitation. A fresh period of limitation is available only when part payment is made within the period of limitation. In the present problem, part payment of Govind is made after the expiry of limitation period. Therefore, fresh period of limitation will not be available to Ghanshayam. The suit filed by Ghanshayam is not maintainable.

3. **Sanjay instituted a suit against manoj beyond the prescribed period of limitation. Manoj did not raise the objection that the suit was beyond the period of limitation. The civil court allowed the suit for a hearing and decreed. Would the decree be treated valid in such suit? Give reasons.**

Answer: Section 3 of the Limitation Act, 1963 provides that any suit, appeal, or application if made beyond the prescribed period of limitation shall be dismissed, although limitation has not been set up as a defense. It is the duty of the Court not to proceed with such suits irrespective of the fact whether the plea of limitation has been raised or not by the defendant. Section 3 of the Limitation Act is mandatory. The Court can Suo motto take note the question of limitation. The question whether a suit is barred by limitation should be decided on the facts as they stood on the date of presentation of the plaint. The effect of Section 3 is not to deprive the Court of its jurisdiction. Therefore, the decision of a Court allowing a suit which has been instituted after the prescribed period of limitation is not vitiated for want of jurisdiction. A decree passed in a time barred suit is not a nullity. Hence the decree is valid in this case.

4. **On 31st December, 1997 Suresh took a loan of Rs. 10,000 from Umesh. He paid Rs. 2,000 to him on 16th June, 2001 towards part-payment. After that, Umesh did not receive any amount from Suresh. Subsequently, Umesh instituted a suit for recovery of the dues from Suresh after the expiry of two years from the date of last part-payment. Decide whether Umesh will succeed in his suit.**

Answer: The problem in question is governed by Section 19 of the Limitation Act, 1963. Here in this problem two issues are raised.

i. Whether part-payment is an acknowledgement of payment, and

ii. Whether a fresh period of limitation is available.

Under Section 19 of the Limitation Act, 1963 it is provided that where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period of limitation by the person liable to pay the debt or legacy or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made. Part payment is acknowledgement by conduct, but as per Section 19 of the Limitation Act it should be made before the expiry of the period of limitation. A fresh period of limitation is available only when part payment is made within the period of limitation.

In this problem, part-payment has not been made within the period of limitation. Therefore, fresh period of limitation will not be available to Umesh. The suit filed by Umesh is not maintainable.

5. Ashwani has taken Rs. 5,000 as a loan from Bhushan and has promised to return the loan amount within one year, Ashwani failed to return the Ioan amount within the stipulated period, but he has written a letter' to Bhushan that they would pay the amount within a month. Whether the period of limitation will start after expiry of one year or from the date when Bhushan received the letter? Give reasons.

Answer: In the present case, the period of limitation will start from the date when Bhushan received the letter. It will not start after the expiry of one year. Section 18 of the Limitation Act deals with the effect of acknowledgment of liability in respect of property or right on the period of limitation. The following requirements should be present for a valid acknowledgement as per Section 18.

i. There must be an admission or acknowledgement;

ii. Such acknowledgement must be in respect of any property or right;

iii. It must be made before the expiry of period of limitation; and

iv. It must be in writing a signed by the party against whom such property or right is claimed.

If all the above requirements are satisfied, a fresh period of limitation shall be computed from the time when the acknowledgement was signed.

6. Arpit took a debt of Rs. 10,000 from Bharat on January, 1998 and promised to pay by 31st December, 2003. He could not pay such debt within the stipulated time. On 1st December, 2006, Arpit paid Rs. 500 as interest against such debt to Bharat against receipt. Bharat filed a suit against Arpit to recover such debt on 15th December, 2008. Whether the suit filed by Bharat is within the period of limitation? Decide with reasons citing relevant provisions of the law.

Answer: The given problem relates to Section 19 of the Limitation Act, 1963. Section 19 provides that where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made.

Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing singed by, the person making the payment.

In the present problem the limitation period for Bharat to file a suit to recover a debt from Arpit expired on 31st December, 2006. But Arpit paid interest amount on 1st December, 2006 i.e. before the expiry of the limitation period. In view of the provisions of Section 19, Bharat is entitled to a fresh period of limitation of three years from the date of payment of interest by Arpit. Therefore, the suit filed by Bharat on 15th December, 2008 is within the period of limitation.

LIST OF SECTIONS

Sections	Particulars of Section
3	Concept of time barred
4	Extension of time if court is closed
5	Doctrine of sufficient cause for expansion of time or condo nation of delay
6, 7 & 8	Period of limitation in the case of persons under legal disability
9	Continuous running of time
12	Calculation of limitation period in case of appeal.
14	Exclusion of time bonafide taken in a court without jurisdiction
16	Death of party
17	Fraud
18	Effects of acknowledgement in writing
19	Effect of part payment of principal amount on period of limitation
20	Acknowledgement by another person
24	Computation of time mentioned in instruments
25	Acquisition of ownership by possession i.e., 20 years in case of easement

8 CIVIL PROCEDURE CODE, 1908

INTRODUCTION

The Civil Procedure Code is a general law relating to civil suits. If there is a conflict between the Code and the special law the latter prevails over the former. Where the special law is silent on a particular matter the Code applies.

The Civil Procedure Code (CPC) defines the process of settling the disputes in respect of property, breach of contract and matrimonial disputes. CPC consists of two parts. 158 Sections form the first part relates to substantive law and the rules and orders contained in Schedule I form the second part, which is a procedural law.

The substantive law determines rights and liabilities of parties, whereas the procedural law lays down practice, procedure for enforcing the substantive law.

SOME IMPORTANT TERMS

Cause of Action

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

Decree

"Decree" is defined in Section 2(2) of the Code as

i. the formal expression of an adjudication which, so far as regards the Court expressing it;

ii. conclusively;

iii. determines the rights of the parties;

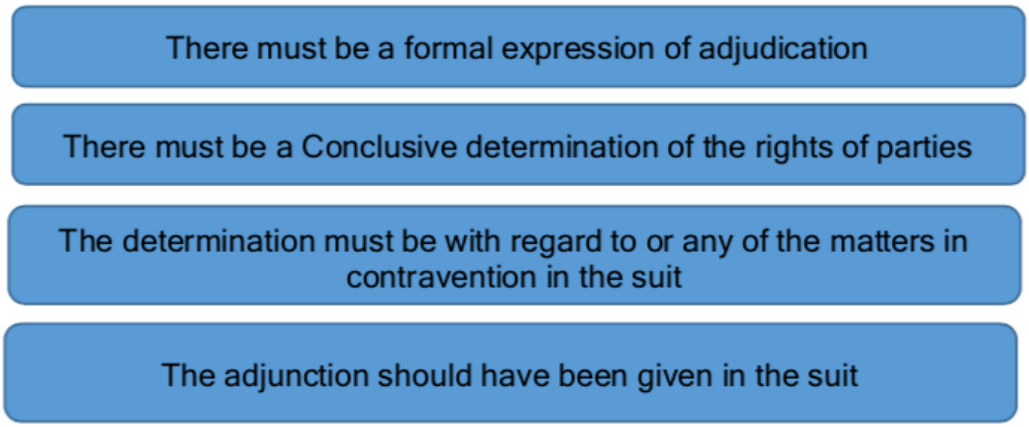
iv. with regard to all or any of the matters in controversy;

v. in the suit and may be either preliminary (i.e. when further proceedings have to be taken before disposal of the suit) or final. But decree does not include:

   a. any adjudication from which an appeal lies as an appeal from an Order, or

   b. any order of dismissal for default.

Essentials of a decree



Decree-holder

"Decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made. [Section 2(3)] Thus, a person who is not a party to the suit but in whose favour an order capable of execution is passed is a decree-holder.

Judgement-debtor

"Judgement-debtor" means any person against whom a decree has been passed or an order capable of execution has been made. [Section 2(10)]. The definition does not include legal representative of a deceased judgement-debtor.

Judgement

The "judgement" means a statement given by a judge on the grounds of a decree or order [Section 2(9)]. What is ordinarily called as an order is in fact a judgement. Also, an order deciding a primary issue is a judgement.

Order

As per Section 2(14), the formal expression of any decision of a civil court which is not a Decree is Order. In simple words it is a decision of Civil Court which is not a decree.
Essentials of an Order

a. An order can be passed by the court at any time during existence of the suit.

b. There is no limit for passing an order by the Court.

c. No appeal lies against the orders except law provides otherwise.

Interlocutory Order

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

Difference between Decree and Order

Basis	Decree	Order
When it is passed	It is passed in a suit made on the presentation of plaint	It is passed in a suit made on the presentation of plaint, application, and petition
Determination of Rights	It has conclusive determination of right	It may or may not be conclusive
Number	There can be one decree in a suit (at the max. two, if there is a preliminary decree involved)	There can be many orders in a suit
Appealable	Decrees are always appealable until specifically forbidden by law	Orders are generally not appealable until specifically provided by law
Second Appeal	Second appeal is possible	Second appeal is not possible

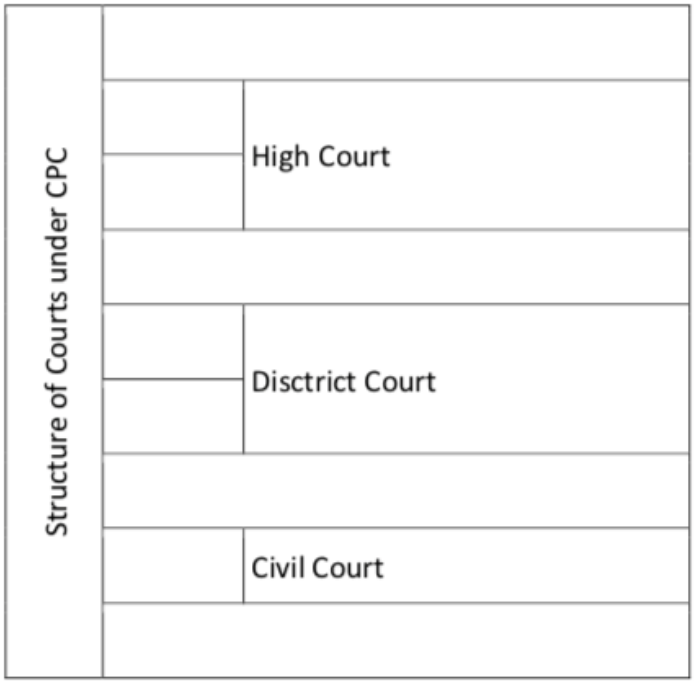
Difference between Decree, Order & Judgement

Decree	Order	Judgement
Section 2(2)	Section 2(14)	Section 2(9)
Formal expression of an adjudication which conclusively determine the right of parties with regarding to the matter in controversy in suit.	Formal expression of any decision of civil court, which is not decree.	Statement given by judge on the ground of decree or order.

Decree: • > Preliminary • > Final		Judgement set out in the ground and the reason for the judge to have arrived at the decision.

STRUCTURE AND JURISDICTION OF CIVIL COURTS

Section 3 of the Civil Procedure Code lays down the structure of the courts in following manner-



Jurisdiction

Jurisdiction means the authority of the Court to decide matters that are brought before it for adjudication. The jurisdiction of the civil court is decided on following basis: -

I. Main Grounds

i. **Jurisdiction over the subject matter:** When the jurisdiction is decided on the basis of matters which can be entertained by the Courts, it is said to be jurisdiction over the subject matter.

Example: A small cause court can try suits for money due under a promissory note or a suit for price of work done.

ii. **Territorial Jurisdiction:** Government has decided territorial limit of jurisdiction for each court. It can try matters falling within the territorial limits of its jurisdiction.

iii. **Jurisdiction over persons:** Usually courts have jurisdiction over every person except specifically prohibited like Foreign State, Ruler, etc.

iv. **Pecuniary Jurisdiction:** The literal meaning of Pecuniary is 'related to money'. All courts in the judicial hierarchy have pecuniary limits; and they can't entertain cases beyond their particular limit.

II. **Additional Grounds**

i. **Original Jurisdiction:** When a Court tries and decides suits originally filed before it. It is called its original jurisdiction.

Example: If High Court decided a case originally filed before it, it is termed as its original jurisdiction.

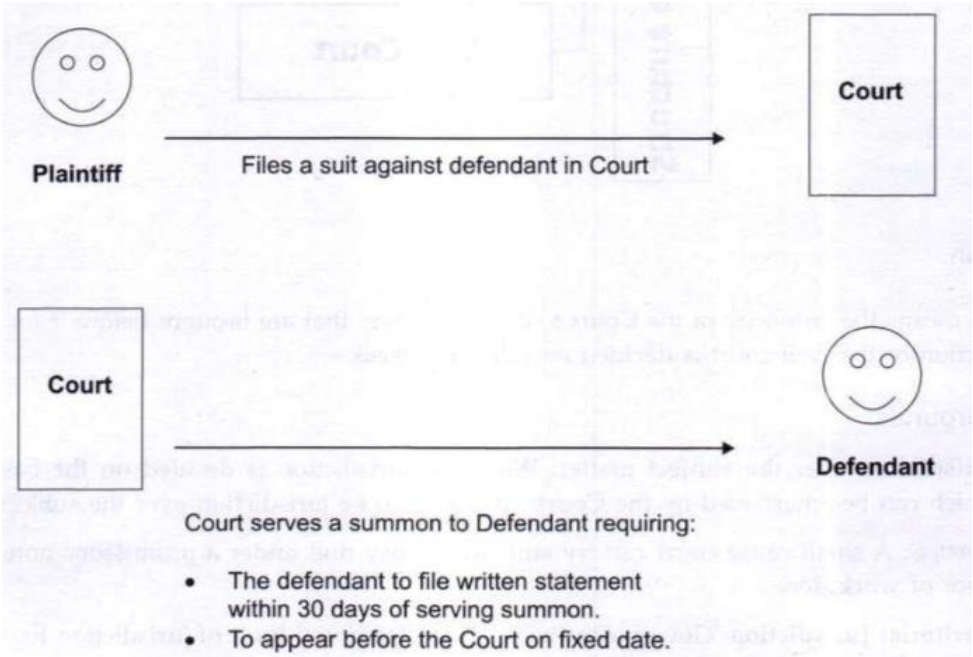
ii. **Appellate Jurisdiction:** When a court hears and decides appeals made to it is against its subordinate court, it is termed as Appellate Jurisdiction.

Example: If High Court decides a case filed with it as an appeal against District Court, it is its Appellate jurisdiction.

iii. **Original and Appellate Jurisdiction:** The Supreme Court, the High Courts and the District Courts have both original and appellate jurisdiction in various matters.

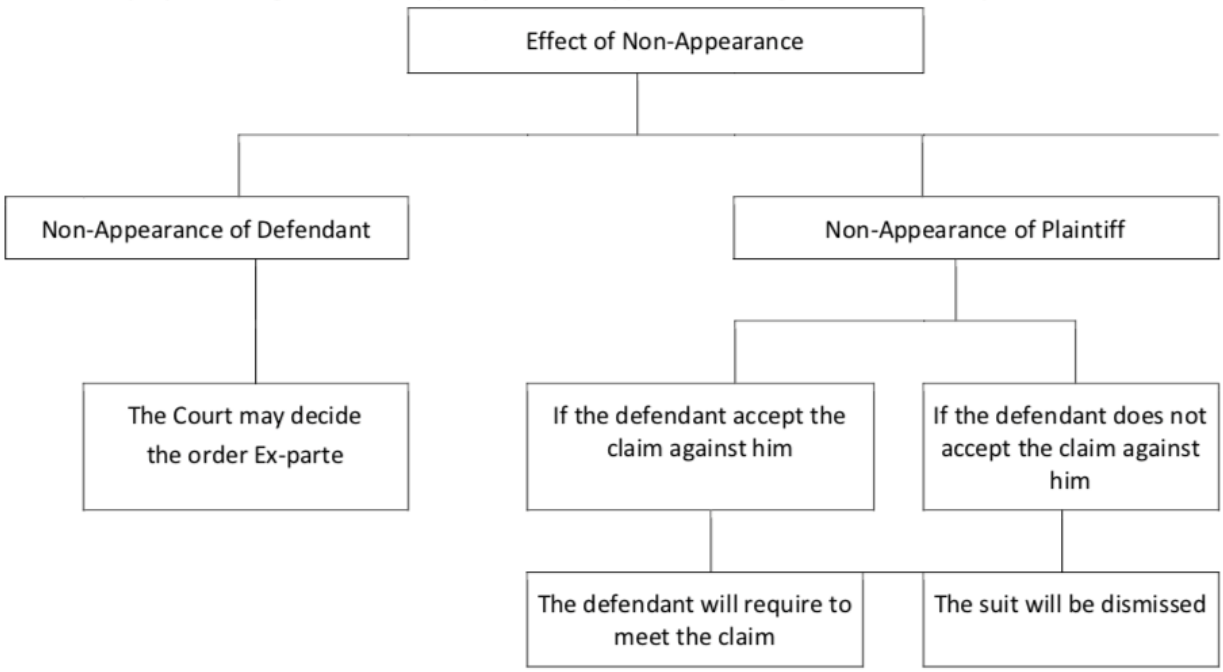
APPEARANCE OF PARTIES AND CONSEQUENCES OF NON-APPEARANCE

Appearance and non-appearance is an important issue to settle a dispute. Order IX of the Code of Civil Procedure, 1908 lays down the provision of consequences of appearance and non-appearance of parties in a civil case.



EFFECT OF NON-APPEARANCE OF PARTIES

Even after proper serving of summon a party does not appear, following will be the consequences: -



Ex-parte means an order or decree passed on the basis of documents, evidences and records available in the absence of one party.

Note:

1. If both plaintiff and defendant do not appear, the suit will be dismissed.
2. Plaintiff means the party who files the suit and defendant mean the party against whom the suit is filed.

SECTION 10- STAY OF SUIT DOCTRINE OF RES SUB-JUDICE

This provision requires that where there is identity of the matters directly or substantially is issue in two suits, then the subsequent suit must be stayed. This provision is also known as Res-subjudice.

Note: It is to be noted that the subsequent suit is merely stayed and not dismissed. Secondly, the section does not bar the institution of a suit, it bars only the trial of such a suit.

There are following essential conditions for stay of suit:

- There must be two suits instituted at different times
- The matter in issue in the second suit should be directly and substantially in issue in the previously instituted suit.

- Such suit should be between the same parties.
- Such previously instituted suit is still pending in a court of competent jurisdiction.

In **Madgvi Amma Bhawani Amma v Kunjikutty PM Pillai**, AIR 2000, it has been decided by the Supreme Court this principal of res judicata applies where an issue which has been raised in a subsequent, I suit was directly and substantially in issue in former suit between the same parties and was heard and decided finally. Findings incidentally recorded do not operate as res judicata.

- **Case Law- Wings Pharmaceuticals v Swan Pharmaceuticals**

  A suit was instituted by the plaintiff company alleging infringement by the defendant company by using trade name of medicine and selling the same in wrapper and carton of identical design with same color combination etc. as that of plaintiff company. A subsequent suit was instituted in different court by the defendant company against the plaintiff company with the same allegation. The Court held that subsequent suit should be stayed as simultaneous trial of the suits in different courts might result in conflicting decisions as issue involved in two suits was totally identical.

SECTION 11- DOCTRINE OF RES-JUDICATA

- The doctrine of res-judicata or the Rule of conclusiveness of judgments is explained in Section 11 of the Civil Procedure Code.
- It provides that once the matter is finally decided by a competent court, no party can be permitted to re-open it in subsequent litigation.
- The principle underlines that no one shall be vexed twice for the same cause. It prevents two different decrees on the same subject.
  If a case is decided between two parties and a subsequent case is filed between the same parties on the same issue, then the subsequent case should be dismissed if the earlier court was competent to decide the case and the case was conclusively determined by the earlier court.

Essential elements

- An earlier case is decided.
- Case was decided by competent court.
- The issue in both the cases is same.
- Parties in both the cases are same.
- The earlier case was conclusively decided.

The application of this doctrine is based on the public policy so that the patties would not be harassed again and again on the same issue already decided. The court's time will also not get vested on matter already decided.

Note: It may be noted the Section 11 will not be applicable in those circumstances where the first suit has been dismissed on technical ground and has not been decided on merit of the case.

Constructive Res judicata - Every court is bound to apply res judicata, there is a compulsion that subsequent suit must be barred. The purpose of a construction res judicata is as follows:

- Endless litigation can't be allowed on the same issue.
- Two parties to a same issue must not waste the time of court again.
- Issues once decided should not be disturbed again.

When the earlier case was fully decided than no subsequent dispute should be allowed to be raised between same parties on the same issue.

Question: Does the principle of 'res judicata' apply in case of wrong decision by court? Give reasons.

Answer: Yes, the principle of 'res judicata' applies in case of a wrong decision of court also if the court was having jurisdiction in the matter concerned. The Apex Court of the land in the case of State v. Hemant, held that the doctrine of res judicata applies even if the previous decision of a Court is wrong provided that the court had jurisdiction to try the case.

Thus, the principle of 'res judicata' applies in those cases also where the decision of the court was wrong provided that the court giving the decision was having the jurisdiction to try the concerned case.

SECTION 12

Section 12 of Civil Procedure Code provides that abatement of suit or its dismissal, for not bringing the legal representative on record, bars further suit.

SECTION 15

Place of Filing of Suit

SECTION 16

Every suit shall be instituted in the court of lowest grade. Suits regarding immovable property are instituted in the court within whose jurisdiction, the Immovable property is situated.

SECTION 17

Where immovable property is situated in the jurisdiction of different courts, the suit may be filed in any of such courts.

SECTION 18

Where there is apparent uncertainty regarding the jurisdiction of the court, the suit may be filed in any of such courts.

SECTION 19

Suit with regards to the compensation for wrongs done to the persons or suit pertaining to movable property can be filed in the court having the jurisdiction over the place where the wrong was committed or where the defendant resides.

SECTION 20

Where above section i.e., Section 16, 17, 18 and 19 are not applicable, such suits may be filed in the court having jurisdiction over the place where the defendant resides or where the cause of action has arisen.

For instance, A resides at Shimla, B at Calcutta and C at Delhi. A, B and C being together at Varanasi, B and C make a joint promissory note payable on demand and deliver it to A. A may sue B and C at Varanasi, where cause of action arose. He may also sue them at Calcutta where B resides or at Delhi where C resides, but in each case, if the non-resident defendant objects, the suit can't be proceeded without the leave of the Court.

Section 20 further provides that in the case of a Company, the suit may be filed at any of the following places: —

- Place where the Principal office or the Head office of the Company is situated.
- Place where the cause of action has arisen, subject to the condition that the company has a Branch office at such place.

SET-OFF, EQUITABLE SET-OFF AND COUNTER CLAIM

- **Set-off**

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

  In short, both parties extinguish their rights and claims.

  Where the defendant's claim to set-off against the plaintiff's demand, in a suit for the recovery of money, any ascertained sum of money legally recoverable by him from the plaintiff, the defendant may present a written statement containing the particulars of the debt sought to be set-off.

  Example: Manish sells rice for Rs. 25000 to Ramesh. Ramesh sells cloth worth Rs. 28000 to Manish. Ramesh files a suit against Manish for recovery of price of cloth. Manish also files claims for setting-off of the cost of rice in this suit.

For giving effect to any set-off, a written statement shall have to file for pronouncement of final judgement of the original claim and set-off.

- **Equitable set-off**

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

Where the defendant claims set-off in respect of an unascertained sum of money, where the claim arises of the same transaction and then such set-off is known as equitable set-off.

Generally, the suits emerge from cross demands in the same transaction and this doctrine is intended to save the defendant from having to take recourse to a separate cross suit.

Essentials:

i. There is no sum specified for claim.

ii. The claims must be originated from the same transaction.

In short, the suits emerge from the cross demands in the same transaction and the defendants may be allowed to claim a set-off for an uncertain amount/claim.

Example: Where A sues B to recover Rs. 50,000/- under a contract, B can claim set-off towards damages sustained by him due to the breach of the same contract by A.

Difference between Set-off and Equitable Set-off

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

- **Counterclaim**

A defendant in a suit may, in addition to his right of pleading a set-off, file a suit against the plaintiff that is known as counter claim. This rule is applicable in the interest of public policy so as to minimize litigation between the parties which could have been filed by the defendant separately.

In short, counter claim means a claim filed by the defendant opposing the claim of the plaintiff. It is like retaliatory claim by a defendant against the plaintiff's claim.

In simple words in a counter-claim, the defendant puts his claim against plaintiff for a large amount. A counter- claim is a claim made by the defendant in excess of the right claimed by the plaintiff. Therefore, the court will now proceed against plaintiff for the balance amount.

Difference between Set-Off and Counter Claim

Set-Off	**Counter Claim**
The claim is of ascertained amount of money	The claim is related to a larger sum of money than original claim
It is more a shield to protect yourself	It is more a sword to counter attack
The amount of defendant's claim is lesser than plaintiff's claim	The amount of defendant's claim exceeds the plaintiff's claim
The court continue to proceed against defendant.	The court continue to proceed against plaintiff

Note: Counter claim only be filed after plaint filed by the plaintiff.

Example: Ram files a suit against Laxman claiming Rs. 5000/-. Laxman takes a defense that Ram owes Rs. 8000/- to Laxman as well. In this case since the amount of claim of defendant exceeds the amount of claim of plaintiff. The court will proceed against Ram for sum exceeding the original claim i.e. Rs. 3000. (Rs. 8000 - Rs. 5000).

Reference	Review	Revision	
	Injunction	Appeal	

OTHER IMPORTANT CONCEPTS DURING PROCEEDING OF A CIVIL CASE

Reference

Section 113 of the Code lays down the provision of Reference. Whenever a subordinate or lower court has a reasonable doubt on any question involving law, it can make a reference to the higher courts.

Application for Reference

Application for reference is made to the higher court only by the lower court, either Suo moto or on an application made by any party to the suit to the lower court.

Review

Section 114 of the Code lays down the provision of Review. Review means to re-consider, re-assess or reexamine a given matter. It gives an opportunity to the Courts to correct its own decision.

Application for Review

Application for review is made to the same court which has passed the decree or order by an aggrieved party.

When Review is permitted?

Review is permitted in following cases:

- When the decree or order passed is non-appealable.
- When the decree or order passed is appealable, but the aggrieved party has not filed an appeal.

Revision

Section 115 of the Code deals with Revision. Revision literally means to go thoroughly and to look again through an order or decree. The case must be the one which is not appealable.
When Revision is permitted?

- When the Court has exercised a jurisdiction not vested in it.
- When the Court failed to exercise a jurisdiction vested in it.
- When the Court acted in exercise of its jurisdiction illegally or with material irregularity.

Injunction

Injunction is a preventive relief given by the courts with an intention to save the interest of one party whose rights are either invaded or threatened to be invaded.

In simple words, a courts order by which a person is restrained from performing a particular act, is called injunction.

Example: Katappa is demolishing a building in which Bahubali has some claims. Bahubali may ask the competent court to order Katappa to not demolish the building until the trial for the claim of the building is complete and judgement goes in his favour. This is termed as injunction.

Types of Injunction

There are two types of injunction:

- Temporary Injunction
- Perpetual Injunction

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

The court may grant temporary injunction order on the following grounds: -

i. That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

ii. That the defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors, or

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

But before passing temporary injunction, the Court must satisfy itself that substantial and irreparable harm or injury would be suffered by him if such temporary injunction is not granted and that such loss or damage or harm cannot be compensated by damages.

Interlocutory orders

The court may grant interlocutory orders in respect of any movable property provided such property is of speedy and natural decay nature. This type of orders can only be passed by the judge based on circumstances of the suit.

The court may on the application of the applicant of any party to a suit order the sale of such detained goods.

Note: The movable property must be the subject matter of such suit or attached before the judgement of the court.

Appeals

The word appeal has not been defined under the code, but it means an application by an aggrieved party to an appellate court, asking it to set aside or reverse a decision of subordinate court.

In simple words if any party to suit feels aggrieved by any decree or order passed by a court, he may choose to go up to the higher courts, if that decree or order is appealable.

Appeal is a process for requesting a formal change to a decision of subordinate adjudication. Right of appeal is not a natural right or inherent right attached to litigation. Such right is given by statute or by rules having the force of statute.

Four Kinds of Appeals

i. **Appeal from Original Decree [Section 96-99]**

Appeals from original decrees may be preferred in the Court superior to the Court passing the decree. An appeal may lie from an original decree passed ex parte. Where the decree has been passed with the consent of parties, no appeal lies.

ii. **Second Appeals [Section 100-103]**

An appeal lies to the High Court from every decree passed in appeal by any subordinate court if the High Court is satisfied that the case involves a substantial question of law.

The memorandum of appeal must precisely state the substantial question of law involved in the appeal. If the High Court is satisfied that a substantial question of law is involved, such question shall be formulated by it and the appeal is to be heard on the question so formulated.

iii. **Appeal from Order [Section 104-106]**

Orders are generally not appealable, until and unless it has been specifically provided in the law. But in no case second appeal can be made in the case of orders.

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

- An order refusing leave to institute a suit,
- An order for compensation for obtaining attachment or injunction on insufficient ground,
- An order under the Code imposing a fine or directing the detention or arrest of any person except in execution of a decree,
- Appealable orders as set out under Order 43, R.l.

iv. **Appeal to the Supreme Court [Section 104-106]**

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

- From any decree or order of Civil Court when the case is certified by the Court deciding it to be fit for appeal to the Supreme Court or when special leave is granted by the Supreme Court itself,

- From any judgement, decree or final order passed on appeal by a High Court or by any other court of final appellate jurisdiction,

- From any judgement, decree or final orders passed by a High Court in exercise of original civil jurisdiction.

  The general rule is that the parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary.

  But the appellate court has discretion to allow additional evidence in the following circumstances: -

  i. When lower court has refused to admit evidence, which ought to have been admitted.

  ii. The appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgement.

  iii. For any other substantial cause. But in all such cases the appellate court shall record its reasons for admission of additional evidence: - The essential factors to be stated in an appellate judgement are:

- The points for determination,

- The decision thereon,

- The reasons for the decision, and

- Where the decree appealed from is reversed or varied, the relief to which the appellant is entitled. The judgement shall be signed and dated by the judge or judges concurring therein.

INSTITUTION OF SUIT/PROCEDURE OF A SUIT

↓
Filing of a Plaint in the Civil Court by the Plaintiff based on certain cause of action for claiming
↓
The Civil Court issues summon to the defendant.
↓
↓
After receiving summon, the defendant has the opportunities to file reply in the Court.
↓
The Civil Court starts cross-examination and review the evidence.
↓
The Civil Court decides the rights of the parties based on the evidence or written statement submitted by Plaintiff and defendant.
↓
The Civil Court passes decree and judgment.

SUITS BY OR AGAINST MINOR

If Minor is Plaintiff

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

If Minor is Defendant

Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

When minor attain majority

When the minor plaintiff attains majority, he may elect to proceed with the suit or elect to abandon it.

If he elects to continue with the suit, he shall apply for an order discharging the next friend and the title of the suit will be corrected.

If he elects to abandon the suit, he shall apply for an order to dismiss the suit and has to pay the costs incurred by defendants.

SUMMARY PROCEDURE

The object of summary suit or summary procedure is to summarize the procedure of suit in those cases where the defendant does not have any defense. It is to avoid unnecessary destruction by the defendant.

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Applicability

- Suits related to bills of exchange, hundis, and promissory notes.
- Suits to recover debt under a written contract.

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

i. High Courts, City Civil Courts and Small Courts;

ii. Other Courts: In such Courts the High Courts may restrict the operation of Order 37 by issuing a notification in the Official Gazette.

Effect

In the above cases the Court passes a decree without the defendant getting a chance to defend, as the debt is proven and there is no point in keeping the trial pending.

9 INDIAN PENAL CODE, 1860

INTRODUCTION

Crime is a social phenomenon. It is a wrong committed by an individual in a society. It arises first when a state is organised, people set up rules, the breaking of which is an act called crime.

Crime is what the law says it is. The difference between a criminal offence and a civil wrong is that while the former is considered a wrong against the society because of their grave nature, a civil wrong is a wrong done to an individual. It is believed that serious crimes threaten the very existence of an orderly society, and therefore, if such a crime is committed, it is committed against the whole society.

In India, the base of the crime and punitive provision has been laid down in Indian Penal Code, 1860. In this Code the definition of crime has not been attempted or defined but according to its section 40 the word 'Offence' denotes a thing made punishable by the Code.

INDIAN PENAL CODE, 1860

The Indian Penal Code was passed in the year 1860 but it came into force on 1st January 1862, and it applies to the whole of India except the state of Jammu and Kashmir. The State of Jammu and Kashmir, in view of the special status under Article 370 of the India Constitution, has a separate penal code, though substantially of the same nature and character as the IPC.

INTRA TERRITORIAL V/S EXTRA TERRITORIAL JURISDICTION OF INDIAN PENAL CODE, 1860

The geographical area or the subjects to which a law applies is defined as the jurisdiction of that law. Ordinarily, laws made by a country are applicable within its own boundaries because a country cannot have a legal machinery to enforce its laws in other sovereign countries. Thus, for most of the laws, the territorial jurisdiction of a law is the international boundary of that country.

INTRA-TERRITORIAL JURISDICTION

Where a crime under any provision of IPC is committed within the territory of India the IPC applies and the courts can try and punish irrespective of the fact that the person who had committed the crime is an Indian national or foreigner. This is called 'intra-territorial jurisdiction' because the submission to the jurisdiction of the court is by virtue of the crime being committed within the Indian territory.

SECTION 2 OF THE CODE DEALS WITH INTRA-TERRITORIAL JURISDICTION OF THE COURTS

The section declares the jurisdictional scope of operation of the IPC to offences committed within India. The emphasis on 'every person' makes it very clear that in terms of considering the guilt for any act or omission, the law shall be applied equally without any discrimination on the ground caste, creed (Belief), nationality, rank, status or privilege. The Code applies to any offence committed:

- Within the territory of India as defined in Article 1 of Constitution of India. or
- Within the territorial waters of India
  or
- On any ship or aircraft either owned by India or registered in India.

Note:- It should be noted that it is not defence that the foreigner did not know that he was committing a wrong, the act itself not being an offence in his own country. (Ignorance of Law' is no Excuse)

EXEMPTIONS FROM INTRA-TERRITORIAL JURISDICTION OF IPC

i. Article 361(2) of the Constitution protects criminal proceedings against the President or Governor of a state in any court, during the time they hold office.

ii. In accordance with well-recognized principles of international law, foreign sovereigns are exempt from criminal proceedings in India.

iii. This immunity (protection) is also enjoyed by the ambassadors and diplomats of foreign countries who have official status in India.

iv. This protection is extended to all secretaries and political and military attaches, who are formally part of the missions.

EXTRA-TERRITORIAL JURISDICTION

Countries, however, also make laws that apply to territories outside of their own country, this is called the extra-territorial jurisdiction.

Section 3 and section 4 of the IPC provide for extra-territorial jurisdiction: Where a crime is committed outside the territory of India by an Indian national, such a person may be tried and punished by the Indian courts.

According to section 3 if anyone commits any offence beyond India which is punishable in our country under any Indian law, he is liable to be convicted and punished in the same manner as if the crime was committed in India.

Section 4 expands on section 3, while at the same time clarifying that the provisions of the Code shall apply to first, in case of Indians, for any offence committed outside and beyond India; and second, in case of any person in any place without and beyond India for targeting computer resource located in India. (Computer Hacking)

Section 4 also talks about the applicability of IPC to any offence committed by any person on any ship or aircraft registered in India wherever it may be. (Indian Plane Hijacked in Nepal by Pakistani Terrorists)

Section 188 of CrPC deals with Extra Territorial Jurisdiction. 5. Admiralty Jurisdiction

The jurisdiction of a court over offences committed in high seas is based on the precept that a ship in the high seas is considered to be a floating island belonging to the nation whose flag the ship flies. It does not matter where the ship or boat is, whether it is in high seas or on rivers, whether it is moving or stationery, having been anchored for the time being. This jurisdiction called the 'admiralty jurisdiction'.

CASE LAW

S.NO.	CASE NAME	PROVISONS
1	Mobarik Ali Ahmed v. State of Bombay	In this regard the Supreme Court held that it is obvious that for an Indian law to operate and be effective in the territory where it operates, i.e., the territory of India, it is not necessary that the laws should either be published or be made known outside the country in order to bring foreigners under its ambit. It would be apparent that the test to find out effective publication would be publication in India, not outside India so as to bring it to the notice of everyone who intends to pass through India.

DIFFERENCE BETWEEN CRIMINAL AND CIVIL WRONG

The difference between a criminal offence and a civil wrong is that while the former is considered a wrong against the society because of their grave nature, a civil wrong is a wrong done to an individual.

CRIME AND ITS FUNDAMENTAL ELEMENTS

In reference to the Indian Penal Code (Code or IPC) crime means such act or omission which has been forbidden by the Code and if such act or omission is committed by anyone, he or she becomes liable to punishment prescribed under the Code.

ESSENTIAL INGREDIENTS OF CRIME

I. Human Being

The first requirement for commission of crime is that the act must be committed by a human being. Only a human being is subject of IPC.

Example: If a lion killed a man, the lion will not be punishable under IPC, as the crime is done by lion, who is not a human being.

II. Mens Rea (Guilty Mind)

Mens Rea is a Latin word which means a guilty mind. Mens rea is the fundamental principle to constitute a crime. It is based on maxim "Actus non facit ream nisi mens sit rea" which means an act will in itself not be considered as a crime if guilty intention is missing.

The general rule to be stated is "there must be a mind at fault before there can be a crime".

In simple words, a bad intention or guilt is an essential ingredient in every crime.

Example: Tara Singh is a lorry driver who ended up hitting and killing a pedestrian. Imagine two situations in this:

Situation 1: Tara Singh never saw the person until it was too late, tried his best to stop the lorry, but could do nothing to stop the accident and in fact ended up killing the pedestrian.

Situation 2: Tara Singh has been looking out for the pedestrian and upon seeing him, steered towards him and slammed into him, killing him on the spot.

In Situation 1 Tara Singh will be liable only in civil court for monetary damages as the intention to kill is missing. Whereas in Situation 2 Tara Singh will be criminally liable because he intended to kill the pedestrian.

Therefore, even though the pedestrian is killed in both situations, the intent of Tara Singh was different and so punishments will also be different.

The act is judged not from the mind of the wrong-doer, but the mind of the wrong-doer is judged from the act. Forms of Mens Rea

1. Intention: Intention is defined as The purpose with which an act is done'. Intention indicates the position of mind, condition of someone at particular time of commission of offence and also will of the accused to see effects of his unlawful conduct.

Criminal intention does not mean only the specific intention but it includes the generic intention as well.

Example: A poisons the food which B was supposed to eat with the intention of killing B. C eats that food instead of B and is killed. A is liable for killing C although A never intended it.

2. Negligence: Negligence is the second form of mens rea. Negligence is not taking care, where there is a duty to take care. The standard of care established by law is that of a reasonable man in identical circumstances. Reasonable care may differs from thing to thing depending upon situation of each case. In criminal law, the negligent conduct amounts to mens rea.

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

3. Recklessness: Recklessness occurs when the actor does not desire the consequence, but is able to foresee the possibility of risk and still consciously takes the risk. Recklessness is a form of mens rea.

For Example: Drink & Drive is prohibited and once a person does that, he shall be punished for recklessness.

Exception to Mens Rea

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

(a) Liabilities imposed by statute: Where a statute imposes liability, the presence or absence of a guilty mind is irrelevant.

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

(c) Public Interest: In the interest of public safety, strict liability is imposed and whether a person causes public nuisance with a guilty mind or without guilty mind, he is punished.

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

III. ACTUS REA

Actus Rea is a Latin word which means criminal act. It is the actual physical act of committing a crime. There cannot be a crime if an actual wrongful or criminal act has not taken place.

A man may be held fully liable even when he has taken no part in the actual commission of the crime. For example, if a number of people conspire to murder a person and only one of them actually shoots the person, every conspirator would be held liable for it.

IV. Injury to another person
An injury should have occurred to another party due to Actus rea.

STAGES OF CRIME

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

1. Criminal Intention

Criminal intention is the first stage in the commission of offence. Intention is the conscious exercise of mental faculties of a person to do an act for the purpose of accomplishing or satisfying a purpose. Intention means doing any act with one's will, desire, voluntariness, malafides and for some purpose. In the IPC, all these varied expressions find place in the various sections of the Code.

2. Preparation

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

- Preparation to wage war against the Government (section 122).
- Preparation for counterfeiting of coins or Government Stamps (sections 233 to 235, 255 and 257).
- Possessing counterfeit coins, false weights or measurements and forged documents (section242, 243, 259, 266 and 474).
- Making preparation to commit dacoity (section 399),

3. Attempt

Attempt, which is the third stage in the commission of a crime, is punishable. Attempt has been called as a preliminary crime. Section 511 of the IPC does not give any definition of 'attempt' but simply provides for punishment for attempting to commit an offence. Attempt means the direct movement towards commission of a crime after necessary preparations have been made. It should be noted that whether an act amounts to an attempt to commit a particular offence is a question of fact depending on the nature of crime and steps necessary to take in order to commit it.

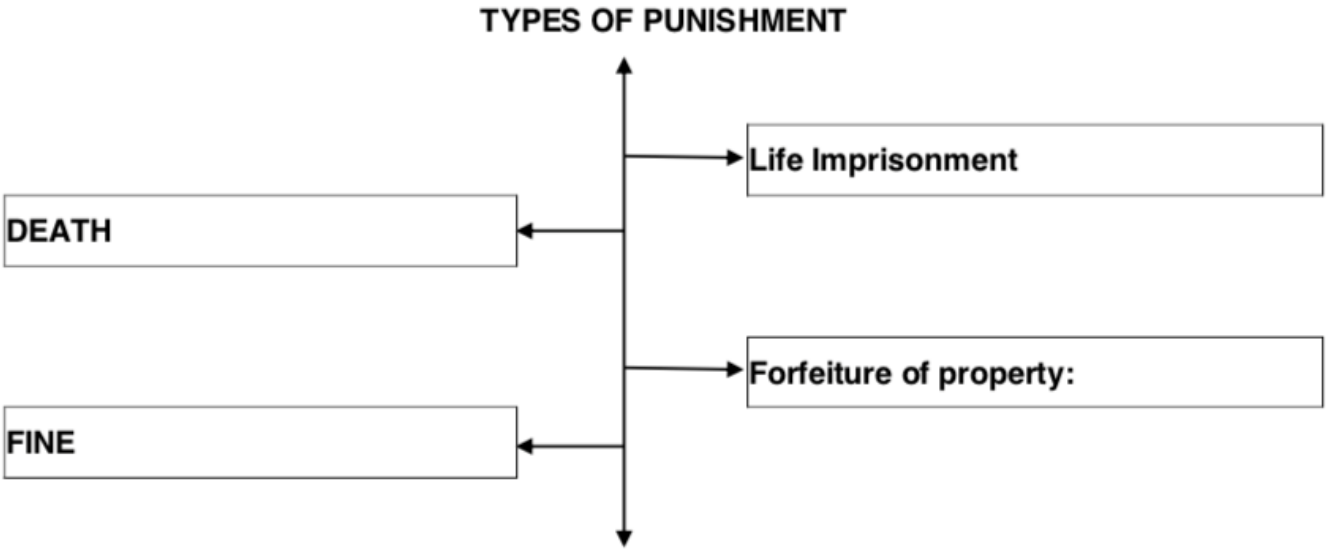
4. Commission of Crime or Accomplishment: - The last stage in the commission of crime is its accomplishment. If the accused succeeds in his attempt, the result is the commission of crime

and he will be guilty of the offence. If his attempt is unsuccessful, he will be guilty for an attempt only. If the offence is complete, the offender will be tried and punished under the specific provisions of the IPC.

PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

There is a presumption of innocence in favour of any person accused of committing any crime. It means that in the eyes of the law, the accused person is innocent till it is proven otherwise. So strong is this presumption that in order to rebut it, the prosecution must prove it 'beyond reasonable doubts' that the crime was committed by the accused.

PUNISHMENT



1. Death:- A death sentence is the harshest of punishments provided in the IPC, which involves the judicial killing or taking the life of the accused as a form of punishment. The Supreme Court has ruled that death sentence ought to be imposed only in the 'rarest of rate cases'.

The IPC provides for capital punishment for the following offences:

o Murder
o Dacoity with Murder.
o Waging War against the Government of India.
o Abetting mutiny actually committed.
o Giving or fabricating false evidence upon which an innocent person suffers death o Abetment of a suicide by a minor or insane person;
o Attempted murder by a life convict.

2. IMPRISONMENT:- IMPRISONMENT WHICH IS OF TWO DESCRIPTIONS NAMELY -

- Rigorous Imprisonment, that is hard labour;
- Simple Imprisonment

Life Imprisonment:- Imprisonment for life meant rigorous imprisonment, that is, till the last breath of the convict.

3.Forfeiture of property: - Forfeiture is the divestiture of specific property without compensation inconsequence of some default or act forbidden by law. The Courts may order for forfeiture of property of the accused in certain occasions. The courts are empowered to forfeit property of the guilty under section 126 and section 127 of the IPC.

4.Fine:- Fine is forfeiture of money by way of penalty. It should be imposed individually and not collectively. When court sentences an accused for a punishment, which includes a fine amount, it can specify that in the event the convict does not pay the fine amount, he would have to suffer imprisonment for a further period as indicated by the court, which is generally referred to as default sentence.

CRIMINAL CONSPIRACY

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

Definition of criminal conspiracy (Section 120A)

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

i. An illegal act, or

ii. An act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

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

The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the

conspiratorial agreement is terminated by completion of its performance or by abandonment or by frustration or however else it may be.

CASE LAWS

S.NO.	CASE NAME	PROVISONS
1	R. Venkatkrishnan v. CBI	The ingredients of the offence of criminal conspiracy 1. an agreement between two or more persons; 2. the agreement must relate to doing or causing to be done either • an illegal act; • an act which is not illegal in itself but is done by illegal means.
2	NCT of Delhi v. Navjot Sandhu, (SC), (Parliament attack case)	In order to prove a criminal conspiracy which is punishable under section 120B there must be direct or circumstantial evidence to show that there was an agreement between two or more persons to commit an offence, the accused had never contacted the deceased terrorist on place but had helped one of the conspirators to flee to a safer place after incident was not held guilty as conspirator.

PUNISHMENT OF CRIMINAL CONSPIRACY (SECTION 120B)

- Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

- Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

- The punishment for conspiracy is the same as if the conspirator had abetted the offence. The punishment for criminal conspiracy is more severe if the agreement is one to commit a serious offence and less severe otherwise.

CRIMINAL MISAPPROPRIATION OF PROPERTY

Section 403 and 404 of the Indian Penal Code, 1860 deal with Criminal Misappropriation of Property.

DISHONEST MISAPPROPRIATION OF PROPERTY (SECTION 403)

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

Dishonestly is an essential ingredient of the offence and the Code provides that whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that 'dishonestly'. Misappropriation means the intentional, illegal use of the property or funds of another person for one's own use or other unauthorised purpose.

There are two things necessary before an offence under section 403 can be established.

1) Property must be misappropriated or converted to the use of the accused, and,

2) Secondly, that he must misappropriate or convert it dishonestly.

CASE LAWS

S.NO.	CASE NAME	PROVISONS
1	In Bhagiram Dome v. Abar Dome,	It has been held that under Section 403 criminal misappropriation takes place even when the possession has been innocently come by, but where, by a subsequent change of intention or from the knowledge of some new fact which the party was not previously acquainted, the retaining become wrongful and fraudulent.

2	In Mohammad Ali v. State,	Fifteen bundles of electric wire were seized from the appellant but none including electricity department claimed that wires were stolen property. Evidence on records showed that impugned electric wire was purchased by the applicant from scrap seller. Merely applicant not having any receipt for purchase of impugned wire cannot be said to be guilty of offence punishable under Section 403 of the Code. Order of framing charge was, therefore, quashed by the Supreme Court and the accused was not held guilty under section 403 of the Indian Penal Code, 1860.
3	In U. Dhar v. State of Jharkhand,	There were two contracts- one between the principal and contractor and another between contractor and sub-contractor. On completion of work sub-contractor demanded money for completion of work and on non-payment filed a criminal complaint alleging that contractor having received the payment from principal had misappropriated the money. The magistrate took cognizance of the case and High Court refused to quash the order of magistrate. On appeal to the Supreme Court, it was held that matter was of civil nature and criminal complaint was not maintainable and was liable to be quashed. The Supreme Court also observed that money paid by the principal to the contractor was not money belonging to the complainant, sub- contractor, hence there was no question of misappropriation.

SOME ILLUSTRATIONS

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

2) A finds a rupee on the high road, not knowing to whom the rupee belongs, A picks up the rupee. Here A has not committed the offence defined in this section.
3) A finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.
4) A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to his own use. A has committed an offence under this section.
5) A finds a purse with money, not knowing to whom it belongs; he afterwards discovers that it belongs to Z, and appropriates it to his own use. A is guilty of an offence under this section.
6) A finds a valuable ring, not knowing to whom it belongs. A sells it immediately without attempting to discover the owner. A is guilty of an offence under this section.

DISHONEST MISAPPROPRIATION OF PROPERTY POSSESSED BY DECEASED PERSON AT THE TIME OF HIS DEATH (SECTION 404)

Offence: If a person dishonestly misappropriates or converts for his own benefit any property of a deceased person, knowing that such property was in the possession of a deceased person at the time of that person's death, shall be guilty under section 404.

Time of commission of this offence: The offence under this section shall be committed between the time when the possessor of the property dies, and the time when it comes into the possession of some person or officer authorised to take charge of it.

Punishment: Imprisonment upto 3 years shall also be liable to fine, and if the offender at the time of such person's death was employed by him as a clerk or servant, the imprisonment may extend to seven years.

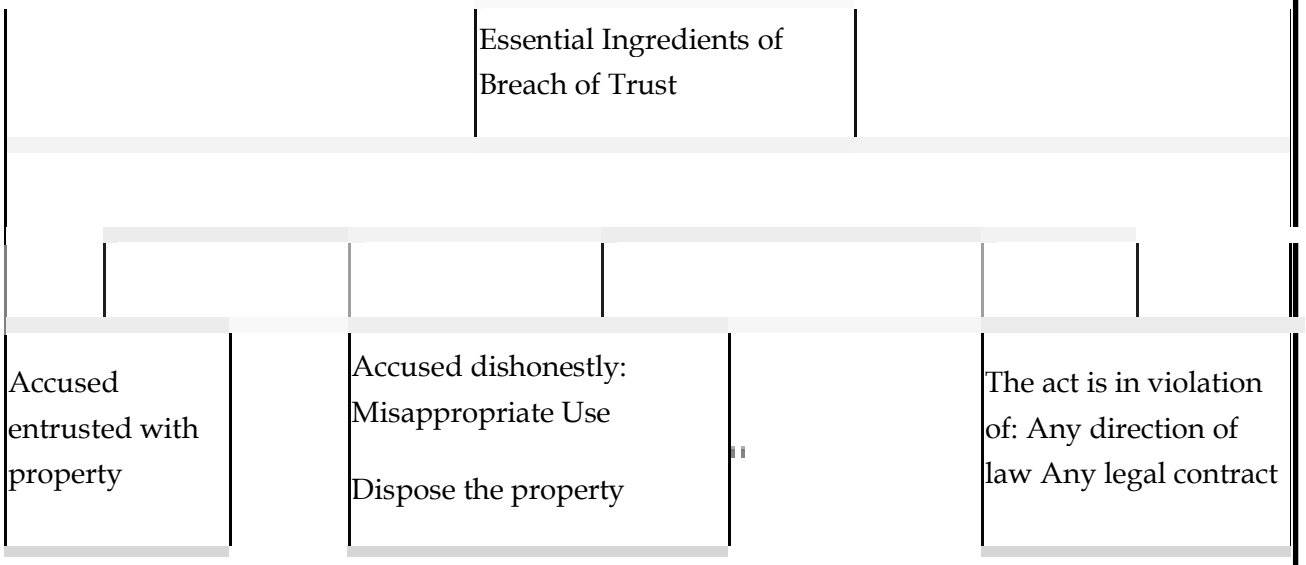
Illustration:

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

CRIMINAL BREACH OF TRUST

The criminal breach of trust as laid down under section 405 of the IPC is 'dishonest misappropriation' or 'conversion to own use' another's property, which is similar to the offence of criminal misappropriation defined under section 403. The only difference between the two is that in respect of criminal breach of trust, the accused is entrusted with property or with dominion or control over the property.

Criminal Breach of Trust - Essential Ingredients



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

1. The accused must be entrusted with the property.

2. The person so entrusted (i.e., the accused) must

- dishonestly misappropriate, or convert to his own use, that property, or

- dishonestly use or dispose of that property.

3. The act was done in violation of

- any direction of law, or

- any legal contract.

Illustrations:

(a) A is an executor to the will of a deceased person and he is directed by the law to divide the property according to the will. He dishonestly disobeys the law and appropriates them to his own use. A has committed criminal breach of trust.

(b) A is a warehouse-keeper. Z going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse room. A dishonestly sells the goods. A has committed criminal breach of trust.

(c) A, a revenue-officer, is entrusted with public money and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust.

CASE LAWS

S.NO.	CASE NAME	PROVISONS
1	V.R. Dalai v. Yugendra Naranji Thakkar	The Supreme Court of India has held that the first ingredient of criminal breach of trust is entrustment and where it is missing, the same would not constitute a criminal breach of trust. Breach of trust may be held to be a civil wrong but when mens-rea is involved it gives rise to criminal liability also. The expression 'direction of law' in the context of Section 405 would include not only legislations pure and simple but also directions, instruments and circulars issued by authority entitled therefor.
2	OnkarNath Mishra v. State (NCT of Delhi),	The Supreme Court has held that in the commission of offence of criminal breach of trust, two distinct parts are involved. The first consists of the creation an obligation in relation to property over which dominion or control is acquired by accused. The second is a misappropriation or dealing with property dishonestly and contraiy to the terms of the obligation created.

3	S.K. Alagh v. State of U.P.	Where demand drafts were drawn in the name of company for supply of goods and neither the goods were sent by the company nor the money was returned, the Managing Director of the company cannot be said to have committed the offence under Section 406 of Indian Penal Code. It was pointed out that in absence of any provision laid down under statute, a director of a company or an employer cannot be held vicariously liable for any offence committed by company itself.
	Suryalakshmi Cotton Mills Ltd. v. Rajvir Industries Ltd	it was held that a cheque is property and if the said property has been misappropriated or has been used for a purpose for which the same had not been handed over, a case under Section 406 of the Code may be found to have been made out.

To conclude that for an offence to fall under this section all the four requirements are essential to be fulfilled.

i. The person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them or to put him in position of trustee.

ii. The accused must be in such a position where he could exercise his control over the property i.e; dominion over the property.

iii. The term property includes both movable as well as immovable property within its ambit.

iv. It has to be established that the accused has dishonestly put the property to his own use or to some unauthorised use. Dishonest intention to misappropriate is a crucial fact to be proved to bring home the charge of criminal breach of trust.

PUNISHMENT FOR CRIMINAL BREACH OF TRUST (SECTION 406)

Case	Section	Punishment
Punishment for cases other than the following cases	406	Imprisonment upto 3 years OR with Fine OR both
When breach of trust is done by a carrier, wharfinger, or warehouse keeper	407	Imprisonment upto 7 years AND Fine
When breach of trust is done by clerk or servant	408	Imprisonment upto 7 years AND Fine
When breach of trust is done by a public servant or banker, merchant, factor, broker, attorney or agent	409	Imprisonment for life OR Imprisonment upto 10 years AND Fine

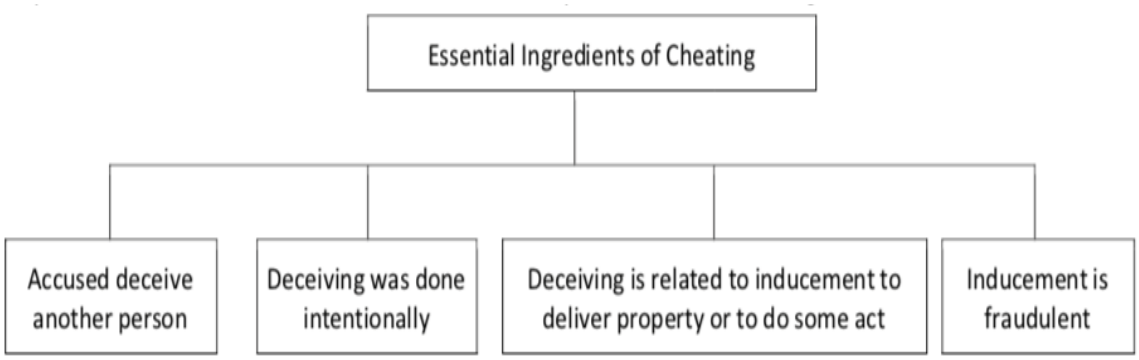
CHEATING

Sections 415 to 420 of Indian Penal Code, 1860 deal with the offence of cheating. Cheating can be described as a dishonest or unfair act done to gain advantage over the other.

Section 415 defines cheating as follows:-

"Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to cheat."

Explanation: A dishonest concealment of facts is a deception within the meaning of this section.



- The accused must deceive another person.
- The act of deceiving was done intentionally.
- The person who is deceived should be induced to deliver any property, or to do an act.
- Such inducement should be fraudulent or dishonest.

Illustrations:

(a) A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

(b) A, by exhibiting to Z a false sample of an article intentionally deceives Z into believing that the article corresponds with the sample, and thereby dishonestly induces Z to buy and pay for the article. A cheats.

(c) A, by pledging as diamond articles which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(d) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.

(e) A intentionally deceives Z into a belief that A has performed A's part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.

CASE LAWS

S.NO.	CASE NAME	PROVISONS
1	Iridium India Telecom Ltd. v. Motorola Incorporated	The Supreme Court in has held that deception is necessary ingredient under both parts of section. Complainant must prove that inducement has been caused by deception exercised by the accused. It was held that non-disclosure of relevant information would also be treated a misrepresentation of facts leading to deception.
2	M.N. Ojha and others v. Alok Kumar Srivastav	The Supreme Court in has held that where the intention on the part of the accused is to retain wrongfully the excise duty which the State is empowered under law to recover from another person who has removed non-duty paid tobacco from one bonded warehouse to another, they are held guilty of cheating.
3	R. Arya v. State of Punjab	In T, it was held that negligence in duty without any dishonest intention cannot amount to cheating. A bank employee when on comparison of signature of drawer passes a cheque there may be negligence resulting in loss to bank, but it cannot be held to be cheating.

CHEATING BY PERSONATION

As per section 416 a person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation: The offence is committed whether the individual personated is a real or imaginary person. Illustrations:

(a) A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.

(b) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

CASE LAWS

S.NO.	CASE NAME	PROVISONS
1	Kuriachan Chacko v. State of Kerala	The money circulation scheme was allegedly mathematical impossibility and promoters knew fully well that scheme was unworkable and false representations were being made to induce persons to part with their money. The Supreme Court held that it could be assumed and presumed that the accused had committed offence of cheating under section 420 of the IPC.
2	Mohd. Ibrahim and others v. State of Bihar and another	The accused was alleged to have executed false sale deeds and a complaint was filed by real owner of property. The accused had a bonafide belief that the property belonged to him and purchaser also believed that suit property belongs to the accused. It was held that accused was not guilty of cheating as ingredients of cheating were not present.
3	Shruti Enterprises v. State of Bihar	It was held that mere breach of contract cannot give rise to criminal prosecution under section 420 unless fraudulent or dishonest intention is shown right at the beginning of transaction when the offence is said to have been committed. If it is established that the intention of the accused was dishonest at the time of entering into the agreement then liability will be criminal and the accused will be guilty of offence of cheating. On the other hand, if all that is established is that a representation made by the accused has subsequently not been kept, criminal liability cannot be fastened on the accused and the only right which complainant acquires is to a decree of damages for breach of contract

PUNISHMENT FOR CHEATING

Case	Section	Punishment
Punishment for cases other than the following cases	417	Imprisonment upto 1 year OR with Fine OR both
If a person who is bound to protect another person's interest cheats that person with the knowledge that the act will cause wrongful loss to that party	418	Imprisonment upto 3 years OR with Fine OR both
Punishment for cheating by personation	419	Imprisonment upto 3 years OR with Fine OR both
Where cheating leads to dishonestly inducing delivery of property	420	Imprisonment upto 7 years AND Fine

FRAUDULENT DEEDS AND DISPOSITIONS OF PROPERTY

Fraudulent Deeds and Dispositions of Property are covered under section 421 to 424 of the Indian Penal Code, 1860. These sections deal with fraudulent conveyances referred to in section 53 of the Transfer of Property Act and the Presidency-towns and Provincial Insolvency Acts.

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

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

Guwahati High Court in Ramautar Chaukhany v Hari Ram Todi, held that an offence under this section has following essential ingredients:

(i) That the accused removed, concealed or delivered the property or that he transferred, it caused it to be transferred to someone;

(ii) That such a transfer was without adequate consideration;

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

(iv) That he acted dishonestly and fraudulently.

This section specifically refers to frauds connected with insolvency. The offence under it consists in a dishonest disposition of property with intent to cause wrongful loss to the creditors. It applies to movable as well as immovable properties. In view of this section, the property of a debtor cannot be distributed according to law except after the provisions of the relevant enactments have been complied with.

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

Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

This section, like the preceding section 421, is intended to prevent the defrauding of creditors by masking property.

CASE LAWS

S.NO.	CASE NAME	PROVISONS
1	Commissioner of Wealth Tax v G.D. Naidu	It was held that the essential requisites of debt are- (1) ascertained or ascertainable, (2) an absolute liability, in present or future, and (3) an obligation which has already accrued and is subsisting. All debts are liabilities but all liabilities are not debt.
2	Mangoo Singh v. Election Tribunal,	The Supreme Court has laid down that the word 'demand' ordinarily means something more than what is due; it means something which has been demanded, called for or asked for, but the meaning of the word must take colour from the context and so 'demand' may also mean arrears or dues.

DISHONEST OR FRAUDULENT EXECUTION OF DEED OF TRANSFER CONTAINING FALSE STATEMENT OF CONSIDERATION (SECTION 423)

Whoever dishonestly or fraudulently signs, executes or becomes a party to any deed or instrument which purports to transfer or subject to any charge on property, or any interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

This section deals with fraudulent and fictitious conveyances and transfers. The essential ingredient of an offence under section 423 is that the sale deed or a deed subjecting an immovable property to a charge must contain a false statement relating to the consideration or relating to the person for whose use or benefit it is intended to operate.

Though dishonest execution of a benami deed is covered under this section, the section stands superseded by The Prohibition of Benami Properties Transactions Act, 1988 because the latter covers a wider filed, encompassing the field covered by this section.

DISHONEST OR FRAUDULENT REMOVAL OR CONCEALMENT OF PROPERTY (SECTION 424)

Whoever dishonestly or fraudulently conceals or removes any property of himself or any other person, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

The essential ingredients to bring an offence under section 424 are as follows:

- There is a property;
- That the accused concealed or removed the said property or assisted in concealing or removing the said property;

• That the said concealment or removal or assisting in removal or concealment was done dishonestly or fraudulently.

FORGERY (SECTION 463)

Whoever makes any false document or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

PUNISHMENT FOR FORGERY (SECTION 465)

Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

The making of a false document or false electronic record is defined under section 464 of the Indian Penal Code, 1860

CASE LAWS

S.NO.	CASE NAME	PROVISONS
1	Ramchandran v. State	The Supreme Court, has held that to constitute an offence of forgery document must be made with dishonest or fraudulent intention. A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.
2	Parminder Kaur v. State of UP	The Supreme Court in has held that mere alteration of document does not make it a forged document. Alteration must be made for some gain or for some objective.
3	Balbir Kaur v. State of Punjab,	The allegation against the accused was that she furnished a certificate to get employment as ETT teacher which was found to be bogus and forged in as much as school was not recognized for period given in certificate. However the certificate did not anywhere say that school was recognized. It was held that merely indicating teaching experience of the accused, per-se, cannot be said to indicate wrong facts. So the direction which was issued for prosecution is liable to be quashed.

DEFAMATION

Section 499 provides that whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person. The definition can be understood by going through the essentials of defamation.

Essential Ingredient of Defamation

1. An imputation or accusation is made by

- Words, either spoke or written, or
- Signs, or

- Visible Representations.

2. Such imputation should be published to a third party, i.e. a party other than against whom the imputation is made.

3. The intention behind such imputation is to harm the reputation of the person against whom it is made.

Note:

1. If the reputation of a deceased person is harmed by any imputation which also hurts the feeling of his family and friends will also be covered under defamation.

2. Imputation concerning a company or an association of persons will be treated as defamation.

Exceptions

1. Imputation of truth in public good - If imputation of truth is made in the public good, it will not be treated as defamation.

2. Public conduct of public servants - An opinion given in good faith about public conduct of public servant respecting his character will not be treated as defamation.

3. Conduct of any person touching any public question - An opinion given in good faith about any person touching public question respecting his character will not be treated as defamation.

4. Publication of reports of proceedings of courts - It is not defamation to publish substantially true report of the proceedings of a Court of justice.

5. Merits of case decided in Court or conduct of witnesses and others concerned - An opinion given in good faith respecting the merits of any case will not be treated as defamation.

Further any opinion in good faith respecting the conduct of any person as a party, witness or agent, in any such case.

6. Merits of public performance - It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public.

7. Censure passed in good faith by person having lawful authority over another - It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

8. Accusation preferred in good faith to authorised person - It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

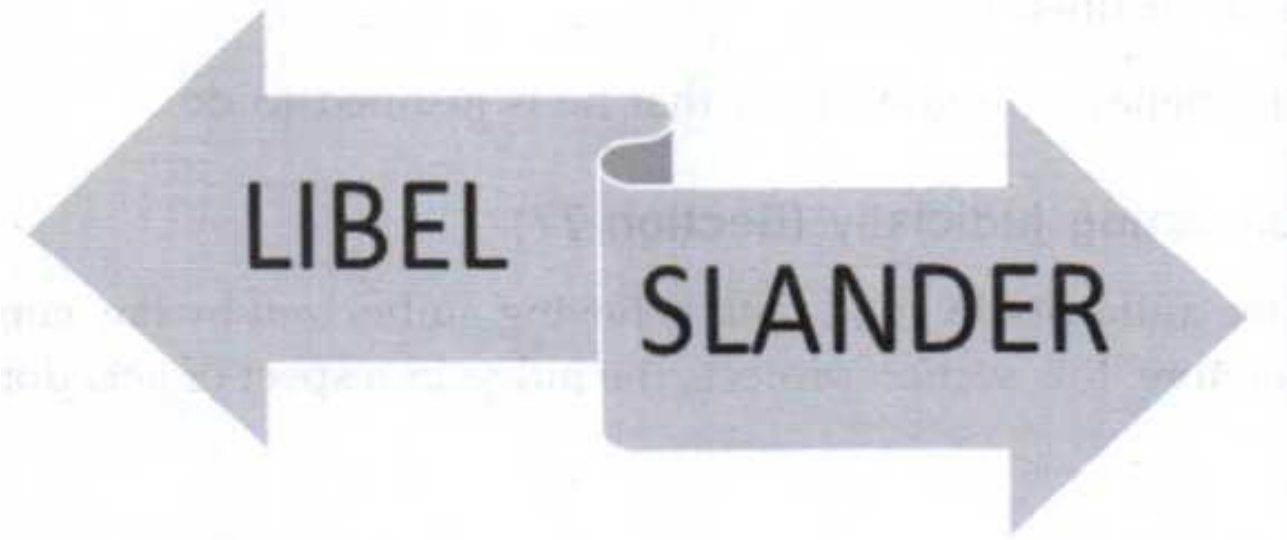
9. Imputation made in good faith by person for protection of his or other's interests - It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.

10. Caution intended for good of person to whom conveyed or for public good - It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

PUNISHMENT FOR DEFAMATION

According to section 500 whoever defames another shall be punished with simple imprisonment for a term which may extend to 2 years, or with fine, or with both.

Kinds of **Defamation**



Libel

In libel, the defamatory statement is made in some permanent and visible form, such as writing, printing or pictures.

Slander

In slander it is made in spoken words or in some other transitory form, whether visible or audible, such as gestures or inarticulate but significant sounds.

MISCELLANEOUS
PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

There is a presumption of innocence in favour of any person accused of committing any crime. It means that in the eyes of the law, the accused person is innocent till it is proven otherwise by the prosecution.

GENERAL EXCEPTIONS

1. Mistake of Fact- bound by law:- According to section 76, if any one commits any act which he is bound to do or mistakenly believes in good faith that he is bound by law to do it, he is not guilty. The mistake or ignorance must be of fact, but not of law. If the mistaken facts were true, the act would not be an offence. Mistake of fact, is a general defence based on the Common Law maxim - ignorantia facit excusat; igoranita juris non excusat- (Ignorance of fact excuses; Ignorance of law does not excuse). In mistake of fact the accused does not possess mens rea or guilty mind.

2. Act of Judge when acting judicially (section 77):-If any judge in his authority in good faith believing authorised by law commits any act, no offence is attracted.

3. Act done pursuant to the judgment or order of Court (section 78):- When any act is committed on judgment or order of the Court of Justice which is in force, it is no offence even if the judgment or order of the Court is without any jurisdiction, though the person who executes the judgment and order must believe that the Court has the jurisdiction. Section 77 protects judges from any criminal liability for their judicial acts. Section 78 extends this protection to ministerial and other staff, who may be required to execute orders of the court. If such immunity was not extended, then executing or implementing court orders would become impossible.

4. Mistake of Fact-justified by law:- According to section 79 of the IPC, if any one commits any act which is justified by law or by reason of mistake of fact and not by reason of mistake of law believes himself to be justified by Law.

5. Accident in doing a lawful act: - According to section 80, if any one commits any offence by accident or misfortune without malafide or without knowledge in performance of his legal duty in legal manner with proper care and caution is no offence.
   The protection under this section will apply only if the act is a result of an accident or a misfortune.
   The word 'accident' is derived from the Latin word 'accidere' signifying 'fall upon, befall, happen, chance. It rather means an unintentional, an unexpected act. Thus, injuries caused due to accidents in games and sports are all covered by this section.

6. Act likely to cause harm, but done without criminal intent, and to prevent other harm (section 81):-Any act done by anyone without any criminal intent for saving or preventing harm to third person or property in good faith is no offence. According to the 'explanation' to this section, it is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

7. Act of a child under seven years of age (section 82):-If any child who is below seven years of age commits any offence, he is not guilty because it is the presumption of law that that a child below 7years of age is incapable to having a criminal intention (mens rea) necessary to commit a crime.

8. Act of a child above seven and under twelve of immature understanding (section 83):- If any minor child is in between seven and twelve years of age and not attained the maturity of what is wrong and contrary to law at the time of commission of offence in not liable to be convicted and punished.

9. Act of a person of unsound mind (section 84):- Nothing done by any person of unsound mind is an offence if at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

10. Act of a person incapable of judgment by reason of intoxication caused against his will (section 85):-
Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law: provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

11. Offence requiring a particular intent or knowledge committed by one who is intoxicated (section86):- In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will. If the accused himself takes and consumes intoxicated thing or material with knowledge or intention and under intoxication he commits any offence he is liable for punishment.

12. Act not intended and not known to be likely to cause death or grievous hurt, done by consent(section 87):- When anyone commits any act without any intention to cause death or grievous hurt and which is not within the knowledge of that person to likely to cause death or grievious hurt to any person who is more than eighteen years of age and has consented to take the risk of that harm, the person doing the act has committed no offence.

This section is based on the principle of 'volenti-non-fit injuria' which means he who consents suffers no injury. The policy behind this section is that everyone is the best judge of his own interest and no one consents to that which he considers injurious to his own interest

13. Act not intended to cause death, done by consent in good faith for person's benefit (section 88):-Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm. Section 88 extends the operation of consent to all acts except that of causing death intentionally provided that the act is done in good faith for the benefit of the consenting party.
For example:- A, a surgeon, knowing that a particular operation is likely to cause the death of Z who suffers under the painful complaint but not intending to cause Z's death and intending in good faith Z's benefit, performs that operation on Z with Z's consent. A has committed no offence. But if surgeon while performing the operation leaves a needle inside the abdomen of the patient who die due to septic- He would be liable criminally for causing death by negligence because he did not perform the operation with due care and caution.

14. On consent of guardian if any act is done in good faith to it (section 89):- This section gives power to the guardian of a child under 12 years of age or a person of unsound mind to consent to do an act done by a third person for the benefit of the child or a person of unsound mind. Anything done by the third person will not be an offence provided that it is done in good faith and for the benefit of the child or a person of unsound mind. This section gives protection to the guardians as well as other person acting with the consent of a guardian of a person under 12 years of age or a person of unsound mind.

15. Consent (section 90):-The consent is not valid if it is obtained from a person who is under fear of injury, or under a misconception of fact and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception. The consent is also not valid if it's given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent. The consent is given by a person who is under twelve years of age is also not valid unless the contrary appears from the context.

16. Exclusion of acts which are offences independently of harm caused (section 91):- The exceptions in sections 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

17. Act done in good faith for benefit of a person without consent (section 92):- Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit. This defence is subject to certain exceptions.

18. Communication made in good faith (section 93):- No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person. For example: A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

19. Act to which a person is compelled by threats (section 94):- Except murder, and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence. For this defence to be valid the person acting under threat should not have himself put under such a situation.

20. Act causing slight harm (section 95):- Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that nonperson of ordinary sense and temper would complain of such harm.

10 CODE OF CRIMINAL PROCEDURE,1973

INTRODUCTION

- IT CAME IN TO FORCE 1 APRIL 1974
- IT EXTENDS TO WHOLE OF INDIA EXCEPT STATE OF JAMMU AND KASHMIR

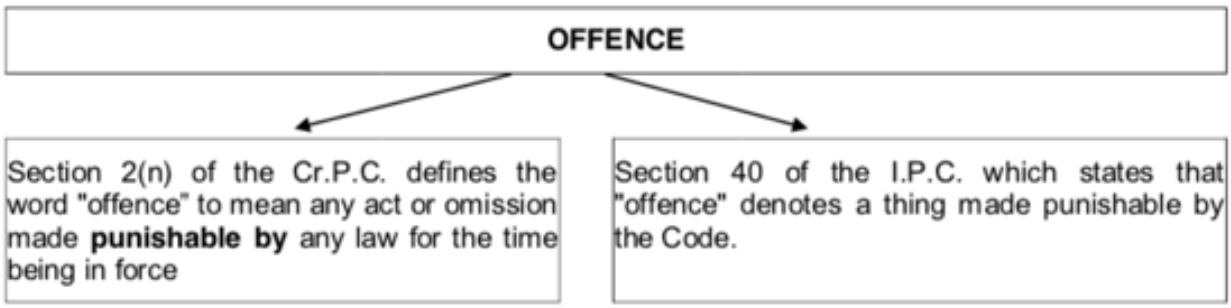
CRIMINAL LAWS

INDIAN PENAL CODE 1860	**CRIMINAL PROCEDURE CODE 1973**
SUBSTANTIVE LAW	PROCEDURAL LAW
↓	↓
IT DECIDES WHAETHER AN ACT IS OFFENCE OR NOT	**IT SUPPLEMENTS THE PROVISONS OF IPC**

Code of criminal procedure, 1973 **(Cr.P.C)** Provides mechanism for the enforcement of criminal law. The Code of Criminal Procedure prescribes the procedure for the trial of offences which the Indian Penal Code, 1860 (IPC) defines.

The Code of Criminal Procedure creates the necessary machinery for apprehending the criminals, investigating the criminal cases, their trials before the criminal courts and imposition of proper punishment on the guilty person.

OFFENCE



MENS REA

Mens rea means a guilty mind. The fundamental principle of penal liability is embodied in the maxim 'actus non facit ream nisi mens sit rea', i.e., unless an act is done with a guilty intention, it will not be criminally punishable. The general rule to be stated is "there must be a mind at fault before there can be a crime". Thus mens rea in an essential ingredient in every criminal offence.

PLEADER

With reference to any proceedings in any Court, it means a person authorised by or under any law for the time being in force, to practice in such Court and includes any other person appointed with the permission of the Court to act in such proceeding.

Section 2(q) further states that it is an inclusive definition and a non-legal person appointed with the permission of the Court will also be included.

PUBLIC PROSECUTOR

A "public prosecutor" means any person appointed under Section 24, and includes any person acting under the directions of a Public Prosecutor.

[Section 2(u)] Public prosecutor, though an executive officer is, in a larger sense, also an officer of the Court and he is bound to assist the Court with his fair views and fair exercise of his functions.

BAILABLE OFFENCE AND NON-BAILABLE OFFENCE

A "bailable offence" means an offence which is shown as bailable in the First Schedule or which is made bailable by any other law for the time being in force. "Non-bailable" offence means any other offence. [Section 2(a)]

COGNIZABLE OFFENCE AND NON-COGNIZABLE OFFENCE

"Cognizable offence" or "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.

"Non-cognizable offence" or "non-cognizable" case means a case in which, a police officer has

no authority to arrest without warrant. Thus, a non-cognizable offence needs special authority to arrest by the police officer.

In order to be a cognizable case under Section 2(c) of the Code, it would be enough if one or more (not ordinarily all) of the offences are cognizable.

(Note: It may be observed from the First Schedule that non-cognizable offences are usually bailable while cognizable offences are generally non-bailable).

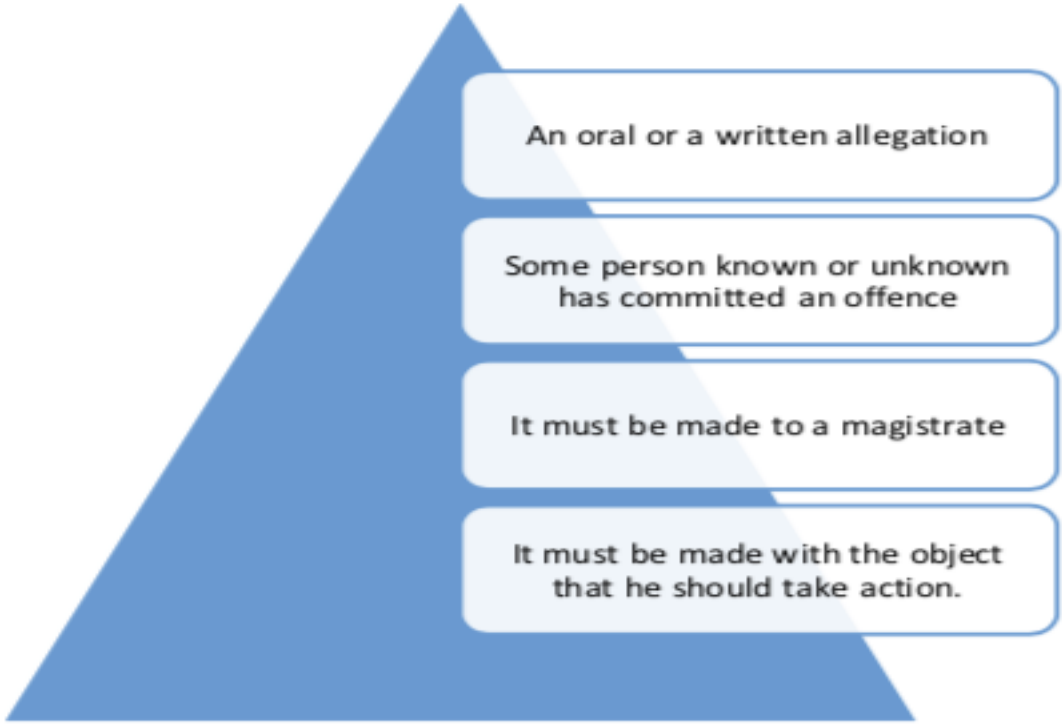
COMPLAINT

"Complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence, but it does not include a police report. [Section 2(d)]

However, a report made by the police officer in a case which discloses after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint, and the police officer making the report as a complainant. In general a complaint into an offence can be filed by any person except in cases of offences relating to marriage, defamation and offences mentioned under Sections 195 and 197.

Police report is expressly excluded from the definition of complaint but the explanation to Section 2(d) makes it clear that such report shall be deemed to be a complaint where after investigation it discloses commission of a non-cognizable offence. Police report means a report forwarded by a police officer to a Magistrate under Sub-section (2) of Section 173.

A complaint in a criminal case is what a plaint is in a civil case. The requisites of a complaint are:



There is no particular format of a complaint. A petition addressed to the Magistrate containing an allegation that an offence has been committed, and ending with a prayer that the culprit be suitably dealt with is a complaint. (Mohd. Yousuf v. Afaq Jahan, AIR 2006 SC 705).

BAIL

It means the release of the accused from the custody of the officers of law and entrusting him to the private custody of persons who are sureties to produce the accused to answer the charge at the stipulated time or date.

An "anticipatory bail" is granted by the High Court or a Court of Session, to a person who apprehends arrest for having committed a non-bailable offence, but has not yet been arrested (Section 438). An opportunity of hearing must be given to the opposite party before granting anticipatory bail (State of Assam v. R.K. Krishna Kumar AIR 1998 SC 144).

INQUIRY

It means every inquiry other than a trial, conducted under this Code by a Magistrate or Court.

[Section 2(g)]— the inquiry is different from a trial in criminal matters;

– Inquiry is wider than trial and it stops when trial begins.

INVESTIGATION

It includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf. [Section 2(h)]

The three terms — 'investigation', 'inquiry' and 'trial' denote three different stages of a criminal case. The first stage is reached when a police officer either on his own or under orders of a Magistrate investigates into a case (Section 202). If he finds that no offence has been committed, he submits his report to the Magistrate who drops the proceedings. But if he is of different opinion, he sends that case to a Magistrate and then begins the second stage—a trial or an inquiry. The Magistrate may deal with the case himself and either convict the accused or discharge or acquit him. In serious offences the trial is before the Session's Court, which may either convict or acquit the accused. (Chapter XVIII)

JUDICIAL PROCEEDING

It includes any proceeding in the course of which evidence is or may be legally taken on oath. The term judicial proceeding includes inquiry and trial but not investigation. [Section 2(i)]

SUMMONS AND WARRANT CASES

"Summons case" means a case relating to an offence and not being a warrant case. [Section 2(w)]

A "Warrant case" means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. [Section 2(x)]

Those cases, which are punishable with imprisonment for two years or less, are summons cases, the rest are all warrant cases. Thus, the division is based on punishment that can be awarded. The procedure for the trial of summons cases is provided by Chapter XX and for warrant cases by Chapter XIX.

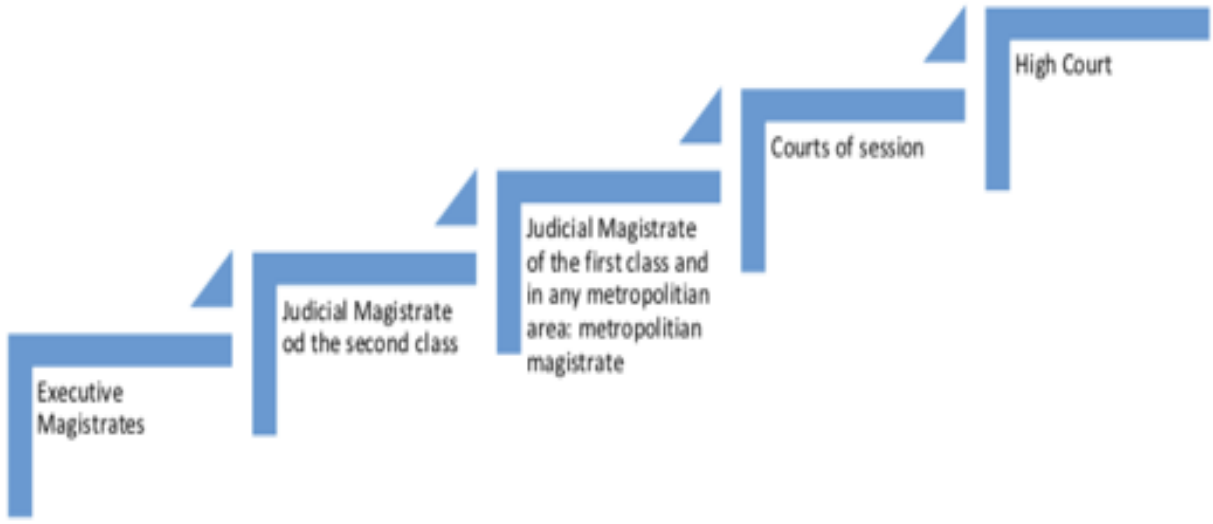
CLASSES OF CRIMINAL COURTS

Following are the different classes of criminal courts:-

- Supreme Court
- High Courts;
- Courts of Session;
- Chief Judicial Magistrates
- Magistrates of the First class;

Magistrates of the second class

The Supreme Court is also vested with some criminal powers. Article 134 of Constitution of India confers appellate jurisdiction on the Supreme Court in regard to criminal matters from a High Court in certain cases.



POWER OF THE COURT TO PASS SENTENCES

a) Sentences which High Courts and Sessions Judges may pass:

a) According to Section 28, a High Court may pass any sentence authorized by law.
b) A Sessions Judge or Additional Sessions Judge may pass any sentence authorized by law, but any sentence of death passed by any such judge shall be subject to confirmation by the High Court.
c) An Assistant Sessions Judge may pass any sentence authorized by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years.

b) Sentences which Magistrates may pass

Section 29 lays down the powers of individual categories of Magistrates to pass the sentence as under: -

a) The Court of a Chief Judicial Magistrate – may pass any sentence of imprisonment not exceeding 7 years.
b) Magistrate of the First class - may pass any sentence of imprisonment not exceeding 3 years or with a fine exceeding RS 5000
c) Magistrate of the Second class – may pass any sentence of imprisonment not exceeding 1 year or with a fine exceeding RS 1000

c) **Sentence of imprisonment in default of fine**

Where a fine is imposed on an accused and it is not paid, the law provides that he can be imprisoned for a term in addition to a substantive imprisonment awarded to him, if any. Section 30 defines the limits of Magistrate's powers to award imprisonment in default of payment of fine.

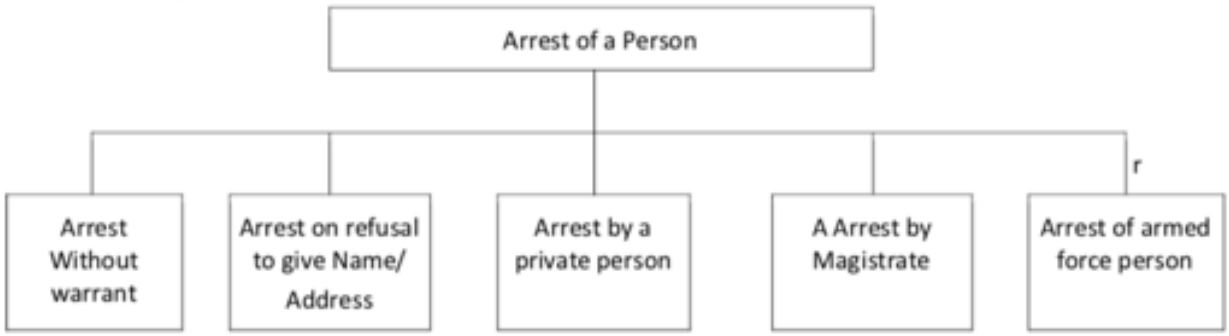
It provides that the Court of a Magistrate may award such term of imprisonment in default of

payment of fine as is authorised by law provided the that the term:

(i) Is not in excess of the powers of the Magistrate under Section 29; and
(ii) Where imprisonment has been awarded as part of the substantive sentence, it should not exceed 1 /4th of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

ARREST OF A PERSON

The provisions given under the Code related to arrest can be laid down as follows:-



1) Arrest without Warrant

As per section 41, any police officer can arrest a person without a warrant in following cases :-

- Cognizable Offence
- Offence of House breaking without any lawful justification
- A proclaimed offender

- Offenders of stealing property
- Obstructing a police officer in the execution of his duty
- If a person escaped, or attempts to escape, from lawful custody
- A deserter from any of the Armed Forces
- A released convict on breach of any rules imposed on him
- Wage war against Government of India
- Any offender has been released by the Court but offender doesn't comply with the order of the Court
- If a person has committed an act outside India, which if committed in India would have amounted to offence and punishable in India
- If a requisition is received whether written or oral from any other police officer. The requisition should state the exact person to be arrested along with the offence he has committed. Further the police officer who is issuing a requisition should at the first place have power to arrest the person without a warrant

Example: Shakti Kapoor has committed a cognizable offence in Mumbai and to save himself from arrest he escaped to Kolkata. If Mumbai police issues a requisition to Kolkata police stating the offence and identity of offender, the Kolkata police can arrest Shakti Kapoor without a warrant.

If in the above case Shakti Kapoor committed a non-cognizable offence, he cannot be arrested by Kolkata police without warrant on requisition given by Mumbai police, as Mumbai police originally had no power to arrest him without a warrant.

2) Arrest on refusal to give Name and Residence

When any person who, in the presence of a police officer, has committed or has been accused of committing non-cognizable offence refuses to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.

3) Arrest by a Private Person

As per section 43, a private person can arrest any person without a warrant in following cases:-

- If a person has committed a cognizable and non-bailable offence in his presence, or
- He is a proclaimed offender, or
- When he is directed to arrest that person

4) **Arrest by a Magistrate**

As per section 44, a Magistrate can arrest without a warrant, any person:

- Who has committed an offence in his presence,
- For whose arrest he is competent to issue warrant.

5) Arrest of armed force person

As per section 45 member of the Armed Forces of the Union cannot be arrested for anything done by him in the discharge of his official duties except after obtaining the consent of the Central Government.

SUMMON AND WARRANT

- **SUMMON**

A summon is a written notice issued by the Court ordering either to appear or to produce a document before the court, at a stipulated time and place.

Essentials of a Summons

- It should be in writing
- It should be in Duplicate
- It should be signed by Presiding Officer
- It should bear the seal of Court
- It should be clear and specific
- It should mention exact day, date, time when the person/documents to be presented

The person to whom it is addressed, should be ascertained Serving of Summon

Summon to be served to person	As per Section 62 – A summon to be served by a Police Officer/An Officer of Court/Other Public Servant if practicable to be served personally.
Summon on Corporations	As per Section 63 - A summon can be served on the Secretary/Local Manager/ Other Principal Officer of the Corporation.

Summon if the concerned person is not found	As per Section 65 - A summon can be served to the male adult of the family if the concerned person is not found.
If no one is found at the home or household	As per Section 65 if no one is found at home then affix the duplicate copy of summon to conspicuous part of the home or household where the summoned person ordinarily resides.
Summon in case of Government Employee	A summon shall ordinarily be sent to the Head of the office in which such person is employed.

WARRANT

A warrant is described as a legal document issued by a judge or magistrate, which empowers a police officer to make an arrest, search or seize premises.

Essentials of Warrant:

(a) It should be in writing.

(b) It should bear the name of person who is to execute it.

(c) It contains the full name and description of the person to be arrested.

(d) It should state the offences charged.

(e) It must be signed by the presiding officer and sealed by the Court.

DIFFERENCE BETWEEN SUMMON AND WARRANT

BASIS	SUMMON	WARRANT
MEANING	Summon implies a legal order, issued by the Court to a person to appear or produce documents.	Warrant is an authorization issued by the court that permits the police officer to arrest, search or seize.

CONTENT	Instruction to appear or produce a document or thing before the court.	Authorization to police officer to apprehend the accused and produce him/her before the court.
ADRESSED TO	To the Party	To The Police

SEARCH WARRANT

A search warrant may be issued by the court in the following cases:-

1. If a summon to produce a thing has been given to a person, but the court has reason to believe that he will not produce the desired documents.
2. Where such documents or thing is not known to the court to be in possession of that person.
3. Where a general inspection or search is necessary.

POWER OF POLICE

1. Preventive Action taken by Police:

If the police officer receives the information that a cognizable offence is designed to be committed, he can communicate such information to his superior police officer. The police officer may arrest the person without orders from Magistrate and without a warrant if the commission of such offence cannot be otherwise prevented. The arrested person can be detained in custody only for 24 hours unless his further detention is required.

2. Inspection of weights and measures

1. Any officer in-charge of the police station may without a warrant enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, if he has reason to believe that in such place any weights, measures or instruments for weighing which are false are kept.

2. If he finds in such place any false weights, measures or instruments he may seize the same and shall give information of such seizure to a Magistrate having jurisdiction.

3. Power to investigate in case of cognizable offence In case of a cognizable offence the police officer may conduct investigations without the order of a Magistrate.

4. Search by warrants

If the police officer has reason to believe that anything necessary for the purpose of an investigation may be found. The officer must record in writing his reasons for making of a search. But, the illegality of search will not affect the validity of the articles or subsequent trial.

MISCELLANEOUS

SUMMON CASES AND WARRANT CASES

Warrant Case

As per Section 2(x), "warrant-case" means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding 2 years.

In simple words any case related to offence punishable with

- - Death
- - Imprisonment for Life
- - Imprisonment exceeding 2 years is termed as a Warrant Case.

Note:

(1) A warrant case cannot be withdrawn by petitioner subsequently.
(2) In warrant case a court order is issued to the police to produce the person before the court.

PROCLAMATION AND ATTACHMENT

If a Court has reason to believe that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, the Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than 30 days from the date of publishing such proclamation. (Section 82)

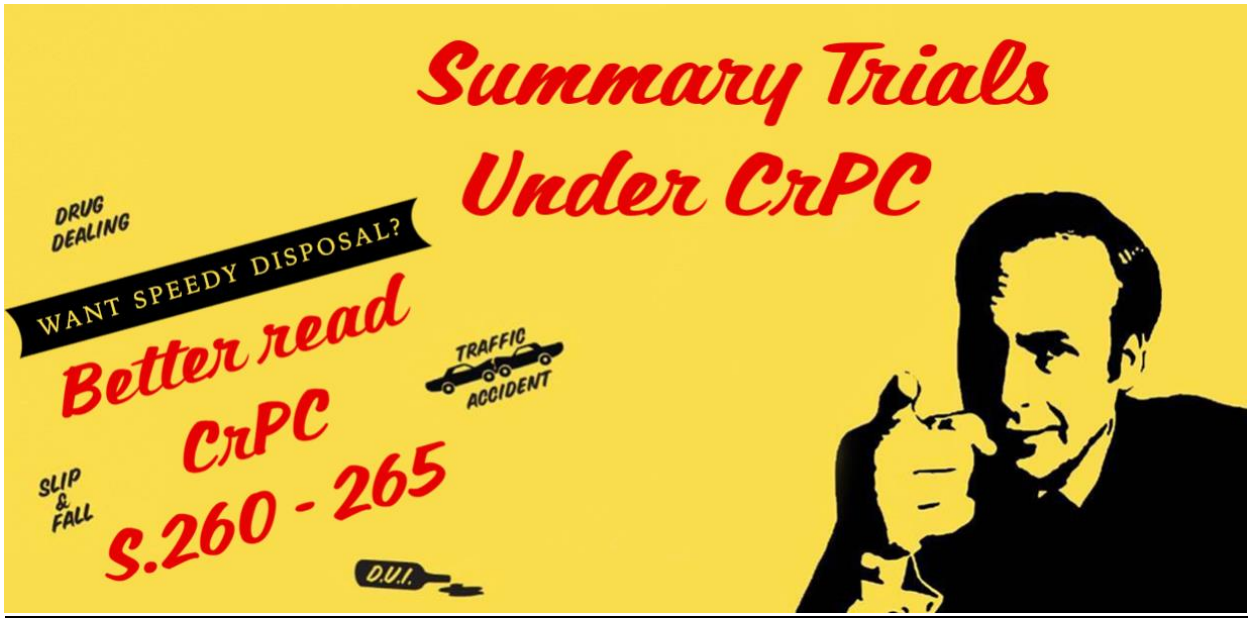
While issuing proclamation, the Magistrate must record to his satisfaction that the accused has

absconded or is concealing himself. The object of attaching property is not to punish him but to compel his appearance.

INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

INFORMATION IN COGNIZABLE CASES	**INFORMATION IN NON- COGNIZABLE CASES**
Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him. Every such information shall be signed by the person giving it and the substance thereof shall be entered in a book kept by such officer in such form as may be prescribed by the State Government in this behalf. The above information given to a police officer and reduced to writing is known as First Information Report (FIR). In case of a cognizable offence the police officer may conduct investigations without the order of a Magistrate. Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information may send the substance of such information in writing to the Superintendent of Police concerned who if satisfied that such information discloses the commission of a cognizable offence shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him.	When information is given to an officer in-charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf and refer the informant to the Magistrate. The police officer is not authorised to investigate a non-cognizable case without the order of Magistrate. Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non- cognizable.

SUMMARY TRIALS



Summary trial means the "speedy disposal" of cases.

Summary cases apply to such offences not punishable with death, imprisonment for life or imprisonment for a term exceeding two years;

Summary trial can be only conducted by:-

(a) Any Chief Judicial Magistrate;

(b) Any Metropolitan Magistrate;

(c) Any Magistrate of the First class who is specially empowered in this behalf by the High Court,

Section 262 states that no sentence of imprisonment for a term exceeding 3 months shall be passed in any conviction in summary trials.

Summary trials can be conducted only in respect of those offences in which the value of property does not exceed RS 200.

SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

The provisions of Chapter VIII are aimed at persons who are a danger to the public by reason of the commission of certain offences by them. The object of this chapter is prevention of crimes and disturbances of public tranquillity and breach of the peace.

Security for keeping the peace on conviction

When a Court of Session or Court of a Magistrate of first class convicts a person of any of the offences specified in sub-section (2) or of abetting any such offence and is of opinion that it is

necessary to take security from such person for keeping the peace, the Court may, at the time of passing sentence on such person, order him to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding three years, as it thinks fit.

The offences specified under sub-section (2) are as follows:

1) Any offence punishable under Chapter VIII of the India Penal Code I860.
2) Any offence which consists of or includes, assault or using criminal force or committing mischief;
3) Any offence of criminal intimidation;
4) Any other offence which caused, or was intended or known to be likely to cause a breach of the peace.

SECURITY FOR KEEPING THE PEACE IN OTHER CASES

When an Executive Magistrate receives information that any person is likely to:

- Commit a breach of peace; or

- Disturb the public tranquility; or

Does any wrongful act that may probably occasion a breach of the peace; or disturb the public tranquility he may require such person to show cause why he should not be ordered to execute a bond for keeping the peace for a period not exceeding one year as the Magistrate deem fit. (Section 107)

MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

UNLAWFUL ASSEMBLIES

Dispersal of assembly by use of civil force

Any Executive Magistrate or office in-charge of a police station or, in the absence of such officer in-charge, any other officer not below the rank of sub-inspector may command any unlawful assembly or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse and it shall be thereupon the duty of the members of such assembly to disperse accordingly.

Use of armed forces to disperse assembly

If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Executive Magistrate of the highest rank who is present may cause it to be dispersed by the armed forces and to arrest and confine such persons in order to disperse the assembly or to have them punished.

PUBLIC NUISANCES

Section 133 lays down the following public nuisances, which can be proceeded against:

a) The unlawful obstruction or nuisance should be removed from any public place or from

any way, river or channel which is or may be lawfully used by the public; or

b) Carrying on any trade or occupation, or keeping of any goods or merchandise, injurious to the health of the community; or
c) The construction of any building or the disposal of any substance, as is likely to cause conflagration or explosion; etc.
d) The building, tent or structure near a public place.
e) The dangerous animal requiring destroying, confining or disposal

PREVENTIVE ACTION OF THE POLICE AND THEIR POWERS TO INVESTIGATE

Section 149 authorises a police officer to prevent the commission of any cognizable offence. If the police officer receives the information of a desire to commit such an offence, he can communicate such information to his superior police officer and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence.

The police officer may arrest the person without orders from Magistrate and without a warrant if the commission of such offence cannot be otherwise prevented. The arrested person can be detained in custody only for 24 hours unless his further detention is required under any other provisions of this Code or of any other law. (Sections 150 and 151) Section 152 authorises a police officer to prevent injury to public property.

LIMITATION FOR TAKING COGNIZANCE OF CERTAIN OFFENCES

In general, there is no limitation of time in filling complaints under the Code. But delay may hurdle the investigation. Further, the Indian Limitation Act provides the period of limitation for appeal and revision applications. Therefore, chapter XXXVI has been introduced in the Code prescribing limitation period for taking cognizance of certain offences. (Sections 467 to 473) Except as otherwise specifically provided in the Code, no Court shall take cognizance of an offence after the expiry of the period of limitation mentioned below:

a) Six months, if the offence is punishable with fine only.
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 exceeding one year but not exceeding three years.

11 INDIAN EVIDENCE ACT, 1872

INTRODUCTION

Evidences are important part of the legal system.

Indian Evidence Act, 1872 contains the general rules of evidence, which are applicable both in civil as well as in criminal matters

Indian Evidence Act is applicable in whole of India except the state of Jammu & Kashmir. Section 3 of the Act recognizes the two categories of evidence i.e., oral evidence and documentary (written) evidence.

Oral evidence means and includes all statements which the Court permits or required to be made before it by witnesses, in relation to matters of fact under enquiry.

Documentary evidence means and includes all documents produced for the inspection of the Court.

Affidavit: It is the written statement given by a person on oath. It mentions an allegation or fact. An affidavit can be treated as evidence only if the party so desired. In civil laws affidavits are normally accepted as evidences.

Fact: A fact is defined u/s. 3 it means and includes:

- State of things.
- The relation of things with each other.
- Mental condition of a person.

Relevant facts are those which help in proving the fact in issue. E.g. A murders B. In this case following are the fact in issue:

- Was he murdered?
- Did A murdered B?

For the purpose of evidence, facts are divided into the following two categories:

- **Fact in Issue:** The facts which are constituent of a litigated right, liability, or disability are called facts in issue.
- **Relevant Fact:** In order to prove the existence or non-existence of facts in issue, certain other interconnected fact may be given in evidence. They are called relevant facts.

SEC. 3- LEGAL RELEVANCY VS. LOGICAL RELEVANCY OF FACT

Every fact must be legally relevant mere logical relevancy is not enough. Relevancy must be such as can be legally proved. In a fact is logically relevant it does not mean that it is legally relevant also.
Normally a legally relevant fact is logical fact. So, a legal relevancy is a under term than a logical relevancy.

Legal Relevancy and Admissibility of Fact

- Every fact, if it is legally relevant may or may not be admissible. Every fact must be admissible only after that it can be accepted as an evidence.

- Every fact in issue may not be issue of fact while every issue of fact itself is fact in issue. Fact in issue is the subject matter of case. Further, issues of fact is a language used in C.P.C. while fact in issue is a language used in an Indian Evidence Act.

RELEVANT FACT

Relevant facts are those mentioned under section 6 to section 55 these are as follows:

- Sec. 6 to sec. 16: these are facts connected with the facts to be proved.

- Sec. 17 to sec.31: these are confession and admission.

- Sec. 32, 33: person who cannot be called as evidences, (dying declarations)

- Sec. 34 to sec.38: statement made under special circumstances.

- Sec.39: part of the statement to be proved.

- Sec. 40 to sec.44: judgement of court relevant for case.

- Sec. 45 to sec.51: 3rd party opinions.

- Sec. 52 to sec.55: characters of parties and accused in cases.

Relevancy of Facts Forming Part of the same Transaction [Section 6]
Section 6 lays down the requirement that the inter-connection between facts in issue and other connected facts must be such that they form part of the same transaction. A transaction may be defined as a group of facts so connected together so as to referred to by a single legal name as a crime or a contract or a wrong or any other subject of enquiry which may be in issue.

- **Case Law- Rattan v Queen**

  In Rattan v Queen, a man was prosecuted for murder of his wife. His defence was that the bullet went off accidentally. There was evidence to the extent that the deceased, before her death, telephoned to telephone operator and said "get the police please". Before the operator could have connected the call to the police, the lady had given the address and the call suddenly ended. Thereafter the police, the lady had given the address and the call suddenly ended. Thereafter the police came to the house and found the dead body of the lady. Her call and the words she had spoken to the telephone operator were held to be relevant as the part of the same transaction.

SEC. 6. FACTS CONNECTED WITH THE FACT IN ISSUE (RES GESTE). MEANING OF RES GESTAE

The term Res Gestae means surrounding or accompanying circumstances which are inseparable from the fact in issue and are necessary to explain the nature of the main act.

They include acts or declaration accompanying or explaining the transaction or fact in issue. The area of events covered by Res Gestae depends upon circumstances of each case.

There are the facts which are connected with the fact in issue.
E.g. A stabbed B and B died. After which B said something to C. Whatever was said by B to C is Res Gestae.

E.g. During an aggression, certain students burnt a bus. Burning of bus is a relevant factor. So, Res Gestae is a relevant fact as it is connected with the fact in issue which is required to be proved.

SECTION 8- MOTIVE, PREPARATION AND CONDUCT

Every crime can be divided into the following three stages i.e., Motive, Preparation and Conduct.

- **Motive:** It is the moving power which impels one to do an act. It is the inducement for doing an act. Motive by itself is no crime. But once a crime has been committed, the evidence of motive becomes important.

- **Case Law- Tara Devi v State of U.P**

  In Tara Devi v State of U.P., it was held that motive of a woman to get rid of her husband was not enough to convict particularly when her paramour was acquitted.

- **Preparation:** Preparation means the means and measures necessary for the commission of any offence.

- **Conduct:** Conduct means attempt to commit the crime and actual commission of the crime.

- **Previous Conduct of Parties**

  Behaviour of parties before committing an offence is a relevant fact.

E.g. A demanded extortion money from B and B refused to pay after which B was killed by A. In this demanding of money is a previous conduct of parties and it is relevant fact.

Subsequent Conduct of Parties It is also a relevant in proving a fact in issue.

E.g. A committed a bank robbery after which he spends money luxuriously in the market. Spending of money is the subsequent conduct of parties.

Facts Establishing the Identity of a Person are also Relevant If a fact establishes the identity of a person then it is also relevant. Any fact establishing the relation of two person is also relevant.

SECTION 11- INCONSISTENT FACT

Section 11 provides that the fact which ordinarily have nothing to do with the fact of the case, become relevant because of the reasons that they are inconsistent with the fact in issue.

Question: CS: Satyan is facing Trial for the charge of committing murder of Raja at Pune at 5.00 P.M. on 5lh November 1999. Satyan wants to prove that he had a telephonic conversation with Nalin form Delhi on, 5th November, 1999 at about 3.3. P.M. will he be permitted to do so?

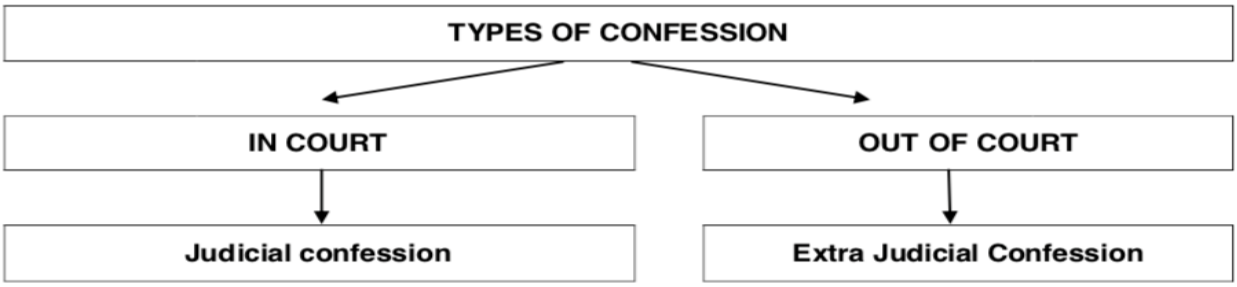
Answer: Yes. According to Section 11 of the Indian Evidence Act, 1872, even facts not normally relevant to the fact in question become relevant in certain situations. When the facts indicate something opposing, what is indicated by the fact in issue, then they need to clarify the probability or otherwise of the fact in issue, either singly or in conjunction with other facts. In this case, Satyan is under trial for the murder of Raja of Pune. Satyam wants to prove that on the on the same date, although not at the same time, he had a telephonic conversation with Nalin from Delhi. Under the above-mentioned Section, he is permitted to do so.

STATEMENT ABOUT THE FACTS TO BE PROVED E.G. ADMISSION, CONFESSION (SECT1ONS 17 TO 31)

SECTION 17- ADMISSIONS

Admission is a statement given by a person admitting a fact which suggests as to the existence of his liability. An admission is the best evidence against the person making it. It is based on the principle that what a party himself admits to be true may be reasonably presumed to be true so that until the presumption is rebutted the fact admitted must be taken to be true.
E.g. A undertakes to collect rent for B. B sues A for not collecting rent due from C to B. A denies that rent was due from C to B. a statement by C that he owed rent to B is an admission and is a relevant fact as against A, if A denies that C did owes rent to B.

CONFESSION



Confession is a special form of admission. The main points of difference between them are:-

ADMISSIONS	CONFESSIONS
Admission can be either in civil or criminal proceedings.	Confessions can only be in criminal proceedings.
Admission need not to be voluntary always.	Confession need to be voluntary always.
Admission can be made by anybody	Admission can be made only by accused.
Admission can't bind co-accused	Confession can bind co-accused
Every admission may not amount to a confession	Every confession must be an admission

The word confession is not defined in the Indian Evidence Act. 1872. Hence, the definition of admission given in sec 17 is also applicable to confession. Thus, confession is a statement given by an accused admitting his guilt. If confession is made to court, it is called judicial confession and if the confession is made to any person outside the court it is called Extra Judicial Confession.

SECTION 24- IMPORTANT PROVISIONS RELATING TO CONFESSION

Confession must be free and on voluntary basis

SECTION 25 CONFESSION MUST NOT BE CAUSED BY INDUCEMENT, THREAT OR PROMISE.

Confession made to police officer will be irrelevant and inadmissible

SECTION 26

Confession made to a police officer in the immediate presence of magistrate is admissible.

SECTION 27

A statement in the form of confession to a police officer will be admissible provided that the statement leads to the discovery of a fact connected with a crime.

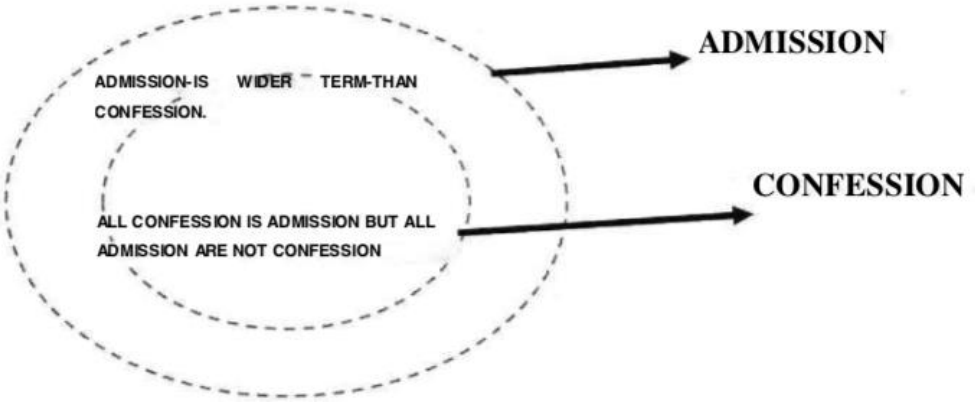
E.g. A confesses to police that he has murdered B with a revolver and that the revolver is with C. the police recovered the revolver from C. Thus, in such a case sec 27 will be applicable.

SECTION 30

When a statement in the form of a confession is given by co-accused then such statement may be used against another co-accused,

e.g., A and B together murdered C. There is allegation on them and B confesses before a judge that he has murdered C along with A. This is a statement by co-accused and thus can be used against another co-accused i.e. A.

DIAGRAMATIC REPRESENTATION OF DIFFERENCE B/W ADMISSION AND CONFESSION



STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES

Certain statements made by persons who are dead or cannot be found or produced without unreasonable delay or expense, makes the second exception to the general rule. However, the following conditions must be fulfilled for the relevancy of the statements:

a. That the statement must relate to a fact in issue or relevant fact (b) That the statement must fall under any of following categories:

- the statement is made by a person as to the cause of this death or as to any of the circumstances resulting in his death;
- statement made in the course of business;
- Statement which is against the interest of the maker
- a statement giving the opinion as to the public right or custom or matters of general interest;
- a statement made before the commencement of the controversy as to the relationship of persons, alive or dead, if the maker of the statement has special means of knowledge on the subject;
- a statement made before the commencement of the controversy as to the relationship of persons deceased, made in any will or deed relating to family affairs to which any such deceased person belongs;
- a statement in any will, deed or other document relating to any transaction by which a right or custom was created, claimed, modified, etc.;
- a statement made by a number of persons expressing their feelings or impression;

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES

The following statements become relevant on account of their having been made under special circumstances:

- Entries made in books of account, including those maintained in an electronic form regularly kept in the course of business. Such entries, though relevant, cannot, alone, be sufficient to charge a person with liability; (Section 34)
- Entries made in public or official records or an electronic record made by a public servant in the discharge of his official duties, or by any other person in performance of a duty specially enjoined by the law; (Section 35)
- Statements made in published maps or charts generally offered for the public sale, or in maps or plans made under the authority of the Central Government or any State government; (Section 36)

- Statement as to fact of public nature contained in certain Acts or notification; (Section 37)
- Statement as to any foreign law contained in books purporting to be printed or published by the Government of the foreign country, or in reports of decisions of that country. (Section 38)

OPINION OF THIRD PERSONS WHEN RELEVANT

The general rule is that opinion of a witness on a question whether of fact or law, is irrelevant. However, there are some exceptions to this general rule. These are: -

a. Opinions of experts- when the court has to form an opinion upon a point of foreign law or of science or art, or as to identify handwriting or finger impression, the opinions upon that point of persons especially skilled in such are relevant.

b. Opinion as to the handwriting of a person if the person giving the opinion is acquainted with the handwriting of the person in question;

c. Opinion as to the digital signature of any person, the opinion of the Certifying Authority which has issued the Digital Signature Certificate;

d. When it is the ques. Of relationship between two persons the opinion of someone who knows the facts about it would be relevant

HEARSAY EVIDENCE

Section 59 of the Indian Evidence Act provides that except the contents of document, all other facts must be proved by oral evidence.

Section 60 further provides that oral evidence must be direct and it should not be indirect or hearsay. Thus, it can be stated that in all cases, the evidence has to be that of a person who himself witnessed the happening of a fact. Such a witness is called "eye witness".

Therefore, it is normally said, "hearsay evidence is no evidence." However, there are certain exceptions to the aforesaid rule that hearsay evidence is no evidence. They are as under: -

1. RES GESTAE- as per this provision, statement of person may be proved through another person who appears as a witness, if the statement is a part of a transaction in issue.

2. ADMISSION AND CONFESSION

3. DYING DECLARATION - As per section 32, statements are proved through testimony of the witness to whom such statement has been made. But where a person making a declaration survives, then the statement made by him can't be used as dying declaration.

The evidence given by witness in a judicial proceeding can be used as evidence in subsequent proceedings.

SECTION 115- ESTOPPEL

When one person has by his declaration act or caused an admission or permitted another person to believe a thing to be true to act upon such belief neither he nor his representative shall be allowed in any suit or proceedings between himself and such person or his representative to deny the truth of that thing.

e.g. A intentionally and falsely led B to believe that certain land belongs to him and thereby induces B to buy and pay for it. The land afterwards becomes the property of A and A set aside the sale on the ground that at the time of sale he had no title he must not be allowed to prove his want of title the fact constituting the estoppels will be relevant and admissible.

DIFFERENT KINDS OF ESTOPPEL

- Estoppel by attestation
- Estoppel by contract
- Estoppel by election
- Constructive Estoppel
- Equitable Estoppel
- Estoppel by negligence
- Estoppel by silence

CASE LAWS

S.NO.	CASE NAME	PROVISIONS
1	Sorat Chunder v. Gopal Chunder	The doctrine of estoppel is based on the principle that it would be most inequitable and unjust that if one person, by a representation made, or by conduct amounting to a representation, has induced another to act as he would not otherwise have done, the person who made the representation should not be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it

2	Mohori Bibee v. Dharmodas Ghosh	The rule of estoppel does not apply where the statement is made to a person who knows the real facts represented and is not accordingly misled by it. The principle is that in such a case the conduct of the person seeking to invoke rule of estoppel is in no sense the effect of the representation made to him. The main determining element is not the effect of his representation or conduct as having induced another to act on the faith of such representation or conduct.
3	Biju Patnaik	One private university permitted to conduct special examination of students prosecuting studies under one-time approval policy. After
4	University of Tech. Orissa v. Sairam College	inspection, 67 students were permitted to appear in the examination and their results declared. However, university declined to issue degree certificates to the students on the ground that they had to appear for further examination for another condensed course as per syllabus of university. It was held that once students appeared in an examination and their results declared, the university is estopped from taking decision withholding degree certificate after declaration of results.

FACTS OF WHICH EVIDENCE CANNOT BE GIVEN

There are some facts of which evidence cannot be given though they are relevant facts. They are classified as privileged communications. The privileges are enumerated below: -

1. **Privileges of judges and magistrate**

   No judge or magistrate shall except upon the special order of some court to which he is subordinate be compelled to answer any question as to his own conduct in court as judge or magistrate

2. **Communication during marriage**

   Section 122 prevents communication between husband and wife from being disclosed. Thus, a wife or husband can't be permitted to disclose what her husband or his wife respectively has stated with regards to the matters in issue, such communication remains protected after the divorce. However, communication made before the marriage or after the divorce are not protected.

3. **Official communication**

   No public officer shall be compelled to disclose communications made to him in official confidence when he considers that public interest would suffer from such disclosures.

4. **Professional communication**

Communications made by a client to his advocate for the purpose of his professional work are not permitted to be disclosed.

5. **As to affairs of state**

No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of state. Except with the permission of the officer who is the head of the department concerned.

WHO CAN BE A WITNESS?

Every person is a competent witness I he/she-

a. Understand the questions posed to him.

b. Can give logical and rational answer to those questions.

EVIDENCE IN RESPECT OF CERTAIN DOCUMENTS

As per Section 93 of the Indian Evidence Act, 1872 when the language used in the document is, on its face, defective or ambiguous, evidence may not be given of facts which would show its meaning or supply its defects.

For ex. Amar agrees in writing to sell a horse to Bijoy for Rs. 2,000 or Rs. 3,000. Evidence cannot be given to show which price was to be given?

SEC. 97 provides that where language of a document applies partly to one sets of facts or partly to another sets of facts, but doesn't apply accurately to either sets of facts, then evidence can be given to show to which fact the document intended to apply

For ex. A agree to sell to my land at Delhi in possession of y. A has land at Delhi but not in the possession of y, and he has land in possession of y but it is situated at Mumbai. Evidence may be given of facts showing which land he meant to sell.

PROVISIONS OF EVIDENCE RELATING TO ELECTRONIC RECORDS

Section 65A of the Indian Evidence Act, 1872 provides that the contents of electronic records may be proved in accordance with the provisions of Section 65B

UNDER Section 65B any information contained an electronic record which is printed on paper, stored, recorded or copied in optical or magnetic media produced by computer shall be deemed to be a document

For ex. Babloo borrowed Rs. 5,000 from Shambhu, which was recorded on a printed paper and stored in computer as the computer output. After some time, Shambhu demanded money from Babloo, which the latter refused to pay. Shambhu filed a suit for recovery of money from Babloo

on the basis of computer records. The Court will treat it as sufficient proof for granting relief of Shambhu against Babloo.

ORAL, DOCUMENTARY AND CIRCUMSTANTIAL EVIDENCE

As discussed above, all facts (except two Sections 56 and 58) which are neither admitted nor are subject to judicial notice must be proved. The Act divides the subject of proof into two parts: (i) proof of facts other than the contents of documents; (ii) proof of documents including proof of execution of documents and proof of existence, condition and contents of documents.

However, all facts except contents of documents or electronic records may be proved by oral evidence (Section 59) which must in all cases be "direct" (Section 60). The direct evidence means the evidence of the person who perceived the fact to which he deposes.

Thus, the two broad rules regarding oral evidence are:

i. all facts except the contents of documents may be proved by oral evidence;

ii. oral evidence must in all cases be "direct".

Oral evidence means statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry. But if a witness is unable to speak, he may give his evidence in any manner in which he can make it intelligible as by writing or by signs. (Section 119)

DIRECT EVIDENCE

In Section 60 of the Evidence Act, expression "oral evidence" has an altogether different meaning. It is used in the sense of "original evidence" as distinguished from "hearsay" evidence and it is not used in contradiction to "circumstantial" or "presumptive evidence". According to Section 60 oral evidence must in all cases whatever, be direct; that is to say:

- if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

- if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

- if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; The evidence of a witness who says he perceived it by that sense or in that manner;

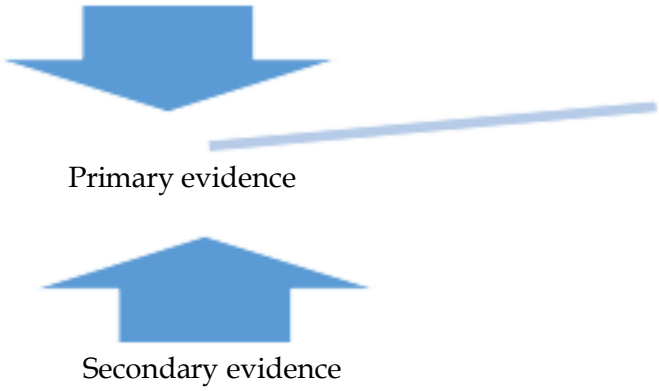
- if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

Thus, if the fact to be proved is one that could be seen, the person who saw the fact must appear in the Court to depose it, and if the fact to be proved is one that could be heard, the person who heard it must appear in the Court to depose before it and so on. In defining the direct evidence in Section 60, the Act impliedly enacts what is called the rule against hearsay. Since the evidence

as to a fact which could be seen, by a person who did not see it, is not direct but hearsay and so is the evidence as to a statement, by a person who did hear it.

DOCUMENTARY EVIDENCE

A "document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used for the purpose of recording that matter. Documents produced for the inspection of the Court is called Documentary Evidence. Section 60 provides that the contents of a document must be proved either by primary or by secondary evidence.



PRIMARY EVIDENCE

"Primary evidence" means the document itself produced for the inspection of the Court (Section 62). The rule that the best evidence must be given of which the nature of the case permits has often been regarded as expressing the great fundamental principles upon which the law of evidence depends. The general rule requiring primary evidence of producing documents is commonly said to be based on the best evidence principle and to be supported by the so-called presumption that if inferior evidence is produced where better might be given, the latter would tell against the withholder.

SECONDARY EVIDENCE

Secondary evidence is generally in the form of compared copies, certified copies or copies made by such mechanical processes as in themselves ensure accuracy. Section 63 defines the kind of secondary evidence permitted by the Act. According to Section 63, "secondary evidence" means and includes.

1. certified copies given under the provisions hereafter contained;
2. copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;
3. copies made from or compared with the original;
4. counterparts of documents as against the parties who did not execute them;

5. oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations

a. A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

b. A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter if it is shown that the copy made by the copying machine was made from the original.

Section 65 stipulates the cases in which secondary evidence relating to documents may be given. As already stated, documents must be proved by primary evidence but in certain cases for example, where the document is lost or destroyed or the original is of such a nature as not to be easily, movable, or consists of numerous documents, or is a public document or under some law by a certified copy, the existence, condition or contents of the document may be proved by secondary evidence.

CIRCUMSTANTIAL EVIDENCE

In English law the expression direct evidence is used to signify evidence relating to the 'fact in issue' (factum probandum) whereas the terms circumstantial evidence, presumptive evidence and indirect evidence are used to signify evidence which relates only to "relevant fact" (facta probandum). However, under Section 60 of the Evidence Act, the expression "direct evidence" has altogether a different meaning and it is not intended to exclude circumstantial evidence of things which could be seen, heard or felt. Thus, evidence whether direct or circumstantial under English law is "direct" evidence under Section 60. Before acting on circumstances put forward are satisfactorily proved and whether the proved circumstances are sufficient to bring the guilt to the accused the Court should not view in isolation the circumstantial evidence but it must take an overall view of the matter.

PRESUMPTIONS

The Act recognizes some rules as to presumptions. Rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and coincidence of facts and circumstances. A presumption is not in itself an evidence but only makes a prima facie case for the party in whose favour it exists. A presumption is a rule of law that courts or juries shall or may draw a particular inference from a particular fact or from particular evidence unless and until the truth of such inference is disproved. There are three categories of presumptions:

- presumptions of law, which is a rule of law that a particular inference shall be drawn by a court from particular circumstances.

- presumptions of fact, it is a rule of law that a fact otherwise doubtful may be inferred from a fact which is proved.

- mixed presumptions, they consider mainly certain inferences between the presumptions of law and presumptions of fact.

The terms presumption of law and presumption of fact are not defined by the Act. Section 4 only refers to the terms "conclusive proof", "shall presume" and "may presume". The term "conclusive proof" specifies those presumptions which in English Law are called irrebuttable presumptions of law; the term "shall presume" indicates rebuttable presumptions of law; the term "may presume" indicates presumptions of fact. When we see a man knocked down by a speeding car and a few yards away, there is a car going, there is a presumption of fact that the car has knocked down the man.

12 SPECIAL COURTS, TRIBUNAL UNDER COMPANIES ACT AND OTHER LEGISLATIONS

INTRODUCTION

The term 'Tribunal' is derived from the word 'Tribunes', which means 'Magistrates of the Classical Roman Republic'. 'Tribunal' is an administrative body established for the purpose of discharging quasi-judicial duties. An Administrative Tribunal is neither a Court nor an executive body. It stands somewhere midway between a Court and an administrative body. The exigencies of the situation proclaiming the enforcement of new rights in the wake of escalating State activities and furtherance of the demands of justice have led to the establishment of Tribunals.

The difference between a Court and a Tribunal is the manner of deciding a dispute.

To overcome the situation that arose due to the pendency of cases in various Courts, domestic tribunals and other Tribunals have been established under different Statutes, hereinafter referred to as the Tribunals. A 'tribunal' in the legal perspective is different from a domestic tribunal. The 'domestic tribunal' refers to the administrative agencies designed to regulate the professional conduct and to enforce disciple among the members by exercising investigatory and adjudicatory powers. Whereas, Tribunals are the quasi-judicial bodies established to adjudicate disputes related to specified matters which exercise the jurisdiction according to the Statute establishing them. The Tribunal has to exercise its powers in a judicious manner by observing the principles of natural justice or in accordance with the statutory provisions under which the Tribunal is established. There may be a lis between the contending parties before a statutory authority, which has to act judiciously to determine the same. There may not be a lis between the contending parties, the tribunal/authority may have to determine the rights and liabilities of the subject. In both the situations, it will be known as a quasi-judicial function. The word 'quasi' means 'not exactly'. (Law Commission of India Report 272)

NCLT AND NCLAT

The Ministry of Corporate Affairs has issued notification for constitution of the National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) with effect from today i.e. 1st June, 2016. Company Law Board (CLB) stands dissolved w.e.f. 1st June, 2016.

Benches of NCLT

NCLT can be considered as biggest Tribunal till date. Because NCLT will CONSOLIDATE the corporate jurisdiction of the followings:

- Company Law Board/ BIFR/AAIFR
- Jurisdiction and powers relating to winding up restructuring and other such provisions, vested in the High courts

Advantages of NCLT & NCLAT

- It shall avoid multiplicity of litigation before various Forums (High Courts, CLB, BIFR. AAIFR).
- There shall be at least 11 benches of the NCLT, thereby providing justice almost at one's doorstep.
- This tribunal shall comprise of technical experts who will provide more concrete and precise decision.
- There will be mixture of judicial and equitable jurisdiction while deciding matters.
- There shall be reduction in period of winding up from 20-25 years to 2 years.

SOME MAJOR CHANGES AFTER CONSTITUTION OF NCLT/NCLAT

Winding up

The National Company Law Tribunal has also been empowered to pass an order for winding up of a company. Therefore Practicing Company Secretaries may represent the winding up case before the Tribunal.

Compromise and Arrangement

With the establishment of NCLT, a whole new area of practice will open up for Company Secretary in Practice with respect to advising and assisting corporate sector on merger, amalgamation, demerger, reverse merger, compromise and other arrangements right from the conceptual to implementation level. Company Secretaries in practice will be able to render services in preparing schemes, appearing before NCLT/NCLAT for approval of schemes and post-merger formalities

CONSTITUTION OF (NCLT) SECTION 408

The Central Government shall, by notification, constitute, with effect from (1 JUNE 2016) a Tribunal to be known as the National Company Law Tribunal consisting of a President and such number of Judicial and Technical members, as the Central Government may deem necessary, to be appointed by it by notification, to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force.

SECTION 410- CONSTITUTION OF APPELLATE TRIBUNAL

The Central Government shall, by notification, constitute, with effect from such date (1 JUNE 2016) an Appellate Tribunal to be known as the National Company Law Appellate Tribunal consisting of a chairperson and such number of Judicial and Technical Members, not exceeding eleven, as the Central Government may deem fit, to be appointed by it by notification, for hearing appeals against the orders of the Tribunal.

Qualification: (Chairman/Member of NCLAT) SECTION 411

National Company Law Appellate Tribunal, constituting of a Chairperson and not exceeding eleven members for hearing appeals against the orders of the Tribunal.

S.No.	Chairman	Judicial Member	Technical Member
1	Is/has been Judge of Supreme Court	Is/has been Judge of High Court	Person with proven ability, integrity and standing having special knowledge and experience > 25 years in industrial finance, industrial management, industrial reconstruction, investment and accountancy
2	Is/has been Chief Justice of High Court	Is a Judicial Member of Tribunal for at least 5 years	

SECTION 413- TERM OF OFFICE OF PRESIDENT, CHAIRPERSON AND OTHER MEMBERS

Term of President and other Members of NCLT

The President and every other Member of the Tribunal shall hold office as such for a term of five years AND shall be eligible for re- appointment for another term of five years.

Time of vacation of office

a. In the case of the President, the age of **sixty-seven years**

b. In the case of any other Member, the age of **sixty-five years**

Provided that a person who has not completed fifty years of age shall not be eligible for appointment as Member:

Term of Chairperson and other members NCLAT

The chairperson or a Member of the Appellate Tribunal shall hold office as such for a term of **five years** AND shall be eligible for re- appointment for another term of **five years.**

Time of vacation of office

a. In the case of the Chairperson, the age of **seventy years;**

b. In the case of any other Member, the age of **sixty-seven years**

Provided that a person who has not completed fifty years of age shall not be eligible for appointment as Member.

SECTION 419- BENCHES OF TRIBUNAL

1. There shall be constituted such number of Benches of the Tribunal, as may, by notification, be specified by the Central Government.

2. The Principal Bench of the Tribunal shall be at New Delhi which shall be presided over by the President of the Tribunal.

3. The powers of the Tribunal shall be exercisable by Benches consisting of two Members out of whom one shall be a Judicial Member and the other shall be a Technical Member.

4. The Central Government shall, by notification, establish such number of benches of the Tribunal, as it may consider necessary, to exercise the jurisdiction, powers and authority of the Adjudicating Authority conferred on such Tribunal by or under Part II of the Insolvency and Bankruptcy Code, 2016.

SECTION 420- ORDERS OF TRIBUNAL

1. The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit.

2. The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties

   Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

3. The Tribunal shall send a copy of every order passed under this section to all the parties concerned.

SECTION 421- APPEAL FROM ORDERS OF TRIBUNAL

1. Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal.

2. No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.

3. Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed:

   Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

4. On the receipt of an appeal under sub-section (1), the Appellate Tribunal shall, after giving the parties to the appeal a reasonable opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

5. The Appellate Tribunal shall send a copy of every order made by it to the Tribunal and the parties to appeal.

SECTION 422- EXPEDITIOUS DISPOSAL BY TRIBUNAL AND APPELLATE TRIBUNAL

1. Every application or petition presented before the Tribunal and every appeal filed before the Appellate Tribunal shall be dealt with and disposed of by it as expeditiously as possible and every endeavor shall be made by the Tribunal or the Appellate Tribunal, as the case may be, for the disposal of such application or petition or appeal within three months from the date of its presentation before the Tribunal or the filing of the appeal before the Appellate Tribunal.

2. Where any application or petition or appeal is not disposed of within the period specified in sub-section (1), the Tribunal or, as the case may be, the Appellate Tribunal, shall record the reasons for not disposing of the application or petition or the appeal, as the case may be, within the period so specified; and the President or the Chairperson, as the case may be, may, after taking into account the reasons so recorded, extend the period referred to in sub-section (1) by such period not exceeding ninety days as he may consider necessary.

SECTION 423- APPEAL TO SUPREME COURT

Any person aggrieved by any order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of receipt of the order of the Appellate Tribunal to him on any question of law arising out of such order:

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

SECTION 424- PROCEDURE BEFORE TRIBUNAL AND APPELLATE TRIBUNAL

The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice or of the Insolvency and Bankruptcy Code, 2016, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.

The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act or under the Insolvency and Bankruptcy Code, 2016, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely

- Summoning and enforcing the attendance of any person and examining him on oath
- Requiring the discovery and production of documents; (c) receiving evidence on affidavits
- Subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office
- issuing commissions for the examination of witnesses or documents; (f) dismissing a representation for default or deciding it ex parte
- Setting aside any order of dismissal of any representation for default or any order passed by it ex parte
- Any other matter which may be prescribed

  Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein

SECTION 425- POWER TO PUNISH FOR CONTEMPT

The Tribunal and the Appellate Tribunal shall have the same jurisdiction, powers and authority in respect of contempt of themselves as the High Court has and may exercise, for this purpose, the powers under the provisions of the Contempt of Courts Act, 1971, which shall have the effect subject to modifications that—

a. The reference therein to a High Court shall be construed as including a reference to the Tribunal and the Appellate Tribunal; and

b. The reference to Advocate-General in section 15 of the said Act shall be construed as a reference to such Law Officers as the Central Government may, specify in this behalf.

SECTION 432- RIGHT TO LEGAL REPRESENTATION

A party to any proceeding or appeal before the Tribunal or the Appellate Tribunal, as the case may be, may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any other person to present his case before the Tribunal or the Appellate Tribunal, as the case may be.

SECTION 433- LIMITATION

The provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be.

SPECIAL POINTS IN CASE OF COMPOUNDING

- An offence punishable with imprisonment only or with imprisonment and fine is not compoundable under this section.
  The section empowers the NCLT to compound offences without any limit or where a maximum amount of fine which may be imposed by an offence does not exceed Rs. 5, 00,000 it may be compounded by the Regional Director.

- Any offence covered under this section by any company or its officer shall not be compounded if the investigation against such company has been initiated or is pending under this Act.

- The offences committed by a company or its officer within a period of three years from the date on which the similar offence was committed by it or him was compounded under this section, are not compoundable.

- Every application for the compounding of an offence shall be made to the Registrar of Companies who shall forward the same, together with its comments thereon, to the Company Law Board or the Regional Director, as the case may be. Where any offence is compounded under this section, whether before or after the institution of any prosecution, an intimation thereof shall be given by the Company, to the Registrar of Companies, within 7 days from the date on which the offence is so compounded.

- Where any offence is compounded before the institution of any prosecution, no prosecution shall be instituted in relation to such offence, either by the Registrar or by any shareholder of the company or by any person authorised by the Central Government against the offender in relation to whom the offence is so compounded.

- Where the compounding of any offence is made after the institution of any prosecution, such compounding shall be brought by the Registrar in writing, to the notice of the court in which the prosecution is pending and on such notice of the compounding of the offence being given, the company or its officer in relation to whom the offence is so compounded shall be discharged.

- Any offence which is punishable under this Act, with imprisonment or fine, or with imprisonment or fine or with both, shall be compoundable with the permission of the Special Court, in accordance with the procedure laid down in that Act for compounding of offences;

- Any offence which is punishable under this Act with imprisonment only or with imprisonment and also with fine shall not be compoundable.

PROCEDURE FOR FILING OF APPLICATION IN FRONT OF NCLT

1. Every appeal or petition or application or caveat petition or objection or counter presented to the Tribunal shall be in English and in case it is in some other Indian language, it shall be accompanied by a copy translated in English and shall be fairly and legibly type written, lithographed or printed in double spacing on one side of standard petition paper with an inner margin of about four centimeter width on top and with a right margin of 2.5. cm, and left margin of 5 cm, duly paginated, indexed and stitched together in paper book form;

2. The cause title shall state "Before the National Company Law Tribunal" and shall specify the Bench to which it is presented and also set out the proceedings or order of the authority against which it is preferred.

3. Appeal or petition or application or counter or objections shall be divided into paragraphs and shall be numbered consecutively and each paragraph shall contain as nearly as may be, a separate fact or allegation or point.

4. Where Saka or other dates are used, corresponding dates of Gregorian calendar shall also be given.

5. Full name, parentage, age, description of each party and address and in case a party sues or being sued in a representative character, shall also be set out at the beginning of the appeal or petition or application and need not be repeated in the subsequent proceedings in the same appeal or petition or application.

6. The names of parties shall be numbered consecutively and a separate line should be allotted to the name and description of each party.

7. These numbers shall not be changed and in the event of the death of a party during the pendency of the appeal or petition or matter, his legal heirs or representative, as the case may be, if more than one shall be shown by sub-numbers.

8. Where fresh parties are brought in, they may be numbered consecutively in the particular category, in which they are brought in.

9. Every proceeding shall state immediately after the cause title the provision of law under which it is preferred.

10. The bench may permit more than 1 person join together and present joint petition if it is satisfied both of them have common interest in matter.

11. Any person may lodge a caveat in triplicate in any appeal or petition or application that may be instituted before this Tribunal by paying the prescribed fee after forwarding a copy by registered post or serving the same on the expected petitioner or appellant and the caveat shall be in the form NCLT 3C and contain such details and particulars or orders or directions, details of authority against whose orders or directions the appeal or petition or application is being instituted by the expected appellant or petitioner or applicant which

full address for service on other side, so that the appeal or petition or application could be served before the appeal or petition or interim application is taken up. Provided that the Tribunal may pass interim orders in case of urgency. The caveat shall remain valid for a period of ninety days from the date of its filing.

12. On the admission of appeal or petition or application the Registrar shall, if so directed by the Tribunal, call for the records relating to the proceedings from any adjudicating authority and retransmit the same.

NCLAT RULES 2016
National Company Law Appellate Tribunal Rules, 2016. 21st July 2016

S.NO.	PARTICULARS	PROVISIONS
1	RULE 3 Computation of time period -	Where a period is prescribed by the Act and these rules or under any other law or is fixed by the Appellate Tribunal for doing any act, in computing the time, the day from which the said period is to be reckoned shall be excluded, and if the last day expires on a day when the office of the Appellate Tribunal is closed, that day and any succeeding day on which the Appellate Tribunal remains closed shall also be excluded
2	RULE 9 Sitting hours of the Appellate Tribunal.-	The sitting hours of the Appellate Tribunal shall ordinarily be from 09.30 AM. to 01.00 P.M. and from 2.15 P.M. to 5.00 P.M. subject to any order made by the Chairperson and this shall not prevent the Appellate Tribunal to extend its sitting as it deems fit.
3	RULE 10 Working hours of office.-	1. The office of the Appellate Tribunal shall remain open on all working days from 09:30 A.M. to 6.00 P.M. 2. The filing counter of the Registry shall be open on all working days from 10.30 AM to 5.00 P.M. "
4	RULE 13 Listing of cases	All urgent matters filed before 12 noon shall be listed before the Appellate Tribunal on the following working day, if it is complete in all respects as provided in these rules and in exceptional cases, it may be received after 12 noon but before 3.00 P.M. for listing on the following day, with the specific permission of the Appellate Tribunal or Chairperson.

5	RULE 14 Power to exempt.-	The Appellate Tribunal may on sufficient cause being shown, exempt the parties from compliance with any requirement of these rules and may give such directions in matters of practice and procedure, as it may consider just and expedient on the application moved in this behalf to render substantial justice.
6	RULE 15 Power to extend time.-	The Appellate Tribunal may extend the time appointed by these rules or fixed by any order, for doing any act or taking any proceeding, upon such terms, if any, as the justice of the case may require, and any enlargement may be ordered, although the application therefore is not made until after the expiration of the time appointed or allowed.
7	RULE 17 Power of adjournment.-	All adjournments shall normally be sought before the concerned Bench in court and in extraordinary circumstances, the Registrar may. if so directed by the Tribunal in chambers, at any time adjourn any matter and lay the same before the Tribunal in chambers.
8	RULE 18 Delegation powers of the Chairperson.-	The Chairperson may assign or delegate to a Deputy Registrar or to any other suitable officer all or some of the functions required by these rules to be exercised by the Registrar

		1.Every appeal to the Appellate Tribunal shall be in English and in case it is in some other Indian language, it shall be accompanied by a copy translated in English and shall be fairly and legibly type- written or printed in double spacing on one side of standard paper with an inner margin of about four centimeters width on top and with a right margin of 2.5 cm, and left margin of 5 cm, duly paginated, indexed and stitched together in paper book form. 2.The cause title shall state "In the National Company Law Appellate Tribunal" and also set out the proceedings or order of the authority against which it is preferred. 3.Appeal shall be divided into paragraphs and shall be numbered consecutively and each paragraph shall contain as nearly as may be, a separate fact or allegation or point. 4.Where Saka or other dates are used, corresponding dates of Gregorian calendar shall also be given.
9	RULE 19 Procedure for proceedings.	5.Full name, parentage, description of each party and address and in case a party sue or being sued in a representative character, shall also be set out at the beginning of the appeal and need not be repeated in the subsequent proceedings in the same appeal, 6.The names of parties shall be numbered consecutively and a separate line should be allotted to the name and description of each party and these numbers shall not be changed and in the event of the death of a party during the pendency of the appeal, his legal heirs or representative, as the case may be, if more than one shall be shown by sub-numbers. 7. Where fresh parties are brought in, they may be numbered consecutively in the particular category, in which they are brought in. 8. Every proceeding shall state immediately after the cause title and the provision of law under which it is preferred.

10	RULE 22 Presentation of appeal.-	1.Every appeal shall be presented in Form NCLAT-1 in triplicate by the appellant or petitioner or applicant or respondent, as the case may be, in person or by his duly authorised representative duly appointed in this behalf in the prescribed form with stipulated fee at the filing counter and non-compliance of this may constitute a valid ground to refuse to entertain the same. 2.Every appeal shall be accompanied by a certified copy of the impugned order. 3.All documents filed in the Appellate Tribunal shall be accompanied by an index in triplicate containing their details and the amount of fee paid thereon. 4.Sufficient number of copies of the appeal or petition or application shall also be filed for service on the opposite party as prescribed. 5.In the pending matters, all other applications shall be presented after serving copies thereof in advance on the opposite side or his advocate or authorised representative. 6.The processing fee prescribed by the rules, with required number of envelopes of sufficient size and notice forms as prescribed shall be filled along with memorandum of appeal.

POWERS EXERCISE BY NCLT COMPANIES ACT, 2013

POWERS OF NCLT	SECTION
CHAPTER-I "PRELIMINARY"	
To allow certain companies or body corporate to have a different financial year	2(41)
CHAPTER-II "INCORPORATION OF COMPANY AND MATTERS INCIDENTAL THERETO"	
In case a company has got incorporated by furnishing any false or incorrect information or by suppression of any material fact or information, NCLT can pass such orders as it thinks fit.	7(7)

Any assets remaining on wind-up of Section 8 company may be transferred to another company having similar objects with the approval of Tribunal or transferred to the Rehabilitation and Insolvency Fund u/s 269.	8(9)
Conversion of a public company into a private company requires the approval of NCLT.	Proviso of 14(1)
CHAPTER -IV "SHARE CAPITAL AND DEBENTURES"	
Not less than ten percent of the issued shares of a class, who did not consent to a variation, may apply to the Tribunal for cancelling the variation.	48(2)
NCLT can approve issue of further redeemable preference shares when a company is unable to redeem its existing unredeemed preference shares or to pay dividend thereon.	55(3)
NCLT can order forthwith redemption of such preference shares the holder of which have not consented to the issue of further redeemable preference shares.	Proviso of 55 (3)
To make an order imposing prohibition on delivery of certificates for the securities issued by a company	56(4)
The transferee of shares in a private company may appeal to the NCLT within one month from the receipt of notice of refusal or within sixty days from the date on which the instrument of transfer or intimation of transmission was delivered to the company	58(3)
The transferee in a public company within sixty days of refusal to register transfer or transmission, or within ninety days of delivery of instrument of transfer or of intimation of transmission may apply to the NCLT for relief.	58(4)
To dismiss appeal against refusal to register transfer and transmission ofshares OR to direct rectification of register and payment of damages by company.	58(5)
To order rectification of register of members on transfer or transmission of shares.	

To direct a Company or depository to set right a contravention of SCRA or SEBI Actor any other law, resulting by transfer of securities and to rectify concerned registers and records held by the Company or depository	59(4)
To approve Consolidation and division of share capital resulting in change in voting percentage of shareholders	

Proviso under 61(1)(b)

Where the terms of conversion of debentures into shares of a company ordered by the Government are not acceptable to the company, the company may appeal to the Tribunal for making such order as it may deem fit.

Proviso under Section 62(4)

Confirmation by NCLT for reduction of capital in a company limited by shares or guarantee and having share capital.

Proviso under Section 66(1)

Where the assets of a company are insufficient to discharge the debentures, the debenture trustee may apply to the NCLT.

Proviso under Section 71(9)

NCLT to order redemption of debentures forthwith by payment of principal and interest due thereon

Proviso under Section 71(10)

CHAPTER V "ACCEPTANCE OF DEPOSITS BY COMPANIES"

To direct the company to make repayment of the matured deposits or for any loss or damage incurred by him as a result of non-payment.

Proviso under 73(4)

On an application by the company, NCLT may allow further time to the company to repay the amount of deposit or part thereof and the interest payable.

Proviso under 74(2)

CHAPTER -VII "MANAGEMENT AND ADMINISTRATION"

On the application of a member, the Tribunal may call or direct the calling of an annual general meeting if default is made in holding the Annual General Meeting.

Proviso under 97(1)

In case it is impracticable to call a meeting, the Tribunal may either suo moto, or on application of a director or member of the company who is entitled to vote at the meeting, order to call meeting i.e extra ordinary general meetings and give such directions as may be necessary.The Tribunal may direct that inspection of minute book of general meeting be given to a member.

Proviso under 119(4)

CHAPTER -VIII " DECLARATION AND PAYMENT OF DIVIDEND"

To sanction utilization of 1EPF for reimbursement of legal expenses incurred on class action suits by members, debentures or depositors.	125 (3)(d)
CHAPTER-IX "ACCOUNTS OF COMPANIES" The Tribunal may allow a company to recast its financial statements	130(1)
With the approval of NCLT, company may prepare revised financial statement for any of the three preceding financial years.	131(1)
CHAPTER-X "AUDIT AND AUDITORS"	
To restrict copies of representation of the auditor to be removed to be sent out.	140 (4)
The Tribunal may, on the application of the company or any aggrieved person, order that copy of representation by the Auditor need not be sent to members nor read at the meeting.	Second proviso of 140(4)(iii)(b)
Where NCLT is satisfied that the Auditor has acted in a fraudulent manner, it mat order that the Auditor may be changed	140(5)
CHAPTER- XI "APPOINTMENT AND QUALIFICATIONS OF DIRECTORS"	
Regarding removal of director, NCLT may order that representation from the director need not be sent to the members and nor read at the meeting.	169(4)(b) proviso
CHAPTER -XIV "INSPECTION, INQUIRY AND INVESTIGATION"	

To order investigation of the affairs of the company.	210(2)
The Tribunal may ask the Central Government to investigate into the affairs of the company in other cases on application where the business of the company is being conducted with intent to defraud creditors, persons concerned in the formation of the company or management of its affairs have been guilty of fraud, misfeasance or other misconduct and members have not been given all the information with respect to the affairs of the Company.	213
To order investigation of ownership of Company.	216 (2)
NCLT may pass suitable orders for the protection of the employees in respect of investigation under section 210,212,213 or 219.	218(1)
To order freezing of assets of company on inquiry and investigation in case of complaint made by its members, for a period of three years.	221(1)
To impose restrictions in connection with securities.	222(1)
To entertain petition for winding up of a Company or Body Corporate in pursuance of Inspector's report.	224(2)

To hear petition for winding up of a Company presented by Central Govt. 224(2)

NCLT may, on application of Central Government, pass order for disgorgement of assets and other matters	224(5)
To pass orders after inspector's intimation of pendency in investigation proceedings	226 1st Proviso
CHAPTER-XV "COMPROMISES, ARRANGEMENTS AND AMALGAMATIONS"	
With reference to compromise or arrangements between the company and its creditors and members, Tribunal may order a meeting of creditors or class of creditors or members of the company.	230(1)
To sanction compromise or arrangement agreed to at the meeting of creditors/ members ordered by the Tribunal	230 (6)

To dispense with calling of meeting of members/ creditors for approving compromise or arrangement.	230(9)
To pass orders on an application on grievance in respect of takeover offer of companies other than listed companies	230(12)
To enforce compromise and arrangement as sanctioned under Section 230.	231(1)
If the Tribunal is satisfied that the compromise or arrangement sanctioned under Section 230 cannot be implemented satisfactorily with or without modifications, and the company is unable to pay its debts as per the scheme, it may make an order for winding up the company.	231(2)
To sanction the scheme of merger and amalgamation.	232(1)
To call meeting of creditors or members for facilitating merger and amalgamation of companies.	232 (2)
If the Central Government is of the opinion that the scheme filed under section 233 is not in public interest, it may file an application before the Tribunal within Sixty days of receipt of the scheme under sub section (2).	233(5)
To entertain the application made by the dissenting shareholders of the scheme approved by the majority.	235(2)
Any aggrieved person in respect of compensation made by the prescribed authority may make appeal to the Tribunal within 30 days.	237(4)
Appeal to the tribunal against the refusal of the Registrar to register the circular.	238(2)
CHAPTER- XVI "PREVENTION OF OPPRESSION AND MISMANAGEMENT"	

Complaints of oppression and mismanagement will be heard by the 241(1) Tribunal.

Where the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company, Tribunal may pass necessary orders.	242(1)(a)
To make an order where winding up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the Company should be wound up.	242(1)(b)
Tribunal may pass orders for regulation of conduct of affairs of the company in future.	242(2)(a)
To make an order for purchase of shares or interests of any members of the company by other members thereof or by the company.	242(2)(b)
To make an order for reduction of share capital consequent to purchase of shares of the company in the manner envisaged under Section 242(2)(b)	242(2)(c)
The Tribunal can restrict on the transfer or allotment of the shares of the company.	242(2)(d)
To terminate, set aside or modify any agreement, however arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the NCLT, be just and equitable in the circumstances of the case.	242(2)(e)
To terminate, set aside or modify any agreement between the company and any person other than the managing director, any other director or manager referred to in Clause (e) of sub-section (2) of Section 242, Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned.	242(2)(f)

To set aside any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within 3 months before the date of the application made pursuant to section 241, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference.	242(2)(g)
Removal of the managing director, manager or any of the directors of the company.	242(2)(h)
Recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilization of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims.	242(2)(i)

Manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made. 242(2)(j)

Appointment of such number of persons as directors, who may be required by the NCLT to report to be NCLT on such matters as the NCLT may direct.	242(2)(k)
Imposition of costs as may be deemed fit by the NCLT	242(2)(1)
Any other matter for which, in the opinion of the NCLT, it is just and equitable that provision should be made	242(2)(m)
In case of termination or modification of certain agreements by the Company with managing directors or other directors, leave be granted by the NCLT.	243(1)
To pass specified order in receipt of application by members or depositors or any class of them in case if they are of the opinion that the management or conduct of the affairs of the company is being conducted in a manner prejudicial to the interests of the company or its members or depositors.	245(1)

To punish for the contempt of the Tribunal in cases where a fraudulent application is made u/'s 241 (Oppression and Mismanagement) and 245(Class Action Suits). This power shall apply for Sections 337 to 341.	246
CHAPTER -XVIII "REMOVAL OF NAME OF COMPANIES FROM THE REGISTER OF COMPANIES"	
To wind up a company the name of which has been struck off by registrar from Register of Companies.	248 (8)
Tribunal may order restoration of the name of a company to the Register of companies in case of an appeal made to the tribunal within three years of the order of the Registrar.	252(1)
To entertain the application made by the secured creditors of a company representing 50 per cent or more of its outstanding amount of debt and the company has failed to pay the debt within a period of 30 days of the service of the notice of demand.	253(1)
NCLT may appoint an interim administrator within seven days of receipt of application under Section 256.	254(1),(3)
NCLT may appoint interim administrator to be the company administrator in case of an application made by the creditors that the company can be revived.	258
NCLT can delineate or direct the functions and duties of the Company administrator.	260
To sanction the scheme of revival and rehabilitation of sick industrial companies as prepared in Section 261, Companies Act, 2013.	262
To implent the scheme of revival and rehabilitation of sick industrial companies.	264

Where the scheme is not approved by the creditors, NCLT may issue orders 265 for the winding up of the sick company.

To assess damages against the delinquent Directors in the course of the scrutiny or implementation of any scheme or proposal and pass suitable orders.	266

To punish in case of making a false or incorrect evidence to the NCLT or the NCLAT.	267

SPECIAL COURT

Establishment of special courts [section 435 to 440] 18th May 2016

435. The Central Government may, for the purpose of providing speedy trial of offences under this Act, by notification, establish or designate as many Special Courts as may be necessary.

a. A Special Court shall consist of a single judge holding office as Session Judge or Additional Session Judge, in case of offences punishable under this Act with imprisonment of two years or more; and

b. a Metropolitan Magistrate or a Judicial Magistrate of the First Class, in the case of other offences, who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.

PROVISIONS REGARDING SPECIAL COURTS

- The Special Court may exercise the same power which a Magistrate having may exercise under Section 167 of the Code of Criminal Procedure, 1973 in relation to an accused person who has been forwarded to him.

- When a person accused of or suspected of the commission of an offence under the Act is forwarded, a Judicial Magistrate may authorise the detention of that person for fifteen days or an Executive Magistrate for seven days.

- When the Magistrate consider that the detention of the person upon or before the expiry of the period of detention is unnecessary, he shall order such person to be forwarded to the Special Court having Jurisdiction.

- The Special Court may try in a summary way any offence under this Act which is punishable with imprisonment for a term not exceeding three years.

- In case of summary trial, a sentence of imprisonment for a term exceeding one year shall not be passed.

- All offence under the Companies Act shall be triable only by the Special Court for the area in which the registered office of the company in relation to which the offence is committed. The provisions of the Code of Criminal Procedure, 1973 shall apply to the proceedings before a Special Court. The Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court be deemed to be a Public Prosecutor.

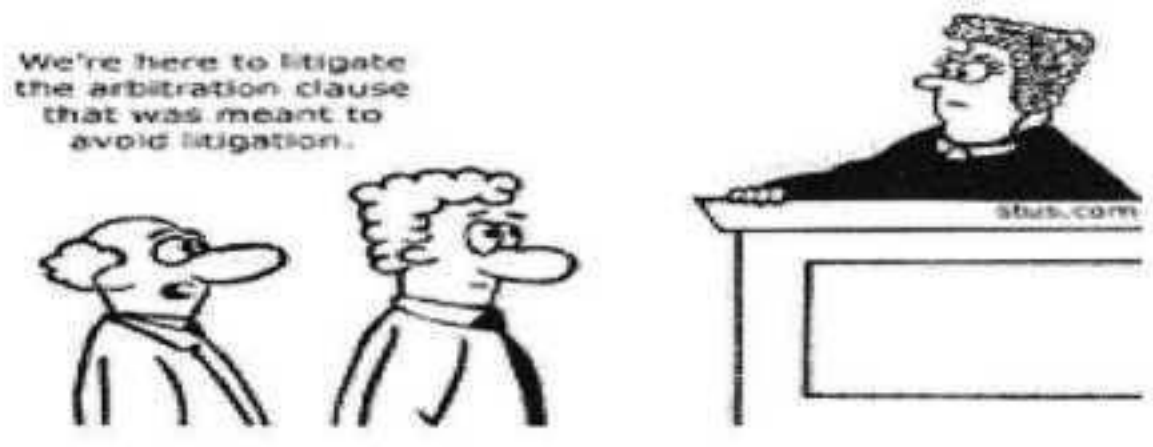
- all the offences pertaining to Companies Act, 2013 are non-cognizable, except offences referred to Serious Fraud Investigation Office (SFIO)

In exercise of the powers conferred by sub-section (1) of section 435 of the Companies Act, 2013, the Central Government hereby, after obtaining the concurrence of the respective Chief Justices of the High Courts, designates the following Courts mentioned in the Table below as Special Courts for the purposes of trial of offences punishable under the Companies Act, 2013 with imprisonment of two years or more in terms of section 435 of the Companies Act, 2013, namely:-

SR. No.	Existing Court	Jurisdiction as Special Court
1	Courts of Additional Special Judge, Anti-Corruption at Jammu and Srinagar	State of Jammu and Kashmir
2	Presiding Officers of Court No's. 37 and 58 of the City Civil and Sessions Court, Greater Mumbai	State of Maharashtra
3	Court of Principal District and Sessions Judge, Union territory of Dadra and Nagar Haveli at Silvassa.	Union Territories of Dadra and Nagar Haveli and Daman and Diu
4	Court of District Judge-1 and Additional Sessions Judge, Panaji.	State of Goa
5	Court of Principal District and Sessions Judge, Ahmedabad (Rural), situated at Mirzapur, Ahmedabad.	State of Gujarat
6	9th Additional Sessions Judge, Gwalior Madhya Pradesh.	State of Madhya Pradesh
7	Court of Additional District and Session Judge, Port Blair, Andaman and Nicobar Islands.	Union territory of Andaman and Nicobar Islands.
8	2nd Special Court, Calcutta.	State of West Bengal

13 ARBITRATION AND CONCILIATION ACT

INTRODUCTION



With the passage of time, some difficulties in the applicability of the Arbitration and Conciliation Act, 1996 have been noticed. **IT CAME IN TO FORCE ON 22 AUGUST 1996**

Interpretation of the provisions of the Act by Courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of Courts in arbitration matters, which tend to defeat the object of the Act.

With a view to overcome the difficulties, the Government promulgated an Ordinance (Arbitration and Conciliation (Amendment) Ordinance, 2015) amending the Arbitration and Conciliation Act, 1996 which received assent from the President as on 23.10.2015.

The Arbitration and Conciliation (Amendment) Bill, 2015 was introduced in both the Houses of Parliament to replace the Ordinance and was subsequently passed.

Thereafter, the Amendment Bill became Act after receiving President's assent as on 31.12.2015 and shall be deemed to have come into force from 23.10.2015.

Such an amendment was necessary to make India a hub of International Commercial Arbitration, to encourage foreign investment by projecting India as an investor friendly country having a sound legal framework and ease of doing business in India.

Arbitration and Conciliation (Amendment) Act, 2015 facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user-friendly, cost effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases.

Alternative Dispute Resolution (ADR): There is a growing awareness that courts will not be in a position to bear the entire burden of justice system.

A very large number of disputes lend themselves to resolution by alternative modes such as arbitration, mediation, conciliation, negotiation, etc. The ADR processes provide procedural flexibility save valuable time and money and avoid the stress of a conventional trial.

At present, ADR services are offered in India in very rudimentary (simple) form. There is, therefore, an urgent need to establish and promote ADR services for resolution of both domestic and international disputes in India.

The International Centre for Alternative Dispute Resolution (ICADR) is a unique centre in this part of the world that makes provision for promoting, teaching and research in the field of ADR as also for offering ADR services to parties not only in India but also to parties all over the world.

The ICADR is a Society registered under Societies Registration Act, 1860, it is an independent non-profit making organisation. It maintains panels of independent experts in the implementation of ADR processes. Areas in which ADR works

Almost all disputes including commercial, civil, labour and family disputes, in respect of which the parties are entitled to conclude a settlement, can be settled by an ADR procedure. ADR techniques have been proven to work in the business environment, especially in respect of disputes involving joint ventures, construction projects, partnership differences, intellectual property, personal injury, product liability, professional liability, real estate, securities, contract interpretation and performance and insurance coverage.

DEFINITION

Arbitration Agreement [Section 2(1) (b)]	"Arbitration agreement" means an agreement referred to in Section 7 Under Section 7, the Arbitration agreement has been defined to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
Arbitration Section 2(1) (a)	The term "Arbitration" as to mean any arbitration whether or not administered by a permanent arbitral institution.
Ad hoc Arbitration	• "Ad hoc Arbitration" is arbitration agreed to and arranged by the parties themselves without recourse to an Institution. • The proceedings are conducted by the arbitrators as per the agreement between the 'parties' or with concurrence of the parties. • It can be domestic, international, or foreign arbitration.

Arbitrator	The term "arbitrator" is not defined in the Arbitration and Conciliation Act. In general, "arbitrator" is defined as a person who is appointed to determine differences and disputes between two or more parties by their mutual consent, - It is not enough that the parties appoint an arbitrator. - The person who is so appointed must also give his consent to act as an arbitrator. - His appointment is not complete till he has accepted the reference. - The arbitrator must be absolutely disinterested and impartial. - He is an extra-judicial tribunal whose decision is binding on the parties.
Arbitral tribunal [Section 2(1) (d)]	"Arbitral tribunal" means a sole arbitrator or a panel of arbitrators.
Court	Court means in case of "Domestic Arbitration Agreement"
	The principal Civil Court of original jurisdiction in a district, and INCLUDES : The High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, EXCLUDE: Any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes; c In case of "INTERNATIONAL COMMERCIAL AGREEMENT"

	• The High Court in exercise of its ordinary original civil jurisdiction having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and • In other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court. [Section 2(1)(e)] [AMENDMENT UNDER 2015]
International Commercial Arbitration [Section 2(1) (f)]	"International commercial arbitration" means an arbitration relating to disputed arising out of legal relationships, whether contractual or not, considered as commercial under law in force in India and where at least one of the parties is: - • An individual who is a resident in, any country other than India; or • A body corporate which is incorporated in any country other than India ; or • An association or a body of individuals whose central management and control is exercised in any country other than India; or • The Government of a foreign country.
Legal Representative - Section 2 (1) (g)	The following are the persons who are legal representatives: a. A person who in law represents the estate of a deceased person II. A person who intermeddles with the estate of the deceased b. A person on whom the estate of a deceased person devolves on the death of the party acting in a representative's capacity

SECTION 7 ARBITRATION AGREEMENT

Definition of Arbitration Agreement

Section 7 of the Act defines the Arbitration Agreement in the following words:

"Arbitration Agreement means an agreement by the parties to submit to arbitration all or certain disputes, which have arisen or which may arise between them, in respect of a defined legal relationship, whether contractual or not".

Essentials of Arbitration Agreement

An arbitration agreement, to be valid and binding, must have the following essential elements:

- It must be in writing and includes an exchange of letter, telex, telegrams or other means of communication which provides a record of such arbitration agreement.

- It must have all the essential elements of a valid contract and the parties must ad idem. If it is vague and uncertain and not capable of being made certain, there is really no agreement in law.

- **Case Law Rukmanibai v Collector**

  An arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of subject-matter of the contract, such disputes shall be referred to arbitration. Then such an agreement would spell out an arbitration agreement.

  - It must be to refer a dispute, present or future, between the parties to arbitration.

  - It may be in the form of an arbitration clause in a contact or in the form of a separate agreement.

- **Case Law Naihato Jute Mills v Khyaliran**

  It may be noted that if a contract containing an arbitration clause cony to an end owing to frustration or is avoided on the ground of fraud, misrepresentation, undue influence or coercion, the arbitration clause continues to be binding.

<u>Interim measures by Court</u>

Section 9(1) states that a party may, before, or during arbitral proceedings or at any time after making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-

1. for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

2. for an interim measure of protection in respect of any of the following matters, namely: -

   - the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

   - securing the amount in dispute in the arbitration;

   - the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or

building in the possession of any part) or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

- interim injunction or the appointment of a receiver;
- such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

Number of arbitrators

As per Section 10(1) of the Act, the parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

Failing the determination referred to in Section 10(1) above, the arbitral tribunal shall consist of a sole arbitrator.

Appointment of Arbitrators

According to section 11(1) a person of any nationality may be an arbitrator, unless otherwise agreed by the parties. Section 11(2) states that subject to Section 11(6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

Section 11 (6) provides that where, under an appointment procedure agreed upon by the parties

- a party fails to act as required under that procedure; or
- the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- a person, including an institution, fails to perform any function entrusted him or it under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

Section 11 (3) states that failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators, shall appoint the third arbitrator who shall act as the presiding arbitrator.

Under Section 11 (4) if the appointment procedure in Section 11 (3) applies and-

- a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
- the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made upon request of a party, "the

Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court".

Section 11 (5) says that failing any agreement referred to in Section 11 (2), in an arbitration with a sole arbitrator if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by "the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court".

Section 11 (6) provides that where, under an appointment procedure agreed upon by the parties,

- a party fails to act as required under that procedure; or
- the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- a person, including an institution, fails to perform any function entrusted him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

Section 11(6A) states that the Supreme Court or, as the case may be, the High Court, while considering any application under Section 11(4) or Section 11(5) or Section 11(6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.

Under Section 11(6B) the designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.

Section 11(7) provides that a decision on a matter entrusted by Section 11(4) or Section 11(5) or Section 11(6) to the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision.

Section 11 (8) says that the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of section 12(1), and have due regard to-

a. any qualifications required for the arbitrator by the agreement of the parties; and

b. the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

Under Section 11(9) in the case of appointment of sole or third arbitrator in an international commercial arbitration, "the Supreme Court or the person or institution designated by that Court" may appoint an arbitrator of a nationality other than the nationalities of the parties where

POWER OF CENTRAL GOVERNMENT TO AMEND FOURTH SCHEDULE

In terms of Section 11A of the Act, if the Central Government is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, amend the Fourth Schedule and thereupon the Fourth Schedule shall be deemed to have been amended accordingly.

Grounds for challenge

Section 12(1) provides that when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances-

- such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and
- which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1- The grounds stated in the Fifth Schedule of the Act shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2- The disclosure shall be made by such person in the form specified in the Sixth Schedule of the Act.

According to Section 12(2), an arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub section (1) unless they have already been informed of them by him.

Section 12(3) states an arbitrator may be challenged only if-

- circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or
- he does not possess the qualifications agreed to by the parties.

Section 12(4) provides that a party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reason, of which he becomes aware after the appointment has been made.

Section 12(5) states that notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule of the Act shall be ineligible to be appointed as an arbitrator.

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

CHALLENGE PROCEDURE

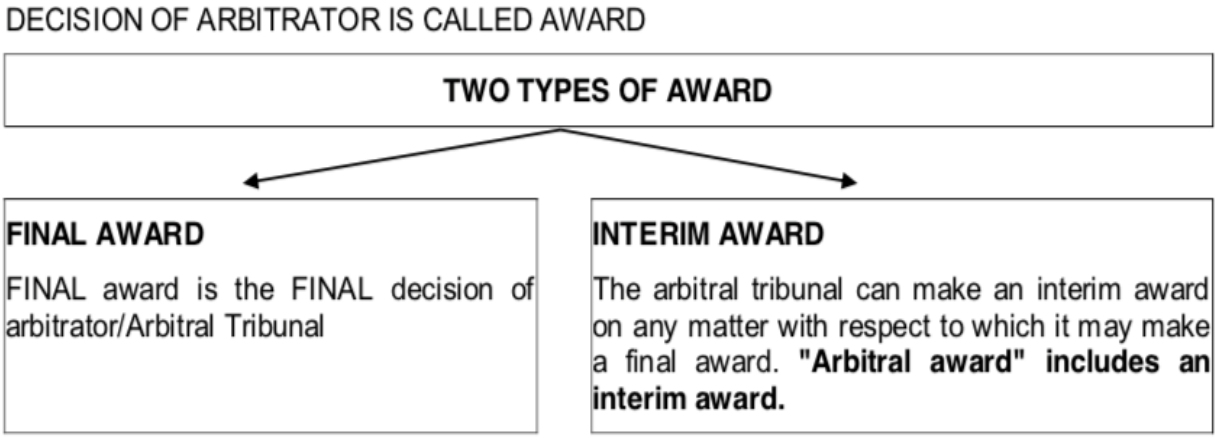
Section 13 of the Act contains detailed provisions regarding challenge procedure. Sub-section (1) provides that subject to provisions of Sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

Sub-Section (4) states that if a challenge under any procedure agreed upon by the parties or under the procedure under Sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. But at that stage, the challenging party has the right to make an application in the Court to set aside the award in accordance with Section 34 of the Act.

Sub-section (2) provides that failing any agreement referred to in sub-section (1) of Section 13, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in Sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

The tribunal shall decide on the challenge unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge. It is also provided that where an award is set aside on an application made under sub-section (5) of Section 13 of the Act, the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

ARBITRAL AWARD



As per Section 2(1)(c), "arbitral award" includes an interim award. The definition does not give much detail of the ingredients of an arbitral award. However, considering other provisions of the Act, the following features are noticed:

ESSENTIALS PREREQUISITE/CONTENTS OF A VALID AWARD

i. An arbitration agreement is required to be in writing.

ii. The arbitral award is required to be made on stamp paper of prescribed value

iii. The award is to be signed by the members of the arbitral tribunal.

iv. The award should contain reasons. However, there are two exceptions where an award without reasons is valid i.e.

- Where the arbitration agreement expressly provides that no reasons are to be given, or
- Where the parties settled the dispute and the arbitral tribunal has recorded the Settlement in the form of an arbitral award on agreed terms.

v. The award should be dated i.e. the date of making of the award should be mentioned in the award.

vi. The arbitral tribunal is under obligation to state the place of arbitration

vii. After the award is made, a signed copy should be delivered to each party for appropriate action like implementation or recourse against arbitral award

TIME LIMIT FOR ARBITRAL AWARD

Section 29A (1) provides that the award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.

Explanation. -For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.

Section 29A (2) states that if the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

Under Section 29A (3) the parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

Section 29A(4) states that if the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this subsection, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent for each month of such delay.

FAST TRACK PROCEDURE

Section 29B(1) provides that notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in subsection (3).

Section 29B (2) states that the parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.

Section 29B (3) says that the arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1)

- The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;
- The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them
- An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues
- The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.
- Section 29B(4) states that the award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.

TERMINATION OF PROCEEDINGS

As per section 32 (1) the arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).
Under section 32 (2) the arbitral tribunal shall issue an order for the termination of the arbitral proceedings where-

- the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognizes a legitimate interest on his part in, obtaining a final settlement of the dispute
- the parties agree on the termination of the proceedings,
- the arbitral tribunal finds that the continuation of the proceedings has for any other mason become unnecessary or impossible.

Section 32(3) says that the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings. This is subject to the provisions of Sections 33 and 34(4) of the Act.

CORRECTION AND INTERPRETATION OF AWARD

Section 33(1) provides that within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties-

- A. a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award
- B. if go agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

Further Section 33 (2) states that if the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form pan of the arbitral award.

Further Section 33 (3) states that the arbitral tribunal way corrects any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

ADDITIONAL AWARD

Section 33 (4) provides that unless otherwise agreed by the parties, a party with notice to the other party may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

Section 33 (5) provides that if the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

Under Section 33 (6) the arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

Section 33 (7) states that section 31 shall apply to a connection or interpretation of the arbitral award or to an additional arbitral award made under this section.

APPLICATION FOR SETTING ASIDE ARBITRAL AWARD

Section 34(1) provides that recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

Section 34 (2) states that an arbitral award may be set aside by the Court only if-the party making the application furnishes proof that-

- A party was under some incapacity
- The arbitration agreement is not valid

- The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration,
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties,
- The subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
- The arbitral award is in conflict with the public policy of India.

GROUNDS ON WHICH AN AWARD IS IN CONFLICT WITH THE PUBLIC POLICY

i. The making of the award was induced or affected by fraud

ii. It is in contravention with the fundamental policy of Indian law; or

iii. It is in conflict with the most basic notions of morality or justice.

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re appreciation of evidence.

TIME LIMIT FOR SETTING ASIDE ARBITRAL AWARD

Section 34 (3) provides that an application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

Under Section 34 (4) on receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

As per Section 34 (5) an application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

Under Section 34 (6) an application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.

FINALITY OF ARBITRAL AWARDS

Section 35 provides that an arbitral award made under the Act is final and binding on the parties and persons claiming under them respectively.

ENFORCEMENT

Section 36(1) provides that where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.

ARBITRAL TRIBUNAL Section 2(1)(d)

Arbitral tribunal means a sole arbitrator or a panel of arbitrators.

WHEN FOREIGN AWARD BINDING

Section 46 states that any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defense, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.

ALTERNATIVE DISPUTE RESOLUTION SYSTEM(APRS)

a. Alternate dispute resolution would include within it any method of dispute resolution other than court litigation. It would include arbitration, mediation and conciliation in main.

b. There is a growing awareness that courts will not be in a position to bear the entire burden of justice system.

c. A very large number of disputes lend themselves to resolution by alternative modes such as arbitration, mediation, conciliation, negotiation, etc.

d. The ADR processes provide procedural flexibility save valuable time and money and avoid the stress of a conventional trial.

REGISTRATION OF AWARD

The award which deals with immovable property of the value of Rs. 100 or more requires registration.

STAMP DUTY ON ARBITRATION AWARD

The stamp duty on the arbitration award passed by an arbitrator is payable as per the provisions of Indian stamp act, 1899 the rate of stamp duty varies fries from state to state.

[SECTION 10, 11, 12]

Failure or Impossibility to Act as an Arbitrator (Section 14)	As per Section 14, the mandate of an arbitrator shall terminate and he shall be substituted by' another arbitrator, if a. He becomes de jure or de facto unable to perform his functions, or b. He fails to act without undue delay due to some other reasons. Mandate is also terminated, if he withdraws from his office, or the parties agree to the. termination of his mandate.
Substitution of Arbitrator	Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointee according to the rules that were applicable to such appointment being replaced. • Unless otherwise agreed by the parties, where an arbitrator is replaced, any hearings. previously held may be repeated at the discretion of the arbitral tribunal. • Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

Interim measures ordered by arbitral tribunal	• The arbitral tribunal shall have power to grant all kinds of interim measures which the Court is empowered to grant under section 9 of the Act. Such interim measures can be granted by the arbitral tribunal during the arbitral proceedings or at any time after making the arbitral award, but before it is enforced under section 36 of the Act. • Any order issued by the arbitral tribunal for grant of interim measures shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 in the same manner as if it were an order of the Court.

ARBITRAL PROCEEDINGS/ARBITRATION PROCEDURE SECTION 23-27

It is open to parties to agree for holding oral hearings for presentation of evidence and for oral arguments, or, alternatively, for conducting proceedings on the basis of documents such as affidavit. In the absence of any such agreement, a decision in this regard may be taken by the arbitral tribunal.

STATEMENTS OF CLAIMS AND DEFENCE

Within the period of time agreed upon by the parties or determined by the tribunal, the claimant has to state the facts in supporting his claim, the points at issue and the relief or remedy sought. Similarly, the respondent shall also state his defense in respect of these particulars.

HEARING AND WRITTEN PROCEEDINGS

The arbitral tribunal shall hold oral hearing for the presentation of evidence or oral arguments on the day to day basis and shall not grand any adjournments without any sufficient cause.

AMENDMENTS

Parties may amend or supplement these statements during the proceedings, unless

i. Parties have agreed otherwise, or

ii. Arbitral tribunal considers it inappropriate to allow the amendment or supplement, due to delay in making it.

DETERMINATION OF RULES OF ARBITRAL PROCEDURE

According to Section 19 the arbitral tribunal is neither bound by the Code of Civil Procedure 1908, nor by the Indian Evidence Act, 1872.

COURT ASSISTANCE IN TAKING EVIDENCE

The arbitral tribunal as well as any party, with the approval of the arbitral tribunal, can apply to the court for assistance in taking evidence.

Section 29 of the Act provides for decision by majority where there is more than one arbitrator.

APPOINTMENT OF EXPERTS BY ARBITRAL TRIBUNAL

Section 26 of the Act provides for appointment of expert's subject to agreement between the parties.

CONCILIATION

Meaning	• Conciliation is an informal process in which the conciliator (the third party) tries to bring the disputants to agreement. He does this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement. • The Act gives a formal recognition to conciliation in India.
Number of Conciliators	• There shall be one conciliator unless the parties agree that there shall be two or three conciliators. • Where there is more than one conciliator, they ought, as a general rule, to act jointly.
Appointment of Conciliators	• In conciliation proceedings with one conciliator, the parties may agree on the name of a sole conciliator; • In conciliation proceedings with two conciliators, each party may appoint one conciliator; • In conciliation proceedings with three conciliators, each party may appoint one conciliator and the parties may agree on the name of the third conciliator who shall act as the presiding conciliator.

Role of Conciliator	• The conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute. • The conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties. • The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral! statements, and the need for a speedy settlement of the dispute, • The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefore.

TERMINATION OF CONCILIATION PROCEEDINGS

The conciliation proceedings shall be terminated: -
By the signing of the settlement agreement by the parties on the date of the agreement; or

By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration.

ALTERNATIVE DISPUTE RESOLUTION SYSTEM (ADRS)

Alternate dispute resolution would include within it any method of dispute resolution other than court litigation. It would include arbitration, mediation and conciliation in main.

There is a growing awareness that courts will not be in a position to bear the entire burden of justice system. A very large number of disputes lend themselves to resolution by alternative modes such as arbitration, mediation, conciliation, negotiation, etc. The ADR processes provide procedural flexibility save valuable time and money and avoid the stress of a conventional trial.

14 INDIAN STAMP ACT, 1899

INTRODUCTION

The Indian Stamp Act, 1899 is the law relating to stamps which consolidates and amends the law relating to stamp duty. It is a fiscal legislation envisaging levy of stamp duty on certain instruments. The Act is divided into eight Chapters and there is a schedule which contains the rates of stamp duties on various instruments.

Union List

Union List, Entry 91 gives power to the Union Legislature to levy stamp duty with regard to certain instruments (mostly of a commercial character). They are bill of exchange, cheques, promissory notes, bill of lading, letter's of credit, policies of insurance, transfer of shares, debentures, proxies and receipt. The power to reduce or remit duties on these instruments is vested in the Union Government as per Section 9 of the Act.

The State Legislature

State List, entiy 63 confers on die States power to prescribe the rates of stamp duties on other instruments. As per "Principles" for levy of duty fall in the Concurrent List, entry 44.

Amendments, entry 44

The amendments to the Central Act effected by the States are in die shape of amendment of sections of the Central Act, adding new sections, adding separate schedules, modifying in schedules, etc. Some States, for their convenience, have passed separate legislation to cover the matters coming under State's domain. As a result, the rates of stamp duties in different States on other instruments categoiy differ from State to State for the same instrument.

IMPORTANT DEFINITIONS

Section 2 of the Act contains definitions of various terms used in the Act. Some important definitions are discussed below:

1. Banker

"Banker" includes a bank and any person acting as a banker [Section 3 of the Negotiable Instruments Act defines a banker as including persons or a corporation or company acting as bankers]. [Section 2(1)]

2. Bill of Lading

"Bill of Lading" includes a 'through bill lading' but does not include a mate's receipt. [Section 2(4)]

A bill of lading is a receipt by the master of a ship for goods delivered to him for delivery to X or his assigns. Three copies are made, each signed by the master. One is kept by the consignor of the goods, one by the master of the ship and one is forwarded to X, the consignee, who, on receipt of it, acquires property in the goods. It is a written evidence of a contract for the carriage and delivery of goods by sea, for certain freight.

3. Conveyance

The term "conveyance" includes a conveyance on sale and every instrument by which property (whether movable or immovable) is transferred inter vivo and which is not otherwise specifically provided for by Schedule. It does not include a will. [Section 2(10)]

4. Instrument

Section 2(14) defines an "instrument" to include every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded. The definition is an inclusive definition, and is not necessarily restricted to those documents which are specifically mentioned in the definition. Briefly stated, an instrument includes conveyances, leases, mortgages, promissory notes and wills, but not ordinary letters or memoranda or accounts.

Following instances may be noted:

i. An unsigned draft document is not an "instrument" (because it does not create or purport to create any right, etc.).

ii. An entry in a register, containing the terms of hiring of machinery is an "instrument", where it is authenticated by the thumb impression of the hirer. (Reason is, that it purports to create, a liability etc.)

iii. A letter which acknowledges receipt of a certain sum as having been borrowed at a particular rate of interest and for a particular period and that it will be repaid with interest on the due date is an "instrument".

These examples show, that the law looks to the substance and effect (or intended effect) of the text of the instrument and not the physical medium through which it is recorded.

iv. Photocopy of an agreement is not an instrument as defined under Section 2(14) of the Act. Ashok Kalam Capital Builders v. State & Amr., AIR 2010 (NOC) 736 (Del).

5. Executed / Execution

Under Section 1(12), the words "executed" and "execution" (used with reference to instruments), mean "signed" and "signature" respectively.

Signature includes mark by an illiterate person. [Section 3(52), General Clauses Act, 1897]

An instrument which is chargeable with stamp duty only on being "executed" is not liable to stamp duty until it is signed.

The Collector can receive the stamp duty without penalty and certify an instrument as duly stamped, as from the date of execution. (Sections 37 and 40) according to Section 2(13), "impressed stamp" includes:

a. labels affixed and impressed by the proper officer;

b. stamps embossed or engraved on stamp paper.

The instrument is duly stamped if it has been duly stamped at the time of execution and is admissible in evidence, though the stamp is subsequently removed or lost (Mt. Mewa Kunwari v. Bourey, AIR 1934 All. 388).

6. Bill of exchange

According to Section 2(2), "bill of exchange" means a bill of exchange as defined in the Negotiable Instruments Act, 1881 and includes also a Hundi and any other document entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money. The Negotiable Instruments Act, defines a "bill of exchange" as an instrument in writing, containing an unconditional order signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.

7. Bill of exchange payable on demand

Under Section 2(3) of the Stamp Act, a "bill of exchange on demand" includes:

a. an order for the payment of any sum of money by a bill of exchange or promissory note or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or in the payment of any sum of money out of any particular fund

which may or may not be available, or upon any condition or contingency which may or may not be performed or happen;

b. an order for the payment of any sum of money weekly, monthly or at any other said period; and

c. a letter of credit, that is to say, any instrument by which one-person authorises any other person to give credit to the person in whose favour it is drawn. It may be noted that a bill of exchange payable on demand includes even a letter of credit, as per above definition.

Thus, the definition in the Stamp Act includes many instruments which could not be classed as 'bills of exchange' within the definition given by the Negotiable Instruments Act, 1881.

8. Cheque

Under Section 2(7) of the Stamp Act, "cheque" means a bill of exchange drawn on specified banker, not expressed to be payable otherwise than on demand. This definition follows the definition given in the Negotiable Instruments Act, 1881.

It should be mentioned that in India, cheques are no longer subject to stamp duty. Entry 21 in the Schedule levying duty on cheque was deleted by Act 5 of 1927.

9. Bond

Under Section 2(5), a "bond" includes -

a. any instrument whereby a person obliges himself to pay money to another on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;

b. any instrument attested by a witness not payable to order or bearer, whereby a person obliges himself to pay money to another; and

c. any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another.

The word "oblige" has been used in all sub-clauses in the definition. Therefore, no document can be a bond unless it is one which, by itself, creates the obligation to pay the money. The words "obliges himself to pay money" make it very clear, that the obligation is not a pre-existing one. Where the liability already exists, it cannot be said that under a subsequent document (merely reproducing the nature of the obligation) an obligation has been created.

10. Chargeable

Under Section 2(6) "chargeable" as applied to an instrument executed or first executed after the commencement of the Act means chargeable under the Act and as applied to any other instrument, chargeable under the law in force in India when such instrument was executed or where several persons executed the instrument at different times, first executed.

11. Lease

"Lease" means a lease of immovable property and includes also:

a. a patta;

b. a kabuliyat or other undertaking in writing, not being a counterpart of a lease to cultivate, occupy or pay or deliver rent for, immovable property;

c. any instrument by which tolls of any description are let;

d. any writing on an application for a lease intended to signify that the application is granted. [Section 2(16)]

Section 105 of the Transfer of Property Act defines lease as a transfer of a right to enjoy such property, made for a certain time, expressed or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

- A patta is an instrument given by the Collector of District or any other receiver of the revenue, to the cultivator, specifying the condition or conditions upon which the lands are to be held and the value or proportion of the produce to be paid therefor.

- A Kabuliyat is executed by the lessee, accepting the terms of the lease and undertaking to abide by them. Although, it is not a lease under Section 105 of the Transfer of Property Act, it is expressly included in the definition for the purposes of the Stamp Act.

- Toll is a tax paid for some liberty or privilege, such as for passage over a bridge, ferry, along a highway or for the sale of articles in a market or fair or the like. It does not include 'octroi' or 'chungi.

12. Promissory Note

It means a promissory note as defined by the Negotiable Instruments Act, 1881. It also includes a note promising the payment of any sum of money out of a particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen. [Section 2(22)]

Requisites of a promissory note as per the Negotiable Instruments Act, 1881 are the following:

a. the document must contain an unconditional undertaking to pay;

b. the undertaking must be to pay money only;

c. the money to be paid must be certain;

d. it must be payable to or to the order of a certain person or to bearer;

e. the document must be signed by the maker.

Illustrations
An instrument in the form:

"I do acknowledge myself to be indebted to B in Rs.1,000 to be paid on demand for value received" is a promissory note.

"I have received a sum of £20 which I borrowed from you and I have to be accountable for the sum with interest" held not to be a promissory note.

"On demand I promise to pay to the trustees of W&C or their treasurer for the time being £100" was held a good promissory note.

13. Receipt

"Receipt" includes any note, memorandum or writing:

a. whereby any money or any bill of exchange, cheque or promissory note is acknowledged to have been received; or

b. whereby any other movable property is acknowledged to have been received in satisfaction of a debt; or

c. whereby any debt or demand, or any part of a debt or demand is acknowledged to have been satisfied or discharged; or

d. which signifies or imports any such acknowledgement, and whether the same is or is not signed with the name of any person. [Section 2(23)]

A mere acknowledgement in writing of the receipt of immovable property will not attract sub- clause (b). Under sub-clause (c), any acknowledgement in satisfaction or discharge of any debt or demand or any part thereof is covered; for instance, a receipt given by the secretary or other manager of a club acknowledging payment of the club dues comes within the sub-clause. An ordinary cash memo issued by a shopkeeper or another person selling the goods or other merchandise is not a receipt, unless it contains an acknowledgement of receipt of the money. A letter acknowledging the receipt of money or cheque is a receipt. A document merely saying that the signatory has received a sum of Rs. 500 is a receipt.

14. Settlement

"Settlement" means any non-testamentary disposition, in writing, of movable or immovable property made:

a. in consideration of marriage;

b. for the purpose of distributing property of the settler among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him; or

c. for any religious or charitable purpose; and includes an agreement in writing to make such disposition. [Section 2(24)]

The definition of "settlement" excludes a will. A will is intended to operate only on death, while a settlement operates immediately.

15. Marketable Security

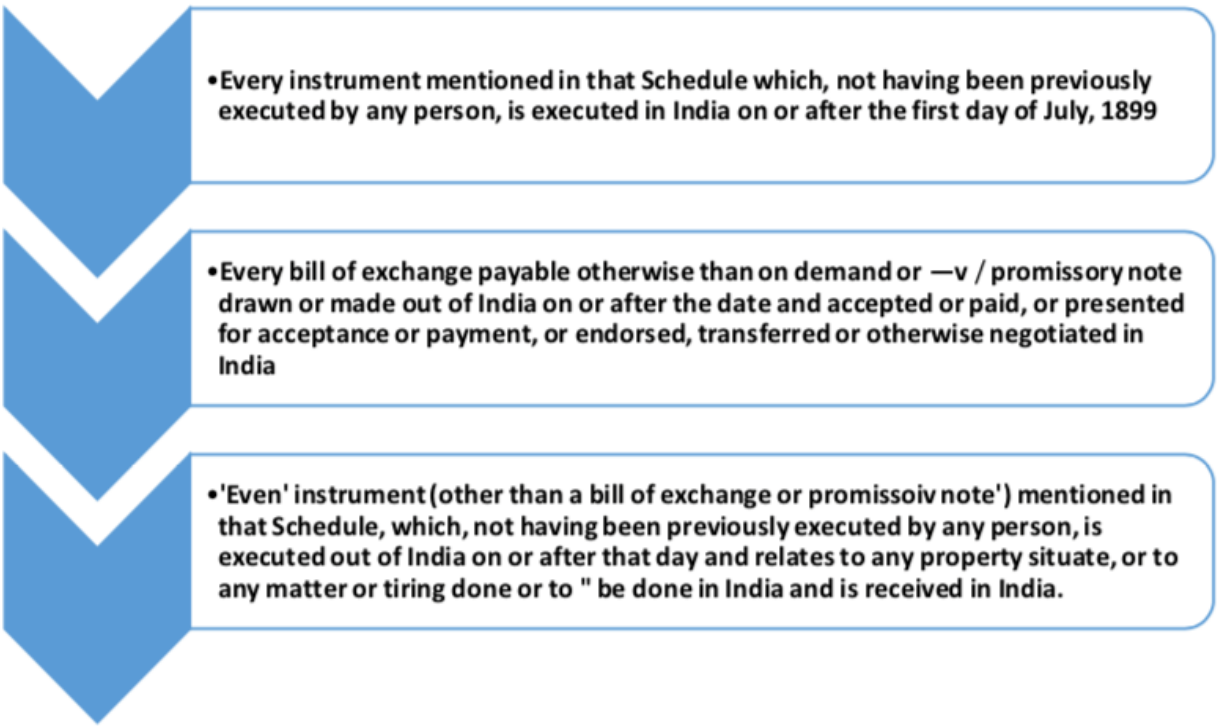
Under Section 2(16A), "marketable security" means a security of such a description as to be capable of being sold in stock market in India or in the United Kingdom.

16. Stamp

"Stamp" means any mark, seal or endorsement by any agency or person duly authorised by the State Government and includes an adhesive or impressed stamp for the purposes of duty chargeable under this Act. This definition of the stamp has been inserted by the Finance (No. 2) Act, 2004.

INSTRUMENTS CHARGEABLE WITH DUTY

Section 3 of the Act is the charging section. It provides that subject to the provisions of the Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with a duty of the amount indicated in that Schedule as the proper duty therefor, namely:



However, no duty shall be chargeable in respect of:

- any instrument executed by or on behalf of or in favour of the Government, in cases where, but for this the Government would be liable to pay the duty chargeable in respect of such instrument.

- any instrument for the sale, transfer or disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel or any part, interest, share of property of or in any ship or vessel registered under the Merchant Shipping Act, 1894 or under Act XIX of 1838 or the Indian Registration of Ships Act, 1841 as amended by subsequent Acts.
  [The references to repealed Acts are now to be read as references to the corresponding re-enacting Act].

- Any instrument executed by, or, on behalf of, or in favour of, the Developer or Unit or in connection with the carrying out of purposes of the special Economic Zone.

Explanation - For the purposes of this clause, the expressions "Developer" "Special Economic Zone" and "Unit" shall have meanings respectively assigned to them in Clauses (g), (za) and (zc) of Section 2 of the Special Economic Zones Act, 2005.

Thus, Section 3 charges certain instruments to be liable to stamp duty.

The Court has observed as under in Commissioners of Inland Revenue v. G. Angus, 1889 23 QBD 579, followed in re Swadeshi Cotton Mills, AIR 1932 All 291, "the first thing to be noticed is that thing which is made liable to duty is an instrument. If a contract of purchase and sale or a conveyance by way of purchase and sale, can be, or is carried out without an instrument the case is not within the section and no tax is imposed. It is not the transaction of purchase and sale which is struck at; it is the instrument whereby the purchase and sale are affected which is struck at. And if any one carries through a purchase and sale without an instrument, then the Legislature has not reached that transaction".

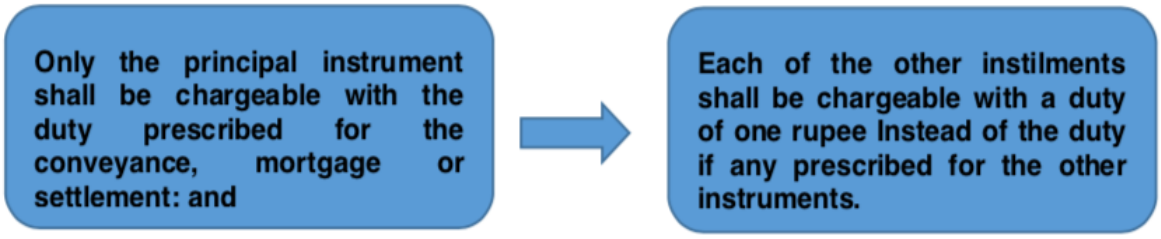
SUBSTANCE AND DESCRIPTION

Courts have invariably upheld the principle of substance of the transaction, over the form, in the matter of deciding the nature of the instrument. The substance of the transaction contained in the document may not necessarily embody the description given at the head thereof.

It is the substance of the transaction as contained in the instrument and not the form of the instrument that determines the stamp duty, though the duty is leviable on the instrument and not on the transaction. In determining whether a document comes within the description of a document upon which a stamp is required by the Act, one has to look at the entire document to find out whether it falls within the description. Where a single instrument contains several purposes, the instrument as a whole should be read to find out its dominant purpose. To determine whether a document is sufficiently stamped the Court must look at the document itself, as it stands.

EXTENT OF LIABILITY OF INSTRUMENTS TO DUTY (SEVERAL INSTRUMENTS IN SINGLE TRANSACTION OF SALE, MORTGAGE OR SETTLEMENT)

Section 4 provides that, where in the case of any sale, mortgage or settlement, several instruments are employed for completing the transaction –



Illustrations (Section 4 held applicable)

Each of the other installments shall be chargeable with a duty of one rupee Instead of the duty if any prescribed for the other instruments.

i. A executed a conveyance of immovable property. On the same deed his nephew (undivided in status) endorsed his consent to the sale, as such consent was considered to be necessary. It was held that the conveyance was the principal instrument. The consent was chargeable with only one rupee (ILR 13 Bom 281).

ii. Subsequent to a sale of immovable property, two declarations were executed reciting that the sale was subject to an equitable mortgage created by the vendor. These declarations were held to be chargeable, together with the sale deed, as having completed the conveyance (Somaiya Organics Ltd. v. Chief Controlling Revenue Authority, AIR 1972 All 252).

iii. Brother A executed in favour of brother B a gift of all his property. By another deed, brother B made provision for the living expenses of brother A and hypothecating in favour of brother A part of the property included in the above-mentioned gift deed, in order to secure the payment of the living expenses. It was held that the two documents were part of the same transaction. They amounted to a settlement and Section 4 applied (Maharaj Someshar Dutt, ILR 37 All 264).

iv. B conveyed the whole of his property to three persons who undertook to provide for him and to perform his obsequies. By another document, the three donees agreed to provide for B. This was mentioned in the deed executed by A also. It was held that the two documents had to be construed as part of the same act; the first was liable to duty as a conveyance while the second was liable to a duty of Rupee 1 only (Dadoba v. Krishna, ILR 7 Bom. 34).

v. A company executed, first a deed of trust and mortgage stating that the company was to issue notes for raising loans secured by the sale deed. It was held as under:

- The deed was principal or primary security (and not a collateral security). It was chargeable as mortgage under Article 14.
- The notes issued subsequently were debentures and not principal instruments (Madras Refinery Ltd. v. Chief Controlling Revenue Authority, Madras, AIR 1977 SC 500).

vi. The Rangoon Gymkhana executed a duly stamped trust deed, mortgaging its assets as security for the repayment of the debenture stock issued by it. In addition, it had issued certificates of debenture stock to the subscribers, but these did not contain any promise to repay any need, but merely stated the amount standing in each shock holder's name. It was held that the certificates were not debentures, but were instruments employed to complete the mortgage [Rangoon Gymkhana In re, AIR 1927 Rang. 37 (Section 4 applied)].

Section 4 not applicable

i. A lease is executed and got registered. A second document is executed altering the terms of the first document. The second document has to be stamped as a lease. Section 4 does not apply.

ii. A purchaser of land executes a mortgage of the land in favour of the vendor for a portion of the purchase money. The mortgage is liable to full duty as a separate instrument. Section 4 does not apply.

INSTRUMENTS RELATING TO SEVERAL DISTINCT MATTERS

Under Section 5, an instrument comprising or relating to several distinct matters is chargeable with the aggregate amount of the duties with which each separate instrument, relating to one of such matters, would be chargeable under the Act (This is the reverse of the situation governed by Section 4).

The Section deals with multifarious instruments. The expression "distinct matter" means distinct transactions (Ram Swarup v. Joti, (1933) Allahabad Law Journal 427; Board of Revenue, Madras v. Narasimhan, AIR 1961 Mad 504).

Section 5 applies even where the two (or more) matters are of the same description.

Illustrations as to "distinct matters"

i. A document containing both an agreement for the dissolution of a partnership and a bond, is chargeable with the aggregate of the duties with which two such separate instruments would be chargeable. The two are "distinct matters" (Chinmoyee Basu v. Sankare Prasad Singh, AIR 1955 Cal. 561 (cf. AIR 1936 Lah. 449).

ii. An agreement containing two covenants making certain properties chargeable in the first instance and creating a charge over certain properties if the first mentioned properties are found insufficient does not fall within Section 5 (Tek Ram v. Maqbul Shah, AIR 1928 Lah. 370).

iii. A grant of annuity by several persons requires only one stamp (because there is only one transaction).

iv. A lease to joint tenants requires only one stamp.

v. A conveyance by several persons jointly relating to their separate interest in certain shares in an incorporated company requires only one stamp.

vi. A power of attorney executed by several persons authorising the agent to do similar acts for them in relation to different subject matter is chargeable under Section 5, where they have no common interest.

vii. Where a person having a representative capacity (as a trustee) and a personal capacity delegates his powers in both the capacities, section 5 applies. In law, a person acting as a trustee is a different entity from the same person acting in his personal capacity.

viii. The position is the same where a person is an executive or administrator and signs an instrument containing a disposition by him in his personal capacity and also a disposition as executor. The two capacities are different (Member, Board of Revenue v. Archur Paul Benthall, AIR 1956 SC 35).

PRINCIPAL AND ANCILLARY

The test is - "What is the leading object? Which is principal and which is ancillary?

If an instrument taken with reference to its primary object is exempted then stamp duty cannot be charged merely because matter ancillary to it is included and that matter is chargeable to stamp duty. A very common example of this is an agreement for sale of goods, which also contains an arbitration clause. The latter clause is incidental to the former agreement. Where a deed of dissolution of partnership contains a clause charging the partnership assets for payment of certain amounts to outgoing parties, the instrument is chargeable separately for the charge and the partnership. The former is not ancillary to the latter.

Where a document contains a transfer of mortgage and an agreement to make a loan, the mortgage and the loan are distinct matters and separately chargeable.

If in a lease there is also an agreement to pay a certain sum on account of the balance of previous year, the document is chargeable (i) as a lease and (ii) also as a bond.

A lease reserving separately rent for house and rent for furniture is chargeable separately for each of the items.

Where, at an auction, a purchaser purchases several lots and there is only one instrument in respect of all of them the separate purchases are, nevertheless, separate and distinct matters and so, the stamp duty must be determined separately.

Thus, the test usually adopted is the test of "leading object". If there is only one leading object, Section 5 will not apply. But if there are several distinct contracts, each is taxable.

BONDS, DEBENTURES, ETC. ISSUED UNDER THE LOCAL AUTHORITIES LOAN ACT, 1879

Section 8 provides that any local authority raising a loan under the provisions of the Local Authorities Loans Act, 1879 or of any other law for the time being in force by the issue of bonds, debentures or other securities, shall, in respect of such loans, be chargeable with a duty of one percent on the total amount of the bonds, debentures or other securities issued by it. Such bonds, debentures or other securities need not be stamped and shall not be chargeable with any further duty on renewal, consolidation, sub-division or otherwise. This is so notwithstanding anything contained in the Indian Stamp Act: In the event of willful neglect to pay the duty required by this section, the local authority shall be liable to forfeit to the Government, a sum equal to 10 percent

of the amount of duty payable and a like penalty for every month after the first, during which the neglect continues.

SECURITIES DEALT IN DEPOSITORY NOT LIABLE TO STAMP DUTY

As per Section 8A of the Act—

a. an issuer, by the issue of securities to one or more depositories shall, in respect of such issue, be chargeable with duty on the total amount of security issued by it and such securities need not be stamped;

b. where an issuer issues certificate of security under sub-section (3) of Section 14 of the Depositories Act, 1996, on such certificate duty shall be payable as is payable on the issue of duplicate certificate under this Act;

c. the transfer of—

   i. registered ownership of securities from a person to a depository or from a depository to a beneficial owner;

   ii. beneficial ownership of securities, dealt with by a depository;

   iii. beneficial ownership of units, such units being units of a Mutual Fund including units of the Unit Trust of India established under sub-section (1) of Section 3 of the Unit Trust of India Act, 1963, dealt with by a depository, shall not be liable to duty under this Act or any other law for the time being in force.

Explanation 1 - For the purposes of this section, the expressions "beneficial ownership", "depository" and "issuer" shall have the meanings respectively assigned to them in clauses (a), (e) and (f) of Sub-section (1) of Section 2 of the Depositories Act, 1996.

Explanation 2- For the purposes of this section, the expression "securities" shall have the meaning assigned to it in clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956.

CORPORATISATION AND DEMUTUALISATION SCHEMES AND RELATED INSTRUMENTS NOT LIABLE TO DUTY

Section 8B has been inserted by the Finance Act, 2005, w.e.f. 13.5.2005. Section 8B states that

a. a scheme for corporatization or demutualization, or both of a recognized stock exchange; or

b. any instrument, including an instrument of, or relating to, transfer of any property, business, asset whether movable or immovable, contract, right, liability and obligation, for the purpose of, or in connection with, the corporatization or demutualization, or both of a recognized stock exchange pursuant to a scheme, as approved by the Securities and Exchange Board of India under Sub-section (2) of Section 4B of the Securities Contracts (Regulation) Act, 1956 shall not be liable to duty under this Act or any other law for the time being in force.

Explanation — For the purposes of this Section—

a. the expressions "corporatization", "demutualization" and "scheme" shall have the meanings respectively assigned to them in clauses (aa), (ab) and (ga) of Section 2 of the Securities Contracts (Regulation) Act, 1956;

b. "Securities and Exchange Board of India" means the Securities and Exchange Board of India established under Section 3 of the Securities and Exchange Board of India Act, 1992.

REDUCTION, REMISSION AND COMPOUNDING OF DUTIES

Section 9 empowers the Government, (Central or the State as the case may be), to reduce or remit, whether prospectively, or retrospectively, the duties payable on any instrument or class of instruments or in favour of particular class of persons or members of such class. Section 9 also empowers the Central Government to provide for the composition or consolidation of duties of policies of insurance and in the case of issues by any incorporated company or other body corporate or of transfers where there is single transferee (whether incorporated or not) of debentures, bonds or other marketable securities.

VALUATION FOR DUTY UNDER THE ACT

Sections 20 to 28 (Chapter II of the Act) deal with valuation of instruments for duty.

a. According to Section 20, where an instrument is chargeable with ad valorem duty in respect of any money expressed in any currency other than that of India, such duty shall be calculated on the value of such money in the currency of India, according to the current rate of exchange on the date of the instrument. The Central Government notifies from time to time, in the Official Gazette the rate of exchange for conversion of certain foreign currencies into Indian currency for this purpose and such rate shall be deemed to be the current rate.

b. Section 21 provides that in the case of an instrument chargeable with ad valorem duty in respect of any stock or any marketable or other security, such duty shall be calculated on the value of such stock or security according to the average price or the value thereof on the date of the instrument. The term "marketable security" has been defined in Section 2(16-A) of the Act.

Where the shares are quoted on the stock exchange, it is easy to ascertain the price of the shares or stock. However, where the shares or stocks are not quoted on any stock exchange, the valuation has to be based upon the average of the latest private transactions, which can generally be ascertained from the principal officer of the concerned company or corporation. If, there have been no dealings at all, then unless some other reliable evidence of market value is forthcoming the value is to be taken at par. Section 22 of the Act, however, provides that if such price or value is mentioned in the instrument for the purpose of calculating duty, it shall be presumed (until the contrary is proved) to be correct.

c. Section 23 provides that where interest is expressly made payable by the terms of the instrument, such instrument shall not be chargeable with a duty higher than that with which it would have been chargeable, had no mention of interest been made therein. For instance, a promissory note for Rs.10,000 is drawn with the recital of interest at the rate of 18 percent per annum, payable by the promissor; stamp is leviable on the basis that the instrument is for Rs. 10,000 only.

d. Section 23A provides that in the case of an instrument (not being a promissory note or bill of exchange) which -

i. is given upon the occasion of the deposit of any marketable security by way of security for money advanced or to be advanced by way of loan, or for an existing or future debt, or

ii. makes redeemable or qualifies a duly stamped transfer, intended as a security, of any marketable security. It shall be chargeable with duty as if it were an agreement or memorandum of an agreement, chargeable with duty under Article 5(c) of Schedule I to the Act.

iii. A release or discharge of any such instrument shall be chargeable only with the like duty.

iv. According to Section 24, where any property is transferred to any person in consideration (wholly or in part) of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, (whether being or constituting a charge or encumbrance upon the property or not), such debt, money or stock is to be deemed the whole or part, (as the case may be), of the consideration in respect whereof the transfer is chargeable with ad valorem duty. However, nothing in this section shall affect such a certificate of sale as is mentioned in Article 18 of the First Schedule to the Act.

The object of this section is that, upon every purchase ad valorem duty has to be paid on the entire consideration which either directly or indirectly represents the value of the free and unencumbered corpus of the subject matter of the sale (Collector of Ahmedabad v. Deepak Textile Industries, AIR 1966 Guj. 227).

What Section 24 means is that where property is sold subject to the payment by the purchaser, discharging a debt charged on the property, then the purchaser is really paying a consideration which includes the amount of that debt also (Somayya Organics Ltd. v. Board of Revenue, AIR 1986 SC 403)

Proviso to Section 24 operates for the benefit of assignee of the mortgage.

When the mortgaged property is sold to the mortgagee along with other properties, the stamp duty already paid is to be deducted from the duty payable on the deed of sale. In order to entitle the mortgagee to a deduction of the duties payable the entire property mortgaged should be transferred and not merely a portion of it (In re Mirabai, in re Laxman and Ganpat, ILR 29 Bom. 203).

Explanation to Section 24 provides that in the case of sale of property subject to mortgage or other encumbrances, any unpaid mortgage money or money charged together with the interest, if any, due on the same shall be deemed to be part of the consideration for the sale provided that where property subject to a mortgage is transferred to the mortgagee he shall be entitled to deduct from the duty payable on the transfer the amount of any duty already paid in respect of the mortgage. Three illustrations which have been appended to the Section are as under:

i. A owes B Rs. 1,000/-. A sell a property to B, the consideration being Rs. 500/- and the release of the previous debt of Rs. 1,000/-. Stamp duty is payable on Rs. 1,500/-

ii. A sells a property to B for Rs. 500 which is subject to a mortgage to C for Rs. 1,000/- and unpaid interest Rs. 200/-. Stamp duty is payable on 1,700.

iii. A mortgages a house of the value of Rs. 10,000/- to B for Rs. 5,000/-. B afterwards buys the house from A. Stamp duty is payable on Rs. 10,000/- less the amount of stamp duty already paid for the mortgage.

e. Section 25 deals with the manner of computation of duty in the case of annuities. Valuation of an annuity will be material, where the payment of annuity or other sum payable periodically is secured by an instrument or where the consideration for a conveyance is an annuity or other sum payable periodically. In such cases, the amount secured by such instrument or the consideration for such conveyance, as the case may be, shall be deemed to be:

i. where the sum payable is for a definite period so that the total amount to be paid can be previously ascertained such total amount;

ii. the sum is payable in perpetuity or for an indefinite time not terminable with any life in being at the date of such instrument or conveyance - the total amount which, according to the terms of such instrument or conveyance will or may be payable during the period of twenty years calculated from the date on which the first payment becomes due, and

iii. where the sum is payable for an indefinite time terminable with any life in being at the date of such instrument or conveyance - the maximum amount which will be or which may be payable as aforesaid during the period of 12 years calculated from the date on which the first payment becomes due.

Clause (a) mentioned above applies where the sum is payable for a definite period, so that the total amount to be paid can be previously ascertained. According to clause (b), where the payment is in perpetuity or for an indefinite period, then only the amount payable for 20 years would be taken for assessment of the duty.

Illustration

By a document, 'A' binds himself and his posterity on the security of some immovable property for the annual payment to a temple of Rs. 2,200/-. It is a mortgage deed, chargeable with duty calculated on 20 years' payment.

f. Section 26 deals with cases where the value of the subject matter is indeterminate. The object of this section is to protect the revenue, in cases where an instrument is chargeable with ad valorem duty, but such duty cannot be ascertained by reason of the fact that the amount of value of the subject matter of the instrument cannot be determined at the time of the execution of the instrument. This object is sought to be achieved by providing, that the executant can value the instrument as he pleases, but he shall not be entitled to recover under such document any amount in excess of the amount for which the stamp duty is sufficient.

However, under the combined operation of Sections 26 and 35, a lessee under the mining lease is entitled, upon payment of the proper penalty, to recover the royalty provided for in the stamp originally affixed to the lease. [AIR 1924 PC 221; AIR 1930 Cal. 526]. Section 26 applies only when the instrument is chargeable with ad valorem duty. Section 26 has two provisos. Under the first proviso, in the case of mining lease, the stamp duty is to be calculated on the estimated value of the royalty or the share of the produce, as the case may be. If the lease is granted by the Government, stamp duty has to be paid on the amount or value of the royalty as determined by the Collector of Stamps. And, if subsequently any excess is claimed, proper penalty under section 35 may be paid and the claim fully recovered. But when the lease has been granted by a person other than the Government, the valuation has to be at Rs. 20,000/- a year.

The second proviso to Section 26 is intended to cover the case where an instrument has, by accident or mistake, been insufficiently stamped. The deficiency is made up in proceedings under Section 31 or 41 and the Collector having certified the amount paid, it shall be deemed to be the stamp actually used at the date of execution. By reason of this proviso, the amount claimable under the instruments would be the amount for which the duty as certified by the Collector had been paid and not the amount for which duty was originally paid.

CONSIDERATION TO BE SET OUT

Section 27 provides that the consideration and all other facts and circumstances affecting the chargeability of any instrument with duty or the amount of duty with which it is chargeable shall be fully and truly set forth in the instrument. "Value of any property" would mean that real value of the property in the open market at the time the document was executed and not at the time when the executant acquired it. Where there is no value set forth in the instruments, there would be contravention of Section 27, but the omission does not render the document inadmissible or liable to be impounded and taxed in the manner provided in Section 35 (Vinayak v. Hasan Ali, AIR 1961 MP 6).

The Collector cannot proceed to ascertain the value of the property with a view to causing the instrument to be stamped with reference to the value so ascertained by the Collector. The Act does not provide for any powers to the revenue authority to make an independent enquiry into the value of the property conveyed for determining the duty chargeable. (In Re. Muhammad Muzaffar Ali AIR 1922 All 82)

However, the Collector can direct the prosecution of a person who executed the instrument under Section 64 of the Act. Under Section 64, what is punishable is the omission to set-forth fully

and truly the value of the property, with intent to defraud the Government. The Collector, can, if he feels that there is a deliberate under-valuation of property, hold an independent enquiry to ascertain the true value of the property and to consider whether there was deliberate under-valuation rendering the executant liable to prosecution for defrauding the Government.

APPORTIONMENT

Section 28 prescribes certain rules for apportionment of the consideration, in cases of certain conveyances arising out of a property being contracted to be sold and thereafter conveyed in parts etc.

Under Section 28(1) where a person contracts the sale of property as a whole and thereafter conveys to the purchaser the property in separate parts, the consideration shall be apportioned in such manner as the parties think fit, provided that a distinct consideration is set-forth for each separate part in the conveyance and thereafter the conveyances shall be chargeable with ad valorem in respect of such distinct consideration.

Under Section 28(2), where the contract is for the sale of a property as a whole to two or more purchasers jointly or by any person for himself and others, and the property is conveyed to them in parts by separate conveyance, then each distinct part of the consideration shall be chargeable with ad valorem duty in respect of the distinct part of the consideration so specified.

Section 28(3) covers cases where a person, after contracting to purchase a property from another and before the property has been duly conveyed to him, enters into a contract to sell the property to a third person, and the contract is given effect to only by one conveyance from the owner of the property to the sub purchaser directly. The stamp duty payable is on the consideration paid by the sub-purchaser. This provision avoids double payment that would otherwise arise.

Section 28(4) provides that where a person contracts for the sale of property and before obtaining a conveyance in his favour, enters into a contract to sell the property in parts to other persons, the

In some States, local amendments have given such powers to the collector.

Conveyances which may be executed directly by the owner to each sub-purchaser would be liable to be charged with duty in respect of the consideration paid by the sub-purchaser, original price for the whole and the aggregate price paid by the sub-purchasers, subject to a minimum duty of Re. 1/-.

Section 28(5) provides that when a person contracts to sell a property to another person and again contracts to sell the same property to a third person and such third person obtains a conveyance first from the seller with whom he had contracted and later gets another conveyance of the same property from original seller, the duty is to be charged on the consideration received by the original seller subject to a maximum of Rs. 5/-.

PERSONS LIABLE TO PAY DUTY

Section 29 deals with the persons responsible for payment of duty. Under this section, in the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne:

a. in the case of any instrument described in any of the following articles of Schedule-I

b. in the case of a policy of insurance other than fire insurance by the person effecting the insurance;

c. in the case of a policy of fire-insurance - by the person issuing the policy;

d. in the case of a conveyance including a reconveyance of mortgaged property by the grantee; in the case of a lease or agreement to lease by the lessee or intended lessee;

e. in the case of a counterpart of a lease - by the lessor;

f. in the case of an instrument of exchange - by the parties in equal shares;

g. in the case of a certificate of sale - by the purchaser of the property to which such certificate relates; and

h. in the case of an instrument of partition - by the parties thereto in proportion to their respective shares in the whole property partitioned, or, when the partition is made in execution of an order passed by a Revenue Authority or Civil Court or arbitrator, in such proportion as such authority, Court or arbitrator directs.

RECEIPTS

Under Section 30 of the Act any person receiving any money exceeding twenty rupees in amount or any bill of exchange, cheque or promissory note for an amount exceeding five hundred rupees or receiving in satisfaction of a debt any movable property exceeding five hundred rupees in value, shall on demand by the person paying or delivering such money, bill, cheque, note, or property, give a duly stamped receipt for the same.

PARTY LIABLE TO PAY

Section 29 specifies in the case of certain instruments which party should pay, for the stamp. The section is not exhaustive and makes no reference to several instruments. Section 30 contains a special provision as to stamping of receipts. There are several other instruments not mentioned in Section 29, for which there is no express provision as to who should bear the stamp expenses. The primary duty of stamping lies in all cases on the person executing the instrument as Section 17 directs that the instruments chargeable with duty shall be stamped at or before executing an instrument without the same being duly stamped. Section 29 would apply only in the absence of a special agreement between the parties as stated in the opening words of the section. An agreement to bear the cost of preparation of an instrument implies an agreement to pay stamp duty also on it.

Any person receiving or taking credit for any premium or consideration for any renewal of any contract of fire- insurance, shall, within one month after receiving or taking credit for such premium or consideration, give a duly stamped receipt for the same.

METHODS OF STAMPING

a. According to the provisions of the Act and rules made thereunder, the duty with which an instrument is chargeable is to be paid by means of stamps indicated in the Act and the rules. Generally, rules deal with the subject.

Section 10 provides that all duties with which any instrument is chargeable shall be paid, and such payment shall be indicated on such instrument, by means of stamps according to the provisions contained in the Act, or when no such provision is applicable thereto, as the State Government concerned may by rule, direct. The rules may, among other matters, regulate:

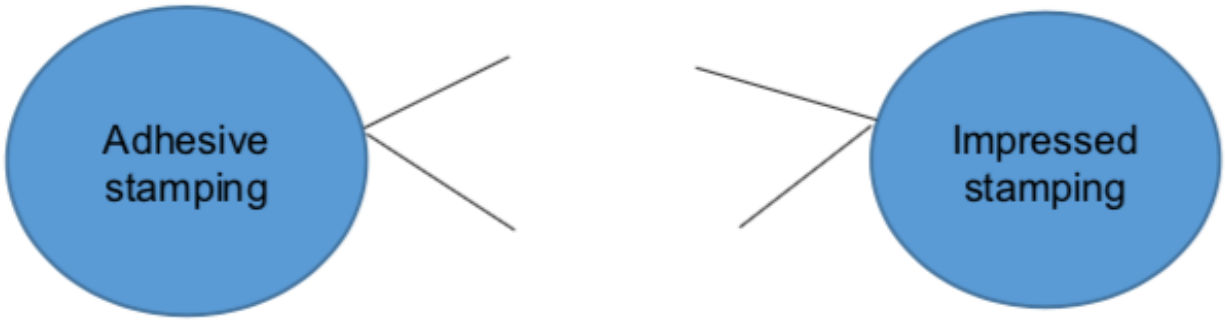
i. in the case of each kind of instrument, the description of stamps which may be used;

ii. in the case of instruments stamped with impressed stamps, the number of stamps which may be used;

iii. in the case of bills of exchange or promissory notes, the size of the paper on which they are written.

b. There are two types of stamping, namely:

USE OF ADHESIVE STAMPS



Section 11 deals with the use of adhesive stamps. This Section provides that the following instruments may be stamped with adhesive stamps, namely –

The use of the words 'may be stamped' really connotes 'shall be stamped'. The rules framed under the Stamp Act as well as under the relevant state laws invariably provide that the adhesive stamps shall carry special words, to indicate the use to which the stamps can be put.

CANCELLATION OF ADHESIVE STAMPS

Section 12(1)(a) provides that any person affixing any adhesive stamp to any instrument chargeable with duty which has been executed by another person shall, when affixing such

stamp cancel the same so that it cannot be used again. Under Sub-section (1)(b), an obligation has been imposed on person executing any instrument on any paper bearing an adhesive stamp, to cancel the stamp, if such cancellation has not been done, at the time of such execution. If a person fails to cancel the stamp, he becomes liable to penalty in accordance with Section 63. The object is to prevent the same stamp from being used again.

Under Sub-section (2) of Section 12, any instrument bearing an adhesive stamp which has not been cancelled is deemed to be unstamped.

MODE OF CANCELLATION OF ADHESIVE STAMPS

a. Section 12(3) deals with the mode of cancellation of stamp. It provides that the cancellation of an adhesive stamp may be done by the person concerned by writing on or across the stamp his name or initials, or the name or initials of his firm with the true date of his so writing, or in any other effectual manner. Sub-section (3) merely lays down as a guidance one of the ways in which an adhesive stamp can be cancelled.

b. In Mahadeo Koeri v. Sheoraj Ram Teli, ILR 41 All 169; AIR 1919 All 196, it was held that a stamp may be treated as having been effectively cancelled by merely drawing a line across it. But, in Hafiz Allah Baksh v. Dost Mohammed, AIR 1935 Lah. 716, it was held that if it is possible to use a stamp a second time, inspite of a line being drawn across it, there is no effectual cancellation. Again, the question whether an adhesive stamp has been cancelled in an effectual manner has to be determined with reference to the facts and circumstances of each case.

   In Melaram v. Brij Lal, AIR 1920 Lah. 374, it was held that a very effective method of cancellation is the drawing of diagonal lines right across the stamps with ends extending on to the paper of the document. A cross marked by an illiterate person indicating his acknowledgement, was held to be an effective cancellation of the stamp in Kolai Sai v. Balai Hajam, AIR 1925 Rang. 209. Accordingly, where the adhesive stamps on promissory note were cancelled by drawing lines on them in different directions and stretching beyond the edge of the stamp on the paper on which the promissory note was written, it was held that the stamp had been effectually cancelled. Where one of the four stamps used on an instrument had a single line drawn across the face of the stamp, the second had two parallel lines, the third three parallel lines and the fourth two lines crossing each other, it was held that the stamps must be regarded as having been cancelled in manner so that they could not be used again (In re Tata Iron Steel Company, AIR 1928 Bom. 80). Putting two lines crossing each other is effective (AIR 1961 Raj. 43).

c. However, putting a date across the stamp by a third party on a date subsequent to the date on which the bill had been drawn, was held to be not proper cancellation in Daya Ram v. Chandu Lal, AIR 1925 Bom. 520 Cf. Rohini v. Fernandes, AIR 1956 Bom. 421, 423. Similarly, crossing by drawing lines and signing on the adjacent stamp was held to be not a cancellation of the first stamp in U. Kyaw v. Hari Dutt, AIR 1934 Rang. 364. Cross is a good way of cancellation. AIR 1976 Cal. 99.

d. Where it is alleged that the cancellation was made at later stage than that of execution, the burden of proving it, lies on the party who so alleges. Where instrument prima facie appears to be duly stamped and cancelled by the drawer at the date of execution, the burden of providing the contrary lies on the party who avers that the cancellation was not affected at the time of execution. In the absence of evidence to the contrary, it may be inferred that the stamp was duly affixed and cancelled.

INSTRUMENTS STAMPED WITH IMPRESSED STAMPS HOW TO BE WRITTEN (WRITING ON STAMP PAPER)

a. Section 13 provides that every instrument written upon paper stamped with an impressed stamp shall be written in such manner that the stamp may appear on the face of the instrument and cannot be used for or applied to any other instrument. The expression, 'face of the instrument' is not to be interpreted as meaning that the document must commence on the side on which the stamp is impressed or that both sides of the paper or parchment may not be written upon. In Dowlat Ram Harji v. Vitho Radhoji, 5 Bom. 188, it was held when the face of a deed or document is mentioned, no particular side of the parchment or paper, on which the deed or document is written, is thereby indicated. Even the last line may constitute the face (Westroph, CJ.).

b. Under Section 14, no second instrument chargeable with duty shall be written upon piece of stamp paper upon which an instrument chargeable with duty has already been written. However, this section shall not prevent any endorsement which is duly stamped or is not chargeable with duty, being made upon any instrument for the purpose of transferring any right created or evidenced thereby, or of getting the receipt of any money or goods the payment or delivery of which, is secured thereby.

c. The object of Section 14 is to prevent a stamped paper which has been used for one instrument, from being used for another instrument thereby avoiding payment of duty in respect of second instrument, AIR 1928 Rang 262. Except for an endorsement of the kind referred to earlier, no second instrument shall be engrossed on a stamp paper on which there is already written 'an instrument chargeable with duty'.

An alteration in the instrument as originally written, if it is of such nature, as to require fresh stamp, would come within the prohibition contained in the section. It is an important question as to what would be a material alteration which converts an instrument written on stamp paper into a second instrument within the meaning of Section 14. A "material alteration" is one which alters (or purports to alter), the character of the instrument itself and which affects (or may affect) the contract which the instrument contains or alters evidence of any charge, or varies the liability under the instrument in any way. An alteration which vitiates the instrument as could cause it to operate differently was also held to be a material alteration. An alteration which may affect the contract which the instrument contains is a material alteration.

Section 15 of the Act deems every instrument written in contravention of Section 13 or Section 14 to be unstamped and to be inadmissible in evidence as not being duly stamped.

DENOTING DUTY

Section 16 of the Act deals with denoting duty. The object of this section is to spare parties to an instrument, the inconvenience of having to produce (in cases in which the duty payable on an instrument depends upon the duty already paid on another instrument), and the original or principal instrument in order to prove that the second instrument has been duly stamped.

Section 16 provides that where the duty with which an instrument is chargeable, or its exemption from duty, depends in any manner upon the duty actually paid in respect of another instrument, the payment of such last mentioned duty, shall, if application is made in writing to the Collector for that purpose, and on production of both the instruments, be denoted upon such first mentioned instrument, by endorsement under the hand of the Collector of Stamps or in such other manner as the rules of the State Government may provide.

TIME OF STAMPING INSTRUMENTS

a. Instruments executed inside India: Section 17 provides that all instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution. The scope of Section 17 is restricted to only instruments executed in India. If the executant of a document has already completed the execution of the document and in the eye of law the document, could be said to have been executed, a subsequent stamping, (however close in time) could not render the document as one stamped at the time of execution. Thus, where a promissory note is executed by 'A' and 'B' and a stamp is afterwards affixed and cancelled by 'A' by again signing it, the stamping has taken place subsequent to the execution and hence, the provisions of Section 17 are not complied with (Rohini v. Fernandes, AIR 1956 Bom 421). A receipt stamped subsequent to its execution, but before being produced in the Court is not stamped in time and accordingly, not admissible in evidence.

b. Instruments executed outside India: Section 18 relates to foreign instruments (other than bills and promissory note)

   Foreign bills and notes received in India have been dealt within Section 19. According to Section 18, every instrument chargeable with duty executed only out of India and (not being a bill of exchange or promissory note) may be stamped within three months after it has been first received in India. Section 18(2) provides that where such instrument cannot with reference to the description of stamp prescribed therefore, be duly stamped by a private person, it may be taken within the said period of three months to the Collector who shall stamp the same in such a manner as the State Government may by rule prescribe, with a stamp of that value as the person so taking such instrument may require and pay for. Where an instrument is brought to the Collector after the expiry of three months, the Collector may, instead of declining to stamp it, validate it under Sections 41 and 42 if he is satisfied that the omission to stamp in time was due to a reasonable cause.

   The object of Section 18 is to facilitate the stamping of the documents within a period of three months, in as much as, by the very nature of things, Section 17 relating to instruments executed in India cannot be complied with. Section 18 is intended to mitigate the inconvenience and hardship that will entail if the instrument concerned is required to be

stamped before or at the time of execution as laid down in Section 17. Instrument executed in India is not within Section 18 (Nath Bank v. Andhar Mamik Tea Co., AIR 1960 Cal 779).

As far as bills of exchange and promissory notes are concerned, Section 19 makes an elaborate provision. Any bill of exchange payable otherwise than on demand or promissory note drawn or made out of India must be stamped and the stamp cancelled, before the first holder in India deals with the instrument, i.e., presents the same for acceptance or payment, or endorses transfers or otherwise negotiates the same in India.

The proviso to Section 19 clarifies that if, (i) at any time any bill of exchange or note comes into the hands of any holder thereof in India, (ii) the proper adhesive stamp is affixed thereto and cancelled in the manner prescribed by Section 12 and (iii) such holder has no reason to believe that such stamp was affixed or cancelled otherwise than by the person, and at the time required by the Act, then such stamp shall (so far as relates to such holder), be deemed to have been duly affixed and cancelled. However, nothing contained in the proviso shall relieve any person from any penalty incurred by him, for omitting to affix or cancel a stamp.

ADJUDICATION AS TO STAMPS

a. Chapter III, consisting of Sections 31 and 32, deals with adjudication by the Collector, as to the proper stamp that an instrument has to bear. The provisions of this Chapter are intended to assist any party who is in doubt as to the proper stamp to be affixed on an instrument but is nevertheless anxious to stamp the instrument. When the document or any draft of the document is produced to the Collector, he shall determine the proper stamp duty on payment of a nominal fee. The relevant provisions of the Act and matters in regard to the performance of this function by the Collector are discussed below.

b. Under Section 31(1) when (i) an instrument, (whether executed or not and whether previously stamped or not), is brought to the Collector, and (ii) the person bringing it applies to have the opinion of that officer as to the duty if any, with which it is chargeable, and (iii) pays a fee (not exceeding Rs. 5 and not less than 50 naya paise as the Collector may direct), the Collector shall determine the duty if any with which in his judgment, the instrument is chargeable. Under Section 31 (2), the Collector may require to be furnished with an abstract of the instrument and also with such affidavit or other evidence as he may deem necessary to prove that all the facts and circumstances affecting the chargeability of the instrument with duty, or the amount of duty with which it is chargeable, are fully and truly set-forth therein, and may refuse to proceed upon accordingly. However, no evidence furnished pursuant to this section shall be used against any person in any civil proceeding, except in an enquiry as to the duty with which the instrument to which it relates is chargeable. Every person by whom such evidence is furnished shall, on payment of the full duty, be relieved from any penalty which he may have incurred under the Act by reason of the omission to state truly in such instrument any of the facts or circumstances.

c. The duty of the Collector under Section 31 is only to determine the stamp duty payable upon the instrument. He is not authorized to impound the instrument or to impose any penalty if he concludes that the instrument is not sufficiently stamped. Where a person has

obtained the opinion of the Collector on any draft instrument, and thereafter does not want to proceed any further to execute the instrument, no consequences will follow and, after determination of the duty, the Collector becomes functus officio. But where the party wants to proceed with effectuating the instrument or using it for the purposes of evidence, he has to pay the duty determined by the Collector and obtain from the Collector under Section 32, an endorsement that the full duty with which the instrument is chargeable has been paid. Normally, the determination by the Collector of the duty payable on an instrument under Section 31 is final.

d. Section 32 deals with certificate by the Collector of Stamps as well as the time limit within which such a certificate can be given by the Collector of Stamps. Sub-section (1) of the section provides that when an instrument is brought to the Collector with an application for having an opinion as to the proper duty chargeable thereon, and the Collector is of the opinion that the instrument is already fully stamped or the duty determined by the Collector under Section 31 or such a sum as (with the duty already paid in respect of the instrument), is equal to the duty so determined, has been paid, the Collector shall certify by endorsement on such instrument, that the full duty (stating the amount) with which it is chargeable has been paid. When the Collector is of opinion that any such instrument brought to him is not chargeable with duty, he shall certify in the same manner that such instrument is not so chargeable. Under Section 32(3), any instrument upon which an endorsement has been made by the Collector shall be deemed to be duly stamped or not chargeable with duty as the case may be, and if chargeable with duty, shall be receivable in evidence or otherwise and may be acted upon and registered as if it had been originally duly stamped. The proviso to Section 32(3) categorically provides that the Collector shall not make any endorsement on any instrument under Section 32, where -

- any instrument is executed or first executed in India and brought to him after the expiration of one month from the date of its execution or first execution, as the case may be;
- any instrument is executed or first executed out of India and brought to him after the expiration of three months after it has been first received in India; or
- any instrument chargeable with a duty not exceeding 10 naya paise or any bill of exchange or promissory note, is brought to him after the drawing or execution thereof, on paper not duly stamped.

In effect, the proviso to Section 32(3) lays down the time limit within which the Collector of Stamps can make any endorsement on any instrument brought to him, for his opinion as to the duty chargeable thereon.

INSTRUMENTS NOT DULY STAMPED - TREATMENT AND CONSEQUENCES (IMPOUNDING)

a. The definition of the term "duly stamped" has already been explained. Chapter IV of the Act (consisting of Sections 35 to 48) provides for the consequences that follow where instruments are not duly stamped.

Section 33 contains a mandate on certain officials to impound an instrument which is not duly stamped. Section 33(1) provides that every person having by law or consent of parties, authority to receive evidence and every person in charge of a public office, except an officer of police before whom any instrument, chargeable in his opinion, with duty is produced or comes in the performance of his functions, shall, if it appears to him that the instrument is not duly stamped, impound the same. The object of this Section is to protect the revenue, and the Court or public officer authorized by this Section must, exercise the powers under the Section suo moto and the jurisdiction of the Court does not depend upon raising of an objection by the parties. For the purposes of this section, the State Government may determine what offices are public offices. The Section also provides that the instrument must be impounded, before it can be admitted in evidence. Once it is admitted in evidence, the instrument cannot be impounded at a later stage and a court, after it becomes functus officio, cannot rectify an earlier error.

b. The word 'produced' has to be properly understood. It means produced in response to a summon or produced voluntarily for some judicial purpose, such as, for supporting an evidence. It does not refer to a document which accidentally or incidentally falls into a judge's hand. The Court is not justified in impounding a document which the witness had not been called upon to produce (Narayandas v. Nathuram, ILR 1943 Nag. 520; AIR 1943 Nag. 97). Similarly, a Court before which a copy of a document has been produced cannot compel the party to produce the original document with a view to impounding it, having received information that is not sufficiently stamped. It is open to the party to refuse to obey the order of the Court in this respect (Uttam Chand v. Permanand, AIR 1942 Lah. 265).

c. Where a magistrate issued a warrant with a view to discovering registers kept by the accused containing documents not stamped in accordance with the provisions of the Stamp Act, and in course of the search, the registers were seized and produced before the magistrate, it was held that the documents thus produced could be impounded as the word 'comes' is sufficiently wide to include documents produced by the search under a search warrant (Emperor v. Balu Kuppayyan, ILR 25 Mad. 525). This case should be confined to its facts.

d. An arbitrator has the consent of parties to adjudicate the issues coming before him and where the parties' tender evidence, an arbitrator has a statutory duty under Section 33(1) to check whether the instrument so produced is duly stamped and if not, to impound the same.

e. However, this shall not compel any magistrate or judge of a Criminal Court to examine or impound (if he does not think it fit to do so) any instrument coming before him in the course of any proceeding other than possession proceedings and maintenance proceedings.

Also, a judge of a High Court can delegate the duty of examining and impounding any instrument to any other person appointed by the court in this behalf.

UNSTAMPED RECEIPTS

Section 34 provides that where the instrument is an unstamped receipt produced in the course of an audit of any public account, the officer before whom the receipt is produced has discretion either to impound or to require the receipt to be stamped. This section applies where the receipt is chargeable with a duty not exceeding 10 naya paisa. The officer concerned can, instead of impounding the receipt require a duly stamped receipt to be substituted therefor.

INSTRUMENTS NOT DULY STAMPED INADMISSIBLE IN EVIDENCE

a. Section 35 stipulates that no instrument chargeable with duty shall be-

i. admitted in evidence for any purpose whatsoever by any person authorized by law (such as judges or commissioners) or by the consent of the parties (such as arbitrators) to record evidence; or

ii. shall be acted upon; or

iii. registered; or

iv. authenticated by any such person as aforesaid or by any public officer. unless such instrument is duly stamped.

An insufficiently stamped instrument is not an invalid document and it can be admitted in evidence on payment of penalty. [See K. Narasimha Rao v. Sai Vishnu, AIR 2006 AP 80 also at p.302]

b. The proviso to Section 35 provides as under:

i. any instrument not being an instrument chargeable with a duty not exceeding 10 naya paisa only, or a bill of exchange, or promissory note, subject to all such expectations, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of Rs. 5/- or when ten times the amount of the proper duty or deficient portion thereof exceeds Rs. 5/-, on a sum equal to ten times such duty or portion;

ii. where any person from whom a stamped receipt could have been demanded has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, on payment of a penalty of Re. 1/- by the person tendering it;

iii. where a contract or agreement of any kind is affected by the correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

iv. nothing contained in Section 35 shall prevent the admission of any instrument in evidence in any proceeding in a criminal Court other than the proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898;

v. also, nothing contained in Section 35 shall prevent the admission of any instrument in the Court, when such instrument has been executed by or on behalf of the Government, or where it bears the certificate of the Collector as provided by Section 32 or any other provision of the Act.

c. The words 'shall not be admissible in evidence' used in this Section only means that the document shall not be made the basis of the decision or should not be relied upon to support any finding (Sheonath Prasad v. Sorjoo Nonia, 1943 ALJ, 189; AIR 1943 All 220 (FB)). There is no embargo upon proving the surrounding circumstances.

d. The words 'for any purpose' used in this Section would have their natural meaning. Where an unstamped document is admitted in proof of some collateral matter, it is certainly admitted in evidence for that purpose, which the Act prohibits. In Ram Ratan v. Parmanand, ILR 1946 Lah. 63, it was held that an unstamped partition deed cannot be used to corroborate the oral evidence for the purpose of determining even the factum of partition as distinct from its term. The words 'for any purpose' would in effect mean 'for each and every purpose whatsoever without any exception'.

e. It is immaterial whether the purpose is the main purpose or a collateral one. The words 'acted on' means that nothing can be recovered under the instrument unless it has a proper stamp. Similarly, where a suit is brought upon an instrument which is not duly stamped, the admission of the contents of the instrument made by the defendant does not avail the claimant and a decree cannot be based on such instruments. Admitting an instrument in evidence also amounts to acting upon it and an instrument which should have been stamped but is not stamped is not admissible in evidence for any purpose whatsoever.
(f) Where an unstamped instrument is lost, the party relying on it is helpless and no payment of penalty can enable admission of secondary evidence.

ADMISSION OF INSTRUMENTS (WHERE NOT TO BE QUESTIONED)

Section 36 provides that where an instrument has been admitted in evidence, such an admission shall not (except as provided in Section 61) be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. Section 36 is mandatory (Guni Ram v. Kodar, AIR 1971 All 434, 437).

If notwithstanding any objection, the trial Court admits the document, the matter ends there and the Court cannot subsequently order the deficiency to be made and levy penalty (Bhupathi Nath v. Basanta Kumar, AIR 1936 Cal. 556; AIR 1933 Lah. 240).

However, it should be mentioned that Section 61 makes certain important provisions, details of which will be discussed later.

ADMISSION OF IMPROPERLY STAMPED INSTRUMENTS

Under Section 37, opportunity is given to a party, of getting a mistake rectified when a stamp of proper amount, but of improper description has been used. Under this section, the State Government may make rules providing that, where an instrument bears a stamp of sufficient amount but of improper description, the instrument may, on payment of the duty with which the stamp is chargeable, be certified to be duly stamped, and any instrument so certified shall then be deemed to have been duly stamped as from the date of its execution.

DEALING WITH INSTRUMENTS IMPOUNDED

a. Section 38 deals with instruments impounded under Section 33. A person impounding an instrument under Section 33 and receiving the same in evidence (upon payment of penalty under Section 35 or, of duty under Section 37) shall send, to the Collector of Stamps, an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof and shall send such amount to the Collector or to such person as the Collector may appoint in this behalf. In every other case, the person so impounding an instrument shall send it in original to the Collector.

b. Section 39 vests the Collector with certain powers to refund penalty recovered by a court on impounding a document not duly stamped when produced before it. Under Section 38, the court so impounding the instrument and realizing the penalty has to forward an authenticated copy of the instrument and the amount of penalty recovered to the Collector. The Collector, on examining the instrument so received by him may, in his discretion, refund the whole penalty if it had been imposed for contravention of Section 13 or Section 14 of the Act and in any other case any portion of the penalty in excess of Rs. 5/- in cases where a copy of the instrument under Section 38(1) has been sent to him. The Collector can act Suo moto without any application in this behalf being made by a party affected.

Collector's Power to Stamp Instrument Impounded

Section 40 deals with Collector's powers to stamp an instrument which is impounded. Under Section 40(1), the Collector when impounding any instrument under Section 33, or receiving any instrument under Section

38(2) not being an instrument chargeable with duty not exceeding 10 naya paisa only or a bill of exchange or promissory note, shall adopt the following procedure:

i. if he is of the opinion that instrument is duly stamped or is not chargeable with duty, he shall certify by endorsement thereon that it is duly stamped, or that it is not so chargeable as the case may be;

ii. if he is of the opinion that such instrument, is chargeable with duty and is not duly stamped, he shall require the payment of the proper duty or the amount required to make up the same, together with a penalty of Rs. 5/-, if he thinks fit and amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or falls short of Rs. 5/-.

The Collector, however, has the discretion to remit the whole penalty leviable under this Section in a case where the instrument has been impounded only because it has been written in contravention of Section 13 or Section 14.

A certificate given in the situation (i) above, shall, for the purposes of the Act be conclusive evidence of the matters stated therein. Sub-section (3) of Section 40 provides that an instrument which has been sent to the Collector under Section 38(2) shall be returned to the impounding officer after the collector has dealt with the same in the manner provided above.

INSTRUMENTS UNDULY STAMPED BY ACCIDENT

Section 41 deals with cases where a person, of his own motion bring it to the Collector's notice that the instrument is not duly stamped. In such cases, if the Collector is satisfied, that the omission to pay the proper duty was due to accident, mistake or urgent necessity, he may receive the deficit amount and certify by endorsement on the instrument that the proper duty has been levied. In order to avail of the benefit of this section, the instrument must be produced before the Collector within one year of the date of its execution. Where the instrument is brought to the notice of the Collector, beyond the period of one year, Section 47 has no application and the Collector has to proceed under Section 42 read with Section 33 and 40 of the Act. Where the instrument having been brought to the notice of the Collector within the period of one year, the Collector is in doubt regarding the amount of duty chargeable, he may refer the case to the Chief Controlling Revenue Authority and proceed in accordance with the decision of such authority. However, where no such reference is made by the Collector, the Collector's decision would be final, and the Chief Controlling Revenue Authority cannot interfere with his decision.

ENDORSEMENT OF INSTRUMENT ON WHICH DUTY HAS BEEN PAID UNDER SECTIONS 35, 40 AND 41

Section 42 deals with cases where duty and penalty, if any, have been levied and realized by the court or any other body or by the Collector. In such cases, the authority refunding and collecting the duty and penalty must make an endorsement on the instrument as to the amount paid and the name and the residence of the person paying the same. Upon such certification, the instrument becomes admissible in evidence and may be registered and acted upon as if it had been duly stamped. The duty and penalty referred to in this Section are those covered by Sections 35, 40 or 41 as the case may be. The proviso to this Section lays down that no instrument which has been admitted in evidence upon payment of duty and a penalty under Section 35, shall be delivered to the person from whom possession of it came into the hands of the officer impounding it, before the expiration of one month from the date of such impounding or if the Collector has certified that its further detention is necessary and has not cancelled such certificate. Again, nothing contained in Section 42 shall affect the provisions of clause (3) of Section 144 of the Code of Civil Procedure, 1889 [under the present Code the corresponding provision is proviso to Order 13, Rule 9(1)].

PROSECUTION FOR OFFENCES AGAINST STAMP LAW

Section 43 deals with prosecutions for offences against the Stamp Law. This section provides that a levy of a penalty or payment thereof in respect of an unstamped or insufficiently stamped document (as provided for in Chapter IV) does not necessarily exempt a person from liability for prosecution for such offence. However, the proviso to the section clarifies that no such prosecution shall be instituted in the case of any instrument in respect of which a penalty has been paid, unless it appears to the Collector that the offence was committed with the intention of evading the payment of proper duty. On receipt of copy of the instrument impounded under Section 38, the Collector can initiate criminal proceedings if he sees reasons therefor.

RECOVERY OF DUTY OR PENALTY IN CERTAIN CASES

Section 44 deals with the circumstances in which persons paying duty or penalty may recover the same in certain cases. The duty or penalty under this Section refers to the duty or penalty paid/levied under Sections 35, 37, 40 or 41 of the Act. It also includes any duty or penalty under Section 29. The remedy is available to a person who, under the Act, was not bound to bear the expense of providing the proper stamp for such instrument. Such a person shall be entitled to recover, from the person bound to bear such expense, the amount of duty or penalty, if any, paid. For the purpose of such recovery, any certificate granted in respect of such instruments under the Act shall be conclusive evidence of the matters therein certified. Sub-section (3) of Section 44 further provides that the amounts so recoverable may, if the court thinks fit, be included in any order as to cost in any suit or proceedings to which such persons are parties and in which such instrument has been tendered in evidence. If the court does not include the amount in such order, no further proceedings for the recovery of the amount shall be maintainable.

REFUND OF DUTY OR PENALTY IN CERTAIN CASES BY REVENUE AUTHORITY

Section 45 deals with power of the Revenue Authority to refund the penalty in excess of duty payable on instrument in certain cases. Section 39 of the Act empowers the Collector to refund a part and, in some cases, the whole of the penalty paid under the provisions of Section 35. Section 45 further empowers the Chief Controlling Revenue Authority to order refunds. The object of granting such further power to the Chief Controlling Revenue Authority is evidently to set right mistakes or other omissions by the Collector to order refund in deserving cases. The Section provides that where any penalty is paid under Section 35 or Section 40, the Chief Controlling Revenue Authority may, upon application in writing made within one year from the date of payment, order, refund such penalty wholly or in part. Where in the opinion of the Chief Controlling Revenue Authority, stamp duty in excess of that which is legally chargeable has been charged and paid under Section 35 or Section 40, such authority may, upon application in writing made within three months of the order charging the same, refund the excess.

It is necessary to appreciate the differences between the powers of the Collector under Section 39 and the powers of the Controlling Revenue Authority under Section 45 at this stage. They are:

i. Section 39 provides for refund of penalty, whereas Section 45 confers powers to refund even duties where they have been paid in excess.

ii. The Collector's power to refund penalty is restricted only to two cases mentioned in Section 39(3) but the powers under Section 45 are not subject to any such limitation.

iii. Section 39 does not lay down any time limit for the Collector to exercise his powers to refund, but in the case of Section 45 there is a time limit.

iv. The power under Section 45 is to be exercised only when an application is made by a party, whereas under Section 39 it is routine function of the Collector. The power under Section 45 is a purely discretionary one and the Chief Controlling Revenue Authority cannot be compelled to exercise his power by any further proceedings.

NON-LIABILITY FOR LOSS OF INSTRUMENTS SENT UNDER SECTION 38

Section 46 provides that where any instrument sent to the Collector under Section 38(2) is lost, destroyed during transmission, the person sending the same, shall not be liable for such loss, destruction or damage. However, Section 38(2) provides that when any instrument is to be sent, the person from whose possession it came into the hands of the person impounding the same may require a copy thereof to be made at his expense and authenticated by the person impounding such instruments.

POWER TO STAMP IN CERTAIN CASES

Under Section 47 when any bill exchange or promissory note chargeable with a duty not exceeding 10 naya paise is presented for payment unstamped, the person to whom it is so presented may affix thereto the necessary adhesive stamp, and, upon cancelling the same in the manner provided in the Act, may pay the sum payable upon such bill or note and may charge the duty against the person who ought to have paid the same, or deduct it from the sum payable as aforesaid and such bill or note shall, so far as respects the duty, be deemed good and valid. However, nothing contained in this section shall relieve any person from any penalty or proceeding to which he may be liable in relation to such bill or note.

RECOVERY OF DUTIES AND PENALTIES

Under Section 48, all duties penalties and other sums required to be paid under this Chapter may be recovered by the Collector by distress and sale of the movable property of the person or by any other process used for the recovery of the arrears of land revenue. This section provides for the mode of realization of duty or penalty or other sums not voluntarily paid.

ALLOWANCE AND REFUND

Section 49 deals with different circumstances in which refund would be admissible in respect of impressed stamps not used. The section applies only to impressed stamps and not adhesive stamps. Clause (a) of the section refers to cases where the stamp paper is spoiled before any document has been written thereon, or is spoiled in the course of writing and before execution. Clause (b) refers to cases where the document has been written out wholly or in part but not executed. Clause (c) refers to bills of exchange payable otherwise than on demand and promissory notes, when these have not been accepted or made use of. Clause (d) deals with refunds after execution.

Section 49 provides that subject to such rule as may be made by the State Government, as to the evidence to be required, or the enquiry to be made, the Collector may, on application made within the period prescribed in Section 50, and if he is satisfied as to the facts, make allowance for impressed stamps spoiled in the cases hereinafter mentioned, namely:

a. the stamp on any paper inadvertently and undesignedly spoiled, obliterated or by error in writing or any other means rendered unfit for the purpose intended before any instrument written thereon is executed by any person;

b. the stamp on any document which is written out wholly or in part; but which is not signed or executed by any party thereto;

c. in the case of bills of exchange payable otherwise than on demand or promissory notes:

   i. the stamp on any such bill of exchange signed by or on behalf of the drawer which has not been accepted or made use of in any manner whatever or delivered out of his hands for any purpose other than by way of tender for acceptance provided that the paper on which any such stamp is impressed, does not bear any signature intended as or for the acceptance of any bill of exchange to be afterwards written thereon;

   ii. the stamp on any promissory note signed by or in behalf of the maker which has not been made use of in any manner whatever or delivered out of his hands;

   iii. the stamp used or intended to be used for any such bill of exchange or promissory note signed by, or on behalf of, the drawer thereof, but which from any omission or error has been spoiled or rendered useless, although the same, being a bill of exchange may have been presented for acceptance or accepted or endorsed, or being a promissory note may have been delivered to the payee: provided that another completed and duly stamped bill of exchange or promissory note is produced identical in every particular, except in the correction of such omission or error as aforesaid, with the spoiled bill, or note;

d. The stamp used for an instrument executed by any party thereto which-

   i. has been afterwards found to be absolutely void in law from the beginning;

   ii. has been afterwards found unfit, by reason of any error or mistake therein, for purpose originally intended;

   iii. by reason of the death of any person by whom it is necessary that it should be executed, without having executed the same, or of the refusal of any such person to execute the same, cannot be completed so as to affect the intended transaction in the form proposed;

   iv. for want of the execution thereof by some material party, and his inability or refusal to sign the same, is in fact incomplete and insufficient for the purpose for which it was intended;

v. by reason of the refusal of any person to act under the same or to advance any money intended to be thereby secured or by the refusal or non-acceptance of any office thereby granted, totally fails of the intended purpose;

vi. becomes useless in consequence of the transaction intended to be thereby affected being affected by some other instrument between the same parties and bearing a stamp of not less value;

vii. is deficient in value and the transaction intended to be thereby affected has been affected by some other instrument between the same parties and bearing a stamp of not less value;

viii. is inadvertently and undesignedly spoiled, and in lieu whereof another instrument made between the same parties and for the same purpose is executed and duly stamped.

Provided that, in the case of an executed instrument, no legal proceeding has been commenced in which the instrument could or would have been given or offered in evidence and that the instrument is given up to be cancelled.

TIME LIMITS

Section 50 prescribes the time limit within which an application for relief in respect of impressed stamps spoiled can be made; different time limits have been specified for the purpose, namely:

i. in the cases mentioned in clause (d)(5) of Section 49, within two months of the date of the instrument;

ii. in the case of a stamped paper on which no instrument has been executed by any of the parties thereto, within six months after the stamp has been spoiled;

iii. in the case of a stamped paper in which an instrument has been executed by any of the parties thereto, within six months after the date of the instrument, or if it is not dated, within six months after the execution thereof by the person by whom it was first or alone executed:

Provided that -

a. when the spoiled instrument has been for sufficient reasons sent out of India, the application may be made within six months after it has been received back in India.

b. when, from unavoidable circumstances, any instrument for which another instrument has been substituted, cannot be given up to be cancelled within the aforesaid period, the application may be made within six months after the date of execution of the substituted instrument.

UNUSED FORMS

Section 51 of the Act enables the Chief Controlling Revenue Authority or the Collector if authorized by the Chief Controlling Revenue Authority, for such purpose to allow refunds in cases where refunds of stamps on printed forms used by bankers, incorporated companies/bodies corporate if required. Allowance may be made without limit of time, for stamped papers used for printed forms of instruments any bankers or by any incorporated company or other body corporate, if for any sufficient reasons such forms have ceased to be required by the said banker, company or body corporate: provided that the Chief Controlling Revenue Authority or the Collector, as the case may be, is satisfied that the duty in respect of such stamped papers has been duly paid.

MISUSED STAMPS

Section 52 deals with allowance for misused stamps and applies to both impressed and adhesive stamps in the following instances:

a. When any person has inadvertently used, for an instrument chargeable with duty, a stamp of a description other than that prescribed for such instrument by the rules made under this Act, or a stamp of greater value than was necessary, or has inadvertently used any stamp for an instrument not chargeable with any duty; or

b. When any stamp used for an instrument has been inadvertently rendered useless under Section 15, owing to such instrument having been written in contravention of the provisions of Section 13.

The Collector may, on application made within six months after the date of instrument or, if it is not dated, within six months after the execution thereof by the person by whom it was first or alone executed, and upon the instrument, if chargeable with duty, being re stamped with the proper duty, cancel and allow as spoiled the stamp so misused or rendered useless.

Under Section 53, in any case in which allowance is made for spoiled or misused stamps, the Collector may give in lieu thereof:

a. other stamps of the same description and value; or

b. if required and he thinks fit, stamps of any other description to the same amount in value; or

c. at his discretion, the same value in money, deducting ten naya paisa for each rupee or fraction of a rupee.

Section 54 of the Act enables a person to obtain refund of the value of stamps purchased by him, if he has no immediate use thereof. Under this section, when any person is possessed of a stamp or stamps which have not been spoiled or rendered unfit or useless for the purpose intended, but for which he has no immediate use, the Collector shall repay to such person the value of such stamp or stamps in money, deducting ten naya paise for each rupee or portion of a rupee, upon such person delivering up the same to be cancelled and proving to the Collector's satisfaction

a. that such stamp or stamps were purchased by such person with a bona fide intention to use them; and

b. that he has paid the full price thereof; and

c. that they were so purchased within the period of six months next preceding the date on which they were so delivered.

Provided that, where the person is a licensed vendor of stamps, the Collector may, if he thinks fit, make the repayment of the sum actually paid by the vendor without any such deduction as aforesaid.

DEBENTURES

Section 55 is intended to relieve companies renewing debentures issued by them from the liability to pay stamp duty on both the original and the renewed debenture. As per this section, when any duly stamped debenture is renewed by the issue of a new debenture in the same terms, the Collector shall, upon application made within one month, repay to the person issuing such debenture, the value of the stamp on the original or on the new debenture whichever shall be less:

Provided that the original debenture is produced before the Collector and cancelled by him in such manner as the State Government may direct.

A debenture shall be deemed to be renewed in the same terms within the meaning of this section notwithstanding the following changes:

a. the issue of two or more debentures in place of one original debenture, the total amount secured being the same;

b. the issue of one debenture in place of two or more original debentures, the total amount secured being the same;

c. the substitution of the name of the holder at the time of renewal for the name of the original holder; and

d. the alteration of the rate of interest of the date of payment hereof.

REFERENCE AND REVISION

Sections 56 to 61 deal with Reference and Revision. Section 56 provides that the powers exercisable by a Collector under Chapter IV and V and under clause (a) of the first proviso to Section 26 shall in all cases be subject to the control of the Chief Controlling Revenue Authority. Further, if any Collector, acting under Sections 31,40 or 41, feels doubt as to the amount of duty with which any instrument is chargeable, he may draw up a statement of the case, and refer it, with his own opinion thereon, for the decision of the Chief Controlling Revenue Authority [Section 56(2)]. Such authority shall consider the case and send a copy of its decision to the Collector, who shall proceed to assess and charge the duty (if any) in conformity with such decision.

As per Section 57(1), the Chief Controlling Revenue Authority may state any case referred to it under Section 56(2) or otherwise coming to its notice, and refer such case, with its own opinion thereon to the High Court and the same shall be decided by not less than three Judges of the High Court and the majority decision shall prevail.

According to Section 58, if the High Court is not satisfied that the statements contained in the case are sufficient to enable it to determine the questions raised thereby, the court may refer the case back to the Revenue Authority for further feedback. The High Court shall decide the questions raised and give its judgment to the Authority who shall dispose of the case as per the judgment.

As per Section 60, any subordinate Court can also refer such case to the High Court like the Revenue Authority but should be through proper channel. In Section 61(1) of the Act it is provided that a Court may take into consideration on its own motion or on application of the Collector, an order of the lower Court admitting the instrument as duly stamped or as not requiring stamp duty or on payment of duty and penalty. According to sub-section 2 of Section 61, if such Court is not in agreement with the stand of the lower Court, it may require that the instrument be produced before it and may even impound the same if necessary. While doing so, the Court shall send a copy of its order to the Collector and to the office/Court from which such instrument has been received. [Section 61(3)]

PROSECUTION

As per Section 61(4), the Collector has got the power notwithstanding anything contained in the order of the lower court, to prosecute a person if any offence against the Stamp Act which he considers that the person has committed in respect of such an instrument. The prosecution is instituted when he is satisfied that the offence is committed with an intention of evading the proper stamp duty. The order of the lower Court as to the instrument shall be valid except for the purposes of prosecution in this respect.

CRIMINAL OFFENCES

Sections 62 to 72 deal with penalties for offences. The provisions are as under:

1. As per Section 62(1), any person

   a. drawing, making, issuing, endorsing or transferring, or signing otherwise than as a witness, or presenting for acceptance or payment, or accepting, paying or receiving payment of or in any manner negotiating, any bill of exchange (payable otherwise than on demand) or promissory note without the same being duly stamped; or

   b. executing or signing otherwise than as a witness any other instrument chargeable with duty without the same being duly stamped; or

   c. voting or attempting to vote under any proxy not duly stamped shall, for every such offence, be punishable with fine which may extend to five hundred rupees.

   Provided that, when any penalty has been paid in respect of any instrument under Sections 35, 40 or 61, the amount of such penalty shall be allowed in reduction of the fine (if any)

subsequently imposed under this section in respect of the same instrument upon the person who paid such penalty. In such a case the Collector is to make an enquiry and to give an opportunity to the accused to pay. In such cases the instrument is (i) chargeable with duty, and (ii) there is a dishonest intention not to pay the duty.

Sub-section (2) of Section 62, provides that if a share-warrant is issued without being duly stamped, the company issuing the same, and also every person who, at the time when it is issued, its managing director or secretary or other principal officer of the company, shall be punishable with fine which may extend to five hundred rupees.

2. Any person required by Section 12 to cancel an adhesive stamp, and failing to cancel such stamp in the manner prescribed by that section, shall be punishable with fine which may extend to one hundred rupees (Section 63). The criminal intention is necessary for an offence under this Section.

3. As per Section 64, any person who, with intent to defraud the Government—

   a. executes any instrument in which all the facts and circumstances required by Section 27 to be set forth in such instrument are not fully and truly set forth; or

   b. being employed or concerned in or about the preparation of any instrument, neglects or omits fully and truly to set forth therein all such facts and circumstances; or

   c. does any other Act calculated to deprive the Government of any duty or penalty under this Act; shall be punishable with fine which may extend to five thousand rupees.

Here also, an intention to evade payment of proper stamp duty or intention to defraud the Government of its stamp revenue is necessary.

4. Any person who (a) being required under Section 30 to give a receipt, refuses or neglects to give the same; or (b) with intent to defraud the Government of any duty, upon a payment of money or delivery of property exceeding twenty rupees in amount or value, gives a receipt for amount or value not exceeding twenty rupees, or separates or divides the money or property paid or delivered shall be punishable with fine which may extend to one hundred rupees (Section 65). To constitute an offence under this section, an intention to defraud the Government is necessary.

5. As per Section 66, any person shall be punishable with fine which may extend to Rs. 200/- if he -

   a. receives, or takes credit for any premium or consideration for any contract of insurance and does not, within one month after receiving or taking credit for, such premium or consideration, make out and execute a duly stamped policy of such insurance; or

b. makes, executes or delivers out any policy which is not duly stamped or pays or allows in account, or agrees to pay or to allow in account, any money upon, or in respect of, any such policy.

6. As per Section 67, if any person drawing or executing a bill of exchange (payable otherwise than on demand) or a policy of marine insurance purporting to be drawn or executed in a set of two or more, and not at the same time drawing or executing on paper duly stamped the whole number of bills or policies of which such bill or policy purports the set to consist, shall be punishable with fine which may extend to one thousand rupees.

7. Any person who, (a) with intent to defraud the Government, of duty, draws, makes or issues any bill of exchange or promissory note bearing a date subsequent to that on which such bill or note is actually drawn or made; or (b) knowing that such bill or note has been so post- dated, endorses, transfers, presents for acceptance or payment, or accepts, pays or receives payment of, such bill or note; or in any manner negotiates the same; (c) with the like intent, practices or is concerned in any act, contrivance or device not specially provided for by this Act or any other law for the time being in force; shall be punishable with fine which may extend to one thousand rupees. Intention to defraud is an essential ingredient for offence under Section 68.

8. If any person appointed to sell stamps who disobeys any rule made under Section 74, and any person not so appointed who sells or offers for sale any stamp [other than a (ten naya paise or five naya paise) adhesive stamp] shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both (section 69). Before instituting criminal proceedings under this section against any person, sanction of the Collector must be obtained. Otherwise, the proceedings will be vitiated. A criminal court having jurisdiction to try offences under Cr. P.C. can try such offences.

TAKING COGNIZANCE

a. No prosecution in respect of any offence punishable under this Act or any Act hereby repealed, shall be instituted without the sanction of the Collector or such other officer as the State Government generally or the Collector specially, authorizes in that behalf.

b. The Chief Controlling Revenue Authority, or any officer generally or specially authorized by it in this behalf, may stay any such prosecution or compound any such offence.

c. The amount of any such composition shall be recoverable in the manner provided by Section 48.

A Magistrate other than a Presidency Magistrate or a Magistrate whose powers are not less than those of a Magistrate of the second class, shall try any offence under this Act (Section 71).

Every such offence committed in respect of any instrument may be tried in any district or presidency town in which instrument is found as well as in any district or presidency town in which such offence might be tried under the Code of Criminal Procedure for the time being in force (Section 72).

MISCELLANEOUS PROVISIONS

Chapter VIII, containing Sections 73 to 78 deals with supplemental provisions regarding inspection of relevant registers, books, records, etc.; to enter the premises for that purpose, powers of Government to frame rules for the sale and supply of stamps and to make rules generally to carry out the provisions of the Act.

Section 77A provides that all stamps in denominations of annas four or multiples thereof shall be deemed to be stamps of the value of 25 naya paise or (as the case may be), multiples thereof and shall accordingly be valid for all the purposes of the Act. From this it can be inferred that whatever the stamp duty is mentioned to be annas in the first Schedule; the instrument concerned has to be treated as leviable with duty of 25 naye paise or in multiples thereof as the case may be.

SCHEDULE

The Schedule to the Stamp Act prescribes the rates of stamp duties on instruments. Articles 13, 27, 37, 47, 49, 53 and 62(a) of the Schedule relate to instruments, the rates of duties on which are prescribed by the Central Legislature and have been subject to legislative amendments by that Legislature (See Entry 91 of List I). The other articles relate to instruments in respect of which the Central Legislature has lost its power to regulate rates of duties (except for Union Territories) since the passing of the Government of India Act, 1935. With respect to these instruments, the rates mentioned are fixed by the State Legislatures (See Entry 63 of List II).

E-STAMPING

E-Stamping is a computer-based application and a secured way of paying Non Judicial stamp duty to the Government. The benefits of e-Stamping are e-Stamp Certificate can be generated within minutes; e- Stamp Certificate generated is tamper proof; Easy accessibility and faster processing; Security; Cost savings and User friendly.

15 REGISTRATION ACT, 1908

APPLICABILITY

The registration act, 1908 came in to force on 1st day of January, 1909

THIS ACT EXTENDS TO WHOLE OF INDIA EXCEPT JAMMU AND KASHMIR

INTRODUCTION

a) Registration means recording of the contents of a document with a Registering Officer and preservation of copies of the original document. The Registration Act, 1908 is the law relating to registration of documents.

b) Registration is the process by which the records of such document are preserved and through observing certain procedure can be made available to the general public by Registrar.

c) Therefore, the registration is notice to the general public. Registered document becomes public document, such document can be inspected and certified true copy of the same can be obtained by anybody on payment of necessary fees and by observing the prescribed procedure.

THE PURPOSE OF THE REGISTRATION ACT

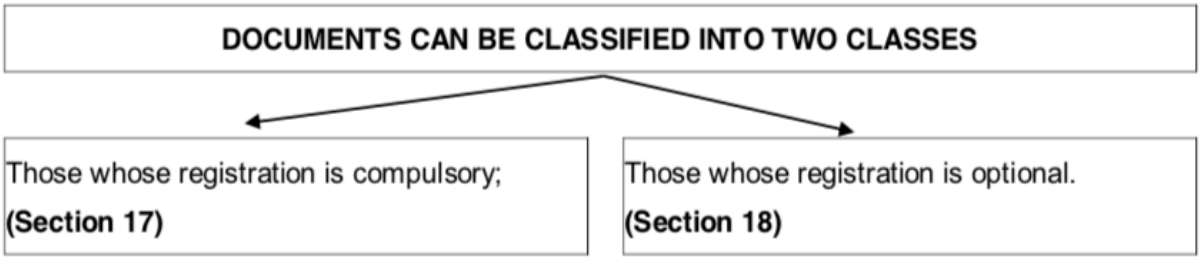
- Is to provide a method of public registration of documents so as to give information to people regarding legal rights and obligations arising or affecting a particular property,
- To perpetuate documents which may afterwards be of legal importance, and
- Also to prevent fraud.
- Registration lends inviolability (incapable of being violation) and importance to certain classes of documents.

DOCUMENTS

Section 3(18) of General clauses Act 1897
The term document means any matter, written, expressed, or described upon any substance by means of letter, figures which is intended to be used for the purpose of recording that matter.

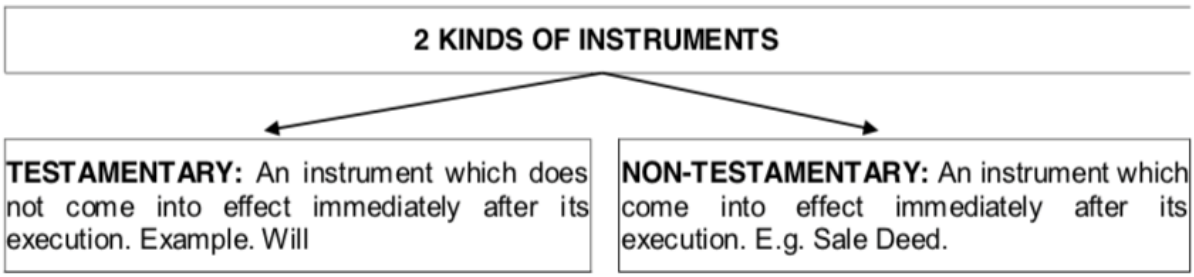
Examples-

- Minutes of a meeting.
- A map is a document.
- A caricature is a document.



IMPORTANT TERMS

INSTRUMENT as per section 2(14) of Indian stamp Act, 1899 define instrument as including every document by which any right or liability is or purported to be created, transferred, limited, extinguished or recorded. E.g. Promissory Note.



It may be noted that all instruments are documents but all documents need not be instruments.

DOCUMENTS WHOSE REGISTRATION IS COMPULSORY (SECTION 17)

According to Section 17 of the Registration Act, 1908, documents whose registration is compulsory are the following:-

Gift	Instruments of gift of immovable property. Section 17(l)(a)
Non-Testamentary Instruments	which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title of interest, of the value of one hundred rupees and upwards, in immovable property. Section 17(l)(b)

Acknowledge Receipt or payment	Non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation, or extinction of an interest of the value of Rs. 100 or upwards in immovable property. Section 17(l)(c)
Lease of immovable property	A lease of immovable property is compulsory registrable: i. If it is from year to year; or ii. If it is for a term exceeding one year; or iii. If it reserves a yearly rent. Section 17(l)(d)
Decree of court or award of arbitrator	Non testamentary instruments transferring or assigning any decree or order of a court or any award, when such decree, order or award purports to create, declare, assign, limit or extinguish; whether in present or in future, any right, title or interest, whether vested or contingent of value of one hundred and upwards in immovable property, Section 17(l)(e) NOTE However, registration of Arbitrator's Award is necessary only if title is founded on the award. If the award contains a mere declaration of pre-existing right, the award is not creating a right, title and interest. Then it is not required to be compulsorily registered. -Sardar Singh vs. Smt Krishna Devi
Authority to Adopt	A son which is not conferred by will. 17(3)

EXCEPTIONS TO SECTION 17(1), & [SECTION 17(2)]

Documents which are covered under Sec 17 (1) and also covered under Sec 17 (2) then they are optionally Registerable.

Some of few examples are-

a. Any instrument relating to shares in Joint Stock Company; or

b. Any debentures issued by any such Company; or

c. Any grant of immovable property by the Government; or

d. Composition deed (i.e., every deed the essence of which is composition; or

e. Any endorsement upon or transfer of any debenture; or

f. Any order granting loan made under the Agriculturists Loans Act, 1884 or instrument for securing the repayment of a loan made under that Act; or

g. Any endorsement on a mortgage deed acknowledging the payment of the whole or any part of the mortgage money, and any other receipt for payment of money, due under a mortgage when the receipt does not purport to extinguish the mortgage;

DOCUMENTS OF WHICH REGISTRATION IS OPTIONAL (SECTION 18)

Section 18 specifies documents, registration of which is optional. It provides that any of the following documents may be registered under this Act, namely:

- Instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent, of value less than one hundred rupees, in immovable property;
- Instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment; limitation or extinction of any right, title or interest of value less than one hundred rupees, in immovable property;
- Leases of immovable property for any term not exceeding one year.
- Wills
- Other documents not required by Section 17(1) to be registered.

RE-REGISTRATION (SECTION 23A)

Section 23A provides for the re-registration of certain documents. The section is mainly intended to deal with situations where the original presentation was made by a person not duly authorized.

If a person finds that a document has been filed for registration by a person who is not empowered to do so, he can present the document for re-registration within four months from the date he became aware of the fact that registration of document is invalid.

The document if registered under section 23A shall be deemed to have been registered from the date of its original registration.

UNSTAMPED

If the document is not sufficiently stamped its presentation is still good presentation though penalty under the Stamp Act can be levied (Mahaliram v. Upendra Nath)

PLACE OF REGISTRATION

DOCUMENTS AFFECTING IMMOVABLE PROPERTY

Section 28 provides that documents affecting **immovable property** shall be presented for registration in the office of a **Sub-Registrar within whose sub-district** the whole or some portion of the relevant **property is situated.**

ANY OTHER DOCUMENT (includes will)

Section 29 Any **Other Document** may be presented for registration either in the office of the Sub-Registrar in whose sub-district the document was **executed or** in the office of any other Sub-Registrar under the **State Government** at which all the persons executing desire the document to be

PLACE FOR PRESENTATION OF DOCUMENT

TIME LIMIT FOR PRESENTATION OF DOCUMENT (SECTION 23 - 26)

TIME LIMIT FOR PRESENTATION

DOCUMENTS EXECUTED IN INDIA

Section 23 provides that a document other than a will must be presented within **four months** of its execution.

As per section 25 provide that in cases of **urgent necessity** or an unavoidable accident etc. the registrar may **extend** the period by maximum **4 months,** on payment of higher fees.(Up **to 10 times)**

DOCUMENTS EXECUTED OUT OF INDIA

As per Section 26 Where the registering officer is satisfied that the document was executed outside India and it has been presented for registration within **four months** after its arrival in India, he may accept such document for registration on payment of proper registration fee.

[A document executed outside India is not valid unless it is registered in India.]

As per section 24 provide that where there are several person executing a document at different time, such document may be presented for registration and Re- registration (Section 23A) with in 4 month from the date of Each Execution.

Registration in Certain Cities

Section 30 (1) Any Registrar may in his discretion receive and register any document which might be registered by any Sub-Registrar subordinate to him.

Section 31, registration is permitted in cases of necessity under extra - ordinary circumstances, at the residence of the executant.

PRESENTING OF DOCUMENTS FOR REGISTRATION (SECTION 32-33)

Section 32 specifies the persons who can present documents for registration at the proper registration office. Such persons are as follows: -

- Some person executing or claiming under the document;
- The representative or assignee of such person,
- The agent of such person, representative or assignee, duly authorised by power-of-attorney (SPECIAL POWER OF ATTORNEY). An executed and authenticated in the manner hereinafter mentioned as under (Section 33);
- If the principal at the time of executing the power of attorney, resides in any part of India and the power of attorney executed before and authenticated by the Registrar or Sub-Registrar or any Magistrate within whose district the principal resides;
- If the principal at the time aforesaid does not reside in India, a power of attorney executed before and authenticated by a Notary Public or any court, Judge, Magistrate Council or Vice Council or representative of the Central Government;

Provided that the following persons shall not be required to attend the registration office or court for the purpose of executing any such power of attorney as is mentioned in clause (a) and (b) of this section namely :-

i. Persons who by reason of bodily infirmity are unable without risk or serious inconvenience so to attend;

ii. Persons who are in jail under civil or criminal process; and

iii. Persons exempt by law from personal appearance in court. (Under sec.38)
The above mentioned persons are exempt from appearing at registration office u/s. 38.

In case of every such person the registering officer shall either himself visit such place or go to the house of such person, or to the jail in which he is confined, and examine him or issue a commission for this examination.

It is immaterial whether the registration is compulsory or optional; but, if it is presented for registration by a person other than a party not mentioned in Section 32, such presentation is wholly inoperative and the registration of such a document is void. (Kishore Chandra Singh v. Ganesh Prashad Singh)

Under Section 33 of the Registration Act, a special power of attorney is required. A general power of attorney will not do. Section 33 requires that a power of attorney, in order to be recognised as giving authority to the agent to get the document registered, should be executed before and then authenticated by the Registrar within whose district or sub-district the principal resides.

PARTICULARS TO BE ENDORSED ON DOCUMENTS ADMITTED TO REGISTRATION

1. On every document admitted to registration, other than a copy of a decree or order, or a copy sent to a registering officer under Section 89, there shall be endorsed from time to time the following particulars, namely:

    - the signature and addition of every person admitting the execution of the document and, if such execution has been admitted by the representative, assign or agent of any person, the signature and addition of such representative, assign or agent;

    - the signature and addition of every person examined in reference to such document under any of the provisions of this Act; and

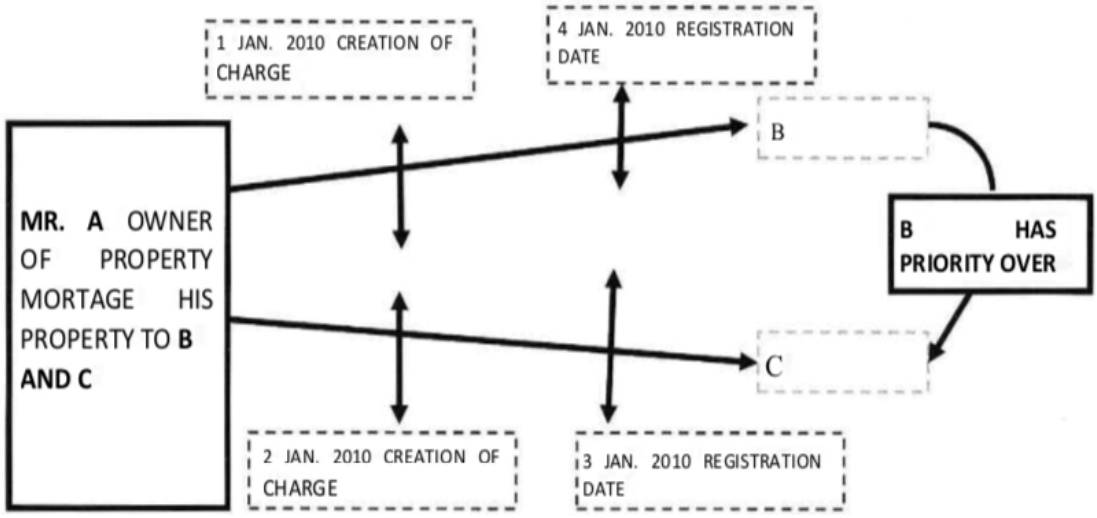
    - Any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document and any admission of receipt of consideration, whole or in part, made in his presence in reference to such execution.

2. If any person admitting the execution of a document refuses to endorse the same, the registering officer shall nevertheless register it, but shall at the same time endorse a note of such refusal. (Sections 58 to 62)

REGISTERED DOCUMENT WHEN OPERATIVE SECTION - 47

A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of its registration.

As between two registered documents, the date of execution determines the priority. Of the two registered documents, executed by same persons in respect of the same property to two different persons at two different times, the one which is executed first gets priority over the other, although the former deed is registered subsequently to the later one (K.J. Nathan v. S.V. Maruthi Rai,)



SOME IMPORTANT TOPICS (SECTION 48 - 49)

Registered documents relating to property when to take effect against oral agreement (section 48)	Registered documents relating to any property whether movable or immovable shall take effect against any oral agreements or declaration relating to such property unless followed by delivery of possession which constitutes a valid transfer under any law for the time being in force.
Effect of non-registration of documents (section 49)	Section 49 of the Act provides that document required by Section 17 if not registered shall not: • Take affect against any immovable property comprised therein; or • Confer any power to adopt; or • Be received as evidence of any transaction affecting such property or conferring such power. However, as provided in Section 49, proviso, an unregistered document affecting immovable property and required to be registered may be received as evidence of a contract in a suit for part performance under Section 53A of the Transfer of Property Act, 1882. &Suit for Specific Performance.

Certificate of registration	After all the applicable provisions are complied with, the registering officer shall endorse thereon a certificate containing the word "registered" along with the number, and page of the book in which the document has been copied. The certificate shall be signed, sealed and dated by the registering officer. The certificate of registration in respect of a document is prima facie evidence that the document has been legally registered and raises a presumption that the registering officer proceeded in accordance with the law.

REASONS FOR REFUSAL TO REGISTER TO BE RECORDED (SECTION 71)

Every Sub-Registrar refusing to register a document, except on the ground that the property to which it relates is not situated within his sub-district, shall make an order of refusal and record his reasons for such order give a copy of the reasons so recorded to parties.

It may be noted that under- valuation of stamp duty is not a valid ground for refusing the registration of a document. In such a case, the sub- registrar can guide the person to affix proper stamp before he can register the document presented. If the sub-registrar is doubtful as to the proper value of stamp affixed, he can refer the case to the collector of stamp to be adjudicated.

PROVISION RELATED TO APPEAL

Appeal to registrar from the order of sub-registrar refusing registration on grounds other than denial of execution of document. [SECTION 72]

An appeal shall lie against an order of a Sub-Registrar refusing to admit a document to registration to the Registrar to whom such Sub-Registrar is subordinate within 30 days from the date of the order; and the Registrar may reverse or alter such order. This does not apply where the refusal is on the ground of denial of execution. If the order of the Registrar directs the document to be registered and the document is duly presented for registration within thirty (30) days after the making of such order, the Sub- Registrar shall register the same,

Appeal to registrar when sub- registrar refusing to register the documents on the ground of denial of execution. [SECTION 73, 74, 75]

Where the sub registrar has refused to register a Document on the ground of Denial of Execution, then any person claiming under such document may, within 30 days, after the making of the order of refusal, apply to the Registrar to whom such Sub- Registrar is subordinate in order to establish his right to have the document registered. Where such an appeal is made to the registrar, then he shall enquire to find out whether the document has been really executed or not. If the Registrar finds that the Document has been executed, he shall order the document to be registered. If the Document is duly presented for Registration within 30 days after the making of such order, the Sub- Registrar shall register the same.

[Such registration shall take effect as if the document has been registered when it was first duly presented for registration.]

INSTITUTION OF SUIT IN CASE OF ORDER OF REFUSAL BY REGISTRAR

Where the Registrar refuses to order the document to be registered any person claiming under such document, may, within thirty days after the making of the order of refusal, institute in the Civil Court, within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered, a suit for a decree directing the document to be registered in such office if it be duly presented for registration within thirty days after the passing of such decree.

INSTRUMENTS OF GIFT OF IMMOVABLE PROPERTY

In a case where the donor dies before registration, the document may be presented for registration after his death and if registered it will have the same effect as registration in his life time. On registration the deed of gift operates as from the date of execution.

It was held in Kalyana Sundram v. Karuppa, that while registration is a necessary solemnity for the enforcement of a gift of immovable property, it does not suspend the gift until registration actually takes place, when the instrument of gift has been handed over by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. And if it is presented by a person having necessary interest within the prescribed period the Registrar must register it. Neither death nor the express revocation by the donor is a ground for refusing registration, provided other conditions are complied with.

16 RIGHT TO INFORMATION, 2005

INTRODUCTION

RIGHT TO INFORMATION, 2005

Throughout the world, the right to information is seen by many as the key to strengthening participatory democracy and ensuring more people-centred development. In India also, the Government enacted Right to Information (RTI) Act in 2005 allowing transparency and autonomy, and access to accountability in public authorities.

It may be pointed out that the Right to Information Bill was passed by the Lok Sabha on May 11, 2005 and by the Rajya Sabha on May 12, 2005 and received the assent of the President on June 15, 2005. The Act considered as watershed legislation, is the most significant milestone in the history of Right to Information movement in India allowing transparency and autonomy and access to accountability.

The RTI Act confers on all citizens a right to information. The Right to Information Act, 2005 provides an effective framework for effectuating the right to information recognized under Article 19 of the Constitution.

CONSTITUTIONAL VALIDITY OF ACT

Article 19(1) (a) of our Constitution guarantees to all citizens freedom of speech and expression. Right to freedom of speech and expression in Article 19(1) (a) carries with it the right to propagate and circulate one's views and opinions subject to reasonable restrictions as mentioned above. The prerequisite for enjoying this right is knowledge and information. Information adds something "new to our awareness and removes vagueness of our ideas".

Thus, a citizen has a right to receive information and that right is derived from the concept of freedom of speech and expression comprised in Article 19(1) (a).

SALIENT FEATURES OF THE ACT

- The RTI Act extends to the whole of India except Jammu & Kashmir.
- It shall apply to Public Authorities.
- All citizens shall have the right to information, subject to provisions of the Act.
- The Public Information Officers/Assistant Public Information Officers will be responsible to deal with the requests for information and also to assist persons seeking information.
- Fee will be payable by the applicant depending on the nature of information sought.
- Certain categories of information have been exempted from disclosure under Section 8 and 9 of the Act.

IMPORTANT DEFINITIONS

"Public authority" means any authority or body or institution of self -government established or constituted -

a. By any other law made by Parliament;

b. By and other law made by State Legislature;

c. By notification issued or order made by the appropriate Govt. Record" includes: —

i. any document, manuscript and file;

ii. any microfilm, and facsimile copy of a document;

iii. any reproduction of image or images embodied in such microfilm (d) any other material produced by a computer or any other device

"Information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form.

"Right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to —

a. taking notes, extracts, or certified copies of documents or records;

b. inspection of work, documents, records;

c. taking certified samples of material;

d. obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device.

OBLIGATIONS OF PUBLIC AUTHORITY

Every public authority under the Act has been entrusted with a duty to maintain records and publish manuals, rules, regulations, instructions, etc. in its possession as prescribed under the Act.

DESIGNATION OF PUBLIC INFORMATION OFFICERS (PIO)

Every public authority has to: —

(a) Designate in all administrative units or offices **Central or State Public Information Officers** to provide information to persons who have made a request for the information.

(b) Designate at each sub-divisional level or sub-district level **Central Assistant or State Assistant Public Information Officers** to receive the applications for information or appeals for forwarding the same to the Central or State Public Information Officers.

REQUEST FOR OBTAINING INFORMATION

The Act specifies the manner in which requests may be made by a citizen to the authority for obtaining the information. It also provides for transferring the request to the other concerned public authority who may hold the information.

a. Application is to be submitted in writing or electronically, with prescribed fee, to Public Information Officer (PIO).

b. Information to be provided within 30 days.

c. 35 days if application is made to assistant PIO

d. 40 days if interest of 3rd party involve

e. 48 hours where life or liberty is involved.

f. No action on application for 30 days is a deemed refusal.

DUTIES OF A PUBLIC INFORMATION OFFICER

PIO shall deal with requests from persons seeking information and where the request cannot be made in writing, to render reasonable assistance to the person to reduce the same in writing. If the information requested for is held by or its subject matter is closely connected with the function of another public authority, the PIO shall transfer, within 5 days, the request to that other public authority and inform the applicant immediately.

PIO may seek the assistance of any other officer for the proper discharge of his/her duties. PIO, on receipt of a request, shall as expeditiously as possible, and in any case within 30 days of the receipt of the request, either provide the information on payment of such fee as may be prescribed or reject the request

Where the information requested for concerns the life or liberty of a person, the same shall be provided within forty-eight hours of the receipt of the request. If the PIO fails to give decision on the request within the period specified, he shall be deemed to have refused the request.

PARTIAL DISCLOSURE ALLOWED

Under Section 10 of the RTI Act, only that part of the record which does not contain any information which is exempt from disclosure and which can reasonably be severed from any part that contains exempt information, may be provided.

If allowing partial access, the PIO shall give a notice to the applicant, informing: -

a. That only part of the record requested, after severance of the record containing information which is exempt from disclosure, is being provided;

b. The reasons for the decision, including any findings on any material question of fact, referring to the material on which those findings were based;

c. The name and designation of the person giving the decision;

d. Where a request has been rejected, the PIO shall communicate to the requester: -

i. The reasons for such rejection,

ii. The period within which an appeal against such rejection may be preferred, and

iii. The particulars of the Appellate Authority.

EXEMPTION FROM DISCLOSURE

Certain categories of information have been exempted from disclosure under the Act. These are: -

a. Where disclosure prejudicially affects the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

b. Information which has been expressly forbidden by any court or tribunal or the disclosure of which may constitute contempt of court;

c. Where disclosure would cause a breach of privilege of Parliament or the State Legislature;

d. Information including commercial confidence, trade secrets or intellectual property, where disclosure would harm competitive position of a third party, or available to a person in his fiduciary relationship, unless larger public interest so warrants;

e. Information received in confidence from a foreign government;

f. Information the disclosure of which endangers life or physical safety of any person or identifies confidential source of information or assistance;

g. Information that would impede the process of investigation or apprehension or prosecution of offenders;

h. Cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken.

WHO IS EXCLUDED

The Act excludes Central Intelligence and Security agencies specified in the Second Schedule like IB, R&AW, Directorate of Revenue Intelligence, Central Economic Intelligence Bureau, Directorate of Enforcement, Narcotics Control Bureau, BSF, CRPF, ITBP, CISF, NSG, Assam Rifles, the Crime Branch-CID-CB, and Lakshadweep Police etc. Agencies specified by the State Governments through a Notification will also be excluded.

The exclusion, however, is not absolute and these organizations have an obligation to provide information pertaining to allegations of corruption and human rights violations. Further, information relating to allegations of human rights violation shall be given only with the approval of the Central Information Commission within forty-five days from the date of the receipt of request.

APPELLATE AUTHORITIES

- request within the specified time limits who thinks the fees charged are unreasonable; who thinks information given is incomplete or false or misleading; and
- If the Commission feels satisfied, an enquiry may be initiated and while initiating an enquiry the Commission has same powers as vested in a Civil Court.

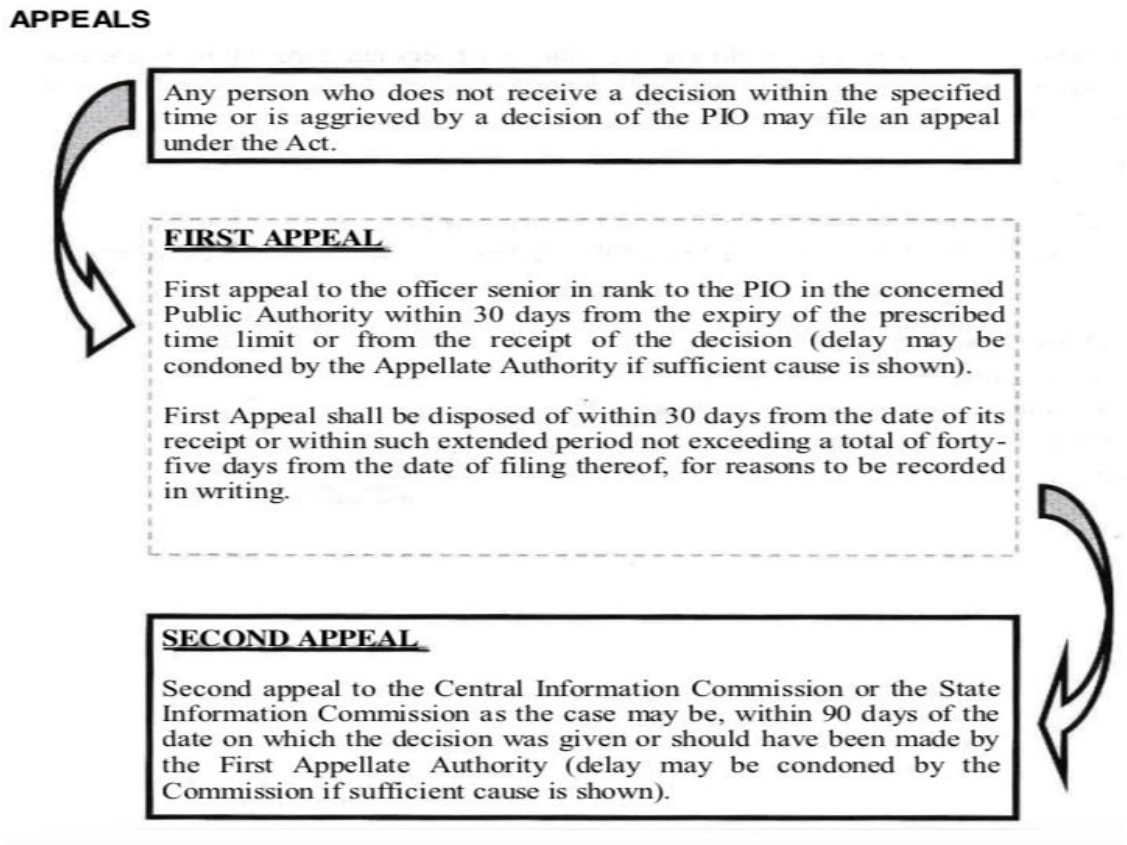
Any person who does not receive a decision within the specified time or is aggrieved by a decision of the PIO may file an appeal under the Act.

First Appeal. First appeal to the officer senior in rank to the PIO in the concerned Public Authority within 30 days from the expiry of the prescribed time limit or from the receipt of the decision (delay may be condoned by the Appellate Authority if sufficient cause is shown).

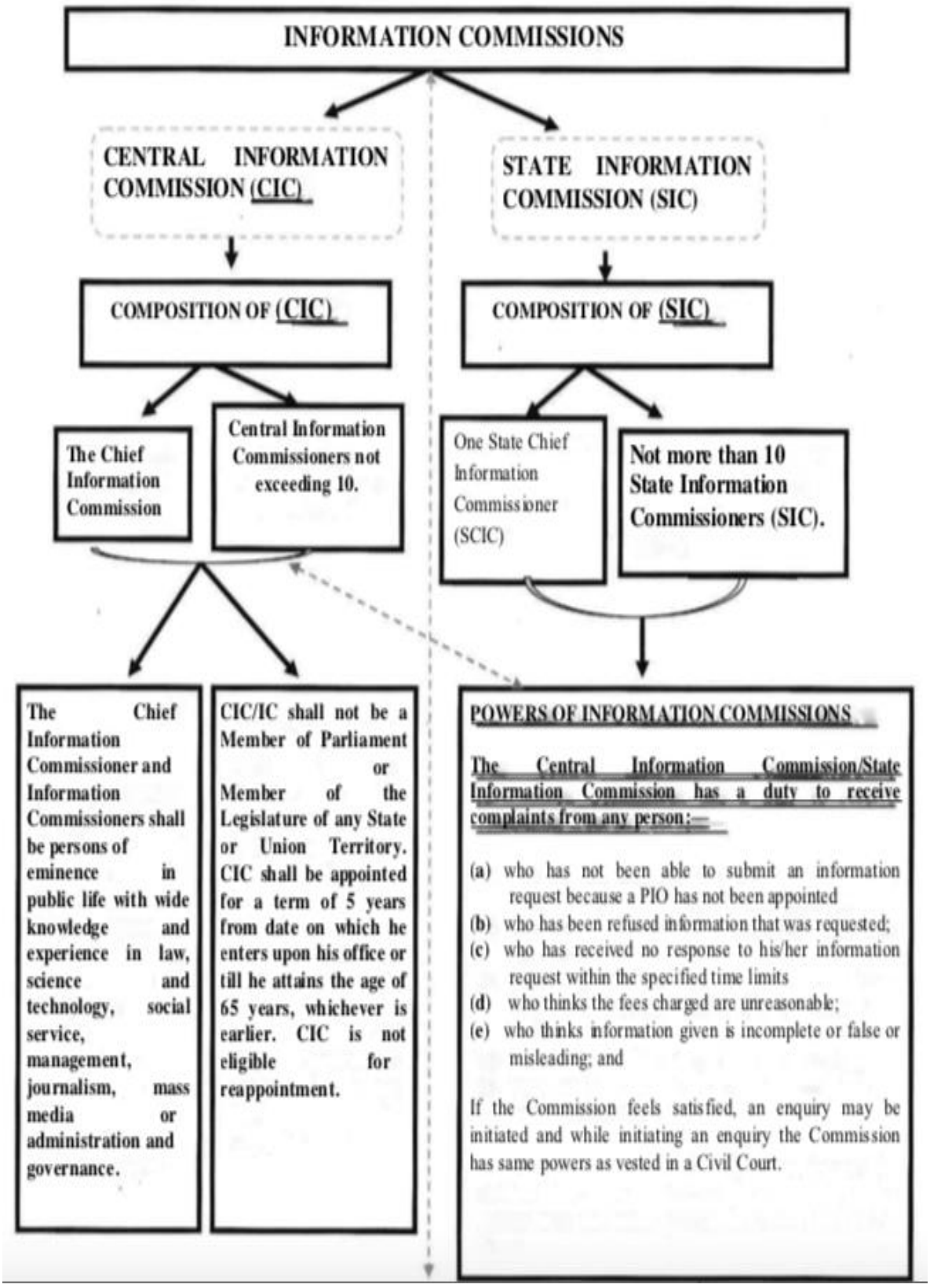
Second Appeal: Second appeal to the Central Information Commission or the State Information Commission as the case may be, within 90 days of the date on which the decision was given or should have been made by the First Appellate Authority (delay may be condoned by the Commission if sufficient cause is shown).

Third Party appeal against PIO's decision must be filed within 30 days before first Appellate Authority; and, within 90 days of the decision on the first appeal, before the appropriate Information Commission which is the second appellate authority.

Burden of proving that denial of information was justified lies with the PIO. First Appeal shall be disposed of within 30 days from the date of its receipt or within such extended period not exceeding a total of forty-five days from the date of filing thereof, for reasons to be recorded in writing. Time period could be extended by 15 days if necessary. (Section 19)



INFORMATION COMMISSIONS



POWERS OF INFORMATION COMMISSIONS

The Central Information Commission/State Information Commission has a duty to receive complaints from any person

a. who has not been able to submit an information request because a PIO has not been appointed

b. who has been refused information that was requested

c. who has received no response to his/her information request within the specified time limits

d. who thinks the fees charged are unreasonable

e. who thinks information given is incomplete or false or misleading

f. any other matter relating to obtaining information under this law.

If the Commission feels satisfied, an enquiry may be initiated and while initiating an enquiry the Commission has same powers as vested in a Civil Court. The Central Information Commission or the State Information Commission during the inquiry of any complaint under this Act may examine any record which is under the control of the public authority, and no such record may be withheld from it on any grounds. (Section 18)

PENALTIES

Section 20 of act imposes penalty on public information officer (PIO) for failing to provide information. Every PIO will be liable for fine of Rs. 250 per day, up to maximum of Rs. 25,000/- for

a. Not accepting an application

b. Malafidely denying information

c. Destroying information that has been requested

d. Knowingly give wrong information

e. Delaying information

17 INFORMATION TECHNOLOGY ACT,2000

INTRODUCTION

India is the world's largest democracy. The citizens of Democratic India elect representatives and put him in power. Right to Information Act, 2005 (RTI) was introduced to empower the citizens for the purpose of promoting transparency and accountability in the working of the Government, contain corruption, and make our democracy work for the people in real sense. Accordingly, RTI makes responsible/accountable to the public representatives (i.e. MPs & MLAs) therefore, they cannot use public funds carelessly. It extends to whole of India except the State of Jammu and Kashmir.

Right to Know

The right to know is essential in participatory democracy. It has its roots in Article 19 & Article 21 of the Constitution of India. A person has a right to hold a particular opinion. But to sustain that opinion information is needed. For sustaining and nurturing that opinion it becomes necessary to receive information. Article 21 gives a right to know which include a right to receive information.

The interesting thing to be noticed over here is that the right to receive information has its roots in right to freedom of speech and expression. Article 19(l)(a) of our Constitution guarantees to all citizens freedom of speech and expression under reasonable restrictions. A citizen can effectively use his right to express and speech only if he has information.

For example: If your teacher asks you a question in the class, will you be able to answer the question if you have no information about it? Obviously, No. You will be able to answer the question and express your views about it only if you have knowledge about the topic. Similarly you will be able to effectively use your right to expression and speech only if you have information. Thus, a citizen has a right to receive information and that right is derived from the

concept of freedom of speech and expression comprised in Article 19(l)(a). The State on one hand is under an obligation to respect the Fundamental Rights of the citizens, and on the other hand has an obligation to make sure that these rights are meaningfully and effectively enjoyed by one and all.

OBJECTIVE OF THE ACT

The objective of the Act is to promote transparency and accountability of the Public Authorities. It has codified the citizen's right to get information.

DOCUMENTS OR TRANSACTIONS TO WHICH THE ACT SHALE NOT APPLY

1. A negotiable instrument (other than a cheque) as defined in section 13 of the Negotiable Instruments Act, 1881.
2. A power-of-attorney as defined in section IA of the Powers-of-Attorney Act, 1882.
3. A trust as defined in section 3 of the Indian Trust Act, 1882.
4. A will as defined in clause (h) of section 2 of the Indian Succession Act, 1925
5. Any contract for the sale or conveyance of immovable property or any interest in such property.

SECTION 2- DEFINITIONS OF BASIC EXPRESSIONS

S.NO.	DEFINITION	PROVISIONS
1	ACCESS	"ACCESS" with its grammatical variations and cognate expressions means entering, instructing or communicating with the logical, arithmetical, or memory function resources of a computer, computer system or computer network. [Section 2(1)(a)]
2	ASYMMETRIC CRYPTO SYSTEM	"ASYMMETRIC CRYPTO SYSTEM" means a system of a secure key pair consisting of a private key for creating a digital signature and a public key to verify the digital signature [Section 2(1)(f)]
3	COMPUTER	"COMPUTER" means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions, by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software, or communication facilities which are connected or related to the computer in a computer system or computer network. [Section 2(1)(i)]

4	COMPUTER NETWORK"	"COMPUTER NETWORK" means the interconnection of one or more computers through – i. the use of satellite, microwave, terrestrial line or other communication media; and ii. terminals or a complex consisting of two or more interconnected computers, whether or not the interconnection is continuously maintained. [Section 2(1)(i)]
5	COMPUTER RESOURCE	COMPUTER RESOURCE"means computer, computer system, computer network, data, computer database or software. [Section 2(1)(k)]
6	COMPUTER SYSTEM	"COMPUTER SYSTEM "means a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files, which contain computer programs, electronic instructions, input data, and output data, that performs logic, arithmetic, data storage and retrieval, communication control and other functions. [Section 2(1)(l)]
7	DIGITAL SIGNATURE	"DIGITAL SIGNATURE" means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of Section 3. [Section 2(1)(p)]

8	ELECTRONIC RECORD	"ELECTRONIC RECORD" means data, recorded or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer-generated micro fiche. [Section 2(1)(t)]
9	ELECTRONIC SIGNATURE	"ELECTRONIC SIGNATURE" means authentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes digital signature. [Section 2(1)(ta)]
10	ELECTRONIC SIGNATURE CERTIFICATE	"ELECTRONIC SIGNATURE CERTIFICATE" means an Electronic Signature Certificate issued under section 35 and includes Digital Signature Certificate. [Section 2(1)(tb)]
11	INFORMATION	"INFORMATION" includes data, message, text, images, sound, voice, codes, computer programs, software and data bases or microfilm or computer-generated micro fiche. [Section 2(1)(v)]

12	KEY PAIR	"KEY PAIR" in an asymmetric crypto system, means a private key and its mathematically related public key, which are so related that the public key can verify a digital signature created by the private key, [Section 2(1)(x)]
13	ORIGINATOR	"ORIGINATOR" means a person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person, but does not include an intermediary. [Section 2(1)(za)]
14	PRIVATE KEY	"PRIVATE KEY" means the key of a key pair, used to create a digital signature. [Section 2(1)(zc)]
15	PUBLIC KEY	"PUBLIC KEY "means the key of a key pair, used to verify a digital signature and listed in the Digital Signature Certificate. [Section 2(1)(zd)]

16	SECURE SYSTEM	"SECURE SYSTEM" means computer hardware, software, and procedure that- • are reasonably secure from unauthorized access and misuse; • provide a reasonable level of reliability and correct operation; • are reasonably suited to performing the intended functions; and adhere to generally accepted security procedures;

DIGITAL SIGNATURE AND ELECTRONIC SIGNATURE

Digital signature (i.e. authentication of an electronic record by a subscriber, by electronic means) is recognized as a valid method of authentication. The authentication is to be affected by the use of "asymmetric crypto system and hash function", which envelop and transform electronic record into another electronic record. [Sections 3(1), 3(2)]

Verification of the electronic record is done by the use of a public key of the subscriber. [Section 3(3)] The private key and the public key are unique to the subscriber and constitute a functioning "key pair".

Section 3 A deals with electronic signature. Section 3A(1) provides that notwithstanding anything contained in section 3(1), but subject to the provisions of sub-section (2), a subscriber may authenticate any electronic record by such electronic signature or electronic authentication technique which

a. is considered reliable; and

b. may be specified in the Second Schedule.

For the purposes of above any electronic signature or electronic authentication technique shall be considered reliable if

a. the signature creation data or the authentication data are, within the context in which they are used, linked to the signatory or, as the case may be, the authenticator and to no other person;

b. the signature creation data or the authentication data were, at the time of signing, under the control of the signatory or, as the case may be, the authenticator and of no other person;

c. any alteration to the electronic signature made after affixing such signature is detectable;

d. any alteration to the information made after its authentication by electronic signature is detectable; and

e. it fulfils such other conditions which may be prescribed.

ELECTRONIC GOVERNANCE (LEGAL RECOGNITION OF ELECTRONIC RECORDS)

The Act grants legal recognition to electronic records by laying down that where (by any law) "information" or any other matter is to be in:

a. writing or

b. typewritten form or

c. printed form, then, such requirement is satisfied, if such information or matter is:

d. rendered or made available in an electronic form; and

e. accessible, so as to be usable for a subsequent reference. (Section 4)

PRIVATE TRANSACTIONS

Section 4 of the Information Technology Act practically equates electronic record with a manual or typed or printed record.
Section 5 deals with legal recognition of electronic signatures. It states that where any law provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature of any person, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of electronic signature affixed in such manner as may be prescribed by the Central Government.
It may be noted that "signed", with its grammatical variations and cognate expressions, shall, with reference to a person, mean affixing of his hand-written signature or any mark on any document and the expression signature" shall be construed accordingly.

Public records
Above provisions are primarily intended for private transactions. The Act then proceeds to bring in the regime of electronic records and electronic signature in public records, by making an analogous provision which grants recognition to electronic records and electronic record signatures, in cases where any law provides for

a. the filing of any form, application or any other document with a Governmental office or agency or

b. the grant of any license, permit etc. or

c. the receipt or payment of money in a particular manner. (Section 6)

Delivery of services by service provider

According to Section 6A the appropriate Government may, for the purposes of this Chapter and for efficient delivery of services to the public through electronic means authorize, by order, any service provider to set up, maintain and upgrade the computerized facilities and perform such other services as it may specify, by notification in the Official Gazette. It may be noted that service provider so authorized includes any individual, private agency, private company, partnership firm, sole proprietor firm or any such other body or agency which has been granted permission by the appropriate Government to offer services through electronic means in accordance with the policy governing such service sector.

RETENTION OF INFORMATION

The Act also seeks to permit the retention of information in electronic form, where any law provides that certain documents, records or information shall be retained for any specific period. Certain conditions as to accessibility, format etc. are also laid down. (Section 7)

AUDIT OF DOCUMENTS MAINTAINED IN ELECTRONIC FORM

Where in any law for the time being in force, there is a provision for audit of documents, records or information, that provision shall also be applicable for audit of documents, records or information processed and maintained in the electronic form (Section 7A)

SUBORDINATE LEGISLATION

Subordinate legislation is also authorized, by the Act, to be published in the Official Gazette or the electronic Gazette, and the date of its first publication in either of the two Gazette shall be deemed to be the date of publication. (Section 8)

But the provisions summarized above shall not confer any right upon any person to insist, that any Government agency shall accept, issue etc. any document in electronic form or effect any monetary transaction in electronic form. (Section 9)

VALIDITY OF CONTRACTS FORMED THROUGH ELECTRONIC MEANS

As per section 10A of the Act, where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic records, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose

ATTRIBUTION AND DISPATCH OF ELECTRONIC RECORDS

Since, in an electronic record, the maker remains behind the curtain, it was considered desirable to make a provision for "attribution" of the record. An electronic record is attributed to the "originator".

Broadly, the "originator" is the person at whose instance it was sent in the following cases -

a. if it was sent by the originator himself; or

b. if it was sent by a person authorized to act on behalf of the originator in respect of that electronic record; or

c. if it was sent by an information system programmed by or on behalf of the originator to operate automatically. (Section 11)

Regarding acknowledgement of receipt of electronic records, the Act provides that where there is no agreement that the acknowledgment be given in a particular form etc. then the acknowledgement may be given by:

a. any communication by the addressee (automated or otherwise) or

b. any conduct of the addressee which is sufficient to indicate to the originator that the electronic record has been received. [Section 12(1)]

Special provisions have been made for cases where the originator has stipulated for receipt of acknowledgment, [Section 12 (b)] or where the acknowledgement is not received by the originator in time. [Section 12(2), 12(3)]

TIME AND PLACE OF DISPATCH ETC.

After these provisions, there follows a provision which is of considerable significance for the law of contracts.

The date of offer and the date of acceptance are crucial, in determining whether and which contract has come into existence. The two terminal points - dispatch and receipt, are dealt with, in detail. Subject to agreement between the parties, the dispatch of an electronic record occurs, when it enters a "computer resource" outside the control of the originator. [Section 13 (1)]

Computer resource", as defined in Section 2 (k), means a computer, computer system, computer network, data, computer database or software.

TIME OF RECEIPT

As regards the time of receipt of electronic records, two situations are dealt with, separately. Subject to agreement, if the addressee has designated a computer resource for receipt, then receipt occurs when the electronic record enters the designated resource. However, if the record is sent to a computer resource of the addressee which is not the designated resource, then receipt occurs at the time when the electronic record is retrieved by the addressee. [Section 13(2)(a)]

If the addressee has not designated a computer resource (with or without specified timings), then receipt is deemed to occur, when the electronic record enters the computer resource of the addressee. [Sections 13(1), 13(2)] Above provisions apply, even where the place of location of the computer is different from the deemed place of receipt.

The Act also contains provisions as to the place of dispatch and receipt. [Section 13(3)]

SECURE ELECTRONIC RECORDS

The Central Government is required, by the Act, to prescribe the security procedure for electronic records, having regard to the commercial circumstances prevailing at the time when the procedure is used (Section 16). When the procedure has been applied to an electronic record at a specific point of time, then such record is deemed to be a secure electronic record, from such point of time to the time of verification. (Sectionl4)

An electronic signature shall be deemed to be a secure electronic signature if

a. the signature creation data, at the time of affixing signature, was under the exclusive control of signatory and no other person; and

b. the signature creation data was stored and affixed in such exclusive manner as may be prescribed. (Section 15)

CERTIFYING AUTHORITIES

The Act contains detailed provisions as to "Certifying Authorities" (Sections 17-34). A Certifying Authority is expected to reliably identify persons applying for "signature key certificates", reliably verify their legal capacity and confirm the attribution of a public signature key to an identified physical person by means of a signature key certificate. To regulate the Certifying Authorities, there is a Controller of Certifying Authorities.
(Section 17) Obligations of Certifying Authorities are also set out, in the Act. (Sections 30-34)

ELECTRONIC SIGNATURE CERTIFICATES

Procedure of obtaining electronic signature Certificate:

a. Any person may make an application in prescribed form to the Certifying Authority for the issue of electronic signature Certificate in such form as may be prescribed by the Central Government.

b. Every such application shall be accompanied by prescribed fees

c. Every such application shall be accompanied by a certification practice statement or where there is no such statement, a statement containing such particulars, as may be specified by regulations.

d. On receipt of an application, the Certifying Authority may, after consideration of the certification practice statement or the other statement and after making such enquiries as it may deem fit, grant the electronic signature Certificate or for reasons to be recorded in writing, reject the application.

It may be noted that no application shall be rejected unless the applicant has been given a reasonable opportunity of showing cause against the proposed rejection.

PENALTIES AND ADJUDICATIONS

Section 43 provides that if any person without permission of the owner or any other person who is in charge of a computer, computer system or computer network, -

a. accesses or secures access to such computer, computer system or computer network or computer resource;

b. downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium;

c. introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network;

d. damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network;

e. disrupts or causes disruption of any computer, computer system or computer network;

f. denies or causes the denial of access to any person authorized to access any computer, computer system or computer network by any means;

g. provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made thereunder;

h. charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network;

i. destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means;

j. steal, conceal, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used for a computer resource with an intention to cause damage; he shall be liable to pay damages by way of compensation to the person so affected.

COMPENSATION FOR FAILURE TO PROTECT DATA

Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the person so affected.

(Section 43A) It may be noted that body corporate" means any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities

A person failing to provide information or failing to file a return etc. (as required by the Act), has to pay a penalty not exceeding ten thousand rupees for every day during which the failure continues. (Section 44) Contravention of a rule or regulation attracts liability to pay compensation up to 25,000 rupees, to the person affected by such contravention or to pay penalty up to that amount. (Section 45)

ADJUDICATING OFFICER

An adjudication officer is to be appointed by the Central Government for adjudging whether any person has committed a contravention of the Act or of any rule, regulation, direction or order issued under the Act. He may impose penalty or award compensation in accordance with the provisions of the relevant section (Section 46).

The Act takes-care to set out the factors to be considered by the Adjudicating officer, in adjudging the quantum of compensation under this Chapter. He has to have due regard to the following factors:

a. the amount of gain of unfair advantage (wherever quantifiable), made as a result of the default;

b. the amount of loss caused to any person as a result of the default; and

c. the repetitive nature of the default.

APPELLATE TRIBUNAL (SECTIONS 48-62)

The Telecom Disputes Settlement and Appellate Tribunal established under section 14 of the Telecom Regulatory Authority of India Act, 1997, shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017 (7 of 2017), be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall exercise the jurisdiction, powers and authority conferred on it by or under this Act.

The Central Government shall specify, by notification the matters and places in relation to which the Appellate Tribunal may exercise jurisdiction.

Any person aggrieved by an order of the Controller of Certifying Authorities or of the adjudicator can appeal to the Appellate Tribunal, within 45 days. (Section 57)

Any person aggrieved by "any decision or order" of the Appellate Tribunal may appeal to the High Court, within 60 days. Jurisdiction of Civil Courts is barred, in respect of any matter which an adjudicating officer or the Appellate Tribunal has power to determine.

TAMPERING WITH COMPUTER SOURCE DOCUMENTS

Whoever knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy, or alter any computer source code used for a computer, computer programme, computer system or computer network, when the computer source code is required to be kept or maintained by law for the time being in force, shall be punishable with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.

It may be noted that "computer source code" means the listing of programmes, computer commands, design and layout and programme analysis of computer resource in any form (Section 65)

COMPUTER RELATED OFFENCES

If any person, dishonestly or fraudulently, does any act referred to in section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both. (Section 66)

The offences listed in the Act are the following -

- Dishonestly receiving stolen computer resource or communication device
- Identity theft
- Cheating by personation by using computer resource
- Violation of privacy
- Cyber terrorism
- Publishing or transmitting of material containing sexually explicit act, etc., in electronic form
- Publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form
- Misrepresentation
- Breach of confidentiality and privacy
- Disclosure of information in breach of lawful contract
- Publishing electronic signature Certificate false in certain particulars
- Publication for fraudulent purpose.

This Chapter XI of the IT Act also contains certain provisions empowering the Controller of Certifying Authorities to issue certain directions to certifying Authorities (Section 68).

Further, as per section 69 where the Central Government or a State Government or any of its officers specially authorized by the Central Government or the State Government, as the case may be, in this behalf may, if satisfied that it is necessary or expedient so to do , in the interest of the sovereignty or integrity of India, defense of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence, it may subject to the provisions of safeguard and procedure as may be prescribed , for reasons to be recorded in writing, by order, direct any agency of the appropriate Government to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information generated, transmitted, received or stored in any computer resource.

EXTRA TERRITORIAL OPERATION

Extra-territorial operation of the Act is provided for, by enacting that the provisions of the Act apply to any offence or contravention committed outside India by any person, irrespective of his nationality, if the act or conduct in question involves a computer, computer system or computer network located in India. (Section 75)

LIABILITY OF NETWORK SERVICE PROVIDERS

The Internet system depends, for its working, on network service providers- i.e. intermediaries. An "intermediary", with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cybercafés.(Section 2(1)(w).

In his capacity as an intermediary, a network service provider may have to handle matter which may contravene the Act. To avoid such a consequence, the Act declares that no network service provider shall be liable "under this Act, rule or regulation made thereunder", for any third party information or 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. (Section 79)

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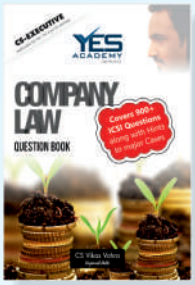

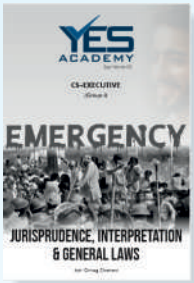

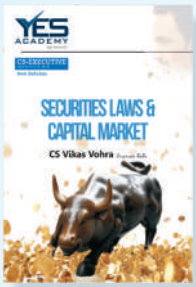

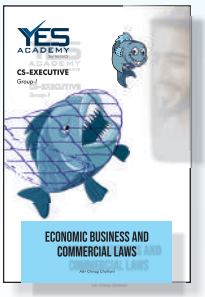

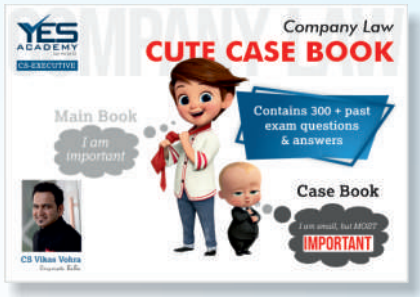

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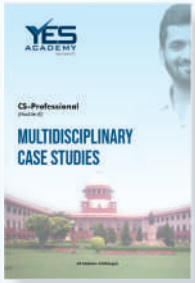

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